

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

Z Market,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0220555

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance to impose a permanent disqualification against Z Market (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a permanent disqualification against Appellant on December 6, 2019.

AUTHORITY

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

CASE CHRONOLOGY

By letter dated September 16, 2019, the Office of Retailer Operations and Compliance charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in March through May 2019. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

On September 26, 2019, counsel requested and was approved for an extension of time to October 28, 2019, to respond. Appellant, through counsel, responded to the charges in a letter dated October 2, 2019, that did not contain a request for a CMP or any documentation in support of one. The Office of Retailer Operations and Compliance notified Appellant by letter dated December 6, 2019, that the firm was permanently disqualified from participation as a SNAP retailer in accordance with 7 CFR § 278.6(c) and 278.6(e)(1) for trafficking violations. This letter also stated that Appellant was not eligible for the CMP because insufficient evidence was submitted to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

By letter dated December 9, 2019, Appellant, through counsel, appealed the Office of Retailer Operations and Compliance's assessment and requested administrative review. The appeal was granted. No subsequent correspondence was received.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

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

7 CFR § 278.6(a) states: "FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system."

7 CFR § 278.6(e)(1)(i) states: "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." Trafficking is defined in part as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food". Trafficking includes "Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food".

7 CFR § 278.6(i) states: "FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking . . . if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program."

7 CFR §278.6(b)(2)(ii) states: “Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence that establishes the firm’s eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in §278.6(i). This information and evidence shall be submitted within 10 days, as specified in §278.6(b)(1).” Part 278.6(b)(2)(ii) further states that if a firm fails to request a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the specified 10 days, the firm shall not be eligible for such a penalty.

SUMMARY OF THE CHARGES

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking. The charges on review were based on an analysis of SNAP EBT transaction data during the three month period of March through May 2019. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. An excessive number of manually keyed EBT transactions were made from the firm.
2. Excessively large purchase transactions were made from recipient accounts.

APPELLANT’S CONTENTIONS

The following may represent a summary of Appellant’s contentions in this matter; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein:

- The firm’s EBT machine has been inoperable since May 2016 [sic] so SNAP purchase transactions had to be made manually. The EBT machine stopped for the most part taking swipe transactions sometime in early March 2019 and the only way to complete transactions was manually. The EBT machine stopped processing transactions completely in May 2016 [sic]. The firm has submitted no additional SNAP transactions since receiving the list of transactions. The attached photo shows that the EBT machine is not set-up correctly and is not working properly at this time. The owner attempted to contact EBT to replace the machine, but was told he could not do so at this time, presumably as a result of this investigation;
- The firm’s revenue was marginally higher than prior revenue for some of the period set out in the charge letter as a result of a sale wherein cases of drinks and other food products were purchased from the market; and,
- There have been no violations in the 20 year history of the firm’s SNAP participation and it has always been the owner’s intent to comply with USDA rules and regulations which he has done throughout the store’s operations.

Appellant submitted an undated photo of a Verifone POS terminal/PIN pad in support of these contentions.

ANALYSIS AND FINDINGS

Stores caught in trafficking violations consistently display particular, characteristic transaction patterns including those cited in the charge letter. 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. Without supporting evidence and rationale, assertions that the firm has not violated program rules do not constitute valid grounds for overturning the determination.

In the absence of evidence for the legitimacy of such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the unusual, irregular, and inexplicable transactions and patterns evidence trafficking as the most likely explanation. Each Attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant firm during the review period. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

Store Background and FNS Store Visit

FNS initially authorized the firm on September 19, 2006, and most recently reauthorized it on April 7, 2016. The case file indicates that in reaching a disqualification determination, the Office of Retailer Operations and Compliance considered information obtained during a May 17, 2019, store visit conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the firm's suspicious SNAP transactions. The store visit documented the following store size, description, and characteristics:

- The firm was a convenience store offering a very minimal quantity and variety of staple foods and carrying no unique items or offering any distinctive services. The store stocked traditional American brands as well as a good variety of canned and packaged Hispanic foods. There were no other ethnic or specialty food items.
- The store visit report and photos showed no shopping carts or handheld baskets for customer use thus severely limiting the amounts of food that could be moved to the checkout.
- No food packages, bundles, case sales, bulk items, or other sales were evident that would explain the unusual transactions and no cased items were available for purchase except for beverages.
- The store visit report specifically noted that the firm was not a specialty store and that there were no meat packages, fish specials, or fruit and vegetable boxes for sale.
- There was only one checkout area that was approximately 1.5 feet wide and 1.5 feet deep set into a plastic security wall with the PIN pad and displays on the sides leaving a very limited area for customers to place their purchases. The small checkout area would make it problematic to process large orders. The checkout area had one cash register, one specialty cash register, a POS terminal, and no optical scanner as confirmed by the store cashier.

- The firm had a very minimal stock of staple foods that also included many single serving and pre-packaged items with a significant portion of inventory in soda, candy, snacks, other drinks, and many ineligible items.
- The firm had no fresh or frozen unprocessed meat or seafood, a very limited quantity and variety of processed meats and seafood (sausages and canned meat, poultry, and fish), no bacon, no jerky, no hot dogs, no packaged lunch meats, no deli meats, no frozen dinners, no frozen entrees, eggs, no fresh or frozen fruits or vegetables, dried beans, no other dried fruits or vegetables, packaged nuts, single serving packaged nuts, 100 percent fruit and vegetable juices, no fresh fruit cocktails, several canned soups, a minimal quantity and variety of canned and packaged staple food items, no deli cheese, packaged cheese, no single serving cheese, no yogurt, no single serving yogurt, large yogurt drinks, single serving yogurt drinks, no butter, no margarine, sour cream, fresh milk, no single serving fresh milk, canned milk, no half & half, no coconut milk, no soy milk, no Lactaid milk, powdered milk, single serving milk drinks, no cottage cheese, no cream cheese, two single serving cheese dips, no bread, three rolls, tortillas, no pitas, tostadas, no corn meal, no AP flour, corn flour, no sugar, rice, no cold cereal, no single serving cold cereal, no hot cereal, many single serving Ramen noodle soup, no canned pasta, no single serving pasta, dry pasta, dry noodles, no pancake mixes, no baking mixes, no mac&cheese, no single serving size mac&cheese, no cold ready-to-eat sandwiches, no frozen heat & eat sandwiches, cooking oil, coffee, no tea, no cocoa, no baby cereal, no baby foods, no infant formula, no soy infant formula, and very few expensive staple food items.
- Ineligible items included: lottery, alcohol, tobacco, household products, paper products, auto products, health and beauty items, ATM, phones/phone cards, money transfer, hats, toys, candles, jewelry, bedding, and charcoal while accessory foods included: candy, condiments, spices, snacks, baked goods, cooking oil, single serving ice cream, coffee, and un/carbonated drinks.
- The firm's hours of operation, as confirmed by the cashier, were open 8:00 AM-11:00 PM daily. The cashier also stated that the firm did not take phone or online orders, did not deliver groceries, and did not round transaction totals up or down.
- Signage was in Spanish and English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- Most food items were individually priced and the FNS store visit report, completed in conjunction with the cashier, specifically stated that most food prices end in .x9. A price ending in .x9 cents is the most common pricing structure for stores of this type.
- The FNS store visit report listed the four most expensive food items costing more than \$5.00 for sale in the store as being: a 56.4 ounce can of Nido Powdered Milk priced at \$21.99, a 16 ounce container of honey priced at \$11.59, a 7.95 ounce container of Nescafe coffee priced at \$10.59, and a four-pack of Red Bull 8.4 ounce cans priced at \$7.99. It was noted that there were eight units of Nido, eight units of honey, seven units of Nescafe coffee, and three units of Red Bull in stock. This listing of the most expensive items was provided by the cashier during the store visit.
- The firm was not a WIC vendor.
- The store visit photos showed some dusty canned foods indicating a slow turnover of stock.

Excessive Numbers of Manually Keyed EBT Transactions

This Attachment documents 45 manually keyed SNAP transactions

5 U.S.C. § 552 (b)(6) & (b)(7)(C) conducted by 36 different households at the Appellant firm that is an unusually high number and accounts for more than one out of every 10 SNAP transactions during the review period. There are also 10 transactions ending in the same cents amount of .00 cents that are not supported by the store pricing structure.

Appellant contends the manual transactions are because the firm's EBT machine has been inoperable since May 2016 [sic] so SNAP purchase transactions had to be made manually. The EBT machine stopped for the most part taking swipe transactions sometime in early March 2019 and the only way to complete transactions was manually. The EBT machine stopped processing transactions completely in May 2016 [sic]. The firm has submitted no additional SNAP transactions since receiving the list of transactions. The attached photo shows that the EBT machine is not set-up correctly and is not working properly at this time. The owner attempted to contact EBT to replace the machine, but was told he could not do so at this time, presumably as a result of this investigation.

Manually keyed transactions are those in which the magnetic strip on the back of an EBT card is not being read by the store's POS device and the clerk must manually key enter the lengthy EBT card number into the POS device. When the magnetic strip on an EBT card fails, it can no longer be swiped and replacement EBT cards contain different identification numbers. On-site investigations into trafficking at retailers have found it is not uncommon for retailers to have a SNAP recipient's PIN and EBT card number in order to facilitate trafficking SNAP benefits in exchange for cash without the need for the recipient to be physically present. The retailer key enters the EBT card number manually as the recipient has the actual EBT card and then enters the PIN. A review of EBT transactions during the review period shows that the Appellant firm's POS device appeared to be functioning properly as there were swipe transactions interspersed amongst the manual transactions. It is particularly unusual and suspicious that, contrary to Appellant's claim of the firm's POS device having stopped taking swiped transactions in March 2019 and stopping altogether in May 2019, FNS records show both swiped and manual SNAP transactions being processed by the same POS device during March, April, May, and June 2019 with only swiped transactions occurring in June 2019. It is even more suspicious that although there were dozens of manual transactions during the months of March and April 2019, there was only one manually keyed transaction (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) following the FNS store visit on May 17, 2019, through the last SNAP transaction submitted by the Appellant firm on June 29, 2019.

A SNAP recipient's EBT card having a worn or malfunctioning magnetic strip is the most common reason, outside of trafficking, for excessive numbers of manual transactions. An analysis of the transaction data in this Attachment identified transactions by multiple households which do not fit the pattern of an EBT card having a worn or malfunctioning strip and therefore are indicative of trafficking. Specifically, the Office of Retailer Operations and Compliance identified households that conducted manually keyed transactions at the Appellant business even though the household's EBT card was being swiped at other stores. In many instances, a recipient's EBT card was manually keyed 5 U.S.C. § 552 (b)(6) & (b)(7)(C) before or after a

swiped transaction at another business. There were even households with a manually keyed transaction at the Appellant firm 5 U.S.C. § 552 (b)(6) & (b)(7)(C) before or after a swiped transaction at supermarkets located miles away from the Appellant firm. The distances between the supermarkets and the Appellant firm would make it impossible for these households to have traveled between the two stores in the allotted time span and since an EBT card must be physically present for swiped transactions, these are indicative of trafficking at the Appellant firm.

A review of the firm's SNAP redemption history using FNS records shows that the firm had no suspicious patterns of manually keyed transactions during the period January 2018 through November 2018. The suspicious patterns of manually keyed transactions first appeared in December 2019 which also happens to be the same time that the Appellant firm's monthly SNAP redemptions increased to double and even triple prior month's redemptions. As discussed, Appellant's explanation of the firm's POS device not working properly is not credible given the fact that swiped and manual transactions were processed in March 2019 through June 2019 with only one manual transaction occurring after the FNS store visit. The only logical conclusion given the evidence is that Appellant appears to have begun trafficking SNAP benefits in December 2018 and then stopped trafficking after the FNS store visit in May 2019.

High Dollar Value Transactions

This Attachment lists 61 individual EBT transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The substantial number of high dollar transactions is uncharacteristic for a grocery store offering a very minimal stock of staple foods and calls into question the legitimacy of these transactions. The transactions are also substantially higher than the average SNAP transaction amount of \$6.34 for this store type in Shelby County. This is unusual and indicative of trafficking.

The evidence under review shows that SNAP households shopping at the Appellant firm are also shopping at many full-line supermarkets and super stores, located nearby as well as at a distance from Appellant's location that offer a greater quantity and variety of SNAP eligible foods items for better prices than customers can find at the Appellant firm. These high dollar value transactions remain questionable when considering the proximity of the other stores that would be better shopping options for consumers. Based on their shopping patterns, transportation does not appear to be an issue for these households. Yet, they continue to shop and spend suspicious high dollar amounts at the Appellant firm, where the eligible food stock is very limited, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of their purchases at larger food stores. Specifically, 32 of the 49 households (66 percent) listed in this Attachment shopped at a super store, supermarket, or a large grocery store 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of the flagged transaction with 41 of 49 households (84 percent) shopping at these types of larger stores 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

While households residing in areas with extremely limited grocery store options may conduct high dollar transactions at convenience stores out of necessity, this is not the case when they have better alternatives. FNS records show there are 11 SNAP retailers located within a 1.0 mile radius of the Appellant firm that includes one supermarket, one medium grocery store, seven convenience stores, and two combination grocery stores. The nearest combination grocery store

is located across the street and the two nearest convenience stores are both located 2.5 blocks from Appellant's location while the medium grocery store is about six blocks away. Other nearby stores include a super store, three supermarkets, one large grocery store, one medium grocery store, one seafood specialty store, and one bakery located between 1.0-1.67 miles. The larger stores would offer greater quantities and varieties of staple food items at lower prices than would be found at a very minimally stocked convenience store offering no fresh or frozen unprocessed meats or seafood and no fresh or frozen fruits or vegetables. The proximity of the many larger stores combined with Appellant's very minimal stock of staple foods makes it unlikely that any SNAP recipient would consider the firm as their primary source for groceries.

The difference in the average SNAP transaction amount, the total SNAP transaction dollar volume, and the total SNAP transaction count for Shelby County convenience stores during the review months and at the Appellant firm is significant. Appellant's average SNAP transaction amount is 5 U.S.C. § 552 (b)(6) & (b)(7)(C) larger than that of Shelby County convenience stores while its average SNAP transaction dollar volume is 2.01 percent smaller and its total SNAP transaction count is 71.18 percent smaller than the County average. A comparison of Appellant's SNAP redemptions to that of nearby like type stores having redemptions for the review period shows that none exhibit the same suspicious transaction patterns listed in the charge letter for the Appellant firm even though all are located in proximity to Appellant's location and would therefore be expected to share the same SNAP customer base and shopping patterns. This is further indication that the transactions in this Attachment and the previous do not represent legitimate food purchases. The Office of Retailer Operations and Compliance considered all of these to be indicators of unusual and suspicious activity.

The firm also had irregular SNAP transaction data compared to like type stores in Shelby County. A comparison of Appellant's redemption data to the average for County convenience stores using ten dollar increments shows that Appellant's transaction count and dollar volume were significantly less than that of like type stores in the lowest ranges (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) and then began to significantly exceed them 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at which point transactions stop. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This transaction pattern does not appear in the transaction patterns for other like type stores. These large dollar transactions are considered to be irregular and suspicious based on the firm's food inventory. The Office of Retailer Operations and Compliance determined there was no credible reason for the firm to have transactions at these dollar levels given the very minimal stock of staple foods and the lack of any specialty, bulk, or ethnic foods that might sell for large dollar amounts and also considered this to be a strong indication of trafficking. None of Appellant's contentions explain these unusual and suspicious differences.

The SNAP transactions noted in this Attachment are not presumed to be trafficking because they exceed a set dollar amount; they are questionable because they are inconsistent for this type of store and store stock. A shopping pattern analysis by the Office of Retailer Operations and Compliance shows that households in this Attachment are regularly shopping at much larger stores, and conducting high dollar transactions, yet are conducting comparable or higher dollar transactions at the Appellant firm. It makes no sense for a household that regularly shops at larger stores and apparently has no transportation limitations to spend large dollar amounts at the

Appellant firm since its cost of goods is higher than that of larger stores such as supermarkets or super stores.

Appellant contends the large transactions in this Attachment explainable because the firm's revenue was marginally higher than prior revenue for some of the period set out in the charge letter as a result of a sale wherein cases of drinks and other food products were purchased from the market.

No evidence to support the firm having had a sale was offered by Appellant. Additionally, contrary to Appellant's claim of revenue being only marginally higher, FNS redemption records show that the Appellant firm's SNAP redemptions during the review period were two or three times greater than the firm's redemptions prior to December 2018.

Information obtained during the FNS store visit on May 17, 2019, shows that the Appellant firm offers a very minimal quantity and variety of SNAP eligible staple food items, many accessory foods, and many ineligible items. Much of the inventory for sale consists of inexpensive snacks, candy, drinks, and various single serving foods as well as many ineligible items. The fact that lottery, alcohol, tobacco, household products, paper products, auto products, health and beauty items, ATM, phones/phone cards, money transfer, hats, toys, candles, jewelry, bedding, and charcoal are not eligible for purchase with SNAP benefits also provides no justification for the large transaction amounts.

Higher food prices make it even more unlikely that SNAP recipients, with very limited food benefits, would want to spend a considerable part of their benefits in a store that does not address all of their food needs when they are already shopping at larger, fully-stocked stores that would offer a greater variety of foods at lower prices. Many of these stores also offer store brand products at lower prices, weekly specials, and have shopping carts and checkouts with built-in scanners and conveyor belts to facilitate processing purchases quickly. Additionally, Appellant furnished no itemized cash register and EBT receipts for the period under review to document the legitimacy of these excessively large transactions and no evidence was provided of SNAP eligible store stock via receipts of products taken into inventory for the relevant months. The firm also has a very small checkout area and no shopping carts thereby making it extremely difficult to facilitate the great quantities of eligible food items required to make up these large dollar transactions. The fact that the firm carries a very minimal stock of staple food items also makes it improbable that the high dollar transactions in this Attachment were for the purchase of eligible food items and more likely that the amounts were contrived.

As previously stated, SNAP redemptions at the Appellant firm inexplicably doubled and even tripled during the period December 2018 to May 2019 while redemptions for the 11 months prior to December 2018 averaged well under 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per month indicating that trafficking was occurring. The firm voluntarily stopped accepting SNAP benefits after June 29, 2019. Additionally, SNAP redemptions fluctuated unusually following the store visit on May 17, 2019. The volume of SNAP redemptions at the Appellant firm decreased 74.94 percent from April 2019 to June 2019 while the number of SNAP transactions decreased 40.94 percent and the average dollar amount of SNAP transactions decreased 57.56 percent during this same period of time. A pronounced fluctuation in SNAP redemptions following the store visit is a

clear indication of trafficking since, if trafficking were not occurring, there would be no abnormal fluctuations in redemption amounts.

Based on this discussion, Appellant did not provide adequate evidence to support the legitimacy of the excessively large transactions in this Attachment.

Other Contentions

A record of participation in SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges. It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Office of Retailer Operations and Compliance and is limited to what circumstances were at the basis of the action at the time such action was made. In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact. When store ownership signed the certification page of the SNAP retailer authorization application to become a SNAP retailer and again when it applied for reauthorization as a SNAP retailer, it confirmed it understood and agreed to abide by program rules and regulatory provisions. It also agreed to accept responsibility on behalf of the firm for violations of the SNAP including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. Regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, the ownership is accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP.

The ownership and the firm were charged with trafficking based on a computer analysis of the store's transactions for the review period. The charges do not derive from the use of a confidential informant or independent investigator who visited the store and made illegal purchases to support findings of trafficking, but by a computer program used by SNAP Administrators. While traditional undercover operations are still in use by USDA, for many years federal regulations have also authorized the use of evidence consisting of EBT transaction data in investigations of SNAP retail stores to determine if trafficking is occurring and U.S. District Courts have long upheld the validity of EBT transaction data.

The issue under review involves a charge of trafficking SNAP benefits based on EBT transaction data. EBT transaction data is covered in SNAP regulations at 7 CFR § 278.6(a) and is addressed below. Trafficking is always considered to be the most serious violation even if it is a first offense therefore a temporary suspension or lesser penalty would not be applicable. SNAP regulations at 278.6(e)(1) clearly state that, "FNS shall disqualify a firm permanently if

personnel of the firm have trafficked as defined in § 271.2.” SNAP regulations at 7 CFR § 271.2, define trafficking as, “The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food”. SNAP regulations at 7 CFR § 278.6(a) clearly state that “FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system”. In the present case, the data presented in the Attachments is solely based on the SNAP EBT transactions conducted at the Appellant firm during the review period. This firm was selected as a result of a series of complex algorithms that make numerous data comparisons with other like type firms during the review period. All of the transactions were then reviewed and analyzed by the Office of Retailer Operations and Compliance staff before the decision was made to issue a charge letter. This investigative process included a detailed examination of information obtained from various sources, including, but not limited to the inventory report and photos from the FNS store visit, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant firm during the review period. This analysis also included a review of the firm to ensure its store classification was correct and the data comparisons with like type firms valid. Additionally, there are nearby like type stores whose transaction data does not form these suspicious patterns and are therefore not at risk of disqualification for trafficking. There is also no regulatory requirement that trafficking disqualifications be based solely on on-site undercover operations.

Based on this empirical data, and in the absence of sufficient evidence for the legitimacy of such transaction patterns, a conclusion can be drawn, through a preponderance of evidence that the “unusual, irregular, and inexplicable” transactions and patterns cited in the charge letter evidence trafficking as the most likely explanation for the questionable transactions listed. It is herein determined that Appellant did not provide a preponderance of evidence demonstrating that the transactions contained in the charge letter were more likely due to eligible food sales than not. Under review, the evidence more substantially supports a conclusion that the transaction activity in the charge letter Attachments is due primarily to trafficking in SNAP benefits.

The Food and Nutrition Act of 2008, as amended, and the regulations issued pursuant thereto do not cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be the most serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification “shall be permanent upon the first occasion of a disqualification based on trafficking by a retail food store.” In keeping with this legislative mandate, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved and second chances are not an authorized option under existing regulations.

CIVIL MONEY PENALTY

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

The Office of Retailer Operations and Compliance determined that the Appellant was not eligible for a trafficking CMP in lieu of a disqualification under 7 CFR 278.6(i) because 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 within the specified timeframe. As such, the Office of Retailer Operations and Compliance determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

Based on the above discussion and the evidence under review, Appellant failed to meet the regulatory standard for a trafficking CMP as it did not request or provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i). Based on the above, the Office of Retailer Operations and Compliance's decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

CONCLUSION

The Office of Retailer Operations and Compliance presented a case that Appellant has likely trafficked in SNAP benefits. Their analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics consistent with trafficking violations in SNAP benefits. This is evidenced by: the suspicious patterns in two Attachments of EBT transaction data, the inadequacy of the store's staple food stock as observed during the store visit to support large transactions in short time frames, the lack of adequate evidence for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant that likely offer a greater selection of eligible food items at competitive prices, and the irregular SNAP transaction data of Appellant as compared to other like type and larger stores in the county and state.

The retailer has not provided sufficient evidence to rebut the case that Appellant most likely trafficked in SNAP benefits. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged. Based on the discussion above, the determination to impose a permanent disqualification against Appellant is sustained. Furthermore, the Office of Retailer Operations and Compliance properly determined that Appellant was not eligible for a trafficking CMP according to Section 278.6(i) of the SNAP regulations.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record

of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

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

ROBERT T. DEEGAN
ADMINISTRATIVE REVIEW OFFICER

March 2, 2020