

August 27, 1999

Judy Love
Redemption Management Branch
Benefit Redemption Division
Food and Nutrition Service
3101 Park Center Drive
Alexandria, VA 22302-1594

Re: Food Stamp Program: Revisions to the Retail Food Store
Definition and Program Authorization Guidance; 64 Fed. Reg. 35,082
(June 30, 1999).

Dear Ms. Love:

The Office of the Chief Counsel for Advocacy of the U.S. Small Business Administration was created in 1976 to represent the views and interests of small business in federal policy making activities.¹ The Chief Counsel participates in rulemakings when he deems it necessary to ensure proper representation of small business interests. The Chief Counsel also reports to Congress annually on federal agency compliance with the Regulatory Flexibility Act (RFA),² and works with federal agencies to ensure that their rulemakings demonstrate an analysis of the impact that their decisions will have on small businesses.

On June 30, 1999, the Food and Nutrition Service (FNS) published the above-referenced proposed rule in the Federal Register. The rule is designed to implement certain provisions of the Food Stamp Program Improvements Act of 1994 that revise the criteria for eligibility of firms to participate in the Food Stamp Program as retail food stores. The main purpose of the rule is to ensure that food stamp recipients continue to have adequate access to such stores where they can purchase a wide variety of nutritious food items. FNS certified that the rule would not have a significant economic impact on a substantial number of small entities pursuant to section 605 of the RFA.

A number of specific changes to the Food Stamp Program are proposed, and a few are discussed here. Under Criterion A, a qualifying business must maintain no fewer than three different varieties of staple food items for home preparation and consumption in each of the four defined staple food categories, including perishable foods in at least two of those categories. According to FNS, this means that a retailer who sells skim, chocolate and whole milk can only claim one variety of dairy product. Also, in order to ensure the sufficiency of stock on a continuing basis, a qualifying business must be able to verify at least \$30,000 in wholesale purchases (or, purchases of goods by retailers for resale to

¹ Pub. L. No. 94-305 (codified as amended at 15 U.S.C. §§ 634a-g, 637).

² Regulatory Flexibility Act, 5 U.S.C. § 601, as amended by the Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, 110 Stat. 866 (1996). The RFA requires federal agencies to assess and analyze the impact of their regulations on small entities and asks agencies to consider less burdensome alternatives that do not interfere with the agencies' policy or regulatory objectives.

consumers) annually. If a business cannot meet Criterion A requirements, it can try Criterion B which requires a business to have more than 50 percent of its total eligible food sales in staple foods, it requires that more than 50 percent of its total gross retail sales be in staple food sales.

The above-mentioned requirements may have no impact on grocery stores, however, small independent convenience stores³—which have served the Program well in the past—may be impacted due to fewer sales and less wholesale purchases and stock than large grocery stores. Unfortunately, it is not possible to determine the actual impact on small independent convenience stores simply by reading the regulation. For instance, there is no mention in the rule about the number of small entities affected—an RFA prerequisite for determining whether a substantial number of small businesses have been impacted. Moreover, there is no explanation of the arbitrary cut-offs in the rule (i.e., minimum \$30,000 in annual wholesale purchases, minimum of three varieties of each stable product, etc.) and why they will not impact small businesses. For these reasons, the Office of Advocacy believes that FNS was incorrect in its RFA certification.

Section 605(b) of the RFA states,

Sections 603 and 604 of this title [concerning the preparation of an initial regulatory flexibility analysis and a final regulatory flexibility analysis, respectively] shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register . . . along with a statement providing the **factual basis for such certification**. [Emphasis added.]

There only seems to be one passage in the proposed rule that addresses the impact on small business, but it also lacks a factual basis.

Congress revised the eligibility requirements . . . in response to concerns that a number of small firms (particularly convenience type stores) were at risk of losing their authorization to accept food stamps. This concern was particularly evident in inner-cities and rural areas where the Department seeks to ensure that food stamp households have access to nutritious foods that are intended for home preparation and consumption. The department anticipates that because of the relatively few firms that may be negatively impacted by these requirements and the small quantities of staple foods that affected stores sell to recipients, their ineligibility will not cause hardship to food stamp households and the standard will continue to allow adequate recipient access to eligible staple food for home preparation and consumption.⁴

³ SBA's definition of a small convenience store (according to standard industrial classification code 5411) is \$20 million or less in annual receipts. 13 C.F.R. § 121.201. Some franchise stores may also be included in the definition of "small" based on the degree of affiliation with the parent company.

⁴ 64 Fed. Reg. at 35,087.

Is FNS certain that only a few firms will be impacted? How is “a few” defined? FNS is required by law to state the basis for such a conclusion.

A complete and open analysis could reveal that FNS’ certification may in fact be accurate, however, the agency has not provided a factual basis for its conclusions regarding the impact of the regulation. The Office of Advocacy urges FNS to re-propose the regulation with a factually based and legally sufficient certification, or with an initial regulatory flexibility analysis containing an analysis of appropriate alternatives that could reduce the burden on small entities.

The intent of Congress in passing the Food Stamp Program Improvements Act of 1994 was to insure adequate access for food stamp recipients, while barring so-called marginal food stores from the Program. These comments are not intended to force FNS to abandon this statutory requirement—nor are they intended to undermine the ability of FNS to exercise its discretionary regulatory authority. Rather, these comments are intended to remind FNS that every regulatory agency is legally obligated, under the RFA, to analyze carefully the impact of their regulations on small business before they certify that there will be no significant economic impact on a substantial number of small entities.

Thank you for your attention to this important matter. Please do not hesitate to contact our office if you have any questions, 202-205-6533.

Sincerely,

Jere W. Glover
Chief Counsel for Advocacy

Shawne Carter McGibbon
Asst. Chief Counsel for Advocacy