

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

**A & Z Food Mart,**

**Appellant,**

**v.**

**Case Number: C0194639**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that a Permanent Disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against A & Z Food Mart (hereinafter “Food Mart”) by the Retailer Operations Division of FNS.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1)(i) in its administration of the SNAP when it imposed a Permanent Disqualification against Food Mart on April 27, 2017.

**AUTHORITY**

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

**CASE CHRONOLOGY**

In a letter dated November 3, 2016, the Retailer Operations Division informed the Appellants that their firm was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 270 – 282, based on EBT SNAP benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm."

In letters to the Retailer Operations Division dated November 12, 2016 and December 2, 2016, the Appellants, through counsel, denied the trafficking allegations and claimed that FNS erroneously concluded that they had trafficked SNAP benefits based solely upon computer records utilizing the unreliable ALERT program. The Appellants' counsel also requested information and documents from FNS with regard to the Agency's case against Food Mart pursuant to the Freedom of Information Act (FOIA).

The record indicates that the Retailer Operations Division provided a response to counsel's FOIA request, dated January 11, 2017, and received no further communication from the Appellants or counsel.

Following consideration of the Appellants' replies and the evidence in the case, the Retailer Operations Division issued a Determination Letter dated April 27, 2017, informing the Appellants that Food Mart was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations.

In a letter postmarked May 5, 2017, the Appellants, through counsel, requested an administrative review of the Retailer Operations Division's decision to permanently disqualify the firm from participation in the SNAP. FNS granted the Appellants' request for administrative review by letter dated May 17, 2017.

## **STANDARD OF REVIEW**

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

## **CONTROLLING LAW**

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2021, Part 278.6(a) and Part 278.6(e)(1)(i) of the

Regulations establish the authority upon which a permanent disqualification may be imposed upon a retail food store or wholesale food concern. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary in order to permanently disqualify retail stores.

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

... a disqualification under subsection (a) shall be ... permanent upon ... the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store  
or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards ...

7 CFR § 278.6(a) states, inter alia:

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

7 CFR § 278.6(e)(1)(i) states:

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

7 CFR § 271.2 states, inter alia:

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

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

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

7 CFR § 278.6(i) states, inter alia:

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

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

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

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

### SUMMARY OF CHARGES

The Appellants were charged and determined to be trafficking based on an analysis of EBT transaction data from April 2016 through September 2016. This involved the following transaction patterns which are indicative of trafficking:

- There were an unusual number of transactions ending in a same cents value;
- There were multiple transactions made from individual benefit accounts in unusually short timeframes; and
- There were excessively large purchase transactions made from recipient accounts.

**Charge Letter Attachment 1:** There were an unusual number of transactions ending in a same cents value. This Attachment lists 128 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). In addition, there are 30 transactions 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.

**Charge Letter Attachment 2:** Multiple transactions made from individual benefit accounts in unusually short timeframes. This Attachment lists 20 sets of transactions (46 total transactions) 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is not credible that the subject store would have so many suspicious SNAP transactions greatly exceeding the average SNAP transaction for convenience stores in Texas during the review period. Violating stores often conduct multiple transactions from the same household account to avoid detection of single high dollar transactions that cannot be supported by the firm's food inventory and infrastructure.

**Charge Letter Attachment 3:** Excessively large purchase transactions made from recipient accounts. This Attachment lists 210 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). There is no indication from the store visit report that Food Mart would be likely to have SNAP redemption patterns significantly different from similar-sized competitors offering similar food items. The substantial number of high dollar purchases atypical of a SNAP authorized convenience store calls into question the legitimacy of these transactions.

### APPELLANTS' CONTENTIONS

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

In the Appellants' replies to the Charge Letter and in the request for administrative review postmarked May 5, 2017, the Appellants, through counsel, stated the following summarized contentions, in relevant part:

- The Appellants deny that trafficking of SNAP benefits took place at Food Mart;
- The SNAP regulations that allow a permanent disqualification to be imposed without sufficient evidence and based on mere speculation, conjecture and unreliable computer generated data is not rationally related to a legitimate government purpose and violates due process of law. The Appellants cited case law in support thereof. The charges of SNAP benefit trafficking in the present case are based upon mere speculation and conjecture resulting from reviewing computer sales records utilizing the unreliable ALERT Program and nothing more. The Agency's conclusions are not based upon any reliable data or confirmation by any actual transactions conducted by an undercover confidential informant;
- The Appellants appear to be making the argument that the legislative process underpinning the SNAP statute and regulations does not adequately represent foreign-born persons such as the store owners in the present case. Moreover, the store owners, being foreign born, do not

understand the technical legislation being applied against them but have nonetheless worked hard to meet SNAP participation requirements. Lastly, there are no reasonable grounds for upholding the permanent disqualification when it involves a foreign born store owner. The Appellants cite case law in support of their contention;

- The Appellants argue that the statute and regulations relied upon by the Retailer Operations Division violate the Contracts Clause of the U.S. Constitution, is arbitrary, capricious, done in bad faith and serves no legitimate public purpose. The Appellants cite case law in support of their contention;
- The Appellants argue that the statute and regulations relied upon by the Retailer Operations Division violate the Takings Clause of the U.S. Constitution. The Appellants cite case law in support of their contention;
- The penalty imposed upon Food Mart is extremely severe based upon the allegations and is unconstitutional;
- The SNAP disqualification of Food Mart will impose a hardship on area SNAP customers as the surrounding area is not sufficiently covered by other retailers who accept SNAP benefits;
- The Appellants are requesting that FNS dismiss the charges imposed against them; and
- In the alternative, the Appellants are requesting that FNS impose a reasonable civil money penalty in lieu of a permanent SNAP disqualification.

## **ANALYSIS AND FINDINGS**

### **Store Characteristics**

FNS authorized Food Mart as a convenience store on April 1, 2014. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an October 4, 2016 store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information obtained from the store visit was also used to ascertain if there were justifiable explanations for the firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Food Mart is approximately 3,600 square feet in size and it does not have a storage area outside of the public view;
- Food Mart is located in an urban commercial area of Houston, Texas;
- There were no shopping carts or hand-held baskets available for customer use;

- Food Mart has one cash register and one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;
- There was no optical scanner or conveyor belt for the speedy processing of transactions;
- Food Mart has a food stock that is typical of convenience stores and it offers customers a minimal variety and amount of eligible staple foods for sale;
- Several of the store shelves were partially stocked and the food items were pushed to the front in order to make the shelves appear to be fully stocked;
- Food Mart does not stock any specialty or ethnic food items;
- There were no meat/seafood specials or bundles that might sell for high prices;
- Food Mart is not a WIC Program vendor and it does not sell any infant foods or infant formula;
- Per the store visit observations, Food Mart does not sell any high priced food items;
- It does not appear from the store visit observations that Food Mart extends credit to customers;
- No signs were posted in the store nor were there any flyers advertising the availability of bulk foods offered at a discounted rate to include grocery package deals or meat package specials;
- The checkout counter has a limited space and it is surrounded by a Plexiglas barrier. As such, the checkout counter does not provide adequate space for the large amounts of individual food items necessary to make up many of the large transactions cited in the Charge Letter Attachments;
- Food Mart did not stock any fresh or frozen meats, poultry, or seafood items;
- Food Mart does not have a deli case/section in which deli meats and cheeses are sold by the pound;
- Food Mart does not have a kitchen/food preparation area and it does not sell hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption and require no additional preparation;
- Food Mart does not have any tables or chairs for customers to utilize while waiting for and eating hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption and require no additional preparation;
- Meat items available for sale included canned fish, canned/potted meat, pork bacon, and eggs;
- The only frozen food item stocked at Food Mart is ice cream;
- Food Mart did not stock any fresh produce items;
- Food Mart did not stock any frozen fruits or vegetables;
- Other staple foods available for purchase included such items as 100%

- juice, canned fruits and canned vegetables, milk, margarine, cheese, pasta, rice, corn meal, cereal, snack foods, cakes/pastries, etc.;
- Much of the remaining food stock consisted of accessory foods such as candy and gum, carbonated and non-carbonated drinks, condiments, coffee, tea, sugar, and vegetable oil; and
  - Food Mart stocked a large supply of ineligible nonfood items such as health and beauty aids, paper products, household cleaning supplies, laundry detergent, automotive supplies, clothing, ice chests, pet food, alcohol, lottery tickets, CDs, tobacco products, over-the-counter medications, infant diapers, sunglasses, toys, school/office supplies, charcoal and lighter fluid, gasoline, hardware items, etc.

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

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Based on this empirical data, and in the absence of any reasonable explanations for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the most likely explanation for “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges is trafficking.

Transactions having such characteristics sometimes do have valid explanations that support that they were the result of legitimate purchases of eligible food items. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, the Retailer Operations Division determined that the Appellants’ contentions did not outweigh the evidence. The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that questionable transactions were the result of trafficking. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

### **Denial of Trafficking Allegations:**

Regarding the Appellants’ contention that they deny the trafficking allegations, this review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which is, as noted above, to determine whether the Appellants demonstrate by a preponderance of the evidence that the permanent disqualification should be reversed. In this case, therefore, if the Appellants demonstrate by a preponderance of the evidence that

trafficking did not occur in the Appellants' firm, then trafficking will be considered not to have occurred and the disqualification reversed. If this is not demonstrated the case is to be sustained. 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.

### **Computer Generated Data Unreliable:**

The Appellants contend that the SNAP regulations that allow a permanent disqualification to be imposed without sufficient evidence and based on mere speculation, conjecture and unreliable computer generated data is not rationally related to a legitimate government purpose and violates due process of law. The Appellants cited case law in support thereof. The charges of SNAP benefit trafficking in the present case are based upon mere speculation and conjecture resulting from reviewing computer sales records utilizing the unreliable ALERT Program and nothing more. The agency's conclusions are not based upon any reliable data or confirmation by any actual transactions conducted by an undercover confidential informant.

Firms are chosen for analytical investigation based upon numerous detailed and rigorous mathematical algorithms. This data presents the Retailer Operations Division with a statistically valid prima facie indication of highly unusual transaction activity; the activity therein identified is not marginally aberrant, but markedly so. Properly analyzed and interpreted, the Retailer Operations Division does not contend that EBT transactions are overtly suspicious when they occur on an occasional or intermittent basis, but when such transactions form repetitive patterns, on a comparative basis, over a period of time that ensures such activity is not simply intermittent, such activity is identified for further analysis.

Once such firms have been identified as potential compliance cases, from approximately 262,462 authorized firms nationwide, the Retailer Operations Division undertakes a detailed examination of the available transaction data and obtains further relevant information regarding the firm's business operations such as the level and condition of staple food stock maintained by the firm, the presence or absence of the firm's logistical retail wherewithal and numerous other factors pertinent to the firm's ability to legitimately process the transaction activity for which the firm has been flagged. Agency policy and procedures direct that only after a careful, comprehensive and complete analysis, from which appropriate conclusions are logically derived, will the firm be issued a Charge Letter. The firm is then given the opportunity to reply to those charges and provide any information it deems appropriate in justifying as legitimate the transaction activity detailed in the Charge Letter. In the present case, these

policies and procedures are shown by the record to have been duly performed in all relevant and pertinent detail.

Moreover, 7 CFR § 278.6(a), noted above, established the authority upon which FNS may disqualify any authorized retail food store on the basis of evidence obtained through a transaction report under an electronic benefit transfer system. The Retailer Operations Division's use of transaction data and other reports, in addition to store visit observations and an analysis of household shopping behavior and other relevant data and information, in rendering a finding that trafficking is the most likely explanation of the transaction activity, is as valid a means of establishing evidence as that obtained through an on-site investigation and the eye witnessing of trafficking. Accordingly, the Appellants' contention that the charges are based on mere speculation, conjecture and unreliable computer generated data is not compelling.

As for the reliability of the ALERT system, it is a database software solution that has passed rigorous government testing, meets quality assurance requirements and has been certified to accurately reflect the transaction data received from State EBT data banks compiled from the actual EBT transactions of individual stores. The Retailer Operations Division uses ALERT as a tool to identify EBT transactions that form patterns having characteristics indicative of trafficking and saves the Retailer Operations Division time and effort of having to make such compilations manually. ALERT does not determine or conclude that trafficking has occurred. The Retailer Operations Division must still analyze the transaction data and patterns, often with other factors such as, in this case, observations from store visits, an analysis of customer shopping behavior and a comparison of stores in the area, and render a determination whether questionable transactions were, more likely than not, the result of trafficking. Therefore, although the Retailer Operations Division does not manually prepare the transaction data upon which they may charge firms with trafficking violations, the raw transaction data is reliable, and the Retailer Operations Division has the authority to analyze and use that data in evidence to substantiate a determination that violations have occurred.

In regard to the case laws cited by the Appellants, considerations of relevant legal precedent through case laws, or the lack thereof in relation to the present case, are beyond the scope of this review. This review relies upon the statute and regulations governing the SNAP and evaluates whether the decision of the Retailer Operations Division to impose a disqualification upon the Appellants was in accordance with same and sustainable by a preponderance of the evidence. The Appellants' case law references are acknowledged in this context only.

**Foreign Born Store Owners:**

The Appellants appear to be making the argument that the legislative process underpinning the SNAP statute and regulations does not adequately represent foreign-born persons such as the store owners in the present case. Moreover, the store owners, being foreign born, do not understand the technical legislation being applied against them but have nonetheless worked hard to meet SNAP participation requirements. Lastly, there are no reasonable grounds for upholding the permanent disqualification when it involves a foreign born store owner.

Whether or not the statute and regulations governing the SNAP adequately represent foreign-born persons is beyond the scope of this review and more appropriately within the purview of judicial review. For the record, the firm was authorized to participate in the SNAP on or about April 1, 2014 and thus had been participating in the program for over 2.5 years at the time the Charge Letter was issued. That the Owners of the Appellant firm may be foreign born cannot be accepted as a valid basis for dismissing any of the charges or for mitigating the impact of the violations upon which they are based. By means of the certification and signature statement (the last page of the application for participation in the SNAP) which the Appellants signed on February 25, 2014, the Appellants acknowledged that they understood and agreed with the conditions of participation (specifically noting that trafficking SNAP benefits is not permitted and disqualification can result from engaging in same) and accepted responsibility to understand program rules, to follow them and to ensure that any/all personnel handling transactions on behalf of the firm likewise understands and follows program rules.

### **Contracts Clause and Takings Clause:**

The Appellants argue that the statute and regulations relied upon by the Retailer Operations Division violate the Contracts Clause of the U.S. Constitution, is arbitrary, capricious, done in bad faith and serves no legitimate public purpose. The Appellants also argue that the statute and regulations relied upon by the Retailer Operations Division violate the Takings Clause of the U.S. Constitution.

The Appellants have contended that the agency's actions do not meet the requirements of the United States Constitution. This review finds that the Retailer Operations Division properly implemented the sanction at issue in accordance with the statute and regulations. The administrative review process cannot properly include an assessment of the constitutionality of the statute and regulations under which the agency imposed adverse actions, but rather assesses whether the agency actions undertaken were proper pursuant to those laws and regulations and sustainable by a preponderance of the evidence. As such, this office does not have the authority to determine whether the United States Congress, in its enactment of legislation, has conformed to constitutional mandates or whether the regulations issued pursuant to those mandates conform

thereto. Additionally, charges to the laws and regulations governing the SNAP are more appropriately within the scope of judicial review. Accordingly, no further findings or conclusions are rendered in this regard.

### **Imposed Penalty Severe:**

The Appellants contend that the penalty imposed upon Food Mart is extremely severe based upon the allegations and is unconstitutional. The statute, regulations and agency policy allow for no sanctioning discretion in trafficking cases, other than a civil money penalty, as noted above. Such provisions are prescriptive in that sufficient evidence of trafficking always warrants permanent disqualification unless a firm qualifies for a civil money penalty. No minimum amount of benefits trafficked or a minimum proportion of cash to SNAP benefits exchanged is required. Any amount of cash exchanged for any amount of SNAP benefits is considered SNAP benefits trafficking. With further regard to the contention that a permanent disqualification is an overly harsh sanction in response to trafficking by an authorized firm, the administrative review process does not include an assessment of the laws and regulations under which the agency imposed adverse actions, but rather assesses whether the agency actions undertaken were proper in accordance with those laws and regulations and sustainable by a preponderance of evidence. The regulations at 7 CFR § 278.6(e) provide for a continuum of sanctions, beginning with permanent disqualification for trafficking, term disqualifications from several years to six months for lesser violations and warning letters for firms committing violations less severe than those warranting six-month disqualifications. 7 CFR § 278.6(e)(1)(i) states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in §271.2. In the present case, the violations at issue include SNAP benefit trafficking. The imposition of a warning letter or lesser sanction for SNAP benefits trafficking is counter to said statute and regulations and is therefore incorrect. Accordingly, the record reflects that the Retailer Operations Division correctly imposed the sanction required by the statute and regulations.

### **Hardship on SNAP Customers:**

The Appellants contend that the SNAP disqualification of Food Mart will impose a hardship on area SNAP customers as the surrounding area is not sufficiently covered by other retailers who accept SNAP benefits. 7 CFR § 278.6(f) of the SNAP regulations provides for civil money penalty assessments in cases where disqualification would cause “hardship” to SNAP households because of the unavailability of a comparable participating food store in the area to meet their needs. However, this regulation also sets forth the following specific exception to such assessments there under: “A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification”.

Therefore, since this case involves a permanent disqualification action, the civil money penalty provision is not applicable to the present case.

### **Dismissal of Charges Requested:**

The Appellants are requesting that FNS dismiss the charges imposed against them. However, the Food and Nutrition Act of 2008, at § 2021, does not allow for discretion in determining sanctions for trafficking and is specific in its requirement that "... a disqualification . . . shall be permanent upon ... the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards ...". In keeping with this legislative mandate, 7 CFR § 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked.

### **CIVIL MONEY PENALTY**

The Appellants are requesting that FNS impose a reasonable civil money penalty in lieu of a permanent SNAP disqualification. In the November 3, 2016 Charge Letter the Appellants were informed by the Retailer Operations Division that, under certain conditions, FNS may impose a civil money penalty (CMP) of up to \$59,000 in lieu of permanent disqualification of a firm for trafficking. Per Section 278.6(i) of the SNAP regulations, four criteria must be met in order to be considered for a trafficking civil money penalty. If requesting a trafficking CMP, an Appellant must meet each of the four criteria listed and provide the documentation as specified within ten days of the Appellant's receipt of their Charge Letter. As specified in 7 CFR § 278.6(i), in determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following four criteria:

Criterion 1. The firm shall have developed an effective compliance policy as specified in 7 CFR § 278.6(i)(1);

Criterion 2. The firm shall establish that both its compliance policy and program were in operation at the location where the violations(s) occurred prior to the occurrence of violations cited in the Charge Letter;

Criterion 3. The firm had developed and instituted an effective personnel training program as specified in 7 CFR § 278.6(i)(2); and

Criterion 4. Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations.

If the Appellant's request for a trafficking CMP and the required documentation are not submitted on time, he will lose his right for any further consideration for a trafficking CMP. The SNAP regulations are specific at 7 CFR §278.6(b)(2)(iii) that "if a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified, the firm shall not be eligible for such a penalty". The regulations do not provide the agency discretion to extend the time within which documentation and evidence in support of a trafficking civil money penalty may be submitted.

In the Appellants' response to the Charge Letter allegations dated November 12, 2016, they requested that FNS allow them to pay a reasonable civil money penalty in lieu of permanently disqualifying Food Mart from participation in the SNAP. However, the Appellants did not provide any information or documentation to validate that they had developed an effective compliance policy and program as specified in 7 CFR § 278.6(i)(1) and that both were in operation at Food Mart prior to the occurrence of the SNAP violations that were cited in the Charge Letter. As such, the Appellants did not address the requirements described herein and did not provide any evidence, in accordance with the criteria detailed in the referenced regulations, that the firm established and implemented an effective policy and program to prevent violations.

Therefore, in the April 27, 2017 Determination Letter, the Appellants were informed by the Retailer Operations Division that consideration was given to the Appellants for a trafficking CMP according to the terms of the SNAP regulations but the Retailer Operations Division determined that the Appellants were not eligible for the trafficking CMP because they failed to submit sufficient evidence to demonstrate that Food Mart had established and implemented an effective compliance policy and program prior to the SNAP violations occurring in order to prevent violations of the SNAP. Therefore, the Retailer Operations Division's decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

## **CONCLUSION**

The Retailer Operations Division's analysis of the Appellants' EBT transaction record, upon which charges of violations are based, together with observations made during the store visit and an analysis of customer shopping behaviors, provide substantial evidence that questionable transactions during the focus period have characteristics and display patterns that are not consistent with

legitimate sales of eligible food to SNAP benefit customers at a store of this type, size and makeup. Rather, the characteristics are indicative of illegal trafficking in program benefits. The Appellants' contentions do not outweigh this evidence.

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

### **RIGHTS AND REMEDIES**

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

Under the Freedom of Information Act, 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.

LORIE L. CONNEEN  
Administrative Review Officer

February 22, 2018