

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

**Zahra Deli Inc,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0176804**

**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 Retailer Operations Division to impose a permanent disqualification against Zahra Deli Inc (hereinafter Appellant) from participating 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 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a permanent disqualification against Appellant on June 20, 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 December 1, 2014, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in March 2014 through August 2014. 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).

Appellant, through counsel, responded to the charges in a letter dated December 10, 2014, that did not contain a request for a CMP or any documentation in support of one. Counsel also

submitted a Freedom of Information Act (FOIA) request on this same date. The agency responded to this request by correspondence dated February 9, 2015. On March 23, 2015, counsel appealed the FNS FOIA response and the Retailer Operations Division suspended all work on this case pending the outcome of the appeal.

The FNS FOIA Office was unable to contact counsel and the FOIA appeal was closed on April 29, 2019, due to lack of response from the requester. The Retailer Operations Division notified Appellant by letter dated May 1, 2019, that it had 10 days to submit any additional information, explanation, or evidence regarding the charges. No information was received and the Retailer Operations Division notified Appellant by letter dated June 20, 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 June 24, 2019, Appellant appealed the Retailer Operations Division'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 six month period of March 2014 through August 2014. This involved three patterns of EBT transaction characteristics indicative of trafficking:

1. There were an unusual number of transactions ending in a same cents value.
2. Multiple transactions were made from individual benefit accounts in unusually short time frames.
3. 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.

In counsel’s December 10, 2014, reply to the charges, Appellant contends:

- Appellant vehemently denies that anyone involved with or employed by the business has engaged in trafficking. All of the transactions are not unusual and are not based on any illegal activity;
- The business is open seven days a week from 6:00 AM until 11:00 PM and employs one full-time employee in addition to the owner. Fifty-five percent of sales are from SNAP so ownership would not jeopardize this business by engaging in illegal activity;

- Ownership has continuously trained and tested the employee concerning SNAP regulations and requirements. The business has an unblemished record that is evidence of ownership's training and supervision of his employee;
- The store is always well stocked with staple food items and the vast majority of people that patronize the store are regular customers who do all of their grocery and food shopping in this store. The store sells large volumes of formula, baby food, cereals, juices, dairy products, fresh meat and produce;
- The same cents transactions result from accommodating regular customers who purchased high cost items. On many occasions the amount charged is "rounded-out" to the lesser even price being the remaining balance in the recipient's SNAP account. Also, a large number of these transactions resulted from the store's pricing of items on sale;
- The multiple transactions from individual benefit accounts in unusually short time frames were all legitimate transactions by recipients placing orders by telephone and then picking-up their orders at which time they pay for the telephone orders and purchase additional items. Customers also place telephone orders and then purchase items that are to be delivered all of which are charged to the EBT card at or about the same time period;
- The excessively large transactions are legitimate charges for eligible items by frequent customers who do their major shopping in short time periods and stock-up on necessary food items;
- The letter of charges is nothing more than an unsubstantiated general accusation; it has no merit, and to base a decision upon such an accusation is to deprive the vendor of due process. USDA's sole use of EBT records is inadequate. It is not based on fact, and the conclusions reached are unfounded and without merit. The EBT transactions should be more carefully reviewed than basing a decision totally upon computer generated reports that only create an unfounded presumption of wrongdoing. USDA only furnishes the vendor a listing of transactions for the six month period and provides nothing concerning the other transactions that occurred in the store; and,
- There are no definitive factual allegations of why these transactions involve or are indicative or trafficking. It appears the disqualification decision is based upon a predetermined standard of EBT activity for this type of firm. If this be the case, then a statistical sampling or survey has been used to erroneously determine that the normal transactions in this store significantly exceed the normal practice for this type of firm. USDA has failed to specifically describe the type of firm operated by this vendor and has failed to investigate and set forth the precise transactions that constitute trafficking. It would be expected and required in so serious a matter that USDA would investigate and evaluate the specific activities in this business that has an unblemished record before deciding on a permanent disqualification.

In the June 24, 2019, request for administrative review, Appellant contends:

- Sometimes there are errors in swiping EBT cards and the owner swipes twice not knowing this is making a withdrawal twice. This looks like a problem and that the owner is doing something illegal, but he is not;
- The firm sell a lot of Enfamil Milk at \$22.00 a can;
- The owner has been in business for 40 years and has never done anything against the rules or regulations.

Appellant submitted no evidence or other rationales in support of any of the above contentions.

It is noted that the contentions submitted by counsel in response to the charges are virtually identical to those received from counsel for other similarly charged retailers and therefore do not accurately reflect the circumstances and conditions found at the Appellant firm. This is supported by counsel's claims that the firm is open from 6:00 AM to 11:00 PM; employs one clerk in addition to the owner; and is well stocked with fresh meats, formula, baby foods, and fresh produce. FNS records, that include the firm's 2012 retailer application and two FNS store visit reports, show that the firm is in fact open 24/7 and therefore would require more employees than the two claimed by counsel. The store visit reports and numerous photos also show that the firm actually offers a very limited quantity and variety of staple foods with no fresh meat or fresh produce and no baby foods or formula. Thus, counsel's contentions are found to be baseless and without merit.

### **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 November 30, 2012. The record indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a June 30, 2014, store visit conducted by a 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 small grocery store with limited floor space offering a very limited quantity and variety of staple foods and carrying no other unique items or offering any distinctive services.

- The store stocked traditional American brands and there were little or no 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.
- 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.
- The only checkout area was an opening approximately 3.5 feet wide and 1.5 feet deep set into a plastic display wall leaving a small narrow 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, a POS terminal, and no optical scanner.
- The firm had a very limited stock of staple foods that also included many single serving and pre-packaged items with a significant portion of inventory in soda, candy, snacks, and other drinks as well as many ineligible items.
- There was a large interior menu board advertising deli meats, deli cheeses, hot/cold sandwiches, hot soups, hot drinks, and hot breakfast items.
- The firm had no fresh or frozen unprocessed meat, no fresh or frozen unprocessed seafood, a very limited quantity and variety of processed meats and seafood (canned poultry and fish, sausages/hot dogs, deli meats, and jerky), no packaged lunch meat, no canned meat, no bacon, no frozen entrees, no frozen dinners, eggs, no fresh fruit or vegetables, no frozen fruit or vegetables, no dried fruit or vegetables, no packaged nuts, a limited stock of single serving nuts, 100 percent fruit juices, no 100 percent vegetable juices, canned soups, a minimal quantity and variety of canned and packaged staple food items, deli cheese, no packaged cheese, no large yogurt, a moderate stock of single serving yogurt, no butter, margarine, no sour cream, three gallons of fresh milk, no single serving milk, several single serving milk drinks, canned milk, no coconut milk, no soy milk, no Lactaid milk, no powdered milk, no cream cheese, no bread, rolls for use in prepared foods, no tortillas, no pitas, no tostadas, several corn meal, several bags of flour, three bags of sugar, rice, cold cereal, single serving cold cereal, hot cereal, many single serving noodle soups, canned pasta, no single serving pasta, no dry pasta, no dry noodles, no pancake mixes, mac&cheese, no single serving size mac&cheese, cooking oil, no coffee, tea, no cocoa, no baby foods/cereals, no infant formula, and no expensive staple food items.
- Ineligible items included: tobacco, hot foods/drinks, household products, paper products, pet products, health and beauty items, and diapers while accessory foods included: candy, condiments, snacks, baked goods, three sugar, single serving ice cream, spices, cooking oil, tea, and un/carbonated drinks.
- The firm's hours of operation were open 24/7.
- Signage was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- Most food items at the Appellant firm were priced with all visible prices ending in .x9 cents which is the most common pricing structure for stores of this type.
- The firm was not a WIC vendor.

- The store visit report and photos showed many empty or minimally stocked shelves and display racks as well as dust on the tops of canned/bottled goods and ice crystals on frozen foods indicating a slow turnover of stock.

### **Unusual numbers of transactions ending in a same cents value**

This attachment lists 334 transactions ending in a same cents value of .25 cents or 0.00 cents. These 334 transactions include 227 transactions ending in the same cents value of .00 cents and 107 transactions ending in the same cents value of .25 cents. **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 FNS store report and photo revealed no signs posted to indicate special food packages, bundles, case sales, or other sales that would explain the unusual number of transactions ending in these same cents values and no bulk items were available for purchase. The high percentage of same cent transactions combined with the large number of high dollar transactions is irregular and suspicious for this type store.

Counsel contends the same cents transactions are explained by the store rounding down large totals to even prices and by food items being on sale while the store owner contends they are the result of his erroneously swiping a card twice and by the sales of infant formula at \$22.00 a can.

As previously stated, the inventory report and photos from the June 30, 2014, FNS store visit show no evidence of food sales that would account for these transactions and no infant formula being stocked by the firm. A review of the charge letter Attachments shows no evidence of an EBT card being swiped twice for the same dollar amount by the same household and the Attachments also contain many large dollar transactions that are not rounded thereby refuting the claims made by counsel and by the store owner.

Most food items at the Appellant business are priced with the majority of visible prices ending in .x9 cents which is the most common pricing structure for grocery stores. No food packages, bulk products, bundles, case sales, or other sales of eligible items were evident during the store visit that would explain these unusual same cents transactions. The purchase of several items with prices ending in .x9 cents would most likely not result in a total ending in a same dollar amount of .25 or .00 cents as multiples of nine seldom have a value ending in .25 or .00 cents making it statistically impossible that this many store transactions would end in a value of .25 or .00 cents. When there are a disproportional amount of transactions ending in a same cent value, it appears that these transaction amounts are contrived and therefore, in the absence of any compelling rationale to the contrary, are indicative of trafficking.

While some of the transactions in this Attachment may have been for legitimate staple food purchases, particularly those in the lower dollar amounts, there is insufficient evidence that these repeating same cent transactions are legitimate. When many transactions end in a same cents amount, it appears that these transaction amounts are contrived and therefore, in the absence of compelling evidence to the contrary, are suggestive of trafficking. As such, the transactions in this Attachment have not been adequately documented as legitimate and therefore do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact.

## **Multiple transactions in unusually short time frames**

This Attachment documents 172 individual transactions in 81 sets of two or more transactions conducted by 55 different households in a short period of time 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The dollar amounts of subsequent transactions in each set are substantial and nearly equal or exceed the dollar amount of the initial transaction in 51 of the 81 sets.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Ten sets are comprised of three individual transactions while the remaining 71 sets are comprised of two individual transactions. It is not a usual shopping pattern to see so many purchases, in a short period of time, by the same recipients as documented in this Attachment. Multiple transactions conducted by the same household within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by store inventory and structure. These sets of transactions appear to be in amounts which are indicative of trafficking.

Counsel contends the multiple transactions from individual benefit accounts in unusually short time frames were all legitimate transactions by recipients placing orders by phone and then picking-up their orders at which time they pay for the phone orders and purchase additional items or by recipients placing phone orders and then purchasing items that are to be delivered all of which are charged to the EBT card at or about the same time period. The store owner offers no evidence or rationales to support the legitimacy of the listed transactions in this Attachment other than his claim of erroneously swiping a card twice, a claim which has previously been discussed and refuted.

The FNS store visit reports from June 30, 2014, and November 21, 2012, show no signage indicating that the firm accepts phone orders or offers delivery. Additionally, none of the materials received by FNS pertaining to the authorization of this firm offer any indication of the firm offering phone orders or delivery. No evidence was offered to support these allegations and the store owner does not repeat them in his contentions. Counsel has presented virtually identical contentions for other retailers and these clearly do not accurately reflect the circumstances and conditions found at the Appellant firm, as previously discussed. Therefore, it is more likely than not that the allegations of phone orders or deliveries are nothing more than fabrications made by counsel in an attempt to explain the transactions in this Attachment.

SNAP households have no limit on the number of times they may use their benefits or the dollar value of eligible food they may purchase. The SNAP transactions listed in this Attachment 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 small grocery store's stock and facilities and are thus indicative of trafficking. These transaction sets do not contain the characteristics associated with a household purchasing a forgotten item right after checking-out, of household members/friends shopping together and making separate purchases, or of households making a separate purchase to check their balance followed by another transaction as 74 of the 81 transaction sets 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The transaction sets also do not contain the characteristics of a household returning later in the day to purchase a forgotten item or two as all of the sets have subsequent transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C), far more than the cost of a forgotten item or two. Appellant also offers no explanation as to why



households would conduct up to three sizeable transactions at a very poorly stocked store within a short period of time when there are dozens of comparably sized or larger retail food stores located nearby that includes a supermarket located on the same block as the Appellant firm and another less than three blocks away. The availability of other nearby SNAP retail stores combined with the very limited quantity and variety of staple foods make it unlikely that any SNAP recipient would consider the Appellant firm as their primary source for groceries.

It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a short period of time. However, it is unusual that subsequent transaction dollar amounts are substantial in these transaction sets and that all of the sets in this Attachment total **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** when the comparable average small grocery store SNAP transaction amount in Kings County during the review period was \$11.12. These multiple transactions indicate that the amounts were contrived in an attempt to avoid suspiciously high transactions that would be indicative of trafficking by breaking them into multiple, smaller amounts. FNS transaction data shows that this same pattern of multiple transactions in unusually short time frames is not evident at other nearby like type grocery stores further supporting that trafficking was occurring at the Appellant firm during the period under review.

The Retailer Operation Division's analysis of shopping patterns for households listed in this Attachment shows they have ready access to transportation as evidenced by their shopping at a variety of comparably sized or larger food stores located nearby and at a distance from Appellant's location, including super stores and supermarkets. Their analysis also shows these households shopped at the Appellant firm and at a super store and/or supermarket **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** inexplicably spent more at Appellant's small grocery store than they did at the super stores and/or supermarkets. Appellant failed to offer any explanation or rationale as to why households who are regularly shopping and spending large dollar amounts at many larger and better stocked stores would conduct multiple purchases often totaling to comparable or higher dollar amounts at a poorly stocked grocery store. There is no legitimate reason why households would spend so much of their SNAP allotment at the Appellant firm when they clearly had access to and frequently shopped at supermarkets and super stores. Common sense dictates that it is improbable that households would choose to spend large dollar amounts at the Appellant firm if their purchases consisted solely of eligible food items that could be purchased at any of the super stores and/or supermarkets they were already regularly shopping at and therefore the more plausible explanation is that these households were trafficking SNAP benefits at the Appellant firm.

**5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. There is no legitimate reason why these households would spend so much of their SNAP allotments at a poorly stocked small grocery store when they clearly had access to and frequently shopped at supermarkets and super stores located nearby and at a distance. The more plausible explanation is that these households were trafficking at the firm. Other households analyzed exhibited similar shopping patterns indicative of trafficking.

There may be legitimate reasons why a SNAP household might return to a store during a short period of time, but the examples in this Attachment indicate a series of SNAP purchases that total to large dollar amounts. Multiple transactions over a short period of time, especially those of high dollar values, are indicative of attempts to obscure trafficking by dividing a large dollar

value transaction into a series of smaller dollar value transactions and are a method which violating stores use to avoid high dollar transactions that cannot be supported.

### **High Dollar Value Transactions**

This Attachment lists 553 individual EBT transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The substantial number of high dollar transactions is uncharacteristic for a store offering a very limited stock of staple foods and calls into question the legitimacy of these transactions. The transactions are substantially higher than the average SNAP transaction amount of \$11.12 for this store type in Kings County. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

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 limited, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of their purchases at larger food stores.

While households residing in areas with extremely limited grocery store options may conduct high dollar transactions at small grocery stores out of necessity, this is not the case when they have better alternatives. FNS records show there are more than 90 comparably sized or larger SNAP retailers and specialty food stores located within a 1.0 mile radius of the Appellant firm that includes four super stores, 15 supermarkets, six large grocery stores, 10 medium grocery stores, 52 small grocery stores, six seafood specialty stores, one meat specialty store, one fruit and vegetable specialty store, two farmers markets, and a bakery. The larger stores would offer greater quantities and varieties of staple food items at lower prices than would be found at a poorly stocked small grocery store offering no fresh or frozen unprocessed meats or seafood and no fresh or frozen fruit and vegetables.

The difference in the average SNAP transaction amount, the total SNAP transaction dollar volume, and the total SNAP transaction count for Kings County small grocery 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)(7)(E)** larger than that of Kings County small grocery stores while its average SNAP transaction dollar volume is 64.1 percent larger and its total SNAP transaction count is 35.08 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 Retailer Operations Division 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 Kings County. A comparison of Appellant's redemption data to the average for County small grocery stores using ten dollar increments shows that Appellant's transaction count and dollar volume is significantly lower than that of like type stores in the lowest ranges

(5 U.S.C. § 552 (b)(6) & (b)(7)(C)) and then begins to significantly exceed that of like type stores in the remaining 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at which point transactions stop. It is unusual that like type Kings County small grocery stores do not begin averaging less than one transaction in each range 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C) 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 Retailer Operations Division determined there was no credible reason for the firm to have transactions at these dollar levels given the very limited 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.

Counsel's claims that the store is always well stocked with staple food items sells large volumes of formula, baby food, cereals, juices, dairy products, fresh meat and produce and that the vast majority of people that patronize the store are regular customers who do all of their grocery and food shopping in this store while the store owner claims that the firm sells a lot of Enfamil Milk at \$22.00 a can.

Both counsel's and the store owner's claims are refuted by the evidence obtained during the FNS store visit on June 30, 2014, showing the firm, in fact, offers a very limited quantity and variety of SNAP eligible staple food items with no fresh meat or fresh produce and no baby foods or formula. 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 tobacco, hot foods/drinks, household products, paper products, pet products, health and beauty items, and diapers are not eligible for purchase with SNAP benefits also provides no justification for the high transaction amounts.

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 Retailer Operations Division 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.

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 small checkout area and no shopping carts or handbaskets 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 limited 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.

It is further noted that SNAP redemptions at the Appellant firm fluctuated unusually following the store visit on June 30, 2014. The volume of SNAP redemptions at the Appellant firm decreased 9.41 percent from June 2014 to July 2014 while the number of SNAP transactions decreased 6.77 percent and the average transaction amount decreased 2.84 percent over the same period. SNAP redemptions continued to decrease through September 2014. The volume and average transaction amount of SNAP redemptions also decreased following receipt of the charge letter on December 2, 2014, with the volume falling 39.58 percent from November 2014 to December 2014 while the average transaction amount fell 35.65 percent over the same period. 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**

Regarding Appellant's denial of trafficking, the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division 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, 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. 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.

With regards to Appellant's contention that its rights to due process were violated, section 278.6(b)(1) of the SNAP regulations provides that upon charging a firm with SNAP violations,

the letter informing the firm of the charges “shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter.” This section further states that, “Any firm considered for disqualification, shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination.” A review of Retailer Operations Division’s administrative actions regarding this matter indicates full compliance with applicable SNAP regulations, policies, and procedures. This disqualification is an administrative action and SNAP regulations provide for an administrative review of the action. The Act and regulations provide that any firm aggrieved by an administrative review determination may seek judicial review of the determination in Federal court or a State court of record having competent jurisdiction. In such event, trial de novo proceedings ensure the firm of a full evidentiary hearing on the agency action at issue.

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 Retailer Operations Division 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 Retailer Operations Division 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 Retailer Operations Division 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 Retailer Operations Division’s decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

## **CONCLUSION**

The Retailer Operations Division 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 three 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 Retailer Operations Division 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

October 15, 2019