



BENEFIT REDEMPTION DIVISION

*Index No. 01-04
7 C.F.R. 271.2 and 278.1
318 320-320A*

August 14, 2001

POLICY MEMO

SUBJECT: Implementation of Final Retail Store Eligibility Rule

TO: Program Directors
Field Operations Directors
Food Stamp Program
All Regions

The purpose of this memorandum is to provide implementing guidance for the final rule entitled Food Stamp Program: Revisions to the Retail Food Store Definition and Program Authorization Guidance, published in the Federal Register on January 12, 2001, at 66 FR 2795.

Effective August 13, 2001, eligibility determinations must be based on requirements in the final rule. A copy of the rule as well as Q and A's providing specific guidance are attached. While the rule provides more specificity than store eligibility policy guidance used during the past few years, it should not produce a significant change in eligibility determinations.

Implementation of this final rule rescinds the following policy guidance issued since 1994, when provisions of the Food Stamp Program Improvements Act of 1994 was enacted into law (Public Law 103-225):

- 94-03 "Implementation of Revised Retail Food Store Definition" issued June 14, 1994, and "Clarifications on Implementation of Revised Retail Food Store Definition" issued January 31, 1996.
- 94-06 "Eligibility of Carry-Out Sandwich Shops" issued July 22, 1994.
- Rev.1 Eligibility of Eat-In and/or Carry-Out Restaurants" issued March 18, 1997.
- 96-01 "Clarification of 'Total Gross Sales' as it Relates to Criterion B in the Definition of Retail Food Store" issued October 5, 1995.

If you have any questions, please contact Judy Love on my staff at (703) 305-2237.

/Original Signed/

Thomas O'Connor
Director
Benefits Redemption Division

Attachments (See Below)

Store Eligibility Rule O & A's

On August 13, 2001, the long awaited Retail Store Eligibility Rule which was published on January 12, 2001, becomes effective. It implements a law that changed the retail store eligibility requirements for Food Stamp Program participation by establishing two different eligibility criteria, reflected in the rule as Criterion A and Criterion B. A revised insert about the new regulation will be available to order from the Landover, Maryland warehouse by mid-August and must be included in the Compilation of Regulations until the compilation is revised/reprinted with the changes included.

Effective Date

Q. How will the effective date be implemented?

A. Beginning on **August 13, 2001**, all eligibility determinations must be based on the new regulations.

Q. Will the new regulation change the way we have been making eligibility determinations during the past few years?

A. It should not change the way Criterion B store eligibility is determined, and it should not be a significant change for Criterion A. However, Criterion A of the regulation is more specific than our policy guidance has been, which should make it easier to determine the eligibility of stores that are considered “marginal”. The specificity of the regulation should make it clear whether or not a store is eligible.

Criterion A

The law requires that stores participating in the Food Stamp Program under Criterion A must offer for sale, on a continuous basis, a variety of foods in each of four staple food categories, with perishable foods in at least two of those categories. The law itself is clear that the four staple food categories are: meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products. However, the law does not define the terms “variety of foods”, “perishable foods” or “continuous basis”. They are defined/clarified in the new regulations.

Variety of Foods

Q. What is considered an acceptable “variety of foods” in a staple food category?

A. There must be at least three different types of food items in a staple food category. A higher threshold of more than three different types cannot be required. Examples of acceptable varieties include sliced bread, cornbread mix, and flour in the bread/cereal category. Another example in the dairy category that would be acceptable is yogurt, milk and cheese. Examples of unacceptable varieties includes tomato juice, fresh tomatoes and canned stewed tomatoes in the vegetables or fruits category. In the dairy category, skim milk, chocolate milk and whole milk would not be considered a variety. In addition the same types of foods, different brands of the same type of foods or different sizes or types of packaging is not considered variety.

- Q. If a food item includes a combination of different foods, can it count in more than one category? For example, would pasta in a cream sauce count in the bread and dairy categories?
- A. No. Foods with a combination of ingredients can only count in one of the four staple food categories, based on the main ingredient (except for water). A pasta in cream sauce would likely contain mostly flour and, therefore, would be assigned to the bread/cereal category.
- A. Will the reading of labels for the main ingredient in foods with a combination of ingredients be required under the new regulations?
- Q. Only when absolutely necessary should this be done. A store that has so few food items that reading the labels would be necessary in order to make an eligibility determination should be very rare.
- Q. Can prepared, ready-to-eat staple foods be counted toward variety in determining eligibility?
- A. No. These are foods typically freshly prepared for immediate consumption. (See more below under Criterion A and B section.)

Perishable Foods

- Q. What are perishable foods?
- A. Perishable foods can be fresh unrefrigerated, fresh refrigerated or frozen, and are foods that should spoil or deteriorate in 2 to 3 weeks. Fresh or frozen breads, vegetables, fruits, refrigerated dairy products, meats, poultry and fish are examples of perishable foods.
- Q. Are food items with “sell by” dates on them considered to be perishable foods?
- A. They are if they should be sold in about three weeks or less, or if the food item requires refrigeration. For example, orange juice that requires refrigeration before it is opened is a perishable, however orange juice in a jar that does not require refrigeration until after it has been opened is not a perishable. Parmesan cheese in the refrigerated section of the store is a perishable, while parmesan cheese on the shelf without refrigeration is not.
- Q. Can a food item with a date longer than 2 to 3 weeks be considered a perishable food item?
- A. Yes, if they require refrigeration. Examples would be eggs, yogurt and cheeses, and, of course, frozen foods.
- Q. Are prepared, ready-to-eat foods considered “perishable” foods that can be counted in determining eligibility under Criterion A?

- A. No. Prepared, ready-to-eat foods should not be counted in making eligibility determinations, even though they are typically perishable items. (See more below under the Criterion A and B section.)

Continuous Basis

Q. How is “continuous basis” defined in the new regulations?

A. An eligible store must offer for sale the required variety of food items on any given day of operation.

Q. How should field offices apply this new requirement for “variety of foods” and “perishable foods” when making eligibility determinations?

A. If a store has less than the required items in two or more staple food categories, it can be denied or withdrawn for failing to meet the required variety of staple foods. However, if a store has less than the required items in only one staple food category and otherwise would be eligible, the store must have the opportunity to document that normally it would meet the requirements for that category. The field office should contact (by phone or in writing) the store and allow at least 10 days to provide such documentation. If the store fails to provide sufficient documentation, the field office must deny or withdraw it from program participation. The same thing must also apply to a store that only has perishable foods in one category, but otherwise would be eligible. However, if a store fails to have any perishable foods, it can be denied or withdrawn from program participation without requesting documentation. Asking for documentation as described in this paragraph should be considered a routine part of the authorization process prior to making an eligibility determination. It is separate from the appeals process that all stores have access to after they have been denied or withdrawn. This does not change the Administrative Review or the Judicial Review appeals processes.

If a store does not meet Criterion A, it must be evaluated under Criterion B before it is denied or withdrawn.

Criterion B

Criterion B requires an eligible store to have more than 50 % of its total gross sales in eligible staple food sales, with one exception. This rule continues to make an exception when determining the eligibility of meat processors. However, the rule changes the way the exception for meat processors is calculated. Policy guidance prior to this rule has been to not count fees charged to process the meat in the calculation of staple food sales or in the calculation of total gross sales. In order to allow meat processors to continue participating in the Food Stamp Program, the regulation requires meat processing fees to be counted as staple foods in calculating staple food sales, and fees should also be

counted in calculating total gross sales. This change should produce the same outcome as the policy guidance. This exception ONLY applies to meat processors.

Q. How are prepared, ready-to-eat staple foods counted under Criterion.

A. As is the case under Criterion A, prepared, ready-to-eat staple foods not intended for home preparation must not be counted as staple foods when determining eligibility; however, under this criterion they must be counted as a part of total gross sales. Firms with more than 50% of their sales in prepared, ready-to-eat staple foods are considered to be a restaurant and not eligible to participate in the Food Stamp Program as a retail food store.
(See more below.)

Criteria A and B

Prepared, ready-to-eat foods cannot be counted as staple foods in determining if a store is eligible to participate in the Food Stamp Program. This means not counting these foods to determine variety under Criterion A and not calculating them in determining the ratio of staple foods to total gross sales under Criterion B. However, under Criterion B they must be counted in determining total gross sales.

Q. What foods are considered to be prepared, ready-to-eat foods?

A. These are typically freshly made prepared foods, such as sandwiches and salads, that are ready-to-eat. They are usually prepared and/or found in the deli section of stores, but could be in other places such as salad bars in the fresh vegetable section of the store.

Q. Should such foods as yogurt and ice cream be counted as prepared, ready-to-eat?

A. Generally such foods as brands of yogurt in the dairy section of the store or brands of ice cream in the freezer section of the store are not considered prepared, ready-to-eat and would be counted as a staple food in making eligibility determinations. However, yogurt and ice cream provided in single servings such as yogurt or ice cream scooped into a cup or cone in the store and intended to be eaten immediately would be considered prepared, ready-to-eat. Generally, when people purchase a cup or cone of yogurt or ice cream from a vendor in the store it is to be consumed on the spot.

Q. When does this become an issue? Will field offices be required to collect sales data and make these distinctions in order to figure out if a store is eligible?

A. The requirement not to count freshly prepared foods as staple foods when determining store eligibility is intended to prevent restaurants and carryout shops from being authorized as retail food stores. Therefore, whenever information provided by a firm or the results of a store visit suggests that a store could be primarily a restaurant, this information should be examined. Otherwise, it should not be an issue.

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Friday, January 12, 2001

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 271 and 278

[Amdt. 391]

RIN 0584-AB90

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

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule implements 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 as retail food stores, and to provide for notification to such firms of eligibility criteria for participation in the Food Stamp Program. The intended effect of this 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 firms to participate in the Food Stamp Program as retail food stores.

This 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. In addition, a technical, non-substantive correction is being made to three citations in this final rule.

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 and 278
are amended as follows:

1. The authority citation for parts 271
and 278 continues to read as follows:

Authority: 7 U.S.C. 2011–2036.

**PART 271—GENERAL INFORMATION
AND DEFINITIONS**

2. In § 271.2:

a. Paragraph (1) of the definition of
“Retail food store” and the definition of
“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 normally
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) of this
chapter, 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)
of this chapter as determined by visual
inspection, marketing structure, business
licenses, accessibility of food items
offered for sale, purchase and sales
records, counting of stockkeeping units,
or other inventory or accounting
recordkeeping methods that are
customary or reasonable in the retail
food industry as set forth in §278.1(b)(1)
of this chapter. Entities that have more
than 50 percent of their total gross retail
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) of
this chapter.

* * * * *

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) of this chapter. 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 which may be purchased with food stamp benefits.

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**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) * * *

(1) * * * (i) *Retail food store.* (A) 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 it sells food for home preparation and consumption and meets one of the following criteria: 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 (Criterion A); or have more than 50 percent of the total gross retail sales of the establishment or route in staple foods (Criterion B).

(B) A retail food store must meet eligibility determination factors which 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 program.

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

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

Documentation to determine if a firm stocks a sufficient amount of required staple foods to offer them for sale on a continuous basis may be required in cases where it is not clear that the requirement has been met. Such documentation can be achieved through store visits and/or verifying information when requested. Failure to provide

verifying information when requested or to cooperate with store visits shall result in the denial or withdrawal of authorization.

(B) 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; and (C) Offer a variety of staple foods which means different types of foods, such as apples, cabbage, tomatoes, and squash in the fruit or vegetable staple food category, or milk, cheese, butter and yogurt in the dairy category. 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 each be considered as more than one staple food variety 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.

(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, may 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 Food Stamp Program shall not be eligible for program participation. New applicant firms that are found to be ineligible will be denied authorization to participate in the program, and authorized retail food stores found to be ineligible will be withdrawn from program participation. Ineligible firms under this paragraph 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. Such firms may qualify, however, under 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) * * * With the exception of EINs and SSNs, any information collected from retail food stores and wholesale food concerns, 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 Nutrition 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.

§ 278.6 [Amended]

4. In § 278.6:

- a. Paragraph (a) is amended by removing the reference to “\$10,000” and adding in its place the words “an amount specified in §3.91(b)(3)(i) of this title” and removing the reference to “\$20,000” and adding in its place the words “an amount specified in §3.91(b)(3)(ii) of this title”; and
- b. Paragraph (g)(3) is amended by removing the reference to “\$10,000” in the last sentence and adding in its place the words “an amount specified in §3.91(b)(3)(i) of this title”.

Dated: January 5, 2001.

Shirley R. Watkins,

Under Secretary, Food, Nutrition and Consumer Services.

[FR Doc. 01-957 Filed 1-11-01; 8:45 am]

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