

April 23, 2013

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Shanta Swezy, Chief
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RE: *Comments for the Proposed Rule by the Department of Agriculture, Food and Nutrition Service, to 7 CFR Part 278 – Supplemental Nutrition Assistance Program: Suspension of SNAP Benefit Payments to Retailers (RIN 0584-AE22)*

Dear Ms. Swezy:

The New York City (NYC) Human Resources Administration (HRA) supports the goals of the U.S. Department of Agriculture's (USDA) Food and Nutrition Service's (FNS) proposed rule to increase program integrity efforts against fraud, waste, and abuse by retailers in the Electronic Benefit Tracking (EBT) system. However, the proposed rule will not achieve the stated goal of "allow[ing] the Department to take appropriate action against retailers who are committing [Supplemental Nutrition Assistance Program (SNAP)] fraud and lack the necessary business integrity to further the purposes of the program."¹

In preparing the proposal, FNS should consider Executive Order 13132's requirement to "consider the impact of their regulatory actions on State *and local governments*."² Local governments help administer the Federal SNAP program, and they are also burdened with the significant collateral crimes stemming from retailer SNAP trafficking.³ Retailers who traffic in SNAP benefits serve as both crime generators (that is, offering opportunities for those without predisposition to commit crimes) and crime attractors (i.e. attracting offenders to a location for the purpose of committing a crime) with significant adverse impacts on their neighborhoods beyond SNAP trafficking. In New York City, for example, SNAP traffickers have also been involved in the fencing of stolen iPads and iPhones, creating an incentive for robberies and purse-snatching.

¹ Supplemental Nutrition Assistance Program: Suspension of SNAP Benefit Payments to Retailers, 78 Fed. Reg. 12,245 (Feb. 22, 2013) [hereinafter *Proposed Rule*] (to be codified at 7 C.F.R. pt. 278).

² Proposed Rule, *supra* note 1, at 12,246; Exec. Order No. 13,132, 3 C.F.R. 206 (2000), *reprinted as amended* in 3 C.F.R. § 301 (2006).

³ These include trafficking in cell phones, tobacco, and other products.

FNS' regulatory decision, as set forth in this proposed regulation, to punish only the "most flagrant violators" has a major potential impact on local governments' program and crime-related responsibilities. In addition, allowing these crime generators to remain in the SNAP redemption business has an impact on two other significant local concerns: (a) encouraging recipients to use benefits for cash, rather than for nutrition for themselves and their families; and (b) supporting the growth and maintenance of retailers focused on providing good food (who are at a competitive disadvantage to the flagrant violators), rather than those focused on opportunities for fraud.

We recommend that the proposed regulation be modified to reflect current program integrity policy and successes in other government agencies. A better way to address retailers who commit SNAP fraud and lack business integrity is to follow President Obama's three articulated program integrity principles for the federal government:

1. Identify and recover improper payments,
2. Implement a zero-tolerance policy for fraud, and
3. Integrate organizational and informational transparency.

New York City administers SNAP benefits to 1.8 million recipients each year—a number that rose by 663,000 in a four-year period—and is home to 10,000 SNAP retailers.⁴ The City has made significant strides toward increasing SNAP participation and assuring program integrity. Moreover, the USDA Office of the Inspector General (OIG) stressed that "since SNAP participation has reached record levels, we believe that even incremental improvements in fraud detection and prevention can have a meaningful impact on program integrity."⁵ As the largest local social services district in the country, HRA is in a unique position to provide comments concerning changes to the existing and proposed regulations to allow more comprehensive and efficient ways to protect the integrity of SNAP.

1. IMPROPER PAYMENTS: The proposal should demonstrate compliance with federal improper payments laws by implementing the Medicaid provider integrity framework—an existing, successful solution.

In Executive Order 13520 addressing improper payments, President Obama said, "When the Federal Government makes payments . . . it must make every effort to confirm that the right [person] is receiving the right payment for the right reason at the right time."⁶ The Executive Order went on to specifically require transparency and public participation, agency accountability and coordination, and an enhanced focus on working with state and local stakeholders. FNS, in the proposed regulation, relies on its assumption that it is a federal program with a very low rate of improper payments; however, that rate is not accurate because it

⁴ "In April 2008 almost twenty-eight million Americans participated in the SNAP program. By July 2011 participation had reached a record forty-five million, or approximately one in seven Americans." Dan Lesser, *An Emerging Issue in the Supplemental Nutrition Assistance Program Should Be Participants Be Subject to New Identification Requirements?*, 45 CLEARINGHOUSE REV. 290, 291 (Dec. 2011); HRA Facts February 2013, http://www.nyc.gov/html/hra/downloads/pdf/statistics/hra_facts/hrafacts_2013/hra_facts_2013_02.pdf.

⁵ U.S. DEP'T OF AGRIC. OFFICE OF INSPECTOR GEN., AUDIT REPORT 27002-0011-13, ANALYSIS OF FNS' SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM FRAUD PREVENTION & DETECTION EFFORTS 1, 2 (Sept. 2012) [hereinafter OIG AUDIT], <http://www.usda.gov/oig/webdocs/27002-0011-13.pdf>.

⁶ Exec. Order No. 13,520, *reprinted in* 74 Fed. Reg. 62201 (Nov. 25, 2009).

does not include payments to retailers for SNAP trafficking. In its *Analysis of FNS' SNAP Fraud Prevention and Detection Efforts*, OIG reported, "FNS does not have a methodology for determining a total rate for retailer fraud."⁷ It went on to explain that FNS used flawed methodology and sampling practices to determine its rate of improper payments; FNS currently reports "one cent of every benefit dollar issued" is diverted for trafficking.⁸ Even if the estimated rate of improper payments were correct, it would still mean that SNAP made \$2.2 billion per year in improper payments based on trafficking.⁹ The proposed rule would be stronger and more efficient if it addressed how (a) FNS will comply with the requirements of the Improper Payments Elimination and Recovery Act of 2010 (as to payments based on retailer trafficking) and (b) how it will create and implement a comprehensive retailer program integrity arm, which should mirror the tested structure that the Centers for Medicare and Medicaid Services (CMS) use for Medicaid providers.

a. *Improper Payments Elimination & Recovery Act of 2010*

FNS has identified SNAP as a program susceptible to significant improper payments under the Improper Payments Elimination and Recovery Act (IPERA) of 2010.¹⁰ President Obama prioritized this law, which was enacted to reduce wasteful and improper payments in government programs by \$50 billion within two years. Efforts to reduce and recover improper payments under IPERA include identification and estimation of improper payments, payment recapture audits, use of recovered improper payments, and compliance and non-compliance requirements. SNAP is a program susceptible to significant improper payments, which means "annual erroneous payments in the program exceed[] both 2.5 percent of program payments and \$10 million."¹¹ An agency's OIG will monitor its compliance with IPERA.

Programs susceptible to significant erroneous payments must:

1. Obtain a statistically valid estimate of the annual amount of improper payments in programs and activities;
2. Implement a plan to reduce improper payments; and
3. Report estimates of the annual amount of improper payments in programs and activities and progress in reducing them.¹²

The Office of Management and Budget provides guidance about achieving these steps. First, the statistically valid sample must have a 90% confidence interval, and OMB urges agencies to use

⁷ OIG Audit, *supra* note 5, at 20.

⁸ U.S. DEP'T OF AGRIC. FOOD & NUTRITION SERV., USDA TAKES AGGRESSIVE ACTION TO FIGHT TRAFFICKING, http://www.fns.usda.gov/cga/FactSheets/SNAP_Trafficking.pdf.

⁹ The White House, Payment Accuracy, Supplemental Nutrition Assistance Program, *available at* <http://www.paymentaccuracy.gov/programs/supplemental-nutrition-assistance-program#learnmore>.

¹⁰ This law applies to all Executive Agencies and Departments and "An improper payment is any payment that should not have been made or that was made in an incorrect amount under statutory, contractual, administrative, or other legally applicable requirements." OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, MEMORANDUM ON ISSUANCE OF REVISED PARTS I & II TO APPENDIX C OF OMB CIRCULAR A-123 1, (April 14, 2011), <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-16.pdf>.

¹¹ OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, MEMORANDUM ON ISSUANCE OF PART III TO OMB CIRCULAR A-123, APPENDIX C 1, 4 (Mar. 22, 2010), http://www.whitehouse.gov/sites/default/files/omb/assets/a123/a123_appx-c.pdf.

¹² *Id.* at 5-7.

larger samples than the minimums set by OMB guidance. Second, the implementation plan requires putting in place a corrective action plan to reduce payments. This plan must “set reduction targets for future improper payment levels and a timeline within which the targets will be reached.”¹³ States and localities may help achieve these set targets, and FNS should allow help in these areas. Finally, FNS must provide detailed annual reports to OMB concerning its payment accuracy rate. Annual reports require:

- Estimating the annual amount of improper payments (gross over and underpayments, plus the methodology used to arrive at that estimate);
- Discussing the causes of the identified improper payments, actions the Agency will take to correct the cases, and results of the actions it took;
- Discussing the amount of actual improper payments that the Agency expects to recover and how it will recover them;
- Describing the steps (including timeline) the Agency has taken and plans to take to ensure that its managers and accountable officers are held accountable for reducing and recovering improper payments; and
- Stating how the Agency plans to reduce improper payments from the baseline rate over the next three fiscal years—provided the agency has estimated a baseline improper payment rate for the program.¹⁴

In September 2012, OIG released an audit report detailing FNS’ lack of a comprehensive way to estimate, identify, and eliminate fraud within its program. The audit report offered many recommendations. These recommendations talk about program integrity enhancements, including updating the retailer transactional database (ALERT), “plans to upgrade retailer surveillance technology, promotion of a trafficking hotline number, and an expanded definition of trafficking.”¹⁵ It also cited FNS’ ongoing effort to develop “stronger penalties and sanctions for small retailers.”¹⁶

The OIG reported that FNS agreed to OIG recommendations; however, FNS authored an official response to the audit, which lessens the likelihood that it will comply with OIG recommendations. For example, OIG recommended that FNS require states to participate in the Public Assistance Reporting Information System (PARIS) to detect and prevent duplicative accounts within the same state. PARIS data matches also help states detect recipients who receive public assistance benefits in more than one state at the same time. The OIG report says FNS will comply. The FNS official audit response says it released a policy directive in November 2011 to states that they must routinely check for duplicative benefits. It also said “PARIS is available to States as an additional tool to identify interstate duplicate participation but is not mandatory for States to use PARIS.”¹⁷ It then marked the OIG recommendation complete as of November 2011. PARIS use should be mandatory.

¹³ *Id.* at 6. See also Posting of Jack Lew to Office of Management & Budget Blog, <http://www.whitehouse.gov/blog/2011/05/23/new-ideas-cut-improper-payments> (May 23, 2011, 11:53 EST).

¹⁴ *Id.* at 7, 10.

¹⁵ OIG Audit, *supra* note 5, at 7.

¹⁶ *Id.*

¹⁷ *Id.* at Appendix, page 3.

b. *The Medicaid Model*

Rather than providing a complex, resource intensive, and exception-riddled enforcement approach to retailers who violate SNAP participation rules, FNS should implement the Medicaid provider integrity system used by the Centers for Medicare and Medicaid Services (CMS). The FNS proposed rule includes scattered solutions to retailer actions, which fit into roughly four groups: Payment Suspension,¹⁸ Disqualification Process,¹⁹ Business Integrity,²⁰ and Firm Practice.²¹ None are comprehensive, and several proposals are ambiguous. Instead, FNS should focus its efforts on a few central themes and vulnerabilities, none of which were mentioned in the proposed rule. FNS could do this in three ways.

First, FNS should publish its retailer enforcement work. This means publishing the complete list of excluded retailers, sanctioned retailers, and retailers that it audited or investigated—including the outcomes of those actions. It should publish all of this information in a central location, and include each excluded and sanctioned entity in the GSA maintained EPLS (excluded parties list system). Including excluded retailers in EPLS would allow compliance and business integrity efforts by suppliers and potential buyers to self-police their relationships with sanctioned entities, and to have heightened vigilance and reporting of activities by recipients connected with those retailers. FNS could also combine this information with its Watch List, which “compiles retailer data that meet[s] predefined parameters (generally retailers with the highest ALERT scores) into a single list. Investigators use the Watch list to identify stores for investigation.”²² This list should be available to state and local agencies that administer SNAP to monitor frequent fliers and other necessary information.

Second, it could follow-up on “new” retailers. The proposed rule includes two “business integrity” provisions. For one, FNS talked about its regulatory power to deny or withdraw authorization for retailers who “fail[] to pay any fine, claim, or fiscal penalty assessed [by FNS] against it.”²³ The proposed rule did not discuss whether FNS would apply this power, or how it planned to apply this power. For the other, FNS says it will *now* consider buyers and sellers responsible for unauthorized transactions. Historically, there was only an administrative fine for the buyer who used the seller’s old EBT machine without re-applying to be a SNAP retailer.

FNS should address how it will monitor whether a buyer and seller are related, and whether they are conspiring to evade SNAP participation rules. FNS should also state specifically in the rule—and in documents related to the transfer, including a buyer and seller certification—that a claim for SNAP benefits submitted by a related buyer, or by an excluded person or entity is in violation

¹⁸ FNS proposes to suspend EBT payments to investigation targets, who are the most flagrant violators of program rules. Proposed Rule, *supra* note 1, at 12,248-49.

¹⁹ FNS reiterated its somewhat confusing policy about disqualification process and clarified that once a retailer receives an agency notice of determination, it only has ten days to respond with further information. Proposed Rule, *supra* note 1, at 12,248-49.

²⁰ FNS outlined two ways that it will evaluate business integrity. Proposed Rule, *supra* note 1, at 12,249-50.

²¹ FNS outlined a limited, ambiguous standard for “firm practice,” which is an element required to disqualify a retailer “if it has been found to have been the firm’s practice to exchange major non-food items for SNAP benefits” (e.g. alcohol, tobacco, etc.). Proposed Rule, *supra* note 1, at 12,250.

²² OIG AUDIT REPORT, *supra* note 5, at 5.

²³ Proposed Rule, *supra* note 1, at 12,250.

of federal laws, and that compliance with the buyer-seller rules is a condition of payment. These steps are important because, for example, a February 2012 Scripps Howard News investigation alleged that it found “dozens of individuals who had been banned as food-stamp vendors nonetheless remained in the business in New York; Los Angeles, Phoenix; San Diego; Tulsa, Okla.; West Palm Beach, Fla.; Baltimore and other communities across the country.”²⁴ This investigative method “involved comparing data from hundreds of current liquor, food and health licenses, state corporate filings and city business records with a list of stores that the USDA has permanently disqualified.”²⁵ Of the subset of excluded retailers, “Scripps’ analysis identified 137 locations at which merchants had been disqualified as many as four times.”²⁶ Many of the cities identified in the report are urban areas, which have localities willing to help the USDA find and eliminate this form of fraud.

Finally, it could follow the remaining Medicaid rules and regulations—as appropriate—to govern its retailers. For example, CMS requires that health care providers and other recipients of federal funds (e.g. nursing homes, managed care entities) have provider program integrity programs in place to identify and eliminate fraud, waste, and abuse in the Medicaid system. This helps the federal government monitor a very large program that states and localities bear responsibility for administering. There are many states and localities willing to help bear this burden to protect the vulnerable populations within their borders.

2. ZERO TOLERANCE FOR FRAUD: Proposed rule will not address cities like New York that, as FNS identified, face a larger risk of retailer trafficking.

President Obama has made fighting fraud a cabinet-level priority, including “leveraging technology to save money and deliver results.”²⁷ The U.S. Department for Health and Human Services is leading the charge in the fight against public assistance fraud, waste, and abuse. Secretary Kathleen Sebelius wrote, “If a friend or family member gets robbed, you would want to see the perpetrator brought to justice. The same is true for catching criminals who steal money from American taxpayers and businesses.”²⁸ Many of the programs with the highest vulnerability for improper payments are public assistance programs. FNS already has many of the tools to be a leader in this field, and the proposed rule should focus on a zero-tolerance policy for fraud.

Although FNS outlines its data analytical efforts to identify hotspots of potential fraud, its investigative actions demonstrate that it does not focus on the areas that FNS identified as the most at risk. A 2006 Government Accountability Office (GAO) report highlighted the need for data analytics to identify high-risk areas, tougher retailer penalties, and to focus its retailer

²⁴ Isaac Wolf, *Store Owners, Banned from Food Stamps, Still Do*, Scripps Howard News Serv., Feb. 20, 2012, available at <http://www.standard.net/stories/2012/02/20/store-owners-banned-taking-food-stamps-still-do>.

²⁵ *Id.*

²⁶ *Id.* at 3.

²⁷ The White House, “Cutting Waste” from the Reform and Fiscal Responsibility portion of the website, <http://www.whitehouse.gov/economy/reform/cutting-waste>.

²⁸ Posting of Kathleen Sebelius to The White House Blog, <http://www.whitehouse.gov/blog/2010/01/28/a-zero-tolerance-approach-health-care-fraud> (Jan. 28, 2010, 10:00 EST).

investigations where the fraud occurs—urban areas with high concentrations of small retailers.²⁹ The GAO also directed FNS to focus its retailer enforcement actions against known trafficking hotspots in urban areas with high concentrations of small retailers.³⁰ FNS now finds trafficking hotspots by looking at:

- a. Multiple purchases from the same SNAP account in a brief period,
- b. Multiple SNAP purchases by multiple SNAP households in rapid succession from a single point of sale,
- c. SNAP transactions that are unusually large for an individual,
- d. SNAP purchases that completely deplete a participant’s monthly allotment,
- e. Transactions that are large for the store’s size and location, and
- f. Multiple SNAP redemptions in even dollar amounts.³¹

Using analyses provided by USDA, Dan Lesser, Executive Director of Economic Justice for the Sargent Shriver National Center on Poverty Law, explained, “Most trafficking now occurs directly between a small urban retailer and a SNAP recipient.”³² Mr. Lesser continued:

Currently 87.3 percent of SNAP transactions occur in publicly owned, large supermarkets, but only 5.4 percent of trafficking occurs in these stores. Conversely 8.9 percent of SNAP benefits are redeemed in privately owned, small convenience and grocery stores, but *these stores account for almost 80 percent of the SNAP dollars trafficked.*³³

FNS posits that because there are so “few” of these small, privately-owned retailers, the risk for trafficking is low. For many states and localities, this argument may hold true. In Oklahoma, for example, retailers redeemed roughly \$1 billion SNAP benefits in a year, and 74% of those dollars went to eight large supermarkets or publicly owned convenience store chains.³⁴ In many highly-urbanized areas, the opposite is true.³⁵ In New York City, there are more convenience stores and fast food chains than supermarkets and produce stands.³⁶ Of its roughly 10,000 SNAP

²⁹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-53, REPORT TO CONGRESSIONAL COMMITTEES ON FOOD STAMP TRAFFICKING: FNS COULD ENHANCE INTEGRITY BY BETTER TARGETING STORES LIKELY TO TRAFFIC AND INCREASING PENALTIES 32-33 (2006), [hereinafter GAO REPORT 2006], <http://www.gao.gov/assets/260/252570.pdf>.

³⁰ GAO REPORT 2006, *supra* note 29, at 13.

³¹ Lesser, *supra* note 4, at 293 (citing Young Choi Inc. v. U.S., 639 F. Supp. 2d 1169, 1185 (2009)).

³² Lesser, *supra* note 4, at 292 (emphasis added).

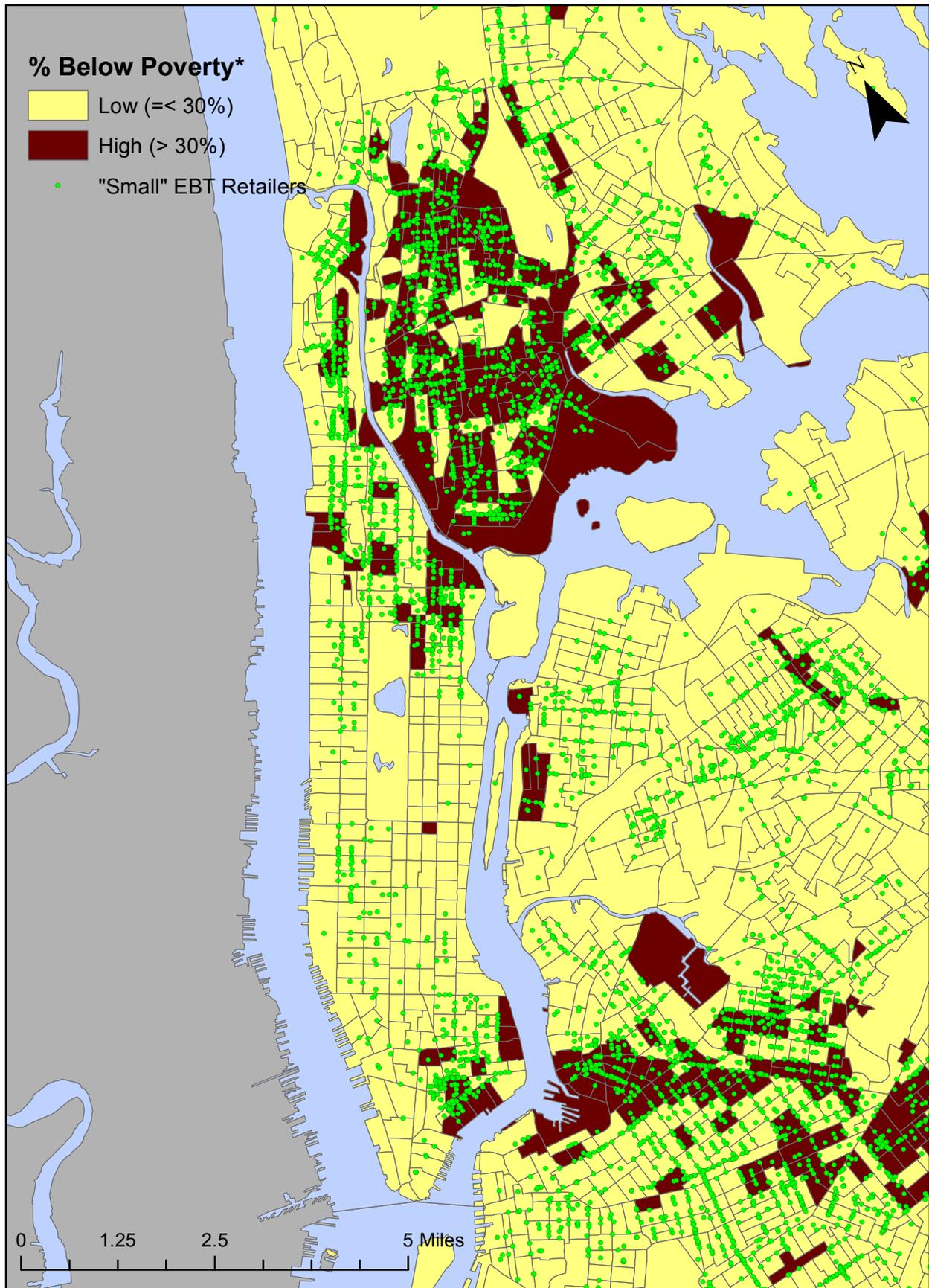
³³ *Id.* at 294 (citing Office of Research & Analysis, U.S. FOOD & NUTRITION SERVICE, U.S. DEP’T OF AG., THE EXTENT OF TRAFFICKING IN THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM: 2006-2008, at 11 (Mar. 2011) [hereinafter FNS EXTENT OF TRAFFICKING IN SNAP], <http://www.fns.usda.gov/ora/menu/published/SNAP/FILES/ProgramIntegrity/Trafficking2006.pdf>) (emphasis added).

³⁴ Michele Simon, Food Stamps: Follow the Money – Are Corporations Profiting from Hungry Americans? at 17, <http://www.eatdrinkpolitics.com/wp-content/uploads/FoodStampsFollowtheMoneySimon.pdf>.

³⁵ “Eighty-nine national and local studies document uneven geographic access to supermarkets in urban areas according to income, race, or both and nine had mixed results.” The Food Trust, *The Grocery Gap: Who Has Access to Healthy Food & Why It Matters*, at 13 (2010), <http://www.policylink.org/atf/cf/%7B97C6D565-BB43-406D-A6D5-ECA3BBF35AF0%7D/FINALGroceryGap.pdf>.

³⁶ *Id.* at 14.

New York City's Small SNAP Retailers



*U.S. Census Bureau, 2007-2011 American Community Survey

retailers, more than 80% are small, privately-owned retailers.³⁸ The proposed regulation’s limitation to a few of the “most flagrant” violators exposes the program to significant risk of continued improper payments, and to the collateral local risks discussed above (i.e. diversion of SNAP benefits from their food purpose, and creation of crime attractors and crime generators).

a. *Case study: Meriden, Connecticut trafficking prosecution*

In December 2012, the U.S. Attorney’s Office for the District of Connecticut announced that a Meriden SNAP retailer pled guilty to one count of food stamp fraud and agreed to pay \$216,680.12 in restitution. The retailer “admitted that he illegally redeemed SNAP benefits at J’s Corner Store in exchange for cash, typically at a discounted rate of approximately 50 to 70 percent of the full value of the benefits.”³⁹ As of December 18, 2012 the owner was awaiting sentencing; on April 5, 2013, a local police blotter reported the owner was arrested and charged with larceny and several other drug offenses.⁴⁰

Meriden is in New Haven County, Connecticut, which has roughly 860,000 residents. As of 2009, the county had an estimated 10% of its population on SNAP, and had roughly 700 EBT retailers as of 2011.⁴¹ Comparatively, Bronx County—one of five counties that make up NYC—had roughly 1.3 million residents in 2009 and 29.28% of its residents use SNAP benefits to support their families. For one zip code in the South Bronx, which has a population of 47,000, 23% of its residents redeem SNAP benefits at 131 small, privately-owned retailers. (NYC has 175 zip codes.) The FNS integrity strategy should concentrate on areas with the highest risk of loss, based upon the factors identified.

b. *FNS should focus its investigative efforts where there is the highest risk of fraud—cities like New York, who also bear responsibility for both SNAP administration and crime prevention.*

FNS research suggests when a retailer is more likely to traffic in benefits, but its investigations with OIG do not reflect its analyses. FNS research reports indicate a retailer is more likely to

³⁸ To arrive at this number, we pulled from stores listed in each New York City zip code and approximated the number of large and small retailers using FNS’ definitions of those terms. U.S. Dep’t of Agric., Food & Nutrition Service, SNAP Retailer Locator, available at <http://www.snapretailerlocator.com/>.

³⁹ Press Release, *Meriden Store Owner Pleads Guilty to Federal Food Stamp Fraud Charge*, U.S. Dep’t of Justice (Dec. 18, 2012), available at <http://www.justice.gov/usao/ct/Press2012/20121218-2.html>.

⁴⁰ The owner “was arrested and charged with larceny in the sixth degree, possession of narcotics, possession of drugs, possession of drugs with intent to sell, possession of narcotics near a school zone, possession of controlled substance near a school zone, illegal storage of narcotics, illegal obtaining of a controlled substance, sale of controlled substance.” Posting by Lisa DeVito to Police Blotter: Receiving Stolen Property and Assault on Emergency Personnel, <http://meriden.patch.com/groups/police-and-fire/p/police-blotter-receiving-stolen-property-and-assault-e9d183129d> (Aug. 20, 2011, 5:14 EST).

⁴¹ All numbers from this discussion can be found in the New York Times analysis from 2009. Jason DeParle & Robert Gebeloff, *Food Stamp Use Soars, and Stigma Fades*, Interactive Map, N.Y. TIMES, (Nov. 28, 2009), available at <http://www.nytimes.com/interactive/2009/11/28/us/20091128-foodstamps.html>. Study and data were published in an alternate format by the Food Research and Action Center, which can be found at: <http://frac.org/reports-and-resources/snapfood-stamp-monthly-participation-data/county-by-county-review-of-snapfood-stamp-participation-nytimes/>.

traffic in benefits if it meets four key criteria:

- a. small retailer,
- b. privately-owned retailer,
- c. higher poverty level in the retailer's surrounding neighborhood, and
- d. retailer is located in a "most urban" or "most rural" area.⁴¹

Highly-urbanized areas had more trafficking than the most rural areas. Neighborhoods where the majority of the population is 30% or more below the federal poverty level are the highest at risk for retailer trafficking. Despite developing indicia of fraud, the OIG believes that "because FNS estimates its trafficking rate using a judgmental sample method, results may not be representative of the retailer population; therefore, the actual extent of trafficking could be over or underestimated."⁴² It recently tasked FNS with determining "the feasibility of using the redemption practices of a nationwide random sample of SNAP retailers for calculating a national trafficking rate."⁴³ This should be done by September 30, 2013.

HRA, as the administrator of SNAP, receives frequent complaints from the public about SNAP trafficking at small, local retailers. We administer more than \$3 billion in SNAP benefits per year to 1.8 million SNAP recipients, who shop at 10,000 local SNAP retailers.⁴⁴ Moreover, NYC contributes more than \$626 million annually to administer SNAP. We believe that the federal investment in benefits and the City's investment in program administration must be properly protected.

In December 2011, FNS promised "stronger sanctions and penalties for retailers to allow USDA to take more aggressive action against those that violate program rules and give responsible retailers a bad name."⁴⁵ FNS also promised to follow this with a proposed rule in the spring of 2012. After devoting half its investigative resources and prosecuting no reported cases in a major metropolitan area, the OIG had a \$57 million impact on improper payments. It is a beginning, but if we follow the USDA's own conservative estimates, this would recover only 2.5 percent of the improper payments in SNAP. [OIG recently reported "FNS does not have tools to effectively estimate a total SNAP fraud rate over time."⁴⁶]

3. TRANSPARENCY: The proposed rule provides fractured solutions that would make enforcing SNAP retailer rules more difficult and even less transparent today.

President Obama directed the heads of Executive Departments and Agencies, to prioritize transparency, which "promotes accountability and provides information for citizens about what

⁴¹ FNS EXTENT OF TRAFFICKING IN SNAP, *supra* note 33, at 9-10.

⁴² OIG AUDIT REPORT, *supra* note 5, at 2.

⁴³ *Id.* at 3.

⁴⁴ "In April 2008 almost twenty-eight million Americans participated in the SNAP program. By July 2011 participation had reached a record forty-five million, or approximately one in seven Americans." Dan Lesser, *An Emerging Issue in the Supplemental Nutrition Assistance Program Should Be Participants Be Subject to New Identification Requirements?*, 45 CLEARINGHOUSE REV. 290, 291 (Dec. 2011); HRA Facts February 2013, *supra* note 4, at 1.

⁴⁵ Press Release, *USDA Announces New Tactics to Combat Fraud and Enhance SNAP Program Integrity*, U.S. Dep't of Justice (Dec. 6, 2011), available at <http://www.fns.usda.gov/cga/pressreleases/2011/0503.htm>.

⁴⁶ OIG AUDIT REPORT, *supra* note 5, at 2.

their Government is doing.”⁴⁷ He reiterated this directive in his Executive Order concerning improper payments; the order’s first substantive section concerns transparency and public participation.⁴⁸ In another memo to agency and department executives, the President issued a directive concerning Freedom of Information Act (FOIA) requests. Specifically, the federal government should operate with “a presumption in favor of disclosure;” agencies should not only answer specific FOIA requests, but “take affirmative steps to make information public.”⁴⁹

a. *Sharing EBT Transactional Data*

FNS has drawn criticism from journalists and open-government advocates for its unwillingness to share EBT transactional data for the SNAP program. Historically, it denied FOIA requests for this information. On April 3, 2013, a consortium of journalism associations and open-government advocates asked the USDA to release information about SNAP:

The secretiveness surrounding SNAP contrasts with the type of information available about other public programs, including Medicare, Medicaid and Temporary Assistance for Needy Families, which discloses where recipients used their EBT cards to withdraw cash assistance. With any federal program, but especially with one as large as SNAP, records should be public unless there is a compelling reason to hide them. We have yet to hear a good reason for this secrecy. And we believe it is simply wrong to withhold basic information about a multibillion-dollar program from the people who pay for it.⁵⁰

In developing proposals for regulatory changes surrounding retailer trafficking, FNS should heed the President’s directives and work with state and local governments and the public to develop a comprehensive, transparent policy. With the proposed regulation, it should make current data showing per-store redemptions available to states, localities, and interested private parties under FOIA, and permit crowd-sourced analysis of the weaknesses of the SNAP retailer system.

b. *Publishing Investigative Results as Specific and General Deterrents*

FNS’ current policies and enforcement actions do not demonstrate an interest in eliminating SNAP retailer trafficking.⁵¹ The preamble to the proposed rule states that FNS is exploring how it would suspend payments for retailers who violate SNAP rules; a power FNS did not codify when granted to it by the Food, Conservation, and Energy Act of 2008. Moreover, the proposed

⁴⁷ Memorandum on Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 26, 2009), <http://www.gpo.gov/fdsys/pkg/FR-2009-01-26/pdf/E9-1777.pdf>.

⁴⁸ Exec. Order No. 13,520, *reprinted in* 74 Fed. Reg. 62201 (Nov. 25, 2009).

⁴⁹ The President went on to state “The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.” Memorandum on Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009), http://www.uspto.gov/ip/boards/foia_rr/President_Letter_re_FOIA_Jan-21-2009.pdf.

⁵⁰ Letter from Charles Ornstein, *et. al*, President, Ass’n of Health Care Journalists, to Tom Vilsack, Secretary, U.S. Dep’t of Agric. (Apr. 3, 2013), <http://healthjournalism.org/uploads/food-stamps-Vilsack-4-3-13.pdf>.

⁵¹ Due to the advent of EBT and other tracking systems, OIG praised states for eliminating the majority of recipient-fraud in SNAP. However, their Audit Report still reported approximately \$3.7 million per month in benefits redeemed for eligibility, budgeting, and duplicative benefit issues. GAO REPORT 2006, *supra* note 29, at 1-2.

rule does not recognize or address issues and solutions provided in the body of literature covering fraud control and specific and general deterrence.

FNS undermines confidence in its enforcement when the proposed rule limits its application to only “the most flagrant violators” and says unspecified criteria and a hidden threshold will define the keyword flagrant.⁵² Although the proposed rule asks for comments about what should go into the criteria, FNS does not publish comments on its proposed regulations—unlike CMS does for proposed regulatory changes in Medicaid. Moreover, the rule describes an inefficient process wherein FNS would “establish checks and balances by requiring consultation with OIG on *each* case to ensure that there is agreement between *both* agencies that the retailer has met the established criteria.”⁵³ FNS does not anticipate that the proposal will impact the majority of its SNAP retailer-trafficking investigations.

In 2006, a GAO study noted that implementing the EBT system itself was not enough to stop retailer fraud, which was the only remaining major concern about fraud in SNAP. “Despite FNS progress, the program remains vulnerable because retailers can enter the program intending to traffic, often without fear of severe criminal penalties.”⁵⁴ The report provided a series of solutions that FNS could take to improve its ability to detect and deter fraud from retailer trafficking; FNS implemented only one solution.⁵⁵

A 2012 OIG Semi-Annual Report to Congress revealed that FNS has not changed course; “FNS’ policy is not to pursue suspension or debarment of retailers. . . .”⁵⁶ The OIG urged a mid-point by asking FNS “to consider doing so on a case-by-case basis.”⁵⁷ As a response, FNS proposed this rule, which does make mention of several retailer enforcement actions; however, it is not comprehensive, and the language makes it unclear how broadly FNS will apply these “heightened” punishments.

Due to limited resources, many federal investigations require a high-dollar amount or multiple targets. For example, “Using one of the EBT Management Reports, the Manual Transaction Report, OIG found 122 retailers in New Jersey who processed more than 400 manual transactions each during the review month. . . . [T]hese transactions totaled over \$4.4 million and represented 49 percent of the retailers’ total SNAP transactions during the month.”⁵⁸ There are 231,465 active SNAP retailers. If the federal government wanted to investigate one percent of stores, that would mean that FNS and OIG would have to discuss 2315 individual retailers to see if each one met the hidden criteria to make it one of “the most flagrant violators.” In the interim, the retailer would continue to receive SNAP benefits from any EBT card swiped or keyed in his store.

⁵² Proposed Rule, *supra* note 1, at 12,248.

⁵³ *Id.* (emphasis added).

⁵⁴ GAO REPORT 2006, *supra* note 29, at 2.

⁵⁵ FNS reports that it now uses data analytics to identify retailer trafficking hotspots; however, it is unclear how they proceed once they identify a hotspot. FNS EXTENT OF TRAFFICKING IN SNAP, *supra* note 33, at 7-9.

⁵⁶ U.S. DEP’T OF AGRIC. OFFICE OF INSPECTOR GEN., SEMI-ANNUAL REPORT TO CONGRESS FIRST HALF FISCAL YEAR 2012 14 (May 2012) [hereinafter SARC 1 FY 2012], http://www.usda.gov/oig/webdocs/sarc2012_1st_half.pdf.

⁵⁷ *Id.*

⁵⁸ Charles J. Mullin, *Statistical Analysis of Fraud in the Florida Food Assistance Program* 15 (Nov. 28, 2012), http://www.flstrikeforce.com/Documents/FINAL_ERS_Report_on_Florida_SNAP_Program_Fraud.pdf.

The depth and breadth of federal enforcement actions remains unclear. In the proposed rule, FNS claims there were only five criminal or civil actions against a retailer that trafficked in benefits last year (i.e. 2011), and none were in a major metropolitan area.⁵⁹ It also reports sanctioning less than one-half of one percent of its 231,465 retailers for trafficking in benefits.⁶⁰ However, the OIG reports that it “devoted about 52 percent of its investigative resources to SNAP-related criminal investigations, which resulted in 342 convictions and monetary results totaling \$57.7 million.”⁶¹ We recommend that FNS publish the results of retailer exclusions, sanctions, and federal and local indictments and convictions in a central location—like the LEIE list for Medicare and Medicaid providers, and the HHS/OIG website for Medicare and Medicaid, or the website for financial fraud (www.STOPFRAUD.gov)—to allow education and measurement of how effectively and efficiently FNS and the OIG addressed SNAP retailer trafficking. Such a publication would help to enlist local and state agencies, investigators, prosecutors, private citizens, and entities in addressing these issues. Moreover, that would comply with President Obama’s directive that “Executive departments and agencies should harness new technologies to put information about their operations and decisions online and readily available to the public.”⁶²

Aggressive efforts to control fraud against a \$100 billion public program should not be limited to the “most flagrant” violators, as this proposed regulation seeks to do. Actions taken against fraudsters should be open and public, both to serve as a warning to others and to encourage citizens to aid in identifying continued violations, and easily accessible for anyone interested in doing so, as this regulation does not do. Standards and guidelines for taking action against violators should be disclosed (as the HHS OIG does), not kept secret as the proposed regulation states. FNS should make clear in this regulation that program compliance by vendors is a condition of payment for SNAP claims, subject to federal law enforcement. Violators who continue to transact business after violations should be given clear notice by the regulation of their notice of their responsibilities and the consequences of their conduct, and required by the regulation to undertake monitoring, reporting, and certification of their compliance efforts.

Sincerely,


James G. Sheehan
Chief Integrity Officer

⁵⁹ The federal government requires the Offices of the Inspector General submit Semi-Annual Reports to Congress (SARC), which outline how they use their resources. These reports generally include a brief summary of investigative actions taken during the reporting period. For the two SARC in Fiscal Year 2012, the USDA OIG reported only one case that occurred in one of the ten largest U.S. cities. SARC 1 FY 2012, *supra* note 57; U.S. DEP’T OF AGRIC. OFFICE OF INSPECTOR GEN., SEMI-ANNUAL REPORT TO CONGRESS SECOND HALF FISCAL YEAR 2012 14 (Nov. 2012) [hereinafter SARC 2 FY 2012], http://www.usda.gov/oig/webdocs/sarc2012_2nd_half.pdf.

⁶⁰ Proposed Rule, *supra* note 1, at 12,248.

⁶¹ *Budget Testimony: Hearing Before the Subcomm. on Agric., Rural Dev., Food & Drug Admin., and Related Agencies Comm. On Approp.*, (Mar. 21, 2013) (statement of Phyllis K. Fong, Inspector General, U.S. Dep’t of Agric.), <http://appropriations.house.gov/uploadedfiles/hbrg-113-ap01-wstate-fongp-20130321.pdf>.

⁶² Memorandum on Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 26, 2009), <http://www.gpo.gov/fdsys/pkg/FR-2009-01-26/pdf/E9-1777.pdf>.