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Submitted via www.regulations.gov

RE: EPPC Scholar's Comment Opposing Key Provisions of Proposed Rule "Supplemental Nutrition Assistance Program: Program Purpose and Work Requirement Provisions of the Fiscal Responsibility Act of 2023" (Docket ID FNS-2023-0058, RIN 0584-AF01)

Dear Ms. Kamau:

I write in response to the U.S. Department of Agriculture (USDA) Food and Nutrition Service's request for comments on the proposed rule "Supplemental Nutrition Assistance Program: Program Purpose and Work Requirement Provisions of the Fiscal Responsibility Act of 2023" (Docket ID FNS-2023-0058, RIN 0584-AF01).

The Fiscal Responsibility Act of 2023 (FRA) was a major piece of bipartisan legislation that averted a fiscal crisis, saving the federal government from defaulting on its debt obligations. The FRA's changes to SNAP work requirements for able-bodied adults without dependents (ABAWDs) helped to gain support for its passage. Congress intended for these changes to adjust which ABAWDs would be subject to the work requirement, to better align these requirements with core American values. Congress did not intend, on net, either to subject large numbers of additional ABAWDs to the work requirement or to exempt large numbers of additional ABAWDs from it.[1] Neither did the President.[2] Yet USDA's proposed rule—along with recommendations to States regarding implementation—would gut the SNAP work requirement.

Five key provisions of the proposed rule should be reconsidered and modified:

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[1] "House Agricultural Chair G.T. Thompson (R-Pa.), who oversees SNAP, said the CBO's final funding estimate of the SNAP changes 'should've been a wash.'" See https://www.politico.com/news/2023/05/31/mccarthy-tries-to-hold-off-last-minute-rebellion-over-work-requirements-in-debt-deal-00099502.

[2] President Biden stated, "Well, I'm not—they're—I'm not going to accept any work requirements that's going to impact on medical health needs of people. I'm not going to accept any work requirements that go much beyond what is already—what I—I voted years ago for the work requirements that exist. But it's possible there could be a few others, but not anything of any consequence." See https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/05/17/remarks-by-president-biden-on-preventing-a-first-ever-government-default/.

1. USDA proposes a novel definition of "veteran" that would unnecessarily complicate program administration and inappropriately provide benefits for a dishonorable discharge.

The ordinary statutory definition of veteran is found in 38 U.S. Code § 101 (2): "The term 'veteran' means a person who served in the active military, naval, air, or space service, and who was discharged or released therefrom under conditions other than dishonorable." Adherence to this definition is ubiquitous. Even private businesses that offer discounts to veterans typically require the presentation of a Veteran's Identification Card issued by the Veteran's Administration to individuals who are veterans according to this ordinary definition.[3]

While the FRA did not specifically refer to this ordinary definition of "veteran," USDA should adopt it for purposes of SNAP administration. It is undoubtedly the definition that members of Congress had in mind when they chose to honor veterans with a lifetime exemption from the SNAP work requirements, and it is inconceivable that Congress intended to honor *dishonorable* service, as USDA specifically proposes to do. Furthermore, consistent use of the ordinary definition would enable States to administer the exemption more efficiently and effectively, as veteran status under this definition is readily verifiable.

Perplexingly, citing surveys showing higher rates of food insecurity among *self-identified* veterans, USDA proposes a definition of "veteran" that is purposefully "broad" and admittedly includes categories of individuals "who may not identify with the term 'veteran.'" Such surveys are irrelevant for determining whether individuals who are not ordinarily considered veterans and would not identify with the term "veteran" even experience these higher rates of food insecurity, much less whether USDA could appropriately consider them to *be* veterans.

USDA cites just one instance, in Sec. 5126(f)(13)(F) of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (Public Law 117-263), signed on December 23, 2022, in which Congress adopted a definition of "veteran" that is not directly restricted based on the conditions of discharge. However, it is essential to understand that that definition pertains to a small pilot food program only for veterans and their family members who already receive various services from the Veteran's Administration and therefore meet the more restrictive statutory and regulatory requirements to receive these services. This instance therefore should not be taken to mean that Congress does not consider their type of discharge to be relevant for determining their veteran status and it is somehow appropriate for USDA to ignore conditions of discharge when defining "veteran" for purposes of implementing the FRA SNAP changes.

To ensure just, consistent, and efficient SNAP administration, USDA should simply adopt, by reference, the ordinary statutory definition of "veteran" found in 38 U.S. Code § 101(2) and accept all determinations of "veteran" status made by the Department of Veterans Affairs.

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[3] See https://news.va.gov/117828/va-id-card-proof-discounts/.

2. USDA proposes to replace the statutory definition of "homeless individual" with a broad, unworkable alternative, then uses a narrower definition in its regulatory impact analysis.

USDA acknowledges "the program's longstanding definition of 'homeless individual' at Sec. 3(l) of the Act," which states "'Homeless individual' means—(1) an individual who lacks a fixed and regular nighttime residence; or …" The statute is written in the present tense, and expectations regarding the continuation of that residence into the future are rightly irrelevant; an individual logically cannot be homeless unless he or she lacks a home, at which point he or she reasonably qualifies for the new statutory exemption from the ABAWD work requirement included in the FRA. This is easy to understand and relatively straightforward for States to administer.

However, USDA wishes also to exempt those who are "imminently homeless" and proposes to amend 7 CFR 271.2 to read as follows: "*Homeless individual* means (1) An individual who lacks a fixed and regular nighttime residence, including, but not limited to, an individual who will imminently lose their nighttime residence; or …" In doing so, it invites much speculation as to the expected future duration of the current residence, which is unknowable and easily manipulable to allow for ongoing claims that the loss of the residence is "imminent." This is a vague standard. Every non-homeowner with anything short of a lifetime lease agreement for his or her current residence could claim to be "imminently homeless," as could any homeowner who is currently under contract to sell his or her home (without a peculiar agreement for continued lifetime residency after the sale). Would anything in the proposed rule prevent a SNAP recipient in any of these circumstances from advancing and succeeding with such a claim?

USDA suggests that it may issue "further sub-regulatory guidance on circumstances that may render an individual 'imminently homeless.'" But when the possible interpretations of "imminently homeless" range from something as broad as the hypothetical scenarios I mention in the preceding paragraph to something so narrow that it perhaps includes only those who must move out of their home later today, how can the public comment intelligently on the proposed rule, and how can USDA reasonably produce the required regulatory impact analysis?

But USDA *has* published a regulatory impact analysis, claiming *instead* to have proposed to amend 7 CFR 271.2 to read as follows: "*Homeless individual* means (1) An individual who lacks a fixed and regular nighttime residence, including, but not limited to, an individual who will imminently lose their primary nighttime residence, provided that primary nighttime residence will be lost within 14 days, no subsequent housing has been identified and the individual lacks support networks or resources needed to obtain housing; or …" Was the regulatory impact analysis actually performed based on this different, narrower definition?

Will USDA please explain what happened and provide a consistent proposed rule and accompanying regulatory impact analysis, then allow ample time for the public to comment on the corrected version? Alternatively, of course, USDA could simply retain the statutory definition of "homeless individual," as I have argued would be more appropriate anyway.

3. USDA proposes an unlawfully broad interpretation of former foster child.

The FRA newly exempts from the ABAWD work requirement "an individual who is 24 years of age or younger and who was in foster care under the responsibility of a State on the date of attaining 18 years of age or such higher age as the State has elected under section 475(8)(B)(iii) of the Social Security Act (42 U.S.C. 675(8)(B)(iii))." By using the words "the date of attaining," the statute unambiguously refers to the foster care status as of a specific date. This date must be the date on which the individual attains the maximum age for foster care, which is either 18 years of age or a higher age if the individual's State of residence has so elected.

USDA instead proposes to allow the exemption for anyone who was in foster care upon attaining age 18, regardless of the State of residence, even if the individual subsequently leaves foster care before the maximum age elected by his or her State. This interpretation, while perhaps reasonable as a matter of public policy, appears to lack support in the text of the statute, as it renders meaningless all words from "or such higher age …" to the end of the sentence. What, then, do these words mean, if not what I have suggested?

4. USDA discourages State agencies from requiring verification of exemptions from the work requirement, apparently encouraging States to exempt anyone who is willing to lie.

USDA acknowledges that "The FRA did not make any changes to how State agencies verify exceptions from the time limit" for ABAWDs and does not claim to be authorized to prevent States from requiring individuals to verify their exemptions from the ABAWD work requirement, yet "The Department encourages State agencies avoid setting guidelines for questionable information that would consider self-attestation questionable and require every individual who meets exception criteria to provide verification."

Is this intended to suggest that USDA discourages States from routinely requiring verification for self-attestation of any exemption that is not already easily verifiable using databases that the State can routinely access? It seems that some exempt statuses (e.g., former foster child) may frequently be verifiable using databases that are already available to the States, while other exempt statuses (e.g. homeless) may never be verifiable from such databases. If self-attestation is deemed to be sufficient for any single category of exemption, then how does this not ultimately result in a system in which anyone who is willing to lie to claim membership in that exempt category is able to maintain an ongoing exemption from the ABAWD work requirement (unless reported for fraud by someone who becomes aware of the lie)?

It seems likely that invalid self-attestation of exempt status would be a key component of many fraudulent SNAP claims, so verification should always be required, either from a database that the State can routinely access or, if not possible, from other documentation provided by or on behalf of the individual claiming the exemption. Otherwise, the State will have created a *de facto* exemption from the ABAWD work requirement for anyone who is willing to lie.

5. USDA proposes to allow States to use accumulated unused discretionary exemptions from the ABAWD work requirement beyond the statutory deadline.

Following a series of sentences explaining how USDA shall calculate the number of allowable discretionary exemptions for each State for each fiscal year and how such calculation shall be adjusted for over- or under-use of exemptions in the preceding year, the amended statute states, "During fiscal year 2024 and each subsequent fiscal year, nothing in this paragraph shall be interpreted to allow a State agency to accumulate unused exemptions to be provided beyond the subsequent fiscal year."

The Department correctly envisions a regime in which a State agency that does not use all of the exemptions newly awarded on the basis of its caseload in one fiscal year is allowed to carry over the remaining exemptions for possible use in the subsequent fiscal year, but no further. That is the only reasonable interpretation of the independent clause in the sentence quoted in the preceding paragraph. But by when must the changes go into effect, and do USDA's proposed regulatory changes ever implement this new regime as intended?

USDA speaks of a "historical balance" of unused exemptions as if such a balance simply exists, unattributable to any particular historical fiscal year(s), and these exemptions somehow deserve to be treated no differently in terms of their expiration date than how exemptions newly received in 2024 based on the projected 2024 caseload will be treated. However, the concept of a "historical balance" is foreign to the statute, which knows only exemptions attributable to specific fiscal years. To the extent that any exemption originating in a prior year carries over into fiscal year 2024, it does so only because of an interpretation of the relevant paragraph occurring "during 2024" and must be subject to the accumulation and expiration constraint mentioned above. Therefore, during 2024, unused exemptions from fiscal year 2023 may still be provided (because fiscal year 2024 is the subsequent fiscal year), while unused exemptions from fiscal year 2022 and earlier have already expired (because the subsequent fiscal year has ended). The proposed rule improperly allows unused exemptions from fiscal year 2023 and earlier to be provided beyond their statutory expiration dates, expiring only at the end of fiscal year 2025.

USDA proposes to implement the accumulation and expiration constraint merely by adding the following sentence to 7 CFR 273.24(h)(2)(i): "Starting in FY 2026, FNS will increase the estimated number of exemptions allocated to the State agency for the subsequent fiscal year by the remaining balance of unused exemptions earned for the previous fiscal year." It does not, however, propose to repeal or modify the current sentence that explains the pre-FRA method for adjusting exemptions, allowing it to remain in place with no stated end date. If USDA were to finalize the proposed rule as written, one could interpret the new regulation to allow for the continuation of the pre-FRA adjustment method, *plus* the new adjustment method to be applied beginning in fiscal year 2026. Such a double adjustment is obviously neither what the statute commands nor what USDA intends, so this language must be clarified.

Conclusion: Key provisions of the proposed rule must be modified before it is finalized.

USDA claims, "The proposed rule would implement changes to exceptions form the ABAWD work requirement and time limit in a way that closely adheres to the FRA's statutory language." However, in fact, for each of the three new exemption categories—veterans, homeless individuals, and former foster children—it substitutes an expansive definition of questionable legality. Then it openly discourages States from taking sensible steps to protect the interests of taxpayers in the face of potential increases in fraud following the adoption of these definitions. Finally, USDA proposes to implement, in a delayed and confusing manner, what should be a straightforward requirement to rein in its historical abuse of a formula to calculate the number of additional ABAWDs States may exempt from the work requirement at their discretion, even after all these other exemptions have been applied. Before this rule is finalized, these five provisions I have mentioned must be reconsidered and should be modified in line with the spirit of bipartisan compromise with which the statute was written, not the arbitrary and capricious approach USDA took in developing its proposed rule.

Sincerely,

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[4] My affiliation and title are provided for identification purposes only. I submit this comment in my personal capacity only and not on behalf of the Ethics and Public Policy Center.