

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

KS Market,

Appellant,

v.

Case Number: C0211199

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support that the Retailer Operations Division properly imposed a permanent disqualification of KS Market 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 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against KS 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.”

CASE CHRONOLOGY

In a letter dated August 10, 2018, 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 during the months of January 2018 through June 2018. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter stated the Appellant had the right to respond to the charges within 10 days of receipt to provide explanations for the irregular SNAP transaction patterns. The letter also stated 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). The charge letter was delivered to the Appellant by UPS on August 14, 2018.

In a letter postmarked August 20, 2018, the Appellant, through counsel, responded to the charge letter and described its training procedures for new employees and provided statements from those employees. The Appellant also provided letters of support from customers and other individuals in the community. In addition, the letter attached purchase invoices from the review period, store closeout reports, undated pictures of store inventory and a handwritten price list. The Appellant did not request a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i).

After reviewing the Appellant's response and the evidence in the case record, the Retailer Operations Division issued a determination letter dated September 26, 2018. The letter informed the Appellant it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and 7 CFR § 278.6(e)(1). The determination letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of 7 CFR § 278.6(i). The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP 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 violations of the SNAP.

In a letter postmarked September 25, 2018, the Appellant, through counsel, requested an administrative review of the Retailer Operation Division's determination. It should be noted that the request for administrative review was postmarked before the determination letter was delivered to the Appellant. Nevertheless, the request for administrative review was granted.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means 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 covered in the Food & 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 § 271.2 states that the definition of “coupon” includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

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 defines trafficking, in part, as:

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 defines eligible food, in part, as:

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

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, **evidence obtained through a transaction report under an electronic benefit transfer system...**

[Emphasis added.]

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.

7 CFR § 278.6(b)(2) states, in part:

(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\(b\)\(1\)](#).

SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from January 2018 through June 2018. This involved the following transaction patterns which are trafficking indicators:

- **Charge Letter Attachment 1:** There were an unusual number of transactions ending in a same cents value. This attachment lists 91 transactions [5 U.S.C. § 552 \(b\)\(6\) & \(b\)\(7\)\(C\)](#). [5 U.S.C. § 552 \(b\)\(6\) & \(b\)\(7\)\(C\)](#).
- **Charge Letter Attachment 2:** Multiple transactions were made from individual benefit accounts in a set time frame. This attachment lists 17 sets of 43 transactions [5 U.S.C. § 552 \(b\)\(6\) & \(b\)\(7\)\(C\)](#) in SNAP benefits. [5 U.S.C. § 552 \(b\)\(6\) & \(b\)\(7\)\(C\)](#).
- **Charge Letter Attachment 3:** Excessively large purchase transactions were made from recipient accounts. This attachment lists 181 SNAP transactions [5 U.S.C. § 552 \(b\)\(6\) & \(b\)\(7\)\(C\)](#). [5 U.S.C. § 552 \(b\)\(6\) & \(b\)\(7\)\(C\)](#).

APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions, in relevant part:

- The store has many transactions ending in 80 cents because many other items at the store are priced evenly at 00 cents. The store sells many Take-N-Bake pizzas at prices that end in 80 cents. Each pizza combo (pizza and drink) is either \$15.80 or \$20.80.
- The SNAP manual issued by the USDA disallows store owners from questioning the purchase of SNAP eligible food items.
- Once a customer makes their first purchase, the customer then asks how much money is left on their card and based on the reply, purchases more groceries. For this reason, they normally make a test purchase of a qualified grocery item and then plan for future purchases. [5 U.S.C. § 552 \(b\)\(6\) & \(b\)\(7\)\(C\)](#).
- Store customers normally have a large number of children per family. As a result, the children of the card holder do much of the family's shopping. They routinely return to the store multiple times to pick up more items to take home. It is common for transactions to be excessively large since there are sometimes 7 children living in the same home with different needs. Since the store is located within a short walking distance of their customers, there are normally many transactions from the same card holder as there are numerous visits.
- Many customers will buy large quantities of pizza to meet the family's needs for a whole month to eliminate the need for frequent visits to the store. Given the customer

base, there are a significant number of individuals that do not own automobiles. Secondly, there are also a number of individuals that have restrictions such as wheelchairs and other accessibility issues that make it very difficult to make frequent trips to the grocery store. For this reason, buying in bulk is a practical option.

- Under SNAP regulation 278.6(2)(d) the Appellant has not violated SNAP law. The store transactions are based on the sale of qualified merchandise.
- In the alternative, the store should be eligible for a trafficking CMP in lieu of a permanent disqualification.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

Authorization History

An owner signed the SNAP application for the store on March 13, 2010 and acknowledged that the owner was aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owner would "accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time." The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations such as accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible items.

FNS authorized KS Market for the SNAP on June 15, 2010 as a convenience store. On September 4, 2014, the store was issued a warning letter due to SNAP violations discovered during an onsite investigation.

Store Visit Report

During the review period of January 2018 through June 2018, the Retailer Operations Division classified the store as a convenience store. The case record documents that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a July 18, 2018 store visit conducted by an FNS contractor to observe the nature and scope of the store's operation, stock and facilities. This information was then used to ascertain if there were justifiable explanations for the store's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- KS Market is approximately 1,200 square feet in size and operates out of a free standing building in a rural area.

- The store has no shopping carts and no shopping baskets for customer use.
- The store has two (2) cash registers and one (1) point-of-sale device for grocery purchases. The store does not have a conveyor belt at the checkout area.
- There were no large bulk foods, expensive international or specialty foods that might sell for a high price. There were no fresh meat/poultry/seafood bundles or large boxes of fresh fruit and vegetables for sale. The store had no signs advertising bulk purchase deals.
- There was no special pricing structure and food prices ended in typical retail pricing amounts of even dollars or nine (9) cents such as .29, and .99.
- There was a storage area of approximately 726 square feet that was outside of public view. The storage area mostly contained carbonated and non-carbonated beverages, energy drinks, and alcohol. Store personnel confirmed that no food was stored offsite.
- The store had a kitchen and food preparation area where SNAP ineligible hot food was sold.
- The checkout area consisted of a countertop with open space of approximately two (2) feet by three (3) for stacking purchases. The very limited space for stacking food at the checkout area made it not conducive to conducting large transactions.

The SNAP eligible staple food stocked by the store consisted mainly of inexpensive canned and packaged goods. There was a very limited selection of fresh fruits. The store also sold a large amount of inexpensive accessory food items such as snack foods, ice cream, candy, potato chips, coffee, tea, carbonated and non-carbonated drinks, condiments, and spices. Store personnel confirmed that the most expensive food items sold by the store was Take-N- Bake pizza at \$16.99; a 1.75 quart container of ice cream at \$9.99; six(6) ounces of beef jerky at \$9.99; and 29.8 ounces of frozen pizza at \$8.99. None of these items were available in amounts of ten (10) or more stocking units.

The SNAP ineligible items sold by the firm included gasoline, lottery tickets, tobacco, alcohol, automotive products, health and beauty aids, paper goods, cleaning products, housewares, gift items, party goods, and souvenirs. The store also sold SNAP ineligible hot and cold prepared food not intended for home preparation and consumption. Given the available inventory and store layout as noted above, there is no indication from the store visit report that the store would be likely to have SNAP transaction patterns significantly different from similar-sized competitors offering similar food items. It should be noted that store photographs submitted by the Appellant do not significantly differ from the store photographs taken during the July 18, 2018 store visit.

Same Cent Transactions

Out of 2,739 SNAP transactions conducted during the review period, KS Market conducted 1,189 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Out of these larger dollar transactions, a total of 91 transactions (7.65 percent) ended in 80 cents. The charge letter shows that 28 of those transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). When such repetitive patterns are unsupported by special pricing structures they are a strong indicator of trafficking in SNAP benefits.

The Appellant states that the store has many transactions ending in .80 because many other items at the store are priced at even dollar amounts. According to the Appellant, the store sells many Take-N-Bake pizzas at prices that end in 80 cents and each pizza combo (pizza and drink) is either \$15.80 or \$20.80. However, there is no evidence that the store had a special pricing policy that would cause a disproportionate number of higher dollar transactions to end in 80 cents. The store visit report and photographs documented that most food items in the store had price amounts ending in typical even dollar amounts or nine (9) cent amounts such as .29 and .99. Store personnel at the time of the store visit stated that Take-N-Bake pizza was priced at \$16.99 and frozen pizza (9.8 ounces) was priced at \$8.99.

There is no evidence that the store was selling pizzas at amounts ending in 80 cents other than a handwritten price list that was likely drafted after the store received the charge letter. However, for the sake of argument, assuming that the store sold pizza at amounts ending in 80 cents, the purchase of just one additional item that doesn't end in an even dollar value would result in a SNAP transaction ending in something other than 80 cents. Likewise if more than one pizza priced at amounts ending in 80 cents were purchased, it would result also result in a transaction amount other than 80 cents.

A review of the store's food inventory and prices indicates that the larger dollar transactions cited in the charge letter would normally consist of multiple food products being purchased in one transaction. It is implausible that these purchases, would disproportionately result in total purchase prices ending in 80 cents. Instead when SNAP customers buy multiple food items, resulting in higher dollar amounts, the total transaction amount is more likely to result in a more random statistical spread of ending cent ranges from 00 to 99 cents.

Consequently, when there are a disproportional amount of transactions that end in a same cents value such as 80 cents, it appears that these transaction amounts are contrived and therefore, in the absence of any compelling rationale to the contrary, are a strong indicator that the firm is trafficking in SNAP benefits. A preponderance of the evidence indicates that the irregular transactions cited in Charge Letter Attachment 1 are more likely than not a result of the store trafficking in SNAP benefits.

Multiple Transactions by the Same Household within a Set Time Period

The Appellant states that the store cannot control how often SNAP recipients chose to shop. It is true that SNAP households have no limit on the number of times they may use their SNAP cards or how much eligible food they may purchase. However, 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 a convenience store's stock and facilities and are thus indicative of trafficking.

Charge Letter Attachment 2 lists 17 sets of 43 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(7)(E)**. In fact, this average SNAP transaction is larger than the average SNAP transaction at a California supermarket or superstore during the review period. It is not credible that a convenience store that has only a limited selection of inexpensive staple foods, would have

suspicious SNAP transactions much greater than a supermarket and a superstore. It is even less likely that these excessively large transactions would be conducted multiple times by the same household during a set time period.

The Appellant states that once a customer makes their first purchase, the customer then asks how much money is left on their card and based on the reply, purchases more groceries. For this reason, they normally make a test purchase of a qualified grocery item and then plan for future purchases. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Appellant's contentions are not credible. First, it is not necessary to run a transaction to determine the balance remaining on the card as the SNAP recipient can run a balance inquiry at the store without making a purchase. Second, even if a recipient had run an initial transaction to determine the balance on the card, there would be an interval of time in which the client went to select additional food items for purchase and transported them to the counter to complete another large dollar transaction all without shopping carts and shopping baskets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Appellant states that store customers normally have a large number of children per family. As a result, the children of the card holder do much of the family's shopping. They routinely return to the store multiple times to pick up more items to take home. The Appellant alleges it is common for transactions to be excessively large since there are sometimes seven (7) children living in the same home with different needs. Since the store is located within a short walking distance of their customers, there are normally many transactions from the same card holder as there are numerous visits.

The Appellant's contentions are not credible. Even if families in the area have multiple children who make frequent trips to the store, it is unlikely they would consistently make large dollar purchases atypical of a convenience store. It is even more unlikely considering that the store does not have shopping carts or shopping baskets. It is also noteworthy that the other SNAP authorized stores in the area, including a nearby supermarket with a greater depth and breadth of food at likely better prices, do not exhibit these same irregular transaction patterns.

In conclusion, the store visit pictures show that is unlikely that SNAP customers would shop at the store and purchase such a large volume of items multiple times during a short time frame. In addition, the store's small checkout area and limited counter space makes it unsuitable for conducting large transactions. The store also had no shopping carts and no shopping baskets for transporting food within the store which would be required for the larger dollar transactions. Based on the analysis above, and in the absence of any other reasonable explanation, the irregular transaction patterns are more likely than not to be a result of trafficking in SNAP benefits.

Excessively Large Transactions

SNAP households have no limit on the amount of eligible food they may purchase (subject to the remaining balance on the card). However, the SNAP transactions noted in the charge letter are

questionable not because they exceed any regulatory 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.

Charge Letter Attachment 3 cites 181 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. This average transaction also exceeds the average SNAP purchase for a supermarket or superstore in California during the review period. Even the smallest transactions cited in the charge letter had an amount which is three (3) or four (4) times higher than the average SNAP purchase amount for a Plumas County convenience store.

The Appellant states that many customers will buy large quantities of pizza to meet the family's needs for a whole month to eliminate the need for frequent visits to the store. Allegedly, there are a significant number of individuals that do not own automobiles. In addition, there are also a number of individuals that have restrictions such as wheelchairs and other accessibility issues that make it very difficult to make frequent trips to the grocery store. For this reason, according to the Appellant, buying in bulk is a practical option.

The Appellant's contentions are not credible. The store visit report and photographs document that the store likely does not sell food in bulk. Store personnel also confirmed that the most expensive food items sold by the store was Take-N-Bake pizza at \$16.99; a 1.75 quart container of ice cream at \$9.99; six(6) ounces of beef jerky at \$9.99; and 29.8 ounces of frozen pizza at \$8.99. However, none of these items were available in ten (10) or more stocking units at the time of the store visit. If it is true that local customers lacked transportation or were limited due to accessibility issues, there were other nearby stores that would be impacted by the same conditions including a nearby supermarket; yet none of these stores exhibited the same irregular transaction patterns as KS Market.

Sometimes a store may have higher than normal SNAP transactions due to the lack of access to other SNAP authorized stores in the area. However, the Retailer Operations Division determined that during the review period there were five (5) SNAP authorized stores located less than a half-mile radius from KS Market. These included two (2) other convenience stores, a medium grocery store, a combination grocery store, and a supermarket located only 0.07 miles away. A government report¹ on SNAP benefit redemption patterns revealed that households most often redeemed their benefits at supermarkets and superstores with only four (4) percent of all households never shopping in a supermarket or superstore. Thus, when a supermarket or superstore is available, it is highly unlikely that a SNAP recipient would conduct excessively large SNAP transactions at a convenience store with a more limited selection of staple foods.

The case record also documents that the Retailer Operations Division conducted a detailed analysis of four (4) households identified in the charge letter to analyze their shopping patterns at KS Market compared to their shopping patterns at other SNAP authorized stores. All of these households had access to, and shopped at supermarkets and/or superstores. However, despite this access to better stocked stores, these sampled households conducted excessively large transactions at KS Market often on the same day or within a day or two of shopping at a

¹ "Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program," report prepared by Mathematica Policy Research for the Food and Nutrition Service, February 2011.

supermarket or a superstore. It is highly unlikely that a convenience store with limited staple foods would have legitimate SNAP transactions comparable or larger than these SNAP authorized supermarkets and superstores.

In summary, the store's layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount 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 support the Retailer Operations Division determination. 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 a preponderance of the evidence, the irregular transaction patterns cited in Charge Letter Attachment 3 are more likely than not the result of trafficking in SNAP benefits.

Statements from Customers and Community Members

The Appellant provided a few statements of support from community members and customer statements testifying to their alleged shopping habits. These statements offered little probative value to the Appellant's contentions as they were either irrelevant or inadequate to fully explain the irregular transactions cited in the charge letter.

Basis of Determination under 7 CFR § 278.6(d)

The Appellant, through counsel, appears to contend that the Retailer Operations Division did not properly apply the three factors under 7 CFR § 278.6(d) before imposing a permanent disqualification on the firm. SNAP regulations at 7 CFR §278.6(d) states, in part, that in making a disqualification determination FNS 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 the nature and scope of the violations, trafficking in SNAP benefits is a very serious violation and warrants a permanent disqualification on the first violation. Both 7 U.S.C. § 2021(b)(3)(B) and 7 CFR § 278.6(e)(1)(i) mandate that the penalty for trafficking is a permanent disqualification and does not provide for a lesser period of disqualification or a warning letter.

In addition, 7 CFR § 278.6(d) does not **require** the Retailer Operations Division to give prior warnings or to show the firm's intent to violate. The Retailer Operations Division only has to **consider**, when rendering a final determination, any prior warnings or intent to violate that might be evident if applicable. Intent to violate is not applicable in this case as the definition of trafficking at 7 CFR §271.2 does not require an element of intent on the part of the violator.

It is true that SNAP regulations allows for the issuance of warning letters in some cases. Specifically, 7 CFR § 278.6(e)(7) states “send the firm a warning letter if violations are too limited to warrant a disqualification.” However, in this case, a warning letter was not issued because the violations were not limited and trafficking in SNAP benefits warrants a permanent disqualification. In conclusion, 7 CFR § 278.6(d) does not constitute valid grounds for dismissal of the trafficking charges or for mitigating the impact of those charges through a warning letter or lesser penalty.

Purchase Invoices

The Appellant submitted its food purchase invoices from March 2018 through June 2018 in an attempt to show it had sufficient food inventory to support its SNAP redemptions. The Retailer Operations Division tabulated the food purchases from these invoices and applied a 40 percent markup to estimate the likely gross retail food sales during the months of March 2018 through June 2018. This analysis indicated that the store had an insufficient food inventory to support its SNAP redemptions even before taking into account that the store likely had food sales by cash, check or credit card. Thus, the store likely did not have sufficient food stock to justify its SNAP redemptions for the review period. However, it should be noted that even if the store had sufficient inventory to support its SNAP redemptions, this would still not explain the irregular transaction patterns cited in the charge letter. It is not unusual for violating stores to conduct largely legitimate SNAP transactions while conducting a smaller number of trafficking transactions with a few trusted households.

CIVIL MONEY PENALTY

In its administrative review request, the Appellant, through counsel, requested a trafficking CMP in lieu of a permanent disqualification. However, the Appellant did not timely request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i) even though it was informed of the right to do so in the charge letter. SNAP regulations at 7 CFR § 278.6(b)(2)(iii) states 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 in § 278.6(b)(1), the firm **shall not be eligible** for such a penalty.” [Emphasis added.]

Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an **effective** SNAP compliance policy and program **prior** to the violations. The Appellant only submitted some statements from the owner and store employees regarding their initial training and did not provide any contemporaneous documents with records of dates of initial training sessions and refresher training.

The criteria for a trafficking CMP in lieu of disqualification as defined under 7 CFR § 278.6(i) reads, in part:

In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, the firm shall, at a minimum, establish by **substantial** evidence its fulfillment of each of the following criteria:

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

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 sent to the firm; and

Criterion 3. The firm had developed and instituted an **effective** personnel training program as specified in §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; or it is only the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations by the firm [Emphasis added.]

Regarding compliance policy standards, 7 CFR 278.6(i)(1) further states, in part:

As specified in Criterion 1 above, in determining whether a firm has established an effective policy to prevent violations, **FNS shall consider written and dated statements** of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with this part 278 of current [SNAP] regulations As required by Criterion 2, **such policy statements shall be considered only if documentation is supplied** which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation. In addition, in evaluating the effectiveness of the firm's policy and program to ensure FSP compliance and to prevent FSP violations, FNS may consider the following:

- (i) **Documentation** reflecting the development and/or operation of a policy to terminate the employment of any firm employee found violating FSP regulations;
- (ii) **Documentation** of the development and/or continued operation of firm policy and procedures resulting in appropriate corrective action following complaints of FSP violations or irregularities committed by firm personnel;
- (iii) **Documentation** of the development and/or continued operation of procedures for internal review of firm employees' compliance with FSP regulations [Emphasis added.]

Regarding training program standards, 7 CFR 278.6(i)(2) further states, in part:

A firm which seeks a civil money penalty in lieu of a permanent disqualification **shall document its training activity** by submitting to FNS its **dated training curricula** and **records of dates** training sessions were conducted; a **record of dates** of employment of firm personnel; and **contemporaneous documentation** of the participation of the violating employee(s) in initial and any follow-up training held prior to the violation(s). [Emphasis added.] The Retailer Operations Division's decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

The Retailer Operations Division's analysis of the Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify the retailer. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges.

In the absence of any reasonable explanations 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. 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 determined by the Retailer Operations Division. Based on the discussion above, the decision to impose a permanent disqualification against KS Market, Appellant, is sustained.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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.

RONALD C. GWINN
Administrative Review Officer

February 1, 2019