



May 17, 2016

The Honorable Thomas J. Vilsack
U.S. Department of Agriculture
1400 Independence Avenue SW, Room 200-A
Washington, DC 20250

Re: RIN 0584-AE27 – Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)

Secretary Vilsack,

I am gravely concerned with USDA's proposed changes to its regulations governing SNAP retailer eligibility. Several parts of the draft rule, independently—and certainly the whole rule, collectively—would disqualify all of Cumberland Farms' approximately 550 convenience stores from continuing to accept SNAP benefits.

Enclosed, please find my staff's detailed analysis of the proposed rule. We implore you to address the serious issues raised therein, before USDA moves forward with any final rule.

Sincerely,

A handwritten signature in black ink, appearing to read "Ari N. Haseotes".

Ari N. Haseotes

President and Chief Executive Officer

Encl. (1)

Cc: Mark G. Howard
Executive Vice President and Chief Legal Officer



May 17, 2016

VIA ELECTRONIC FILING — www.regulations.gov

The Honorable Thomas J. Vilsack
Secretary of Agriculture
U.S. Department of Agriculture
Washington, D.C.

Re: RIN 0584-AE27 / Docket No. FNS-2016-0018 — “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)”

Dear Secretary Vilsack,

I. INTRODUCTION

Cumberland Farms, Inc. (“Cumberland Farms”) respectfully submits these comments to the U.S. Department of Agriculture (“USDA”) on the above-referenced rulemaking (the “Proposed Rule”), which would effect significant changes to the retailer eligibility standards whereby our stores are presently authorized to accept Supplemental Nutrition Assistance Program (“SNAP”) benefits.¹ We sincerely hope that USDA will take our feedback to heart; for the sake of beneficiaries and retailers alike, the Proposed Rule must not be adopted as written.

We did not oppose the enhanced breadth of stock minimums in the Agricultural Act of 2014 (the “Farm Bill”), recognizing the relative practicality of those provisions, the necessity of political consensus-building, and the reality of an evolving marketplace.² We likewise do not oppose rulemaking by USDA’s Food and Nutrition Service (“FNS”) to integrate those Farm Bill provisions into existing SNAP regulations.

However, in several key aspects, the Proposed Rule would go far beyond the changes required by the Farm Bill or envisioned by Congress. Those additional discretionary provisions, whatever their intent, would disqualify each and every one of our presently-authorized retail stores from SNAP eligibility going forward.

¹ See Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program, 81 Fed. Reg. 8015-21 (Feb. 17, 2016) (hereinafter the “Proposed Rule”).

² See Agricultural Act of 2014, H.R. 2642, Pub. L. 113–79 (hereinafter the “Farm Bill”).

Cumberland Farms urges FNS to avoid that extreme, unnecessary outcome—and the attendant negative consequences for SNAP beneficiaries across our eight-state operating footprint.³ We also urge FNS to review the impact analyses upon which it relied in designing such a flawed Proposed Rule.

II. BACKGROUND

A. Company Overview: Cumberland Farms is a large and evolving convenience store chain, and we serve as an essential grocery source for many SNAP beneficiaries.

Cumberland Farms was founded more than 75 years ago by an immigrant couple with little more than a dairy cow and the dream of a better life for their children. Today we are among the largest convenience store chains in the country, with more than 560 retail locations—and counting—across the New England states, New York, and Florida. We continue investing hundreds of millions of dollars into those locations as part of an aggressive capital improvement program, rebuilding or remodeling them to focus on meeting our customers’ evolving demands in the food and beverage categories. Concurrently, we have assumed more control over the production and distribution of those products, with our recent construction of a new central kitchen and cold storage facility to complement our existing warehouse and distribution center.

Though we have certainly grown since our modest beginnings, we are still family-owned, family-operated, and committed to making life easier for members of the communities we serve. Often, that commitment means providing an essential grocery source for low-income customers working hard to make ends meet. Virtually all Cumberland Farms convenience stores are authorized to accept SNAP benefits, and tens of thousands of SNAP beneficiaries rely on those stores every day for basic necessities like qualified foods and beverages. And, as our business increasingly focuses on food and beverage products, we expect that our continued participation in SNAP will only become more valuable to our communities.

While we cannot force SNAP beneficiaries—or any of our customers—to buy nutritious foods, we certainly can and do promote their availability in our stores. In fact, Cumberland Farms frequently advertises deals tied to the sale of one or more healthful grocery items, some recent samples of which are reproduced at Appendix A. Those same products are displayed in a prominent and accessible way in accordance with our planograms, some samples of which are

³ These formal comments on behalf of Cumberland Farms, Inc. do naturally emphasize our business and economic perspective as a retailer—but related issues from the beneficiary perspective cannot be understated. As part of our analysis of the Proposed Rule, we received numerous internal comments from our store managers regarding their own experiences serving SNAP beneficiaries. One manager, from a suburban community in Connecticut, wrote: “I have a lot of disabled people that live behind my store, and this is the only place they can get to without a ride. It would be a shame to have them go without milk, bread or whatever they need because they can’t use their card here.” Another, from a rural community in Massachusetts, wrote: “This regulation would hurt many people in my area, which is a very remote area, where numerous people are confined to walking as their only means of transportation. Here in the hilltowns, people are not rich and cannot count on traveling five miles to get their staple items for surviving.” Yet another, from an urban community in New York, wrote: “This is so crucial to our customers who receive EBT and turn to us for alternatives, whether it be for proximity to our business or getting off third shift when we are truly the only option in some communities.” These sentiments and concerns about beneficiary access are representative of those expressed by hundreds of our individual team members.

reproduced at Appendix B. As those attached materials demonstrate, our merchandising practices and recent promotional offers emphasize foods like milk, apples, bananas, deli meats, still and sparkling water, fruit and vegetable juices, hummus, bread, cereal, and yogurt—to name just a few.⁴

In addition to our own marketing efforts, Cumberland Farms was proud to be part of the Healthy Incentives Pilot (“HIP”) program, through which SNAP beneficiaries received “an incentive of 30 cents for every dollar of SNAP benefits that they spent on targeted fruits and vegetables” at participating retail stores.⁵ This rebate—and related promotional activity—succeeded in boosting fruit and vegetable consumption by participating SNAP households, changing their purchasing behavior in ways that were “both statistically significant and large enough to be nutritionally relevant.”⁶

B. Guiding Principles: retailers competing in the food industry must operate under certain market realities, the recognition of which is essential to appropriate SNAP policymaking and fulfillment of Congressional intent.

In its description of the Proposed Rule in the Federal Register, FNS referenced several times its desire to promote legislative intent.⁷ Fortunately, when Congress created SNAP many years ago, its intent was explicitly codified:

To alleviate...hunger and malnutrition, a supplemental nutrition assistance program is herein authorized which will *permit* low-income households to obtain a more nutritious diet through *normal channels of trade* by increasing food *purchasing power* for all eligible households who apply for participation.⁸

Given this distinctly market-based programmatic framework, its appropriate implementation demands a concrete understanding of how authorized retailers must participate in the market and compete for business. Yet by its own sworn admission, “FNS does not have expertise in the food industry market and the ways in which retailers may or may not compete with each other.”⁹

⁴ See Appendix A-B *infra*.

⁵ Susan Bartlett, et al., Evaluation of the Healthy Incentives Pilot (HIP): Final Report, USDA FOOD & NUTRITION SERVICE, at 1 (Sept. 2014).

⁶ *Id.* at 8. Specifically, HIP participants consumed 26% more targeted fruits and vegetables each day than did non-HIP respondents. See *id.*

⁷ See Proposed Rule at 8015-19 (making at least eight references to statutory or Congressional intent).

⁸ 7 U.S.C. § 2011 (emphasis added) (Congressional declaration of SNAP policy).

⁹ Def. Mem. Supp. Mot. Summ. J. at 8, Argus Leader Media v. USDA, No. 4:11-cv-04121-KES (D.S.D. Jan. 20, 2015), ECF No. 61.

And here, remarkably, no one with retail experience was involved in drafting the Proposed Rule.¹⁰

It is all the more important, then, for FNS to give serious weight to the comments and concerns expressed by expert food retailers like us. Cumberland Farms is fortunate to have an exceptional team of dedicated employees, with a broad diversity of skillsets and a combined 34,000 years—i.e., 34 millennia—of work experience in the convenience store industry. Our company, our customers, and our communities have been well-served by this vast institutional knowledge. And, it provides us with valuable perspective on public policy issues like SNAP, which have a direct impact our business.

Here, as we outline below, there are several especially-relevant principles that inform both our activities in the marketplace and our positions on the Proposed Rule. These principles have been essential to our present-day success, and their abandonment—whether by choice or by regulatory mandate—would threaten our competitive viability going forward.

(i) **Meet Demand.** To be successful in our fiercely competitive industry, a change in product offerings must be driven by a change in market demand—not vice versa. Through extensive consumer research, product trials, and hard-earned experience over the past eight decades, Cumberland Farms has become skilled at anticipating, analyzing, and responding to demand from the communities we serve. Our customers do not buy products simply because we offer them for sale; to the contrary, we can only sell products if our customers actually want to buy them. The quantity and variety of products on our shelves is, and must continue to be, a reflection of that reality.¹¹

(ii) **Maximize Space.** Unlike supermarkets, convenience stores must carefully curate their product offerings to fit within a relatively confined space. Across our entire chain, the average Cumberland Farms store is just over 3,000 square feet; our newer food-focused stores are slightly larger. We work diligently to strike the right balance: stocking the products that our customers demand, while avoiding the negative safety and efficiency impacts caused by an overcrowded store. Therefore, our locations have already been designed and merchandised in a way that maximizes the space available for display and storage alike. There is very limited capacity to add new products to our displays, unless we make space by removing existing products. Likewise, most of our stores receive a maximum of two deliveries per week from our warehouse, and shipments are carefully calibrated to provide only what that specific store can physically accommodate based on sales volume and storage space.

¹⁰ Public Hearing Re: Examining USDA Organization & Program Administration—Part I, U.S. House Agriculture Committee, 114th Cong. (Mar. 17, 2016) (statement of Ms. Audrey Rowe, Administrator, FNS), available at <https://youtu.be/D3HibtOpFBk?t=27m12s>

¹¹ Of course, regulatory compliance and general propriety are an important consideration, too. Cumberland Farms is a responsible and conscientious member of the communities we serve. Our role in the marketplace is to *lawfully* supply the *legal* products that our customers demand, and our participation in SNAP is no exception. Deliberately noncompliant SNAP retailers—like those which facilitate trafficking and fraudulent redemptions—are rightly a cause for concern amongst Congress, FNS, and legitimate SNAP retailers like us. However, we again wish to stress that reducing programmatic fraud and encouraging healthy food choices are two different issues, and FNS should take care not to conflate them.

(iii) **Minimize Waste.** There is an estimated 70 billion pounds of food waste in the United States each year; up to 40% of the food that is grown, processed, and transported in our country will never be consumed.¹² Reducing that statistic is good business as well as good citizenship. We strive to do our part by constantly looking at ways to minimize food waste across our entire production and supply chain. This effort extends to our stores themselves, where delivery schedules, sales volume, food quality, and storage practices are analyzed. Our goal is to ensure we are meeting actual demand without oversupplying—which creates needless waste, particularly with fresh and perishable items.

(iv) **Promote Access.** Ease of access is a key competitive factor in the convenience store industry. Indeed, our on-the-go customers react to everything from the location of sidewalks and curb cuts in the parking lot, to the hours of operation inside the store. We consider all of these factors in determining where and how to develop our stores, allowing us to best serve a diverse customer base across hundreds of different urban, rural, and suburban communities. As a result, our stores tend to be easily accessible from the surrounding neighborhood, and nearly all have extended hours—the significant majority of them are open 24 hours a day. This is especially important for those of our customers who may have limited transportation options, be disabled or have impaired mobility, live in an underserved area, or need to shop later at night when other stores are closed. In contrast to large supermarkets—destination-type stores with relatively fewer locations and shorter hours, for which customers often need to plan ahead and travel further—our hundreds of smaller stores are conveniently distributed across our communities to serve our customers where they need us, when they need us.

III. POLICY ISSUES

A. Categorical & Perishable Variety (Breadth of Stock): the proposed implementation of updated breadth of stock minimums is appropriate, to the extent that it mirrors the mandatory Farm Bill provisions.

The Proposed Rule would implement the new breadth of stock minimums imposed by Congress through the Farm Bill: to remain eligible, SNAP retailers will now need to offer at least seven varieties of qualified foods in each of the four staple food categories, with perishable foods in at least three of those categories.¹³ Notwithstanding the remainder of the Proposed Rule, we expect that virtually all Cumberland Farms stores would continue to participate in SNAP under these new minimums.

Cumberland Farms did not oppose this statutory language when Congress debated the Farm Bill. The product of political compromise, it makes realistic changes to SNAP and is generally consistent with the natural evolution of our business. FNS should update its existing SNAP regulations to carefully and faithfully implement the Farm Bill as Congress intended. Even before the Farm Bill, market demand has driven a similar shift in the type and variety of

¹² Food Waste in America, FEEDING AMERICA (last accessed on May 17, 2016), <http://www.feedingamerica.org/about-us/how-we-work/securing-meals/reducing-food-waste.html>

¹³ See Proposed Rule at 8020-21.

foods that we offer for sale. To the extent that merchandising modifications might be required in some circumstances, it does not appear that those changes would present an insurmountable cost or operational burden.

B. Stocking Units (Depth of Stock): the proposed six-unit minimum depth of stock is unjustifiably rigid, wasteful, and a poor fit for modern inventory management techniques.

The Proposed Rule would require SNAP retailers to have, “on any given day of operation...a minimum of six stocking units” for each staple food used to meet the enhanced breadth of stock minimums discussed above.¹⁴ *We expect that this proposal would eliminate virtually all Cumberland Farms stores from SNAP.*

Cumberland Farms is adept at managing our thousands of different product varieties, with millions of individual stocking units moving through our supply chain at any one time. The dynamic systems we use to control this supply chain can even suggest a predictive reordering of items from our warehouse, based on recent sales volume and the number of stocking units presently on hand. Indeed, in an ever-competitive marketplace, this type of flexibility and adaptive capability is an essential tool in the evolving toolbox for brick-and-mortar retailers fighting to survive.¹⁵

Against this backdrop, an arbitrary six-unit minimum depth of stock for staple foods is unjustifiably rigid and completely out of touch with modern supply chain management techniques. Instead of allowing retailers the flexibility they need to compete efficiently in a modern marketplace, it will force them to stock more products on their shelves than they need—likely more than six units, to account for sales that occur between restocking.

We do not believe our current stocking needs and inventory management systems can guarantee a minimum of six units at all times for each of the relevant staple foods. At very least, we would need to revise our planograms and general merchandising strategies, and revisit our hardware and software applications. These are not solutions we believe we can presently achieve in a reasonable and cost-effective manner.

¹⁴ Proposed Rule at 8021.

¹⁵ See, e.g., Lynda DePillis, Amazon Wants To Send Stuff Before You Order It, THE WASHINGTON POST (Jan. 30, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/01/30/amazon-wants-to-send-stuff-before-you-order-it-are-other-retailers-doomed/> (“Retail storefronts, after all, are the original hubs for data on what customers want. And big retailers are very familiar with adaptive stocking...”); Jennifer Alsever, “Inside The World Of One-Click Grocery Delivery: A Look At What It’s Like To Live On The Edge In The Logistics Business,” FORTUNE (Jan. 21, 2014), <http://fortune.com/2014/01/21/inside-the-world-of-one-click-grocery-delivery/> (“[A]ctually turning a profit and managing the logistics of food delivery is tricky....Unlike shipping books or durable products via UPS, fresh food delivery requires specific short routing, planning, technology, and a race against the clock”); Lynda DePillis, Retail In The Age Of Amazon: Scenes From An Industry Running Scared, THE WASHINGTON POST (Jan. 15, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/01/15/retail-in-the-age-of-amazon-scenes-from-an-industry-running-scared/> (“A few years of overhauling technological infrastructure and rethinking distribution is turning traditional retailers into the kinds of entities that have a chance to survive in the new world Amazon has created”).

Additionally, given space constraints, making room for this bloated depth of stock would probably require us to remove other products from our inventory, thereby reducing the overall variety of products available to our customers. Forcing such a byzantine mandate onto retailers in the 21st century—particularly for perishable staple foods, the variety of which already must increase under the Farm Bill—is also a recipe for waste, increasing our costs and undermining our sustainability efforts.

C. Cooked & Heated Foods: the proposed 15% maximum revenue figure is an arbitrary measure of an irrelevant characteristic.

The Proposed Rule would require that “at least 85 percent of an entity’s total food sales must be for items that are not cooked or heated on-site before or after purchase.”¹⁶ As such, retailers deriving more than 15% of their food sales from items cooked or heated on-site would immediately lose their SNAP eligibility. *We expect that this proposal would eliminate about half of all Cumberland Farms stores from SNAP immediately—plus more over time*, as our new food-focused store model incrementally replaces our more traditional convenience store sites.

If a retail store meets reasonable breadth of stock requirements for qualified foods, it should be eligible to accept SNAP benefits, without regard to what other products it may sell or what other customers it may serve. The dynamics of today’s market increasingly require different types of outlets—convenience stores, drug stores, supermarkets, quick-serve restaurants, etc.—to compete with each other, blurring the traditional distinctions between their respective channels of trade. If it fails to recognize this reality, FNS will be doing a great disservice to SNAP beneficiaries who rely on these hybridizing outlets. They are becoming more and more common in communities across America, and their participation in SNAP ensures adequate and diverse access to nutrition.

We also note that certain fresh staple foods—loaves of bread and similar bakery items, sliced turkey and similar deli meats, pasteurized milk and similar dairy products, etc.—are always cooked or heated by the producer at some point before retail sale. Likewise, those and countless other qualified foods are frequently cooked or heated by the consumer at some point after retail sale. Overregulating or micromanaging the physical premises where such cooking or heating occurs does not further the declared Congressional policy of “permit[ting] low-income households to obtain a more nutritious diet through normal channels of trade.”¹⁷ Provided that the final product is not in the form of a statutorily prohibited “hot food...ready for immediate consumption” at the time of retail sale, the precise location of pre-sale production or post-sale preparation seems trivial in the scheme of nutrition policy challenges.¹⁸

¹⁶ Proposed Rule at 8021.

¹⁷ 7 U.S.C. § 2011.

¹⁸ 7 U.S.C. § 2012(k) (defining qualified foods to generally exclude “hot foods or hot food products ready for immediate consumption”).

D. Multi-Ingredient Foods: the proposed exclusion of processed foods and prepared mixtures from the definition of staple foods is unworkable and counterproductive.

The Proposed Rule would exclude “[c]ommercially processed foods and prepared mixtures with multiple ingredients that do not represent a single staple food category” from the definition of staple foods, which are required to meet the enhanced breadth of stock minimums discussed above.¹⁹ We expect that this proposal would eliminate virtually all Cumberland Farms stores from SNAP.

By treating multi-ingredient foods as accessory foods instead of staple foods, FNS would disincentivize relatively healthful products like “[m]ultiple ingredient soups, e.g. minestrone,” for no other reason than the fact that it “contains vegetables and pasta” in the same product—two staple foods that are part of a well-rounded diet.²⁰ This is counterproductive to the goal of ensuring a variety of nutritious options for SNAP households—particularly for busy customers who may not have the luxury of, e.g., spending more than an hour to make minestrone soup from scratch, or for elderly and disabled customers who may rely on multi-ingredient foods due to their ease of preparation at home.²¹

At the same time, the multi-ingredient exclusion would invite significant confusion and subjective interpretations, due to the purported exemption for multi-ingredient foods where “the primary staple food ingredient is clearly represented and easily recognized.”²² This is an unworkable and ambiguous test, as its limits are likely to be unclear to retailers and FNS staff alike—a particularly strange result, given the agency’s stated goal to remedy supposed “confusion” related to multi-ingredient foods under the current regulations.²³

E. Similar Foods: the proposed treatment of various similar foods as one singular type of staple food is impractical and inherently subjective.

The Proposed Rule would consider multiple “similar food items” as just one staple food variety for purposes of meeting the minimum breadth of stock requirements.²⁴ The vague and subjective nature of this proposal makes it very difficult to analyze with any certainty, but we estimate that it would eliminate hundreds of Cumberland Farms stores—likely, all of them—from SNAP.

¹⁹ Proposed Rule at 8020.

²⁰ Clarification of Proposed Rule and Extension of Comment Period, 81 Fed. Reg. 19502 (Apr. 5, 2016) (hereinafter the “FNS Clarification”).

²¹ See, e.g., Lauren Brennan, Contest-Winning Easy Minestrone Recipe, TASTE OF HOME (last accessed May 17, 2016), <http://www.tasteofhome.com/recipes/contest-winning-easy-minestrone> (indicating 25 minutes of preparation time and 40 minutes of cooking time for an “easy” minestrone soup recipe).

²² Proposed Rule at 8017.

²³ *Id.* Adding to the confusion, this ostensible carve-out appears only in the preamble; it is not reflected anywhere in the operative part of the Proposed Rule.

²⁴ *Id.* at 8021.

FNS did list several examples of what it considers to be sufficiently dissimilar food items, which the agency claims is “not an exhaustive list of acceptable varieties.”²⁵ However, that list is populated with some truly bizarre examples, indicating to us that even FNS was hard-pressed to meet its own proposed guidelines using mainstream food products. For example, we would be surprised to learn of a customer who is disappointed by the lack of “fresh goat’s milk,” “shrimp,” and “frozen catfish” at her local convenience store, as suggested by FNS.²⁶ Our customers—SNAP beneficiaries or otherwise—simply have not expressed any demand for those unusual products as part of their Cumberland Farms experience.

It is little comfort that “FNS plans to issue specific guidance on the changes proposed in this rulemaking.”²⁷ First, not knowing what that guidance will look like, we are foreclosed from offering any specific feedback through this public comment period. Second, we cannot conceive of any guidance that could possibly address the relative similarity between every possible combination of the countless and growing number of food products on the market today. Trying to do so would be an exercise in frustration for retailers and for FNS. It is another unworkable proposal, and should not be entertained going forward.

F. Accessory Foods: the proposed treatment of snack and between-meal foods is vague and overbroad, and misapprehends common healthy eating behaviors.

The Proposed Rule would redefine an accessory food to include “foods that are generally consumed between meals and/or are generally considered snacks or desserts.”²⁸ This will have the effect of excluding such products from being counted as staple foods for purposes of meeting the minimum breadth of stock requirements. Again, the vagueness and subjectivity of the proposed definition creates serious analytical difficulties, but we estimate that it would eliminate hundreds of Cumberland Farms stores—likely, all of them—from SNAP.

According to FNS, this disfavorable treatment of snack and between-meal foods “will ultimately encourage stores to offer more nutritious options and provide SNAP recipients access to a larger selection of healthy foods.”²⁹ But this fails to recognize that a growing number of consumers regularly snack between meals, or eat many smaller meals throughout the day—and moreover that “[c]onsumers following the healthiest diets snack twice as often as those with less healthy diets.”³⁰ As our attachments indicate, there is growing demand for more healthful snack-

²⁵ FNS Clarification at 19502.

²⁶ *Id.*

²⁷ Proposed Rule at 8017.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Consumers with Healthier Eating Habits Snack More, The NPD Group (Nov. 12, 2012), <https://www.npd.com/wps/portal/npd/us/news/press-releases/consumers-with-healthier-eating-habits-snack-more-reports-npd/> (“Contrary to conventional wisdom, the more consumers snack, the healthier their eating behaviors”).

sized products such as yogurt, fresh cut fruit, and hummus dips.³¹ Some of our customers undoubtedly eat these products on-the-go, or at home between meals; others, as part of a timesaving addition to a well-rounded meal—of whatever size, and at whichever time of day, best suits their individual needs.

FNS would vastly overstep its role—and create an administrative nightmare—if it attempts to be the arbiter of what constitutes a “proper” staple food based upon the quantity or time of day that such foods are “generally” consumed.³² The agency has already admitted the “challenges in making clear distinctions” in this area, and should avoid attempting to do so here.³³

G. Retailer Exemptions: the proposed waiver criteria for otherwise-ineligible retailers will lead to an uncertain and inconsistent application of the rules.

The Proposed Rule would permit FNS to “consider need for access when a retailer does not meet all of the requirements for SNAP authorization.”³⁴ In effect, FNS would issue waivers for otherwise-ineligible retailers, based upon “factors such as distance from the nearest SNAP authorized retailer, transportation options to other SNAP authorized retailer locations, the gap between store’s stock and SNAP required stock for authorization eligibility, and whether the store furthers the purposes of the Program.”³⁵

We are concerned that a store may rely on a waiver to invest in an underserved market, only to have that waiver revoked in the future for matters beyond its control—such as a competitor moving in down the street. More broadly, the substantive and procedural criteria for a waiver seem overwhelmingly subjective—e.g., whether a particular store “furthers the purposes of the Program”—and is an invitation for fundamental unfairness in SNAP administration.³⁶

If there appears to be a need for waivers from the outset, that is probably a good indication that the initial eligibility criteria are too strict to begin with. Given its professed lack of expertise in the food industry, FNS should not be positioning itself to pick winners and losers in the competitive marketplace. Rather, we need clear and objective standards that apply fairly to all retailers—and the Farm Bill has already achieved that.

³¹ See Appendix A-B, *infra*.

³² Proposed Rule at 8017.

³³ *Id.*

³⁴ *Id.* at 8018.

³⁵ *Id.*

³⁶ *Id.*

IV. IMPACT ANALYSES

A. Regulatory Flexibility Act: the cost analysis published by FNS understates the likely impact of the Proposed Rule in the marketplace, and fails to account for significant alternatives available to FNS.

In its Regulatory Flexibility Act (“RFA”) analysis, FNS claims that “the rule does not present a significant economic impact to a substantial number of small businesses,” and estimates that the average *one-time* cost to small businesses would be a “nominal” \$140 per store.³⁷ However, we are informed that recent convenience store industry data suggests that the Proposed Rule will result in an average *monthly* cost of \$5,000 per store for small-format retailers. It appears, therefore, that FNS may have vastly underestimated the cost of the Proposed Rule, by at least an order of magnitude.

To begin, FNS asserts that “[f]or the average small retailer, the cost of adding the additional inventory” required by the Proposed Rule “represents a negligible share of their SNAP redemptions and of total gross sales.”³⁸ For competitive reasons, we cannot publicly discuss this type of sensitive revenue data in any great detail. But if Cumberland Farms—one of the largest and most sophisticated convenience store chains in the country, with substantial SNAP revenues—cannot justify the additional cost to remain eligible for SNAP by complying with the Proposed Rule, it is unclear to us how the many smaller businesses in our industry could possibly do so.

FNS arrived at its cost estimate in part by assuming a 25% carrying cost for new inventory. But the very source cited by FNS for that figure, in the very next sentence, warns that “[i]nventory carrying cost is different for every business.”³⁹ Furthermore, even if that figure claimed to be specific to the convenience store industry—which it does not—the same cited source also warns that “[i]t is not wise to use the industry average as your inventory carrying cost,” that “inventory carrying cost...should be calculated for each business,” and that “[i]f the carrying cost is inaccurate or incorrect, then the calculation will produce sub-optimal and sometime misleading results.”⁴⁰ As these warnings illustrate, such a casual estimate is wholly inappropriate for such a consequential rulemaking.

An appropriate cost analysis needs to more thoroughly explore factors like the cost of money, taxes, insurance, warehouse expenses, physical handling, inventory control,

³⁷ Initial Regulatory Flexibility Analysis – Proposed Rule, USDA FOOD & NUTRITION SERVICE, Docket No. FNS-2016-0018-0007 at 2 (hereinafter “RFA Supplement”).

³⁸ RFA Supplement at 7.

³⁹ Billy Hou, Do You Know Your Inventory Carrying Costs?, OPS RULES (Sep. 10, 2013), <http://www.opsrules.com/supply-chain-optimization-blog/bid/314279/Do-You-Know-Your-Inventory-Carrying-Costs>

⁴⁰ *Id.*

obsolescence, and deterioration.⁴¹ It also needs to consider the opportunity costs for retailers who opt to achieve compliance with the Proposed Rule—e.g., the loss of revenues from replacing a higher volume multi-ingredient product with a lower volume single-ingredient product, from reducing or eliminating hot food sales, or from taking products off the shelf to make room for a full six stocking units of a staple food item.

FNS did not adequately evaluate these issues in its assessment of the Proposed Rule and the resulting compliance costs for small-format retailers. For example, its RFA analysis claims that new inventory requirements “could be accomplished by swapping out certain items for others”—but there is no consideration of whether that new item would suffer from lower demand and thus fewer sales.⁴² Similarly, it claims that “the initial cost of adding new items to inventory would be recouped when a retailer sells those items”—which assumes, without discussion, that the items will, in fact, sell.⁴³ And, it claims that “[i]n the event of spoilage, the inventory carrying cost accounts for the need to replace items”—without any allowance for the likelihood that items would not have spoiled in the first place, if retailers had instead been permitted to sell products that their customers actually want to purchase at a meaningful volume.⁴⁴

Finally, instead of discussing significant alternatives, FNS absolves itself from responsibility by alleging that “most of the changes to inventory requirements in this proposed rule are directed by statute.” This is, respectfully, not true. As the preceding policy discussion makes clear, the statutory Farm Bill portion of the Proposed Rule is the least-burdensome and least-controversial proposal. The remaining portions of the Proposed Rule—those that would eliminate Cumberland Farms from SNAP by imposing insurmountable new inventory requirements—are entirely discretionary.

In light of the above, it is clear that FNS has not satisfied its RFA obligation to “explore regulatory alternatives for reducing any significant economic impact on a substantial number of [small] entities” and to “explain the reasons for their regulatory choices” amongst the available alternatives.⁴⁵

B. Unfunded Mandate Reform Act: the Proposed Rule imposes a federal mandate on the private sector that is likely to cost more than \$100 million, indicating that FNS should consider an alternative that is less burdensome or more cost-effective.

In its Unfunded Mandate Reform Act (“UMRA”) analysis, FNS asserts that the Proposed Rule “contains no Federal mandates...[f]or the private sector of \$100 million or more in any one

⁴¹ See, e.g., Methodology of Calculating Inventory Carrying Costs, REM ASSOCIATES (last accessed on May 17, 2016), <http://www.remassoc.com/portals/0/remprecc.pdf>

⁴² RFA Supplement at 6. If retailers thought the opposite was true, they would already stock the new item instead of the old item; that is how supply and demand works.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ RFA Supplement at 1.

year” and that the rulemaking is therefore exempt from further UMRA requirements.⁴⁶ However, as noted in the preceding RFA discussion, the total cost of the Proposed Rule is likely to far exceed the estimated \$140 per-store median cost calculated by FNS. Taking the FNS approximation of 200,000 retailers impacted by the Proposed Rule, and using the industry estimate of \$5,000 in monthly costs per store, the total cost of the Proposed Rule easily surpasses the \$100 million UMRA threshold.⁴⁷

Therefore, FNS has not satisfied its UMRA obligation to “prepare a written statement, including a cost-benefit analysis,” for the Proposed Rule.⁴⁸ FNS has also failed 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,” as mandated by UMRA.⁴⁹ There are ample alternatives for FNS to explore, as indicated by our positive experience with HIP—and by a voluminous body of literature on consumer behavior and behavioral economics, particularly that which is directed at customer demand rather than retailer supply.

C. Civil Rights Impact Analysis: the Proposed Rule is likely to have a disparate impact on protected classes of persons, disadvantaging them by limiting their ability to redeem SNAP benefits.

In its Civil Rights Impact Analysis (“CRIA”), FNS posits that the Proposed Rule “will not in any way limit or reduce the ability of protected classes of individuals to *receive* SNAP benefits on the basis of their race, color, national origin, sex, age, disability, religion or political belief.”⁵⁰ But FNS fails to analyze or even mention any impact on the ability of such recipients to *redeem* their benefits once received. The receipt and redemption of benefits are equally-essential components of basic SNAP functionality, and both demand an equally-rigorous CRIA before any final rule is adopted. Importantly, such an analysis requires FNS to consider not just the “purpose” of the Proposed Rule, but also the “effect” that it “may have” on protected classes.⁵¹

It seems evident that the Proposed Rule will indeed have the effect of limiting and reducing the ability of protected classes to *redeem* SNAP benefits in their communities. As has been well-documented by USDA research spanning several decades, there are correlations

⁴⁶ Proposed Rule at 8019.

⁴⁷ We recognize that the industry figure, too, is an estimate. But even discounting that estimate by a factor of ten, to assume a cost of just \$500 instead of \$5,000—and further accepting, for the sake of argument, FNS’s position that the cost will apply just *once* instead of *monthly* to approximately 200,000 retailers—the aggregate cost will still meet the UMRA threshold of \$100 million in one year. *See id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Proposed Rule at 8020 (emphasis added).

⁵¹ Civil Rights Impact Analysis, DR 4300-4, USDA OFFICE OF CIVIL RIGHTS (May 30, 2003), *available at* <http://www.ocio.usda.gov/sites/default/files/docs/2012/DR4300-4%5B1%5D.pdf>

between food insecurity and certain demographic groups—including protected classes generally, and those living in urban or rural areas specifically.⁵² It follows that, by reducing the number of SNAP-authorized retailers—especially those serving urban and rural areas—the Proposed Rule is virtually guaranteed to have an outsized negative impact on protected classes. This troubling prospect warrants a more thorough and complete CRIA.

V. CONCLUSION

Last week, the chairman of the U.S. House Agriculture Committee observed that the Proposed Rule would “not work in the real world.”⁵³ Another member of that Committee described its provisions as “impractical, unworkable, discriminatory, draconian and unnecessary.”⁵⁴ The ranking member of the Nutrition Subcommittee urged FNS to “go back to the drawing board” with this rulemaking, to avoid creating new barriers to food access for low-income families.⁵⁵

We agree with those legislators and many of their colleagues in Congress, with anti-hunger organizations, with hundreds of our individual team members, and with small format retailers from across the country in expressing grave concerns about the Proposed Rule. However noble its goals may be, the means by which FNS proposes to achieve them are almost entirely inappropriate.

If adopted without substantial revision, the Proposed Rule would have a severe detrimental impact on convenience stores—in the case of Cumberland Farms, entirely eliminating us from the program. By extension, the Proposed Rule will also have troublesome negative consequences for the countless SNAP beneficiaries who rely on us for access to basic nutrition.

⁵² See, e.g., Household Food Security in the United States in 2014, ERR-194, USDA ECONOMIC RESEARCH SERVICE, at 13 (Sept. 2015) (“The prevalence of food insecurity varied considerably among households with different demographic and economic characteristics”); *id.* (“The prevalence of food insecurity was...below the national average for White, non-Hispanic households”); *id.* (“Rates of food insecurity were higher than the national average for...[h]ouseholds with children headed by a single woman”); *id.* at 13-15 (“Across the metropolitan area classifications, the prevalence of food insecurity was highest for households located in nonmetropolitan areas...and lowest in suburbs and other metropolitan areas outside principal cities”); Racial/Ethnic Minorities in Rural Areas: Progress and Stagnation, 1980-90, AER-731, USDA ECONOMIC RESEARCH SERVICE (Aug. 1996) (“Rural minorities lag behind rural Whites and urban minorities on many crucial economic and social measures”).

⁵³ House Committee Criticizes SNAP Proposed Rule, NAT’L ASS’N OF CONVENIENCE STORES (May 13, 2016), <http://www.nacsonline.com/Media/Daily/Pages/ND0513161.aspx> (quoting Rep. Mike Conaway, R-TX).

⁵⁴ *Id.* (quoting Rep. David Scott, D-GA).

⁵⁵ Brian Berk, C-Store Advocates Take SNAP Concerns to House Committee, CONVENIENCE STORE NEWS (May 12, 2016), <http://www.csnews.com/node/90563> (quoting Rep. Jim McGovern, D-MA). See also Lydia Wheeler, Dem Calls On Feds to Rewrite Food Stamp Rule, THE HILL (May 12, 2016), <http://thehill.com/regulation/pending-regs/279737-house-dem-to-usda-go-back-to-drawing-board-on-food-stamp-rule> (“I believe we ought to be doing everything we can to promote healthier diets and healthier purchases, but this isn’t the way to do it”).

For all the reasons discussed herein, and in the strongest possible terms, we urge you not to adopt the Proposed Rule in its present form.

Respectfully Submitted,

CUMBERLAND FARMS, INC.

A handwritten signature in black ink, appearing to read "Matthew T. Durand", written in a cursive style.

Matthew T. Durand
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APPENDIX A

SAMPLING OF RECENT CUMBERLAND FARMS FOOD AND BEVERAGE PROMOTIONAL OFFERS

buy  **get**  **FREE**

any Chobani greek yogurt get a piece of fruit. **SAVE**
up to 89¢

SAVE
special value

\$1 off

when you buy Oscar Mayer
Oven Roast Turkey
or Honey Ham

50¢ OFF any Cedar's snack pack
with the purchase of any
fresh cut fruit

SAVE
50¢

includes all available varieties of fresh fruit cups
and snack packs.

buy  **get**  **FREE**

Tropicana 12oz or Naked juice 15.2oz any Quaker chewy bar **SAVE** 89¢

any cereal

buy



get



any cereal

FREE

SAVE up to \$5.79

buy any cereal 8-18oz and get any one FREE. mix or match

Equal or lower price cereal is free with purchase.
Limited time offer. Plus applicable tax. May not be combined with any other offer. Excludes cereal cups.

SAVE
special value

SAVE 78¢

2 for **\$3** or \$1.89 each

Chobani

SAVE
special value

SAVE 47¢

3 for **\$1** or 49¢ each

banana

cookout combo



Bar S Jumbo Franks
8 pack



Cumberland Farms
hot dog **OR** hamburger
rolls 8 pack

\$3
pick any 2
mix or match

SAVE up to \$2.18

APPENDIX B

**SAMPLE STORE PHOTOS AND EXAMPLES OF CURRENT CUMBERLAND
FARMS PLANOGRAMS FOR FRESH FOOD AND GROCERY ITEMS**

Frozen Food 1 Dr Walk In



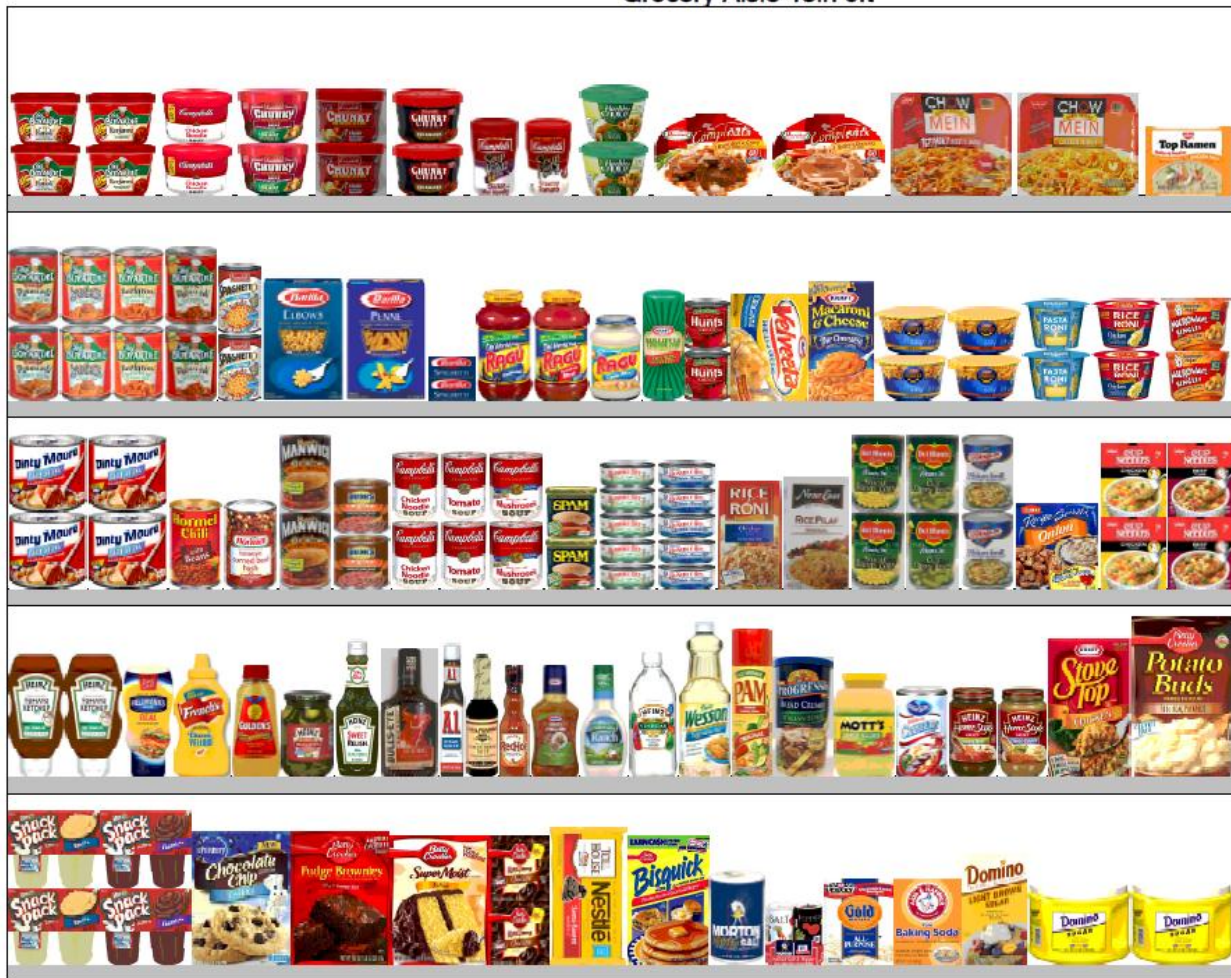
Aim Meat Dairy 1 Dr Sm

If your door's handle is on the right, set door as shown on plan o gram. If your door's handle is on the left, flip all shelves.





Grocery Aisle 48in 6ft





Bread Aisle CF 48in 4ft

