

**U.S. Department of Agriculture  
Food and Nutrition Service  
Administrative Review  
Alexandria, VA 22302**

**Long & 20th Carryout,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0203610**

**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<sup>1</sup> was properly imposed against Long & 20th Carryout (hereinafter “Long & 20th Carryout” and/or “Appellant”) and its owner of record, by the Retailer Operations Division of the FNS.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it imposed a Permanent Disqualification against Long & 20th Carryout in a letter dated February 15, 2018.

**AUTHORITY**

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

**CASE CHRONOLOGY**

In a letter dated November 13, 2017, the Retailer Operations Division informed Appellant that it was being charged with violation of the terms and conditions of the SNAP regulations, 7 CFR §§

---

<sup>1</sup> Section 4001(b) of the Food, Conservation, and Energy Act of 2008 (P.L. 110-234; 122 Stat. 1092) amended the Food and Nutrition Act of 2008 by striking “food stamp program” and inserting “supplemental nutrition assistance program” effective October 1, 2008

270-282, based on Electronic Benefit Transaction (EBT) SNAP benefit transactions considered to “establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm.”

The Retailer Operations Division record indicates Appellant responded both telephonically, and in writing, through counsel. Additionally, Appellant, through counsel, filed a Freedom of Information Act (FOIA) request on November 21, 2017; therefore implementation of the permanent disqualification was held in abeyance during the pendency of the response to that request. The FOIA response was routed to Appellant’s counsel on December 21, 2017, prompting a request for extension for the provision of materials responsive to the letter of charges. The extension was approved through January 31, 2018. The formal written response to the letter of charges was dated January 31, 2018.

Following documented consideration of Appellant’s response, through counsel, the Retailer Operations Division advised Appellant of a final determination of permanent disqualification from participation in the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1) for trafficking violations, in a letter dated February 15, 2018, documented to have been delivered to Appellant on February 16, 2018.

The determination letter also advised that the Retailer Operations Division considered Appellant’s eligibility for a trafficking civil money penalty (CMP) according to the terms of Section § 278.6(i) of the SNAP regulations. The Retailer Operations Division determined that the Appellant was not eligible for the trafficking CMP because the Appellant did not timely submit sufficient evidence to demonstrate the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated February 22, 2018, received in the offices of the Administrative Review Branch on February 27, 2018, Appellant, through counsel, submitted an appeal of the Retailer Operations Division’s assessment, requesting an administrative review of the action. The appeal 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 actions 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 contained in the Food and Nutrition Act of 2008, as amended (the “Act”)<sup>2</sup>, 7 U.S.C. § 2021 and promulgated through regulation under Title 7 of the

---

<sup>2</sup> Effective October 1, 2008, the *Food Stamp Act of 1977* was superseded by the *Food and Nutrition Act of 2008*, as amended through P.L. 110-246.

Code of Federal Regulations (CFR),<sup>3</sup> part 278. In particular 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 relevant 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(e)(1)(i) states, in relevant part:

“FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.”

7 CFR § 271.2(1) defines trafficking, in relevant part:

“ ... the buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits ... 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 relevant 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(a) states, in relevant part:

“FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food & 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(c) states, in relevant part:

“Review of evidence. 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...”

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

---

<sup>3</sup> Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at [https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab\\_02.tpl](https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl)

“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).**” [Emphasis added]

7 CFR § 278.6(e)(7), states, in relevant part:

“Send the firm a warning letter if violations are too limited to warrant a disqualification.”

7 CFR § 278.6(i), states, in relevant part:

“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 of the Program.” [Emphasis added]

### SUMMARY OF THE CHARGES

The Retailer Operations Division materials and the charge letter dated November 13, 2017, reveal that charges were based on an analysis of EBT SNAP benefit transaction data during the six (6) month period of October 2016 through March 2017 and involved two (2) patterns of EBT transaction characteristics indicative of trafficking as follow:

- Attachment #1 lists multiple SNAP EBT transactions made from individual benefit accounts in unusually short timeframes.
- Attachment #2 lists excessively large purchase transactions made from the accounts of SNAP recipients.

### APPELLANT’S CONTENTIONS

In the letter dated February 22, 2018, counsel, on behalf of Appellant, contends that:

- No trafficking has occurred at Appellant, evidenced with a sworn affidavit signed by the owner of record, therefore the trafficking charges should be dismissed; with a civil money penalty (CMP) imposed in lieu of permanent disqualification; or a letter of warning issued pursuant to 7 CFR § 278.6(e)(7).<sup>4</sup>  
Specific reasons for each of the charge letter attachments were provided which state, in summary:
- **Attachment #1** materials indicate that the individual benefit account of a single household is accountable for the multiple transactions in unusually short time frames.

---

<sup>4</sup> Citation corrected on review.

- The report includes 35 transactions for a card ending in **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, which is understood to be registered to a household who previously lived with her six (6) children across the street from Appellant. The customer is reported to have been observed by Appellant's owner making multiple SNAP transactions; allowing use of her SNAP card by other adults; allowing use of her SNAP card by her children, sometimes several times in one (1) day; and, is opined by Appellant's owner to have spent her **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** monthly SNAP allotment "recklessly".
- The remaining cards not belonging to the one (1) household are explained to include purchases by SNAP customers who come asking for prepared food, which was sold cold, and prepared free. While awaiting preparation the customers are explained to collect additional items, such as soda and snacks, running a second transaction before exiting Appellant's premises.

**Note:** Appellant is said to now understand that food cannot be prepared when SNAP is involved therefore the practice has ceased.

- **Attachment #2** materials are contended to include evidence that the transactions were not fraudulent but legitimate because:
  - The same household identified in the Attachment #1 scenario completed many of the transactions that are explained as in Attachment #1.
  - twenty-six (26) SNAP transactions are identified to have been completed by single households using their card only once;
  - twenty-three (23) households were identified to have used their SNAP cards between two (2) and three (3) times; and,
  - the remaining transactions were identified to have been used less than five (5) times by individual households.
- The USDA has conducted several compliance checks at the firm which have been passed each time.
  - On three (3) occasions an undercover agent attempted to get cash off an EBT card, which was refused each time.
  - On two (2) occasions an undercover agent attempted to purchase non-food items with EBT which resulted in the separation of the non-food items and demand of payment in cash by Appellant personnel.
  - Since 2010 there have been seven (7) compliance checks with informants investigating Appellant on three (3) occasions, resulting in only one (1) violation which occurred in 2012, while Appellant was operating under a different corporation. Counsel provides that there should be no successor liability for violations that occurred under a different entity at the same address.

The preceding represents only a brief summary of Appellant's contentions in this matter. However, in reaching a decision, full attention and consideration has been given to all

contentions presented, including any not specifically recapitulated or specifically referenced herein.

## **ANALYSIS AND FINDINGS**

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.

With regards to Appellant's contentions in explanation of questionable transactions, the issue in review is whether there is sufficient evidence, through a preponderance of that evidence, that it is more likely true than not true that the questionable transactions were the result of trafficking.

### **Appellant Operations:**

The record reveals that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a store visit conducted by FNS contracted personnel on May 10, 2017.

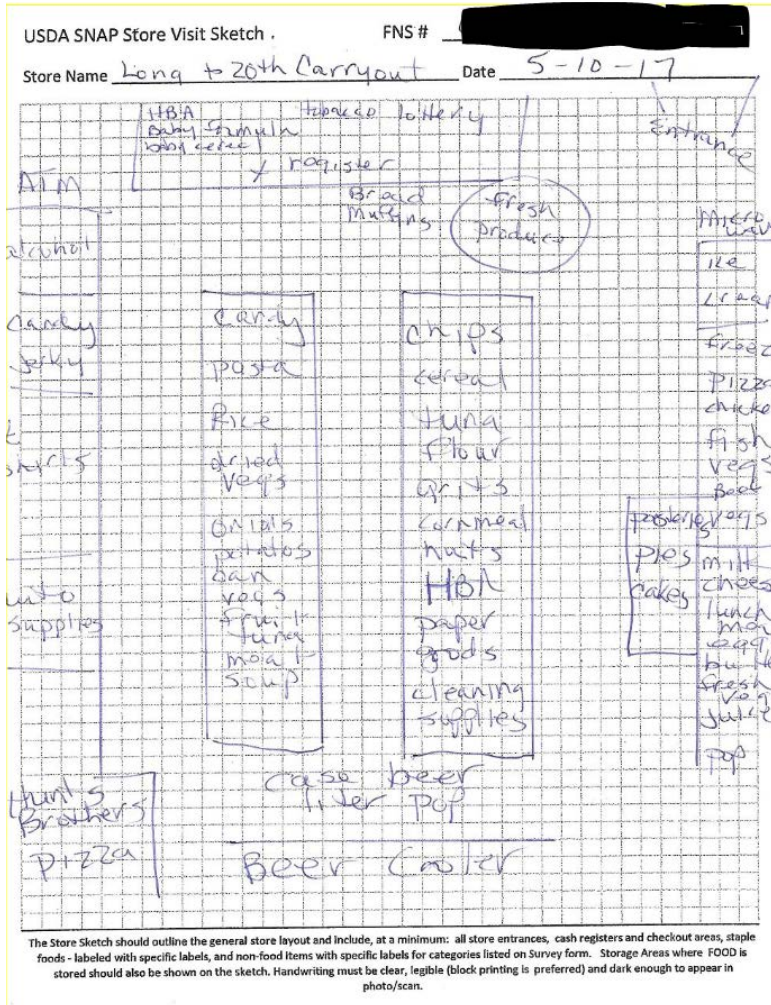
The May 10, 2017 visit was authorized by the self-declared owner and resulted in materials reflecting observations made, and responses received, from the owner during the store visit which describes the nature and scope of Appellant's operation, as well as the stock and facilities.

The record indicates that Appellant was authorized as a SNAP retailer effective September 24, 2009 as a convenience store, in accordance with FNS definitions. The store name has consistently been shown as Long & 20<sup>th</sup> Carryout although the names on the business license for the corporation have changed. Notwithstanding the change in corporation name the owner of record identified has remained consistent throughout the period of SNAP authorization from September 2009 to February 16, 2018.

Appellant reports operating from 9AM until midnight, seven (7) days per week. Appellant is self-reported to operate out of a retail space of approximately 2500 square feet at street level of what appears to be a two-story building. (See photos below). No storage area is declared or noted in the store visit report. The store visit report identifies at least three (3) varieties in each of the four (4) staple food categories. A sketch of store provided for reference below.

The store visit materials describe Long & 20th Carryout to be operating with one (1) general use cash register that is not equipped with scanning technology; and, one (1) point-of-sale (POS) terminal. The checkout operation is seen in the certified store visit photographs to include a limited counter space. Health and beauty aid merchandise and tobacco products are seen shelved behind the checkout area which is restricted with the placement of merchandise for sale displayed on the counter as well.

The store visit materials document that there are no hand-held shopping baskets or shopping carts available to support the delivery of purchases to the counter/checkout area for the completion of merchandise price totaling and payment.



Store Sketch

Certified photographs from the May 10, 2017, contracted store visit are presented below:

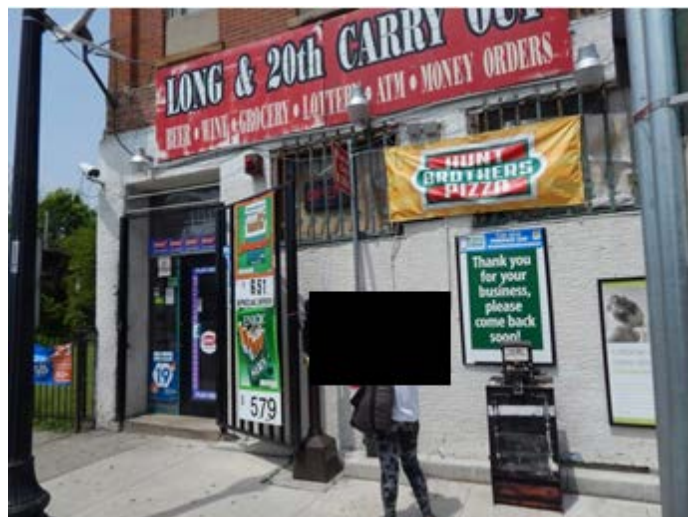


Photo # 7 – Storefront



Photo #25 – Checkout Area



Photo #3 – Store Overview





Photo #6 –Refrigerated Staple Foods



Photo #5 – Pizza Station



Photo #4 – General Stock



Photo #8 – General Stock



Photo #19 – Hot Food Menu – Pizza, Wings

The inventory checklist completed at the time of the May 10, 2017 store visit identifies food varieties available in each of the four (4) staple food groups as follows:

- Five (5) varieties of dairy products including five (5) units of infant formula; milk and butter/margarine in between six (6) and 20 units; and cheese and ice cream in units of more than 20.
- Sixteen (16) varieties of fruits and vegetables with more than 20 units available in four (4) of those varieties; eight (8) varieties with six (6) to 20 units available; and, four (4) with less than six (6) units each.
- Nine (9) varieties of breads and cereals with one (1) unit of infant cereal; more than 20 units identified in six (6) of those varieties; and two (2) varieties showing between six (6) and 20 units each.
- Eight (8) varieties of meat/poultry/fish staple foods are identified with less than six (6) units in two (2) of those varieties; three (3) varieties of between six (6) and 20 units; and three (3) varieties with more than 20 units.

The materials indicate that the owner reported the four (4) highest priced items (over \$5) including Similac Infant formula priced at \$19.99 for a 12.4 ounce container; frozen chicken @ \$7.99 for 29 ounces; one (1) pound of bacon priced at \$5.99; and a 12-pack of “Sunkist” priced at \$5.99. The store visit materials indicate that none of the identified items had prices affixed.

Non-SNAP products and services offered at Appellant include tobacco products, alcohol, lottery tickets, mobile phones/phone cards, automobile products, health and beauty aids, paper goods, gift items, party goods and souvenirs.

### **Redemption Changes:**

The Retailer Operations Division documented that following the November 14, 2017 charge letter delivery there was a 23 percent reduction in SNAP redemptions at Appellant; followed by

another 23 percent reduction from November to December. Additionally the occurrence of SNAP transactions in the patterns identified as suspicious drastically reduced.

### **Charge Letter Attachment Analysis:**

The data reflected in the letter of charges dated November 13, 2017 is the result of information gained primarily from the Anti-Fraud Locator using Electronic Benefits Transfer (EBT) Retailer Transactions (ALERT) system which is a fraud detection, decision support system designed to monitor and track electronically conducted retail transactions completed by SNAP recipients in authorized meal program and food retailer locations.

The ALERT System facilitates management of the program by providing transaction-level information to Federal personnel charged with the responsibility of SNAP retailer management and compliance. The system uses pre-defined criteria or patterns for potential fraud detection. Pre-formatted reports provide information on those stores and transactions meeting the criteria. ALERT supports both online analysis and online queries and reports for use by FNS. The system does not make the final determination instead it is used by Retailer Operations Division to develop information and evidence for consideration in support of their development of an ultimate decision.

Attachment #1: Represents multiple SNAP EBT transactions made from individual benefit accounts in unusually short timeframes and includes 40 transactions; grouped in 17 sets; where eight (8) households redeemed SNAP benefits in sets of two (2) to six (6) transactions; 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Retailer Operations Division documents that completing multiple transactions within a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) period is a method used by some retailers to avoid high dollar transactions that can raise suspicions and cannot be supported, therefore are indicative of trafficking. The Retailer Operations Division also documented that the SNAP households identified to have conducted suspicious transactions at Appellant are recorded to shop at other SNAP authorized area grocery stores, to include full-line supermarkets and superstores that offer the customers a much larger quantity and variety of eligible foods, likely at lower prices, evidencing that transportation does not appear to be a common reason for repeated transactions at Appellant

Appellant has indicated that 35 of transactions identified in Attachment #1 are for card ending in 5 U.S.C. § 552 (b)(6) & (b)(7)(C) which is understood to be registered to 5 U.S.C. § 552 (b)(6) & (b)(7)(C), who formerly lived across the street from Appellant with her six (6) children. It is reported that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) had no car and therefore made multiple transactions per day at Appellant from her 5 U.S.C. § 552 (b)(6) & (b)(7)(C) monthly benefits. Appellant contends that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) individual benefit account is accountable for the multiple transactions in unusually short time frames.

The cards not belonging to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) are explained to involve customers who:

- Purchased food cold, such as pizza and hot wings, and then asked to have it prepared free of charge. These customers are reported to have shopped for other items while waiting for the food preparation resulting in multiple transactions in short time periods.
- Randomly allowed others to use their SNAP cards; which to Appellant's understanding does not represent a violation of the SNAP regulations that solely require the user to know the PIN number prohibiting an ID requirement.
- Are making legitimate SNAP transactions because SNAP regulations do not establish minimum or maximum limits on SNAP purchases; and, Appellant's owner expresses believing it is not his position to investigate customer purchases.

The Retailer Operations Division addressed Appellant's explanations as follow:

- The SNAP household 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is verified to have resided 0.1 miles away from Appellant, down the street at the end of the next block per Google maps, and not across the street. 5 U.S.C. § 552 (b)(6) & (b)(7)(C)

Retailer Operations Division notes that it is not reasonable to be able to conduct the two (2) manual transactions in the time periods identified.

- Appellant is correct to understand that it is not within Appellant's authority to question or restrict the use of SNAP cards by individual SNAP/EBT card holders. As long as the PIN number for the card is known to the user the user is not subject to further identification per regulation.
- Appellant is correct to understand that SNAP does not establish either minimum or maximum transaction limits; and there is no requirement for firm personnel to "investigate" customer purchases.
- Appellant failed to provide any sworn affidavits from either 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or the other seven (7) households identified to have conducted suspicious transactions for consideration.
- The practice of making additional purchases while awaiting food preparation is not reasonable considering the majority (15 of 17) transactions occurred hours or even a calendar day apart.

In sum, the explanations provided by Appellant have not served to evidence that the transactions identified as suspicious in Attachment #1 are, in fact, legitimate. Therefore, the determination of the Retailer Operations Division that the transactions listed in Attachment #1 are more likely than not evidence of trafficking is affirmed.

Attachment #2: Represents excessively large purchase transactions made from the accounts of SNAP recipients with 197 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) conducted by 88 households at Long & 20th Carryout in the focus period. The transactions represent 5 U.S.C. § 552 (b)(6) & (b)(7)(C) more than 36 percent of Appellant's total SNAP redemptions recorded in the focus period.

The Retailer Operations Division indicates that the average convenience store transaction in the State of Ohio in the focus period was \$6.68; the average convenience store transaction in the county of Franklin was \$6.69; 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Of the 88 households conducting SNAP transactions identified as suspicious 68 households, or 77 percent, conducted

SNAP transactions at a superstore, supermarket or large grocery store within one (1) day of the transaction recorded at Appellant. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Appellant responds that a review of the Attachment #2 materials reveals many of the transactions were made by 5 U.S.C. § 552 (b)(6) & (b)(7)(C) therefore the explanations provided for Attachment #1 apply. Further Appellant's owner is reporting having observed the card held by this particular SNAP household being used to buy large quantities of one (1) product, leading to a conclusion that SNAP funds were being spent recklessly. Appellant summarizes the Attachment #2 materials citing that 26 of the transactions identified were conducted by a single household; 23 of the transactions show to have been used by the same household two (2) or three (3) times; and 52 transactions were used by households 5 U.S.C. § 552 (b)(6) & (b)(7)(C)<sup>5</sup>.

The Retailer Operations Division indicates that the number of times a household uses their SNAP card is not evidence of trafficking or the lack thereof. The single household identified as 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is noted to have completed 34 of the Attachment #2 transactions while 36 other households were identified as having recorded between two (2) and six (6) "excessively large" transactions in the period.

In sum, the explanations provided by Appellant have not served to evidence that the transactions identified as suspicious in Attachment #2 are, in fact, legitimate. Therefore, the determination of the Retailer Operations Division that the transactions listed in Attachment #2 are more likely than not evidence of trafficking is affirmed.

### **Comparison/Competitor Store Information:**

Retailer Operations Division documents that Appellant is located in an area that is well served by 19 alternative SNAP authorized retailers within a one-mile radius; 12 of those identified as competitor convenience stores; and, a supermarket located at 0.78 miles distance from Appellant.

An analysis of the SNAP redemptions, transaction count, average transactions, and incidence of occurrence of suspicious transactions in the same categories as those identified for Appellant was completed for two (2) nearby convenience stores that are noted to have had similar or superior inventory.

The results are demonstrated in the following table:

#### **5 U.S.C. § 552 (b)(7)(E)**

Appellant is seen to have had more than double the SNAP redemptions of both the state and the county and significantly more redemptions than either of the nearby convenience stores reviewed by the Retailer Operations Division.

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

---

<sup>5</sup> The numbers provided by Appellant total to 101 households, which is 13 households more than the 88 identified in the Attachment #2 materials.

## Household Analysis:

The Retailer Operations Division documents analyzing the transactions of five (5) of the households identified in the charge letter attachments as responsible for suspicious transactions finding that each of the households analyzed had access to, and shopped at, supermarkets and super stores.

- The transactions of the first household are recounted above and represent the transactions of a household living in close proximity (0.1 miles )to Appellant.
- The transactions of the second household with an address identified as the YWCA 2.4 miles from Appellant recorded no transactions at Appellant between October and December 2016. In January and February 2017 there were 10 SNAP transactions recorded at Appellant for total expenditures of 5 U.S.C. § 552 (b)(6) & (b)(7)(C); with 19 SNAP transactions recorded at two (2) supermarkets and four (4) superstores for an expenditure of 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- The third household reported a residence address 1.5 miles from Appellant recorded 19 transactions at Appellant and 12 at a large grocery store, a supermarket, and a superstore, demonstrating access to alternative SNAP authorized firms.
- The fourth household reviewed recorded a residence of 0.6 miles from Appellant showing an especially suspicious transaction on December 4, 2016 with two (2) transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at stores .30 miles apart, the Appellant transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- The fifth household showed a residence 8.0 miles from Appellant recording six (6) SNAP transactions, all manual at Appellant, and the remaining transactions in the period all done automatically, by swipe, at large grocery stores, supermarkets, and superstores.

The Appellant provided explanations for the suspicious transactions did not serve to sway the decision of the Retailer Operations Division that the charge letter attachment materials were more likely than not representative of trafficking transactions.

## Denial of Charges:

Appellant, through counsel, asserts that no trafficking has occurred as evidenced by the information provided coupled with the owner’s sworn affidavit; and cites that the charges of trafficking should therefore be dismissed. This review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which is to determine whether the Appellant demonstrates by a preponderance of the evidence that the permanent disqualification should be reversed. As referenced above 7 CFR § 278.6(a) states, in relevant part that “FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food & Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, **evidence obtained through a transaction report under an electronic benefit transfer system...**” (Emphasis added.) In the instant case Appellant has not provided explanations or evidence to indicate that the transactions identified as suspicious in Attachment #1 and #2 of the letter of charges represent legitimate SNAP purchases. For example, that the household

5 U.S.C. § 552 (b)(6) & (b)(7)(C) was responsible for 65 percent of the Attachment #1 transactions does not prove that the household was not trafficking with Appellant in the completion of the recorded transactions. It is reasonable that a SNAP household living nearby a grocery store would routinely conduct SNAP transactions at the nearby store, it is not reasonable that the household would spend amounts such as those identified in each of the charge letter attachments at a convenience store with limited stock and facilities while routinely accessing larger, presumably more well stocked and better priced SNAP retailers.

While it cannot be definitively concluded that the transactions cited in the charge letter attachments were the result of trafficking, the evidence offered by the Retailer Operations Division weighs towards the materials likely represent trafficking transactions. Personal sworn or unsworn declarations, without evidence to support conclusions contrary to those drawn by the Retailer Operations Division do not, in and of themselves, eliminate the consideration of the transactions listed in the charge letter attachments.

#### **Warning Letter:**

Appellant indicates that absent the allowance of a CMP in lieu of disqualification (addressed below) a letter of warning should be issued pursuant to 7 CFR § 278.6(e)(7). 7 CFR § 278.6(e)(7) is applicable only when SNAP violations are considered by the Retailer Operations Division to be “too limited to warrant a disqualification.” In the instant case the record evidences SNAP trafficking, which is the most egregious of SNAP violations, subject to permanent disqualification on the first offense. A review of the materials presented has not evidenced violations too limited to warrant a disqualification.

#### **Number of transactions and/or dollar limits:**

As Appellant has correctly stated there is no limit to the number of transactions or the amounts that can be transacted from SNAP benefit accounts; and customers cannot be required to present identification as long as the PIN number is known.

#### **Compliance Investigations:**

As indicated by Appellant the administrative record evidence that USDA has conducted several compliance checks at the firm which are characterized to have been “passed” each time. It is important to clarify that past compliance review outcomes, negative or positive, do not come into consideration in the case of a SNAP trafficking case based on evidence obtained through a transaction report under an electronic benefit transfer system.

#### **Civil Money Penalty:**

Part 278.6(f)(1) of the SNAP regulations provides for civil money penalty assessments in cases where disqualification would cause “hardship” to SNAP households because of the unavailability of a comparable participating food store in the area to meet their needs. Although it is reasonable to consider that the disqualification of Appellant may impact the shopping patterns of area households; and will certainly impact Appellant’s revenue source, the regulation

sets forth the following specific exception to assessments thereunder: “A civil money penalty for hardship to Food Stamp [SNAP] households may not be imposed in lieu of a permanent disqualification.” Therefore, this civil money penalty provision is not applicable in the present case.

As previously indicated the February 15, 2018 determination letter advised Appellant of the ineligibility for consideration for a trafficking civil money penalty (CMP) according to the terms of Section § 278.6(i) of the SNAP regulations. The letter of charges dated November 13, 2017 advised Appellant that documentation of eligibility for that alternative sanction was to be provided within 10 days.

The record documents that Appellant made a request for the imposition of a CMP in lieu of permanent disqualification in a letter dated November 21, 2017, however, no evidence of the existence of a comprehensive training program and compliance policy were provided for consideration.

7 CFR §278.6(i) specifies that “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 of the Program.” The criteria listed therein are, as a whole, specifically identified as a *minimum* standard that firms must meet in order to be eligible for such a penalty. The statute and the regulation allow no flexibility below the level of this stated standard. Appellant provided no evidence of the existence of any compliance policy and program to prevent violations of the SNAP.

Therefore the Retailer Operations Division could not consider the imposition of a CMP in lieu of disqualification. On review the Retailer Operations Division’s determination that Appellant firm is ineligible for the imposition of a civil money penalty in lieu of disqualification is affirmed.

## **CONCLUSION**

The Retailer Operations Division analysis of Appellant’s EBT transaction records, upon which charges of violations are based, together with observations made during the contracted store visit provide substantial evidence that questionable transactions during the focus period have characteristics that are not consistent with legitimate sales of eligible food to SNAP customers at a store of the nature and scope as described in the preceding materials in Attachments #1 and #2 to the letter of charges. Rather, the characteristics are indicative of illegal trafficking in program benefits.

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.

Based on the discussion above, the decision to impose a permanent disqualification from participation in the SNAP against Long & 20th Carryout is sustained.



## **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR §279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

Under the Freedom of Information Act, we are releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

NANCY BACA-STEPAN  
Administrative Review Officer

June 25, 2018