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DEPARTMENT OF AGRICULTURE

Food and Consumer Service

7 CFR Parts 271, 272, 274, and 278

[Amendment No. 343]

RIN 0584-AB02

Food Stamp Program: Miscellaneous Farm Bill Provisions Relating to the Authorization of Retail Firms and Wholesale Food Concerns

AGENCY: Food and Consumer Service, USDA.

ACTION: Final rule.

SUMMARY: This Food Stamp Program rulemaking implements the three following provisions of the Food, Agriculture, Conservation and Trade Act of 1990 (FACT Act): homeless food stamp households may purchase meals with food stamps in restaurants approved by State agencies for this purpose, and the Department may periodically require authorized retailers and wholesalers to be reauthorized to participate in the Food Stamp Program, and no co-located wholesale/retail food concern may be authorized as a retail food store unless the firm does a substantial level of retail food business, or unless failure to authorize such a firm as a retail food store would cause hardship to food stamp households. This rulemaking is necessary to implement sections 1713, 1733 and 1734 of the FACT Act. The intended effects are: to expand the sources of low-cost food to homeless recipients; to provide the Department with complete and current information on retailers and wholesalers participating in the Food Stamp Program and ensure that only those firms qualified to participate in the program are authorized; and to preclude the authorization of the firms not needed to effectuate the purposes of the program.

EFFECTIVE DATE: These provisions were effective February 1, 1992, except the provisions of 7 CFR 278.1(i) which have been submitted to the Office of Management and Budget for approval under the Paperwork Reduction Act of 1995. The provisions of this section will become effective upon approval. FCS will publish a document in the Federal Register announcing the effective date.

FOR FURTHER INFORMATION CONTACT:

Questions regarding this rulemaking should be addressed to Suzanne Fecteau, Chief, Coupon and Retailer Branch, Food Stamp Program, 3101 Park Center Drive, Alexandria, Virginia 22302, or by telephone at (703) 305-2418.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

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

Executive Order 12372

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

Regulatory Flexibility Act

The final rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.). William E. Ludwig, the Administrator of the Food and Consumer Service (FCS), has certified that this final rule will not have a significant economic impact on a substantial number of small entities. State and local agencies that administer the Program will be affected. Some restaurants will be affected because they will be allowed to accept food stamp benefits in payment for meals served to homeless food stamp recipients. The rule will also affect retail food stores and wholesale food concerns which accept and redeem food stamp benefits. Thus, while the rule may affect a substantial number of small entities, the effect on any one entity will not be significant.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, this notice announces the Food and Consumer Service's intention to request Office of Management and Budget's approval of a revision to a currently approved information collection pertaining to food stamp applications to accept and redeem food stamps.

Comments on this information collection must be received by December 16, 1996.

Send requests for copies of this information collection to: Suzanne M. Fecteau, Chief, Redemption Management Branch, Benefit Redemption Division, Food and Consumer Service, U.S. Department of Agriculture, 3101 Park Center Drive, Alexandria, VA 22302 or call (703) 305-2418.

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

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

For further information contact Suzanne M. Fecteau, (703) 305-2418.

Supplementary information: *Title:* Food Stamp Application for Stores, Form FNS-252 (9-93); Food Stamp Program for Stores-Reauthorization, Form FCS-252R (2-95); Food Stamp Program Application for Stores—Supplement, Form FNS-252A (8-94); Food and Nutrition Service Meal Services, Form FNS-252-2 (10-79).

OMB Number: 0584-0008.

Expiration Date of Approval: Three years from date of approval.

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

for approval of application forms has been previously submitted. This submission is for an additional requirement under section 278.1(i) of the Food Stamp Program regulations as described below. The burden associated with this requirement applies to one class of respondents which complete the form FNS-252-2.

Abstract: FCS of the Department of Agriculture is the Federal Agency responsible for the Food Stamp Program. The Food Stamp Act of 1977, as amended (7 U.S.C. 2011 et seq.) requires that the Agency determine the eligibility of firms and certain food service organizations to accept and redeem food stamp benefits and to monitor them for compliance and continued eligibility.

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

Section 278.1(i) of this rule contains an information collection requirement. It requires that restaurants interested in serving homeless food stamp recipients are responsible for obtaining contracts with the appropriate State agency and

providing to the State agency the approximate prices that will be charged for meals served to homeless food stamp recipients.

Estimate of Burden: The public reporting burden for the collection of information for all applicant firms wishing to participate, or continue to participate, in the FSP is estimated to average .280 hours per response.

Respondents: Retail food stores, restaurants and State or local governments.

Estimated Number of Respondents: 80,613.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden: 18,396.

The individual components of the burden are as follows:

Form No. and/or title	Use	Annual re-sponses	Hours per response	Annual burden
Form FNS 252, FSP Application for Stores	New	26,431	.45	11,894
Form FNS 252-2 FSP	New	1,817	1.226	1,185
Application for Meal Services (including private restaurants)	Update	1,775	.1667	296
Form FCS-252R FSP Reauthorization Application	Update	51,590	.1167	6021
		80,613		18,396

¹ Of the 817 new meal service applications, we estimate that 98 will be private restaurants which will be required to obtain a contract with an appropriate State agency. We estimate that the contract requirement will take .50 hours per response, for a total of 49 hours annually.

Send comments regarding the burden estimate or any other aspect of the information collection, including suggestions for reducing the burden, to the following address. Please refer to the OMB Control No. 0584-0008. Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for FCS, 725 17th Street, N.W., Washington, D.C. 20503.

Executive Order 12778

This final rule has been reviewed under Executive Order 12778, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full implementation. This rule is not intended to have retroactive effect unless so specified in the "Effective Date" paragraph of this preamble. Prior to any judicial challenge to the provisions of this rule or the application of its provisions all applicable administrative procedures must be exhausted. In the Food Stamp Program the administrative procedures are as follows: (1) for program benefit recipients—state administrative procedures issued pursuant to 7 U.S.C. s 2020 (e)(10) and 7 CFR s 273.15; (2)

for State agencies—administrative procedures issued pursuant to 7 U.S.C. s 2023 set out at 7 CFR s 276.7 (for rules related to non-quality control (QC) liabilities) or Part 283 (for rules related to QC liabilities); (3) for program retailers and wholesalers—administrative procedures issued pursuant to 7 U.S.C. s 2023 set out at 7 CFR s 278.8.

Background

On October 23, 1991, the Food and Nutrition Service, which has since been redesignated the Food and Consumer Service (FCS), published a proposed rule at 56 FR 54799 to implement the three following provisions of the Food, Agriculture, Conservation and Trade Act of 1990 (Pub. L. No. 101-624, 104 Stat. 3359): (1) restaurants may accept food stamp benefits in exchange for meals from homeless recipients, and (2) the Department may require a periodic reauthorization of authorized firms, and (3) no co-located wholesale/retail food concern may be authorized as a retail food store unless the concern does a substantial level of retail food business, or failure to authorize such firm would cause hardship to food stamp households. These amendments to the Food Stamp Act of 1977, as amended, (the Act) (7 U.S.C. 2011 et seq.) are

found in Pub. L. No. 101-624 at sections 1713, 1733, and 1734, respectively. The public was provided a 30-day period to submit comments on the proposed provisions. Thirteen comments were received in response to the proposed rule. The major concerns raised by the commentors are discussed below.

Authorization of Restaurants to Serve Prepared Meals to Homeless Persons

One State agency commented that use of the terms "private establishment" and "restaurant" interchangeably in the proposed rule is confusing and that the term "private homeless meal providers" should be used instead. The Department concurs that use of the two aforementioned terms is confusing. However, the term "private homeless meal providers" would also be confusing since the regulations contain other references to "private nonprofit homeless meal providers." In order to avoid confusion and to clarify which types of establishments are being referred to, the Department has used the word "restaurant" in this preamble and also in the regulatory text. In addition, to further assist with clarification, the Department has in this rulemaking specified that those entities other than restaurants feeding the homeless are referred to as "public or private

nonprofit" homeless meal providers. To further elucidate the types of establishments to be considered "restaurants" for the purposes of serving meals to eligible categories of recipients, the Department is clarifying that such facilities must be primarily in the business of selling food. Thus, section 7 CFR 278.1(d)(3) is being revised to state that a restaurant must have more than 50 percent of its total sales in food.

The Food Stamp Act and the proposed rule permit restaurants to accept food stamp benefits from homeless recipients but require that restaurants sell the meals at concessional (reduced) prices. Several public interest groups and certain state agencies expressed concern that restaurants would not wish to participate in the program if they were required to provide meals at reduced prices to homeless participants. Another commentator asked whether a restaurant could argue that its prices are so low that a further reduction is not reasonable. The Department has further considered the requirement for a "concessional" price and has concluded that an already low price can be considered to meet this requirement. This interpretation is consistent with a reference in the relevant legislative history to a concessional price as a "cheap or reduced" price in the discussion of restaurants serving elderly and disabled persons offering concessional prices. H.R. Rep. No. 464, 95th Cong., 1st Sess. 333. Due to the similarities in the two provisions, this final rule also refers to a concessional price as a "low or reduced price."

Another commentator asked whether concessional prices would be determined for each restaurant or for each food item. The same commentator also asked if there is a predetermined methodology to determine concessional prices. Provisions for concessional prices will be determined by the contract between the restaurant and the State. There is no predetermined methodology for determining concessional prices. It could include, but would not be limited to, a simple percentage reduction, a set dollar amount reduction, or an offer of a free food item or beverage (excluding alcoholic beverages). Price reductions for homeless individuals must be negotiated between the restaurant and the State.

One commentator asked what is considered a reasonable rate of price reduction. In addition, it has come to the Department's attention that there is a perception that if a restaurant's means of arriving at reduced prices consists of a percentage reduction, that percentage

reduction must be 10 percent. This is not correct. If a restaurant chooses a percentage reduction as a means of arriving at reduced prices, the amount of the reduction may be a subject for negotiation between the restaurant and the State agency. Thus, the final rule does not prescribe a specific rate of reduction in prices of meals sold to homeless participants.

One commentator asked whether restaurants would be required to post two meal prices—one for the homeless and one for the other customers. As long as the restaurant charges the homeless concessional prices, it will not be necessary for the restaurant to post separate prices in order to comply with this rule.

One State agency asked if a restaurant which is approved to serve meals to the elderly and disabled recipients and their spouses would be required to serve the homeless. It is the Department's position that restaurants approved for providing meals to elderly and disabled recipients would not be required to sell meals to the homeless. Restaurant participation in either of these programs is strictly voluntary.

One public interest group stated that change in restaurant transactions should not be limited to 99 cents. Section 7(b) of the Act (7 U.S.C. 2016(b)) provides that eligible households using coupons may receive cash in change so long as the cash received does not equal or exceed the value of the lowest coupon denomination issued. Thus, cash change must be limited to 99 cents as mandated by the Act. The Department has no discretion to change this provision and has adopted it as final in this rulemaking. However, in addition to giving up to 99 cents in change, a restaurant may use the lowest denomination coupon, which is \$1. These coupons must be unmarked and uncanceled for making change. For example, if change in the amount of \$2.50 is due, the restaurant would give the recipient two one-dollar coupons and 50 cents in cash change.

One State agency commented that it presumed that State sales tax is applicable to restaurant meals purchased with coupons by homeless persons. Section 4(a) of the Act (7 U.S.C. 2013(a)) provides that a State agency may not participate in the Food Stamp Program if State or local taxes are collected within that State on purchases made with food stamp benefits. The Department cannot waive this provision. Sales tax cannot be collected on any purchase with food stamp benefits, whether it be restaurant meals or food purchased in retail food stores.

Several commentators stated that the requirement that State agencies contract with restaurants would create a new function for State agencies which are suffering from a lack of resources. These commentators recommended that USDA should handle the negotiations and contracts with restaurants as well as monitor restaurants. Another commentator recommended that the State agency delegate this function to a private nonprofit organization. Congress stated in Pub. L. 101-624 which amended section 3(g)(9) of the Act (7 U.S.C. 2012 (g)(9)), that restaurants eligible for authorization to accept food stamp benefits are those that shall contract with the appropriate agency of the State to offer meals to homeless individuals. However, there is no restriction in the statute which would preclude State agencies from contracting with private nonprofit organizations to administer the restaurant program contracts. The State agency would, however, remain responsible and the Department would hold the State agency liable for any action related to the contract.

One State agency questioned whether the Food and Consumer Service (FCS) has review and approval authority over contracts with restaurants. State agencies have the initial responsibility for ensuring that contracts comply with the provisions of the Act and these regulations. While FCS is responsible for implementing and enforcing the law and accompanying regulations regarding the purchase of meals by homeless participants, FCS is not assuming any direct responsibility for prior review and approval of contracts between State agencies and restaurants. However, at the time a restaurant applies to FCS for authorization to accept food stamp benefits from homeless persons, the restaurant must present a copy of the contract with the State agency. At that time, FCS will review the contract to ensure it meets minimum regulatory requirements. Should a restaurant have a complaint during negotiation of the contract about any of the provisions being required by the State agency, the restaurant may request that FCS review the issue.

One State agency commented that the State has no outreach funds to solicit participation of restaurants. The proposed rule did not mandate that States employ outreach efforts to solicit participation of restaurants. However, if the State wishes to do so, the Department suggests that the State could contact the State restaurant association to determine the level of interest of restaurants in participating in this program.

One commentator stated that in order to encourage restaurants to participate in the program, a simple application process, minimal State regulation and the same prices for homeless and non-homeless alike are needed. This rule does not establish new application procedures for restaurants; the same procedures used for other retailers are used for restaurants. Further, the Department does not expect States to impose a complex set of regulations in administering this program. In addition, as stated above, the Department has no discretion regarding the charging of concessional prices since the requirement that restaurants provide meals at concessional prices is included in the law. Of course, restaurants with already low prices would not be required to further reduce prices to homeless food stamp recipients.

The proposed rule provided that homeless recipients' identification (ID) cards would be marked "CD," the same mark on the card issued to elderly and disabled persons eligible for communal dining or restaurant meals. Several public interest groups and a few State agencies believed that the use of a specially-marked ID card for the homeless would stigmatize them and publicize their situation. In addition, one commentator stated that a declaration system should be used to identify homeless persons. In implementing section 1713, the Department has looked to its experience with section 3(g)(3) of the Act (7 U.S.C. 2012(g)(3)), which allows elderly persons and disabled recipients and their spouses to purchase meals from restaurants. There is a long-standing procedure which designates specially-marked ID cards for elderly and disabled recipients and their spouses and requires restaurants to check ID cards unless restaurant personnel know the individual is eligible to purchase meals with food stamp benefits. The Department is not aware of any problems which have resulted from this procedure. In addition, having the specially-marked ID card will avoid the recipient having to verbally declare homelessness in a public setting as would the system suggested by the commentator. The legislation restricts the use of food stamp benefits in restaurants to only certain groups of recipients, and the only effective method for enforcing this restriction is to issue the recipients specially-marked ID cards. For reasons of program integrity, the Department had decided to require specially-marked ID cards. To assist restaurants in recognizing recipients eligible to purchase meals, State agencies need to

provide restaurants with specially-marked sample ID cards. However, to maximize flexibility for State agencies, the Department has decided not to specify the mark which must be used.

Some State agencies and a public interest group commented that requiring restaurants to check the ID cards of homeless persons is discriminatory. One of these commentators further stated that the requirement to check ID cards places a more restrictive level of accountability on restaurants than is placed on grocery stores. As stated above, the use of food stamp benefits in restaurants is restricted to elderly and disabled recipients and their spouses, and to homeless individuals. Based on this restriction, the Department believes that it must ensure that only those individuals entitled to use food stamp benefits in restaurants do so.

Additional commentators suggested that the homeless designation should be removed from the ID card once the recipient is no longer homeless, and thus, not eligible to purchase meals in restaurants. The Department agrees with this suggestion and has amended the regulations at 7 CFR 274.10(a)(3) to ensure the applicability of the designation be re-established each time that recertification of eligibility occurs.

One State agency commented that the use of food stamp benefits in a restaurant is not the best use of food stamp benefits for those persons temporarily living with someone else who may have access to cooking facilities. The reference to homeless individuals in Section 3(i)(3) of the Act (7 U.S.C. 2012(3)) does not include access to cooking facilities as a factor for determining eligibility of a homeless person. Thus, the Department does not have the discretion to define homeless individuals in terms of whether such individuals have access to cooking facilities.

One commentator asked how complaints about service to the homeless at restaurants would be handled. That commentator also asked if such complaints would be referred to FCS field offices since restaurants operate as authorized retailers. The State agency has primary responsibility for enforcement of all provisions of contracts. Thus, complaints about service to the homeless (e.g., slow service; rude treatment; spoiled food) would be referred to the State agency. However, if violations of the Act or regulations are involved (e.g., selling meals to persons not eligible to buy them, the selling of ineligible items or cash change violations and unequal treatment of food stamp customers), complaints should be referred to FCS

field offices which are responsible for handling such complaints.

One State agency asked whether fast food restaurants would be eligible to participate. Neither the Act nor these regulations exclude any specific type of restaurants from participation. Thus, if a fast food restaurant agrees to provide meals to homeless participants at low or reduced prices, and otherwise qualifies, it could be authorized.

One State agency was concerned about whether restaurants would be able to participate in areas where the Electronic Benefit Transfer (EBT) system has been implemented. In accordance with Food Stamp Program regulations at 7 CFR 274.12, all authorized retailers (including authorized restaurants) must be afforded the opportunity to participate in the EBT system.

One commentator asked whether it is possible to apply for a waiver of any of the requirements of the proposed rule. Food Stamp Program regulations at 7 CFR 272.3 permit the Department to approve requests for waivers to deviate from specific regulatory provisions in some situations. However, because the Department does not have the authority to waive any provisions of the Act except in special demonstration projects, any request must not relate to statutory provisions.

Periodic Reauthorization of Retail Food Stores/Wholesale Food Concerns

In order to ensure that participating firms continue to be eligible to accept food stamp benefits, Section 1733 of Pub. L. No. 101-624 permits FCS to require a full and complete periodic reauthorization of all firms. The information obtained in the reauthorization will be used to update any or all of the information on the firm's application form.

One commentator stated that the rule did not set forth adequate criteria for determining whether a retail food store will be reauthorized and that it would be appropriate to withdraw the proposed rulemaking and issue a further rulemaking which sets forth criteria for reauthorization. The criteria set forth in sections 3(k), 3(u) and 9 of the Act for the authorization of firms will be used during the reauthorization process to determine whether firms are qualified to participate. The criteria for authorization (and, thus, periodic reauthorization) of firms are not affected by this rule and are the same as those specified in the current Act. Therefore, it is not necessary to reissue those standards through this rulemaking action. The Department would call attention to the new authorization criteria made effective on March 25,

1994 with the passage of section 205 of P.L. 103-225, 108 Stat. 108-110.

The reauthorization will utilize the same criteria for authorizing new stores to determine whether firms continue to qualify. If FCS finds during the reauthorization process that a firm no longer qualifies, the firm will be withdrawn. If the firm does meet the appropriate criteria, it will be allowed to continue program participation.

One commentor stated that the proposed rule does not provide adequate notice to existing firms regarding the time period for the periodic reauthorization. The Department is unable to specify an exact date or timetable for updating data on authorized firms. The periodic reauthorization of firms will be conducted as resources and time permit. However, the Department will provide firms with sufficient notice and time to respond to the request for updated information.

Authorization of Wholesale Firms Co-Located With Retail Food Stores

The October 23, 1991, proposed rulemaking included a provision mandated by Section 1734 of Pub. L. No. 101-624, that no co-located wholesale/retail food concern may be authorized as a retail food store unless (A) such firm does a substantial level of retail food business or (B) the Secretary determines that failure to authorize such a wholesale/retail food concern as a retail food store would cause hardship to food stamp households. The proposed rule would have required that a wholesaler's retail food sales constitute at least 50 percent of its total sales in order to be considered as having "substantial" retail food business.

A commentor stated that the requirement that a firm which is primarily a wholesaler must have 50 percent of its sales in retail food sales would be virtually impossible since having 50 percent retail food sales would mean the firm was primarily a retailer and not a wholesaler. The Department concurs with the logic of this comment and notes that the statute requires that such firms have a substantial retail business. Webster's Dictionary defines substantial as "being largely, but not wholly that which is specified." In keeping with the definition and Congressional concern about integrity problems with firms with wholesale components, the Department has provided in this final rule that a firm which has more than 50 percent of its total sales in retail food sales shall not have to meet the criteria contained in this final rule in order to be authorized to accept and redeem food

stamps, but will be subject to the criteria for authorizing retail firms set forth in Sections 3(k) and 3(u) of the Food Stamp Act of 1977, as amended.

As stated above, Section 1734 mandated that no co-located wholesale/retail food concern may be authorized unless it does a substantial retail food business. A wholesale firm should have what can clearly be recognized as a retail outlet in order to participate in the program. It is not the Department's intent to prevent the participation of any wholesaler having a legitimate, substantial retail food business. On the other hand, a wholesale firm which sells little food at the retail level should not be authorized as a retailer.

The first criterion against which an applicant will be evaluated is whether the firm has what can be considered a legitimate retail outlet. In determining this, several indicators shall be considered. For example, is the business licensed solely as a wholesale business, or is there a separate and distinct license for retail sales? Does the firm have separate retail sales tax records and/or separate bookkeeping records? In addition, the way the firm holds itself out to the public shall be evaluated in determining whether a firm is a legitimate retail outlet. This would include the layout of the retail sales space (e.g., presence of a counter for retail customers). Whether a firm actively seeks out retail trade through advertisements, offers specials to attract retail customers, or posts retail prices shall also be considered in determining if a firm is a legitimate retail outlet. In addition, the hours of operation should be considered as well as whether the firm has parking for retail customers as opposed to just a loading dock area.

The Department is adding a new paragraph (A) at 7 CFR 278.1(b)(1)(iv) to emphasize the fact that a co-located wholesale/retail firm must be a legitimate retail outlet. This reflects the longstanding Departmental policy that no firm shall be authorized as a retail outlet unless it is a legitimate retailer.

Once it has been determined that the firm is a legitimate retail outlet, a determination must be made as to whether the co-located firm has a "substantial" level of retail food sales. One commentor suggested that "substantial" be defined as a dollar amount (rather than as a percentage), specifically at least \$100,000 in retail food sales annually. Some wholesalers may have only a small percentage of their total sales in retail trade, but this may still be a significant dollar amount.

The Department agrees with these comments and has determined that the use of a specific dollar threshold is more

appropriate in defining the term "substantial". There will be no required percentage of total sales which must be in retail food business.

The Department believes that the restriction on the authorization of co-located retail/wholesale firms is intended to limit the participation of firms not needed to effectuate the purpose of the program. For the most part, these firms do limited retail food business. FCS data show that firms with very limited retail food sales have a higher propensity to violate than firms with relatively high retail food sales. Thus, the final rule allows a firm that has at least \$250,000 in annual retail food sales to be authorized. The Department believes that the \$250,000 threshold is a reasonable definition of "substantial" and effectively meets the intent of Congress. The Department is confident that this criterion is fair to all wholesale food concerns—large and small—which provide retail services to the community and at the same time protects the integrity of the program. The Department would like to again emphasize that a co-located firm may be authorized to accept food stamps, even if it does not have substantial retail food business, if failure to authorize the firm would cause hardship to food stamp households.

A co-located wholesale/retail firm must either have a substantial retail food business or demonstrate that a hardship to recipients would result if it were not authorized. The proposed rulemaking specified the following criteria for determining whether a hardship to recipients would result from not authorizing a co-located firm: (1) Program recipients would have difficulty in finding authorized firms to accept food stamp benefits for eligible foods; (2) special ethnic foods would not otherwise be available to recipients; or (3) recipients would be deprived of an opportunity to take advantage of unusually low prices offered by the firm. The Department did not receive any comments on these criteria; therefore, they are adopted in this final rule. The Department wishes to stress that a hardship exception can only be granted to a legitimate retail firm.

Finally, if it has been determined that a co-located firm has a legitimate retail business and either has annual retail food sales of at least \$250,000, or can demonstrate recipient hardship, its retail food business must then be subject to the criteria for authorizing retail firms set forth in Sections 3(k) and 3(u) of the Food Stamp Act of 1977, as amended.

A commentor stated that the proposed rule would impose an unnecessary paperwork burden on retailers and

wholesalers. The authority to request information from applicant firms (including those requesting reauthorization) is contained in 7 CFR 278.1(b) of the regulations and is approved under OMB Number 0584-0008. This rule does not add any new information collection requirements. Instead, it modifies current requirements to allow determinations to be made on the qualifications of co-located retail/wholesale firms.

The same commentor stated that the rule would require applicant stores to provide data concerning their sales volume for both wholesale and retail segments of their business and that such data is classified as trade secrets and is therefore confidential. Retail and wholesale sales data are necessary to allow a determination on a co-located retail/wholesale firm's qualification for authorization to accept food stamps as a retail food store. Section 9(c) of the Act (7 U.S.C. 2018(c)) requires that such information be submitted. Section 1734 of Pub. L. No. 101-624 specifies that retailer/wholesaler firms must have a substantial retail food business, and the review of sales data is necessary for the meaningful enforcement of the provision. It should be noted, however, that section 9(c) contains safeguards which restrict the use or disclosure of such information.

List of Subjects

7 CFR Part 271

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

7 CFR Part 272

Alaska, Civil rights, Food stamps, Grant programs—social programs. Reporting and recordkeeping requirements.

7 CFR Part 274

Administrative practice and procedures, Food stamps, Grant programs, social programs, Reporting and recordkeeping requirements.

7 CFR Part 278

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

Accordingly, 7 CFR parts 271, 272, 274, and 278 are amended as follows:

1. The authority citation for parts 271, 272, 274, and 278 continues to read as follows:

Authority: 7 U.S.C. 2011-2032.

PART 271—GENERAL INFORMATION AND DEFINITIONS

2. In § 271.2:

a. The definition of "Eligible foods" is amended by removing the word "and" at the end of paragraph (7), removing the period after paragraph (8) and adding a semi-colon and the word "and" in its place, and by adding a new paragraph (9).

b. The definition of "Homeless meal provider" is revised.

c. The definition of "Retail food store" is amended by adding the words "or a restaurant that contracts with an appropriate State agency to provide meals at concessional (low or reduced) prices to homeless food stamp households;" at the end of paragraph (2).

The addition and revision read as follows:

§ 271.2 Definitions.

* * * * *

Eligible foods * * * (9) In the case of homeless food stamp households, meals prepared by a restaurant which contracts with an appropriate State agency to serve meals to homeless persons at concessional (low or reduced) prices.

* * * * *

Homeless meal provider means:

(1) A public or private nonprofit establishment (e.g., soup kitchens, temporary shelters) that feeds homeless persons; or

(2) A restaurant which contracts with an appropriate State agency to offer meals at concessional (low or reduced) prices to homeless persons.

* * * * *

PART 272—REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

3. Section 272.9 is amended by adding two new sentences after the last sentence to read as follows:

§ 272.9 Approval of homeless meal providers.

* * * The State food stamp agency, or another appropriate State or local governmental agency identified by the State food stamp agency or private nonprofit organization under contract with the State food stamp agency shall execute contracts with restaurants wishing to sell meals in exchange for food stamp benefits to homeless food stamp households. Such contracts shall specify that such meals are to be sold at "concessional" (low or reduced) prices and shall also specify the approximate prices which will be charged, or the amount and type of price reduction.

PART 274—ISSUANCE AND USE OF COUPONS

4. In section 274.10:

§ 274.10 [Amended]

a. Paragraph (a)(3) is amended by adding a comma and the words "and to homeless households certified for restaurant meals" after the word "period".

b. Paragraph (a)(4)(iii) is redesignated as paragraph (a)(4)(iv) and a new paragraph (a)(4)(iii) is added.

c. Paragraph (j) is amended by adding four new sentences at the end of the paragraph. The additions read as follows:

§ 274.10 Use of identification cards and redemption of coupons by eligible households.

(a) * * *

(4) * * *

(iii) Eligible homeless households may use food stamp benefits to purchase meals from restaurants authorized by FCS for such purpose. Any homeless household eligible for, and interested in, using restaurants in those areas where restaurants are authorized to accept food stamp benefits shall have a specially-marked ID card. The State agency shall provide samples of specially-marked ID cards to authorized restaurants.

* * * * *

(j) * * * However, in the case of homeless food stamp households, neither cash change nor credit slips shall be returned for food stamps used for the purchase of prepared meals from authorized public and private nonprofit homeless meal providers. Such meal providers may use the lowest denomination coupons that are uncanceled and unmarked for making change in food stamp transactions. Restaurants which are authorized by FCS under § 278.1 to provide meals to homeless food stamp recipients shall return cash change to such recipients in food stamp transactions when the amount of change due is less than one dollar. If change of one dollar or more is due, uncanceled and unmarked one dollar coupons shall also be used for change.

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

5. In section 278.1:

a. Paragraph (b)(1)(iv) is revised.

b. Paragraph (c)(5) is revised.

c. Paragraph (d)(3) is revised.

d. Paragraphs (i) through (s) are redesignated as paragraphs (j) through (t) respectively, and a new paragraph (i) is added.

d. Newly redesignated paragraph (n) is revised.

e. Newly redesignated paragraph (s) is amended by adding the words "public and private nonprofit" before the words "homeless meal provider" and "homeless meal providers" each time they appear. (six occurrences).

The revisions and additions read as follows:

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

* * * * *

(b) *Determination of authorization.*

* * *

(1) The nature and extent of the food business conducted by the applicant.

* * *

(iv) No co-located wholesale/retail food concern with 50 percent or less of its total sales in retail food sales may be authorized to redeem food stamps unless it meets the criteria applicable to all retail firms and:

(A) It is a legitimate retail food outlet. Indicators which may establish to FCS that a firm is a legitimate retail food outlet include, but are not limited to, the following:

(1) The firm's marketing structure; as may be determined by factors such as, but not limited to:

(i) A retail business license;
(ii) The existence of sales tax records documenting retail food sales; and/or separate bookkeeping records; and

(2) The way the firm holds itself out to the public as evidenced by factors such as, but not limited to:

(i) The layout of the retail sales space;
(ii) The use of retail advertisements;
(iii) The posting of retail prices;
(iv) Offering specials to attract retail customers;

(v) Hours of operation for retail business;

(vi) Parking area for retail customers; and

(B) It has total annual retail food sales of at least \$250,000; or

(C) It is a legitimate retail outlet but fails to meet the requirements in paragraph (b)(1)(iv)(B) of this section, and not authorizing such a firm would cause hardship to food stamp households. Hardship would occur in any one of the following circumstances:

(1) Program recipients would have difficulty in finding authorized firms to accept their coupons for eligible food;

(2) Special ethnic foods would not otherwise be available to recipients; or

(3) Recipients would be deprived of an opportunity to take advantage of unusually low prices offered by the firm if no other authorized firm in the area offers the same types of food items at comparable prices.

* * * * *

(c) *Wholesalers.* * * *

(5) For one or more specified authorized public or private nonprofit homeless meal providers.

* * * * *

(d) *Meal services.* * * *

(3) It is a restaurant operating under a contract with a State or local agency to prepare and serve (or deliver) low-cost meals to homeless persons, elderly persons and SSI recipients (and in the case of meal delivery services, to elderly persons or handicapped persons) and their spouses. Such a facility must have more than 50 percent of its total sales in food. The contracts of restaurants must specify the approximate prices which will be charged.

* * * * *

(i) *Private homeless meal providers.* FCS may authorize as retail food stores those restaurants which contract with the appropriate State agency to serve meals to homeless persons at "concessional" (low or reduced) prices. Restaurants shall be responsible for obtaining contracts with the appropriate State agency as defined in § 272.9 and for providing a copy of the contract to FCS at the time it applies for authorization to accept food stamp benefits. Contracts must specify the approximate prices which will be charged. Examples of reduced prices include, but are not limited to, a percentage reduction, a set dollar amount reduction, a daily special meal, or an offer of a free food item or beverage (excluding alcoholic beverages).

* * * * *

(n) *Periodic reauthorization.* At the request of FCS a retail food store or wholesale food concern will be required to undergo a periodic reauthorization determination by updating any or all of the information on the firm's application form. Failure to cooperate in the reauthorization process will result in withdrawal of the firm's approval to participate in the program.

* * * * *

§ 278.2 [Amended]

6. In § 278.2:

a. Paragraph (a) is amended by adding the words "public or private nonprofit" before the word "homeless" in the last sentence of the paragraph.

b. The third sentence of paragraph (b) is amended by adding the words "public or private nonprofit" before the words "homeless meal providers", and before the words "homeless meal provider".

c. Paragraph (c) is amended by adding the words "public or private nonprofit" before the words "homeless meal

providers" the first time they appear in the third sentence of the paragraph.

d. Paragraph (d) is amended by adding the words "public or private nonprofit" before the words "homeless meal providers" in the third sentence.

e. Paragraph (g) is amended by adding the words "public and private nonprofit" before the words "homeless meal providers" wherever they occur (two occurrences).

f. Paragraph (h) is amended by adding the words "public or private nonprofit" before the words "homeless meal providers" in the last sentence of the paragraph.

g. Paragraph (1) is amended by adding the words "public and private nonprofit" before the words "Homeless meal provider" and before the words "homeless meal providers".

§ 278.3 [Amended]

7. In § 278.3, paragraph (a) is amended by adding the words "public or private nonprofit" before the words "homeless meal providers" wherever they occur (three occurrences).

§ 278.4 [Amended]

8. In § 278.4, the second sentence of paragraph (c) is amended by adding the words "public or private nonprofit" before the words "homeless meal providers."

Dated: September 27, 1996.

Ellen Haas,

Under Secretary for Food, Nutrition, and Consumer Services.

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Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. 96-063-1]

Imported Fire Ant; Approved Treatments

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Direct final rule.

SUMMARY: We are amending the imported fire ant regulations to lengthen the certification period for containerized nursery stock treated with a 10 parts per million dosage of the insecticide tefluthrin in its granular formulation and to remove the 15 parts per million dosage rate for granular tefluthrin. Research has demonstrated that a 10 parts per million dosage of granular tefluthrin is efficacious for 18 months, which is 12 months longer than the current certification period for that