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Updated Standards for SNAP-Authorized Retailers: Final Rule

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Summary

On December 15, 2016, USDA published in the *Federal Register* a final rule, “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP).” This final rule follows USDA-FNS’s proposed rule work earlier in the year:

- On February 17, 2016, the U.S. Department of Agriculture’s (USDA’s) Food and Nutrition Service (USDA-FNS) published the proposed rule.
- On April 5, 2016, USDA-FNS published a clarification of the proposed rule and extended the comment period to May 18, 2016.

SNAP, the largest of USDA’s domestic food assistance programs, provides benefits to eligible participants; these benefits are redeemable for SNAP-eligible foods at SNAP-authorized retailers. SNAP-authorized retailers are stores and other food sellers that are allowed to accept SNAP benefits. In FY2015, the vast majority of benefits were redeemed at “super stores” and supermarkets.

The final rule implements provisions of the Agriculture Act of 2014 (“2014 farm bill,” P.L. 113-79) that increases inventory requirements for SNAP-authorized retailers and also addresses other USDA-FNS policy objectives. Like the proposed rule, the final rule makes changes to 7 C.F.R. Part 271 and Part 278 in five areas of retailer authorization policy: (1) sales of hot, prepared foods; (2) definition of staple foods; (3) inventory and depth of stock; (4) access-related exceptions to the rules; and (5) disclosures of retailer information.

The final rule responds to many of the comments and concerns raised about the proposed rule. The proposed rule had been controversial, particularly the provisions not explicitly required by the farm bill and the potential impact on smaller retailers.

The effective date for the final rule is January 17, 2017, but some aspects of the rule take effect 120 days or 365 days later.

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On December 15, 2016, USDA published in the Federal Register a final rule, “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP).”¹ This final rule follows USDA-FNS’s proposed rule work earlier in the year:

- On February 17, 2016, the U.S. Department of Agriculture’s (USDA’s) Food and Nutrition Service (USDA-FNS) published the proposed rule.²
- On April 5, 2016, USDA-FNS published a clarification of the proposed rule and extended the comment period to May 18, 2016.³

SNAP, the largest of USDA’s domestic food assistance programs, provides benefits to eligible participants; these benefits are redeemable for SNAP-eligible foods at SNAP-authorized retailers. In FY2015, SNAP had an average monthly participation of 45.8 million individuals, \$74.0 billion was obligated for the program (most of the funding is for benefits themselves), and nearly 259,000 firms were authorized to accept benefits.⁴ The final rule implements provisions of the Agriculture Act of 2014 (“2014 farm bill,” P.L. 113-79) that made changes to inventory requirements for SNAP-authorized retailers and also addresses other USDA-FNS policy objectives. The proposed rule had been controversial, particularly the provisions not explicitly required by the farm bill.

SNAP-authorized retailers are stores and other food sellers that are allowed to accept SNAP benefits. Changes in retailer authorization policy can impact a range of SNAP program stakeholders—not only retailers, but also food manufacturers and program participants. Driving the debate over these changes has been the potential impact on smaller retailers. This report will present a brief background on SNAP retailer authorization and related administrative data, a summary of prior regulations, the statutory changes enacted in the 2014 farm bill, and the final rule’s changes to the current regulations (including comparisons to the proposed rule). The **Appendix** includes additional background on agency analysis of the proposed rule and stakeholders’ reactions to the proposed rule.

Background: SNAP-Authorized Retailers and Related Data

SNAP benefits may be redeemed only for eligible foods at authorized retailers.⁵ The SNAP program authorizes retailers based, in part, on the retailer’s inventory or sales. In order to be authorized, a retailer is generally required to (1) apply for authorization, and (2) pass a USDA-

¹ USDA Food and Nutrition Service, “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP),” 81 *Federal Register* 90675-90699, December 15, 2016. (“Final Rule”)

² USDA Food and Nutrition Service, “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP),” 81 *Federal Register* 8015-8021, February 17, 2016. (“Proposed Rule”)

³ USDA Food and Nutrition Service, “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP) Clarification of Proposed Rule and Extension of Comment Period,” 81 *Federal Register* 19500-19502, April 5, 2016. (“Clarification of Proposed Rule”)

⁴ USDA-FNS SNAP participation and cost data available at <http://www.fns.usda.gov/pd/supplemental-nutrition-assistance-program-snap>. Authorized retailers available in 2015 Retailer Management Year End Summaries, p. 2, <http://www.fns.usda.gov/sites/default/files/snap/2015-SNAP-Retailer-Management-Year-End-Summary.pdf>.

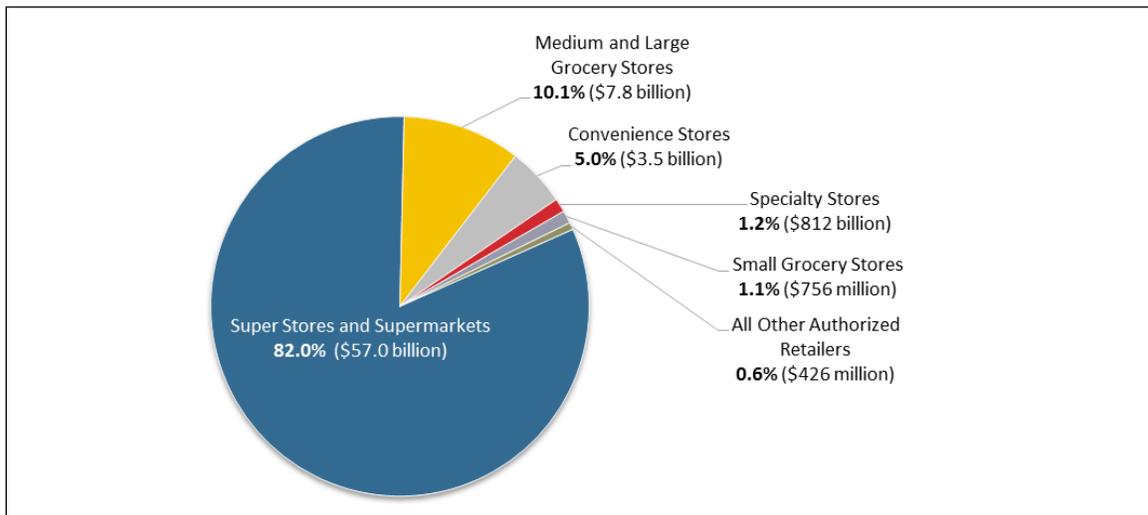
⁵ For more information, see CRS Report R42505, *Supplemental Nutrition Assistance Program (SNAP): A Primer on Eligibility and Benefits*, by Randy Alison Aussenberg.

FNS administered inspection and authorization process.⁶ A wide range of retailers are authorized to accept SNAP, including supermarkets, farmers’ markets, and convenience stores.

Inventory requirements for SNAP retailers are based on stock or sales of “staple foods,” defined in statute as four categories: (1) meat, poultry, or fish; (2) bread or cereals; (3) vegetables or fruits; and (4) dairy products.⁷ Although SNAP participants can buy foods that are not in staple food categories, required staple food inventory or sales is one of the bases for authorizing a retailer to accept SNAP benefits.

Though many different types of retailers are authorized to accept benefits, data show that the majority of SNAP benefits are redeemed at supermarkets and superstores. In FY2015, approximately 82% of benefits were redeemed in supermarkets and superstores.⁸ Although convenience stores make up over 41% of SNAP-authorized retailers, they redeemed approximately 5% of SNAP benefits in FY2015.⁹ **Figure 1** displays the share of SNAP benefits redeemed by different categories of retailers, with further detail on authorizations and redemptions shown in **Table 1**. Retailer data also indicate that smaller retailers (convenience stores, small grocery stores, medium grocery stores) received the bulk of sanctions from USDA-FNS in FY2015; sanctions include time-limited or permanent disqualifications from SNAP.¹⁰

Figure 1. Share of SNAP Dollars Redeemed by Store Type, FY2015



Source: Prepared by CRS based on USDA-FNS, 2015 Retailer Management Year End Summaries, p. 2, <http://www.fns.usda.gov/sites/default/files/snap/2015-SNAP-Retailer-Management-Year-End-Summary.pdf>.

Notes: In order to more clearly highlight small grocery stores and convenience stores, CRS collapsed categories of retailer types. See 2015 Retailer Management Year End Summaries for narrower category data.

⁶ USDA-FNS website, <http://www.fns.usda.gov/snap/retailers/application-process.htm>.

⁷ 7 U.S.C. 2012(q).

⁸ USDA-FNS, 2015 Retailer Management Year End Summaries, p. 2, available at <http://www.fns.usda.gov/sites/default/files/snap/2015-SNAP-Retailer-Management-Year-End-Summary.pdf>. Note: USDA-FNS categorizes retailer types according to definitions in an internal agency document.

⁹ Ibid.

¹⁰ Ibid., p. 12. Dividing number of sanctions by number of authorized retailers also shows that these categories also have the highest *rates* of sanctions.

Table 1. Retailers Authorized and Benefits Redeemed by Retailer Type, FY2015

Retailer Types ^a	Retailers Authorized		Amount of SNAP Benefits Redeemed	
	#	%	\$	%
Superstores and supermarkets	37,868	14.7%	\$57,014,276,433	82.0%
Medium, large, and combination grocery stores	81,345	31.5%	\$7,004,784,308	10.1%
Convenience stores	106,531	41.2%	\$3,494,342,918	5.0%
Specialty stores	8,594	3.3%	\$811,794,376	1.2%
Small grocery stores	12,277	4.8%	\$755,975,667	1.1%
All other authorized retailer types	12,017	4.6%	\$425,971,246	0.6%
TOTAL	258,632	100%	\$69,507,144,948	100%

Source: Prepared by CRS based on USDA-FNS, 2015 Retailer Management Year End Summaries, p. 2, <http://www.fns.usda.gov/sites/default/files/snap/2015-SNAP-Retailer-Management-Year-End-Summary.pdf>.

a. In order to more clearly highlight small grocery stores and convenience stores, CRS collapsed categories of retailer types. See 2015 Retailer Management Year End Summaries for narrower category data.

Prior SNAP Retailer Inventory Regulations

This section summarizes standards for SNAP retailer authorization prior to the final rule (“prior regulations”).

Under the prior regulations, a SNAP-eligible retailer had to meet one of two tests: criterion A (based on store inventory) or criterion B (based on store sales).¹¹ These rules are displayed in **Table 2**.

Table 2. Prior Regulations for SNAP Retailer Authorization

Retailers Apply via Criterion A or Criterion B

Criterion A—Based on Inventory	OR	Criterion B—Based on Sales
Offer, on a continuous basis, three varieties of qualifying foods in each of the four staple food categories, AND		More than 50% of the retailer’s total sales must be from the sale of eligible staple foods
Offer, on a continuous basis, perishable foods in at least two of the four staple food categories.		

Source: Based on 7 C.F.R. 278.1(a) (prior to final rule) and USDA-FNS website, <http://www.fns.usda.gov/snap/retailers/store-eligibility.htm> (accessed December 13, 2016).

Specialty stores, such as fruit and vegetable or seafood markets, tend to apply under criterion B because they carry a limited number of staple food categories.

As noted above, SNAP’s authorizing law defines “staple foods” as foods in the following categories: meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products.¹² The

¹¹ 7 C.F.R. 278.1(a) (prior to final rule).

law further provides that staple foods “do not include accessory food items, such as coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices.”¹³ Under prior regulations, foods with multiple ingredients were counted in a staple food group based on the “main ingredient” as determined by USDA-FNS. For example, a box of macaroni and cheese might be classified as a variety within a staple food category but in the bread or cereal category (despite containing dairy). Prior regulation also defined perishable staple food items as “items which are either frozen staple food items or fresh, unrefrigerated or refrigerated staple food items that will spoil or suffer significant deterioration in quality within 2-3 weeks.”¹⁴ Regulation specified that a “variety” of qualifying foods in a particular category means different types of foods, not different brands, different nutrient values, different varieties of packaging, or different package sizes; the example was given that apples, cabbage, and tomatoes are varieties in the fruit or vegetable staple food category.¹⁵

Although retailers must offer these particular types of foods to qualify as a SNAP-eligible retailer, SNAP participants may redeem their benefits for generally any foods for home preparation and consumption whether they are staple foods or not. SNAP benefits may not be redeemed for alcohol; tobacco; or hot, prepared foods intended for immediate consumption (e.g., a rotisserie chicken). Prior regulations also made ineligible “firms that are considered to be restaurants, that is, firms that have more than 50 percent of their total gross retail sales in hot and/or cold prepared foods not intended for home preparation and consumption.”¹⁶ Restaurants authorized to participate under certain states’ restaurant option (an option to assist homeless, elderly, and disabled individuals who may have difficulty preparing food) are an exception to this 50% rule.¹⁷

2014 Farm Bill (P.L. 113-79) Amendments to Retailer Inventory Requirements

The 2014 farm bill (enacted February 7, 2014) amended many different aspects of SNAP law, including changes to the authorization of SNAP retailers.¹⁸ Section 4002 of P.L. 113-79 required that retailers seeking authorization based on inventory (i.e., criterion A) will have to increase their variety of stock. Namely, the law was amended to require stores to stock at least *seven* varieties of staple foods in each of the four staple food categories and to stock perishable foods in at least *three* categories. Section 4002, which includes other requirements for retailers, also amended the authorizing law to require a review of retailer applications to consider “whether the [retailer] applicant is located in an area with significantly limited access to food.” The law’s conference report included further information on the decision to craft this policy change.¹⁹

(...continued)

¹² 7 U.S.C. 2012(q).

¹³ Ibid.

¹⁴ 7 C.F.R. 278.1(b)(1)(ii) (prior to final rule).

¹⁵ Ibid.

¹⁶ 7 C.F.R. 278.1(b)(1)(iv) (prior to final rule).

¹⁷ This option is authorized at 7 U.S.C. 2018(h). See also relevant section of CRS Report R42505, *Supplemental Nutrition Assistance Program (SNAP): A Primer on Eligibility and Benefits*, by Randy Alison Aussenberg.

¹⁸ All SNAP changes are discussed in CRS Report R43332, *SNAP and Related Nutrition Provisions of the 2014 Farm Bill (P.L. 113-79)*, by Randy Alison Aussenberg.

¹⁹ H.Rept. 113-333, p. 433: “The Conference substitute adopts the Senate provision with an amendment. The amendment strikes the language providing USDA authority to consider a store’s depth of stock, variety of staple food (continued...)”

In a March 2014 policy memorandum, USDA-FNS said that the 2014 farm bill changes to inventory requirements would require rulemaking to implement.²⁰

Final Rule's Changes to SNAP Retailer Standards

This section summarizes the USDA-FNS final rule's changes to prior regulations and includes comparison to the proposed rule.

As a basis for rulemaking, in the February 2016 proposed rule, USDA-FNS explained that the proposed rule was “the result of two separate developments”: (1) the 2014 farm bill’s statutory changes, and (2) “the effort initiated by FNS in 2013 to look at enhancing the eligibility standards for SNAP retailers to better enforce the intent of the [Food and Nutrition Act of 2008] to permit low-income individuals to purchase more nutritious foods for home preparation and consumption.” Related to the latter development, USDA-FNS cited findings from an August 2013 Request for Information (RFI), which posed 14 questions to the public on SNAP retailer eligibility and authorization.²¹ USDA-FNS stated that they received from the RFI over 200 comments “from a diverse group, including retailers, academics, trade associations, policy advocates, professional associations, government entities, and the general public.” The agency also cited related listening sessions.

Before issuing the final rule, FNS reviewed 1,260 germane, nonduplicative comments on the proposed rule. About 72% of comments came from retail food store representatives, owners, managers, or employees, most of whom submitted template or form letters.²² Some Members of Congress and other stakeholders had voiced strong opposition to aspects of the proposed rule; this activity is summarized in the **Appendix**.

As the proposed rule would have, the final rule makes changes to 7 C.F.R. Part 271 and Part 278 in five areas of retailer authorization policy: (1) sales of hot, prepared foods; (2) definition of staple foods; (3) inventory and depth of stock; (4) access-related exceptions to the rules; and (5) disclosures of retailer information. The final rule’s ultimate changes in some ways vary significantly from those in the proposed rule.

(...continued)

items, and the sale of excepted items when approving a retailer. The amendment requires that retailers offer for sale on a continuous basis a variety of at least seven foods in each of the four categories of staple foods categories.... The conference substitute reduces fraud at retail stores by requiring a more rigorous standard for stores to become eligible to process SNAP benefits. Section 4002 requires participating retailers to stock perishable items in at least three of the four staple food categories: dairy products; meat, poultry, or fish; fruits or vegetables; and bread or cereals. Currently, a store stocking as few as twelve food items, many of which have limited nutritional value, could be eligible to be a SNAP retailer. To address this, the conference substitute requires retailers to stock, at a minimum, seven food items in each of the staple food categories to be eligible. The Managers intend for this requirement to serve as a minimum requirement and do not intend in any way to discourage or prevent more robust depth of stock. The Managers remain concerned with retailers that meet the minimum of the existing regulations as a way to gain entry into SNAP for the sole purpose of expanding sales of excepted items, including liquor and tobacco, which is decidedly contrary to the intent of the program.”

²⁰ Jessica Shahin, *Supplemental Nutrition Assistance Program Provisions of the Agricultural Act of 2014 - Implementing Memorandum*, USDA-FNS, March 21, 2014, <http://www.fns.usda.gov/sites/default/files/SNAP%20Provisions%20of%20the%20Agricultural%20Act%20of%202014%20-%20Implementing%20Memo.pdf>.

²¹ USDA Food and Nutrition Service, “Request for Information: Supplemental Nutrition Assistance Program (SNAP) Enhancing Retail Food Store Eligibility,” 78 *Federal Register* 51136-51138, August 20, 2013.

²² See the final rule preamble (pp. 90677-90697) for analysis of comments and how they informed decisionmaking.

These areas are briefly discussed in the sections to follow. The final rule is presented “at-a-glance”—as compared to the proposed rule and the prior regulations—in **Table 4** at the end of this section.

Throughout the proposed and final rules, USDA-FNS expresses the objectives to improve access to healthy foods and to preserve the integrity of the program. The statute as amended by the farm bill explicitly requires

- an increase in the minimum number of food varieties and perishable varieties for retailers authorized under criteria A (discussed further below in “Inventory and Depth of Stock”); and
- access-related exceptions to retailer authorization (discussed further below in “Access-Related Exceptions to the Rules”).

USDA-FNS acknowledges throughout the final rule’s preamble that the regulatory changes in other areas are discretionary.

Note: Neither the 2014 farm bill nor the proposed or final rules make changes to foods eligible for purchase by SNAP participants. Although the proposed rule would place more stringent requirements on the foods stocked by authorized retailers, it does not change what customers may purchase with their SNAP benefits. In general, SNAP benefits may be redeemed for any foods for home preparation and consumption. SNAP benefits may not be redeemed for alcohol, tobacco, or hot foods intended for immediate consumption. (More details about SNAP-eligible foods are available in CRS Report R42505, *Supplemental Nutrition Assistance Program (SNAP): A Primer on Eligibility and Benefits.*)

The effective date for the final rule is January 17, 2017, but most aspects of the rule take effect 120 days or 365 days later. Unless otherwise indicated in the sections to follow, the final rule takes effect

- 120 days after January 17, 2017 for new retailers applying for authorization or retailers applying to reinstate their authorization, and
- 365 days after January 17, 2017, for existing SNAP-authorized retailers.

Sales of Hot, Prepared Foods

Hot, prepared foods are not eligible for purchase with SNAP benefits, and prior regulations required Criteria A and B retailers to have no more than 50% of their sales in hot or cold prepared foods. Ultimately, the final rule kept this 50% threshold in place but specified that it applies to “foods cooked or heated on-site by the retailer before or after purchase.”²³ Under prior regulations, there had been a loophole apparently exploited by some retailers who sell uncooked foods for SNAP purchase and then offer to heat or cook those foods for customers (for free or for a small fee).²⁴

The final rule does not adopt the proposed rule’s proposal to require that at least 85% of an authorized entity’s total food sales must be for items that are *not cooked or heated onsite before or after purchase*. (In other words, the proposed rule would have required that no more than 15%

²³ Final rule preamble, p. 90861.

²⁴ Proposed rule preamble, p. 8016. In the proposed rule’s preamble, USDA-FNS agency said “nothing in current regulations specifically prohibits items sold for SNAP benefits to be sold cold at the point-of-sale and heated or cooked in the store after purchase.” The agency “[thought] it is important to maintain the intent of Congress’s restriction on hot food purchases.”

of total food sales may be from these foods cooked or heated on-site.) In the final rule's preamble, USDA-FNS expressed particular concern that comments and data subsequently reviewed showed that the 85/15% threshold would make most convenience stores ineligible for SNAP authorization.²⁵

The proposed rule also would have added measures aimed at preventing one business from splitting into two to circumvent these restaurant-related SNAP rules. In the final rule, USDA-FNS clarified that it will consider separate businesses to be one if the co-located businesses share ownership, sale of similar or same food products, and inventory.²⁶

The final rule's hot, prepared foods provisions will take effect for all retailers 120 days after January 17, 2017.

Definition of Staple Foods

The final rule would change the regulatory definition of staple foods in several respects. Ultimately, the final rule did not change multi-ingredient rules, but it did change policy around what foods count as separate varieties.

Multiple Ingredient Foods

Under prior regulation, foods with multiple ingredients were only counted in one staple food category based on the item's main ingredient. For example, as mentioned above, the box of macaroni and cheese would be counted as "bread or cereal" for retailer authorization purposes.

In the final rule, USDA-FNS maintained this multiple ingredient policy, taking into account many related comments on the proposed rule.²⁷ The final rule rejected the proposed rule's policy that commercially processed foods and prepared mixtures would not have been counted in any staple food category for retailer authorization.²⁸ For example, inventory of TV dinners, macaroni and cheese, and canned soups would not have counted toward a store's inventory (or sales) requirements for authorization. (Such foods would have remained eligible for SNAP purchase.)

Accessory Foods

Under prior regulation, accessory foods were not counted as staple foods. This is maintained and expanded in the final rule.

Prior regulations defined "accessory foods" as the specific foods listed in the statute: "coffee, tea, cocoa, carbonated and un-carbonated drinks, candy, condiments, and spices."²⁹

The final rule expands this regulatory definition, but in a way that is more narrowly tailored than the proposed rule's approach.³⁰ The final rule expands the list of accessory food items as follows:

²⁵ Final rule preamble, p. 90683.

²⁶ Final rule preamble, p. 90684.

²⁷ Final rule preamble, p. 90678.

²⁸ USDA-FNS had argued that the prior regulations' policy could be confusing and required close examination of product labels. In the proposed rule preamble, the agency mentioned that one company's frozen chicken pot pie may have the main ingredient of chicken, while another company's may have the main ingredient of bread.

²⁹ Section 3(q)(2) of the Food and Nutrition Act of 2008, codified at 7 U.S.C. 2012(q)(2).

³⁰ The proposed rule would have expanded the list of accessory food items to include "foods that are generally consumed between meals and/or are generally considered snacks or desserts ... such as ... chips, dips ... cupcakes ... (continued...)"

Accessory food items include foods that are generally considered snacks or desserts such as, but not limited to, chips, ice cream, crackers, cupcakes, cookies, popcorn, pastries, and candy, and food items that complement or supplement meals such as, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, condiments, spices, salt, and sugar.³¹

The final rule also establishes that “[i]tems shall not be classified as accessory food exclusively based on packaging size,” and “[a] food product containing an accessory food item as its main ingredient shall be considered an accessory food item.”³²

Varieties

Criterion A authorization is based, in part, on a retailer’s stocking a certain number of varieties in each staple food category. The 2014 farm bill requires an increase in varieties offered (implementation discussed in “Inventory and Depth of Stock”). The final rule includes increased flexibility to help stock the required number of varieties. In particular, the regulations are amended to count plant-based sources as varieties for the “meat, poultry, or fish” and “dairy products” staple food groups.³³ For instance, nuts, seeds, and beans can now be varieties of “meat, poultry, and fish.” In addition, the final rule’s preamble, as guidance, includes a list of examples of varieties in each staple food category.³⁴

Inventory and Depth of Stock³⁵

The final rule codifies the 2014 farm bill’s mandatory changes for retailers applying for authorization under criterion A (inventory-based) by

- increasing the required minimum variety of foods in each staple food category from three to seven varieties, and
- increasing the perishable foods requirement from two staple food categories to three staple food categories.

The final rule also adds specifications on the depth of stock; that is, how many of each item are for sale. Under prior regulations, a retailer could be authorized with a minimum stock of at least 12 food items (one item each of three varieties in each of the four categories, including perishable requirements); proposed and final rules sought to change that.

The final rule would not only implement the farm bill’s staple food changes to 28 varieties (seven varieties in each of the four categories, including perishable requirements), but it would add a numeric depth of stock requirement of three stocking units per variety.³⁶ Under this requirement,

(...continued)

candy, or food items that complement or supplement meals, such as ... coffee, tea, carbonated and uncarbonated drinks.” USDA-FNS stated that “counting such foods as accessory items will ultimately encourage stores to offer more nutritious options and provide SNAP recipients access to a larger selection of healthy foods.” Proposed rule preamble, pp. 8017-8018.

³¹ Final rule preamble, p. 90680.

³² Ibid. The final rule preamble discusses that this change prevents potato chips from being counted as a staple food in the fruits and vegetables category.

³³ See final rule preamble, pp. 90689-90691.

³⁴ Final rule preamble, pp. 90692-90694.

³⁵ Proposed rule, p. 8018. This section also refers to Clarification of Proposed Rule, 19500-19502.

³⁶ In its April 5, 2016, clarification, USDA-FNS indicates that the stocking unit is the unit of household purchase; for (continued...)

a store is required to keep in stock a minimum of 84 staple food items. In the final rule, USDA-FNS halved the proposed rule’s depth of stock policy, which would have required six-item depth of stock, requiring a minimum of 168 items. The final rule also added some language to specify that documentation may be provided in cases where it is not clear that the sufficient stocking requirement has been met.

Table 3 summarizes the inventory requirements for criterion A retailers under prior, proposed, and final regulations.

Table 3. Inventory Requirements for SNAP-Authorized Retailers
Under Criterion A

	Prior Regulations	Proposed Rule	Final Rule
Staple food categories	4	4	4
Varieties in each category	3	7	7
Minimum number of categories that must include perishable foods	2	3	3
Depth of stock for each variety	1 item of each qualifying variety	6 items of each qualifying variety	3 items of each qualifying variety
Minimum stocking total (considering staple food categories, varieties, and depth of stock)	12 items	168 items	84 items

Source: Prepared by CRS, based on unamended 7 C.F.R. 278.1, the proposed rule, clarification of proposed rule, and final rule.

Access-Related Exceptions to the Rules

Prior to the 2014 farm bill, a community’s access to a SNAP-authorized retailer was not a consideration in granting or denying a retailer’s application for authorization. Implementing the 2014 farm bill language, the proposed rule, as described in its preamble, would have allowed USDA-FNS to consider need for access “when a retailer does not meet all of the requirements for SNAP authorization.” USDA-FNS proposed a list of factors that they may consider in making this access determination.³⁷

The final rule implements the access-related exceptions with some additional details. It includes a more inclusive list of factors to be considered: “access factors such as, but not limited to, the distance from the applicant firm to the nearest currently SNAP authorized firm and transportation options ... FNS will also consider factors such as, but not limited to, the extent of the applicant firm’s stocking deficiencies in meeting Criterion A and Criterion B and whether the store furthers the purposes of the Program.” The final rule also clarifies that FNS’s considerations will occur during the application process.³⁸

(...continued)

example, one can of tuna, one banana, or one jar of applesauce is a stocking unit. Clarification of Proposed Rule, 19500-19502, April 5, 2016.

³⁷ Proposed rule, p. 8018.

³⁸ Final rule, p. 90699.

Public Disclosure of Retailer Information

The final rule allows USDA-FNS to disclose to the public specific information about retailers that have been disqualified or otherwise sanctioned for SNAP violations. The agency argued, in the proposed rule, that this information would assist in the agency's efforts "to combat SNAP fraud by providing an additional deterrent" and would "provide the public with valuable information about the integrity of these businesses and individuals for future dealings."³⁹ The final rule clarifies that disclosure of these sanctions will only be for the duration of the sanction.

This policy will take effect on January 17, 2017.

³⁹ Proposed rule, p. 8018.

Table 4. Revision of SNAP Retailer Standards At-a-Glance
Comparison of Prior SNAP Regulations with USDA-FNS's Proposed and Final Rules

Topic	Prior SNAP Retailer Standards Regulations ^a	USDA-FNS Proposed Rule on Retailer Standards ^b	USDA-FNS Final Rule on Retailer Standards ^c
Sales of hot, prepared foods (not paid for with SNAP benefits)	Applicant retailers with 50% or greater of sales in hot or cold prepared foods are ineligible to be SNAP authorized (with the exception of the restaurant option operating in some states to serve elderly, disabled, and homeless individuals).	In addition, to be SNAP-authorized, a retailer must have 85% (or more) of its sales in foods that are not cooked or heated on-site (before or after purchase). In other words, a retailer must not have more than 15% of its sales in these foods (with the exception of the restaurant option operating in some states to serve elderly, disabled, and homeless individuals).	Same as prior regulations, but now retailers cannot have 50% or greater of sales in hot or cold prepared foods and foods cooked or heated on-site by the retailer before or after purchase.
Multi-ingredient foods' categorization as staple foods	Counted in the staple food category based on the main ingredient.	Would not be counted as a staple food.	Same as prior regulations.
Accessory foods' categorization as staple foods	A short list of accessory foods are not counted as staple foods.	A longer list of foods would be considered accessory foods, not counted as staple foods.	Similar to proposed rule.
Defining a variety	Varieties are different types of foods within each staple food category (examples listed in regulation), different brands, nutrient values, packaging sizes do not constitute a different variety.	Similar to prior regulations.	Changes examples listed to provide increased flexibility in certain staple food categories.
Requirements for stocking varieties for criterion A applications (see also Table 3 above)	3 varieties in each of the 4 staple food categories. Including perishable items in 2 of the 4 staple food categories. A total of 12 staple food items required.	7 varieties in each of the 4 staple food categories. Including perishable items in 3 of the 4 staple food categories. Depth of stock requirement of 6 items, for a total of 168 staple food items required.	Same as proposed rule, but depth of stock requirement of 3 items, for a total of 84 staple food items required.
USDA-FNS consideration of community's need for access	Not explicitly in retailer regulation.	FNS would consider "whether the applicant is located in an area with significantly limited access to food."	Similar to proposed rule.
Public disclosure of disqualified or sanctioned retailers' information	Not explicitly in regulation.	Would allow FNS to disclose this information to public.	Similar to proposed rule.

Source: Summary prepared by CRS, using regulations and *Federal Register* publications listed.

a. Based on 7 C.F.R. 278.1.

- b. Based on USDA Food and Nutrition Service, “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP),” 81 *Federal Register* 8015-8021, February 17, 2016; and “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP) Clarification of Proposed Rule and Extension of Comment Period,” 81 *Federal Register* 19500-19502, April 5, 2016.
- c. Based on USDA Food and Nutrition Service, “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP),” 81 *Federal Register* 90675-90699, December 15, 2016.

Overview of Final Rule’s Regulatory Impact Analysis⁴⁰

As with the proposed rule, within the final rule’s preamble, USDA-FNS included a summary of its Regulatory Impact Analysis (RIA).⁴¹ The RIA included qualitative benefits of the final rule such as improving SNAP recipients’ access to a variety of healthy food options and authorizing retailers in a way that is consistent with the purposes of SNAP. The analysis estimated that the total cost to the federal government for the agency’s increased store inspections would be approximately \$3.7 million in FY2018 and \$15 million over five years.

Under the agency’s Regulatory Flexibility Act (RFA) analysis, also referenced in the RIA, USDA-FNS focused on the impacts for small businesses.⁴² As discussed in the **Appendix**, and as USDA-FNS acknowledges in the final rule’s preamble, some of the opposition to the proposed rule criticized the agency’s analysis, arguing that the analysis had underestimated the financial impact on small retailers. The final rule’s RIA and RFA analysis reflect a revised methodology (that now includes opportunity costs and administrative costs) and the final rule’s differing policy.

The analysis estimated that the inventory changes in the final rule would impact approximately 187,000 *smaller* retailers (this is 70% of *all* SNAP-authorized retailers in July 2016).⁴³ Based on a sample of small SNAP retailers’ inventory checklists, USDA-FNS estimated an average cost per retailer of \$245 in the first year and about \$620 over five years.⁴⁴ The analysis estimated that over 87% of the currently participating small retailers would not meet the increased variety requirements, but that most would meet the new perishable requirements.⁴⁵

See the **Appendix** for an overview of the proposed rule’s RIA and RFA analysis.

Conclusion

The effective dates for the updated SNAP retailer standards occur during the 115th Congress. USDA-FNS will be administering the new standards for retailers at a time of presidential and policy-official transition. New SNAP retailers will be applying for authorization under the new rules, and existing authorized retailers may be revising their inventory to meet the new rules. The

⁴⁰ This section draws from final rule preamble, pp. 90696-90697.

⁴¹ The final rule’s full RIA is available at <https://www.regulations.gov/document?D=FNS-2016-0018-1267> (Hereinafter cited as “Final full RIA”).

⁴² The Regulatory Flexibility Act (5 U.S.C. §§601-612) requires agencies to estimate economic and other effects of rules on “small entities,” including small businesses. See CRS Report RL34355, *The Regulatory Flexibility Act: Implementation Issues and Proposed Reforms*, coordinated by Maeve P. Carey.

⁴³ These retailers are those categorized as combination stores, convenience stores, or small grocery stores. Final full RIA, pp. 4, 8 (Final full RFA available at <https://www.regulations.gov/document?D=FNS-2016-0018-1266>.)

⁴⁴ Final full RIA, p. 2.

⁴⁵ Final full RFA, p. 3.

perceived benefits and costs in implementing the updated standards may impact subsequent rulemaking. Also, because much of the updated standards originate from a 2014 change in authorizing law, Congress may have interest in changing the law again, and related issues may come up in the formulation of the next farm bill.

Appendix. Analysis of and Response to the February 2016 Proposed Rule

More details on the proposed rule and stakeholders' response are included in this Appendix.

Overview of USDA-FNS's Regulatory Impact Analysis for the Proposed Rule⁴⁶

Within the proposed rule, USDA-FNS included a summary of its Regulatory Impact Analysis (RIA).⁴⁷ The RIA included qualitative benefits of the proposed rule such as improving SNAP recipients' access to a variety of healthy food options and authorizing retailers that are consistent with the purposes of SNAP. The analysis quantified minor costs to the federal government, finding that existing administrative funds would be used to enforce the proposed rule but that there may be an initial increase in requests for administrative reviews (a retailer-initiated appeals process), increasing costs by less than \$150,000.

Under the agency's Regulatory Flexibility Act analysis, USDA-FNS quantified the costs for smaller retailers.⁴⁸ USDA-FNS estimated costs to those establishments that are minimally stocked and to those that are primarily restaurants. Based on a sample of small SNAP retailers' inventory checklists, USDA-FNS estimated an average cost per retailer of \$140 to meet the new requirements. The sample-based estimates found that nearly 89% of the currently participating small retailers would not meet the increased variety requirements but that just over 1% would not meet the increased perishable requirements.⁴⁹ The USDA-FNS analysis found that the rule would impact nearly 195,000 small businesses.

Responses to the Proposed Rule

This section provides an overview of reactions to the proposed rule. The rule received formal comments from a wide range of stakeholders. There was also a range of 114th Congress activity around the rule, including related provisions in committee-reported FY2017 appropriations bills.

Regulatory Comments from a Wide Range of Stakeholders

The proposed rule's comment period closed on May 18, 2016. The docket for the rule shows the agency has received over 1,260 submissions/comments.⁵⁰ Comments were submitted by anti-hunger advocacy groups, food suppliers, other retailer organizations, local governments, and

⁴⁶ This section draws on the proposed rule, pp. 8018-8020. For background on the analysis required in federal rulemaking, see CRS Report R41974, *Cost-Benefit and Other Analysis Requirements in the Rulemaking Process*, coordinated by Maeve P. Carey.

⁴⁷ The summary included in the proposed rule is available at USDA Food and Nutrition Service, "Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)," 81 *Federal Register* 8018-8021, February 17, 2016. The full RIA is available at <https://www.regulations.gov/document?D=FNS-2016-0018-0006> (Hereinafter cited as "Full RIA").

⁴⁸ The Regulatory Flexibility Act (5 U.S.C. §§601-612) requires agencies to estimate economic and other effects of rules on "small entities," including small businesses. See CRS Report RL34355, *The Regulatory Flexibility Act: Implementation Issues and Proposed Reforms*, coordinated by Maeve P. Carey.

⁴⁹ Full RIA, p. 3.

⁵⁰ Available at <https://www.regulations.gov/docket?D=FNS-2016-0018>.

many other organizations and private individuals (many of whom are operators of small stores). This section discusses some of the comments submitted; CRS has not reviewed all comments.

Those critical of the proposed rule included, in particular, the National Association of Convenience Stores (NACS), whose members would be affected by it. NACS submitted 67 pages of comments and encouraged its members to respond.⁵¹ In addition to concerns with implementation of most aspects of the proposed rule, the organization commissioned an alternative analysis of the impact and argues that the USDA-FNS regulatory analysis underestimates costs.⁵² The association argues, in its comments and related documents, for USDA-FNS to withdraw the proposed rule. In response to requests from convenience store operators and their food suppliers, the U.S. Small Business Administration's Office of Advocacy also submitted comments critical of the proposed rule, though it did not request a withdrawal of the rule.⁵³

Stakeholders from the public health community voiced qualified support for the rule. As an example, the American Public Health Association (APHA) supported the rule but cautioned against unintended access-related consequences.⁵⁴ APHA cautioned that improving stocking standards alone was not enough to improve healthy eating.⁵⁵

Related Congressional Activity, Including FY2017 Appropriations Bills

Prior to the close of the comment period and in actions subsequent to it, some Members of Congress expressed their concerns, and those of other stakeholders, with the proposed rule.

The House Committee on Agriculture's leadership, Chairman Conaway and Ranking Member Peterson, submitted a bipartisan letter to USDA with 161 House Member signatures.⁵⁶ Among other concerns, the letter argued that "the proposed rule ... contained several provisions that went beyond Congressional intent and what was set forth in the statutory language [of the 2014 farm bill]." A letter to USDA was also submitted by the Congressional Black Caucus, emphasizing access related concerns in "food desert" communities.⁵⁷ The Senate Committee on Agriculture, Nutrition, and Forestry's leadership, Chairman Roberts and Ranking Member Stabenow, sent to the USDA Secretary a bipartisan letter signed by 47 Senators; this letter emphasizes concerns with access and that in the 2014 farm bill "Congress specifically acknowledged the importance of

⁵¹ Submission includes 40 pages containing a critique of the agency's regulatory impact analysis and an alternative analysis. A press release on the submission and comments submitted are available at the NACS website, <http://www.nacsonline.com/Media/Daily/Pages/ND0519165.aspx#.V6kQ7FJ0fCQ>.

⁵² See pp. 16-17 of the NACS comments for its cost estimates and related arguments.

⁵³ Comments available at <https://www.sba.gov/advocacy/5-17-2016-enhancing-retailer-standards-supplemental-nutrition-assistance-program-snap>.

⁵⁴ Comments available at https://www.apha.org/~media/files/pdf/advocacy/testimonyandcomments/160518_apha_snapretail.ashx.

⁵⁵ Citing related work from the Robert Wood Johnson Foundation, concerning the value of improving stocking requirements but also the value in supporting those requirements with marketing other strategies. Robert Wood Johnson Foundation, Healthy Eating Research, *Minimum Stocking Levels and Marketing Strategies of Healthful Foods for Small Retail Stores*, Princeton, NJ, 2016, <http://healthyeatingresearch.org/research/minimum-stocking-levels/>.

⁵⁶ House Committee on Agriculture, "House Agriculture Committee Leaders Raise Concerns over FNS Retailer Proposed Rule," press release, May 17, 2016, <http://agriculture.house.gov/news/documentsingle.aspx?DocumentID=3358>.

⁵⁷ Helena Bottemiller Evich and Ian Kullgren, "Congressional Black Caucus asks USDA to scrap SNAP stocking rule," *Politico*, May 16, 2016, <http://www.politico.com/tipsheets/morning-agriculture/2016/05/congressional-black-caucus-asks-usda-to-scrap-snap-stocking-rule-epa-launches-billboard-probe-this-week-ag-approps-214311>.

preserving food access and deliberately chose not to make modifications related to percentages of sales of hot foods.”⁵⁸

The proposed rule also came up during multiple congressional hearings in the 114th Congress. Undersecretary Kevin Concannon was asked about it during hearings on the USDA-FNS FY2017 budget; in one House hearing, he responded by discussing concerns with current retailers skirting the hot foods prohibition, an interest in improving participants’ access to healthy foods, and reasons to ask small stores to offer more than they currently do.⁵⁹ Ultimately, both the House- and the Senate-reported FY2017 Agriculture and Related Agencies appropriations bills included language that would have limited USDA’s discretion in setting retailer standards. The House-reported bill (H.R. 5054, Section 763) and the Senate-reported bill (S. 2956, Section 752) would have limited the scope of an interim final or final rule to the 2014 farm bill’s specific changes, though each bill’s exact language varies.

Among other SNAP retailer and integrity topics, the proposed rule was discussed during much of a May 11, 2016, House Committee on Agriculture SNAP hearing⁶⁰ and, in questions from the chairman, during a June 9, 2016, House Committee on Oversight hearing.⁶¹

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⁵⁸ Senate Committee on Agriculture, Nutrition, and Forestry, “Bipartisan Senators Urge USDA to Revise SNAP Rule,” press release, August 2, 2016, <http://www.agriculture.senate.gov/newsroom/rep/press/release/bipartisan-senators-urge-usda-to-revise-snap-rule>.

⁵⁹ “House Appropriations Subcommittee on Agriculture, Rural Development, Food and Drug Administration Holds Hearing on President Obama’s Fiscal 2017 Budget Proposal for USDA Food and Nutrition Service,” *CQ* (Congressional Transcripts), February 24, 2016, <http://www.cq.com/doc/congressionaltranscripts-4843447?0&search=4Qq2c1q4>.

⁶⁰ U.S. Congress, House Committee on Agriculture, *The Past, Present, and Future of SNAP: The Retailer Perspective*, 114th Cong., 2nd sess., May 12, 2016, <http://agriculture.house.gov/calendar/eventsingle.aspx?EventID=3334>.

⁶¹ U.S. Congress, House Committee on Oversight and Government Reform, Subcommittee on the Interior, *SNAP: Examining Efforts to Combat Fraud and Improve Program Integrity*, 114th Cong., 2nd sess., June 9, 2016, <https://oversight.house.gov/hearing/snap-examining-efforts-to-combat-fraud-and-improve-program-integrity/>.