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Program Design Branch
Program Development Division
Food and Nutrition Service (FNS)
3101 Park Center Drive, Room 812
Alexandria, VA 22302

RE: Docket No: FNS-2019-0009
Docket RIN: RIN 0584-AE69
Docket Name: Supplemental Nutrition Assistance Program: Standardization of State Heating and Cooling Standard Utility Allowances

Dear SNAP Program Design Branch:

I write on behalf of Empire Justice Center, a statewide, multi-issue, multi-strategy public interest law firm focused on changing the systems in which poor and low income New Yorkers live.

We appreciate the opportunity to comment in response to the proposed regulatory changes seeking to set more homogeneous heating and cooling standard utility allowances ("SUA") in the Supplemental Nutrition Assistance Program (SNAP), published in the Federal Register on October 3, 2019.

Because SNAP is often the first line of defense against hunger in New York, Empire Justice Center strongly opposes any regulatory changes that will reduce or deny benefits to qualifying households or limit food benefits available to those who need this critical assistance. Consistent with the stated statutory intention in the creation and operation of SNAP,[1] Empire Justice Center supports food policy that provides robust and meaningful access to low-income individuals and families needing this assistance to avert food insecurity and promote well-being.

[1] 7 U.S.C. § 2011.

The Food and Nutrition Act of 2008 substantially maintained existing statutory provisions of the SNAP eligibility determination process that permitted states to set their own SUA. Pursuant to 7 U.S.C. § 2014(e)(6)(c), a state may choose to use a default value for purposes of estimating the monthly utility costs payed by SNAP households in the process of determining eligibility for and budgeting the amount of SNAP benefits the household may receive. Using a default value rather than requiring individual documentation of each household's actual ongoing utility costs helps to streamline the application and recertification processes, in addition to reducing administrative burden on both the eligibility worker and the beneficiaries.[2]

Within the broad framework of the authorizing statute, existing regulations of the Food and Nutrition Service ("FNS") of the United States Department of Agriculture ("USDA") allow for states to: set either a single or tiered SUA; limit which utility expenses would be included in those SUA's at different levels; and provide for variability in the utility allowance based on season, geography and household size.[3] By regulation, states submit the methodology for calculating their SUA to FNS for approval, conduct an annual review of the SUA, and seek approval from FNS if there are changes to the SUA methodology at any point in time.[4] At state option, the SUA maybe mandated for SNAP households, or allowed as an option in lieu of documenting actual utility costs.[5]

The existing statute and regulations expressly do *not* specify a single methodology for determining the SUA level or levels. Rather, the regulations identify what costs may be factored into setting the SUA levels and require the state to submit the methodology with the proposed SUA levels themselves for FNS oversight and approval. By using localized or state level utility cost data in setting SUA levels, the current regulations provide a simple and elegantly flexible manner of approaching wide variability in weather conditions, housing stock, fuel sources and costs, taxation, and utility infrastructure that all play out in the localized variability of utility costs across an entire nation.

A. The Proposed Regulatory Revision Is Fundamentally Flawed and Should Be Withdrawn.

In this proposed rule-making action, FNS has put forth an incomplete and flawed document that should be withdrawn. The proposed language put forth as the revised regulation states only that "FNS will calculate the standards and caps described in paragraph (d)(6)(iii)(A) of this section annually, with the exception of the standards described in paragraph (d)(6)(iii)(B)(4) of this section."[6] The commentary states that the agency is planning to standardized the SUA's but fails to detail the actual calculation methodology the agency is theoretically putting forth to supplant the various state methodologies currently in use.[7] There is

[2] Federal Register, Vol. 84, No. 192, FNS-2019-0009, 52809 (October 3, 2019).
[3] 7 C.F.R. § 273.9(d)(6)(iii)(A).
[4] 7 C.F.R. § 273.9(d)(6)(iii)(B).
[5] 7 C.F.R. § 273.9(d)(6)(iii)(D).
[6] Fed. Reg., Vol. 84, No. 192 at 52814 for proposed regulatory language revising 7 CFR 273.9(d)(6)(iii)(B).
[7] Fed. Reg., Vol. 84, No. 192 at 52810.

no actual standardized SUA calculation put forth in the draft regulation and, thus, the current draft of the proposed regulation is fatally flawed and entirely incomplete.

The process of federal rulemaking requires that the proposed rule be publicly put forth for review and followed by a period for public comment.[8] A rule is the "whole or part of an agency statement…designed to implement, interpret or prescribe law or policy…and includes the approval or prescription for the future of…valuations, costs or accounting, or practices bearing on any of the foregoing."[9] For the current rule making process to be proper and valid, the reasoning and proposed methodology for determining a standardized SUA should have been included in the regulatory provisions to permit meaningful review and input on the that methodology.

USDA has not provided details about how the agency proposes to determine the new federal SUA, nor how identified variables will be weighed in that methodology. The lack of concrete information or data deprives both the state agencies who administer SNAP and the public from presenting alternatives, analyzing the data or providing meaningful input. Further, the proposed rule and accompanying regulatory impact analysis ("RIA") provide minimal details on the specific steps and data that the agency proposes to use in setting its new SUA calculation methodology. USDA does not discuss the data sources or calculations methods in the 2017 SUA study it references; nor does USDA compare the proposed, undisclosed new methodology to those currently used by the states, which FNS has previously reviewed and approved.

Nor does the notice of proposed rule-making ("NPRM") specifically identify a problem with the existing state methodologies; the NPRM states that there are concerns with how "flexible" the existing options are. There is no description of how this unknown new methodology would fix the existing, nonspecific problem with the various states' SUA calculation methodologies. There is no actual explanation or description of why states' current SUA methodologies, which FNS has approved for years, are inappropriate or why these methodologies need to be changed. The existing regulatory process already permits FNS to review and oversee the SUA calculations that states use, yet there is no indication the existing control mechanisms already permitted by regulation were undertaken by FNS or proved inadequate.

In summary, FNS has failed to justify the need for or even provide a standardized SUA calculation methodology at this time. The proposed rule should be withdrawn and re-issued when the agency is prepared to layout its methodology and data in full for public scrutiny; in the alternative, a final rule based on this wholly insufficient shell proposal must include an annualized process for receiving input and weighing current data sources as a routine part of setting a standardized SUA and adjusting it for state variation and cost fluctuations.

B. The Proposed Regulatory Change Will Operate Contrary to Statutory Language.

The proposed regulatory changes are overbroad and in excess of the authorizing statutory language because the impact of the regulation is inconsistent with the goals of the SNAP

[8] 5 U.S.C. § 553(b)-(c).
[9] 5 U.S.C. § 551(4).

program set forth in statute. "It is declared to be the policy of Congress, in order to promote the general welfare, to safeguard the health and well-being of the Nation's population by raising levels of nutrition among low-income households….to alleviate such hunger and malnutrition, a supplemental nutrition assistance program is herein authorized which will permit low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power for all eligible households who apply for participation."[10]

The proposed rule would result in deep cuts to SNAP in New York State. Projections from the Center on Budget and Policy Priorities ("CBPP") indicate that, on average, SNAP households in NY would face a benefit reduction of $55 per month, for those who were even able to remain on benefits.[11] Analysis of 2017 SNAP Quality Control data conducted by CBPP indicates that nearly 40% of SNAP households in New York would lose SNAP altogether if the SUA methodology were drastically changed.[12] Current SUA levels are consistent with the statutory goals articulated in the Food and Nutrition Act. In the NPRM, FNS fails to discuss the implications of the deep and disturbing cuts to SNAP on food insecurity and well-being that would result from implementation of this rule. Existing benefit levels are barely adequate, even though SNAP recipients use a variety of savvy shopping practices to stretch their limited food dollars. The harm from benefit inadequacy is evident in studies that examine end-of-the-month effects, such as the adverse impacts on dietary quality, health, behavior, and learning when SNAP benefits, which are inadequate to last the whole month, are running low for households.[13] No mention is made in the NPRM of increasing food insecurity and hunger as a result of this ill-advised rule.

Additionally, the NPRM states that the agency aims to make SUAs more equitable[14] without defining the alleged inequitability being remedied. The required Civil Rights Impact Analysis of the proposed rule identifies disproportionate impact on elderly and disabled households receiving SNAP because of their uncapped shelter deductions.[15] CBPP analysis further indicates that nearly 38% of SNAP households containing elderly household members and 31% of SNAP households containing disabled household members would lose their SNAP eligibility as a result of the proposed rule.[16] The SNAP case closures in New York would disproportionately impact these households; almost 50% of the SNAP case closures in New York following a SUA change would fall on households with elderly members.[17] This disproportionate impact on a protected category of recipients goes unaddressed by the agency in its rulemaking.

Finally, the proposed rule might create new concerns of equity that are unaddressed in the NPRM. Specifically, the proposed rule eliminates the options for states to vary their SUAs by household size, geographic area of the state, or season because these options are not currently

[10] 7 U.S.C. § 2011.
[11] Unpublished analysis by Center on Budget and Policy Priorities, received by email on November 26, 2019 (data on file with the author).
[12] *Id.*
[13] See https://frac.org/wp-content/uploads/snap-initiatives-to-make-snap-benefits-more-adequate.pdf.
[14] Fed. Reg., Vol. 84, No. 192 at 52810.
[15] Fed. Reg., Vol. 84, No. 192 at 52813.
[16] Unpublished analysis by CBPP.
[17] *Id.*

used by a large number of states.[18] Adjusting a benefit level based on household size provides protection to larger families. To the extent that the agency now proposes to withdraw a state option that may benefit households with children, it should similarly describe and explain the civil rights impact on this population of younger people who would face reduction and termination of benefits under the new proposed rule. Geographic variation within a state may also be a critical metric in a state with significant geographic features, such as intensely mountainous or desert regions, or facing critical intra state variations in heating fuel source (e.g.—deliverable fuels being used more extensively in rural areas away from municipal gas and electric supply[19]), weather conditions, variability of housing stock, state taxation (e.g.—surcharges[20]), as well as the age and capacity of local utility infrastructure (infrastructure upkeep and replacement are a significant source of rate increases for gas and electric service providers[21]). As these options are used by relatively few states, they would not be the root cause of the theoretical "inequitable distribution" of SUA's the agency claims to be addressing, and these state options should simply be retained in any final rule as a means of helping to address problems and cost insensitivity in a new homogeneous SUA calculation that fails to account for real variations at the state level.

Thank you again for the opportunity to provide input and comments regarding proposed changes to the regulations pertaining to determination of SUA levels in SNAP. **Empire Justice Center strongly opposes these proposed rule changes that will reduce or end benefits for tens of thousands of food insecure New Yorkers, and hinder the ability of states to address local hunger needs in a thoughtful and meaningful manner.**

Sincerely,

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[18] Fed. Reg., Vol. 84, No. 192 at 52811.
[19] U.S. Energy Information Administration, *Beyond Natural Gas and Electricity; more than 10% of U.S. Homes Use Heating Oil or Propane*, Nov. 28, 2011, available at https://www.eia.gov/todayinenergy/detail.php?id=4070.
[20] Talia Buford, *The Obscure Charges That Utility Companies Add to Your Bills*, October 21, 2019, available at https://www.propublica.org/article/the-obscure-charges-that-utility-companies-add-to-your-bills.
[21] *See generally,* Joshua D. Rhodes, *The Old, Dirty, Creaky US Electric Grid Would Cost $5 Trillion to Replace*, March 16, 2017, available online at http://theconversation.com/the-old-dirty-creaky-us-electric-grid-would-cost-5-trillion-to-replace-where-should-infrastructure-spending-go-68290 .