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Opportunity Solutions Project appreciates the opportunity to submit the following comments on the FNS advanced notice of proposed rule regarding Supplemental Nutrition Assistance Program: Requirements and Services for Able-Bodied Adults Without Dependents; Advance Notice of Proposed Rulemaking (Code of Federal Regulations Title 7, Parts 273.7 and 273.24).

Opportunity Solutions Project (OSP) is nonprofit, nonpartisan advocacy organization that seeks to improve lives by advocating for public policies based on the principles of free enterprise, individual liberty, and a limited, accountable government. Our primary interest in the proposed rule is to ensure that the food stamp program is designed to promote independence and self-sufficiency for able-bodied adults participating in the program.

Introduction

As part of the 1996 welfare reform overhaul, Congress passed, and President Clinton signed, bipartisan legislation that implemented commonsense work requirements for able-bodied adults on welfare. As a result, able-bodied adults without dependents are now expected to work, train, or volunteer at least part-time as a condition of receiving food stamps. Individuals who refuse to comply with the work requirement are limited to just three months of benefits in any three-year period.

But not long after Congress adopted these work requirements, opponents of the work requirement launched an ongoing campaign to undermine the new law, which continues to this day. Although the law provided for a small amount of regulatory discretion in the rulemaking process, the resulting rules and sub-regulatory guidance have dramatically expanded the exemptions and waivers from the work requirement.

One of Food and Nutrition Service's primary goals is to move more individuals to independence. Work is the single best path to achieving those ends. When in effect, the work requirement has been extremely effective at moving able-bodied adults from welfare to work.

When Kansas implemented work requirements for able-bodied childless adults, it set in place a comprehensive system that would track employment and wages of able-bodied adults removed from food stamps for refusing to work, train, or volunteer.[1] After work requirements were implemented, able-bodied adults went back to work in more than 600 different industries and their incomes more than doubled on average.[2] Higher wages more than offset lost benefits, leading to greater economic activity and higher state and local tax collections.[3]

Maine established a similar tracking system and found consistent results. Those leaving food stamps saw their incomes more than double on average, more than offsetting lost benefits.[4] Higher wages led to greater economic activity and increased income tax collections.[5]

Evidence from these states shows that the longer able-bodied adults remain on the program, the harder it is for them to re-enter the labor force.[6] As such, Food and Nutrition Service's goal should be getting these able-bodied adults off welfare as quickly as possible and back into the workforce.

Unfortunately, current regulations have created loopholes that have allowed states to weaken and eliminate these requirements for millions of adults. FNS should revise its regulations on work requirements to move more able-bodied adults from welfare to work. This would realign the regulatory framework with the agency's primary goal of moving these individuals to independence and self-sufficiency.

Responses to FNS questions

In revising the rules surrounding work requirements for able-bodied adults on food stamps, FNS should first re-establish its authority to reject waivers requests that are not consistent with federal law. The current regulation provides that FNS will automatically approve waivers that meet certain criteria.[7] However, this regulation exceeds statutory authority and strips the Secretary of his discretion allowed under the law.

Under the statute, the Secretary **may** approve state waiver requests in certain circumstances.[8] Nothing in the statute **requires** the Secretary to do so. But the regulation attempts to strip the Secretary of this discretion. Because this regulatory framework is unlawful and would not sustain a legal challenge, FNS should revise the regulation to specify that the Secretary **may** grant waivers to states with unemployment rates above 10 percent and who can objectively demonstrate the area lacks jobs, volunteer opportunities, and training programs.

FNS question: How could the definition of "lack of sufficient jobs" be revised to better support these goals?

Although federal law defines high unemployment for waiver purposes as above 10 percent, this regulation has interpreted the vague "lack of sufficient jobs" standard in a manner that is overly broad, is disconnected from whether an area lacks sufficient jobs, and does not reflect Congressional intent.[9]

Under current regulations, a state may qualify for a waiver due to a lack of sufficient jobs if it demonstrates that its unemployment rate was 20 percent higher than the national average over a 24-month period.[10]

But this metric has nothing to do with whether an area has a lack of sufficient jobs or few job openings. It merely indicates how an area's unemployment rate is performing relative to the national average. This guarantees at least some portion of the country will be granted waivers at any time, even during periods of unprecedented economic growth.

Worse yet, these waivers become easier to obtain as the economy improves. For example, if the national unemployment rate were one percent, a state could waive work requirements so long as its unemployment rate was at least 1.2 percent. As a result of the current regulations, states were able to waive more areas in 2018 than in 2017, despite an improving economy and lower unemployment rates—both nationally and in the states requesting waivers.[11]

Congress made clear through both the statutory language and floor debate that these waivers were intended to be temporary and used only in areas with objectively high unemployment and a clearly demonstrated lack of jobs. If Congress wished to grant waivers in areas with unemployment rates marginally higher than the national average, it could have done so. Instead, it limited such waivers to areas that have unemployment rates above 10 percent or that do not have a sufficient number of jobs.[12] During the floor debate, the amendment's sponsors stated that these waivers could only be granted "in a state with high unemployment" and in states where "there is an unemployment rate over 10 percent."[13] Although the national unemployment rate is a full percentage point lower today than when the work requirement was first enacted, 33 states waive the requirement in some or all areas.[14-15]

This metric also fails to account for job openings, despite that fact that state and federal agencies produce job vacancy surveys. The Bureau of Labor Statistics, for example, produces a monthly report on job openings and labor turnover, which currently shows a record-high 6.3 million open jobs.[16] Similar surveys are frequently produced by state agencies.[17-18-19] Although these local datasets on job openings may not be as comprehensive in showing every possible unfilled job, the data does allow policymakers to gauge the general level of jobs available. The current metric also fails to account for job training and volunteer opportunities, despite the fact that either path could satisfy the work requirement.

FNS should revise the regulation to require states to demonstrate that the area has objectively high unemployment or a lack of jobs. Consistent with the statute, the revised regulations should affirm that the Secretary may approve waivers in areas with unemployment rates above 10 percent.

The regulation concerning unemployment rates relative to the national average should be eliminated, as it does not illustrate a lack of jobs and conflicts with the clear statutory guidance on what high unemployment should mean for waiver purposes.

The regulations should also require states to objectively demonstrate that there is a lack of jobs in all occupations or industries and a lack of volunteer opportunities or job training opportunities which would satisfy the work requirement.

FNS question: States currently have discretion to define the area they are requesting to waive. Should States maintain this flexibility? Should an 'economic area' be limited in geographic scope, such as to a single county, metropolitan area, or labor market area?

Federal law permits—but does not require—the Secretary to approve waivers of the work requirement for individuals in requested areas if those areas have unemployment rates above 10 percent or do not have a sufficient number of jobs. The statute does not define the term "area."

Current regulations have allowed states to combine counties, cities, and other areas for waiver qualification. Allowing states to combine areas has led to widespread abuse, whereby states combine low unemployment counties with high unemployment counties as a means to waive the work requirement for as many able-bodied adults as possible. In fact, officials from multiple states told auditors from the U.S. Department of Agriculture's Office of Inspector General that they were requesting "waivers in as many parts of the State as possible" to "minimize the areas" subject to the work requirement.[20]

Examples of abuses of "area" flexibility:

- Illinois received a waiver by combining all counties except one into a single "area," despite the fact that many counties did not independently qualify.[21-22] Waived counties have unemployment rates as low as 2.6 percent, with many counties at or near record lows.[23-24] Some waived counties even have unemployment rates that are lower than the unemployment rate in the single non-waived county.[25]

- Massachusetts received a waiver that combined a random collection of three individual cities and six different "groupings" of towns and cities based on different criteria, including collections of cities and towns, as well as metropolitan areas.[26] But in each case, areas were combined to allow cities and towns that do not independently qualify for a waiver be included in the waiver request. Although FNS waived the work requirement in 62 of these cities and towns, state-submitted data shows that just 18 of these areas independently qualified for a waiver.[27] In each waived area, Massachusetts used a city or town with relatively high unemployment to anchor cities and towns with low unemployment, allowing the entire combined area to be waived.

- New Hampshire received a waiver by combining cities and towns into a larger area, even though many of the areas did not independently qualify.[28-29] According to the state's waiver request, only half of the cities and towns in the combined areas independently met the current relaxed waiver criteria.[30] New Hampshire's waiver even included towns that had zero unemployment for the entire two-year review period.[31]

- West Virginia received a waiver for a gerrymandered area by combining counties with relatively high unemployment and counties with low unemployment.[32] Although federal guidance indicates that areas should be contiguous, West Virginia's waiver includes non-contiguous counties.[33] Brooke, Hancock, Marshall, and Ohio counties, for example, are completely separated from the other waiver counties by the non-waived Tyler and Wetzel counties. Additionally, many of the waived counties did not independently qualify for waivers and have unemployment rates at or near record lows. The unemployment rate in waived counties is as low as three percent.[34]

States also often rely on software or analyses prepared by left-wing advocacy groups, including the Center on Budget and Policy Priorities.[35-36] These analyses are specifically designed to maximize the number of people states can exempt from the work requirement through waivers. The analyses have no connection to need, but simply seek to find the maximum number of individuals that can be included in the waiver.

Maximizing the number of individuals that can be included in the waiver is not what Congress intended when they included a waiver option for high unemployment areas in the statute. To end these obvious abuses of the definition of "area," FNS should revise the regulation to ensure that cities, towns, municipalities, metropolitan areas, counties, or county equivalents that do not independently qualify for a waiver do not receive them through gerrymandering.

FNS question: Should FNS accept data from additional sources of information that are currently not considered?

The current regulation allows states to use low-quality data and data that does not reflect the statutory purpose of the waiver authority. For example, a state can submit a waiver request with as little evidence as a publication describing the area as lacking jobs.[37] FNS should revise the regulation to eliminate the use of such data and restrict waiver requests to high-quality data that can objectively demonstrate the requested waiver meets statutory requirements.

To better align with the legislative safeguard of only allowing waivers when there is very high unemployment or a lack of jobs available to meet the requirement, FNS should adjust the regulation to require waiver requests to include more objective information on job vacancies, available volunteer opportunities, and job training programs that would allow able-bodied adults to meet the work requirement.

FNS question: How recent should the data and information used in support of a waiver be in relation to the waiver implementation date?

Federal law permits the Secretary to approve waivers when an area has an unemployment rate above 10 percent or does not have a sufficient number of jobs.[38] Both of these standards reflect a present-tense requirement. In other words, the Secretary may approve waivers based on current economic conditions. Current regulations and guidance, however, have created an extended lookback period that allows states to continue waiving work requirements even during times of significant and sustained economic growth.

The current regulations and guidance allow states to use a "recent" 12-month or 3-month average unemployment rate above 10 percent to qualify for a waiver.[39-40] But a "recent" unemployment rate does not mean a current unemployment rate. A state requesting a waiver based on a 12-month average unemployment rate above 10 percent that went into effect January 2018, for example, could rely on data from as far back as February 2016.[41] If a state had requested the waiver based on a three-month average, it could have relied on data from as far back as November 2016.[42] The unemployment rate in February 2016, or even November 2016, tells us little about the economic conditions in January 2018.

The lookback period is even more disconnected from current conditions when waivers are submitted based on unemployment rates relative to the national average. Under that standard, states submit average unemployment rates over a 24-month period, but not the most recent 24-months.[43] Instead, the lookback period can begin as far back as the period the Department of Labor uses to calculate labor surplus areas for the federal fiscal year in which the waiver is implemented.[44] For fiscal year 2018, the 24-month period for labor surplus areas was from January 2015 through December 2016.[45]

The extended lookback period allows states to use data from three or more years ago to justify a waiver, even when that data does not reflect current economic conditions. Some states are also intentionally gaming this process to take advantage of older data from poorer economic conditions.

Examples of abuses with the look-back period:

- California received a waiver that began in September 2017, the last month of fiscal year 2017.[46] By having the waiver begin in the last month of fiscal year 2017, the state was able to use an entire year's worth of older data, going as far back as January 2014 to support its request. Had the waiver begun one month later, California would have had to rely on data that began in 2015. To put this in context, California's unemployment rate in January 2014, which it was allowed to use in its waiver application, was 8.4 percent.[47] In September 2017, the month in which the waiver became effective, the state's unemployment rate was 4.3 percent.[48]

- Louisiana received a waiver that began in September 2017.[49] By having the waiver begin in the last month of fiscal year 2017, the state was able to use data going back to September 2014. Louisiana's unemployment rate in September 2014, which it was allowed to use in its waiver application, was seven percent, compared to the four percent unemployment rate in September, the month in which the waiver became effective.[50] Louisiana submitted this waiver request in December 2016, nearly an entire year before its effective date, to shift the approval period and gain a longer lookback period.[51]

Food and Nutrition Service should revise the regulation to eliminate the extended lookback period and instead require recent evidence, based on the most recently available data, of sustained unemployment rates above 10 percent. Local area unemployment statistics are typically available within just two months.

FNS question: Waivers are typically approved for 1 year, although under certain criteria 2 year waivers are available. Should FNS consider waivers of different time periods? If so, what time period and under what conditions?

Federal law permits the Secretary to approve waivers when an area has an unemployment rate above 10 percent or does not have a sufficient number of jobs.[52] Both of these standards reflect a present-tense requirement, based on current economic conditions. But current Food and Nutrition Service practice is to approve waivers for a one-year or two-year period.[53-54]

This practice allows waivers to continue for extended periods where they may be unnecessary and do not reflect current economic conditions. Between January 2017 and January 2018, the economy added 2.2 million new jobs.[55] The number of people unemployed dropped by nearly one million and the unemployment rate dropped by nearly 15 percent.[56-57] The number of unfilled job openings increased by 868,000 to a record-high 6.3 million open jobs.[58]

One-year waivers assume a static economy and when combined with the current lookback period, allows states with booming economies to pretend that the economic situation three or more years ago is the same as the economic situation expected a year from now.

FNS should revise the regulation to significantly reduce the waiver length to semi-annually or even quarterly, which would ensure that waivers reflect current economic conditions and account for an improving job market.

FNS question: What are best practices for the use of 15 percent exemptions in supporting the appropriate application of ABAWD requirements?

States should only use the allotted 15 percent exemptions when individuals on food stamps demonstrate a real need. Unfortunately, many states utilize the exemptions as a means of simplifying administrative work by the state agency. For example, several states use these exemptions as "wrap-around" exemptions to augment waivers, which in effect allows them to continue waiving the work requirement in areas where a waiver is not approved. This is frequently done as a way to standardize workloads, making clear that the policies are adopted in a way that is determined best for state governments, not best for individual enrollees.

FNS should clarify that these exemptions should be reserved for individuals with demonstrated need or who live in an area impacted by a natural disaster or a short-term major economic event, such as a large business closing where many enrollees were employed.

In addition to the general misuse of the exemptions, FNS should address the egregious flaunting of federal law that has occurred in allowing states to "carry over" unused 15 percent exemptions. Federal law provides states with discretionary individual-level exemptions for able-bodied adults who would otherwise be subject to work requirements. The statute provides that the exemptions "in effect during the fiscal year" cannot "exceed 15 percent" of the able-bodied adults who are ineligible for food stamps due to not meeting the work requirement.[59]

Although the language of the statute is clear that the exemptions cannot exceed this threshold, current regulations have inappropriately interpreted this language to mean that states earn new exemptions worth 15 percent of those able-bodied adults each year, with the ability to carryover unused exemptions year after year.[60]

This carryover policy goes beyond the scope of the statute. In fact, an audit by the Office of Inspector General at the U.S. Department of Agriculture raised concerns about the carryover policy going beyond the scope of the law, noting that the auditors disagree with Food and Nutrition Service's "process of carrying over unused 15 percent exemptions indefinitely."[61]

By fiscal year 2017, states had accumulated 6.4 million exemptions, which were worth nearly $1.1 billion in taxpayer-funded benefits.[62 - 63] Under the statute, Food and Nutrition Service should have capped these exemptions at approximately 1.3 million, worth roughly $220 million.[64-65]

Permitting states to carryover these exemptions from year to year has allowed them to bank the exemptions over time and then use far more exemptions in a given year than authorized by the statute. Ohio, for example, earned fewer than 75,000 exemptions in 2016.[66] Because it had accumulated a stockpile of exemptions, however, it was able to use more than 391,000 exemptions in 2016—far more than authorized by the statute.[67]

Food and Nutrition Service should revise the regulation to eliminate the policy of carrying over exemptions from year to year, consistent with OIG recommendation, the statute, and Congressional intent.

FNS question: Should ABAWDs be subject to additional reporting requirements or be limited to a specific type of reporting system (e.g., change reporting, monthly reporting, quarterly reporting, or simplified reporting)?

The simplified reporting process creates a dynamic where individuals do not report meaningful changes in income or household situation. This ultimately leads to individuals either receiving benefits when they are not eligible or receiving more benefits than for which they are eligible. This often results in unnecessary overpayments.

FNS should revise the regulation to require able-bodied adults without dependents to report all changes that occur to income, resources, or other household situations promptly. This reporting could be done on the same timeline as reporting compliance with the work requirement to simplify reporting for the individual and operations for the state agency.

Additional comments

One area of concern not addressed in the advanced notice of proposed rulemaking was the exclusion of 50-year-old able-bodied adults from the work requirement. Federal law automatically exempts able-bodied adults from the work requirement if they are "over" 50 years old.[68] Separate requirements for work registration apply to able-bodied adults who are "over" the age of 15.[69] But Food and Nutrition Service has interpreted the word "over" in these two provisions in different and conflicting ways.

In the regulations concerning work registration, the agency interpreted "over the age of 15" to mean 16 years old or older, consistent with the plain meaning and common understanding of the term.[70] But the agency interpreted "over" in a completely different way when it comes to the exemption for adults "over 50 years of age," which it interprets to mean 50 years old or older.[71] Auditors from the Office of Inspector General at the U.S. Department of Agriculture have warned that these conflicting interpretations of the same word "do not seem reasonable."[72] Indeed, Food and Nutrition Service officials admitted to auditors that they "made a conscious decision to interpret the statute in this manner" to reduce the number of able-bodied adults subject to the requirements "for the benefit of the SNAP recipients."[73]

According to federal data, few of these able-bodied adults are currently working, despite having no disabilities keeping them from meaningful employment and no dependent children in the home. More than 69 percent of able-bodied 50-year-old childless adults do not work at all, while just 5 percent work full-time.[74] Based on state experiences with work requirements for other able-bodied adults, expanding the work requirement to 50-year-old childless adults, consistent with the statute, would move tens of thousands of able-bodied adults from welfare to work and save taxpayers up to $350 million per year.[75]

Food and Nutrition Service should revise the regulation to remove the exemption for 50-year-old able-bodied adults, which would bring the rule in line with statutory language, Congressional intent, and the agency's interpretation of the same terms in other contexts within the food stamp program.

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7. 7 C.F.R. § 273.24(f)(3) (2018), https://www.gpo.gov/fdsys/pkg/CFR-2018-title7-vol4/pdf/CFR-2018-title7-vol4-sec273-24.pdf.
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22. During the state-defined 24-month period, only 54 of the 101 waived counties had unemployment rates 20 percent above the national average.
23. Washington County had an unemployment rate of 2.6 percent in December 2017.
24. Bureau of Labor Statistics, "Local area unemployment statistics: Illinois, counties and equivalents," U.S. Department of Labor (2018), https://data.bls.gov/cgi-bin/dsrv?la.
25. In December 2017, nine Illinois counties had unemployment rates that were lower than the unemployment rate in the state's single non-waived county.
26. Food and Nutrition Service, "Waiver response: 2150057, amendment and extension," U.S. Department of Agriculture (2017).
27. Ibid.
28. Food and Nutrition Service, "Waiver response: 2130035, amendment and extension," U.S. Department of Agriculture (2017).
29. Bureau of Labor Statistics, "Local area unemployment statistics: New Hampshire, cities, and towns above 25,000 population and cities and towns below 25,000 population in New England," U.S. Department of Labor (2018), https://data.bls.gov/cgi-bin/dsrv?la.
30. Only 7 of the 14 cities and towns in the waiver request independently met the waiver criteria.
31. Cambridge, Dixville, and Millsfield had zero unemployment over the entire state-selected 24-month period.
32. Food and Nutrition Service, "Waiver response: 2150031, amendment and extension," U.S. Department of Agriculture (2017).
33. Ibid.
34. Jefferson County had an unemployment rate of 3.0 percent in December 2017.
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49. Food and Nutrition Service, "Waiver response: 2160020, amendment and extension," U.S. Department of Agriculture (2017).

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65. Authors' calculations based upon fiscal year 2017 exemption allotments not adjusted for carryover and average monthly benefit costs per-person for able-bodied adults without dependents.

66. Food and Nutrition Service, "Fiscal year 2016 allocations of 15 percent exemptions for able-bodied adults without dependents: Not adjusted for carryover," U.S. Department of Agriculture (2015), https://fns-prod.azureedge.net/sites/default/files/snap/FY-2016-ABAWD-Exemptions-Memo-Not-Adjusted-for-Carryover.pdf.

67. Food and Nutrition Service, "Fiscal year 2017 allocations of 15 percent exemptions for able-bodied adults without dependents: Totals adjusted for carryover," U.S. Department of Agriculture (2017), https://fns-prod.azureedge.net/sites/default/files/snap/FY2017-ABAWD-15%25-Exemption-Totals.pdf.

68. 7 U.S.C. § 2015(o)(3) (2016), https://www.gpo.gov/fdsys/pkg/USCODE-2016-title7/pdf/USCODE-2016-title7-chap51-sec2015.pdf.

69. 7 U.S.C. § 2015(d)(1)(A) (2016), https://www.gpo.gov/fdsys/pkg/USCODE-2016-title7/pdf/USCODE-2016-title7-chap51-sec2015.pdf.

70. 7 C.F.R § 273.7(b)(1)(i) (2018), https://www.gpo.gov/fdsys/pkg/CFR-2018-title7-vol4/pdf/CFR-2018-title7-vol4-sec273-7.pdf.

71. 7 C.F.R. § 273.24(c)(1) (2018), https://www.gpo.gov/fdsys/pkg/CFR-2018-title7-vol4/pdf/CFR-2018-title7-vol4-sec273-24.pdf.

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73. Ibid.

74. Authors' calculations based upon data provided by the U.S. Department of Agriculture on food stamp enrollment and work status among 50-year-old non-disabled childless adults in fiscal year 2015. See, e.g., Food and Nutrition Service, "Supplemental Nutrition Assistance Program quality control database," U.S. Department of Agriculture (2016), https:// host76.mathematica-mpr.com/fns/PUBLIC_USE/2015/qcfy2015_st.zip.

75. Authors' calculations based upon state experience with work requirements for other able-bodied childless adults.