

Proposed Rule to Update Standards for SNAP-Authorized Retailers: In Brief

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Summary

On February 17, 2016, the U.S. Department of Agriculture's (USDA's) Food and Nutrition Service (USDA-FNS) published a proposed rule titled, "Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)." 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 markets that are allowed to accept SNAP benefits.

The proposed rule would implement 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, per USDA-FNS, would also address other policy objectives. This proposed rule would make 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 proposed rule has been controversial, particularly the provisions not explicitly addressed by the farm bill. Driving the debate over these changes has been the potential impact on smaller retailers. Many Members of Congress have raised opposition to the proposed rule, and both the House- and the Senate-reported FY2017 Agriculture and Related Agencies appropriations bills include language to limit USDA's discretion in setting retailer standards.

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On February 17, 2016, the U.S. Department of Agriculture's (USDA's) Food and Nutrition Service (USDA-FNS) published a proposed rule titled, "Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)." ¹ On April 5, 2016, USDA-FNS published a clarification of the proposed rule and extended the comment period to May 18, 2016. ²

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. ³ The proposed rule would implement 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, per USDA-FNS, would also address other policy objectives. The proposed rule has been controversial, particularly the provisions not explicitly addressed by the farm bill.

SNAP-authorized retailers are stores and markets 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 current regulations, the statutory changes enacted in the 2014 farm bill, and the proposed rule's changes to the current regulations. Finally, this report briefly discusses stakeholder reactions to the proposed rule and related congressional action.

Background: SNAP-Authorized Retailers and Related Data

SNAP benefits may be redeemed only for eligible foods at authorized retailers. ⁴ 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-FNS administered inspection and authorization process. ⁵ 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. ⁶ Although SNAP participants can buy foods that are not in staple

¹ 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")

² 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")

³ 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>.

⁴ For more information, see CRS Report R42505, *Supplemental Nutrition Assistance Program (SNAP): A Primer on Eligibility and Benefits*, by (name redacted).

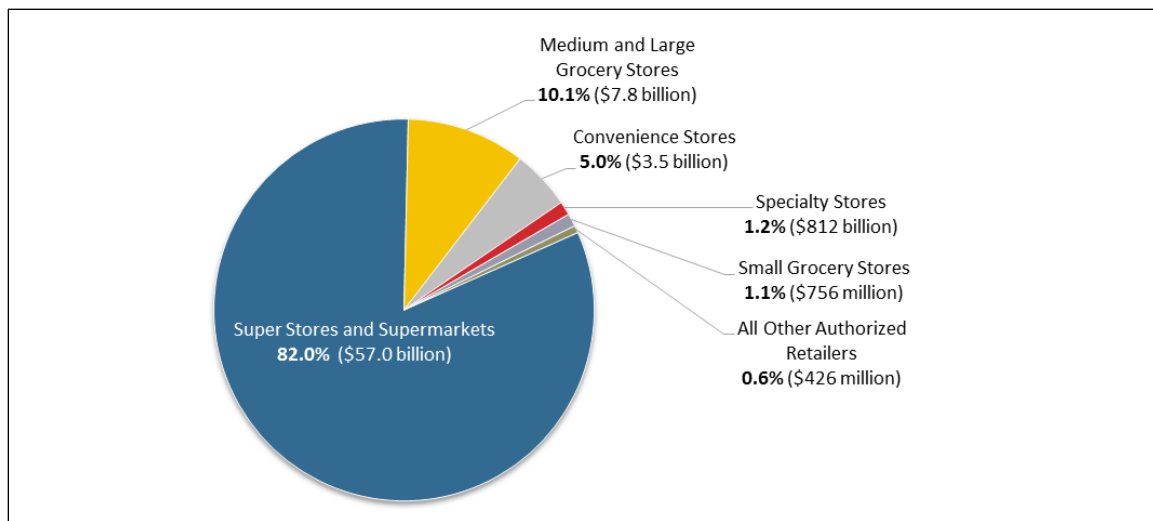
⁵ USDA-FNS website, <http://www.fns.usda.gov/snap/retailers/application-process.htm>.

⁶ 7 U.S.C. 2012(q).

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.⁷ Although convenience stores make up over 41% of SNAP-authorized retailers, they redeemed approximately 5% of SNAP benefits in FY2015.⁸ **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.⁹

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.

⁷ 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.

⁸ Ibid.

⁹ 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.

Current Retailer Inventory and Sales Regulations

Under current regulation, a SNAP-eligible retailer must meet one of two tests: criterion A (based on store inventory) or criterion B (based on store sales).¹⁰ These rules are displayed in **Table 2**.

Table 2. Current Regulations for SNAP Retailer Authorization

Retailers Apply via Criterion A or Criterion B

Criterion A—Based on Inventory		Criterion B—Based on Sales
Offer, on a continuous basis, three varieties of qualifying foods in each of the four staple food categories, AND	OR	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) and USDA-FNS website, <http://www.fns.usda.gov/snap/retailers/store-eligibility.htm>. Regulation has not yet been updated to reflect amendments in P.L. 113-79.

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.¹¹ The law further provides that staple foods "do not include accessory food items, such as coffee, tea,

¹⁰ 7 C.F.R. 278.1(a), available at <http://www.fns.usda.gov/snap/retailers/store-eligibility.htm>.

¹¹ 7 U.S.C. 2012(q).

cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices.”¹² Under current regulations, foods with multiple ingredients are 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 only in the bread or cereal category despite containing dairy. Regulation also defines 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.”¹³ Regulation specifies 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 is given that apples, cabbage, and tomatoes are varieties in the fruit or vegetable staple food category.¹⁴

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). Current regulations make 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.”¹⁵ 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.¹⁶

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.¹⁷ 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.¹⁸

¹² Ibid.

¹³ 7 C.F.R. 278.1(b)(1)(ii).

¹⁴ Ibid.

¹⁵ 7 C.F.R. 278.1(b)(1)(iv).

¹⁶ 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 (name redacted).

¹⁷ All SNAP changes are discussed in CRS Report R43332, *SNAP and Related Nutrition Provisions of the 2014 Farm Bill (P.L. 113-79)*, by (name redacted).

¹⁸ 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 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 (continued...) ”

In a March 2014 policy memorandum, USDA-FNS said that the 2014 farm bill changes to inventory requirements would require rulemaking to implement.¹⁹

Proposed Rule's Changes to SNAP Retailer Requirements

In the February 2016 proposed rule, USDA-FNS explains that the proposal “is 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 cites findings from an August 2013 Request for Information (RFI), which posed 14 questions to the public on SNAP retailer eligibility and authorization.²⁰ USDA-FNS states 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 cites related listening sessions.

The proposed rule would make 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. These areas are briefly discussed in the sections below, including the implementation timeframe associated with each. The proposed rule’s changes to current regulation are presented “at-a-glance” in **Table 4** at the end of this section.

Note: Neither the 2014 farm bill nor the proposed rule 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*.)

Throughout the proposed rule, USDA-FNS expresses the objectives to improve access to healthy foods and to preserve the integrity of the program. As discussed in “Responses to the Proposed Rule,” some have criticized the proposed rule for potentially exceeding the 2014 farm bill provisions’ authority. The amended statute explicitly requires:

(...continued)

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.”

¹⁹ 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>.

²⁰ 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.

- 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”).

Sales of Hot, Prepared Foods²¹

Recalling that hot, prepared foods are not eligible for purchase with SNAP benefits, the proposed rule would 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, no more than 15% of total food sales may be from these foods cooked or heated on-site.) This is in addition to the current regulatory requirement that no more than 50% of sales be *hot or cold prepared foods*. Retailers applying under either criterion A or criterion B would be required to meet this threshold.

USDA-FNS proposes this change because some retailers have been selling uncooked foods for SNAP purchase and then offering to heat or cook those foods for customers for free or for cash. The agency says “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 “thinks it is important to maintain the intent of Congress’s restriction on hot food purchases” and bases the 85% threshold on a review of related retailer data.

In addition, the proposed rule would add measures aimed at preventing one business from splitting into two to circumvent these restaurant-related SNAP rules.

USDA-FNS proposes that the changes described here would take effect for all new applicants and all currently authorized retailers within 120 days of the effective date of the final rule.

Definition of Staple Foods²²

The proposed rule would change the regulatory definition of staple foods with regard to multi-ingredient and accessory foods in the evaluation of a retailer application.

Under current regulation, foods with multiple ingredients are only counted in one staple food category based on the item’s main ingredient. For example, a box of macaroni and cheese might be counted as a bread or cereal for retailer authorization purposes. USDA-FNS says that the current policy can be confusing and requires close examination of product labels. In the 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.

Under the proposed rule, commercially processed foods and prepared mixtures would not be counted in any staple food category, and thus, would not be considered in a retailer’s application for authorization. For example, inventory of TV dinners, macaroni and cheese, and canned soups would not count toward a store’s inventory (or sales) requirements for authorization. (Such foods would remain eligible for SNAP purchase.)

Under regulation, accessory foods are not counted as staple foods. Currently, regulations define “accessory foods” as the specific foods listed in the statute: “coffee, tea, cocoa, carbonated and un-carbonated drinks, candy, condiments, and spices.”²³

²¹ Proposed rule preamble, pp. 8016-8017.

²² Proposed rule preamble, pp. 8017-8018.

The proposed rule would expand 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 ... candy, or food items that complement or supplement meals, such as ... coffee, tea, carbonated and uncarbonated drinks.” USDA-FNS states 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.”²⁴

USDA proposes that these requirements would take effect for all new applicants within 120 days of the effective date of the final rule. Retailers already authorized to participate in the program would have 365 days from the effective date of the final rule to comply.

Inventory and Depth of Stock²⁵

The proposed rule would codify the 2014 farm bill’s mandatory changes for retailers applying for authorization under criterion A (inventory-based):

- 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 proposed rule also would add specifications on the depth of stock; that is, how many of each item are for sale. Under current regulations, a retailer may be authorized with a minimum stock of at least 12 food items (three varieties in each of the four categories, including perishable requirements).

The proposed rule would not only implement the 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 six stocking units per variety.²⁶ Under the proposed rule’s requirement for a six-item depth of stock, a store would be required to keep in stock a minimum of 168 staple food items.

Table 3 summarizes the inventory requirements for criterion A retailers under current regulations and the proposed rule.

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²³ Section 3(q)(2) of the Food and Nutrition Act of 2008, codified at 7 U.S.C. 2012(q)(2).

²⁴ Proposed rule preamble, pp. 8017-8018.

²⁵ Proposed rule, p. 8018. This section also refers to Clarification of Proposed Rule, 19500-19502.

²⁶ In its April 5, 2016, clarification, USDA-FNS indicates that the stocking unit is the unit of household purchase; for 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.

Table 3. Inventory Requirements for SNAP-Authorized Retailers

Under Criterion A

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

Source: Prepared by CRS, based on the proposed rule and clarification of proposed rule.

USDA-FNS proposes that these requirements would take effect for all new applicants within 120 days of the effective date of the final rule. Retailers already authorized to participate in the program would have 365 days from the effective date of the final rule to comply.

Access-Related Exceptions to the Rules²⁷

Prior to the 2014 farm bill, community 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 allow USDA-FNS to consider need for access "when a retailer does not meet all of the requirements for SNAP authorization." USDA-FNS proposes that they "will consider factors such as distance from the nearest SNAP authorized retailer, transportation options to other SNAP authorized retailer locations, the gap between a store's stock and SNAP required stock for authorized eligibility, and whether the store furthers the purpose of the [p]rogram."

USDA-FNS proposes that these changes would go into effect upon the effective date of the final rule.

Public Disclosure of Retailer Information²⁸

The proposed rule would allow USDA-FNS to disclose to the public specific information about retailers that have been disqualified or otherwise sanctioned for SNAP violations. The agency argues 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."

USDA-FNS proposes that these changes would go into effect upon the effective date of the final rule.

²⁷ Proposed rule, p. 8018.

²⁸ Ibid.

Table 4. Proposed Rule on SNAP Retailer Standards At-a-Glance

Comparison of Current SNAP Retailer Authorization Regulations with USDA's Proposed Rule

Topic	Current SNAP Retailer Authorization Regulations ^a	USDA-FNS Proposed Rule on Retailer Authorization ^b
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).
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.
Accessory foods' categorization as staple foods	A short list of accessory foods are not counted as staple foods.	A longer list of foods would not be counted as accessory foods.
Requirements for stocking variety 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.
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."
Public disclosure of disqualified or sanctioned retailers' information	Not explicitly in regulation.	Would allow FNS to disclose this information to public.

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.

Overview of USDA-FNS's Regulatory Impact Analysis²⁹

Within the proposed rule, USDA-FNS has included a summary of its Regulatory Impact Analysis (RIA).³⁰ The RIA included qualitative benefits of the proposed rule such as improving SNAP

²⁹ 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 (name redacted).

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.³¹ 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.³² 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 has also been a range of congressional 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 1,266 submissions/comments.³³ Comments were submitted by anti-hunger advocacy groups, food suppliers, other retailer organizations, local governments, and 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 include, 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.³⁴ 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.³⁵ The association argues, in its comments and related documents, for USDA-FNS to withdraw the proposed rule. In

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³⁰ 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").

³¹ 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 (name redacted).

³² Full RIA, p. 3.

³³ Available at <https://www.regulations.gov/docket?D=FNS-2016-0018>.

³⁴ 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>.

³⁵ See pp. 16-17 of the NACS comments for its cost estimates and related arguments.

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.³⁶

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.³⁷ APHA cautioned that improving stocking standards alone was not enough to improve healthy eating.³⁸

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 have 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.³⁹ Among other concerns, the letter argues 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.⁴⁰ 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 preserving food access and deliberately chose not to make modifications related to percentages of sales of hot foods."⁴¹

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.⁴² Ultimately, both the House- and

³⁶ Comments available at <https://www.sba.gov/advocacy/5-17-2016-enhancing-retailer-standards-supplemental-nutrition-assistance-program-snap>.

³⁷ Comments available at https://www.apha.org/~media/files/pdf/advocacy/testimonyandcomments/160518_apha_snapretail.ashx.

³⁸ 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/>.

³⁹ 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>.

⁴⁰ 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>.

⁴¹ 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>.

⁴² "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* (continued...)

the Senate-reported FY2017 Agriculture and Related Agencies appropriations bills include language to limit 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 limit 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 hearing⁴³ and, in questions from the chairman, during a June 9, 2016, House Committee on Oversight hearing.⁴⁴

Next Steps

Many constituencies are interested in USDA's next steps on promulgating SNAP retailer standards. The agency remains obligated to implement Congress's changes to SNAP law made by the 2014 farm bill, but it remains to be seen how it chooses to address the findings from its RFI that may not be explicitly required by the farm bill's changes. For instance, how will future rulemaking address hot food sales and multiple ingredient foods? Also affecting future rulemaking may be any terms included in FY2017 appropriations law. Many stakeholders raise access-related issues, expressing concerns that the inability of smaller retailers and retailers that sell hot foods to be authorized could leave communities without SNAP retailers. While the proposed rule does include an access-related exception, it is not clear how it would be exercised or enforced; future rulemaking may address this.

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(Congressional Transcripts), February 24, 2016, <http://www.cq.com/doc/congressionaltranscripts-4843447?0&search=4Qq2c1q4>.

⁴³ 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>.

⁴⁴ 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/>.

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