**Via Email** May 14, 2025

Arkansas Department of Human Services
Office of Policy and Rules
ORP@dhs.arkansas.gov

**Re: Pilot Project meant to improve Nutrition and Health under the Supplemental Nutrition Assistance Program**

To Whom it May Concern:

FMI – The Food Industry Association ("FMI") appreciates the opportunity to provide comments on the Arkansas Department of Human Services' request to pilot a project under the Supplemental Nutrition Assistance Program (SNAP). We share the Department's commitment to improving the nutrition, health, and well-being of individuals and families who rely on SNAP, particularly those who are most vulnerable. As an organization representing the food retail industry, we are deeply invested in supporting public and private efforts that advance access to healthy, affordable foods. We welcome continued dialogue on innovative strategies to strengthen SNAP and improve health outcomes.

FMI submits the following comments regarding the April 15, 2025, request of the Arkansas Secretary of Health and Human Services to the Secretary of the U.S. Department of Agriculture ("USDA") to operate a Supplemental Nutrition Assistance Program ("SNAP") pilot project. The request seeks approval for a project that would restrict the use of SNAP benefits to purchase certain foods, and for a waiver of the statutory and regulatory definitions of SNAP-eligible foods.[1] Specifically, the pilot project described in the Waiver Request would "exclude from the definition of eligible foods … soda, low and no-calorie soda, fruit and vegetable drinks with less than 50% natural juice, unhealthy drinks, and candy."[2] Excluded candy would include both

[1] Letter from Kristi Putnam, Secretary of Health and Human Services for the State of Arkansas, to the Secretary of the U.S. Department of Agriculture (April 15, 2025), https://humanservices.arkansas.gov/wp-content/uploads/SNAP-WAIVER-FINAL-TWO.pdf (hereinafter "Waiver Request").

[2] *Id.* at 1.

"confectionary products with flour and artificially sweetened candy," and the exclusions would "not extend to flavored water, carbonated flavored water, and sports drinks."[3]

FMI works with and on behalf of the entire food retailing industry to advance a safer, healthier and more efficient consumer food supply chain. FMI brings together a wide range of members across the value chain – from retailers that sell to consumers, to producers that supply food and other products, as well as the wide variety of companies providing critical services – to amplify the collective work of the industry. FMI has two core principles: enhancing food and product safety and finding ways to achieve efficiency to ensure consumer prices can be as low as possible.

With these principles in mind, we respectfully raise concerns about the practical and legal challenges associated with the proposed pilot. FMI is particularly concerned about the costs of, and administrative difficulties associated with, operationalizing the restrictions on SNAP purchases requested in the Waiver Request. We also believe any pilot intended to inform future SNAP policy should be grounded in a robust and carefully designed evaluation framework. While we appreciate the state's intent to assess the impact of the proposal, we have questions about whether the current evaluation plan, as described, will be able to generate clear, actionable insights.

Moreover, for the reasons described below, we believe the Waiver Request would exceed the existing statutory authority of USDA's Food and Nutrition Service ("USDA FNS" or the "Agency"). We offer these comments not in opposition to the goal of promoting health, but in the spirit of collaboration and transparency – with the hope that Arkansas can build on the strengths of its proposed nutrition education and outreach efforts while avoiding unintended consequences that could disrupt access, increase costs, or strain the effectiveness of SNAP for participants and partners alike.

USDA FNS – the federal agency that administers the SNAP program – has consistently denied similar waiver requests in the past, during both Democratic and Republican administrations. USDA FNS has denied similar waiver requests from

---

[3] *Id.* The Waiver Request also provides that under the requested pilot project, hot rotisserie chickens – currently excluded from the federal definitions of SNAP-eligible foods – would be eligible for purchase with SNAP benefits. *Id.* The Waiver Request also describes certain planned uses of SNAP Education funds, described further below, and states that "[i]f a waiver is required for approval to distribute SNAP Education funding differently, the State of Arkansas requests technical assistance to pursue this approach." *Id.* at 3-4.

Minnesota in 2004, New York in 2011, and Maine in 2016.[4] The agency also denied a subsequent Maine waiver request in 2018 – *i.e.*, during the first Trump administration – that would have restricted use of SNAP benefits to purchase soft drinks and candy, as well as a similar Nevada request in 2018.[5] These denials reflect longstanding concerns, shared across administrations, about the operational complexity of implementing categorical purchase restrictions and the limited potential for such pilots to yield meaningful or reliable health-related findings.

The pilot project requested in the Waiver Request similarly raises many of the same concerns. It would likely impose significant burdens on the administering agency and key stakeholders, including retailers and SNAP participants. Moreover, the evaluation plan, as currently described, may face similar challenges in terms of producing actionable, evidence-based insights.

We therefore do not see grounds upon which USDA FNS could depart from its precedents and now grant the Waiver Request.[6] Thus, we respectfully ask that the Arkansas Department of Health and Human Services reconsider the Waiver Request. As described below, however, we support the planned efforts described in the Waiver Request regarding use of the state's SNAP Education funding for nutrition education and outreach and will work to develop a point of purchase component.[7] We would also welcome the opportunity to work with the governor and her administration to support

---

[4] Letter from Ollice C. Holden, Regional Administrator, SNAP, USDA FNS, to Maria Gomez, Assistant Commissioner, Economic and Community Support Strategies, Minnesota Department of Human Services (May 4, 2004) (hereinafter "FNS Minnesota Waiver Denial") (attached as **Appendix 1**); Letter from Jessica Shahin, Associate Administrator, SNAP, USDA FNS, to Elizabeth R. Berlin, Executive Deputy Commissioner, New York State Office of Temporary and Disability Assistance (Aug. 19, 2011) (hereinafter "FNS New York Waiver Denial") (attached as **Appendix 2**); Letter from Jeffrey N. Cohen, Acting Associate Administrator, SNAP, USDA FNS, to Mary C. Mayhew, Commissioner, Maine Department of Health and Human Services (Apr. 11, 2017) (hereinafter "FNS 2017 Response to Maine Waiver Request") (attached as **Appendix 3**) (describing the prior 2015 request and 2016 denial).

[5] Letter from Jessica Shahin, Associate Administrator, SNAP, USDA FNS, to Ricker Hamilton, Acting Commissioner, Maine Department of Health and Human Services (Jan. 16, 2018) (attached as **Appendix 4**); Letter from Jessica Shahin, Associate Administrator, SNAP, USDA FNS, to Richard Whitley, Director, Nevada Department of Health and Human Services (Jan. 18, 2018) (attached as **Appendix 5**).

[6] Indeed, a reversal from these precedents could be deemed arbitrary and capricious and thus violate the Administrative Procedure Act. 5 U.S.C. § 706(2)(A).

[7] Waiver Request at 3.

the development of complementary point-of-purchase strategies that help consumers make informed, healthy choices.

## I. The Pilot Project Would Pose Operational Difficulties and Impose Significant Costs

### A. The pilot project would pose administrative difficulties related to identifying foods excluded from SNAP.

The pilot project described in the Waiver Request would exclude from SNAP "soda, low and no-calorie soda, fruit and vegetable drinks with less than 50% natural juice, unhealthy drinks, and candy," including both confectionary products with flour and artificially sweetened candy."[8] However, "flavored water, carbonated flavored water, and sports drinks" would not be excluded, and thus could continue to be purchased using SNAP benefits under the proposed pilot project.[9] The Waiver Request further explains that the pilot project would "use the GS1 US framework to define ineligible foods," but does not provide any further detail regarding identifying the particular foods that would be excluded nor how use of the GS1 framework would be operationalized to define eligible and ineligible foods nor the costs associated with the use of the GS1 system.[10]

The food products that would be excluded from SNAP under the requested pilot project would need to be identified in an electronically downloadable list, updated monthly, and available to retailers and manufacturers. This segregation of products would necessitate education of customers, retailers, and manufacturers to understand the array of parameters needed to consider product design, stocking and purchase decisions. It would also create customer and retailer confusion and exacerbate operational difficulties in implementing the new restrictions.

First, some of the foods that would be excluded under the Waiver Request are identified in a manner that is inconsistent with the Arkansas tax definitions, and other excluded foods are vaguely defined. Specifically, the proposed definition of "confectionary products" to include those that contain flour is inconsistent with the Arkansas tax definition of "candy" (which does not cover flour-containing products), and

---

[8] Waiver Request at 1.

[9] *Id.*

[10] *Id.* at 3.

the proposed exclusions of "soda, low and no-calorie soda, fruit and vegetable drinks with less than 50% natural juice, [and] unhealthy drinks" likewise do not squarely fit within relevant Arkansas tax definitions, creating confusion for retailers and other entities involved in implementation, particularly for products programmed as not taxable, yet ineligible for purchase.[11] Indeed, the parameters for identifying products that are to be excluded under the requested pilot project are inadequately defined overall. For example, the precise parameters for products that are included in the broad, undefined categories of "confectionery products" or "unhealthy drinks" are unclear.

These issues create the potential for confusion and underscore the practical complexities of implementing SNAP restrictions that require precise distinctions among thousands of different food products. As USDA FNS has stated in a prior denial of a similar waiver request, it is essential for a pilot project to specify "clear and practical means to determine product eligibility."[12] At present, the Waiver Request does not offer sufficient clarity on this point.

Second, the list of excluded foods under the requested pilot project evinces arbitrary line-drawing among different types of products. In particular, the determinations regarding excluded versus included beverage products are not supported by any clear, unifying rationale. The proposed exclusions are not premised on calorie or sugar content, and the internal inconsistency of the exclusion determinations in the waiver request demonstrates how challenging it is to consistently define the types of foods that would be excluded from SNAP under the pilot project, highlighting the difficulties in administering the requested restrictions.

Without a clear and comprehensive list of ineligible products updated regularly and accessible at the point of sale, store personnel would be left to make difficult and subjective product eligibility determinations at the register and try to communicate them to customers in a high-volume, multi-lane environment. This would be especially problematic to manage in cases where the distinction between included and excluded products is not intuitive. These situations would increase check-out times, lead to

---

[11] Ark. Code Ann. § 26-52-103(3), (33). "Soft drink" is defined for tax purposes to mean a nonalcoholic beverage that contains natural or artificial sweeteners. *Id.* at § 26-52-103(33). A soft drink does not include a beverage that contains milk or milk products, soy, rice, or similar milk substitutes, or that is greater than fifty percent (50%) of vegetable or fruit juice by volume. *Id.*

[12] FNS New York Waiver Denial at 1.

customer frustration, and require staff training to manage conflicts or confusion, ultimately slowing the shopping experience for all customers and imposing new burdens on retailers.

Third, retailers will require significantly more direction from the administering agency[13] to determine the SNAP eligibility of particular food products under the pilot project, a process that would impose meaningful costs at the government and industry levels. This burden should not fall disproportionately on retailers, and without a consistent, electronically downloadable list, human judgment is likely to result in inconsistency, further exacerbating the confusion of customers.

To illustrate, there are over 650,000 food and beverage products on the market today, with approximately 20,000 new products introduced each year, and the average grocery store stocks 32,000 items, with many larger stores carrying thousands more.[14] As a practical matter, to implement the proposed SNAP restrictions, retailers will require a comprehensive, electronically downloadable, and up-to-date list of specific SNAP-ineligible items made available on a monthly basis free of charge.[15]

The Waiver Request provides that the state plans are to use the GS1 US framework to define ineligible foods, but does not provide any explanation of how the state agency plans to utilize GS1 to identify excluded items (assuming the system is capable of doing so) and what the cost is for utilization of this system and who pays those costs. There are certain to be governmental burdens associated with operationalizing the inexplicit definitions of ineligible foods in the Waiver Request using GS1 and communicating eligibility information to retailers. Further, for reliance on GS1 to identify excluded products to even potentially work, the GS1 online system would need to reflect all SNAP-ineligible items. However, not all manufacturers currently utilize GS1, and manufacturers must pay a fee to load product barcodes into GS1. Thus,

---

[13] We assume that the Arkansas Department of Health and Human Services will administer the aspects of the pilot project discussed, though our concerns would likewise apply to administration of aspects of the project by USDA FNS.

[14] FMI, *Food Industry Facts*, FMI The Food Industry Association, https://www.fmi.org/our-research/food-industry-facts (the average grocery store stocks 32,000 items); Stephen Martinez, *Number of new food and beverage products rebounded in 2016*, Economic Research Service, U.S. Department of Agriculture (2017), https://www.ers.usda.gov/data-products/charts-of-note/chart-detail?chartId=83141 (20,000 new products are introduced each year).

[15] Indeed, in USDA FNS' denial of a previous waiver request, the Agency pointed to the lack of a "process for disseminating product information to participating retailers." FNS New York Waiver Denial at 1.

utilizing GS1 would likely impose additional costs on the administering state agency and on manufacturers, especially small and seasonal manufacturers.

### B. The pilot project would impose significant costs on retailers relating to implementing the new SNAP restrictions.

Retailers would face myriad costs relating to operationalizing the SNAP restrictions requested in the Waiver Request, including both startup costs and day-to-day implementation expenses. USDA FNS has denied waiver requests in the past because they would "substantially impact" retailers accepting SNAP benefits with little evidence that affected retailers are well-positioned to implement the restrictions.[16] The same is true for the pilot project requested here, and this project would also disproportionately affect small businesses, for the reasons described below.[17]

First, retailers would need to ensure that their systems are equipped to implement the additional SNAP restrictions. Retailers will require detailed information from the administering agency regarding ineligible foods in order to properly assess for any needed updates to in-store and online systems. The imprecise definitions in the Waiver Request thus further complicate retailers' ability to operationalize the new restrictions. Specifically, to the extent that retailers will need to use GS1 in order to implement the restrictions, many retailers (especially small retailers) will face costs associated with paying for GS1 and transitioning their systems to utilize GS1, given that many retailers do not currently use GS1.

Second, because of the diverse nature of the industry, from small retailers to large national retailers, there is notable pressure on smaller retailers who may not be able to manage the intake of data the way a larger one would. In fact, use of GS1 is not well-suited for many of the types of food products that would be excluded under the Waiver Request, because those products are "direct store delivery items." More specifically, certain products are delivered directly to retail stores via the manufacturer rather than through a wholesale distributor. Retailers receive less assistance for "direct store delivery" items, including those related to item description and other changes.

---

[16] *Id.* ("Without the active commitment and participation of all authorized retailers, the chances of operational success are limited).

[17] *See id.* (The proposed pilot project lacked "clear evidence that small businesses would not be disproportionately affected by the prohibition").

The practical effect is that, for such items, retailers often have to make more manual data entries and the items may not have been logged in GS1. These issues pose additional operational hurdles to implementing the requested expanded SNAP restrictions and will be especially problematic for small retailers like independent grocers.

Third, particularly in light of the vaguely defined food product categories in the Waiver Request, the pilot project would very likely lead to confusion regarding eligible products on the part of SNAP users, and concomitant increased check-out times due to errors, disputes, and customer frustration. Even if the administering agency were to communicate frequently updated lists of ineligible items to SNAP users – which would itself impose significant administrative burdens on the state – SNAP users very likely will nonetheless continue to unknowingly select restricted items.

Every extra second at the register reduces a retail store's already thin 1.6% profit margin, and errors at the register also require retail employees to take time to return items to shelves. Further, retailers would face costs relating to training employees on the new restrictions and managing issues with customers, including potentially embarrassing and contentious encounters that are certain to arise.[18] There are important efficiency benefits to a SNAP program that is simple and streamlined, and the requested pilot project would disrupt those benefits. For every $1 in increased costs, stores would require an additional $50 in sales to avoid cost increases.

### C. The pilot project would increase government bureaucracy and impose costs on the administering government agency related to monitoring for compliance and enforcement.

The requested pilot project would increase government bureaucracy and impose substantial burdens on the administering agency. Including for many of the reasons described above, the pilot project would necessitate that the administering agency become more involved in the daily operations of retailers and the lives of SNAP users. The administering agency would need to regularly evaluate new products and compile lists of specific ineligible items, and would need to regularly communicate those lists to

[18] *See* FNS Minnesota Waiver Denial at 2 ("[S]uch a program change could add confusion and embarrassment at the point of sale when program recipients attempt to purchase food items once allowable but now deemed ineligible."). Such issues could more generally negatively impact program participants, including to increase the risk of stigma for SNAP users.

both retailers and SNAP users. Additionally, the Waiver Request does not provide any detail regarding monitoring for compliance and enforcement.[19] Monitoring and enforcement by the administering agency would impose additional governmental costs and would require the allocation of significant state resources.

### D. The pilot project would undermine the interoperability of SNAP among the states and risk harming the local economy.

If granted, the pilot project would create a patchwork of state SNAP requirements that will likely lead to confusion and additional operational difficulties. Indeed, USDA FNS cited undermining interoperability among the states as a key reason for its denial of Minnesota's prior waiver request, stating that uniform SNAP programs "allows FNS and States to implement interoperability" and that "[a]llowing conflicting definitions of eligible food items would introduce obstacles to continuing interoperability and would undermine the significant benefits that interoperability provides to program recipients nationwide."[20]

These issues would be especially acute for retailers and SNAP users that live near state borders. Arkansas borders six states – Missouri, Tennessee, Mississippi, Louisiana, Texas, and Oklahoma – that would have SNAP rules that differ from those in Arkansas under the pilot project. SNAP users visiting from other states may be unaware of the Arkansas SNAP restrictions under the pilot project, leading to confusion, frustration, and costly delays. There are also questions regarding how issues such as returned products would be handled, *e.g.*, where a product is purchased using SNAP benefits in a state outside of Arkansas (and which would otherwise be ineligible in Arkansas) but is returned in Arkansas. Interoperability also supports administrative efficiency by enabling seamless EBT card use across states, reducing the burden on both recipients and program administrators. It simplifies systems integration for retailers operating in

[19] Prior denials of state waiver requests have noted similar issues. FNS New York Waiver Denial at 1 (The proposal lacked "a communications and coordination plan for retailer compliance activities"); FNS Minnesota Waiver Denial at 2 ("[T]here is some question as to how retailer compliance activities would be impacted if such a waiver were implemented. Administrative difficulties ranging from what penalties, if any, would be brought against retailers for noncompliance with the restrictions imposed by the waiver and what entity, the State or USDA, would be responsible for monitoring compliance would ensue.").

[20] FNS Minnesota Waiver Denial at 2.

multiple states and minimizes errors or transaction disruptions at the point of sale, which ultimately benefits customers and store operations alike.

Additionally, the pilot project may negatively impact the local economy. Every dollar spent using SNAP benefits generates an additional $1.50 for the local economy, thus strengthening local communities.[21] However, under the requested pilot project, Arkansas SNAP participants may be incentivized to shop across state lines to benefit from SNAP programs that do not define SNAP-eligible foods as narrowly. Therefore, the Waiver Request risks drawing shoppers away from state retailers and hurting the local economy.

## II. The Proposed Evaluation Component is Unlikely to Provide Reliable, Meaningful Results

The evaluation component is required for all pilot projects and underlies the statutory provisions authorizing pilot projects as a whole.[22] The core purpose of a pilot project is to conduct a "trial" to "test program changes that might increase the efficiency of the supplemental nutrition assistance program and improve the delivery of supplemental nutrition assistance program benefits to eligible households."[23] The authorizing statute requires that any pilot project include an evaluation component to "determine the effects of the project.[24] The Waiver Request states that the goal of the requested pilot project is to "promote healthier food and beverage purchases and reduce food and beverage purchases that perpetuate chronic health conditions."[25] The Waiver Requests provides little detail regarding the how the state will evaluate the

---

[21]Patrick Canning and Rosanna Mentzer Morrison, *Quantifying the Impact of SNAP Benefits on the U.S. Economy and Jobs*, Economic Research Service, U.S. Department of Agriculture (2019), https://www.ers.usda.gov/amber-waves/2019/july/quantifying-the-impact-of-snap-benefits-on-the-u-s-economy-and-jobs.

[22] 7 U.S.C. § 2026(b)(1)(B)(i)(II) (providing that USDA FNS may not conduct a pilot project unless "the project includes an evaluation to determine the effects of the project"); 7 U.S.C. § 2026(b)(1)(A) ("The Secretary may conduct on a trial basis, in one or more areas of the United States, pilot or experimental projects designed to ***test program changes*** that might increase the efficiency of the supplemental nutrition assistance program and improve the delivery of supplemental nutrition assistance program benefits to eligible households . . .") (emphasis added).

[23] 7 U.S.C. § 2026(b)(1)(A). In Section III below, we explain that the pilot project requested by the Waiver Request is not a "permissible project" within the meaning of the statute.

[24] 7 U.S.C. § 2026(b)(1)(B)(i)(II).

[25] Waiver Request at 3.

effects of the project, stating only that it "will conduct program evaluations based on retailer data to assess the waiver's impact on positive eating and spending habits."[26] However, that proposal is subject to a number of unresolved questions.

First, the Waiver Request does not clearly justify from a scientific and/or nutritional perspective why certain foods would be excluded from the SNAP program under the pilot project and others included. For the pilot project to properly be used to evaluate "healthier food and beverage purchases" and reduction in purchases that "perpetuate chronic health conditions," Arkansas needs to make a carefully considered determination based on consistent nutritional and/or scientific criteria regarding which beverage products to include versus exclude from the SNAP program under the project. Otherwise, the proposed evaluation will not yield sufficiently reliable or actionable information to assess the success of the stated purpose of the pilot project.

Second, the proposed evaluation does not provide for a counterfactual to assess what would happen without the additional restrictions on SNAP purchases, and it is also unclear whether and how the state plans to isolate any effects of the purchasing restrictions from the planned updates to use of the state's SNAP Education funding.[27] Because the requested pilot project would be implemented across the state, the project is not well-suited to provide any comparator counterfactual.

Additionally, the Waiver Request explains that the state plans to "reform its existing SNAP Education funding to promote protein-rich foods, including Arkansas-grown and harvested poultry, eggs, beef, pecans, peanuts, soy, strawberries, sweet potatoes, rice, peaches, oats, and more," and "to distribute SNAP Education nutrition program funding directly to schools, food banks, and other community agencies so they can distribute healthy foods such as fruits and vegetables to families and provide education and outreach about healthy food choices."[28] Any purported effects of the SNAP restrictions that the state might identify in its evaluation could potentially be attributable, at least in part, to these education efforts. Thus, the proposed evaluation component likely will not provide credible results by which to assess the pilot project.

---

[26] *Id.*

[27] USDA FNS denied the 2011 New York waiver request for highly similar reasons. New York Waiver Denial at 1-2.

[28] Waiver Request at 3.

Third, Arkansas is unable to publish store-level nonaggregated retailer data relating to SNAP purchases in any evaluation report. The U.S. Supreme Court's decision in *Food Marketing Institute v. Argus Leader Media* protects public disclosure of retailers' data under Exemption 4 of the Freedom of Information Act ("FOIA").[29]

Specifically, the court held that because FMI's retailers do not customarily disclose store-level SNAP data or make it publicly available and "the government has long promised retailers that it will keep their information private," such data is protected from disclosure under Exemption 4.[30] Since retailer data relating to SNAP purchases falls within the exemption, the government is prohibited from making that data public, including in an evaluation report. This is extremely important to preserve competition. Aggregated data could be utilized. Thus, even assuming retailers can obtain and provide appropriate data – which would need to track whether SNAP users use non-SNAP funds to purchase restricted items[31] – the state may face limitations in how that data can be used or published depending on how it is aggregated in an evaluation report, potentially limiting the usefulness of such an evaluation.

## III. USDA FNS Lacks Authority to Grant the Waiver Request

Finally, USDA FNS lacks authority to grant the Waiver Request because doing so would exceed the Agency's statutory authority. The Waiver Request explicitly asks USDA FNS to waive the statutory definition of "food" that is eligible for purchase with SNAP benefits, such that Arkansas could exclude certain foods from its SNAP program.[32] FNS may only waive provisions of the federal Food Stamp Act by properly authorizing a pilot project pursuant to its statutory authorities.[33] However, USDA FNS cannot approve

---

[29] *Food Mktg. Inst. v. Argus Leader Media,* 588 U.S. 427 (2019).

[30] *Food Mktg. Inst,* 588 U.S. at 432.

[31] *See* FNS 2017 Response to Maine Waiver Request at 2. The likely effects shown by such data are questionable at best, given that USDA FNS has observed that a "substantial body of research has shown that program participants are smart shoppers and that there is little difference in nutrient intakes between low-income participants and higher income consumers." FNS Minnesota Waiver Denial at 2.

[32] Food that is eligible for purchase with SNAP benefits is defined by statute at 7 U.S.C. § 2012(k). The Waiver Request identifies that provision (at 1) as a "Requirement[] to be Waived."

[33] 7 U.S.C. § 2026(b). While FNS has regulatory authority to waive specific regulatory provisions in certain specified circumstances, the Agency may not rely on those provisions to approve any waiver that would be "inconsistent with

(continued...)

the pilot project described in the Waiver Request because doing so would exceed the agency's statutory authority.[34]

The requested pilot project does not fall within the statutory scope of "[p]ermissible projects."[35] The Food Stamp Act authorizes the Secretary to conduct pilot projects to "(I) improve program administration; (II) increase the self-sufficiency of supplemental nutrition assistance program recipients; (III) test innovative welfare reform strategies; or (IV) allow greater conformity with the rules of other programs than would be allowed but for this paragraph."[36]

The pilot project would not "improve program administration." Rather, it would create a plethora of administrative difficulties for the administering agency, retailers, manufacturers, and SNAP users alike, as described above. Further, the intent of the requested pilot project is to *change* the SNAP program by excluding certain foods, and not to improve its administration. Indeed, the Waiver Request makes no reference to improving program administration as a rationale. The Waiver Request likewise does not provide any basis to find that the pilot project would "increase the self-sufficiency" of SNAP recipients, and there is no reason to believe that restricting the types of foods that the already-vulnerable population of SNAP users can purchase will have any positive effect on self-sufficiency. The requested pilot project is also not well suited to "test innovative welfare reform strategies," again, for the reasons noted above. In particular, the proposed evaluation component is not well defined in the Waiver Request, and likely would not be able to provide meaningful information by which the pilot project might be deemed to "test" the change to the program. Finally, nothing in the Waiver Request suggests that the pilot project would allow for greater conformity with the rules of any other program.

* * *

FMI appreciates Arkansas' commitment to nutrition and health and applauds the efforts proposed in the Waiver Request relating to funding for nutrition education and

---

the provisions" of the federal Food Stamp Act. 7 C.F.R. 272.3(c)(2)(i). A waiver to the statutory definition of "food" (or to the consistent regulatory definition) would thus fall squarely outside of USDA FNS' regulatory waiver authority.

[34] 7 U.S.C. § 2026(b)(1)(B)(ii).

[35] *Id.*

[36] *Id.*

outreach. These initiatives align with USDA FNS's longstanding emphasis on supporting "healthier food choices through nutrition education and promotion" rather than via restrictions on foods that may be purchased using SNAP benefits.[37]

For the reasons described above, the requested pilot project that would modify the statutory and regulatory definitions of SNAP-eligible foods to exclude certain food products would create substantial costs for relevant stakeholders as well as the administering agency. The state would also face difficulties related to the proposed evaluation component that would undermine the pilot project's ability to provide credible, meaningful information regarding its effects in relation to the stated goals. Finally, we believe it is beyond USDA FNS' statutory authority to authorize the pilot project. For these reasons, we respectfully encourage the Arkansas Department of Health and Human Services to reconsider the waiver request in light of the legal, operational, and evaluative concerns described above. However, we remain eager to collaborate on efforts that strengthen SNAP's effectiveness and support the well-being of program participants.

Please do not hesitate to reach out if there is further information that FMI can provide to facilitate consideration of these comments.

Sincerely,

Jennifer Hatcher
Chief Public Policy Officer and Senior Vice President, Membership
FMI – The Food Industry Association

Elizabeth K. Tansing
Vice President, State Government Relations
FMI – The Food Industry Association

Attachments (5)

[37] FNS Minnesota Waiver Denial at 2.

# Appendix 1

May 4, 2004

Ms. Maria Gomez, Assistant Commissioner
Economic and Community Support Strategies
Minnesota Department of Human Services
444 Lafayette Road
St. Paul, Minnesota 55155

Dear Ms. Gomez:

This is in response to the State of Minnesota's March 8, 2004 request for a waiver of the definition of eligible foods at 7 CFR 271.2 of the Food Stamp Program regulations. The waiver would have prohibited the purchase of candy and soft drinks that are taxed under State law with food stamp benefits.

We are denying the State's waiver request for the reasons specified in the attached Waiver Response Outline.

We applaud the State for recognizing the importance of healthy eating by food stamp recipients. However, we believe that supporting healthier food choices through nutrition education and promotion is preferable to the proposed mandate. We are committed to working with the State to develop new approaches to improving nutrition levels of food stamp recipients.

If you have any questions or comments, please contact me or have a member of your staff contact Tim English at (312) 353-1533 or tim.english@fns.usda.gov.

Sincerely,

Signed

OLLICE C. HOLDEN
Regional Administrator

WAIVER RESPONSE OUTLINE

1. Waiver serial number: 2040053

2. Type of request: Initial

3. Primary regulation citation: 7CFR 271.2

4. Secondary regulation citation: N/A

5. State: Minnesota

6. Region: MWRO

7. Regulatory requirements: Current regulations at 271.2 define eligible food as any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot foods and hot food products prepared for immediate consumption; eligible foods are further defined as seeds and plants to grow food for the personal consumption of eligible households; and meals prepared and delivered or served to eligible food stamp recipients, as well as equipment for hunting and fishing in certain specified areas in Alaska.

8. Description of proposed alternative procedures: Minnesota proposes to amend the regulations to provide that candy and soft drinks as defined in Minnesota tax law may not be purchased with food stamp benefits. The proposal would exempt any foods that have flour as an ingredient.

9. Action and reason for approval or denial: We are denying the waiver as requested based on Section 272.3(c)(2)(i) of the regulations. This provision specifies that no waiver of the regulations may be approved if such a waiver would be inconsistent with the provisions of the Food Stamp Act. Section 3(g) of the Act defines “”food”“ in a manner that is almost identical to that of the FSP regulations. By proposing to change the definition of “”food”“ in the Food Stamp Program (FSP) operated in the State of Minnesota, the waiver request is in direct conflict with the statute. Therefore, any such waiver request would not qualify for approval.

Further, a demonstration project request under Section 17 of the Food Stamp Act proposing to prohibit the purchase of candy and soda as contained in this waiver request would not be considered, based on the questionable merits of the proposal,

as set forth in the following paragraphs.

Under this proposal, only certain types of candy and soft drinks, as defined by the tax law of Minnesota, would be ineligible for purchase with FSP benefits. For example, Minnesota''s request would allow the purchase of Kit-Kat and Twix candies (because they contain flour), but would prohibit the purchase of Hershey candy bars.

The proposal would also undermine the interoperability of the FSP among States. The FSP is a 100 percent Federal benefit with administrative costs shared with States. A uniform FSP allows FNS and States to implement interoperability. Allowing conflicting definitions of eligible food items would introduce obstacles to continuing interoperability and would undermine the significant benefits that interoperability provides to program recipients nationwide.

We also remain very concerned that approval of any such waiver could have negative consequences for program participants, including the reintroduction of a stigma of participation in the FSP that implementation of EBT helped to eliminate. Further, such a program change could add confusion and embarrassment at the point of sale when program recipients attempt to purchase food items once allowable but now deemed ineligible. Moreover, implementation of this waiver would perpetuate the myth that FSP participants do not make wise food purchasing decisions. A substantial body of research has shown that program participants are smart shoppers and that there is little difference in nutrient intakes between low-income participants and higher income consumers.

Also, there is some question as to how retailer compliance activities would be impacted if such a waiver were implemented. Administrative difficulties ranging from what penalties, if any, would be brought against retailers for noncompliance with the restrictions imposed by the waiver and what entity, the State or USDA, would be responsible for monitoring compliance would ensue.

We applaud the State for recognizing the importance of healthy eating by food stamp recipients. As the cornerstone of the USDA nutrition assistance programs, the FSP plays a vital role in helping to improve nutrition for low-income individuals. In Fiscal Year 2004, the State of Minnesota will receive $6,403,634 of Federal funds for the nutrition education of food stamp recipients. The proposed waiver attempts to improve the nutrition of recipients by prohibiting them from purchasing certain foods with FSP benefits. We believe that supporting healthier food choices

through nutrition education and promotion is preferable to the proposed mandate. We are committed to working with the State to develop new approaches to improving nutrition levels of food stamp recipients.

10. Regulatory or legislative basis for action. We are denying the waiver on the basis that it would be inconsistent with the provisions of the Act as specified in 7 CFR 272.3(c)(2)(i).

OLLICE C. HOLDEN
Regional Administrator
Food Stamp Program
Food & Nutrition Service
U.S. Department of Agriculture

**Appendix 2**

**United States Department of Agriculture**

Food and Nutrition Service

3101 Park Center Drive

Alexandria, VA 22302-1500

AUG 19 2011

Ms. Elizabeth R. Berlin
Executive Deputy Commissioner
New York State Office of Temporary and Disability Assistance
40 North Pearl Street, 16th Floor
Albany, New York 12243-0001

Dear Ms. Berlin:

Thank you for your request of October 6, 2010, that the Department of Agriculture (USDA) waive Supplemental Nutrition Assistance Program (SNAP) rules to permit a demonstration project restricting the purchase of sugar-sweetened beverages with SNAP benefits in New York City (NYC).

While we share in the underlying goal of the waiver to reduce obesity, several aspects of the proposal raise concerns about its potential viability and effectiveness:

- We are concerned that the scale and scope of the proposed demonstration is too large and complex. The proposal would restrict purchases of sugar-sweetened beverages for hundreds of thousands of SNAP households throughout New York City. A change of this significance should be tested on the smallest scale appropriate to minimize any unintended negative effects.

- There are a number of unresolved operational challenges and complexities, including several that could substantially impact the operations of food retailers that accept SNAP benefits. The proposal offers little evidence that the city's retailer community is well-positioned to implement the proposed restrictions. Without the active commitment and participation of all authorized retailers, the chances of operational success are limited.

- The proposal lacks a clear and practical means to determine product eligibility, which is essential to avoid retailer confusion at point-of-sale and stigma for affected clients. It also lacks a process for disseminating product information to participating retailers, a communications and coordination plan for retailer compliance activities, and clear evidence that small businesses would not be disproportionately affected by the prohibition.

- The proposed evaluation design is not adequate to provide sufficient assurance of credible, meaningful results with respect to the demonstration's effect on obesity and health. It falls short on incorporating strong measures of sugar-sweetened beverage purchases and consumption, and total calorie intake. The proposed study does not have a strong counterfactual to show what would have happened in the absence of the restriction. It also does not have the capacity to isolate the effect of the SNAP purchase restrictions from the proposed public information campaign that is intended

to educate SNAP participants about the consequences of consuming sugar-sweetened beverages.

While it is possible that some of these concerns could potentially be addressed through additional consultation, after carefully and extensively considering your original proposal and your response to our questions, we have decided to deny the waiver request. USDA has a longstanding tradition of supporting and promoting incentive-based solutions to the obesity epidemic, especially among SNAP recipients. In fact, USDA is currently partnering with the State of Massachusetts in implementing the Healthy Incentives Pilot, which increases SNAP benefits when fruits and vegetables are purchased. This pilot also includes a significant and rigorous evaluation component to measure success in consumer behavioral changes and health outcomes. We feel it would be imprudent to reverse policy at this time while the evaluation component of the Healthy Incentives Pilot is ongoing.

We appreciate New York's interest and unparalleled leadership in pursuing innovative approaches to promote healthful diets and healthy weight, and would like to work with you in this area to achieve the goal of reduced obesity rates more effectively and efficiently. We would like to look to potential alternative collaborations such as a private-public partnership to design, implement, and evaluate an anti-obesity intervention targeting consumption and associated behaviors while encouraging healthy choices. As part of this proposed project, USDA could evaluate the intervention's efficacy and cost-effectiveness in promoting healthy choices and reducing overweight/obesity.

I regret that we were unable to reach agreement on your waiver request. However, it is clear that no single approach will reverse the trends in overweight and obesity, and our ultimate success will depend on all of us, parents, nutrition and health care providers, government officials, and other like-minded partners. USDA stands ready to work with New York City on ways to address the problem of obesity and promote good nutrition and health for all Americans.

Sincerely,

Jessica Shahin
Associate Administrator
Supplemental Nutrition Assistance Program

# Appendix 3

USDA
United States Department of Agriculture

Food and Nutrition Service

Park Office Center

3101 Park Center Drive
Alexandria
VA 22302

APR 1 1 2017

Ms. Mary C. Mayhew
Commissioner
Maine Department of Health and Human Services
Commissioner's Office
221 State Street
#11 State House Station
Augusta, Maine 04333-0011

Dear Ms. Mayhew:

The Food and Nutrition Service (FNS) received your February 17, 2017, request seeking approval to waive Section 3(k) of the Food and Nutrition Act of 2008 (the Act) regarding eligible foods in the Supplemental Nutrition Assistance Program (SNAP). Specifically, you request authority to operate a demonstration project in Maine to test restrictions on the purchase of soft drinks and candy with SNAP benefits.

In order to carefully consider all aspects of your submission, we require additional information. In reviewing the State's November 2015 demonstration waiver request for the same type of restriction, we posed a set of questions on January 21, 2016, seeking additional information, which the State responded to on March 9, 2016. Please confirm if the State's response of March 9, 2016, is applicable to the current waiver request.

Further, on June 8, 2016, in response to the March 9 submittal, FNS relayed that, while the detailed and specific responses to our questions were helpful, we continued to have significant concerns relative to the evaluation. Specifically, although Maine had proposed a thorough process evaluation to document how the restriction was implemented by both the State and retailers, the proposed impact evaluation was not adequate to provide sufficient assurance of credible, meaningful results with respect to the consumption of sweetened beverages or candy, or the impacts on obesity or other weight-related diseases. The following key issues with the proposed evaluation were noted:

- Since the restriction was to be implemented statewide, the study design did not have a counterfactual to show what would have happened in the absence of the restriction.

- There was no pre- and post-implementation data collection to compare SNAP household purchases before and during the demonstration. The data was to be collected through retrospective surveys at one month and six months after implementation asking participants if their food purchases changed during the demonstration.

- Likewise, the impact evaluation was to rely on SNAP participants accurately reporting, in retrospect, how their purchases of sweetened beverage and candy had changed during the demonstration. Self-reported data is subject to bias as respondents may not remember their purchases six months ago or may be influenced by the statewide restriction and accompanying messaging.

It was further noted that some of these concerns could be addressed by obtaining retailer data from a significant portion of SNAP-authorized stores to analyze item-level purchases to determine if households use cash or other tender to purchase sweetened beverages and candy when making a SNAP Electronic Benefits Transfer (EBT) purchase. This would also require obtaining item-level purchase data for SNAP households when an EBT card is not used in the transaction. Maine doubted that small retailers would be able to provide this data, but was hopeful that large chains would cooperate and provide this data.

However, neither the November 2015 waiver request nor the February 2017 request indicates that Maine had or has agreement from any retailers, or had or has begun conversations with retailers about obtaining this data. The absence of retailer data in the evaluation plan significantly limits the feasibility of determining the impact of the restriction on consumption patterns or health outcomes for SNAP participants in Maine.

As noted, in our June 8 response, FNS asked for clarifying details or more information relative to these key evaluation issues, but did not receive follow-up information. This level of detailed information is still absent from the renewed waiver request. We are again requesting that you address these concerns so that we may fully and thoughtfully consider this waiver request.

Additionally, your 2015 waiver request was time-limited at 24 months. The renewed request asks for an indefinite waiver. An indefinite demonstration waiver is specifically prohibited by the Food and Nutrition Act. Therefore, Maine must reconsider and clarify the intended time frame.

With regards to the use of SNAP nutrition education and obesity prevention grant (SNAP-Ed) funds, in the 2015 request, Maine proposed to reallocate those funds to pay for the evaluation. In addition to using SNAP-Ed funds for the evaluation in the current request, you have also proposed to reallocate SNAP-Ed funds by providing those funds directly to food banks, schools, and other community agencies for the distribution of fruits and vegetables to needy families, and that nutrition education be conducted as part of school curricula, and overseen by the Department of Education.

This is a new request from the State agency and FNS will need further information to determine if a waiver to the Act or regulations is required. Does Maine intend to submit a SNAP-Ed plan according to 7 CFR 272.2 describing the activities and use of SNAP-Ed funds in greater detail for approval?

According to SNAP regulations, SNAP-Ed activities must be evidence-based. Maine would need to demonstrate to FNS that there is evidence that these activities support the requirements for SNAP-Ed.

Finally, we request a full cost estimate that addresses both Federal and State costs associated with this effort so that Maine's demonstration waiver submission can be given full consideration.

Please direct your response to

Andrea Gold
Director, Retailer Policy and Management Division
USDA, Food and Nutrition Service
Supplemental Nutrition Assistance Program
3101 Park Center Drive, Room 424
Alexandria, Virginia 22302
andrea.gold@fns.usda.gov

Maine's commitment to advancing the importance of healthy food purchases for SNAP participants is appreciated. FNS hopes to continue working collaboratively with the State in pursuing innovative approaches to promote healthful diets. Additional follow up with the State may be required if further clarification is needed regarding this request. We look forward to your response and to further discussions with the State as the waiver is considered.

Sincerely,

Jeffrey N. Cohen
Acting Associate Administrator
Supplemental Nutrition Assistance Program

cc: Kurt Messner

**Appendix 4**

USDA
United States Department of Agriculture

Food and Nutrition Service

Park Office Center

3101 Park Center Drive
Alexandria
VA 22302

JAN 16 2018

Mr. Ricker Hamilton
Acting Commissioner
Maine Department of Health and Human Services
Commissioner's Office
221 State Street
#11 State House Station
Augusta, Maine 04333-0011

Dear Mr. Hamilton:

Thank you for Maine's request seeking approval to waive Section 3(k) of the Food and Nutrition Act of 2008 (the Act) regarding eligible foods in the Supplemental Nutrition Assistance Program (SNAP). Specifically, you requested authority to operate a demonstration project in Maine to test restrictions on specific categories of food purchases with SNAP benefits.

I want to thank you for your responses to the Food and Nutrition Service's (FNS) questions about Maine's demonstration waiver request. We want to recognize Maine's ongoing efforts to be innovative in managing SNAP and ensuring the integrity of Maine's SNAP program. We are not though, at this time, going to authorize the request to restrict SNAP participant use of benefits for certain categories of food.

After careful consideration of your request, we have several factors that have informed this decision, including concerns about:

- Likely increase in costs of administering the SNAP program for both the state and retail community;
- Imposing significant burdens on small businesses and private retailers;
- Choosing which foods/beverages are winners and losers in the food industry as an effective means of government intervention;
- Ability to delineate nutritional benefits for allowable and excluded foods;
- Allowing the government to restrict what individuals can eat in their own homes without clear evidence of meaningful health outcomes.

We sincerely appreciate Maine's leadership in pursuing innovative approaches to improve health outcomes, and are interested in partnering with states to support and promote incentive-based solutions. Additionally, the U.S. Department of Agriculture (USDA) continues to seek ideas regarding program flexibilities that promote self-sufficiency, customer service, and integrity, without increasing costs or regulatory burdens on stakeholders.

Again, thank you for your interest in SNAP and your work to ensure eligible recipients have access to food assistance. USDA looks forward to working with Maine to improve health outcomes of its residents, and all Americans.

If you have any questions, please don't hesitate to contact me.

Sincerely,

Jessica Shahin
Associate Administrator
Supplemental Nutrition Assistance Program

# Appendix 5

USDA
United States Department of Agriculture

Food and Nutrition Service

Park Office Center

3101 Park Center Drive
Alexandria
VA 22302

JAN 18 2018

Mr. Richard Whitley
Director
Department of Health and Human Services
4150 Technology Way, Suite 300
Carson City, Nevada 89706

Dear Mr. Whitley:

Thank you for your August 9, 2017, request seeking approval to operate a demonstration project in Nevada to test restrictions on the purchase of sugar sweetened beverages with Supplemental Nutrition Assistance Program (SNAP) benefits.

The U.S. Department of Agriculture (USDA) does not currently believe that the best path forward is to pilot restrictions on the use of SNAP benefits. After careful consideration, USDA has decided not to approve the waiver request due to several factors, including:

- Likely increase in costs of administering the SNAP program for both the State and retail community;
- Imposing significant burdens on small businesses and private retailers;
- Choosing which foods/beverages are winners and losers in the food industry as an effective means of government intervention;
- Ability to delineate nutritional benefits for allowable and excluded foods;
- Allowing the government to restrict what individuals can eat in their own homes without clear evidence of meaningful health outcomes.

We sincerely appreciate Nevada's leadership in pursuing innovative approaches to improve health outcomes, and are interested in partnering with states to support and promote incentive-based solutions. Additionally, USDA continues to seek ideas regarding program flexibilities that promote self-sufficiency, customer service, and integrity, without increasing costs or regulatory burdens on stakeholders.

Again, thank you for your interest in SNAP and your work to ensure eligible recipients have access to food assistance. USDA looks forward to working with Nevada to improve health outcomes of its residents, and all Americans.

If you have any questions, please don't hesitate to contact me.

Sincerely,

Jessica Shahin
Associate Administrator
Supplemental Nutrition Assistance Program