



July 30, 2012

Ms. Jane Duffield
State Administration Branch
3101 Park Center Drive
Alexandria, VA 22302

Re: FNS-2012-0028 [Proposed Rule: Supplemental Nutrition Assistance Program: Trafficking Controls and Fraud Investigations, 77 Fed. Reg. 31738-31742, May 30, 2102]

Dear Ms. Duffield,

AARP is a nonprofit, nonpartisan membership organization that helps people 50+ have independence, choice and control in ways that are beneficial and affordable to them and society as a whole. We are writing to offer comments on the proposed rule by the Food and Nutrition Service (FNS) to amend Supplemental Nutrition Assistance Program (SNAP or Program) regulations at 7 CFR 274.6. AARP is deeply concerned about the issue of hunger because older people are at particular risk of hunger.

AARP Supports Protecting Older and Vulnerable Snap Participants

In this proposed rule FNS is proposing to amend 7 CFR 274.6 to give States an option of refusing to send out a duplicate replacement card until a SNAP recipient contacts them if the recipient has requested four prior cards. While FNS suggests that State agencies electing to exercise this authority will be required to protect vulnerable persons such as the elderly, homeless individuals or individuals with disabilities, no procedures are suggested or in place to protect this population.

AARP strongly agrees that this population needs protecting. SNAP participation rates are already lowest among the elderly. Only one-third of the eligible elderly receive SNAP benefits. The vulnerability of this population is evident; a significant percentage of older Americans eligible or already participating in SNAP are either on Medicaid, live in one-person SNAP households, live in poverty or receive Supplemental Security Income (and perhaps are characterized by all four). There are four primary barriers inhibiting eligible seniors from participating in the program: lack of knowledge, misperceptions about the program, stigma and deterrents including physical limitations and the application process itself. In response, the FNS itself has funded a variety of pilot projects to break down known barriers. These projects implemented strategies including simpler eligibility determination rules and one-on-one application assistance from call

centers and from faith based organizations. Consequently, AARP supports adding examples of the ways in which State agencies may endeavor to protect households containing the homeless, elderly, disabled and other vulnerable persons to the regulations. This addition would make certain that the regulations are more effective in achieving the goal of preventing SNAP trafficking while ensuring that the vulnerable segments of the nation who lose their electronic benefits transfer cards without committing fraud continue to receive their benefits.

One particularly vulnerable group are the elderly homeless, whose numbers have increased tremendously across the country as result of the recent economic downturn. The National Coalition for the Homeless notes that: "Homeless persons aged 50-65 frequently fall between the cracks of governmental safety nets: while not technically old enough to qualify for Medicare, their physical health, assaulted by poor nutrition and severe living conditions, may resemble that of a 70-year-old." [1] For this population it is critical they receive their replacement cards as soon as possible. In addition, AARP recommends that any protections FNS creates to protect the elderly homeless include the near elderly, people 50-65, because they are at nearly as high a risk for bad outcomes as those above 65.

Some cities have witnessed as much as an 11.1% increase in its elderly homeless population since 1994. [2] The elderly homeless have more physical and mental health impairments that create barriers from accessing resources. The U.S. Department of Health and Human Services recognized that the elderly homeless are more likely to be victims of crime which may explain the loss of EBT cards. [3] State agencies may not have complete records of clients who recently evicted or who have just become homeless, and thus they may not have an accurate understanding of the magnitude of the problem and the need to address it through optional state measures. AARP believes this (is) another reason for (delete- the critical need for) further examples and standards to be contained within the regulatory framework.

FNS correctly notes in its proposal that a request for multiple cards may indicate simply that the client does not know how to use the card. Past studies of food stamp recipients

[1] NAT'L COALITION OF THE HOMELESS, HOMELESSNESS AMONG ELDERLY PERSONS (Sept. 2009) (at <http://www.nationalhomeless.org/factsheets/Elderly.pdf>)

[2] M. Williams Sermons & Meghan Henry, Homelessness Research Institute, Demographics of Homelessness Series: The Rising Elderly Population 2 (April 2010) at <http://www.endhomelessness.org/content/article/detail/2698>

[3] Program Assistance Letter from the Office of Minority and Special Populations in the Bureau of Primary Health Care, U.S. Dep't of Health and Human Serv., to Health Care for Homeless Grantees 7-10 (Aug. 15, 2003), *available at* <http://bphc.hrsa.gov/policiesregulations/policies/pdfs/pal200303.pdf>.

indicates that there is a significant percentage of recipients who have literacy problems, and literacy problems are not limited to those with mental disabilities. See e.g., Ann Marie Rakowski, *Just Who Do You Think You're Talking to? The Mandate for Effective Notice to Food Stamp Recipients with Mental Disabilities*, 37 Colum. J.L. & Soc. Probs. 485, 489-90 citing Paul E. Barton & Lynn Jenkins, *Literacy and Dependency: The Literacy Skills of Welfare Recipients in the United States* 6 (Educational Testing Service ed., 1995).

AARP Supports Proposed Intent Requirement of Trafficking Along with Strengthening of Procedural Protections

The Government Accountability Office (GAO) previously reported that SNAP trafficking and erroneous payments significantly has declined since 1993, when the EBT cards were implemented in 2002. U.S. Gov't Accountability Office, GAO-10-956T, *Supplemental Nutritional Assistance Program: Payment Errors and Trafficking Have Declined, but Challenges Remain*, 11 (2010). The national rate of SNAP trafficking declined from 3.8 percent in 1993 to 1% by 2005. *Id.* The current rate of trafficking is still significantly below 1993. Between 2006-2008, however, a slight increase did occur. This reported increase though could be attributed to FNS's improved ability of identifying SNAP trafficking because of the fully implemented EBT system. U.S. Dep't of Agriculture, *The Extent of Trafficking in the Supplemental Nutritional Assistance Program: 2006-2008*, 14 (March, 2011). It is unclear how withholding a benefit card would improve trafficking prevention, if FNS already has the ability to track EBT transaction data to pursue suspicious actions, particularly when the possibility that an innocent person will need to wait several days to get a card replaced.

Addition of the Intent Requirement

AARP supports FNS' proposal to include the "intent" to sell SNAP benefits online or in person and on August 11, 2011 submitted specific comments on a related trafficking proposed regulation. Specifically, AARP recommended that the Department modify the final rule to encompass the following:

1. Violations by program participants must include a properly defined element of intent.
2. *De minimus* and good faith errors would not be construed as intentional for purposes of the definition of trafficking.

We believe the FNS should clarify standards of "intentionality," and refine specific rules regarding SNAP abuses to avoid unintended negative impact on client access to nutritional benefits. We provide the following scenarios to illustrate the importance of our concern:

- Casual observers should not be empowered to initiate formal charges that result in denied access to nutritional benefits based solely on a perception of disallowed activity without reasonable evidence to support that the

purchase was not allowable, and that the purchase intent is in clear violation of SNAP rules. To illustrate, a SNAP client who shares a market basket at check-out with acquaintances who purchased other items not covered by SNAP and paid for it separately does not violate any SNAP trafficking rule. This incident should not result in accusations of violations that are treated as having merit.

- If allowable food products are purchased in containers that can be redeemed for cash and the purchased products were properly consumed, redemption of those containers by a third party does not constitute proof of collusion to obtain cash, goods or services.
- There are also common, human acts of kindness and reciprocity such as allowing a neighbor who lacks a food item to purchase for cash the box of pasta a client planned for use later in the month when originally purchased.

Procedural Protections

Further, the regulations must clarify that an “**appropriate explanation**” is one that demonstrates, explains or indicates that the loss of the card resulted from factors other than fraudulent activity or trafficking. An “appropriate explanation” does not need to be what a worker considers to be a justifiable or good reason, nor can a state require an unreasonable standard of proof or “responsibility.” Forgetfulness or even theft that could have been prevented in hindsight e.g., cards left out to persons providing care or assistance are still appropriate explanations. This may be another area where examples are helpful. Further clarification is also needed to define the timeline a household is given to act in response to the State agency’s notice requesting an explanation of need for card replacement since many factors can affect ability to respond in a timely manner. In addition, AARP is very concerned that a state may require only in-person explanations of why a replacement card is needed; many states already acknowledge the difficulty of in-person interviews and permits elderly and disabled person to skip them. A required in-person could impose a severe hardship on many vulnerable elders and persons with disabilities, especially where access to reasonable transportation is a problem. Indeed, for such vulnerable persons lacking transportation options, the frequency of EBT transactions with retailers found to be guilty of trafficking should not solely be deemed a basis for suspicion of trafficking on the part of SNAP participants because these retailers may be their only practical options.

AARP believes the refusal to send a replacement card, even if limited to several days, could be a de facto denial of benefits which would in some circumstances violate the recipients due process rights to hearing under *Goldberg v Kelly*, 397 U.S. 254 (1970). Under *Goldberg*, a state agency must provide a SNAP recipient with a timely and adequate notice that includes reasons for proposed termination and an opportunity to be heard at a pre-termination hearing. Additionally, the notice must include the reason for the determination and the evidence on which the decision maker relied. *Id.* Other

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regulations mandate that SNAP recipients must be given at least ten days notice before their benefits are terminated. 7 C.F.R. § [273.13\(a\)\(1\)](#).

Due to the fact that the US Postal Service is scaling back its delivery services in many areas, AARP does not oppose FNS' proposal to change the timeframes so that a lost or stole EBT card is sent within one business day. In the proposal, FNS notes recent cutbacks to the US Postal Service has caused delays in mail which has resulted in delays in receipt of mail by SNAP recipients. These delays unfortunately will affect all SNAP recipients and will delay the receipt of replacement cards and much needed food to vulnerable populations. However, given the fact that the postal service is scaling back service in many areas, FNS' proposal to delay forwarding replacement cards to recipients who request multiple cards until contact is made between the recipient and the state agency will result in delay of a replacement card in many instances. This reality further supports the need for the FNS to add examples of the ways in which State agencies may endeavor to ensure that vulnerable SNAP recipients continue to receive their benefits when they lose their electronic benefits transfer cards without committing fraud. If you have any questions, please feel free to contact Larry White on our Government Affairs staff at 202-434-3770.

Thank you for your consideration of our comments.

Sincerely,

A handwritten signature in black ink, appearing to read "David Certner". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

David Certner
Legislative Counsel and Legislative Policy Director
Government Affairs