

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

Country Market,

Appellant,

v.

Case Number: C0206695

Retailer Operations Division,

Respondent.

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 Country Market (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 April 13, 2018.

AUTHORITY

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

CASE CHRONOLOGY

By letter dated March 6, 2018, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in October 2017 through January 2018. 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 letters dated March 16, 2018, and March 26, 2018, that did not request or include documentation in support of a CMP. The Retailer Operations Division notified Appellant by letter dated April 13, 2018, that the firm was permanently disqualified from participation as a SNAP retailer in SNAP 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 April 24, 2018, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. The record reflects that store ownership also submitted a request for administrative review dated April 20, 2018. Subsequent correspondence dated May 26, 2018, 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 four month period of October 2017 through January 2018. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions were made from individual benefit accounts in unusually short time frames.
2. 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:

- Attachment 1 is the result of customers frequenting the owner’s store multiple times per week and sometimes on the same day. There are itemized receipts for each transaction. Store is in a low income area and many customers do not have vehicles leading to multiple trips. Has only in business for less than one year, but these types of transactions seem to be in line with the regular course of business; and,
- The large purchases in Attachment 2 generally involve higher priced items such as the various meat and poultry products regularly for sale. Also carries many frozen foods. Purchases 5 U.S.C. § 552 (b)(6) & (b)(7)(C) happen relatively frequently and proof will be provided by the agreed upon date of March 26, 2018.

Appellant submitted a complete listing of all itemized receipts for the transactions contained in Attachments 1 and 2 of the USDA letter dated March 6, 2018, itemized receipts for cash

transactions with amounts similar to those in Attachment 2, and invoices/receipts for meat and poultry purchases in addition to copies of all previously submitted correspondence.

ANALYSIS AND FINDINGS

Each Attachment furnished with the letter of charges represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant firm during the review period. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

Store Background and FNS Store Visit

FNS authorized the firm as a convenience store on August 28, 2017. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a February 7, 2018, 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 store size, description, and characteristics:

- The firm was a small convenience store offering a minimal quantity and variety of staple foods and carrying no unique items or offering any distinctive services.
- There were two small shopping carts and 21 small handheld baskets for customer use seen during the visit making it difficult for customers to carry large amounts of food to the checkout area.
- The checkout area was approximately 1.5 feet wide and 1.5 foot deep with displays and PIN pads taking up space on both sides leaving limited space for customers to place their purchases. The very small size of the checkout area would make it problematic to process large orders.
- The checkout counter had a cash register, no optical scanner, and a POS terminal as confirmed by a store employee.
- No food packages, bundles, bulk products, case sales, or other sales were evident that would explain the unusual transactions and no SNAP eligible cased items were available for sale.
- The store visit report specifically notes that the firm was not a specialty store.
- The firm had a minimal stock of staple foods that also included many single serving and pre-packaged items with a significant portion of inventory in accessory foods (primarily soda, candy, snacks, and other drinks) and many ineligible items.
- There was a large commercial kitchen with a wide range of equipment, prep tables, and refrigerated storage. The firm had a large wall-mounted menu offering an extensive variety of hot and cold prepared, ready-to-eat foods as well as breakfast items, prepared salads, and hot sides.
- Although there was a refrigerated meat case, it was empty during both the 2018 and 2017 FNS store visits.

- The firm had no fresh unprocessed meat/seafood, a limited quantity and variety of frozen unprocessed meat/seafood, a limited quantity and variety of processed meats and seafood, no frozen entrees, no frozen dinners, seven cartons of eggs, a limited selection of fresh/frozen fruits and vegetables, a very limited selection of single serving nuts, a limited stock of canned soups, a moderate quantity and variety of canned and packaged staple food items, baking mixes, pancake mixes, bread/rolls, no tortillas, corn meal, rice, uncooked pasta/noodles, cold cereal, single serving sizes of cold cereals, hot cereal, baby cereal, fresh milk, dry milk, canned milk, two sour cream, a very limited selection of deli cheese, packaged cheese, butter/margarine, no yogurt, a moderate selection of baby food in jars, infant formula, and few expensive eligible food items outside of infant formula.
- Ineligible items included: tobacco, alcohol, hot foods, household products, paper products, auto products, health and beauty items, clothing, hats, and rock salt while accessory foods included: candy, condiments, spices, snacks, cooking oil, single serving ice cream, sugar, coffee, tea, cocoa, and un/carbonated drinks.
- Signage was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- The firm's hours of operation were 7:00 AM-10:00 PM Monday-Saturday and 8:00 AM- 8:00 PM Sunday; this was confirmed by the store owner during the store visit.
- Many food items were priced with visible staple food prices ending in .x9 cents. Comments on the FNS store visit report by the contract reviewer specifically stated that most of the food prices ended in .x9 cents. A price ending in .x9 cents is the most common pricing structure for stores of this type.
- The FNS store visit report listed the four most expensive items costing more than \$5.00 for sale in the store as being four varieties of infant formula costing \$14.99, \$19.99, \$19.99, and \$26.99. This listing of the most expensive items was provided by a store employee during the store visit.
- The firm was a not a WIC vendor. While the firm did stock a minimal selection of baby food and infant formula, most SNAP households with infants or small children are WIC participants and therefore would be purchasing these products using WIC vouchers, not SNAP EBT.
- The store visit photographs showed many empty or marginally stocked shelves, display racks, and coolers as well as broken coolers that were also present during the 2017 store visit. Additionally, product was fronted to give the appearance of greater inventory.

Multiple transactions in unusually short time frames

This Attachment documents 66 individual transactions in 30 sets of two or more transactions conducted by 19 different households in a short period of time.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The dollar amounts of the subsequent transactions in each set are all substantial and they nearly equal or exceed the dollar amount of the initial transaction in 20 of the 30 sets. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. One set is comprised of four individual transactions, four sets are comprised of three individual transactions, and the remaining 25 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 account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure. These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant contends the multiple transactions are the result of customers frequenting the firm multiple times per week and sometimes on the same day and has submitted itemized receipts for each transaction. The firm is also in a low income area and many customers do not have vehicles leading to multiple trips. Appellant has only been in business for less than one year, but these types of transactions seem to be in line with the regular course of business. Appellant submitted a complete listing of all itemized receipts for the transactions contained in Attachments 1 of the USDA letter dated March 6, 2018, in support of these contentions.

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 convenience store's stock and facilities and are thus indicative of trafficking. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These transaction sets also do not contain the characteristics of a household returning later in the day to purchase a forgotten item or two as all 30 sets have subsequent transactions in amounts 5 U.S.C. § 552 (b)(6) & (b)(7)(C), far more than the cost of a forgotten item or two. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 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.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Six households were examined as part of the Retailer Operations Division's shopping pattern analysis. On average, these six households shopped at 13 different stores with all six shopping at super stores and/or supermarkets. It is noteworthy that one of the six households that was responsible for three of the transaction sets in this Attachment only shopped at other stores located 3.41 miles or further away from Appellant's location raising the question of why would a household travel a significant distance from its regular shopping area to conduct multiple transactions on three different occasions at an average convenience store. Five of the six household's average transaction amount at the Appellant firm was more than double the state and county transaction averages while four of the six households spent more of their SNAP benefits at this minimally stocked convenience store than at several large grocery stores, supermarkets, and super stores. As noted in the store visit report, the Appellant firm carries no unique items that could not be found at these larger stores likely at lower prices. This brings-up the question of why would households who are regularly shopping at numerous larger and better stocked stores elect to conduct multiple purchases at a minimally stocked convenience store that carries no unique foods or offers any special services. It is highly unlikely that a convenience store would offer a superior variety of eligible foods or have better prices than could be found at large chain super stores and/or supermarkets so it would make no sense for households that regularly shop at these larger stores and who apparently have no transportation limitations to spend large dollar amounts at the Appellant firm since its cost of goods would be higher. This also refutes

Appellant's claim that multiple trips are needed due to no transportation and having to walk while carrying purchases. Overall, the Retailer Operations Division's household analysis revealed there were 33 households during the review period that conducted a transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at the subject firm within one day of a transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at a large grocery store, supermarket, or superstore. Appellant offered no explanation as to why multiple households would spend large amounts of their very limited SNAP food benefits at a minimally stocked convenience store before or after conducting large dollar value transactions at super stores and/or supermarkets.

While Appellant submitted "itemized" cash register receipts in support of the multiple transactions listed in this Attachment, no explanation was offered as to how these receipts explain the unusual multiple transaction patterns that only appear at the Appellant firm. Additionally, a review of the cash register receipts shows that the receipts are not truly itemized as claimed by Appellant since all, but three of the receipts list every item purchased as "DEPT. 16" without providing a more detailed description so it is impossible to determine what was purchased. The cash register receipts are addressed in greater detail later in this decision.

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 the subsequent transaction dollar amount is for a substantial amount in all of these transaction sets and that they nearly equal or exceed the dollar amount of the first transaction in 20 of the 30 sets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 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 review period.

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 164 individual EBT transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The substantial number of high dollar transactions is uncharacteristic for a convenience store offering a minimal stock of staple foods and calls into question the legitimacy of these transactions. The SNAP transactions listed in this Attachment are all substantially higher than the average SNAP transaction amount of \$8.00 for this store type in New Haven 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 significant 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 large dollar transactions remain questionable when considering the proximity of these other SNAP authorized stores that would be better shopping options for consumers. Based on these 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 limited, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of their purchases at larger food stores. No explanation for these unusual and suspicious patterns was offered by Appellant. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is an indication of potential trafficking when transactions occur outside of a store's reported business hours.

5 U.S.C. § 552 (b)(7)(E). The unusually high number of SNAP transactions is an indication that the business may be dividing larger transactions into multiple smaller transactions in an effort to circumvent detection as previously discussed. A comparison by the Retailer Operations Division of Appellant's SNAP redemptions to that of nearby convenience stores that had redemptions during the review period shows similar differences. Additionally, none of these nearby stores 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 a further indication that the SNAP transactions in this Attachment and the others do not represent legitimate food purchases. The Retailer Operations Division considered all of these to be indicators of unusual and suspicious activity.

Appellant contends the large purchases in Attachment 2 generally involve higher priced items such as the various meat and poultry products regularly for sale as well as many frozen foods. Purchases 5 U.S.C. § 552 (b)(6) & (b)(7)(C) happen relatively frequently. Appellant submitted a complete listing of itemized receipts for the transactions contained in Attachment 2 of the March 6, 2018, USDA letter, itemized receipts for cash transactions with amounts similar to those in Attachment 2, and invoices/receipts for meat and poultry purchases in support of these contentions.

While households residing in areas with extremely limited grocery store options may conduct high dollar transactions at convenience stores out of necessity, this is not the case when there are better alternatives. FNS records show there is a supermarket located 0.56 miles and a large grocery store located 0.61 miles from Appellant's location that offer greater quantities and varieties of staple food items at lower prices than would be found at a minimally stocked convenience store. Additionally, there is a small grocery store located approximately two blocks away from the Appellant firm that is frequented by the many of the same households. There are also two super stores, one supermarket, one large grocery store, and one medium grocery store located 1.27-1.58 miles away. The Appellant business is located one block away from Dixwell Avenue that has scheduled fixed route bus service that would facilitate shopping at other stores.

The SNAP transactions noted in this Attachment are not presumed to be trafficking because they exceed a set dollar amount; they are questionable because they are inconsistent for this type of

store and the store's stock. An analysis of shopping patterns by the Retailer Operations Division shows that households in this Attachment are regularly shopping at much larger stores, and conducting transactions of large dollar amounts, yet are conducting comparable or higher dollar value transactions at the Appellant firm. It would make 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 would be higher than that of larger stores such as supermarkets or super stores.

Information obtained during the FNS store visit on February 7, 2018, shows that the Appellant firm offers a minimal quantity and variety of SNAP eligible staple food items, many accessory foods, and ineligible items. Much of the inventory for sale consists of inexpensive snacks, beverages, and single serving foods as well as many ineligible items. Since the Appellant firm offers no fresh unprocessed meat/seafood, a limited quantity and variety of frozen unprocessed meat/seafood, a limited quantity and variety of processed meats and seafood, no frozen entrees, no frozen dinners, seven cartons of eggs, a limited selection of fresh/frozen fruits and vegetables, a very limited selection of single serving nuts, a limited stock of canned soups, a moderate quantity and variety of canned and packaged staple food items, baking mixes, pancake mixes, 11 loafs of bread, three bags of rolls, no tortillas, corn meal, rice, uncooked pasta/noodles, cold cereal, single serving sizes of cold cereals, hot cereal, baby cereal, fresh milk, dry milk, canned milk, two sour cream, a very limited selection of deli cheese, only one packaged cheese, butter/margarine, no yogurt, a moderate selection of baby food in jars, infant formula, and few expensive eligible food items outside of infant formula, these patterns are deemed to be suspicious. The fact that tobacco, alcohol, hot foods, household products, paper products, auto products, health and beauty items, clothing, hats, and rock salt are not eligible for purchase with SNAP benefits also provides no justification for the high transaction amounts.

Increasing 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 convenience store that does not address all of their food shopping 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 would also offer store brand products at lower prices, offer weekly specials, and have shopping carts and checkouts with built-in scanners and conveyor belts to facilitate processing purchases quickly. The Appellant firm has a very small checkout area and only two small 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 multiple carts and more likely that the amounts were contrived.

Appellant furnished "itemized" cash register receipts for the transactions listed in this Attachment as well as "itemized" receipts for cash transactions with amounts similar to those in Attachment 2 and invoices/receipts for meat and poultry purchases to document the legitimacy of these excessively large transactions. While Appellant claims the firm regularly carries fresh meat and poultry products it is noted that at the time of the FNS initial authorization store visit on August 14, 2017, and during the subsequent visit on February 7, 2018, the firm had no fresh meat or poultry and, in fact, the meat case was empty/appeared unused during both store visits. Only 10 of the 15 invoices submitted by Appellant for meat and poultry purchases occurred

during the review period 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Based on the fact that no fresh meats or poultry were evident on two FNS store visits and that the meat/poultry products listed on the invoices match the firm's menu of hot, prepared, ready-to-eat foods, it is unlikely that these invoices reflect the availability of SNAP eligible foods and more likely that they were for ineligible hot foods.

As previously mentioned, the cash register receipts are not truly itemized and no corresponding EBT POS receipts were provided by Appellant to validate the legitimacy of the cash register receipts. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As documented during the store visit, the highest priced items available for purchase on the date of the store visit were all baby formula including two varieties at \$19.99; however, the firm carried a very limited supply of these items. Additionally, most SNAP households with infants or small children are WIC participants and therefore would be purchasing these products using WIC vouchers, not SNAP EBT. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is unclear what products had these prices as no items at these price points were provided by store ownership during the most recent store visit indicating the possibility these receipts may have been fabricated to support Appellant's contentions. This is further supported by the following inconsistencies:

- The firm's pricing structure has almost all items with prices ending in .x9 cents as documented in the store visit report yet several of the receipts show items priced in unusual amounts (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) suggesting these price points may have been created to get to a specific total on the receipt.
- The receipts provided are serial numbered sequentially by the cash register yet in several cases the serial number on a receipt is out of sequence. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- A new submission of receipts were provided during the administrative review process. Several receipts were duplicates of ones previously submitted in that they had the same dates and totals, but had different items purchased, different times, and/or different receipt numbers. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- Two of the receipts provided to the Administrative Review Branch as being for transactions listed in Attachment 2 had previously been submitted to the Retailer Operations Division as examples of cash purchases. It is further noted that both receipts show the purchase of 2,000 items.

Based on the concerns cited above, the legitimacy of the cash register receipts provided by Appellant is highly suspect thereby nullifying their evidentiary value. In summary, Appellant did not provide adequate evidence to support the legitimacy of the excessively large transactions in this Attachment.

Other Contentions

It is important to state that this review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which is to determine whether Appellant demonstrates by a preponderance of the evidence, that the disqualification should be reversed. In this case, if Appellant demonstrates by a preponderance of the evidence that it did

not engage in trafficking SNAP benefits, then such transactions will be considered legitimate and the disqualification reversed. If 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. Regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, ownership is accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. The ownership remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time or part-time. Additionally, a record of participation in SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

While a firm that has previously received warnings of possible violations or that has been sanctioned before could receive a more severe penalty, SNAP regulations do not provide any grounds for dismissing or reducing penalties for those firms that have not received warnings or previously been sanctioned. Additionally, Section 278.6(e)(1) states that firms shall be disqualified permanently if personnel of the firm have trafficked.

The owner and the firm were charged with trafficking based on a computer analysis of the store's transactions for the months of October 2017 through January 2018. 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.

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**" (Emphasis added). In the present case, the data presented in the Attachments is solely based on the SNAP electronic benefit transfer transactions conducted at the Appellant firm during the period under review. 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 period under review. 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 photographs 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 in the charge letter Attachments. 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 evidence under review shows SNAP activity indicative of trafficking. Neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be the most serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification “shall be permanent upon the first occasion of a disqualification based on trafficking by a retail food store.” In keeping with this legislative mandate, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved and second chances are not an authorized option under existing regulations.

CIVIL MONEY PENALTY

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

Appellant did not request a trafficking CMP in lieu of a disqualification nor did it make any mention of how the firm met any of the four criteria needed to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations within the specified timeframe. No documentation or other evidence was received from Appellant in support of a trafficking CMP. Therefore, Appellant failed to meet the regulatory standard for a trafficking CMP required by 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 two 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

August 7, 2018