

PROPOSED RULE
SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM:
FARM BILL OF 2008 RETAILER SANCTIONS

Note: Food, Nutrition, and Consumer Services Under Secretary Kevin Concannon signed the following document on July 10, 2012, and the agency has submitted it for publication in the *Federal Register* (FR).

While we have taken steps to ensure the accuracy of this version of the document, it is not the official version. Please refer to the official version in a forthcoming FR publication, which will appear at www.federalregister.gov and on www.regulations.gov.

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Billing Code: 3410-30-P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 278 and 279

RIN 0584-AD88

Supplemental Nutrition Assistance Program: Farm Bill of 2008 Retailer Sanctions

AGENCY: Food and Nutrition Service (FNS), USDA

ACTION: Proposed rule.

SUMMARY: The Department is proposing changes to the Supplemental Nutrition Assistance Program (SNAP) (formerly the Food Stamp Program) retailer sanction regulations in accordance with amendments made to Sections 7, 9, and 12 of the Food and Nutrition Act of 2008 (“the Act”) by the Food, Conservation, and Energy Act of 2008, Pub. L. 110-246 (“the 2008 Farm Bill”). The proposal would update SNAP retailer sanction regulations to include authority granted in the 2008 Farm Bill to allow FNS to impose a civil penalty in addition to disqualification, raise the allowable penalties per violation, and provide greater flexibility to USDA for minor violations.

DATES: Comments must be received on or before [insert 60 days from date of publication in the Federal Register] to be assured of consideration.

ADDRESSES: The Food and Nutrition Service, USDA, invites interested persons to submit comments on this proposed rule. Comments may be submitted by one of the following methods:

- **Federal e-Rulemaking Portal:** Go to <http://www.regulations.gov>. Preferred method; follow the on-line instructions for submitting comments on docket [insert docket number].

- Mail: Comments should be addressed to Andrea Gold, Director, Benefit Redemption Division, Rm. 426, 3101 Park Center Drive, Alexandria, Virginia 22302.

All comments submitted in response to this proposed rule will be included in the record and will be made available to the public. Please be advised that the substance of the comments and the identity of the individuals or entities submitting the comments will be subject to public disclosure. Food and Nutrition Service (FNS) will make the comments publicly available on the Internet via <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Andrea Gold, Director, Benefit Redemption Division, Rm. 426, 3101 Park Center Drive, Alexandria, Virginia 22302, 703-305-2434.

SUPPLEMENTARY INFORMATION:

Executive Summary

I. Purpose of the Regulatory Action:

The purpose of this rule is to implement the greater flexibility provided by the 2008 Farm Bill in assessing SNAP sanctions against retail food stores and wholesale food concerns found in violation of program rules by imposing a civil penalty in addition to disqualification, raising the allowable penalties per violation, and providing greater flexibility to USDA for minor violations. This rule is necessary in order to improve the integrity of the program, deter participating retailers from committing program violations to ensure voluntary compliance, and adjust civil penalties to better reflect the value of redemptions. The legal authority for this proposed rule is addressed by Sections 7, 9 and 12 of the Act, as amended by sections 4115 and 4132 of the 2008 Farm Bill.

II. Summary of the Major Provisions:

Trafficking Civil Penalty and Trafficking Civil Money Penalty. Trafficking is the exchange of SNAP benefits for cash and is the most serious violation of program rules and firms can be permanently disqualified from participating in SNAP for such violations. It significantly undermines the integrity of the program and diverts funds from their intended use. Section 12 of the Act provides FNS greater flexibility in assessing sanctions against retailers that traffic benefits by adding a new trafficking civil penalty in addition to permanent disqualification. This sanction is designed to recoup the government provided funds diverted from their intended use by basing the amount of the civil penalty on a retail food store's SNAP redemptions. Current regulations allow trafficking civil money penalties in lieu of permanent disqualification; not in addition to the disqualification. The change ensures more equitable treatment in the way civil penalties will be assessed while increasing the deterrent effect against large scale fraud that may result in significant administrative penalties beyond existing criminal penalties.

Sale of Common Ineligibles. The sale of common ineligibles, such as paper products and cooking supplies, is the least egregious violation against SNAP and firms can be assessed a disqualification from 6 months to 10 years for such violations. Analysis by FNS indicates that many firms assessed a 6-month disqualification for the sale of ineligibles frequently go out of business because they are located in areas with higher concentration of SNAP recipients. This rule proposes to apply disqualifications only to repeat offenders or more severe violators; first time offenders selling only common ineligibles would be assessed a newly established civil penalty of \$1,000 per violation in lieu of being disqualified. This would allow owners to take corrective actions to prevent such violations in the future.

Civil Money Penalties: Hardship, Transfer of Ownership, Trafficking in Lieu of Permanent Disqualification. Pursuant to Section 12 of the Act, this rule proposes to assess civil money penalties of up to \$100,000 per violation for hardship or transfer of ownership. The civil money penalty for a trafficking in lieu of permanent disqualification will continue to be capped at an overall limit of \$59,000 per investigation. The rule also proposes to allow retailers an additional 15 days to obtain and submit a collateral bond, which is currently required when civil money penalties are imposed. Increasing the time from 15 days to 30 days is in response to concerns from the retailer community that it has become more difficult to find financial institutions offering these services at competitive prices.

Fines for Transactions Conducted without the Presence of an EBT Card. This rule also proposes a new fine involving EBT transactions. If the point-of-sale (POS) device that reads the magnetic stripe of the EBT card cannot read the card, the alternative methods to complete the transaction involve manual key entry of the EBT card number or the use of a voucher. In all EBT transactions the card must be present. FNS receives complaints from SNAP recipients who have had their benefits stolen by firms who conducted transactions without the EBT card being present, and there is no rule that allows FNS to take action against these firms. This provision allows FNS to assess fines against firms that engage in this activity.

III. Costs and Benefits

USDA estimates total sanctions to be assessed from this rule to be approximately \$175 million per year. These provisions are expected to affect a very few, mostly small, retailers, in each of the next 5 years. Most of the provisions will result in larger or additional penalties for firms who commit program violations.

The proposed rule is expected improve program integrity by increasing sanctions and civil penalties on the small number of authorized firms that commit program violations. The vast majority of retailers – those that abide by the rules – will be unaffected by the proposed changes. The purposes of increased sanctions on the few authorized firms that willingly violate program rules will be to provide additional deterrence to strengthen program integrity and increase public confidence in stewardship of program administration.

Summary of Federal Costs and Benefits Per Year

	Costs (in millions of dollars)	Number of Affected Retailers	Benefits
Implementation Costs	\$0.176 (First year only)	0	
Denials and Withdrawals	\$0	0	Improve program integrity
Trafficking Civil Penalty ¹	(\$174)	1,211	Improve program integrity
Sale of Common Ineligibles ¹	(\$1.034)	292	Improve program integrity; Reduce number of retailers facing 6-month disqualification
New Maximum Limits on Civil Money Penalties ¹	(\$0.256)	100	Improve program integrity
Fines for Transactions Without EBT Cards	*	1-3	Improve program integrity
Total Cost	(\$175.1)		

¹The majority of penalties are turned over to Treasury and never collected.

Executive Order 12866 and Executive Order 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

This proposed rule has been designated economically significant. Accordingly, the rule has been reviewed by the Office of Management and Budget. A summary of the regulatory impact analysis is included below. The full analysis is available through www.regulations.gov in the docket for this rule (RIN 0584-AD88).

Regulatory Impact Analysis Summary

Need for Action

The proposed rule is needed to implement expanded authority and flexibility for FNS to assess SNAP retailer penalties as provided in the 2008 Farm Bill.

Benefits

Implementing Farm Bill sanctions and updating regulatory language will strengthen deterrence of violations among retailers, help clarify program requirements and improve program integrity.

Costs

FNS estimates that the cost impact of this proposed rule is minimal. The primary costs anticipated are those FNS will bear in relation to updating systems, training materials and letters to reflect the new regulations; as well as informing participating stores of the changes. The costs are expected to be minimal as the changes may be incorporated into planned, regularly scheduled maintenance updates and mailings that already exist to inform participating stores of relevant program changes.

One provision in this rulemaking will also impact some third party providers that contract with retail food stores or wholesale food concerns who wish to purchase point-of-sale (POS) equipment for their stores to support multiple forms of payment beyond just SNAP electronic benefit transfer (EBT) cards. While the provision does not add any new rules that do not exist today, providing only an enforcement mechanism to ensure that third party providers follow those existing requirements, there will be some cost impact on the providers who have failed to comply with these rules to date. The vast majority of third party POS equipment providers, however, already meet existing requirements as specified in part 7 CFR 274. Therefore, FNS does not anticipate that this provision will have a significant cost impact.

The rule will have no cost impact on retail food stores or wholesale food concerns, as the rule only implements greater authority and flexibility provided by the Act, but does not change what constitutes a violation. Those firms must continue to follow the same program rules as are in place today to prevent any violations.

Accounting Statement

	Primary Estimate	Year Dollar	Discount Rate	Period Covered
Benefits				

Qualitative: The proposed changes to the retailer sanction regulations will improve program integrity by increasing the deterrent effect of sanctions on the small number of authorized firms that commit program violations.				
Costs				
Annualized Monetized (\$millions/year)		2013	7%	FY2013-2017
		2013	3%	
Transfers				
Annualized Monetized (\$millions/year)	\$175	2013	7%	FY2013-2017
	\$175	2013	3%	
From Authorized Firms to the Federal Government.				

Regulatory Flexibility Act

This rule proposes changes to SNAP by issuing regulations in accordance with amendments made to Sections 7, 9 and 12 of the Act. The proposal would codify provisions to provide FNS greater flexibility to assess a disqualification, civil penalty, or both; revise the caps currently in place on civil money penalties to reflect the new limits provided by the Act; and remove penalties that pertain to the issuance and redemption of paper coupons that are no longer relevant. Each year, FNS assesses a sanction, either a disqualification or a civil money penalty, against less than 1% of the participating stores. Of those impacted roughly half commit trafficking violations and will face stiffer sanctions as a result of this proposed rule. A portion of the remaining retail food stores who are disqualified for 6 months under the current rules due to the sale of common ineligibles would now receive a civil penalty instead of a disqualification. Because disqualifications of any duration increase the risk a business may be forced to close, substituting a civil penalty could potentially allow the sanctioned business to continue to operate.

The Regulatory Flexibility Act (5 U.S.C. 601-612) requires Agencies to analyze the impact of rulemaking on small entities and consider alternatives that would minimize any significant impacts on a substantial number of small entities. Pursuant to that review and based on the limited population of retail food stores impacted, this rule is certified not to have a significant impact on a substantial number of small entities.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments, and the private sector. Under Section 202 of the UMRA, the Department generally must prepare a written statement, including a cost/benefit analysis, for proposed and final rules with Federal mandates that may result in expenditures to State, local, or tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule.

This rule does not contain Federal mandates (under the regulatory provisions of Title II of the UMRA) that impose costs on State, local, or tribal governments or to the private sector of \$100 million or more in any one year. This rule is, therefore, not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12372

SNAP is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the Final Rule codified in 7 CFR part 3015, Subpart V and related Notice (48 FR 29115), this Program is excluded from the scope of Executive Order 12372, which requires intergovernmental consultation with state and local officials.

Executive Order 13132

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under section (6)(b)(2)(B) of Executive Order 13132. FNS has considered the impact of this rule on State and local governments and has determined that this rule does not have federalism implications. This rule does not impose substantial or direct compliance costs on State and local governments. Therefore, under Section 6(b) of the Executive Order, a federalism summary impact statement is not required.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full implementation. This rule is not intended to have retroactive effect unless specified in the DATES section of the final rule. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted.

Executive Order 13175 - Consultation and Coordination With Indian Tribal Governments

E.O. 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. In late 2010 and early 2011, USDA engaged in a series of consultative sessions to obtain input by Tribal officials or their designees concerning the impact of this rule on the tribe or Indian Tribal governments. The Joint Consultation sessions were coordinated by USDA's Office of Tribal Relations and held on the following dates and locations:

1. Rapid City, SD – October 28-29, 2010
2. Oklahoma City, OK – November 3-4, 2010
3. Minneapolis, MN – November 8-9, 2010
4. Seattle, WA – November 22-23, 2010
5. Nashville, TN – November 29-30, 2010
6. Albuquerque, NM – December 1-2, 2010
7. Anchorage, AK – January 10-11, 2011

There were no comments about this regulation during any of the aforementioned Tribal Consultation sessions.

Reports from these consultations are part of the USDA annual reporting on Tribal consultation and collaboration. FNS will respond in a timely and meaningful manner to Tribal government requests for consultation concerning this rule. Currently, FNS provides regularly

scheduled quarterly consultation sessions through the end of FY2012 as a venue for collaborative conversations with Tribal officials or their designees.

Civil Rights Impact Analysis

FNS has reviewed this rule in accordance with Departmental Regulations 4300-4, “Civil Rights Impact Analysis,” and 1512-1, “Regulatory Decision Making Requirements.” This rule is not intended to have a differential impact on minority owned or operated business establishments, and woman owned or operated business establishments that participate in SNAP. FNS does not collect or maintain any data on the nationality, ethnicity, or gender of owners of participating retail food stores. Therefore, those factors have no impact on how the Agency identifies fraud or implements sanctions against firms found violating program rules.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR 1320) requires the Office of Management and Budget (OMB) approve all collections of information by a Federal agency before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number. This rule does not contain information collection requirements subject to approval by OMB under the Paperwork Reduction Act of 1995.

E-Government Act Compliance

The Food and Nutrition Service is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Background

This rulemaking proposes to implement the greater flexibility provided by the 2008 Farm Bill section 4132 in assessing sanctions and civil penalties against retail and wholesale food concerns that violate program rules . Furthermore, in accordance with Section 4115 (Issuance and Use of Program Benefits) of the 2008 Farm Bill, this rulemaking proposes to update 7 CFR parts 278 and 279 to reflect the Program's issuance of benefits through EBT systems. FNS recognizes that this proposed rule amends a few but not all of the references to coupon(s) and food stamp(s) in part 278 to reflect the Act's de-obligation of coupons. FNS plans to address this technical discrepancy in future rulemaking.

7 CFR Part 278 – Participation of Retail Food Stores

The general provisions addressed in part 278 are required by Sections 9 and 12 of the Act, as amended by the 2008 Farm Bill. The discussion below and the subsequent regulatory language for this part provide additional details to address operational processes and clarify current policy to align the regulations with authority provided in the Act.

Denial and Withdrawals

The current regulations governing retail food store and wholesale food concern participation in SNAP stipulates that FNS shall deny new applicants or withdraw participating firms that fail

to pay civil money penalties or fines assessed under part 278. In accordance with the Act, FNS proposes to revise the denial and withdrawal language to extend this authority to unpaid portions of the newly introduced civil penalties in addition to those already covered. In addition, the language would be revised to clarify that FNS may deny or withdraw a firm if any member of ownership committed an intentional program violation and was disqualified as a SNAP recipient. This provision is necessary because a person, who violates program rules as a recipient, lacks the necessary business integrity and responsibility expected of a store owner who must train employees and oversee operations to ensure that SNAP EBT transactions are conducted in accordance with Department rules. Allowing a formerly disqualified program recipient the ability to conduct transactions would create an unnecessary risk to the integrity of the program.

In addition, §278.2(b) specifies FNS policy on equal treatment at the food retailer, ensuring that program recipients are treated in the same manner as non-program recipients. This proposed rule introduces a new provision that would allow FNS to deny or withdraw a firm for failing to adhere to §278.2(b) by singling out program recipients for inequitable treatment compared to a firm's other customers. This provision is in response to complaints submitted to FNS of stores that implement policies targeted against SNAP recipients and not applied equally to all customers. An example would be stores that institute a minimum purchase requirement for customers using SNAP as a form of payment, but fail to apply the same requirement on credit, cash, or debit card customers. Retail food stores and wholesale food concerns found out of compliance with this provision would be provided an opportunity to come into compliance prior to being withdrawn.

FNS estimates that half of all participating firms opt to purchase POS equipment from third party providers and do not utilize government provided POS equipment. A small percentage of

those firms have purchased POS equipment from providers that fail to properly adhere to existing requirements for equipment in part 274. Those requirements include informing the recipient as to the transaction and their remaining balance, prohibiting the recipient's personal information from being printed on a receipt to protect their privacy, and providing accurate information to FNS to better help FNS identify and target program fraud. In particular, FNS requires that each POS device is identified by a unique terminal ID and that the unique ID is reported to FNS along with transaction information. Failure to provide unique terminal ID's makes it more difficult for FNS to monitor transaction activity within a firm and may lead to inaccurate assessments that divert FNS resources from taking appropriate actions against stores that violate the Program. This proposed rule would allow FNS to deny or withdraw a firm that opts to purchase or lease POS equipment from a third party provider that fails to comply with part 274, particularly with the requirement to provide unique terminal ID's. There are many third party equipment providers and almost all comply with these requirements; therefore, this change is not expected to result in a significant number of retailer withdrawals. FNS would inform retailers in advance of this requirement so they can use this information to ensure that the provider from whom they elect to purchase equipment meets the requirements. Moreover, retail food stores and wholesale food concerns found out of compliance with this provision would be provided an opportunity to switch providers to avoid being withdrawn.

Trafficking Civil Penalty and Trafficking Civil Money Penalty

Trafficking is the exchange of SNAP benefits for cash and is the most serious violation of program rules. Trafficking represents collusion between a retail food concern and a program recipient. The firm conducts a transaction through the EBT system and provides the recipient

with cash, typically at a discounted rate, that both deprives the recipient of the full value of their benefits intended for eligible food products necessary to help provide the nutritional needs of their household, as well as provides a profit directly to the firm. It significantly undermines the integrity of the program and diverts funds from their intended use. As a result, Congress has been clear in its intent that the administrative penalties for trafficking be severe and has stipulated that such violations result in the permanent disqualification of a firm.

In the Food Stamp Act of 1977, Congress granted FNS the authority to either disqualify a firm for program violations or impose a civil money penalty, but not both. With the Food and Nutrition Act of 2008, Congress removed this constraint, specifically providing USDA greater flexibility in assessing sanctions both for retail food stores and wholesale food concerns with lesser violations as well as for retail food stores and wholesale food concerns that commit the most egregious offenses, such as trafficking. Pursuant to that change, this proposed rule would add a new trafficking civil penalty in addition to the permanent disqualification. With this rule, the Department is proposing a civil penalty that is calculated based on a firm's SNAP redemptions, thereby adjusting to the size and scope of the fraud, much as existing provisions do for civil money penalties, such as those associated with transfer of ownership.

The new proposed trafficking civil penalty is not related to a firm's future participation, but is designed to recoup the government provided funds diverted from their intended use. Thus, this rule would also clarify that, as the trafficking civil penalty and trafficking civil money penalty in lieu of permanent disqualification serve different purposes, they are not mutually exclusive and can both be assessed against a violating retailer. That is, if a firm is granted a trafficking civil money penalty in lieu of permanent disqualification, the firm would still be responsible for paying the trafficking civil penalties assessed pursuant to the violations that had

occurred. The proposed methodology for calculating the trafficking civil penalty is based on a retail food store's redemptions, ensuring that the penalty is reflective of a firm's size and sales volume. The proposed rule, therefore, ensures not only equitable treatment by assessing fines proportional to the violation, but also increases the deterrent effect against large scale fraud that may result in significant administrative penalties beyond existing criminal penalties.

Furthermore, this rule would provide that, if a firm was previously granted a trafficking civil money penalty in lieu of permanent disqualification, and again was found trafficking on a second occasion, the firm would no longer qualify for a trafficking civil money penalty in lieu of disqualification.

Sale of Common Ineligibles

Current regulations at 7 CFR 278.6 outline the penalties assessed against stores found violating the program rules, including those for the sale of common ineligibles. In today's environment, if the violations are too minor to warrant a sanction, FNS sends the store an official warning letter describing what FNS found during its investigation, thus providing the store an opportunity to take corrective action and come into compliance. However, if during an investigation FNS finds that non-trafficking violations are sufficiently extensive or pervasive as to suggest that it is the common practice of a firm, FNS assesses an administrative disqualification that can range from 6 months to 10 years, depending on the seriousness of the violations and whether the retailer has had previous violations. The longer disqualification time periods are reserved for either more egregious violations, such as the sale of alcohol or tobacco products for benefits, or if the firm had been previously sanctioned and has a history of program violations. If FNS establishes that it is common practice for a firm to sell common ineligibles for SNAP benefits, those firms are typically disqualified for six months for the first violation.

In providing greater flexibility for the Department to increase the penalties against trafficking violations, the Act also allows USDA to expand the progressive scale of penalties faced by firms whose violations are less severe. The sale of common ineligibles is the least egregious violation that is issued a sanction by FNS. Common ineligibles typically consist of paper products, cooking supplies, or household products. Research by FNS has indicated that many firms assessed a 6-month disqualification, due to the usual practice of selling common ineligibles, tend to close and/or undergo a change in ownership. This occurs because the firms are typically located in areas that have a higher concentration of SNAP recipients; therefore, even a limited 6-month suspension can result in the firm no longer being economically viable. Consequently, this rule proposes to apply disqualifications only to those repeat offenders or more severe violators; first time offenders that sell only common ineligibles would be assessed a newly established civil penalty and no longer be disqualified.

The proposed civil penalty is \$1,000 per violation and must be paid within 30 calendar days after FNS's final determination. This civil penalty is proposed as a flat fine, instead of being based on redemption volume, to reflect that the sale of common ineligibles for first time offenders is a minor violation, typically the result of negligence or oversight in training on the behalf of management, as opposed to more egregious violations, with the clear intent to defraud the government, that are based on redemption volume. The proposed civil penalty would allow retail food stores to pay the civil penalty, without enduring a disqualification, take corrective action, and re-evaluate their training methodology to ensure that there are no repeat offenses.

Civil Money Penalties: Hardship, Transfer of Ownership, Trafficking in Lieu of Permanent Disqualification

The current regulations reference parts of the Act that had imposed limits on the amount FNS could assess through a civil money penalty, applying caps that were based on individual violations and, in some cases, in a single overall investigation. The maximum limits currently used by FNS are \$11,000 per violation for hardship civil money penalties and transfer of ownership civil money penalties and \$32,000 per violation, with an overall limit of \$59,000 per investigation, for trafficking civil money penalties in lieu of permanent disqualification. In the Act, Congress removed the limitations for hardship civil money penalties and provided new language that allows the Secretary to issue a penalty of up to \$100,000 per violation. This rule revises the caps placed on calculations for hardship and transfer of ownership civil money penalties to bring the regulations in compliance with the Act. The cap for trafficking civil money penalty in lieu of permanent disqualification will remain unchanged.

In addition, the Act removed specific language referencing revised penalties assessed if the removal of a retail food store or wholesale food concern for non-trafficking violations would cause a hardship to SNAP recipients. Nevertheless, pursuant to the flexibility provided to the USDA by Section 12 of the Act, the USDA proposes to retain the qualification criteria for the hardship civil money penalty as it exists in current regulations. Today, upon request by the violating retailer and after FNS assesses whether a retailer qualifies, the hardship civil money penalty is assessed against retail food stores or wholesale food concerns that serve areas with limited food access or provide inventories that are not readily available in a given area, as their removal would cause a hardship to SNAP recipients. Typically, hardship civil money penalties are assessed against retail food stores and wholesale food concerns that sell common ineligibles. As this rule replaces the current 6-month disqualification with a new civil penalty for those situations, FNS estimates that, while hardship civil money penalties are not common today, they

will be even less common going forward. However, as some geographic areas continue to struggle with adequate food access, USDA will be keeping the hardship provision in the regulations to better address unforeseen circumstances that may arise.

Furthermore, when imposing a hardship civil money penalty, current regulations require a retailer to submit a collateral bond within 15 days to be eligible for reinstatement. The proposed rule would extend this time frame to allow retailers up to 30 days to submit a collateral bond. This change is necessary to respond to concerns from the retailer community indicating that it is becoming more difficult to find financial institutions offering these services at a competitive price within the time allotted. The additional time proposed in this rule would allow retailers more time to shop for these services.

Eliminating Fines for the Acceptance of Loose Coupons

This rule would eliminate provisions of part 278 that were enacted to address violations that occurred as a result of how retail food stores and wholesale food concerns accepted and redeemed paper coupons. Section 12(e)(3) of the Act continues to give the Secretary discretion to impose a fine against any retail food store or wholesale food concern that accepts food coupons not accompanied by the corresponding book cover; however, the 2008 Farm Bill de-obligated paper coupons, and such coupons are no longer issued, accepted, or redeemable. As a result, this rule proposes to eliminate a fine for accepting loose coupons at §278.6(1).

Fines for Transactions Conducted without the Presence of an EBT Card

Pursuant to Section 7(h)(2) of the Act, this rule proposes to would impose a fine for conducting a transaction without an EBT card being present. Current rules require that a card be

present at the time of transaction. This new fine would apply to those retailers that conduct transactions without having the card present.

To complete a transaction, a program recipient must present their EBT card, swipe the card through a POS device, and enter their personal identification number (PIN). The PIN identifies the individual as the one responsible for that card and authorizes the transaction. If a POS device is not working, the magnetic stripe of an EBT card is not reading, or if a business does not have ready access to a phone line, the EBT system offers alternative methods for completing the transaction. The typical alternative methods involve manual key entry of the EBT card number or the use of a manual voucher process, the latter of which is more common among delivery routes, farmers' markets, or traditional stores experiencing a system outage. However, the alternative methods do not change the requirement for the recipient and card to be present at the POS. Today, FNS receives complaints that program recipients who have benefits stolen by firms who conduct transactions without the EBT card being present or the knowledge and consent of the recipient. This may be enabled by households providing their card and PIN number to a retail food concern despite training by State Agencies not to ever divulge their PIN. Nevertheless, this is a violation of the regulations and this rule would allow FNS to assess penalties against firms that engage in this activity.

7 CFR Part 279 – Administrative and Judicial Review.

The Department is proposing to update this part to align the regulations with the Act by updating the FNS Administrative Review Branch mailing address and revising references to §278.6(e)(8), which is being moved as part of the changes., and removing some of the references

to coupon claims as the Act de-obligated coupons and prohibits them from being issued, accepted or redeemed.

List of Subjects in

7 CFR Part 278

Approval and participation of retail food stores and wholesale food concerns, participation of financial institutions, disqualification and imposition of civil penalties or fines for retail food stores and wholesale food concerns; and disposition of claims.

7 CFR Part 279

Administrative review, judicial review

For reason set forth in the preamble, 7 CFR parts 278 and 279 are proposed to be amended as follows:

1. The authority citation for 7 CFR parts 278 and 279 continues to read as follows:

Authority: 7 U.S.C. 2011-2036.

PART 278 – PARTICIPATION OF RETAIL FOOD STORES, WHOLESALE FOOD CONCERNS AND INSURED FINANCIAL INSTITUTIONS

2. In §278.1:

- a. Amend paragraph (b)(3)(vi) by removing the period and adding the phrase “, including the commission of intentional program violations while receiving benefits in the Supplemental Nutrition Assistance Program.” at the end.
- b. Revise paragraph (k)(7);
- c. Add paragraph (k)(8);
- d. Add paragraph (k)(9);
- e. Revise paragraph (l)(1)(v);
- f. Remove paragraph (1)(1)(vi) and redesignate paragraph (1)(1)(vii) as paragraph (1)(1)(vi);
- g. Add new paragraphs (1)(1)(vii) and (1)(1)(viii).

The revisions and additions read as follows:

§278.1 Approval of retail food stores and wholesale food concerns.

* * * * *

(k) * * *

(7) The firm has failed to pay any civil penalties assessed under §278.6(e)(1) or (e)(6); pay a transfer of ownership or hardship civil money penalty assessed under §278.6(g); pay any fines assessed under §278.6(m) or §278.6(l); or pay in full any fiscal claim assessed against the firm under §278.7.

(8) The firm has failed to adhere to the equal treatment provisions as specified in §278.2(b).

(9) The firm utilizes any access device that fails to comply with §274.8(b)(6) and (b)(7) or fails to provide unique terminal identification to the EBT system.

* * * * *

(l) * * *

(1) * * *

(v) The firm has failed to pay any civil penalties assessed under §278.6(e)(1) or (e)(6); pay a transfer of ownership or hardship civil money penalty assessed under §278.6(g); pay any fines assessed under §278.6(m) or §278.6(l); or pay in full any fiscal claim assessed against the firm under §278.7; or

(vi) The firm is required under State and/or local law to charge tax on eligible food purchased with benefits or to sequence or allocate purchases of eligible foods made with benefits and cash in a manner inconsistent with §272.1 of these regulations.

(vii) The firm has failed to adhere to the equal treatment provisions as specified in §278.2(b).

(viii) The firm utilizes any access device that fails to comply with §274.8(b)(6) and (7) or fails to provide unique terminal identification to the EBT system.

* * * * *

3. In §278.2, remove paragraphs (c) and (d) and redesignate paragraphs (e) through (l) as paragraphs (c) through (j), respectively.

4. Remove § 278.2(e)(2)

5. Remove and reserve §§278.3 and 278.4.

6. In §278.6:

a. Amend the section heading by adding the words “civil penalties” and removing the words “in lieu of disqualifications”;

b. Revise the heading of paragraph (a);

- c. Revise the first sentence of paragraph (a);
- d. Amend paragraph (b)(1) by removing the words “disqualification or imposition of a civil money penalty” wherever they appear and add in its place the words “disqualification or imposition of a civil penalty or civil money penalty” and by removing the words “The firm shall make its response, if any, to the officer in charge of the FNS field office which has responsibility for the project area in which the firm is located” in the seventh sentence and adding in its place the words “The firm shall make its response to FNS.”
- e. Revise the first sentence of paragraph (b)(2)(i);
- f. Revise the first and second sentences of paragraph (c);
- g. Amend paragraph (d) by removing the word “regional” in the first sentence;
- h. Revise paragraph (e)(1);
- i. Redesignate paragraph (e)(4)(ii) as paragraph (e)(4)(iii) and add a new paragraph (e)(4)(ii);
- j. Amend paragraph (e)(5) by removing the period adding the words “and FNS had previously advised the firm of the possibility that violations were occurring and of the possible consequences of violating regulations” at the end of the paragraph;
- k. Redesignate paragraph (e)(6) to (e)(8) as paragraphs (e)(7) to (e)(9) and add a new paragraph (e)(6);
- l. Revise paragraphs (g) and (h);
- m. Revise the introductory text of paragraph (i);
- n. Revise paragraphs (j) and (l);

The revisions and additions read as follows:

§278.6 Disqualification of retail food stores and wholesale food concerns, and imposition of civil penalties and civil money penalties.

(a) Authority to disqualify and subject to a civil penalty and civil money penalty. FNS may assess a civil penalty and civil money penalty against and disqualify any authorized retail food store or wholesale food concern from further participation. For the purposes of this part, civil money penalty refers to a civil penalty issued for hardship, transfer of ownership, or trafficking in lieu of disqualification.* * *

* * * * *

(b) * * *

(2) * * *

(i) The charge letter shall advise a firm being considered for permanent disqualification based on evidence of trafficking as defined in §271.2 that the firm must notify FNS if the firm desires FNS to consider the sanction of a trafficking civil money penalty in lieu of permanent disqualification and that if granted, the trafficking civil money penalty in lieu of permanent disqualification is in addition to any other civil penalties assessed under §278.6(e). * * *

* * * * *

(c) Review of evidence. The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS office, which shall then issue the determination. In the case of a firm subject to permanent disqualification and civil penalty under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter; however, any civil penalties shall be held in abeyance pending the outcome of administrative or judicial review. * * *

* * * * *

(e) Penalties. FNS shall take action as follows against any firm determined to have violated the Act or regulations. For the purposes of assigning a period of disqualification, a warning letter shall not be considered to be a sanction. A civil money penalty, a civil penalty, and a disqualification shall be considered sanctions for such purposes. FNS shall:

(1) Disqualify a firm permanently and assess a civil penalty in accordance with §278.6(g) if personnel of the firm have trafficked as defined in §271.2; or only disqualify a firm permanently if:

(i) Violations such as, but not limited to, the sale of ineligible items occurred and the firm had twice before been sanctioned.

(ii) It is determined that personnel of the firm knowingly submitted information on the application that contains false information of a substantive nature that could affect the eligibility of the firm for authorization in the program, such as, but not limited to, information related to:

(A) Eligibility requirements under §278.1(b), (c), (d), (e), (f), (g) and (h);

(B) Staple food stock;

(C) Annual gross sales for firms seeking to qualify for authorization under Criterion B as specified in the Food Stamp Act of 1977, as amended;

(D) Annual staple food sales;

(E) Total annual gross retail food sales for firms seeking authorization as co-located wholesale/retail firms;

(F) Ownership of the firm;

(G) Employer Identification Numbers and Social Security Numbers;

(H) Food Stamp Program history, business practices, business ethics, WIC disqualification or authorization status, when the store did (or will) open for business under the current ownership,

business, health or other licenses, and whether or not the firm is a retail and wholesale firm operating at the same location; or

(I) Any other information of a substantive nature that could affect the eligibility of a firm. * *

* * *

(4)* * *

(ii) It is to be the second sanction for the firm and evidence shows that personnel of the firm have committed violations, such as the sale of common nonfood items in amounts normally found in a shopping basket; or

* * * * *

(6) Impose a civil penalty if it is to be the first sanction for the firm and evidence shows that personnel of the firm have committed violations such as but not limited to the sale of common nonfood items due to carelessness or poor supervision by the firm's ownership or management and FNS had not previously advised the firm of the possibility that violations were occurring and of the possible consequences of violating regulations. The civil penalty shall be \$1,000 for each violation and must be paid in full within 30 days of the individual's or legal entity's receipt of FNS' notification to pay the penalty. FNS may withdraw the authorization of any firm that has failed to pay the civil penalty in full within 30 days, as specified under §278.1(l).

* * * * *

(g) Amount of trafficking civil penalties and civil money penalties for hardship and transfer of ownership. FNS shall determine the amount of the trafficking civil penalty and hardship and transfer of ownership civil money penalty as follows:

(1) Determine the firm's average monthly redemptions of benefits for the 12-month period ending with the month immediately preceding the month during which the firm was charged with violations.

(2) Multiply the average monthly redemption figure by 10 percent.

(3) Multiply the product by arrived at in paragraph (g)(2) by the number of months for which the firm would have been disqualified under paragraph (e) of this section. Firms disqualified permanently for trafficking shall multiply the product arrived at in paragraph (g)(2) by 120 when determining the amount of a trafficking civil penalty. Firms disqualified permanently for trafficking shall multiply the product arrived at in paragraph (g)(2) by 240, to reflect double the penalty for a ten year disqualification, when determining a transfer of ownership civil money penalty in accordance with §278.6(f). The penalty may not exceed an amount specified in §3.91(b)(3)(i) of this title for each violation.

(h) Notifying the firm of trafficking civil penalties and civil money penalties for hardship and transfer of ownership. A firm has 15 days from the date that FNS notifies the firm in writing in which to pay the penalty, or to notify FNS in writing of its intent to pay in installments as specified by the Agency. For hardship civil money penalties, FNS shall:

(1) Require the firm to present to FNS a collateral bond as specified in §278.1(b)(4), within 30 days, and the civil money penalty must be paid in full by the end of the period for which the firm would have been disqualified;

(2) Disqualify the firm for the period determined to be appropriate under paragraph (e) of this section if the firm refuses to pay any of the civil money penalty;

(3) Disqualify the firm for a period corresponding to the unpaid part of the civil money penalty if the firm does not pay the civil money penalty in full or in installments as specified by FNS; or

(4) Disqualify the firm for the prescribed period if the firm does not present a collateral bond or irrevocable letter of credit within the required 30 days. Any payment on the hardship civil money penalty which has been received by FNS shall be returned to the firm. If the firm presents the required bond or irrevocable letter of credit during the disqualification period, the civil money penalty may be reinstated for the duration of the disqualification period.

(i) Criteria for eligibility for a civil money penalty in lieu of permanent disqualification for trafficking. FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in §271.2 if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program. A civil money penalty is in lieu of the permanent disqualification does not replace, but is in addition to, the trafficking civil penalty described in §278.6(e)(1). Firms assessed a civil money penalty under this paragraph shall be subject to the applicable penalties included in §278.6(e)(2) through (e)(7) for the sale of ineligible items. In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following criteria:

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

Criterion 2. The firm had developed and instituted an effective personnel training program as specified in §278.6(i)(2) and that both its compliance policy and program were in operation at the location where the violation(s) occurred prior to the occurrence of violations cited in the charge letter sent to the firm; and

Criterion 3. The firm's ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of the trafficking violations; and

Criterion 4. It is the first occasion of any trafficking violations at the firm, regardless of whether the firm's management was aware of, approved of, benefited from, or was in any way involved in the conduct or approval of the trafficking violations. Upon the second occasion of trafficking, regardless of whether the violations were committed by firm management or employees, a firm shall not be eligible for a civil money penalty in lieu of permanent disqualification.

Notwithstanding the above provision, if trafficking violations consisted of the sale of firearms, ammunition, explosives, or controlled substances, as defined in 21 U.S.C. §802, and such trafficking was conducted by ownership or management of the firm, the firm shall not be eligible for a civil money penalty in lieu of permanent disqualification. For purposes of this section, a person is considered to be part of firm management if that individual has substantial supervisory responsibilities with regard to directing the activities and work assignments of store employees. Such supervisory responsibilities shall include the authority to hire employees for the store or to terminate the employment of individuals working for the store.

* * * * *

(j) Amount of civil money penalty in lieu of permanent disqualification for trafficking. A civil money penalty assessed in accordance with §278.6(i) shall not exceed the amount specified in §3.91(b)(3)(ii) of this title for each violation and shall not exceed the amount specified in § 3.91(b)(3)(ii) of this title for all violations occurring during a single investigation. FNS shall determine the amount of the civil money penalty as follows:

(1) Determine the firm's average monthly redemptions for the 12-month period ending with the month immediately preceding the month during which the firm was charged with violations;

- (2) Multiply the average monthly redemption figure by 10 percent;
- (3) Multiply the product by 120, in accordance with §278.6(f), to reflect double the penalty for a ten year disqualification;
- (4) If a second trafficking offense is committed by the firm, the firm shall not be eligible for a civil money penalty in lieu of permanent disqualification.

* * * * *

(1) Fines for acceptance of benefits without an EBT Card being present. FNS may impose a fine against any retail food store or wholesale food concern that accepts benefits that are not accompanied by an EBT card being present and with the intent of conducting a transaction without a recipient’s knowledge or consent. The fine to be assessed against a firm found to be accepting benefits without an EBT card being present shall be \$1,000 per investigation plus an amount equal to double the value of each transaction that occurred without an EBT card being present, and may be assessed in addition to any fiscal claim or civil penalty established by FNS under §278.6(e)(1) through (e)(6), §278.6(g), or §278.6(j). The fine shall be paid in full within 30 days of receipt of FNS’ notification to pay the fine. The Attorney General of the United States may institute judicial action in any court of competent jurisdiction against the store or concern to collect the fine. FNS may withdraw the authorization of the store, as well as other authorized locations of a multi-unit firm which are under the same ownership, for failure to pay such a fine as specified under §278.6(l).

7. In §278.7, remove paragraphs (d) through (g);

8. Remove §278.8 and redesignate §278.9 as §278.8;

9. In the newly redesignated §278.8, remove paragraph (a) and redesignate paragraphs (b) through (m) as (a) through (l), respectively;

10. Remove §278.10.

PART 279 – ADMINISTRATIVE AND JUDICIAL REVIEW – FOOD RETAILERS AND FOOD WHOLESALERS

11. In §279.1:

a. Paragraph (a)(2), remove the reference to “§278.6(e)(8)” and add in its place the reference “§278.6(e)(9)”;

b. Revise paragraph (a)(4) to read as follows:

§279.1 Jurisdiction and authority.

* * * * *

(a) * * *

(4) Denial of all or part of any claim asserted by a firm against FNS under §278.7(c) of this chapter;

* * * * *

12. In §279.2, revise paragraph (a) to read as follows:

§279.2 Manner of filing requests for review.

(a) Submitting requests for review. Requests for review submitted by firms shall be mailed to or filed with the Branch Chief, Administrative Review Branch, U.S. Department of Agriculture, Food and Nutrition Service, 3101 Park Center Drive, Alexandria, Virginia 22302.

* * * * *

13. In §279.6, revise paragraph (a) to read as follows:

§279.6 Legal advice and extensions of time.

(a) Advice from the Office of the General Counsel. If any request for review involves any doubtful questions of law, FNS shall obtain the advice of the Department’s Office of the General Counsel.

* * * * *

14. In §279.7, remove the reference to “§278.6(e)(8)” and add in its place the reference “§278.6(e)(9)”

/signed/

Kevin W. Concannon
Under Secretary
Food, Nutrition, and Consumer Services

Date