

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

**J & D Market LLC,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0215028**

**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 J & D Market LLC (Appellant) 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 J & D Market LLC on September 5, 2019.

**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 April 8, 2019, the Retailer Operations Division informed the Appellant that J & D Market LLC 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." The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i).

In a response to the Retailer Operations Division of April 23, 2019, the Appellant, through counsel, replied to the charges therein denying the trafficking allegations and providing various explanations for the questionable SNAP transactions that were outlined in the April 8, 2019 Charge Letter.

The Appellant's reply, through counsel, also include a FOIA request. FNS made several attempts to accommodate counsel's FOIA request by providing notification of a FOIA fee estimate through forwarded letters to counsel dated June 21, 2019 and June 27, 2019. In correspondences dated July 22, 2019, the Appellant and counsel were informed that the FOIA request had been closed due to nonpayment of the fee balance.

After considering the Appellant's reply and the evidence in the case, the Retailer Operations Division issued a Determination Letter dated September 5, 2019, informing the Appellant that J & D Market LLC was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations. The letter also stated that the Appellant was not eligible for a trafficking civil money penalty (CMP) as the Appellant did not submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter postmarked September 13, 2019, the Appellant, 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 Appellant's request for administrative review by letter dated October 29, 2019.

## **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 Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from July 2018 through December 2018. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were a large number of transactions ending in a same cents value;
- There were multiple transactions made from the accounts of individual SNAP households within a set time period; and
- There were EBT transactions conducted that are large based on the observed store characteristics and recorded food stock.

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.

### **APPELLANT'S CONTENTIONS**

The following represents a brief summary of the Appellant's 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 reply to the Charge Letter and in the administrative review request, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- This is the first occasion of any allegation of misuse of SNAP benefits against the Appellant.
- None of the allegations contained in the April 8, 2019 Charge Letter constitute a violation of the SNAP regulations. These allegations are merely queries about a pattern of SNAP redemptions and there is no evidence of trafficking contained in the Letter. The allegation of trafficking is apparently based on some computer analysis of the transactions rather than upon any individual analysis or observation of these transactions. Although this pattern of SNAP redemptions may be atypical, or not in conformance with an undisclosed computer program, it is not in and of itself illegal or a violation of the SNAP regulations. There is no evidence of trafficking. The time period mentioned in the Charge Letter is at the most six months. This is a very small and statistically insignificant sample to draw any valid conclusions about SNAP benefit redemption patterns.
- With regard to the transactions documented in Charge Letter Attachment 1, the Appellant, for business reasons, designates certain items for sale in the store at round dollar amounts. Since these transactions are exempt from Connecticut sales tax, the sales

all end in round numbers. Also, some of the store's SNAP customers, just like other customers at this or any other market, may only allocate a specific amount of their EBT funds to spend at any given time. Customers often choose to round off their transactions for their convenience. The customer can pay whatever extra amount is due in cash and still easily keep track of the balance on their SNAP card. Section 271.1(b) of the SNAP regulations specifically authorizes transactions consisting of a combination of cash and SNAP benefits. There is nothing in the SNAP regulations that prohibits transactions that end in a same cents value.

- With regard to the transactions documented in Charge Letter Attachment 2, customers return frequently to the Appellant store, sometimes on the same day after they have made an initial purchase. The Appellant caters to an inner city clientele. The Appellant is a convenience type grocery store located on an older city street. There is no parking available at the store and only limited street parking. The Appellant estimates that 95% of its customers are pedestrians. These customers live close by so multiple daily trips to the store are normal. The store's pedestrian customers are also effectively limited to purchasing what they can carry home themselves on any individual visit to the store. There is nothing in Section 274.12(e)(4)(f)(1) of the SNAP regulations that limits the maximum number of SNAP transactions.
- With regard to the transactions documented in Charge Letter Attachment 3, customers purchase as many items as they can while they have credit on their EBT cards at the beginning of the month. USDA studies have shown that the majority of SNAP customers in this area exhaust their entire monthly SNAP benefits within the first two weeks. The transactions included in this Attachment took place at the beginning of the month. These transactions represent only a small amount of thousands of SNAP transactions that were processed at the Appellant during the review period. These amounts cannot be considered excessively large by any reasonable criteria.
- There has not been any previous action taken by FNS to warn the store that violations may be occurring. The Appellant requests that FNS issue a warning letter in lieu of a permanent SNAP disqualification.
- The Appellant has an effective compliance policy. The policy is to allow only authorized items to be purchased and to not exchange cash for SNAP benefits. This policy has been in operation during all relevant time periods in this matter. The EBT policy is posted in several locations throughout the store including at the cash register.

## **ANALYSIS AND FINDINGS**

### **Store Characteristics**

FNS authorized J & D Market LLC as a convenience store on July 19, 2013. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a November 26, 2018 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:

- Approximately 1,500 square feet in size and approximately 1,500 square feet of additional storage outside of public view that stocked predominantly drinks and alcohol;
- No shopping carts and one hand-held basket available for customer use;
- One cash register and one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;
- One checkout counter area with limited check-out counter space which was partially obstructed by an ice cream freezer;
- No optical scanners;
- No signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals;
- No meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices;
- No evidence of a wholesale business such as posted prices or separate entrances for wholesale customers;
- No indication from the store visit report that the firm has a special pricing structure, such as prices ending in \$x.x9 and/or \$x.00;
- Transaction totals are not rounded up or down at the checkout counter;
- Telephone and on-line orders were not taken and delivery was not offered;
- A WIC vendor and sold infant foods and formula;
- The four most expensive food items in stock were Similac infant formula at \$18.99 per 12.4 ounces (8 units in stock); Canilla rice at \$11.99 per 20 pounds (1 unit in stock); Iberia cooking oil at \$9.99 per three quarts; and Frosted Flakes cereal at \$5.99 per 1 pound 8 ounces;
- No fresh meats, poultry, or seafood;
- No frozen meats or poultry;
- Frozen seafood included a few units of squid and Pollock;
- Had a kitchen area/deli in which prepared, made-to-order sandwiches were prepared and sold;
- Deli meats and cheeses were sold by the pound;
- Meat items included units of canned/potted meat, canned fish, and meat jerky;
- Dairy included milk (cow and coconut varieties), margarine, cheese, and yogurt;
- A limited variety and amount of fresh produce;
- Other staple foods available for purchase include such items as juice, pasta, rice, cereal, baking mix, loaf bread, corn meal, flour, and canned goods;
- Much of the remaining food stock consists of accessory foods such as candy, carbonated and non-carbonated drinks, snack foods, seasonings, coffee, and condiments; and
- Ineligible nonfood items included tobacco products, health and beauty aids, paper products, household cleaning supplies, automotive supplies, alcohol, mobile phones/phone cards, and housewares.

The available inventory of SNAP eligible food at the time of the store visit showed food stock that would be typical of a convenience store, where households normally purchase a limited number of items. The SNAP eligible food stocked by the store was generally of a low dollar value, consisting mainly of inexpensive canned and packaged goods, snack foods, single-

serving food items and accessory food items. There was little indication that SNAP households would be inclined to regularly visit the store to purchase large quantities of groceries. 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.

### **Charge Letter Attachments**

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.

Stores caught in trafficking violations consistently display particular characteristics or patterns of transactions, including those cited in the letter of charges. Nevertheless, transactions having such characteristics are sometimes valid and sufficient evidence that support that they were the result of legitimate purchases of eligible food items is provided. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited and to provide evidence that they are legitimate.

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

### **Same Cents Transactions (Charge Letter Attachment 1)**

This Charge Letter Attachment documents transactions ending in same cents values. A review of the store visit record indicates that the store did not promote any specials that could explain the pattern of large numbers of transactions ending in these values.

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

The Appellant contends that it designates certain items for sale in the store at round dollar amounts. Since these transactions are exempt from Connecticut sales tax, the sales all end in round numbers. Also, some of the store's SNAP customers, just like other customers at this or any other market, may only allocate a specific amount of their EBT funds to spend at any given time. Customers often choose to round off their transactions for their convenience. The customer can pay whatever extra amount is due in cash and still easily keep track of the balance on their SNAP card. Section 271.1(b) of the SNAP regulations specifically authorizes transactions consisting of a combination of cash and SNAP benefits. There is nothing in the SNAP regulations that prohibits transactions that end in a same cents value.

A number of households whose transactions were cited in other Attachments to the Charge Letter also consistently made transactions that ended in same cents values. Transactions appearing in

more than one Attachment to the Charge Letter are more suspicious as they display multiple patterns common to trafficking transactions.

The SNAP regulations do not prohibit SNAP transactions that end in a same cents number value. However, an interesting characteristic of questionable transactions is that many of them end in a same cents value. Sets of repeating digits are highly unorthodox and do not regularly occur in legitimate transactions; such transaction structuring is a common hallmark of trafficking activity. In the absence of any compelling rationale to the contrary, these patterns strongly indicate that the firm is trafficking in SNAP benefits.

#### **5 U.S.C. § 552 (b)(7)(E).**

The Appellant contends that it designates certain items for sale in the store at round dollar amounts and that customers often choose to round off their transactions for their convenience. However, the store visit record indicates that the Appellant did not promote any specials nor did it have a special pricing structure, such as prices ending in \$x.50, \$x.75, or \$x.00, that could explain the pattern of large numbers of transactions ending in these values. In addition, the store visit record indicates that transaction totals are not rounded up or down at the checkout counter. It is also important to note that the four most expensive food items noted during the store visit end in price variations of \$x.99.

Furthermore, the EBT card is like a credit card and there is no need for recipients to worry about a cent value or to round purchases for the purpose of budgeting benefits. Additionally, when rounding prices either the SNAP recipient will pay more for a purchase rounded up or the retailer will lose money if purchases are consistently rounded down to an even amount. Also, for the purpose of keeping track of any remaining balance, every SNAP transaction receipt has the recipient's ending balance printed on the receipt or the recipient can request a "balance inquiry" at any time to determine the balance.

While some of the transactions in this Attachment may have been for legitimate staple food purchases, particularly those in the lower dollar amounts, there is insufficient evidence that these repeating same cent transactions are legitimate. Patterns of transactions ending in same cents amounts indicate that SNAP transaction amounts are contrived. Random data, which legitimate transaction activity approximates, is extremely difficult to produce intentionally; it is very difficult to avoid repetitive patterns when attempting to create the appearance of normal, near-random transactions. That various customers each repeatedly had totals with identical cents values during the review period strains the credibility of the Appellant's declaration that this activity reflected the acceptance of SNAP benefits in exchange for eligible food items. As the Appellant has offered no rational explanation or supporting documentation for why such patterns might exist, it is reasonable to conclude that these same cents transactions are the result of trafficking.

#### **Repeat Transactions by the Same Household (Charge Letter Attachment 2)**

This Charge Letter Attachment documents 26 sets of transactions (59 total transactions) **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits to meet the parameters of this scan. These



transactions were completed by 19 different SNAP households. 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.

The Appellant has provided several contentions regarding the SNAP transactions documented in this Attachment, including a claim that customers return frequently to the Appellant store, sometimes on the same day after they have made an initial purchase. The Appellant estimates that 95% of its customers are pedestrians. These customers live close by so multiple daily trips to the store are normal. The store's pedestrian customers are also effectively limited to purchasing what they can carry home themselves on any individual visit to the store. There is nothing in Section 274.12(e)(4)(f)(1) of the SNAP regulations that limits the maximum number of SNAP transactions.

With regard to the Appellant's contentions, although it is not uncommon for customers to have more than one transaction per day and there are no limits on the number of times EBT cards may be used or the amount of eligible foods that may be purchased, it is not common that such multiple transactions are for large dollar amounts. The SNAP transactions noted in the Charge Letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of the Appellant's stock and facilities and are therefore, indicative of trafficking.

The report and photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at J & D Market LLC multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items or food cases for sale. The second, third, and fourth transactions in each set are too large to consist of forgotten items. In addition to the store's limited checkout space which is unsuitable for large transactions, J & D Market LLC has no shopping carts and only one hand-held basket available to customers for transporting food within the store.

It is recognized that sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, there are 12 SNAP authorized retailers, including one super store located 0.20 miles from the subject firm, located within a 0.5 mile radius of J & D Market LLC that can meet the nutritional needs of SNAP customers. Some of these authorized SNAP stores are larger than J & D Market LLC and offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store.

The record indicates that SNAP customers who shopped at J & D Market LLC during the review period also shopped at other area grocery stores and, therefore, transportation to other stores is not an issue for these customers. Therefore, lack of access to other authorized stores or the availability of other food stores does not appear to be an explanation for the Appellant's abnormally high SNAP transaction amounts conducted within a short timeframe of each other.

5 U.S.C. § 552 (b)(7)(E).

Unfortunately, the Appellant has not provided any evidence to show that the transactions listed in Attachment 2 were legitimate purchases of eligible foods. The arguments presented by the Appellant hold little weight without some kind of evidence to substantiate its claims.

### **Excessively Large Transactions (Charge Letter Attachment 3)**

This Charge Letter Attachment lists 221 SNAP transactions, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transaction amounts are not consistent with the store's observed characteristics and food inventory. The frequency of high dollar purchases in the review period calls into question the legitimacy of these transactions.

The Appellant contends that customers purchase as many items as they can while they have credit on their EBT cards at the beginning of the month. USDA studies have shown that the majority of SNAP customers in this area exhaust their entire monthly SNAP benefits within the first two weeks. The transactions included in this Attachment took place at the beginning of the month. These transactions represent only a small amount of thousands of SNAP transactions that were processed at the Appellant during the review period. These amounts cannot be considered excessively large by any reasonable criteria.

A June 2006 study entitled "An Analysis of Food Stamp Benefit Redemption Patterns" prepared by USDA FNS, notes that typical EBT purchases are small (about 71 percent 5 U.S.C. § 552 (b)(6) & (b)(7)(C)) and SNAP benefits are spent throughout a given month--63 percent of SNAP households use more than half of their benefits in the first week after issuance and over half (56 percent) use more than 90 percent of the household benefits within two weeks after issuance. However, the study also found that "Supermarkets accounted for over 64 percent of all EBT transactions and 83 percent of the total value of EBT purchases" while "less than 6 percent never shopped at supermarkets." The study indicates that most SNAP benefits are redeemed at supermarkets. Supermarkets generally provide the widest range of high-quality foods at reasonable prices. Although access to supermarkets may be limited in some areas, most low income shoppers redeem most of their SNAP benefits in supermarkets as opposed to convenience stores like the Appellant firm.

The food stock and facilities of the Appellant as reported in the store visit documentation do not appear sufficient to provide for all of one's food needs. People generally do not spend large sums at such stores. They usually stop at convenience stores to pick up a few staple food items, such as bread, milk, or a can or two of food that they may consider are not worth a trip to the supermarket to purchase. The Appellant contends that the large transactions are not the result of trafficking of SNAP benefits. However, it is rare for a convenience store such as J & D Market LLC to have purchases like those included in this Attachment to the Charge Letter.

The FNS store visit report and photos of November 26, 2018 show that J & D Market LLC offers a moderate stock of SNAP eligible foods with no fresh meats, poultry, or seafood, no frozen meats or poultry, a minimal variety and amount of frozen seafood, a minimal variety and amount of fresh produce, and lacks an abundant depth and breadth of staple foods. The store visit inventory report and photos also show only a few expensive eligible foods in stock that would account for these large amounts as well as showing the store has limited checkout counter space and no shopping carts and only one hand-held basket in which to transport the large number of

items required to make up these large transaction amounts. Without these, it is unlikely that such large dollar value transactions could be for actual food purchases and more likely they are trafficking.

The store visit report and photos also indicate that there were no signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals, no evidence of meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices, and no evidence of a wholesale business such as posted prices or separate entrances for wholesale customers. There is no evidence of a price advantage or custom or special services rendered at the subject store that are not offered at other authorized SNAP stores in the area. There is no evidence that the firm would be likely to have SNAP redemption patterns that differ considerably from similar sized competitors. These large transaction amounts are also not consistent with the Appellant store's inventory.

The average SNAP transaction included in this Attachment **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The large transactions documented in this Attachment are not consistent with a convenience store in Hartford County, Connecticut. During the review period, the average transaction amount for a convenience store in Hartford County was \$8.46. The average transaction in this Attachment is more than six (6) times larger than the average purchase amount for this store type. There is no evidence that the firm would be likely to have SNAP redemption patterns that differ considerably from similar sized competitors. These large transaction amounts are also not consistent with the Appellant store's inventory. Most of the food products in J & D Market LLC consisted of accessory food items such as snack foods, candy, and drinks and inexpensive staple foods such as canned and packaged goods.

While the Appellant firm may be located in a neighborhood with households that qualify for SNAP benefits, these factors are not an indication that questionable transactions would be occurring at any given store. The subject store shows unusual transaction patterns that are not displayed in other similarly stocked stores. If specific household needs are causing these questionable transactions at the subject store, it would be expected that similar patterns would also present themselves at nearby firms as well. But this is simply not the case.

As noted previously, there are 12 SNAP authorized retailers, including one super store located 0.20 miles from the subject firm, located within a 0.5 mile radius of J & D Market LLC that can meet the nutritional needs of SNAP customers. Some of these authorized SNAP stores are larger than J & D Market LLC and offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store.

An analysis of the shopping patterns for all of the SNAP households listed in this Attachment shows that the majority of the households shopping at J & D Market LLC have access to transportation and that all are regularly shopping at a variety of larger stores, including super stores and/or supermarkets, located nearby and at several miles distance from the Appellant's location. While J & D Market LLC does offer some staple food items, SNAP recipients are already shopping at other larger SNAP retailers located in proximity to the Appellant's business offering a greater quantity and variety of products, including fresh meats/seafood and produce, at lower prices.

**5 U.S.C. § 552 (b)(7)(E).**

Based on the discussion above and in the absence of credible evidence for 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 letter of charges evidence trafficking as the most likely explanation. Nevertheless, transactions having such characteristics do sometimes have valid explanations that support that they were the result of legitimate purchases of eligible food items, and this is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, however, the Retailer Operations determined that the Appellant’s contentions did not outweigh the evidence. Assertions that the firm has not violated program regulations, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations.

In summary, the store’s layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding those of similar type stores. In addition to the statistical irregularity of such high dollar transactions, the limited availability of counter space for checking out and the lack of shopping carts and a sufficient number of hand-held baskets support the Retailer Operations Division’s determination. It is not plausible that the store’s customers are carrying large amounts of food around the store without the benefit of shopping carts and/or hand-held baskets. Customers purchasing such large quantities of food items would have to hold them in their arms, or enlist the help of others while shopping. Based on the preponderance of the evidence, the irregular transaction patterns cited in this Attachment are more likely than not the result of trafficking in SNAP benefits.

**No Prior Violations**

The Appellant contends that this is the first occasion of any allegation of misuse of SNAP benefits against the Appellant. However, a record of participation in the 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.

**No Warning**

The Appellant contends that there has not been any previous action taken by FNS to warn the store that violations may be occurring. 7 CFR § 278.6(d)(2) and (3) of the SNAP regulations provides that “The FNS office making a disqualification or penalty determination ... shall consider ... any prior action ... to warn the firm about the possibility that violations are occurring ...” The citation simply requires FNS to consider any prior warnings when determining a sanction. It does not require FNS to give such warnings. FNS did not consider prior actions to warn J & D Market LLC about the possibility that violations were occurring because there were no prior warnings during the review period. The evidence considered by the Retailer Operations Division included the raw data of questionable transactions and information obtained during the aforementioned store visit conducted on November 26, 2018.

With regard to the Appellant's request for the issuance of a warning letter in lieu of a permanent SNAP disqualification, 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. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved.

### **CIVIL MONEY PENALTY**

In the April 8, 2019 Charge Letter the Appellant was 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 violation(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, it will lose its 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 reply to the Charge Letter and in the request for administrative review, the Appellant, through counsel, did not specifically request consideration of a civil money penalty in lieu of a permanent SNAP disqualification. However, the Appellant contends that it has an effective compliance policy. The policy is to allow only authorized items to be purchased and to not

exchange cash for SNAP benefits. This policy has been in operation during all relevant time periods in this matter. The EBT policy is posted in several locations throughout the store including at the cash register.

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking civil money penalty in lieu of a disqualification under 7 CFR § 278.6(i) 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. **5 U.S.C. § 552 (b)(7)(E).**

Therefore, the Retailer Operations Division's decision not to impose a civil money penalty in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

### **CONCLUSION**

The Retailer Operations Division's analysis of the Appellant's 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 Appellant's 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 J & D Market LLC 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, FNS is 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

January 7, 2020