

Note: The following notice has been submitted to the Office of the Federal Register for publication. While USDA-FNS has taken steps to ensure the accuracy of this Internet version of the notice, it is not the official version. Upon publication in the Federal Register, the official version will be available at www.federalregister.gov and www.regulations.gov.

Billing Code: 3410-30-P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 271 and 278

RIN: 0584-AE27

Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)

Clarification of Proposed Rule and Extension of Comment Period

AGENCY: Food and Nutrition Service (FNS), U.S. Department of Agriculture (USDA).

ACTION: Clarification of proposed rule; extension of comment period.

SUMMARY: This action extends the comment period and responds to questions posed by commenters about certain aspects of a proposed rule pertaining to the eligibility of Supplemental Nutrition Assistance Program (SNAP) retail food stores that was published in the Federal Register on February 17, 2016. The Agricultural Act of 2014 (2014 Farm Bill) amended the Food and Nutrition Act of 2008 (the Act) to increase the requirement that certain SNAP authorized retail food stores have available on a continual basis at least three varieties of items in each of four staple food categories, to a mandatory minimum of seven varieties. The 2014 Farm Bill also amended the Act to increase, for certain SNAP authorized retail food stores, the minimum number of categories in which perishable foods are required from two to three. The proposed rule would codify these mandatory requirements.

DATES: The comment period for the proposed rule that was published on February 17, 2016 (81 FR 8015) has been extended from April 18, 2016 to May 18, 2016. To be assured of consideration, comments must be postmarked on or before May 18, 2016.

ADDRESSES:

The Food and Nutrition Service (FNS), USDA, invites interested persons to submit comments.

In order to ensure proper receipt, comments may only be submitted through one of the following methods:

- *Preferred method:* Federal e-Rulemaking Portal: Go to <http://www.regulations.gov>

and follow the online instructions for submitting comments on docket FNS-2016-0018.

- *Mail:* Written comments should be addressed to Vicky Robinson, Chief, Retailer

Management and Issuance Branch, Retailer Policy and Management Division, Room 418, 3101 Park Center Drive, Alexandria, Virginia 22302.

All comments submitted in response to this notice 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. FNS will make the comments publicly available on the Internet via:

<http://www.regulations.gov>. All submissions will be available for public inspection at the address above during regular business hours (8:30 a.m. to 5:30 p.m.), Monday through Friday.

FOR FURTHER INFORMATION CONTACT:

Address any questions regarding this notice to Vicky Robinson, Chief, Retailer Management and Issuance Branch, Retailer Policy and Management Division at the Food and Nutrition Service (FNS), USDA, 3101 Park Center Drive, Alexandria, Virginia 22302. Ms. Robinson can also be

reached by telephone at (703)-305-2476 or by email at Vicky.Robinson@fns.usda.gov during regular business hours (8:30 a.m. to 5:30 p.m.) Monday through Friday.

SUPPLEMENTARY INFORMATION:

I. Background

The Agricultural Act of 2014 (2014 Farm Bill) amended the Food and Nutrition Act of 2008 (the Act) to increase the requirement that certain SNAP authorized retail food stores have available on a continual basis at least three varieties of items in each of four staple food categories, to a mandatory minimum of seven varieties. The 2014 Farm Bill also amended the Act to increase, for certain SNAP authorized retail food stores, the minimum number of categories in which perishable foods are required from two to three. The proposed rule would codify these mandatory requirements.

Further, using existing authority in the Act and feedback from a Request for Information that was published in the Federal Register on August 20, 2013, and that included five listening sessions in urban and rural locations across the nation and generated 233 public comments, FNS proposed several additional changes. Among other items, these proposed changes would address depth of stock, amend the definition of staple foods, and amend the definition of “retail food store” to clarify when a retailer is a restaurant rather than a retail food store.

Additionally, this action extends the comment period for the proposed rule. Since publication of the proposed rule, several entities have requested an extension of the comment period in order to allow ample time for all stakeholders to comment on the rulemaking process. The comment period, therefore, is being extended 30 days in order to provide additional time for interested

parties to review and comment on this proposed rule. To be assured of consideration, comments on this proposed rule must be received by FNS on or before May 18, 2016.

II. Clarification and Request For Comment:

Commenters have posed similar questions to FNS concerning provisions of the proposed rule, in some instances indicating possible misunderstandings of the proposal. FNS appreciates these comments and for this reason, as well as to help ensure that comments submitted are of most value to the Agency, FNS is providing the following additional clarifications and requests for comment regarding certain provisions proposed in this rule.

FNS encourages commenters to review and comment on all of the issues raised in the proposed rulemaking, as well as on issues examined in the supporting Regulatory Impact Analysis and Interim Regulatory Flexibility Analysis prepared for the proposed rule and published as part of the docket in Supporting Documents on Regulations.gov.

1. Under the proposed rule, what would be the *varieties* of items retailers would need to stock?

As required by Section 3(o)(1)(A) of the Food and Nutrition Act of 2008 (the Act), as amended by the Agricultural Act of 2014 (2014 Farm Bill), retailers would be required to stock at least 7 varieties in each of the 4 staple food categories. Section 3(q) of the Act defines the 4 staple food categories as dairy products; breads and cereals; meats, poultry, and fish; and fruits and vegetables. FNS does not have discretion to alter the statutory 7 variety requirement.

However, FNS appreciates the questions it has received from commenters inquiring about the items that constitute variety under the proposed rule in the four staple food categories and encourages additional comments from the public on this point. FNS is particularly interested in comments from the public as to whether and how variety should take into account the differences between products within staple food categories (generally and individually), and what factors should be considered when making such distinctions.

For example, for purposes of variety in the meat, poultry, and fish category, FNS would appreciate public comments on whether to consider food items that come from the same type of animal or species as separate varieties in this food category (e.g., raw chicken breast versus refrigerated grilled chicken breast; roast beef versus ground beef; sliced turkey versus turkey bacon; fresh bluefin tuna steaks versus canned albacore tuna). FNS would also appreciate public comments regarding the basis by which one could consider food items that come from the same type of animal or species as separate varieties, in this or other staple food categories. Finally, FNS would like to clarify its intent in the proposed rule for the meat, poultry, and fish staple food category to include other varieties, such as eggs and meat alternatives (e.g., tofu, gluten, or mycoprotein).

Examples of how a retailer might stock 7 varieties in each of the 4 staple food categories follow further below.

2. Under the proposed rule, how many *perishable items* would retailers need to stock?

Section 3(o)(1)(A) of the Act, as amended by the 2014 Farm Bill, requires that retailers would be required to stock “perishable foods in at least 3 of the [staple food] categories.” Therefore,

FNS has proposed to codify in regulation the statutory requirement that retailers stock at least one perishable variety in 3 of the 4 staple food categories.

The proposed rule does not propose to change the meaning of “perishable” in the current regulations. Currently, under 7 CFR 278.1(b)(1)(ii)(B), *perishable foods* include items that are either frozen or refrigerated staple food items and as well as fresh, unrefrigerated staple food items that will spoil or suffer significant deterioration in quality within 2 to 3 weeks (e.g., bread).

An example of how a retailer might meet the perishables requirement with one perishable variety in 3 of the 4 staple food categories follows further below.

3. Under the proposed rule, what would qualify as *multiple ingredient foods*?

Currently, 7 CFR 271.2 provides that “commercially processed foods and prepared mixtures with multiple ingredients shall only be counted in one staple food category” for the purposes of determining eligibility of any firm.

Under the proposed rule, commercially processed foods and prepared mixtures with multiple ingredients that do not represent a single staple food category (e.g., cold pizza, macaroni and cheese, sandwiches, TV dinners, mixed soup varieties, and pot pies), would not be counted (toward variety, perishables, or depth of stock) as staple foods for purposes of determining a firm’s eligibility to participate in SNAP as a retail food store. Under the proposed rule, multiple ingredient foods would not include such items as yogurt, cheeses, and cereals, as the primary staple food ingredient is clearly represented and easily recognized.

FNS appreciates the questions it has received from commenters on multiple ingredient foods under the proposed rule and encourages additional comments from the public on this provision of the proposed rule. FNS is particularly interested in comments from the public as to whether certain types of foods with multiple ingredients should continue to be counted as staple foods, including toward variety, perishables, or depth of stock requirements. For example, for the purposes of staple food categorization, FNS would appreciate public comments on whether and how to categorize certain foods with multiple staple food ingredients, such as prepared salads, pizzas, pot pies, macaroni and cheese, stuffed pastas, and others, as offered by commenters, for purposes of making a retailer eligibility determination for SNAP authorization.

Examples of additional multiple ingredient foods that would and would not count as staple foods under the proposed rule follow.

Multiple ingredient foods are currently eligible for purchase with SNAP benefits, and this proposed rule would not change the eligibility of these foods for purchase with SNAP benefits in authorized stores.

4. Under the proposed rule, how many total items would retailers be required to stock?

Currently SNAP regulations require that SNAP authorized stores have available on a continuous basis at least 3 varieties of items in each of the 4 staple food categories with perishable varieties in at least 2 of the 4 staple food categories. Under current SNAP regulations, retailers may be SNAP authorized with a minimum stock of at least 12 food items, including at least 2 perishable

items. As noted in the proposed rule, these requirements have been changed by the Food and Nutrition Act of 2008 (the Act), as amended by the Agricultural Act of 2014 (2014 Farm Bill).

Section 3(o)(1)(A) of the Act now requires that retailers stock at least 7 varieties in each of the 4 staple food categories and perishable foods in at least 3 of the 4 staple food categories. That means that retailers are required to stock 28 items on a continuous basis. At least 3 of these items must be perishable.

Under the proposed rule, which would require a depth of stock defined as 6 stocking units, SNAP-authorized retailers would be required to stock a new minimum inventory requirement of 168 staple food items.

Based on the statutory requirement that at least 1 perishable variety be stocked in 3 of the 4 staple food categories, and with depth of stock discretionarily defined as 6 stock keeping units, this proposed rule would require that a store stock at least 18 perishable staple food items (within the 168 staple food item total).

According to Department analysis, contained in the Interim Regulatory Flexibility Analysis prepared for the proposed rule and published as part of the docket in Supporting Documents on Regulations.gov, the average small store would need to add an additional 54 additional staple food items, at a cost of around \$140, in order to meet the proposed eligibility criteria. As set forth in the Interim Regulatory Flexibility Analysis for the proposed rulemaking, FNS estimates that purchasing all 168 staple food items would cost a store approximately \$400, including a one-

time inventory carrying cost of 25% to account for storage costs and potential spoilage. FNS believes that adding new inventory would be a one-time cost, a cost that would be recouped as inventory is sold.

See the full Regulatory Impact Analysis and Interim Regulatory Flexibility Analysis for further details. <https://www.regulations.gov/#!documentDetail;D=FNS-2016-0018-0006>.

More generally, FNS appreciates the questions it has received from commenters on the number of total food items that retailers would be required to stock under the proposed rule and encourages additional comments from the public on this provision of the proposed rule, including comments on the impacts (such as benefits, costs, or small business impacts) associated with proposals that would alter the total food items that retailers would be required to stock.

FNS also appreciates the questions from commenters it has received regarding how the proposed requirements would affect different types of retail food stores and encourages additional comments from the public on potential retail food store impacts.

EXAMPLES of Acceptable Variety, Perishables, and Depth of Stock under the Proposed

Rule

Meat, Poultry, and Fish - the proposed rule would require stocking at least 7 varieties in this staple food category; below are ten examples of what FNS would consider different varieties.

This is an illustrative list and not an exhaustive list of items that FNS proposes to be acceptable varieties in this staple food category.

Perishable:

1. Sliced turkey breast – 6 packages
2. Shrimp – 6 packages
3. Sliced ham – 6 packages
4. Fresh or frozen ground beef– 6 packages
5. Fresh or frozen catfish – 6 packages
6. Eggs – 6 cartons (any size)
7. Frozen lamb chops – 6 packages
8. Tofu (meat substitute) – 6 packages

Non-perishable:

9. Canned tuna – 6 cans
10. Canned chicken – 6 cans

Fruits, Vegetables - the proposed rule would require stocking at least 7 varieties in this category; below are ten examples of what FNS would consider different varieties. This is not an exhaustive list of acceptable varieties in this staple food category. Under the proposed rule, the first 7 varieties listed below would be considered perishable varieties in this staple food group, provided that they will spoil or suffer significant deterioration in quality within 2 to 3 weeks.

Perishable

1. Fresh bananas – 6 bananas
2. Fresh oranges – 6 oranges
3. Fresh pears – 6 pears
4. Frozen raspberries – 6 packages
5. Frozen spinach – 6 packages
6. Fresh baby carrots – 6 packages
7. Fresh celery sticks – 6 packages

Non-Perishable

8. Apple sauce – 6 jars
9. Canned corn – 6 cans
10. Canned peas – 6 cans

Dairy - the proposed rule would require stocking at least 7 varieties in this category; below are ten examples of what FNS would consider different varieties. This is not an exhaustive list of acceptable varieties in this staple food category. Under the proposed rule, the first 8 varieties listed below would likely be considered perishable varieties in this staple food group, provided that they will spoil or suffer significant deterioration in quality within 2 to 3 weeks.

Perishable

1. Fresh cow's milk – 6 containers
2. Fresh goat's milk – 6 containers
3. Fresh yogurt – 6 containers
4. Fresh sour cream – 6 packages
5. Fresh cheddar cheese (hard) – 6 packages
6. Fresh cream cheese (soft) – 6 packages
7. Frozen butter – 6 packages
8. Margarine – 6 containers

Non-Perishable

9. Infant Formula – 6 containers
10. Almond Milk – 6 containers

Breads or Cereals - the proposed rule would require stocking at least 7 varieties in this category; below are ten examples of what FNS would consider different varieties. This is not an exhaustive list of acceptable varieties in this staple food category. Under the proposed rule, the first 5 varieties listed below would likely be considered perishable varieties in this staple food

group, provided that they will spoil or suffer significant deterioration in quality within 2 to 3 weeks.

Perishable

1. Bread – any combination (wheat, white, rye) – 6 packages
2. Tortillas (flour, corn) – 6 packages
3. Bagels (white, wheat, other) – 6 items
4. Pitas – 6 packages
5. Frozen dinner rolls – 6 packages

Non-Perishable

6. Rice – any combination (long-grain, brown) – 6 packages
7. Pasta – any combination (spaghetti, lasagna noodles, rice noodles) – 6 packages
8. Cereal– any combination (wheat, rice, chex, granola, etc) – 6 packages
9. Flour (white, wholegrain, any combination) – 6 packages
10. Infant Cereal – 6 packages

EXAMPLES of Multiple Ingredient Foods that would be Excluded for Purposes of Retailer Eligibility Decisions under the Proposed Rule

- Pizzas (contains dough, cheese, and tomato)
- Multiple ingredient soups, e.g. minestrone (contains vegetables and pasta)
- Multiple ingredient canned foods, e.g. ravioli (contains vegetables, cheese, and pasta)
- Chicken pot pies (contains dough, vegetables, and chicken)

- Frozen TV dinners, e.g. chicken dinner (contains chicken, potatoes, and vegetables)
- Sandwiches (contains meat, cheese, bread, and vegetables)
- Lunch-snack trays (contains meat, cheese, and crackers)

EXAMPLES of Multiple Ingredient Foods that would Continue to Count as Staple Foods (i.e., the primary staple food category ingredient is clearly represented and easily recognized)

- Mixed vegetables (frozen or canned; contains a variety of vegetables)
- Boxed breakfast cereals (intended to served heated or cold; contains a variety of grains)

III. Comment Period Extension:

Since publication of the proposed rule, several entities, including SNAP retail trade groups, have requested an extension of the comment period in order to allow ample time for all stakeholders to comment on the rulemaking process. The comment period, therefore, is being extended 30 days in order to provide additional time for interested parties to review the proposed rule. To be assured of consideration, comments on the proposed rule must be received by FNS on or before May 18, 2016.

Audrey Rowe
Administrator
Food and Nutrition Service

Date