

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

7 CFR Parts 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, and 285

RIN 0584-AB90

### Food Stamp Program: Revisions to the Retail Food Store Definition and Program Authorization Guidance

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Proposed rule.

**SUMMARY:** This proposed rule would implement provisions of the Food Stamp Program Improvements Act of 1994 to revise the criteria for eligibility of firms to participate in the Food Stamp Program (FSP) as retail food stores, and to provide for notification to such firms of eligibility criteria for participation in the FSP. The intended effect of this proposed rule is to ensure that food stamp recipients continue to have adequate access to retail food stores where they can purchase a wide variety of nutritious food items, intended for home preparation and consumption, that meet their daily food needs, and to clarify procedures and eligibility requirements for authorizing participation in the FSP as a retail food store. This proposed rule also reinserts part of a sentence inadvertently removed from the regulations by an earlier rule, and replaces references to the Secretary of Health and Human Services with references to the Commissioner of the Social Security Administration.

**DATES:** Comments must be received by August 30, 1999 to be assured of consideration.

**ADDRESSES:** Comments should be addressed to Judy Love, Redemption Management Branch, Benefit Redemption Division, Food and Nutrition Service, 3101 Park Center Drive, Alexandria, Virginia 22302-1594, or faxed to (703) 305-2418. All written

comments will be open to public inspection at the office of the Food and Nutrition Service during regular business hours (8:30 a.m. to 5 p.m., Monday through Friday) in room 706, 3101 Park Center Drive, Alexandria, Virginia.

#### FOR FURTHER INFORMATION CONTACT:

Questions regarding this rulemaking should be addressed to Judy Love at the above address or by telephone at (703) 305-2418.

#### SUPPLEMENTARY INFORMATION:

##### Executive Order 12866

This rule has been determined to be significant and was reviewed by the Office of Management and Budget under Executive Order 12866.

##### Executive Order 12372

The Food Stamp Program is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the final rule and related Notice to 7 CFR Part 3015 subpart V (48 FR 29115, June 24, 1983), this Program is excluded from the scope of the Executive Order 12372 which requires inter-governmental consultation with State and local officials.

##### Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601-612). Samuel Chambers, Jr., the Administrator of FNS, has certified that this rule does not have a significant economic impact on a substantial number of small entities, based on preliminary implementation data. It may, however, impact a small number of firms that do not effectuate the purposes of the FSP.

##### Executive Order 12988

This proposed 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 that conflict with its provisions, or that would otherwise impede its full implementation. This rule is not intended to have retroactive effect unless so specified in the **EFFECTIVE DATE** paragraph of this preamble. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable

administrative procedures must be exhausted. In the Food Stamp Program the administrative procedures are as follows: (1) for Program benefit recipients—State administrative procedures issued under to 7 U.S.C. 2020(e)(10) and 7 CFR 273.15; (2) for State agencies—administrative procedures issued under to 7 U.S.C. 2023, and set forth in 7 CFR 276.7 (for rules related to non-quality control (QC) liabilities) or 7 CFR Part 283 (for rules related to QC liabilities); (3) for Program retailers and wholesalers—administrative procedures issued under to 7 U.S.C. 2023, and set forth in 7 CFR 278.8.

##### Unfunded Mandate Reform Act of 1995

Title II of the Unfunded Mandate Reform Act of 1995 (UMRA), Pub. L. 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, FNS 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 FNS 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 contains no Federal mandates under the regulatory provision of Title II of the UMRA for State, local and tribal governments or the private sector of \$100 million or more in any one year. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

##### Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, this notice announces our intent to collect additional information on the application completed by retail food stores to request approval to participate in the Food Stamp Program (FSP) and to obtain approval for 3 years of the revised applications.

Comments on this notice must be submitted by August 30, 1999.

Comments are invited on: (a) whether the proposed collection of information is necessary for the performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be sent to Lori Schack, Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, D.C. 20502 (a copy may also be sent to Judy Love, Redemption Management Branch, Benefit Redemption Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Alexandria, VA 22302. For further information, or for copies of the information collection, please contact Ms. Love at the above address.)

All responses to this notice will be summarized, included in the request for OMB approval, and become a matter of public record.

*Title:* Food Stamp Program Store Applications.

*OMB Number:* 0584-0008.

*Type of Request:* Revision of a currently approved collection.

*Abstract:* The Food and Nutrition Service (FNS) of the U.S. Department of Agriculture is the Federal agency responsible for the FSP. The Food Stamp Act of 1977, as amended (the Act) (7 U.S.C. 2011-2036), requires that the Agency determine the eligibility of firms and certain food service organizations to accept and redeem food stamp benefits and to monitor them for compliance and continued eligibility.

Part of FNS's responsibility is to accept applications from retail food establishments and meal service programs that wish to participate in the FSP, review the applications in order to determine whether or not applicants meet eligibility requirements, and make determinations whether to grant or deny authorization to accept and redeem food stamp benefits. FNS is also responsible for requiring updates to application information and reviewing that information to determine whether or not the firms or services continue to meet eligibility requirements.

There are currently 3 application forms approved under OMB No. 0584-0008. Together these forms are used by retailers, wholesalers, meal service providers, certain types of group homes, shelters, and state-contracted restaurants, to apply to FNS for authorization to participate in the FSP. Form FNS-252, Food Stamp Application For Stores is generally used by stores, excluding facilities which provide meal services such as communal dining, shelters, restaurant and other meal service programs, which are newly applying for authorization; Form FNS-252R, Food Stamp Program Application For Stores-Reauthorization is used by the majority of currently authorized stores to apply for reauthorization, excluding facilities which provide meal services such as communal dining, shelters, restaurants and other meal service programs; and Form FNS-252-2, Application to Participate in the Food Stamp Program for Communal Dining Facility/Others generally used by communal dining and restaurant facilities and other food service programs which are newly applying or applying for reauthorization. In a few cases, at the discretion of the FNS field offices, some stores would be required to complete Form FNS-252 to apply for reauthorization. Section 9(c) of the Act provides the necessary authorization(s) to collect the information contained in these forms. This proposed rule contains new eligibility requirements that result in changes to the application form(s).

Except for two of the new eligibility requirements (discussed later in this notice), the burden imposed by the new requirements have already been incorporated into Form FNS-252 and FNS-252R, as appropriate. On May 6, 1996, FNS published a notice for public comment on the revisions resulting from these new statutory requirements and associated burden estimates. The burden estimates and comments received were submitted to OMB. OMB approved the burden estimates through May 30, 1999. On October 15, 1996, FNS issued final rules (61 FR 53595) which implemented a new collection requirement for certain users of Form FNS-252-2. The appropriate notice soliciting comments on the revised estimates was contained in the preamble of that rule. Again, the burden estimates and comments were submitted to OMB. That submission to OMB included the May 1996 estimates and the October 1996 estimates, and were approved by OMB through October 31, 1999. This new notice announces our intent to

revise the existing burden estimates approved by OMB through October 31, 1999 and obtain OMB approval for an additional 3 years based on proposed re-estimates of the existing burden using more recent data as well as estimates for new information collection that was not contained in the May 6, 1996 or October 15, 1996 notices for public comment.

We do not collect information on the number of FSP applications received annually. Current burden estimates associated with these 3 application forms are determined from information maintained in STARS (Store Tracking and Redemption System) based on the total number of currently authorized stores or the number of newly authorized stores. The number of expected applications is divided between initial applications from new applicants and applications for reauthorization from currently authorized stores.

We are proposing new burden estimates which: use more recent store authorization data; include burden estimates associated with new information collection contained in this proposed rule which was not included in the May 6, 1996 notice; and, include a correction in burden estimates to capture a change in application requirements for private restaurants that was inadvertently omitted from the hourly burden estimates when last submitted to OMB.

#### **Adjustments—Re-estimates Based on More Recent Data and Corrections**

For burden estimates associated with new applicants (initial authorizations), we used the number of stores (all types) newly authorized/approved currently estimated at 20,696 (rounded to 20,700) based on FY 1997 year-end data from STARS and inflated this number by 10% (2,070) to capture a total of 22,770 applications expected to be received and processed from stores annually. It is estimated that 98% (22,315) of the 22,770 applications expected to be received would be on Form FNS-252 and 2% (455) would be on Form FNS-252-2. Due to a technical correction discussed later in this section of the preamble, the number of expected applications would be further changed to reflect an expected total of 22,347 applications using Form FNS-252 and 423 applications using Form FNS-252-2.

For burden estimates associated with applications for reauthorization, we used the total number of stores (all types) authorized (184,300) as of December 1997. Generally, authorized stores are subject to reauthorization at least once every 4 years. Thus, it is

estimated that 25% (46,000) of all authorized stores would be subject to reauthorization in any given year. Using the number of authorized stores as of December 1997, it is estimated that 46,000 reauthorization applications would be expected to be received annually. Of the 46,000 reauthorization applications expected, it is estimated that 96% (44,160) will be on Form FNS-252R, 3% (1,380) will be on Form FNS-252-2, and 1% (460) will be on Form FNS-252.

Hourly burden time per response varies by type of application and includes the time to review instructions, search existing data resources, gather and copy the data needed, complete and review the application, and submit the form and documentation to FNS. It should be noted that the number of applicant and authorized stores has been declining over the past few years due to several program changes, such as changes in eligibility requirements, stronger sanctions against violators, and implementation of Electronic Benefit Transfer systems. These declines have resulted in a reduction in the overall number of respondents and ultimately a reduction in the overall proposed burden hours reflected in the summary chart.

Currently, private restaurants applying for FSP participation in the State-administered special restaurant program use Form FNS-252-2 to apply for participation. This category of applicant represents about 7% of the number of current applicants using Form FNS-252-2. Over time, it has been determined that we need additional information from such private restaurants to ensure that they meet necessary requirements of operation to carry out the intent of the FSP. The additional information needed would be captured by having these respondents, estimated at about 32, complete Form FNS-252 rather than Form FNS-252-2. We estimate that these restaurants will spend an estimated 10 minutes of additional burden time using the longer Form FNS-252, however, this contributes to a negligible amount to the increase in the average hourly burden rate reflected in the chart on page 10

because the number of respondents is so small. This change is a technical correction rather than a re-estimate based on more recent data, and is reflected in the number of initial applications expected to be received as shown in the summary chart.

As currently approved by OMB, the hourly burden rate per response for Form FNS-252 is 20 to 68 minutes, with the average being 27 minutes and 10 to 20 minutes for Form FNS 252-2, with the average being 10 minutes. These hourly burden rates are not affected by the re-estimated number of applications expected to be received or the technical correction. However, previous estimates to OMB erroneously reflected the average burden time for Form FNS-252-2 as 10 minutes. The average time is 12 minutes and this correction appears in the proposed estimates in the summary chart.

**Adjustments—New Information Collection—Proposed Rule**

This proposed rule requires that retail food stores qualifying under criterion A offer for sale on a continuous basis a variety of foods in each of the 4 staple food categories: Bread/Cereals; Dairy Products; Fruits/Vegetables; and Meat/Poultry/Fish. Forms FNS-252 and 252R would be affected by this new information collection. Currently, stores simply use a check box entitled "Variety" on Forms FNS-252 and FNS-252R to indicate that they have more than one type of staple food within each of the 4 staple food categories listed. Under the proposed rules (§ 278.1(b)(1)(ii)(A)), stores would have to declare that they have a minimum of 3 different types of staple foods in each of the 4 staple food categories. To implement this change, we would make a simple change to the heading of the current check-box item. Hourly burden associated with this change is expected to be negligible, so no change is made in the estimate.

The proposed regulations (§ 278.1(b)(1)(ii)(B)) further provide that stores qualifying under criterion A have at least \$30,000 in annual wholesale staple food purchases. We would add a Yes/No check-box question to Forms

FNS-252 and FNS-252R to capture this information. Most stores will know their wholesale staple food purchases exceed \$30,000 and will check this box. Those that do not know this information will incur an estimated additional 10 minutes (or .1667 hours) of burden time to assemble and analyze readily available store records such as wholesale inventory receipts. This requirement does not affect users of Form FNS-252-2 as these applicants are meal service providers, which are not subject to the new requirement, nor does it affect stores qualifying under Criterion B, which requires that 50 percent or more of a firm's sales must be in staple foods. We do not know how many stores would incur this additional burden on Forms FNS-252 and 252R. For the purpose of assessing burden, we are assuming that at least an estimated 5% (1,140) of the number of applications expected to be received annually using Form FNS-252 (22,807) would incur this additional burden. We further assume that at least an estimated 5% (2,208) of the number of reauthorization applications expected to be received using Form FNS-252R (44,160) would incur the additional burden.

The hourly burden time for users of Form FNS-252 is estimated to be 20 to 68 minutes, with the average being 27 minutes. The hourly burden time for users of Form FNS-252R is estimated to be 5 to 8 minutes, with the average being 7 minutes. The estimated additional 10 minutes of burden time associated with the new information collection requirements would increase the average burden time for the affected respondents to 37 minutes for Form FNS-252 and 17 minutes for Form FNS-252R. Thus, the overall average hourly burden rate for all users of these forms would change from 27 to 27.5 minutes for Form FNS-252 and from 7 to 7.5 minutes for Form FNS-252R as a result of the new requirements.

Total number of respondents completing at least one of the 3 applications in question, taking into consideration the adjustments discussed above, would be as follows:

FNS-252:			
New authorizations .....	—	22,347	(22,770 × .98 + 32).
Reauthorizations .....	—	460	(184,000 × .25 × .01).
		22,807	
FNS-252-2:			
New authorizations .....	—	423	(22,770 × .02 - 32).
Reauthorizations .....	—	1,380	(184,000 × .25 × .03).
		1,803	
FNS-252R:			

Reauthorizations .....	—	44,160	(184,000 × .25 × .01 – 1,380 – 460).
Total Responses .....		68,770	

The existing estimates, as approved by OMB through May 1999 and shown on the following chart, reflect the total annual number of responses as 80,613 and the annual burden hours as 18,396. The proposed number of responses would be 68,700 with total burden hours of 16,333 hours. The net effect of

the proposed burden estimates is an overall decrease in burden hours of 2,063 hours annually.

*Affected Public:* Food Retail and Wholesale Firms, Meal Service Programs, certain types of Group Homes, Shelters, and State-contracted Restaurants.

*Estimated Number of Respondents:* 68,770.

*Estimated Number of Responses per respondent:* 1.

*Estimated Time per Response:* 0.237501.

*Estimated Total Annual Burden:* 16,333.

SUMMARY OF PROPOSED BURDEN ESTIMATES FOR FORMS FNS-252, 252-2 AND 252R

Title	Number of respondents	Responses per respondent	Total annual responses	Burden hours per response	Total annual burden hours
Form FNS-252:					
Existing .....	26,431	1	26,431	.4500	11,894
Proposed .....	22,807	1	22,807	.4583	10,452
Difference .....	-3,624	1	-3,624	+0.0083	-1,442
Form FNS-252-2:					
Existing .....	2,592	1	2,592	.1855	481
Proposed .....	1,803	1	1,803	.2000	361
Difference .....	-789		-789	+0.0145	-120
Form FNS-252R:					
Existing .....	51,590	1	51,590	.1167	6,021
Proposed .....	44,160	1	44,160	.1250	5,520
Difference .....	-7,430		-7,430	+0.0083	-501
Totals:					
Existing .....	80,613		80,613		18,396
Proposed .....	68,770		68,770		16,333
Difference .....	-11,843		-11,843		-2,063

**Background**

Sections 201 and 202 of the Food Stamp Program Improvements Act of 1994, Pub. L. 103-225, (hereinafter, Pub. L. 103-225), revised the eligibility requirements found in section 3(k)(1) of the Food Stamp Act of 1977, as amended, 7 U.S.C. 2011-2036 (hereinafter the Act) for firms participating in the Food Stamp Program (FSP) as retail food stores. Under the current provisions of the Act, as amended by Pub. L. 103-225, a firm to be eligible to participate as a retail food store, under section 3(k)(1) of the Act, must offer for sale a variety of staple foods for home preparation and consumption in each of four staple food categories, including perishable foods in at least two of the categories, or have the majority of its total gross sales in staple foods for home preparation and consumption.

Current food stamp regulations, implementing section 3(k)(1) of the Act, provide that, in order to participate in the FSP, a firm must have more than 50 percent of its eligible food sales volume in staple food items intended for home preparation and consumption. In 1992, when the Department began the periodic reauthorization of retail food stores, as authorized by the Food,

Agriculture, Conservation, and Trade Act of 1990, Pub. L. 101-624, it was determined that a significant number of small retail food stores participating in the Food Stamp Program, under section 3(k)(1) of the Act, no longer met the required ratio of staple food sales to eligible food sales. Concern developed over the possibility that a massive withdrawal of these retail food stores, especially stores serving recipients in inner-cities and rural areas, could create a hardship for food stamp recipients throughout the country. Accordingly, in Pub. L. 103-225, Congress revised the eligibility criteria that firms must meet in order to obtain and maintain FSP authorization to participate as a retail food store.

H.R. Report No. 352, 103rd Congress (1993) (November 10, 1993, page 3), which accompanied Pub. L. 103-225, (hereafter Report 352), stated that the revised eligibility criteria were intended to allow stores that “. . . sell a wide range and high percentage of nutritious staple foods . . .” to continue participating in the FSP, to ensure “. . . that food stamp recipients have adequate access to retail food stores. . . .” That same report also stated that the revised definition of a retail food store in section 3(k)(1) was

intended to “. . . bar marginal food stores from participating in the program. . . .”

Under current rules implementing section 3(k)(1) of the Act, a firm's eligibility is based on the ratio of staple food sales to eligible food sales. At section 3(g) of the Act, “eligible food” is defined as any food or food product intended for home consumption except alcoholic beverages, tobacco, hot foods, or hot food products ready for immediate consumption. Thus, under current rules, a firm could qualify as long as its staple food sales exceeded 50 percent of its total eligible food sales. This means, for example, that a liquor store that sells a variety of staple snack foods such as chips, crackers, cheeses and hors d'oeuvres, would qualify for authorization as long as the staple food sales exceeded eligible accessory food sales, including carbonated and uncarbonated non-alcoholic beverages, coffee, tea, cocoa, candy, condiments, and spices. This was true even though a store's food sales may have represented only a small portion of its business. Consequently, such marginal food stores have been allowed to participate in the FSP under current rules.

As noted, Report 352 states that the revised definition of a retail food store under Pub. L. 103-225 was intended to bar such marginal food stores from participating in the FSP. Congress amended section 3(k)(1) to require that firms sell a wide range or high percentage of staple foods in order to be eligible to participate as a retail food store. Thus, based on Pub. L. 103-225, this rule proposes that in order to qualify under section 3(k)(1) of the Act, as amended, a firm must either offer for sale an ample variety of staple foods for home preparation and consumption in each of the four staple food categories, including perishable foods in at least two of the categories, or have the majority of its total gross sales in staple foods for home preparation and consumption. This would effectively bar many marginal food stores from participation, and at the same time, ensure that food stamp recipients have access to retail food stores that sell an ample variety of staple foods intended for home preparation and consumption.

Pub. L. 103-225 and this proposed rule are not intended to affect the current prohibition against the participation of certain types of firms that do not effectuate the purposes of the Food Stamp Program, as set forth in Report 352. This includes, but is not limited to, stores selling only accessory foods, such as spices, candy, soft drinks, tea, or coffee; ice cream vendors selling solely ice cream; specialty doughnut shops or bakeries not selling bread. Furthermore, this rule is not intended to affect and does not change current statutory restrictions on the participation of meal services, wholesalers or the special restaurant programs for the elderly, disabled, and the homeless.

Pub. L. 103-225 and this proposed rule restate the long-standing requirement that a qualifying firm under section 3(k)(1) of the Act must sell staple foods for home preparation and consumption. As set forth in section 1 of the Act, the purpose of the FSP is "to provide for improved levels of nutrition among low-income households." Further, as set forth in section 2, the FSP should "permit low-income households to obtain a more nutritious diet through normal channels of trade \* \* \*" The policies and concepts proposed in this rule are based on the underlying principle that a qualifying firm under section 3(k)(1) of the Act must either sell an ample variety of staple foods for home preparation and consumption, or have the majority of its total gross retail sales in staple foods intended for home preparation and consumption.

In addition, Pub. L. 103-225 states that the Secretary must issue regulations providing for periodic notice to participating retail food stores and wholesale food concerns of the definitions of "retail food store," "staple foods," "eligible foods," and "perishable foods." The Department is proposing that this notification, at a minimum, be provided at the time of the initial authorization of a firm, as well as at the time a participating retail food store is reauthorized.

Finally, this proposed rule reinserts language that was inadvertently removed in a regulation published on December 27, 1996, titled "Revisions in Use and Disclosure Rules Involving the Sharing of Information Provided by Retail and Wholesale Concerns with Other Federal and State Agencies". The language, which allows the Department to disclose information about firms participating in the FSP for administration and enforcement purposes, would be added to the first sentence in § 278.1(q) of the FSP regulations. This is consistent with section 9(c) of the Food Stamp Act of 1977, as amended, and section 17 of the Child Nutrition Act of 1966.

#### **Revisions in Definitions and Eligibility Criteria Involving Retail Food Stores (7 CFR 271.2 and 7 CFR 278.1)**

Under current rules (7 CFR 271.2), a retail food store is defined as having more than 50 percent of its total eligible food sales in staple food sales intended for home preparation and consumption. Pub. L. 103-225 amended section 3(k)(1) of the Act and established two separate criteria, meeting either one of which, absent any other restriction, would qualify a firm to be eligible to accept and redeem food stamp benefits as a participating retail food store. This rulemaking proposes to implement changes to section 3(k)(1) of the Act required by Pub. L. 103-225, to revise the definition of "retail food store" and "staple foods" to conform to the statutory changes. It also would define four new terms—"continuous basis," "perishable," "total gross retail sales" and "variety of foods"—that are used in the revised definition of a retail food store.

#### *Eligibility Requirements Under Criterion A*

Criterion A, section 3(k)(1)(A) as amended by Pub. L. 103-225, is the first basis upon which a firm may qualify for participation in the FSP as a retail food store. Section 3(k)(1)(A) requires that an establishment or house-to-house trade route offer for sale, on a continuous basis, a variety of staple foods intended

for home preparation and consumption in each of the four categories of staple foods, as specified in subsection (u)(1) of the Act, including perishable foods in at least two of the four categories.

The Department proposes to revise the definition of "staple food" contained in regulations at 7 CFR 271.2 to mean those items intended for home preparation and consumption in the following four categories: (1) meat, poultry, or fish; (2) bread or cereals; (3) vegetables or fruits; and, (4) dairy products. "Staple foods" do not include accessory food items such as coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices (section 3(u)(2) of the Act). The definition of "staple food" under current rules in 7 CFR 271.2 and in previous statutory language at section 3(k)(1) of the Act, described "staple food" as items for home preparation and consumption, such as meat, poultry, fish, bread, breadstuffs, cereals, vegetables, fruits, fruit and vegetable juices, dairy products and the like, but not including accessory food items, such as coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices.

Hot foods, by statute, continue to be ineligible for purchase with food stamps under this proposed rule, and therefore do not qualify as staple foods for the purpose of determining eligibility. Pub. L. 103-225 and this rule do not change the definition of "eligible foods" that can be purchased with food coupons.

The revised statutory definition of retail food store under this criterion includes four new terms—"variety of foods," "continuous basis," "perishable foods," and "total gross retail sales" (section 3(k)(1)(A) of the Act, as amended by Pub. L. 103-225). Firms that qualify to participate in the Food Stamp Program as a retail food store under Criterion A, must stock and offer for sale a variety of foods on a continuous basis in each of the four defined staple food categories, with perishable foods in at least two of those categories.

#### *Variety of Foods*

The Department proposes that the term "variety of foods" means that a qualifying firm 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.

The Department further proposes that the term "variety of foods" should not be interpreted as meaning different brands, different types of packaging,

different package sizes, or similar food items with varying ingredients. The purpose of this is to ensure that food stamp recipients have a reasonable selection of foods from which to choose. For example, a store could not satisfy the dairy requirement under Criterion A by stocking only skim milk, whole milk, and chocolate milk, because these milks with varying ingredients would count as only one variety. Examples of processed foods with similar ingredients that would count as a single staple food variety for the purpose of determining store eligibility are: various types and brands of sausage (mild, spicy, low salt, low fat); breakfast cereals; sliced breads (white, wheat, rye, oat bran, and multi-grains); pasta sauces; and milk (low fat, flavored, canned, powdered). Examples of their similarities, would count as a single staple food variety for the purpose of determining store eligibility are: different types of apples, lettuce, mushrooms, potatoes, cabbage, tomatoes, squash, or onions. The Department is particularly interested in receiving comments on this aspect of the proposed rulemaking.

In addition, the Department proposes that multi-ingredient food items intended for home preparation and consumption, such as macaroni and cheese, canned beef stew, cold pizzas or frozen dinners, would only be counted as one variety of staple food, which would normally be based on the main staple food ingredient as determined by the Department. For example, macaroni and cheese would be counted as only one variety, a pasta, and not a cheese or both pasta and cheese, because pasta is the main ingredient. The Department believes this proposal is needed for clarification purposes and to ensure more consistent application of the new retail store definition in determining a firm's eligibility. The Department also believes this proposal is reasonable and prudent and meets the intent of Congress in requiring eligible stores to sell a variety of staple foods. The Department invites comments regarding this criteria.

#### Continuous Basis

The stated purpose of the FSP in section 2 of the Act is to alleviate hunger and malnutrition and to permit low-income households to obtain a more nutritious diet. Report 352 states that "only food stores that carry an ample supply of food items in each category of staple foods would be authorized to accept and redeem food stamps." It is, therefore, important that authorized firms qualifying under section 3(k)(1) of the Act be able to

provide food stamp households access to an ample variety of staple food items in sufficient amounts on a continuous basis. The Department proposes that one way to measure whether or not qualifying firms offer a sufficient depth of stock in staple foods on a continuous basis is to require that firms meet a minimum annual staple food wholesale purchase threshold, which would require verification of at least \$30,000 in staple food wholesale purchases annually. Wholesale purchases are purchases of goods by retailers for resale to consumers. This threshold may be periodically adjusted. Participating stores would be notified in advance of any changes in the minimum annual staple food threshold. The Department seeks comments on its proposed threshold, as well as any alternative suggestions.

The Department proposes that a retail food store covered by section 3(k)(1) of the Act would not qualify under Criterion A if it failed to meet the minimum \$30,000 in staple food wholesale purchases annually. New stores must meet this standard to be authorized, and all participating stores must continue to meet this standard in order to maintain their authorization. New stores may meet the standard through projections of, at least, \$30,000 in staple food wholesale purchases annually.

As mentioned above, Congress revised the eligibility requirements in section 3(k)(1) of the Act 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.

#### Perishable Foods

The Department proposes that, for the purpose of this rule, the term "perishable foods" means frozen staple foods as well as fresh, unrefrigerated or refrigerated staple foods that have a turnover rate of approximately 2 to 3 weeks to ensure that optimal quality is maintained. Frozen food is included as

a perishable because of the potential for frozen foods to deteriorate if they are maintained at temperatures above freezing for lengthy periods of time. Typically, perishable foods will spoil or suffer significant deterioration in quality within a 2-3 week period. Examples of perishable food items include fresh milk; fresh or frozen vegetables, fruits, breads, meats, and fish. Two or more staple food categories must include perishable foods. Congressional intent for this requirement, as referenced in Report 352, is to ensure "adequate turnover of items in those categories" which is evidence that a firm is a legitimate food store regularly in the business of selling food for home preparation and consumption under section 3(k)(1) of the Act.

#### Eligibility Requirements Under Criterion B

The eligibility requirements under this criterion, section 3(k)(1)(B) of the Act, are similar to current rules, but rather than requiring a firm 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. A firm that meets the eligibility requirements of the first criterion (Criterion A) (absent other restrictions) would not be required to meet this second criterion (Criterion B) and likewise, a firm that meets the second criterion (absent other restrictions) would not be required to meet the first criterion.

The Department wishes to clarify that total gross retail sales means *all* retail sales of the firm, including food and non-food merchandise, as well as services such as rental fees, professional fees, and entertainment/sports/game income. However, the Department proposes that retail service fees directly connected to the processing of staple foods, such as raw meat, poultry or fish by the service provider, would be calculated as staple food sales under Criterion B. This is to ensure that specialty firms, such as those selling only meat, are not negatively impacted by the proposed retail food store definition if they derive a high percentage of their gross retail sales from services that are not staple food sales but are directly related to staple food sales, such as meat processing fees. These types of specialty firms generally offer reasonably priced staple foods and provide a valued service to food stamp recipients, and clearly effectuate the purposes of the FSP. The Department wishes to reiterate, however, that service charges such as rental fees, professional fees, and entertainment/

sports/games incomes are to be included in the computation of a firm's total gross retail sales.

#### *Verification of Information*

As set forth in Pub. L. 103-225, the Department proposes that verification of information (such as a firm's food sales data, wholesale purchasing receipts, and inventory records) that covers an appropriate period of time may be required to be provided by the firm to the Department to document compliance with eligibility criteria. Failure to provide this information when requested would result in the denial or withdrawal of authorization.

#### *Recipient Hardship Consideration*

Historically, FSP rules and the Act have only stipulated special recipient hardship exceptions in rare cases involving stores that have committed violations and face disqualification from program participation under section 278.6. This rule does not propose to create a new recipient hardship exception for applicant firms. The Department is, however, requesting comments regarding justification for such an exception.

#### *Ineligible Stores*

The changes proposed in this rulemaking are intended to allow continued FSP participation as a retail food store for firms that effectuate the purposes of the FSP and which meet either of the criterion under section 3(k)(1). In keeping with the intent of Congress, it is not the purpose of this proposed rulemaking to expand participation to entities that have not been allowed to participate in the past under section 3(k)(1). Thus, the Department wishes to reiterate that firms that are primarily restaurants would qualify to participate in the FSP only under the restrictions of the special, State administered restaurant programs that serve only special populations (the elderly, disabled or homeless food stamp recipients) at concessional prices. These programs are specifically provided for in section 3(g) of the Act. Therefore, at section 271.2, paragraph 4, the Department has proposed that firms having more than 50 percent of their total gross retail sales in hot or cold prepared foods that are not intended for home preparation and consumption, such as prepared sandwiches, prepared salads and individual cones or dishes of ice cream, that are consumed on the premises or sold for carryout, will continue to be ineligible under section 3(k)(1) (A) or (B) of the Act. This position is strongly supported by the manner in which the

statute at section 3(k) was constructed and subsequently amended by Pub. L. 103-225. That is, section 3(k) sets forth 4 separate and distinct types of eligible firms. Firms described in sections 3(k)(2), (3) and (4) are clearly distinguishable from those covered in 3(k)(1) and are singled out for special treatment. Section 3(k)(2) covers, among other firm types, private restaurants by directly referencing entities cited in sections 3(g)(3), (4), (5), (7), (8), and (9), under the definition of "food." Clearly Pub. L. 103-225 amended only section 3(k)(1) and did not change the restrictions on the types of firms covered under sections 3(k)(2), (3) and (4).

Finally, the provisions in sections 3(g)(3), (4) and (9) of the Act under the definition of "food," permit private establishments (i.e., restaurants) to accept food stamps only from elderly, disabled or homeless individuals, and only if the establishment has a contract with an agency of the State to offer meals to such persons at concessional prices.

#### *Periodic Notification to Stores*

In accordance with the provisions and requirements set forth in section 202 of Pub. L. 103-225, this rule proposes that firms participating as retail food stores will be provided periodic notification of program eligibility criteria. In order to maintain program integrity, authorized retail food stores must fully understand and comply with regulatory requirements to continue to participate in the FSP. Thus, the Department proposes that when a new firm applies for authorization, it will routinely be provided with materials that lay out the criteria for authorization under section 3(k)(1) of the Act. In addition, FNS will provide this information when a participating retail food store receives its reauthorization notification, and at other times, upon request. These materials, at a minimum, will include the definitions of "retail food store," "eligible foods," "staple foods," and "perishable foods."

#### *Request for Comments on Proposed Retail Food Store Eligibility Criteria*

Because the statutory requirements were effective upon enactment, most of the changes in store eligibility criteria required by Pub. L. 103-225 have been implemented. The proposed wholesale purchase threshold used to define the continuous basis requirement under Criterion A is new and has not been implemented. The Department believes most firms that are otherwise eligible under Criterion A will meet this new proposed requirement. Some small

stores that are currently eligible may not meet this proposed threshold; however, because these stores tend to sell primarily staple food items, they should easily qualify under Criterion B, which does not include such a threshold.

The Department projects that the overall impact of this proposed rule will not affect most stores currently participating in the Food Stamp Program. FNS data shows that 1.7 percent of all stores evaluated for reauthorization between October, 1993 and September, 1998, (2,866 out of 168,079 stores) failed to meet either Criterion A or B. The Department requests comments on the effects of this proposed rule, including costs and benefits.

#### **List of Subjects**

##### *7 CFR Part 271*

Administrative practice and procedure, Food stamps, Grant programs—social programs.

##### *7 CFR Part 278*

Administrative practice and procedure, Banks, Banking, Claims, Food stamps, Groceries—retail, Groceries, General line—wholesaler, Penalties.

Accordingly, 7 CFR parts 271 through 285 are proposed to be amended as follows:

#### **PARTS 271-285—[AMENDED]**

1. The authority citation for parts 271 through 285 is revised to read as follows:

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

#### **PART 271—GENERAL INFORMATION AND DEFINITIONS**

2. In § 271.2:

a. The definitions of "retail food store" and "staple food" are revised to read as follows:

##### **§ 271.2 Definitions.**

\* \* \* \* \*

*Retail food store* means: (1) An establishment or house-to-house trade route that sells food for home preparation and consumption displayed in a public area, and, either offers for sale on a continuous basis, a variety of foods in sufficient quantities in each of the four categories of staple foods including perishable foods in at least two such categories (Criterion A) as set forth in § 278.1(b)(1), or has more than 50 percent of its total gross retail sales in staple foods (Criterion B) as set forth in § 278.1(b)(1). Entities that have more than 50 percent of their total gross sales in hot and/or cold prepared, ready-to-eat foods that are intended for

immediate consumption either for carry-out or on-premises consumption, and require no additional preparation, are not eligible for FSP participation as retail food stores under § 278.1(b)(1);

(2) An entity with indicators which may be used to establish that a firm is a legitimate retail food store. These include, but are not limited to, the following: a firm's marketing structure; appropriate retail business licenses; the posting of prices, and the accessibility of food items offered for sale; and

(3) An entity that meets this definition of retail food store as determined by visual inspection, sales records, wholesale purchase records, counting of stockkeeping units, or other inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry.

\* \* \* \* \*

*Staple food* means those food items intended for home preparation and consumption in each of the following food categories: meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products. Commercially processed foods and prepared mixtures with multiple ingredients shall only be counted in one staple food category. For example, foods such as cold pizza, macaroni and cheese, multi-ingredient soup, or frozen dinners, shall only be counted as one staple food item and will normally be included in the staple food category of the main ingredient as determined by FNS. Hot foods are not eligible for purchase with food stamps, and therefore do not qualify as staple foods for the purpose of determining eligibility under § 278.1(b)(1). Accessory food items including, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices shall not be considered staple foods for the purpose of determining eligibility of any firm. However, accessory foods that are offered for sale in authorized retail food stores are eligible food items to be purchased with food stamp benefits.

\* \* \* \* \*

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

3. In § 278.1:

a. Paragraphs (b)(1)(i) and (b)(1)(ii) are revised;

b. Paragraph (b)(1)(iii) is redesignated as paragraph (b)(1)(v) and revised;

c. Paragraph (b)(1)(iv) is redesignated as paragraph (b)(1)(vi) and a heading is added;

d. New paragraphs (b)(1)(iii) and (b)(1)(iv) are added;

e. The first sentence of paragraph (q) introductory text is revised and a new sentence is added after the first sentence.

f. Paragraph (q)(3)(iii) is amended by removing the words "Secretary of Health and Human Services" wherever they appear, and adding in their place the words "Commissioner of the Social Security Administration"; and,

g. A new paragraph (t) is added.

The revisions and additions read as follows:

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

\* \* \* \* \*

(b) *Determination of authorization.* \* \* \*

(1) *The nature and extent of the food business conducted by the applicant.* (i) *Retail food store.* An establishment or house-to-house trade route shall normally be considered to have food business of a nature and extent that will effectuate the purposes of the program if they sell food for home preparation and consumption and meet one of the following criteria:

(A) offer for sale, on a continuous basis, a variety of qualifying foods in each of the four categories of staple foods as defined in § 271.2 of this chapter, including perishable foods in at least two of the categories; or

(B) have more than 50 percent of the total gross retail sales of the establishment or route in staple foods; and

(C) eligibility determination may be based on, but not limited to, visual inspection, sales records, purchase records, counting of stockkeeping units, or other inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry. In determining eligibility such information may be requested for verification purposes, and failure to provide such documentation may result in denial or withdrawal from the FSP.

(ii) *Application of Criterion A.* In order to qualify under this criterion, firms shall:

(A) Offer for sale and displayed in a public area, qualifying staple food items on a continuous basis, evidenced by having on any given day, no fewer than three different varieties of food items in each of the four staple food categories;

(B) Meet a minimum annual staple food wholesale purchase requirement of \$30,000 which may be shown through business records such as, but not limited to, wholesale purchase receipts or sales records, or by visual inspections. Failure to provide verifying information when requested shall result in the denial or withdrawal of

authorization. Wholesale purchases are purchases of goods by retailers for resale to consumers. For new firms, this minimum annual staple food wholesale purchase requirement may be met by business projections. This minimum annual staple food wholesale purchase requirement may be periodically adjusted after advance notification to participating firms of such a change;

(C) Offer for sale perishable staple food items in at least two staple food categories. Perishable foods are 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;

(D) Variety of foods is not to be interpreted as different brands, different nutrient values, different varieties of packaging, or different package sizes. Similar processed food items with varying ingredients such as, but not limited to, sausages, breakfast cereals, milk, sliced breads, and cheeses, and similar unprocessed food items, such as, but not limited to, different varieties of apples, cabbage, tomatoes, or squash, shall not be considered as more than one staple food variety each for the purpose of determining variety.

Multiple ingredient food items intended for home preparation and consumption, such as, but not limited to, cold pizza, macaroni and cheese, soup, or frozen dinners, shall only be counted as one staple food variety each and will normally be included in the staple food category of the main ingredient as determined by the FNS; and

(E) Failure to stock and offer for sale staple food items as required under paragraph (b)(1)(ii) of this section shall result in the store not meeting Criterion A.

(iii) *Application of Criterion B.* In order to qualify under this criterion, firms must have more than 50 percent of their total gross retail sales in staple food sales. Total gross retail sales must include all retail sales of a firm, including food and non-food merchandise, as well as services, such as rental fees, professional fees, and entertainment/sports/games income. However, a fee directly connected to the processing of staple foods, such as raw meat, poultry or fish by the service provider, shall be calculated as staple food sales under Criterion B.

(iv) *Ineligible firms.* Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the FSP shall not be eligible for program participation. New applicant firms that are found to be ineligible will be denied authorization for program participation and

authorized retail food stores found to be ineligible will be withdrawn from program participation. Ineligible firms under this paragraph (b)(1)(iv) include, but are not limited to, stores selling only accessory foods, including spices, candy, soft drinks, tea, or coffee; ice cream vendors selling solely ice cream; and specialty doughnut shops or bakeries not selling bread. In addition, 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, shall not qualify for participation as retail food stores under Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout. This does not, however, change the eligibility requirements for the special restaurant programs that serve the elderly, disabled, and homeless populations, as set forth in paragraph (d) of this section.

(v) *Wholesale food concerns.*

Wholesale food concerns, the primary business of which is the sale of eligible food at wholesale, and which meet the staple food requirements in paragraph (b) of this section, shall normally be considered to have adequate food business for the purposes of the program, provided such concerns meet the criteria specified in paragraph (c) of this section.

(vi) *Co-located wholesale food concerns.* \* \* \*

\* \* \* \* \*

(q) *Use and disclosure of information provided by firms.* With the exception of EINs and SSNs, any information collected from retail food stores and wholesale food concern, such as ownership information and sales and redemption data, may be disclosed for purposes directly connected with the administration and enforcement of the Food Stamp Act and these regulations, and can be disclosed to and used by State agencies that administer the Special Supplemental Food Program for Women, Infants and Children (WIC). Such information may also be disclosed to and used by Federal and State law enforcement and investigative agencies for the purpose of administering or enforcing other Federal or State law, and the regulations issued under such other law.\* \* \*

\* \* \* \* \*

(t) *Periodic notification.* The FNS will issue periodic notification to participating retail stores and wholesale food concerns to clarify program eligibility criteria, including the definitions of "retail food store", "staple

foods", "eligible foods", and "perishable foods". At a minimum, such information will be provided to stores at the time of authorization, reauthorization and upon request.

Dated: June 18, 1999.

**Shirley R. Watkins,**

*Under Secretary, Food, Nutrition and Consumer Services.*

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## NUCLEAR REGULATORY COMMISSION

### 10 CFR Part 20

#### Release of Solid Materials at Licensed Facilities: Issues Paper, Scoping Process for Environmental Issues, and Notice of Public Meetings

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Request for comment on issues paper and scoping process, and notice of plans for public meetings.

**SUMMARY:** The Nuclear Regulatory Commission (NRC) is considering a rulemaking that would set specific requirements on releases of solid materials in order to establish a regulatory framework more consistent with existing NRC requirements on air and liquid releases. The NRC is seeking early public input on the major issues associated with such a rulemaking, including conducting a scoping process related to the scope of environmental impacts. To aid in that process, the NRC is requesting comments on the issues discussed in this notice. NRC also intends to conduct four public meetings beginning in August of this year. This document provides background and topics of discussion for those meetings. **DATES:** Submit comments by November 15, 1999. Comments received after this date will be considered if it is practicable to do so, but the Commission is able to assure consideration only for comments received on or before this date.

In addition to providing opportunity for written (and electronic) comments, public meetings on the issues paper and scoping process will be held as follows: August 4-5, 1999—Chicago, Illinois, 8:30 am-5 pm, Hyatt Regency McCormick Place, 2233 South Martin Luther King Dr, Chicago, Illinois  
September 15-16, 1999—San Francisco, California, 8:30 am-5 pm Radisson Miyako Hotel, 1625 Post Street, San Francisco, California  
October 5-6, 1999—Atlanta, Georgia, 8:30 am-5 pm, Crown Plaza Atlanta

Powers Ferry, 6345 Power Ferry Road NW, Atlanta, Georgia  
November 1-2, 1999—Rockville, Maryland, 8:30 am-5 pm NRC Auditorium, 15545 Rockville Pike, Rockville, Maryland

**ADDRESSES:** Submit comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Attention: Rulemaking and Adjudications staff.

Deliver comments to 11555 Rockville Pike, Rockville, Maryland, between 7:30 am and 4:15 pm on Federal workdays.

You may also provide comments via the NRC's interactive rulemaking website through the NRC home page (<http://www.nrc.gov>). This site provides the capability to upload comments as files (any format), if your web browser supports that function. For information about the interactive rulemaking website, contact Ms. Carol Gallagher, (301) 415-5905 (e-mail: [CAG@nrc.gov](mailto:CAG@nrc.gov)).

Copies of any comments received may be examined at the NRC Public Document Room, 2120 L Street NW (Lower Level), Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Frank Cardile, telephone: (301) 415-6185; e-mail: [fpc@nrc.gov](mailto:fpc@nrc.gov), Office of Nuclear Material Safety and Safeguards, USNRC, Washington DC 20555-0001. Specific comments on the public meeting process should be directed to Chip Cameron; e-mail [fxc@nrc.gov](mailto:fxc@nrc.gov), telephone: (301) 415-1642; Office of the General Counsel, US NRC, Washington DC 20555-0001.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Unlike for air and liquid releases, the Commission currently has no specific regulatory requirements regarding release of solid materials. Even though the NRC does not have requirements in this area, it still receives requests from licensees for release of solid materials which it must evaluate on a case-by-case basis using existing guidance or case-specific criteria. Solid materials include metals, concrete, soils, equipment, furniture, etc., present at licensed nuclear facilities. To provide consistency in its regulatory framework for releases of all materials, the Commission is considering a rulemaking that would set specific requirements for release of solid materials.

The NRC is supplementing its standard rulemaking process by conducting enhanced public participatory activities including facilitated public meetings, before the start of any formal rulemaking process, to solicit early and active public input