

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

**2111 Deli Grocery Corp,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0190953**

**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 Retailer Operations Division to impose a permanent disqualification against 2111 Deli Grocery 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 Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a permanent disqualification against Appellant on March 14, 2019.

**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 June 23, 2016, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in November 2015 through May 2016. 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, through counsel, responded to the charges in a letter dated June 28, 2016, that did not request a CMP or contain any documentation in support of one. This response; however, did

contain a Freedom of Information Act (FOIA) request. USDA FNS responded to this request in a letter dated August 11, 2016. Counsel subsequently requested an appeal of the content of the FOIA response by letter dated November 2, 2016. The final FOIA appeal reply was issued on February 15, 2019, and sent to Appellant's new counsel. A reminder of the opportunity to submit any new information following receipt of the FOIA appeal was sent to counsel on February 19, 2019, but no new correspondence was received.

The Retailer Operations Division notified Appellant by letter dated March 14, 2019, 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 dated March 20, 2019, Appellant appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. No subsequent correspondence was received.

## **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 seven month period of November 2015 through May 2016. This involved four patterns of EBT transaction characteristics indicative of trafficking:

There were an unusual number of transactions ending in a same cents value.

1. Multiple purchase transactions were made too rapidly to be credible.
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 firm is staffed by six full time employees with one cash register and is a medium sized grocery/deli convenience store of approximately 1,000 square feet. It is open daily from 6 AM-12 AM and at all times is well stocked with staple foods and sells large volumes of fresh and packaged food products specifically designed to accommodate those low-income customers who regularly purchase items with SNAP benefits. By virtue of its location, a substantial portion, approximately 60%, of its sales result from SNAP and provide the income necessary to keep the business profitable. The owner would not jeopardize his business and livelihood by engaging in illegal activities;
- The store sells all types of fruit and vegetables and other cooking ingredients, including rice, beans, and pasta. It has two aisles where all types of items are displayed on numerous shelving for canned and packaged foodstuffs down the middle of the store and along the walls. In addition to basic items like meat, organic fruits and vegetables, milk,

eggs, and bread, the store also sells packaged items such as cereal, prepared foods, other dairy products, rice, beans, and other cooking ingredients. Infant formula is also a common item sold in volume and costs \$22.00. There are refrigerators along the wall with a total of 15 doors where soda, milk, eggs, cheese, juices, and many other items are displayed as well as a separate six foot freezer for ice cream and the other items and a separate ice freezer. There is a separate room in the back of the store used for storage of inventory. The store has a 10 foot deli counter where it sells meats and cold cuts for sandwiches on bread, rolls and heroes and a large salad bar. It also sells its meats and cold cuts by the pound together with freshly made salads to promote a healthy diet;

- Any analysis of the store records, store characteristics, recorded food stocks, and store pricing would clearly reveal that this store could support the sales contained in the Attachments and transactions therein. Upon request the owner could substantiate its redemptions with records of inventory purchases as well as providing affidavits from those SNAP recipients who frequent the store. It is also unclear what employees were on duty during the alleged unusual, irregular, and inexplicable activity that supposedly constitute violations of SNAP, but there has been no observed concurrence by the owner;
- The transactions contained in the charge letter are legitimate and not unusual in the normal course of business and are not based off illegal activities. The Attachment 1 same cent values are explained by the pricing structure and by the rounding of transaction totals. A price with a value of .99 is the model for this vendor who has a right to make such a business judgement under the law without being accused and suspected of wrongful criminal behavior. In fact, prices are on stickers so there can be no alteration of the figures. Typically households will purchase several items at a time accounting for higher amounts with same cents values of .99. The owner prices his best-selling items at .99 as well as soft drinks. There is nothing suspicious or unusual about that transaction. Furthermore, FNS prior to authorizing this vendor to accept food stamps, at no time, ever indicated or regulated that pricing items with same cent values is not permitted or would result in regulatory violation. It is unconscionable that this agency can cause an owner to be permanently disqualified merely based on his business judgement, without any other proof of wrongdoing, despite the number of same cents transactions being outside the agency's acceptable computer analysis and computer logarithms;
- The rapid transactions in Attachment 2 are due to customers placing phone orders and then shopping for additional items when they pick up their phone orders;
- Attachment 3 is in part due to recipients needing to ascertain the balance on their card, and once done they make additional purchases. Some recipients allow other family members or other families to use their card after they have made their initial purchase. Some transactions are due to families who live in close proximity to the store and frequent the store regularly to purchase just what items are needed. Others are due to those recipients who need to make multiple trips since they have no vehicles and must carry bags of groceries. Phone orders also account for the transactions in Attachment 3, as they will place a phone order and when picking-up the items will purchase additional forgotten items. Recipients also purchase items on their way to and from church and dropping their children off at school. Furthermore, FNS upon authorizing the firm never indicated that there were any "set time periods" within which SNAP households may use their EBT card. It is incumbent upon FNS to evaluate the merits of this claim through

investigation and in consultation with the SNAP recipients to ascertain whether their usage was in accordance with the FNS rules and regulations;

- Many transactions in Attachment 4 were made from recipient accounts immediately after benefits were added. As a result many recipients use much of their balance at the owner's store. In fact, if the agency were to average the amount of the purchases, one would find that the average **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, which is not unusual under these circumstances. While there are larger stores in the area, those supermarkets are not preferred by residents as they are crowded with longer lines, selling the same items for similar prices. The large transactions are also due to large families that must spend large amounts of money for food;
- It is submitted that the use of EBT records in sole support of what is claimed to be serious unlawful activity is inadequate. It is not based on fact, and the conclusions reached are unfounded and without merit. The EBT transactions should require a more careful review before making such a major decision based totally upon computer generated reports which only create an unfounded inference and presumption of wrongdoing. The owners' business practice may not fit the pattern of the nationwide computer model programmed by FNS, but to prejudge these transactions as unacceptable American business practice is discriminatory and should not render him a criminal. Furthermore the determination set forth in the letter of charges relies upon an analysis of SNAP transaction records, observed store characteristics, recorded food stock, and store pricing only furnishes the owner a listing for a small sampling referred to above concerning those activities that allegedly constitute unlawful transactions. No specifics are set forth concerning the other transactions that occurred in the store. As a result, the owner is not afforded the opportunity to fully answer and challenge the charges against him;
- The owner vehemently denies the allegations and would not jeopardize his business by engaging in illegal activity. He has maintained an exemplary record as evidenced by his continued compliance with the law and employee training. Since being SNAP authorized in 2013, he has continuously trained and tested his employees concerning SNAP regulations and requirements in two weeks of intensive, hands-on classes overseen by the owner. He works with each employee, teaching them SNAP rules and regulations and ensures that they watch the authorized training video before they are permitted to engage in any EBT transactions. They are provided with handouts and other printed materials which they must read, study, and learn prior to their full employment in the store. Upon conclusion of the two week period, the owner gives each employee a test to ensure their compliance with SNAP regulations. Any employee that is suspected of failing the test or failing to comply with the policies of the store is immediately terminated;
- The owner's store is located on the corner of a busy block near bus stops and a subway stop across the street in the heart of the housing projects. There are also other businesses in the area, which brings employees who patronize this premises. It is respectfully submitted that, as there is no other basis to disqualify this owner from SNAP, in lieu of disqualification, FNS should subject this owner to a CMP that as per Section 278.6(a), disqualification would cause hardship to participating households who this owner's store serves and as such, this owner requests an immediate hearing to determine the same. Furthermore, the owner provides necessary items to the community, which is comprised of numerous large multi-family complex apartment houses in this area of the Bronx. There is also a mental health clinic across the street and many family homeless shelters

and other commercial enterprises in the immediate area. In fact, the closest supermarket is approximately ¼ mile away and closes early in the evening. There is a great need for the families in who live and work in the neighborhood, many of which are large, to have access to basic items at all hours of the day. Additionally, there are numerous schools, churches, large apartment buildings, and family shelters in the immediate area, which bring the parents of school age children to the store to buy foodstuffs and other eligible items on a daily basis, before and after pick-up. It is submitted that there are no other similar providers or eligible SNAP providers in the immediate area and, as such, disqualification would result in hardship to the community. A CMP is again requested;

- Finally the USDA has failed to establish intent, which is an essential element of the basis for its decision to permanently disqualify this owner from SNAP; and,
- A disqualification from the program would cause irreparable harm to the owner.

Appellant submitted no evidence or other rationales in support of these contentions.

### **ANALYSIS AND FINDINGS**

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. 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.

The Retailer Operations Division presented a case that Appellant trafficked SNAP benefits. Each Attachment furnished with the letter of charges represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at Appellant's store during the review period. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

#### **Store Background and FNS Store Visit**

FNS initially authorized the firm on November 10, 2010, as a medium grocery store. The case file notes that the Appellant firm and owner received a six month SNAP disqualification in 2012 for accepting SNAP benefits for ineligible nonfood items. The case file also indicates that in reaching the permanent disqualification determination, the Retailer Operations Division considered information obtained during a May 25, 2016, store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the firm's suspicious SNAP transactions. The store visit documented the following store size, description, and characteristics:

- The firm was a small store of approximately 700-800 SF offering an extremely limited quantity and variety of staple foods and carrying no unique items or offering any distinctive services.

- The store stocked traditional American brands as well as a limited variety of canned and packaged Hispanic foods (e.g. Goya). There were no other ethnic or specialty food items.
- The store visit report and photos showed no shopping carts or hand baskets for customer use thus severely limiting the amounts of food that could be moved to the checkout.
- No food packages, bundles, case sales, bulk items, or other sales were evident that would explain the unusual transactions and no cased items were available for purchase other than drinks.
- The store visit report specifically noted that the firm was not a specialty store and that there were no meat bundles, seafood specials, or fruit/vegetable boxes for sale.
- The checkout area was approximately 2.5 feet wide and 1.5 feet deep with displays on both sides leaving a very limited area for customers to place their purchases. The very small checkout area would make it problematic to process large orders. The checkout area had one cash register, one POS terminal, and no optical scanner.
- The firm had an extremely limited stock of staple foods that also included many single serving and pre-packaged items with a significant portion of inventory in soda, candy, snacks, and other drinks as well as many ineligible items.
- The firm had no fresh unprocessed meat or seafood, no frozen unprocessed meat or seafood, no processed meat or seafood except for canned items and deli meats, no hot dogs, no packaged lunch meats, no sausages, no bacon, no jerky, no frozen entrees, no frozen dinners, several cartons of eggs, no fresh fruit except for several bananas at the checkout, no fresh vegetables, no frozen fruit or vegetables, no dried fruit or vegetables, few canned vegetables, few canned fruit, several 100 percent fruit and vegetable juices, a minimal selection of packaged single serving nuts, no canned soups, an extremely limited selection of canned or packaged staple food items, deli cheeses, no packaged cheese, no cheese dips, no yogurt, no sour cream, no butter, no margarine, several canned milk, several single serving milk drinks, fresh milk, bread, rolls, no pitas, no tortillas, no tostadas, no corn meal, several flour, no sugar, several rice, no hot cereal, a good stock of cold cereal, no single serving cold cereals, many single serving Ramen noodle soups, canned pasta, single serving pasta, several dry pasta, no dry noodles, a limited stock of pancake mixes, a limited stock of baking mixes, several packages of mac&cheese, no frozen staple food items, coffee, no tea, no cocoa, a limited stock of baby foods, infant formula, and very few expensive staple food items.
- Ineligible items included: tobacco, smoking accessories, alcohol, hot foods/drinks, household/paper products, pet products, health and beauty items, ATM, diapers, gloves, clothing, and newspapers. Accessory foods included: candy, condiments, snacks, baked goods, single serving ice cream, spices, baking mixes, coffee, and un/carbonated drinks.
- The firm's hours of operation, as confirmed by a store worker, were 6 AM-12 AM daily. There were no signs indicating that the firm took phone orders or offered delivery.
- Signage was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- Most food items were not individually priced. A review of store visit photos showed that all visible food prices ended in .x9 cents with many low cost items priced at .99. A price ending in .x9 cents is a common pricing structure for stores of this type.
- The firm was not a WIC vendor. While the firm did stock a limited selection of baby foods, most SNAP households with infants or small children are WIC participants and therefore would be purchasing these products using WIC vouchers, not SNAP EBT.

- The store visit photos showed marginally stocked shelves, coolers, and display racks.

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

This Attachment lists 882 transactions ending in the same cents value of .99 cents.

**5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. 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 store.

Appellant contends the same cent value transactions are legitimate and are due to the store's rounding of transactions as well as the store's pricing structure of pricing items at .99 cents. It also states that the firm sells all types of fruit and vegetables, rice, beans, pasta, meat, organic fruits and vegetables, and has two aisles for canned and packaged foodstuffs, as well as 15 reach-in coolers with soda, milk, eggs, cheese, juices, and many other items are displayed. The store has a 10 foot deli counter where it sells meats and cold cuts for sandwiches on bread, rolls and heroes and a large salad bar. It also sells its meats and cold cuts by the pound together with freshly made salads to promote a healthy diet. Infant formula is a common item sold in volume and costs \$22.00. Food item prices are on stickers so there can be no alteration of the figures. Typically, households will purchase several items at a time accounting for higher amounts with same cents values of .99. The fact is the owner prices his best-selling items, including soft drinks, at .99 cents.

Contrary to Appellant's assertions, the inventory report and numerous photos from the 2016 FNS store visit show the Appellant firm offering an extremely limited stock of staple foods that included no fresh or frozen unprocessed meats or seafood, no fresh fruits other than several bananas at the checkout area, no fresh vegetables, no frozen fruit or vegetables, and an extremely limited selection of canned or packaged staple food items. The only meats available for purchase were processed deli meats and canned meats, no beans other than canned, no fresh lettuce, approximately nine small bags of rice, and no salad bar. Additionally, the firm carried few expensive eligible food items making it questionable that such a large number of high dollar SNAP transactions could be for legitimate food purchases. While the firm did have a limited stock of infant formula, most SNAP households with infants or small children are WIC participants and therefore would be purchasing these products using WIC, not SNAP EBT.

A review of the many FNS store visit photos shows that most food items are not individually priced and that Appellant's pricing structure appears to have food prices ending in .x9 cents, as opposed to .99 cents, as there were staple food items with prices other than .99 cents. Most notably, Appellant's statement that SNAP households purchase multiple best-selling eligible food items with prices ending in .99 cents resulting in higher dollar transaction totals ending in .99 cents is not feasible. The purchase of multiple items with prices ending in .x9 cents or even in .99 cents would not result in a transaction total ending in a same cents value of .99 cents as multiples of .x9 or .99 cents (e.g. .09, .18, .27, etc. and .99, 1.98, 2.97, etc.) seldom have a value



ending in .99 cents making it statistically impossible that this many store transactions would end in .99 cents with legitimate food purchases. It is also noted that Appellant's original counsel stated the Appellant firm rounded transaction totals down to .99 cents accounting for Attachment 1 transactions, but this claim was not included in the request for administrative review.

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.

### **Rapid Transactions**

This Attachment documents 193 sets of back-to-back transactions made in rapid order at the same POS terminal. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The same household conducted both of the transactions in only nine of the 193 sets. T5 U.S.C. § 552 (b)(6) & (b)(7)(C). Fourteen of the second transactions were manually key-entered as opposed to swiped transactions. Lastly, three of the transaction sets occurred after the firm's reported business hours of 6:00 AM-12:00 AM.

Appellant contends the rapid transactions in Attachment 2 are due to customers placing phone orders and then shopping for additional items when they pick up their phone orders;

Based on the very limited number of expensive items for sale at the Appellant firm, it is likely that a transaction in the amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C) would consist of more than 20 items. SNAP benefit transactions involving legitimate food purchases require many steps: 1) the customer waiting for the previous customer to pick-up their purchases and leave the checkout area; 2) the customer making multiple trips bringing items to the checkout counter for large purchases since the firm has no shopping carts or hand baskets; 3) the cashier separating eligible from ineligible items; 4) the cashier handling individual items to determine the price, which in this case involves manual keying of amounts since there is no scanner; 5) the cashier weighing individual items if sold by weight; 6) the cashier entering prices into a register or adding machine, once for eligible foods and once for ineligible items, which is typical for larger purchases; 7) the cashier handling manufacturers cents-off coupons, if applicable; 8) the cashier bagging the items for carry-out; 9) the cashier informing the customer of the totals (one for eligible foods and one for non-eligible items, if applicable, which for large purchases includes most transactions); 10) the cashier pressing the "SNAP transaction key" on the POS device/card reader; 11) the customer swiping their EBT card; 12) the customer entering their required PIN; 13) the cashier entry of the purchase amount; 14) the cashier confirming the customer has a sufficient benefit balance; 15) the transaction being processed by the system and receiving approval; 16) the cashier printing the EBT and cash register receipts; 17) the cashier accepting an alternate form of payment for nonfoods and possibly handling cash change; and 18) the customer removing products from the checkout area so the next customer in line can begin the next transaction. All or most of these steps are inherent in legitimate large SNAP purchases. One can

readily surmise that while such transactions may be completed in succession, performing these processes on large transactions is not done rapidly. The amount of time required is generally proportional to the dollar amount of the transaction; typically, the larger the dollar amount the longer the time period between transactions. The very limited counter space as well as manually key-entering lengthy EBT card numbers adds additional time to transactions.

The Appellant firm processed large numbers of transactions, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), markedly faster than supermarkets typically process purchases, yet the Appellant firm does not have an optical scanner or any of the logistical tools such as conveyor belts, rotating bagging platforms, or order separators that are routinely used in rapid throughput operations. It is therefore improbable that large dollar value transactions for the purchase of legitimate food items which would consist of a substantial number of lower priced items based on Appellant's stock could be processed in the times listed in this Attachment given the facilities at the firm. The large transaction dollar amounts and the short interval between transactions in this Attachment demonstrate the improbability of these being legitimate eligible food purchases and suggest trafficking as the most likely explanation. Additionally, it is an indication of trafficking when transactions are occurring outside of the firm's reported business hours.

Appellant's contention that these sets were the result of SNAP recipients ordering food items by phone and then paying for them as well as separately purchasing forgotten items is not supported by the evidence that only nine of the 193 sets were conducted by the same household.

Based on this discussion, as well as the stock and facilities present at the Appellant firm, it is unbelievable that these large dollar value transaction sets could occur in the short periods of time listed if they involved legitimate eligible food purchases. It is therefore more likely that the transactions listed in this Attachment are attributable to trafficking.

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

This Attachment documents 574 individual transactions in 261 sets of two or more transactions conducted by 171 different households in a short period of time. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The dollar amounts of subsequent transactions in each set are substantial and nearly equal or exceed the dollar amount of the initial transaction in 122 of the 261 sets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). One set is comprised of five individual transactions, six sets of four, and 32 sets of three while the remaining sets are comprised of two individual 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 contends that the Attachment 3 transactions are in part due to recipients needing their card balance, and once done they make additional purchases. Some recipients allow other family members or other families to use their card after they have made their initial purchase. Some transactions are due to families who live in close proximity to the store and regularly purchase just what items are needed. Others are due to recipients making multiple trips since they have no

vehicles and must carry bags of groceries. Phone orders also account for the transactions in this Attachment as recipients will place a phone order and then pick-up the items plus purchase forgotten items in a separate transaction. Recipients also purchase items on their way to and from church and while dropping their children off at school. Furthermore, FNS upon authorizing the firm never indicated that there were any “set time periods” within which SNAP households may use their EBT card. It is incumbent upon FNS to evaluate the merits of this claim through investigation and in consultation with the SNAP recipients to ascertain whether their usage was in accordance with the FNS rules and regulations.

As previously stated, and contrary to Appellant’s claims, the FNS store visit report and photos show the firm offers an extremely limited quantity and variety of staple foods and does not offer any fresh or frozen unprocessed meat or seafood; has no processed meat or seafood except for canned items and deli meats; and has almost no fresh or frozen fruits or vegetables. The photos also show that the firm had marginally stocked shelves, coolers, and display racks. While the firm is classified as a medium grocery store, the inventory levels in the store are more indicative of a small grocery store. The fact that there is a supermarket directly across the street also makes it unlikely that SNAP recipients would consider this firm as their primary source for groceries.

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 a grocery 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 right after checking-out, of household members/friends shopping together and making separate purchases, or of households making a separate purchase to check their balance followed by another transaction as 255 of the 261 transaction sets occur 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 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 5 U.S.C. § 552 (b)(6) & (b)(7)(C), far more than the cost of a forgotten item or two. Appellant also offers no explanation as to why households would conduct up to three, four, or even five sizeable transactions at the Appellant firm within a short period of time. It should be noted that SNAP regulations require EBT card holders to be able to check their account balance using retailer’s POS terminals without making any purchases or standing in a checkout line, and they can telephone a toll-free number for that information as well. Regulations also require that EBT card holders receive a POS terminal receipt showing the dollar amount of remaining benefits so, contrary to Appellant’s contention, it would be unusual for this many households to not know their SNAP balance.

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 5 U.S.C. § 552 (b)(6) & (b)(7)(C) when the comparable average medium grocery store SNAP transaction amount in Bronx County during the review period was \$13.02. 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 like type grocery stores further supporting that trafficking was occurring at the Appellant firm during the period under review.

The Retailer Operation Division'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 super stores and supermarkets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant fails 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 high dollar values at an extremely poorly stocked store. 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.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Large dollar transactions occurring outside of store business hours are indicative of trafficking.

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 1,416 individual EBT transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The substantial number of high dollar transactions is uncharacteristic for a grocery store offering an extremely limited stock of staple foods and calls into question the legitimacy of these transactions. The transactions are also substantially higher than the average SNAP transaction amount of \$13.02 for this store type in Bronx County. This is unusual and indicative of trafficking.

The evidence under review shows that SNAP households shopping at the Appellant firm are also shopping at many full-line supermarkets and super stores, located nearby as well as at a distance from Appellant's location that offer a greater quantity and variety of SNAP eligible foods items for better prices than customers can find at the Appellant firm. The high dollar value transactions remain questionable when considering the proximity of these 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, these recipients continue to shop and spend suspicious high dollar amounts at the Appellant firm, where the eligible food stock is extremely limited, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of their purchases at larger food stores.

While households residing in areas with extremely limited grocery store options may conduct high dollar transactions at smaller stores out of necessity, this is not the case when they have better alternatives. FNS records show there are 18 comparably sized or larger SNAP retailers located within a 0.49 mile radius of the Appellant firm that includes two super stores and two supermarkets with one of the supermarkets located directly across the street from the Appellant firm. This store and the others would offer greater quantities and varieties of staple food items at lower prices than would be found at an extremely poorly stocked medium grocery store offering no fresh or frozen unprocessed meats or seafood and almost no fresh or frozen produce.

The difference in the average SNAP transaction amount, the total SNAP transaction dollar volume, and the total SNAP transaction count for Bronx County medium grocery stores during the review months and at the Appellant firm is significant. Appellant's average SNAP transaction amount is 56.37 percent larger than that of Bronx County medium grocery stores while its average SNAP transaction dollar volume is 5 U.S.C. § 552 (b)(7)(E) larger and its total SNAP transaction count is 5 U.S.C. § 552 (b)(7)(E) larger than the County average. The extremely high number of SNAP transactions combined with the relatively low average SNAP transaction dollar amount is an indication the firm may be dividing larger transactions into multiple smaller transactions in an effort to circumvent detection as previously discussed. 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 do not represent legitimate food purchases. The Retailer Operations Division 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 Bronx County. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). While there are normally few transactions in these higher ranges, the data shows that most stores of this type do still have a small number of them indicating that the Appellant firm may be dividing larger trafficking transactions into smaller ones as previously discussed and artificially capping transaction amounts in an attempt to avoid suspicion. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This transaction pattern and the unusual spikes in both transaction numbers and dollar volume do not appear in the transaction patterns or in the transaction count and dollar volume 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 Retailer Operations Division determined there was no credible reason for the firm to have transactions at these dollar levels given the extremely limited 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 contends the high dollar transactions are because many of the transactions in this Attachment were made from recipient accounts immediately after benefits were added. As a result many of the recipients use much of their balance at the owner's store. In fact, if the agency were to average the amount of the purchases, one would find that the average is 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which is not unusual under these circumstances. While there

are larger stores in the area, those supermarkets are not preferred by residents as they are crowded with longer lines, selling the same items for similar prices. The large transactions are also due to large families that must spend large amounts of money for food.

**5 U.S.C. § 552 (b)(6) & (b)(7)(C).** Appellant offered no evidence that residents do not prefer shopping at supermarkets and this claim is also refuted by household shopping patterns. While many of the transactions do occur within New York City's SNAP benefit issuance period that essentially is the first two weeks of each month, this fact alone does not provide any evidence as to the legitimacy of the transactions. Appellant also offered no evidence as to why SNAP households with many family members who are shopping and spending large dollar amounts at many larger and better stocked stores would conduct purchases totaling to high or even higher dollar amounts at an extremely poorly stocked store.

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 Retailer Operations Division shows that households in this Attachment 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 Appellant firm since its cost of goods is higher than that of larger stores such as supermarkets or super stores.

Information obtained during the May 25, 2016, FNS store visit shows that the Appellant firm offers an extremely limited quantity and variety of SNAP eligible staple food items, many accessory foods, and many ineligible items. Much of the inventory consists of inexpensive snacks, candy, drinks, and various single serving foods as well as many ineligible items. The fact that tobacco, smoking accessories, alcohol, hot foods/drinks, household/paper products, pet products, health and beauty items, ATM, diapers, gloves, clothing, and newspapers are not eligible for purchase with SNAP benefits also provides no justification for the high transaction amounts.

Higher food prices make it even more unlikely that SNAP recipients, with very limited food benefits, 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 and no evidence was provided of SNAP eligible store stock via receipts of products taken into inventory for the relevant months. The firm also has an extremely small checkout area and no shopping carts thereby making it difficult to facilitate the great quantities of eligible food items required to make up these large dollar transactions. Therefore, it is improbable that the food items purchased in these high dollar amounts could be carried to the register without the use of carts and more likely that the amounts were contrived.



It is further noted that SNAP redemptions at the firm fluctuated unusually following receipt of the charge letter on June 24, 2016. The volume of SNAP redemptions at the Appellant firm decreased 10.34 percent from June 2016 to July 2016 while the number of SNAP transactions decreased 8.42 percent during this same period of time. A pronounced fluctuation in SNAP redemptions following receipt of the charge letter is a clear indication of trafficking since, if trafficking were not occurring, there would be no abnormal fluctuations in redemption amounts.

Based on this discussion, 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 Retailer Operations Division 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, the 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 the store owner signed the certification page of the SNAP retailer authorization application to become a SNAP retailer, he confirmed he understood and agreed to abide by program rules and regulatory provisions. He also agreed to accept responsibility on behalf of the firm for violations of the SNAP 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.

The claims that the store owner has maintained an exemplary record as evidenced by his continued compliance with the law and that he would not jeopardize his business by engaging in illegal action are incorrect. The owner and the firm received a six month SNAP disqualification for accepting SNAP benefits for the purchase of ineligible nonfood items in 2012. This fact shows that there is no exemplary record and that the owner has previously allowed his business to be jeopardized by either personally engaging in illegal actions or by failing to properly train and oversee employees that directly resulted in illegal actions being committed.

Appellant also claims that intent is an essential element of the basis for the decision to permanently disqualify this owner from SNAP and that the USDA has failed to establish intent. However, SNAP regulations at 278.6(e)(1) discuss the permanent disqualification of firms for trafficking and do not specify intent as being a required element.

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 Retailer Operations Division 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.

It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm or to ownership resulting from the imposition of such penalty. To allow ownership to be excused from an assessed administrative penalty based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA. Furthermore, 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, ownership’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**

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. Therefore Appellant’s allegations of there being no comparable providers in the immediate area are not relevant.

The Retailer Operations Division 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 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 Retailer Operations Division determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

SNAP regulations are explicit in what constitutes substantial evidence. Specifically, 7 CFR § 278.6(i)(2) states in relevant part, “As specified in Criterion 3 above, in determining whether a firm has established an effective policy to prevent violations, FNS shall consider written and dated statements of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with part 278 of current FNS regulations and current FSP policy on the proper acceptance and handling of food coupons.” This section goes on to state, “As required by Criterion 2, such policy statements shall be considered only if documentation is supplied which

establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation.” This section further states, “A firm which seeks a civil money penalty in lieu of permanent disqualification shall document its training activity by submitting to FNS its dated training curricula and records of dates training sessions were conducted...”.

No training documentation of any kind was presented by Appellant.

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 provide substantial evidence by the specified deadline that it met all four criteria required by 7 CFR §278.6(i). Based on the above, the Retailer Operations Division’s decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

### **CONCLUSION**

The Retailer Operations Division 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 four 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 Retailer Operations Division 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

July 10, 2019