

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

**Diane Market,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0221677**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a permanent disqualification of Diane Market (hereinafter “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by FNS’s Retailer Operations Division.

**ISSUE**

The issue accepted for review is whether or not the Retailer Operations Division, in its administration of SNAP, took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against Diane Market.

**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.”

**SUMMARY OF CHARGES**

The Appellant was charged with trafficking and subsequently permanently disqualified from SNAP based on an analysis of EBT transaction data from March 2019 through July 2019. This involved the following transaction patterns which are common trafficking indicators:

- There were multiple transactions made from the accounts of individual SNAP households within a set time period.
- The bulk of SNAP households’ remaining benefits were depleted within short timeframes.

- The firm conducted EBT transactions that were large based on observed store characteristics and recorded food stock.

## CASE CHRONOLOGY

The agency's record shows that FNS initially authorized Diane Market for SNAP participation as a small grocery store on August 1, 2005. In a letter dated October 10, 2019, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred between the months of March 2019 and July 2019. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made and supporting documentation submitted within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

In a letter dated October 20, 2019, the Appellant, through counsel, responded to the charge letter with four pages of formal contentions and roughly 500 pages of supporting documents, most of which were inventory invoices and receipts from the months of May to September 2019. The Appellant also submitted signed declarations from both store owners; 22 photographs of the store's on-the-shelf inventory; a Profit & Loss statement from May through September 2019; a Notice of Compliance from Los Angeles County, dated July 19, 2012, indicating that the firm did not sell tobacco products to a minor decoy; and a similar letter from the State of California Department of Alcoholic Beverage Control, dated September 18, 2014.

In the owners' signed declarations, both owners stated that they did not engage in trafficking. They further claimed that the store is located in a poor neighborhood and the closest "big market" is about a seven-minute drive away, or a half-hour walk. The owners further stated that they do not check the identification of persons using EBT cards and do not regulate who uses the cards. They further claimed that they cannot explain every transaction listed on one day, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The owners stated that occasionally a customer will separate their items and then ask the cashier to swipe the items separately. Sometimes this is done for other family members. Some EBT cardholders may lend another family member their card. The owners further stated that it has some suspicions why a card is depleted quickly: There are nearby homes where multiple families live in the same house, and a large family has higher food costs; some customers visit the store multiple times a day, and sometimes other family members use the card. The owners argued that the store carries a lot of food, and stated that they tried to gather up as many inventory receipts as possible, but some are missing. Finally, the owners argued that they are responsible, hard-working, and honest people.

In its formal written reply through counsel, the Appellant again denied that the firm had engaged in trafficking. It stated that the firm sells fresh meat, dairy items, seafood, fresh produce, canned and frozen foods, bread, tortillas, ice cream, and other grocery products. According to the Appellant, the store is well stocked and has support for its purchases of inventory, which enables it to sell to customers. The Appellant further stated that it has no prior violations and that FNS has not taken any prior action to warn the firm about possible violations. The Appellant argued that the written declarations, the well-stocked store, and inventory purchase receipts reflect a bona-

fide market that is free from trafficking. The unrelated sting operations (related to the firm's tobacco and alcohol licenses) demonstrate the firm's lawfulness.

Finally, the Appellant requested a civil money penalty in an equitable amount in lieu of disqualification. Given the store's history and the evidence provided, the proposed CMP of \$59,000, as listed in the charge letter, is inordinate. Without the store, the owners will be destitute, and they simply cannot afford the proposed CMP, which would be in line for willful and deliberate trafficking. In this case, the Appellant argued, there is no SNAP history, and the firm's business practices and ethnics do not reflect willful or intentional violations of the program.

After reviewing the Appellant's response and documentation and further considering the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated February 4, 2020. This letter informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations, but found that a CMP was not appropriate because the 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.

In a letter postmarked February 13, 2020, the Appellant, through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

### **STANDARD OF REVIEW**

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an 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 AND REGULATIONS**

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

7 U.S.C. § 2021(b)(3)(B) states, in part:

...[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, in part:

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, [or] 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.

7 CFR § 271.2 states, in part:

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 § 271.2 states, in part:

Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption...

7 CFR § 278.6(b)(1) states, in part:

Any firm considered for disqualification...under paragraph (a) of this section...shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination. The FNS regional office shall send the firm a letter of charges before making such determination. The letter shall specify the violations or actions which FNS believes constitute a basis for disqualification.... The letter shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter...

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

7 CFR § 278.6(b)(2)(ii) states, in part:

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).

7 CFR § 278.6(b)(2)(iii) states:

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 a penalty.

7 CFR § 278.6(i) states, in part:

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...

### APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- Appellant believes that Diane Market rebutted, by a preponderance of the evidence, the allegations of trafficking.
- In reviewing the regulatory definitions, trafficking can be described as exchanging SNAP benefits for cash or other proscribed items. Here, there is no evidence that Diane Market accepted cash or other proscribed items.
- The sole determination that the Appellant engaged in trafficking consists of singling out transactions from thousands of others. Nothing more is added. Some transactions reflect a higher dollar value, some reflect a depletion of an account in a short period of time, and some reflect more than one transaction in a day, 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- As reflected in the owner declarations and evidence submitted earlier, the firm has rebutted any presumption that it engaged in trafficking. First, it established that it had the inventory to warrant larger sales. Second, it established why a SNAP account may be utilized twice a day, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The firm has established by a preponderance of the evidence that its conduct was lawful.
- The Appellant owners signed written declarations denying that they were engaged in trafficking. The store carries a large amount of inventory and the firm submitted photographs, inventory receipts, and a profit and loss statement which reflects the firm's income and cost of goods sold. These declarations and supporting documents demonstrate that the firm is well-stocked and purchases sufficient inventory, which enables it to sell to a higher dollar volume to its customers. This is not trafficking.
- The firm has no prior violations and FNS has not taken any prior action to warn the firm about possible violations.
- Unrelated sting operations (in 2012 and 2014) demonstrate the firm's lawfulness.
- Notice of suspect transactions was not conveyed to Diane Market until well after the fact. The firm has surveillance cameras, but the system stores the video for only about a week. The time to review the video system and support its position that no trafficking occurred has long passed. The firm is prepared to invest in a video system that can store up to a month. Additionally, all employees will undergo further training.

- The firm's business practices and ethics do not reflect any willful or intentional violations of the program. Permanent disqualification based solely on a few transactions, after the firm's rebuttal of the presumption of trafficking, would be arbitrary and capricious.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all evidence and contentions presented, including any not specifically summarized or explicitly referenced herein.

## **ANALYSIS AND FINDINGS**

The primary issue for consideration in a case based on suspicious SNAP redemption data is whether or not the Retailer Operations Division adequately established that the Appellant firm engaged in the violation of trafficking. In other words, did the Retailer Operations Division, through a preponderance of the evidence, establish that it is more likely true than not true that the irregular and unusual transactions cited in the charge letter were the result of trafficking?

### **Contractor Store Visit**

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered not only the Appellant firm's EBT transactions, but also information obtained from a September 11, 2019, store visit which was conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This store visit information was used to ascertain if there were justifiable explanations for the firm's irregular SNAP transaction patterns. The store visit report and photographs documented the following store size, description, and characteristics:

- Diane Market is a small grocery store, roughly 500 square feet in size, operating in the city of Los Angeles, California.
- The store visit photographs show one cash register and agency records reflect the use of one EBT point-of-sale terminal for SNAP purchases. It appears that the firm uses an optical scanner to ring up items on the cash register.
- The store does not have any shopping carts for customer use, but it does have a small number of handheld shopping baskets.
- The store's staple food stock is typical of a small grocery store or corner market, and includes a large fresh meat counter, where items such as beef, chicken, pork, and sausage are sold. The meat counter also contains a small supply of fresh cheese.
- In addition to a sufficient supply of staple food items, Diane Market sells a variety of accessory foods, including snack foods, candy, condiments, spices, and carbonated and uncarbonated drinks. The store also sells nonfood items such as tobacco products, alcoholic beverages, lottery tickets, paper goods, cleaning supplies, and other miscellaneous household merchandise.
- The checkout area is immediately adjacent to the store's entrance and consists of a small window inside of a larger shelving unit. The total available space to place items for purchase is perhaps 18 inches by 24 inches. The checkout area is not suitable for conducting large or rapid transactions, as there is little room to place more than a few small items at a time, and little room to maneuver with large amounts of groceries.

- There is no indication from the store visit report that the firm has an unusual pricing structure, such as even-dollar prices. As with most stores, the prices of most items appear to end with a cents-value of 9, such as \$2.69, \$3.99, etc. The report also states that the firm does not round transaction totals up or down at checkout.
- There is no evidence that the firm has special food packages for sale or that items are sold in bulk. According to the report, the most expensive food items were a 2-pound bag of frozen shrimp for \$19.99; a 3-pound box of frozen shrimp for \$15.99; and a 33.8-ounce jar of honey for \$12.99. The majority of items in the store appeared to sell for \$5.00 or less.

The available inventory of SNAP-eligible food at the time of the store visit showed stock that would be typical of a small grocery store, where households normally purchase a limited number of items to supplement their overall dietary needs. There was little indication that SNAP households would be inclined to regularly visit Diane Market to purchase large quantities of groceries, especially considering the absence of unique or hard-to-find ethnic food items, the very constricted checkout area, the absence of shopping carts, and the availability of much larger stores in the area, including two supermarkets within a one-mile radius of the store. Given the available inventory and the store's characteristics, this review could find no reason why the Appellant firm's SNAP redemption patterns differed so significantly from those of similar-sized competitors.

### SNAP Transaction Analysis

**Charge Letter Attachment 1: Multiple transactions were made from the accounts of individual SNAP households within a set time period.** This attachment lists 73 sets of transactions (161 transactions in all) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E). For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), an extraordinary amount for a small grocery store with no shopping carts and few expensive food items. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Such transactions at a small store like Diane Market are highly irregular and are often an indication of trafficking. As such, these transactions warrant further explanation.

The Appellant has offered several contentions related to Attachment 1. For example, the Appellant states that it does not check the identification of the persons using EBT cards and does not regulate who uses the cards. It further claim that it cannot explain every transaction listed on one day, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). According to the Appellant, customers will occasionally separate their items and then ask the cashier to split the purchase into separate transactions. Finally, the Appellant argues that some EBT cardholders may lend another family member their card.

Unfortunately, these contentions are not persuasive. An occasional request to have a cashier divide a purchase into two separate transactions is not unusual; neither is it uncommon for multiple members of the same household to use the EBT card at different times. It is also common for a customer to make a purchase and then a short time later realize that he or she forgot to purchase an item or two. Such incidents regularly play out at stores of all types across the country. But the repetitive transactions in Attachment 1 are so frequent and so large at Diane Market, especially in comparison to other stores of similar type, that there appears to be something beyond normal shopping occurring at the store. Unfortunately, the Appellant has not

offered any relevant evidence, such as itemized cash register receipts, to show what actually took place between the customer and the cashier at the point of sale. Without such evidence, it is reasonable for this review to conclude that trafficking was a likely cause of the transaction patterns listed in this attachment.

**Charge Letter Attachment 2:** In a series of transactions, the bulk of SNAP households' remaining benefits were depleted within short time frames. This attachment lists 32 sets of SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(7)(E).

In its written declarations, the Appellant owners offered vague conjecture as to why such transaction patterns may have occurred, such as customers returning to the store multiple times a day or multiple family members using the same EBT card. But none of the explanations were offered with any supporting evidence to demonstrate that the specific transactions in question were legitimate purchases of eligible food. Without such evidence, this review has little option but to conclude that the patterns found in this attachment were likely the result of trafficking.

**Charge Letter Attachment 3:** The store conducted EBT transactions that were large based on observed store characteristics and recorded food stock. This attachment lists 553 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transactions are not consistent with a small grocery store in the state of California. The Retailer Operations Division has determined that during the review period, the average SNAP transaction for a small grocery store in California was \$14.93. In Los Angeles County, the average was even lower, at just \$12.48 per transaction. But the average transaction in Attachment 3 is more than six times larger than the average purchase amount for this store type.

Given that the Appellant firm has a moderate inventory of staple foods as well as other SNAP-eligible items, including snacks and drinks, and considering that the next closest authorized store of any kind is nearly one-third of a mile away, it is probable that there would be an occasional purchase where the transaction amount is high, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As such, it is likely that there are some legitimate SNAP transactions sprinkled among the transactions listed in Attachment 3. However, as noted earlier, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ significantly from similar-sized competitors in the area. The substantial number of high-dollar transactions in a five-month period calls into question the legitimacy of these transactions.

Attachment 3 lists 45 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) during the review period, including a high of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Considering how many food items it would typically take to add up 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and considering that the store has a very small checkout area and no shopping carts to help a customer transport large amounts of food, this review finds it difficult to believe that every large transaction in Attachment 3 was a legitimate purchase of eligible food.



Agency records further show that many households in the area routinely shopped at much larger stores than Diane Market, often on the same day and often spending less at the larger stores. For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This review cannot comprehend what was available at Diane Market that would not have been available at the supermarket or superstore, which undoubtedly have greater inventory quantities and varieties as well as shopping carts to help transport large amounts of merchandise.

The Appellant has not offered specific contentions related to the transactions in Attachment 3 except to say that the firm is well stocked and has enough inventory to account for these large transactions. To support this claim, the Appellant submitted a large amount of evidence, including inventory purchase receipts for the months of May 2019 to September 2019; 22 color photographs of the firm's on-the-shelf inventory; and a profit and loss statement – also from May 2019 through September 2019.

Upon receipt of this documentation, the Retailer Operations Division conducted a thorough analysis of the data and concluded that it did not change their position that trafficking was likely occurring. For instance, the inventory receipts from May, June, and July were analyzed (August and September were not considered because they were dated after the end of the review period). Each receipt was reviewed to identify items that were eligible to be purchased with SNAP benefits. The Retailer Operations Division then calculated that for May, June, and July, the firm purchased approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in inventory. During that same period, the firm conducted 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP transactions. Assuming that the firm has an approximately 40 percent markup on its retail sales, the evidence shows that the firm had more SNAP sales than its available inventory. This suggests that trafficking was likely taking place. One must also take into consideration the total value of cash or credit/debit transactions that took place at the store. If cash or credit transactions constituted just 20 percent of the firm's total eligible food sales, then trafficking appears even more likely.

While the Appellant declared that some of its inventory receipts may have been missing, the agency's analysis suggests that there was something more happening at the store with EBT transactions beyond just legitimate SNAP sales.

As for the Appellant's photographs, these offer no additional insight beyond the information that had already been collected by the contractor during its September 2019 store visit. Likewise, the profit and loss statement is of little relevance, as it does not cover the entire review period in question and gives no insight into the activity that took place between the customers and store personnel at the point of sale.

This review does not doubt that Diane Market sells eligible food items and conducts legitimate SNAP business. But when unusually large transactions form patterns that are substantially different from comparable stores in the area, further evidence from the Appellant is warranted to verify that there is not something more, such as trafficking or other program violations, taking place. In this case, the Appellant's evidence does not adequately explain what occurred between the customers and cashiers at the point of sale. Accordingly, it is the finding of this review that trafficking was a likely cause of the unusual transaction patterns found in Attachment 3.

Except for the rule that SNAP benefits are to be used only for the purchase of eligible food, the regulations do not govern or mandate how a SNAP household should spend its benefit allotment, including how many times a household may use its EBT card at a particular location or how large an individual transaction can be. However, the transactions noted in the charge letter are not questionable because they exceed any limits for use, but because they display patterns of use that are inconsistent with the store's documented physical characteristics and food inventory. It should be further noted that the transactions identified in the charge letter are not marginally abnormal, but decidedly so, especially in comparison with other nearby SNAP-authorized stores with similar characteristics. This review does not contend that repetitive or large EBT transactions are overtly suspicious when they occur on an occasional or intermittent basis, but when such transactions form questionable patterns on a consistent basis over a substantial period of time, such activity is considered highly irregular, and a firm's intent to comply with program regulations is called into question.

In an appeal of adverse action, the onus is on the Appellant to prove, by a preponderance of the evidence, that the administrative action should be reversed. This means submitting sufficient and compelling evidence that would lead a reviewer to conclude that trafficking did not occur. Unfortunately, the Appellant's contentions and evidence do not meet this standard.

### **Trafficking Case Based on EBT Data**

The Appellant argues that there is no evidence that Diane Market accepted cash or other proscribed items in exchange for SNAP benefits. According to the Appellant, the Retailer Operations Division made a determination of trafficking solely by singling out transactions from thousands of other transactions and that nothing more was added.

With regard to this contention, it should be noted that USDA employs a computerized fraud detection tool to identify EBT transactions that form patterns having characteristics indicative of trafficking. However, this tool does not, by itself, determine or conclude that trafficking has occurred. FNS's Retailer Operations Division must still analyze the transaction data and patterns with other factors, such as observations from a store visit, an analysis of customer shopping behavior, and a comparison with similar stores in the area, and then render a determination as to whether or not the questionable transactions were, more likely than not, the result of trafficking. The legality of this method is identified in 7 CFR § 278.6(a), which states, in part, "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, [or] evidence obtained through a transaction report under an electronic benefit transfer system ....**" [Emphasis added.]

Prior to a disqualification determination, the accused firm is given an opportunity to reply to the charges and provide any information it deems appropriate in justifying as legitimate the transaction activity detailed in the charge letter. This review has thoroughly examined the documentation and information provided by the Retailer Operations Division and has found no evidence to suggest that the agency simply manufactured numerical data and declared it to be trafficking. From all indications, the Retailer Operations Division obtained the EBT data, found

it to be suspicious in comparison to other area stores of similar size, and then undertook a thorough analysis before concluding that trafficking was likely occurring.

It is important to restate here that in an appeal of adverse action, the onus is on the Appellant to prove by a preponderance of the evidence that the administrative action should be reversed. Despite being given a list of specific questionable transactions, the Appellant has offered no evidence, such as itemized cash register receipts or other sales records, to prove that the transactions listed were legitimate purchases of eligible food.

### **No Prior Violations / No Warning / No Intent**

The Appellant contends that the firm has no prior violations and claims that tobacco and alcohol sting operations in 2012 and 2014 by local and state officials demonstrate the firm's lawfulness. The Appellant further argues that FNS has not taken any prior action to warn the firm about possible violations. Finally, the Appellant contends that the firm's business practices and ethics do not reflect any willful or intentional violations of the program.

These contentions are similar to SNAP regulations at 7 CFR § 278.6(d), which FNS must consider before making a disqualification determination. This regulation reads as follows:

(d) Basis for determination. The FNS regional office making a disqualification or penalty determination shall consider:

- (1) The nature and scope of the violations committed by personnel of the firm,
- (2) Any prior action taken by FNS to warn the firm about the possibility that violations are occurring, and
- (3) Any other evidence that shows the firm's intent to violate the regulations.

With regard to these contentions, this review finds that the Retailer Operations Division properly considered the elements of § 278.6(d) as required. For instance, the case record shows that FNS evaluated the firm's history with SNAP compliance and found no prior violations. However, statute at 7 U.S.C. § 2021(b)(3)(B) and SNAP regulations at 7 CFR § 278.6(e) require that when trafficking occurs, permanent disqualification is the necessary penalty, even on the first occasion, regardless of a firm's prior compliance with program rules. As such, this review finds that the sanction imposed by the Retailer Operations Division fully conforms to SNAP regulations and is consistent with sanctions imposed upon other retail stores that have committed similar first-time violations.

As to whether or not the firm should have been warned, USDA is under no obligation to warn retailers when trafficking violations are occurring. The regulation at 7 CFR § 278.6(e)(7) states that a warning letter is to be sent if the violations are too limited to warrant a period of disqualification. However, when serious violations, such as trafficking, occur, permanent disqualification is the required penalty.

As to the element of intent, this review acknowledges that a conclusion regarding one's intent is difficult to draw from an analysis of EBT data. However, the preponderance of evidence in this case most assuredly leans in the agency's favor. The highly unusual patterns of transactions over

an extended period of time strongly suggest that intentional violations of SNAP regulations were taking place, and the Appellant's explanation and evidence have failed to convince this review otherwise.

### **Delayed Notification / Remedial Actions**

The Appellant contends that the trafficking charge letter was not issued to Diane Market until well after the transactions had occurred. According to the Appellant, the firm has surveillance cameras, but the system stores the video for only about a week. As such, the time to review the video system and provide evidence to support its position that no trafficking occurred had long passed by the time the charge letter was delivered. The Appellant further states that the firm is prepared to invest in a video system that can store up to a month of footage. Additionally, the Appellant contends that all employees will undergo further training.

With regard to Appellant's insinuation that there was a delay between the alleged trafficking violations and the issuance of the charge letter, it is noted that the charge letter was issued on October 10, 2019 – approximately two and a half months after the end of the review period. This review does not find this to be an unreasonable delay. As noted earlier, before the agency reaches a conclusion that trafficking was likely occurring at a store, it must conduct a full analysis of the transaction data, conduct a store visit, review the report and photographs, and analyze other factors, such as customer shopping behavior and comparisons with similar stores in the area. It is not reasonable to expect that all of these actions, including the delivery of the charge letter, would be completed by FNS within a week of the end of the review period. Having reviewed hundreds of cases, this reviewer can state with certainty that the time between the alleged trafficking violations and the issuance of the charge letter in this case was not unusual or abnormally lengthy. As such, this review can find no evidence that the Appellant's due process rights were violated in any respect.

With regard to the Appellant's claim that it intends to invest in a surveillance system with increased storage capacity and its claim that all employees will undergo training, it must be made clear that this review is limited to the facts that existed at the time the alleged violations were committed. It is not the authority of this review to consider any subsequent remedial actions that may have been taken or that will take place so that a store may enhance or begin to comply with program requirements. In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty on the basis of alleged or planned corrective actions implemented after the discovery of program violations. Accordingly, the firm's planned remedial actions do not provide a valid basis for reversing the agency's disqualification determination.

### **Civil Money Penalty**

In its reply to the charge letter, the Appellant requested an equitable civil money penalty in lieu of disqualification. However, the Appellant argued that based on the store's history and the evidence provided by the firm, the proposed CMP of \$59,000.00 is inordinate. The Appellant indicated that the owners cannot afford the proposed CMP, which it claims would be more applicable to willful and deliberate trafficking.

Regarding this contention, it is true that the amount of a civil money penalty in this case would be \$59,000.00. However, this penalty was not simply proposed as an alternative to disqualification, as the Appellant implies; rather, the charge letter stated that a CMP was an available alternative “under certain conditions,” including meeting each of the criteria as listed in Section 278.6(i) of the SNAP regulations.

The record shows that the Retailer Operations Division determined that the Appellant firm was not eligible for a CMP in lieu of permanent disqualification for trafficking because it did not submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a CMP to be considered, a firm must not only notify FNS that it desires the agency to consider a trafficking CMP, but it must also submit appropriate supporting documentation within 10 days of receipt of the charge letter. While the record shows that the Appellant requested an “equitable” CMP, there is no evidence that the Appellant submitted any documentation that would indicate that the firm had a compliance policy or program of any kind.

Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii) and § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking is not an option in this case.

## **CONCLUSION**

An analysis of the Appellant’s EBT transaction record was the primary basis for the decision by the Retailer Operations Division to permanently disqualify Diane Market from SNAP participation. This data provided sufficient evidence for this review to conclude that the questionable transactions and patterns listed in the charge letter were more likely than not the result of trafficking violations committed by the Appellant. Likewise, the Appellant has not proven, by a preponderance of the evidence, that the administrative action should be reversed.

Based on a review of all available information in this case, the decision to impose a permanent disqualification against the Appellant, Diane Market, under the ownership **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, is sustained.

## **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 30 days of receipt of this decision. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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.

JON YORGASON  
Administrative Review Officer

May 20, 2020