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DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 271 and 274

[FNS-2012-0028]

RIN 0584-AE26

Supplemental Nutrition Assistance Program: Trafficking Controls and Fraud

Investigations

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Final rule, Interim Final Rule.

SUMMARY: The Food and Nutrition Service (FNS) is issuing a final rule to amend Supplemental Nutrition Assistance Program (SNAP or Program) regulations to allow State agencies to deny a request for a replacement card until contact is made by the household with the State agency, if the requests for replacement cards are determined to be excessive. State agencies which elect to exercise this authority will be required to protect vulnerable persons, such as individuals with disabilities, homeless individuals or the elderly, who may repeatedly lose their Electronic Benefit Transfer (EBT) cards but are not committing fraud.

FNS is also changing the EBT card replacement timeframes in the same section to require State agencies to make replacement cards available for pick up or to place the card in the mail within two business days following notice by the household to the State agency that the card has been lost or stolen. FNS is further amending its regulations to define the term “trafficking” to include the attempt to buy or sell SNAP benefits in cases where an individual makes the offer to sell SNAP benefits and/or EBT card online or in person.

Finally, FNS is issuing an interim final rule (with a request for additional comment) that requires State agencies to monitor EBT card replacement requests and send notices to those clients who have requested four cards within a 12-month period. The State agency shall be exempt from sending this Excessive Replacement Card Notice if it adopts the card withholding option in accordance with this final rule and sends the requisite Withhold Replacement Card Warning Notice on the 4th replacement card request.

DATES: Effective dates: This final rule is effective [insert 90 days from date of publication in the Federal Register]. The addition of § 274.6(b)(6) is being issued as an interim final rule and is effective [insert date 120 days from date of publication in the Federal Register].

Comment date: FNS will consider comments from the public on the addition of § 274.6.

Comments must be received at one of the addresses provided below on or before [insert 60 days from date of publication in the Federal Register].

ADDRESSES: The Food and Nutrition Service, USDA, invites interested persons to submit comments on the interim rule provision § 274.6(b)(6). Comments may be submitted by one of the following methods:

- Federal e-Rulemaking Portal: Go to <http://www.regulations.gov>. Preferred method; follow the online instructions for submitting comments on docket 2012-0028.
- Fax: Submit comments by facsimile transmission to: Jane Duffield, Chief, State Administration Branch, Fax number 703-305-0928.
- Mail: Comments should be addressed to Jane Duffield, State Administration Branch, 3101 Park Center Drive, Room 818, Alexandria, VA 22302.

- Hand Delivery or Courier: Deliver comments to Jane Duffield, State Administration Branch, 3101 Park Center Drive, Alexandria, VA 22302, Room 818, Monday – Friday, 8:30 am – 5:00 pm.

All comments submitted in response to the interim rule provision will be included in the record and will be made available to the public. Please be advised that the substance of the comments and the identity of the individuals or entities submitting the comments will be subject to public disclosure. FNS will make the comments publicly available on the Internet via <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Jane Duffield, Chief, State Administration Branch, Food and Nutrition Service, USDA, 3101 Park Center Drive, Alexandria, Virginia, 22302. Ms. Duffield may be reached by telephone at 703-605-4385.

SUPPLEMENTARY INFORMATION:

Background

In this final rule, FNS is amending the SNAP regulations at 7 CFR 274.6, to give State agencies an option for handling requests for multiple replacement cards. Current regulations do not allow State agencies to require clients requesting multiple replacement cards to contact the agency and provide an explanation before a new card is issued, even though such requests may indicate fraudulent activity. Under this rule, State agencies may choose to withhold the benefit card when the client has requested an excessive number of replacements, until the client makes contact with the State agency to provide an explanation for the request. State agencies taking this option would be expected to establish a threshold beyond which the individual must make contact. That threshold may not be fewer than four cards in a 12-month period prior to the request, except in limited circumstances.

Although the intent of the rule is not to systematically affect clients requesting fewer than four cards in a 12-month period, FNS recognizes that State agencies may obtain additional evidence indicating that a household is suspected of potential fraud that may warrant initiating the process sooner. For example, if a State agency receives a complaint that an individual sold their EBT card to another party, the State agency shall initiate an investigation and may promptly provide a notice to the client, requiring the individual or household to contact the State agency to provide an explanation prior to receiving a subsequent replacement card.

FNS established the minimum threshold of four cards within a 12-month period on the basis of an analysis of SNAP EBT electronic transaction records. FNS found that shopping behavior appeared consistent when compared to the average until a household requested its fourth replacement card. Transaction activity indicates that, after the fourth replacement card, a household's shopping behavior is three times more likely to be flagged as potential trafficking by FNS' fraud detection system. Trafficking is the exchange of benefits for cash or other consideration, as defined at 7 CFR 271.2, and is the most egregious Program violation. Furthermore, FNS found during the period of January 2012 through December 2012, approximately 98 percent of participating households had three or fewer EBT cards, with most (79 percent) utilizing only one card throughout the year. This further reinforces that most requests for replacement cards are legitimate and when they occur, it is most likely to replace a lost or damaged card. Since so few households request four or more replacement cards and those that do have such markedly different transaction activity as to indicate a higher likelihood of potential trafficking, FNS chose to define a minimum threshold, and to consider requests beyond four cards within a 12-month period to be considered excessive and a potential indicator of trafficking.

Under this option, the State agency must notify the household when the threshold for excessive card replacements is reached, as determined by the State agency, and indicate that if a member of the household requests another card replacement, the State agency will withhold the card until contact is made. The State agency would be expected to contact the fraud investigation unit regarding clients who contact the agency but do not provide an appropriate explanation. The State agency must issue a replacement card during an ongoing investigation. In all cases, States would be required to protect vulnerable persons who lose EBT cards but are not committing fraud.

FNS is further amending 7 CFR 274.6, to change the EBT card replacement timeframes, requiring State agencies to make replacement cards available for pick up or to place the card in the mail within two business days following notice by the client that the card has been lost, stolen, or damaged. Currently, State agencies must ensure clients receive replacement EBT cards within two business days (or five business days if using a centralized mail issuance system) after the client notifies the State agency that the card has been lost or stolen. This change places the requirement on the State agency issuance end instead of the on receiving end of the replacement card process, and alleviates State agencies' responsibility for mail delays beyond their control, while allowing FNS to hold State agencies more accountable for delays within their control.

Additionally, this final rule amends the definition of trafficking to include actions that clearly express the attempt to sell or buy SNAP benefits or EBT cards in person or online through websites and social media.

Finally, FNS is issuing an interim final rule provision at 7 CFR § 274.6(b)(6), that requires State agencies to monitor card replacement requests and issue Excessive Replacement Card Notices to clients who have requested four card replacements in a 12-month period. The State agency shall be exempt from sending this notice if it chooses to exercise the card withholding option, in accordance with 7 CFR 274.6(b)(5), and sends the Withhold Replacement Card Warning Notice upon the household's fourth card replacement request, indicating that the State agency will withhold a fifth replacement card until the household contacts the State agency.

FNS' decision to issue the interim final rule is based on a comment received in response to the proposed rule. The commenter suggested that the Department propose a method for handling multiple card requests similar to that initiated by North Carolina and recently implemented by the majority of States. The commenter added that the process has proven to be efficient and cost effective for State agencies. FNS agrees with this comment and is, therefore, amending the regulations in the same section, requiring States to monitor and send warning notices to clients who request four card replacements in a 12-month period. Based on current data, the number of clients requesting five or more cards has decreased nationally since many States adopted this practice. Since the majority of States currently monitor EBT card replacement requests and subsequently issue warning notices for four or more requests, FNS does not believe this provision will create a substantial burden for States overall.

The proposed rule was published on May 30, 2012, at 77 FR 31738, and public comments were invited through July 30, 2012. All comments have been considered and adjustments have been made to the final and interim final rule. States administering SNAP are required to administer the Program in accordance with the provisions of the Act and regulations issued pursuant to the Act, including 7 CFR parts 271 and 274.

Failure to comply with the final rule and the interim final rule when they become effective would be subject to appropriate FNS action.

Summary of Comments and Explanation of Revisions

Thirty-six comments to the proposed regulations were received from various stakeholders and are available for public inspection online at www.regulations.gov. In general, most commenters supported the regulations but not as currently written. FNS received eight comments in full support of the rule in its entirety. FNS received one comment which did not offer any comments on the contents of this rule but focused on other areas, such as retailer issues, which is being addressed in other FNS rulemaking. FNS also received comments with suggestions for additional ways to reduce trafficking or ways of handling EBT cards. Examples of these suggestions include making benefit cards larger, using neon colors, having a photo on the card, and charging for the cards, as much as \$50.00 from one commenter. These comments were reviewed and considered but will not be included in this final rulemaking as they were not directly related to the proposal for a State option to withhold the card upon excessive card replacement requests until the household makes contact. FNS received three comments which stated that allowing four replacements is too many and that FNS is being too lenient. This comment was considered but is not included in the final rulemaking as FNS utilized a statistical basis for establishing the minimum threshold, one that differentiates between typical behavior and activity that is more likely to indicate fraud, while allowing States to initiate the process sooner if the State is in possession of additional evidence of trafficking.

Allow States To Withhold Replacement Cards Until Contact Is Made With The State Agency

Several commenters suggested that the threshold for card replacements should be applied to individuals, not households, as some households contain more than one person with a card. These commenters further suggested that EBT cards that are never used should not count against the total for replacements. They pointed out that some clients may not use an EBT card because they request a card be mailed but then go to the office and pick up another card before receiving the card in the mail. Another commenter suggested that many first-time users do not understand how to use the card and a grace period in the beginning would benefit those clients. Multiple commenters felt that individuals must be provided notice before reaching the threshold, as well as receiving a notice once they have exceeded the threshold. Two commenters stated the notice should clarify a reasonable timeframe for the individual to respond. Multiple commenters stated that the notice to the individual must contain contact information for individuals who would like to get more information or need help with their card. Some commenters further noted that the notice should contain information about what it means to be referred to the fraud unit and to meet with a fraud investigator. One commenter stated the rule is not clear that the contact can be made by phone or in person, and that it should be made clear that this is the client's choice. FNS received two comments regarding limited English proficiency, which suggested that notices must be sent in the individual's chosen language.

The terms "individual" and "household" are both used in this rule and serve different purposes. FNS does not intend for this rule to require all members of the household make contact with the State agency before a replacement card can be issued. However, the household must receive the proper notification when the card will be withheld. The household must be aware of why the card is being withheld and understand what they are required to do in order to

receive their card replacement. The term “individual” is used regarding the required contact by an individual member of the household. Further, only an individual who has been found guilty through an administrative or court hearing may be disqualified from SNAP, not the entire household, per regulations at 7 CFR 273.16(b)(11). FNS will retain in the final rule that all card replacement requests will count towards the threshold, regardless of the reason for the request.

Some clients may not understand the State’s process for how to request replacement cards or how long to expect the card replacement to take. For example, they may not understand that a replacement card is not needed every time the benefits are spent down or that once a card is requested, it may take a few days to receive the replacement. This may create situations where clients request additional cards while they are waiting for a replacement card to arrive. In such cases, the State would be able to determine that there is no suspicious activity and thus no reason to refer the case for a fraud investigation. In these situations, States have an opportunity to follow up with these cases and educate the clients about the appropriate replacement card process or otherwise intercede, such as appointing an authorized representative to help the household manage the EBT card.

FNS believes that it is sufficient to notify the client once when they have reached the excessive card replacement threshold, prior to the State agency withholding the EBT card, and then once they exceed the threshold, at the times the State agency withholds the EBT card. The final rule requires that States implementing the card withholding option must send notices to the most recent address on file for all households who have reached or exceeded the excessive card replacement threshold. The State agency may only request an explanation, provide a 5th replacement card, and if deemed appropriate, refer the case for investigation, after the State agency has sent the written notice to the household that the State agency is withholding the

household's EBT card. If the State agency has an over-the counter issuance system in place, and the client comes in to request a 5th replacement card, the State agency must document that the client has first received the written warning notice to withhold the 5th replacement card prior to requesting an explanation from the client, replacing the card, and if deemed appropriate, referring the case for investigation.

States are not required to include a timeframe in the notice because the State can continue to hold the card until the client contacts the State agency. It is up to the client to make the contact in order to receive their replacement card. If the client never makes contact with the agency, the card may be held indefinitely, likely until the client is up for recertification or benefits are expunged according to FNS regulations at 7 CFR 274.2(h).

FNS has also clarified that the notices include information about how the client is to contact the State agency, including a telephone number. It is up to the State agency to determine how the contact should be made, such as in person or by phone, and the State agency must take into consideration those with special circumstances and make accommodations for compliance. FNS feels that notice requirements are adequate for their intended purpose and the notice does not require a statement about what it means to be referred for a fraud investigation. Not all households receiving these notices will be referred for an investigation; some are likely candidates for receiving educational information regarding the proper use of their card. State agencies should provide information on proper EBT card use on the notices. FNS will retain in the final rule the requirement that the State ensures that notices meet language requirements described at 7 CFR 272.4(b).

FNS received several comments suggesting that any explanation provided by the individual that is not evidence of fraud is a satisfactory explanation.

Commenters stated that FNS should make clear that the State may only initiate an investigation for fraud when the explanation provides evidence of fraud. One commenter stated that the language is too vague and permissive, and allows eligibility workers to interpret many legitimate explanations as suspicious. Another commenter points to 7 CFR 273.16(a), which states that the disqualification or prosecution process cannot be initiated unless the State agency has sufficient documentary evidence to substantiate fraud.

The final regulation does not specify which client explanations for needing card replacements are suspicious and which are satisfactory. FNS requires States to refer individuals for fraud investigations and conduct investigations on all cases that the State agency has determined suspicious. The State is not required to have evidence in order to conduct an investigation. The purpose of the investigative process is for the State agency to determine if fraudulent behavior occurred, and to gather evidence in order to pursue a disqualification and/or criminal charges where appropriate. If the State cannot gather enough evidence, then the case would not be taken through the administrative disqualification hearing (ADH) process or prosecuted, and no disqualification penalty will be assigned. If the State has gathered enough evidence of an Intentional Program Violation (IPV), the case will be heard by the appropriate authority, who will make a determination as to whether the individual committed an IPV. 7 CFR 273.16(a) does not preclude a State agency from conducting an investigation to collect evidence, rather it specifies that the case may not be taken to an ADH or prosecuted without sufficient documentary evidence – which is gathered during the investigation.

One commenter stated that, if the State provides a replacement card to a household that has made contact but has not provided an explanation for the need to replace the card, the State has rewarded the household for non-cooperation.

Another commenter stated that clients will not cooperate or show up because there is no reason to do so, and FNS should revise the rule to allow the State agency to close the case if the recipient fails to keep the interview appointment or refuses to cooperate during investigations.

FNS does not view the release of the EBT replacement card upon contact with the State agency as rewarding the household for failing to cooperate. This process provides the State agency an opportunity to address the issue with the client to determine if the behavior may be indicative of fraud. In cases where the client does not provide a reasonable explanation for the requests, the State agency must refer the case to the State's fraud investigation unit. This final rule is intended to provide a tool for States to use as a means of assessing these cases of multiple card replacements. It is not intended as a means for a State agency to terminate or close a case.

State agencies may not terminate or close a case where the client has not been found guilty of an IPV through an ADH or a court hearing. Clients have the right to remain silent and have their cases heard by the appropriate authority. Until the client has been found to have committed an IPV, the case may not be closed. This final rule allows the State agency to hold the card until the household makes contact in order to help the State agency determine why they are requesting so many cards. If the client refuses to cooperate by not providing an explanation, this should be taken into consideration and the case must be turned over for an investigation. However, withholding the card until contact is made, regardless of client cooperation, does not affect the client's eligibility for the Program.

One commenter stated that the rule should ensure that States replace cards without any undue delays, such as lengthy waits in State agency offices, lack of access to in-person appointments or inability to reach someone at the State agency by phone. FNS agrees that the State agency must ensure they have a process in place to handle these cases and there is not a

delay in issuing the card when the client complies with the requirement to contact the State agency after reaching the excessive card threshold for replacement cards. The regulation has been modified to require State agencies to mail or make the replacement card available for pick up within two business days after the client contacts the State agency to provide an explanation.

FNS received 11 comments requesting guidance be provided for States that use EBT cards for both SNAP and cash assistance. One commenter expressed concerns as some States use EBT cards for SNAP, cash benefits and Medicaid. The commenter stated that if the card is also used to deliver cash aid, such as Temporary Assistance for Needy Families (TANF), it cannot be withheld or delayed unless the cash assistance program provides for this. FNS recognizes the challenge where EBT cards are used for multiple programs and reiterates that the process for withholding the card in these cases is a State agency's option and not a requirement. FNS has conferred with the United States Department of Health and Human Services (HHS), which has responsibility for the TANF Program, and determined there are no TANF rules preventing States from invoking this option. FNS urges State agencies to work with other assistance programs delivered on the State's EBT card, such as Medicaid, to determine solutions that may address this issue. FNS is willing to assist States in this process.

FNS received four comments regarding the increased workload issues, costliness and requirement of massive system changes to implement this rule. These comments expressed that this option will create a lot of work for State agencies, and the agencies will not get much in return for the extra effort. State agencies may choose not to implement this process because they decide it is not a good use of limited State resources.

One commenter is concerned with implementing this rule timely, and the ability or willingness of EBT contractors to make the necessary changes for reports on card replacements.

This section of the final rule, allowing State agencies to withhold the EBT card until contact is made, is an agency option designed to provide States with a tool to assist in identifying and disqualifying those who are committing IPV against SNAP, as well as to educate those who do not understand how to properly use their EBT card. FNS is not requiring State agencies to implement this option and therefore has no requirement for agencies to comply in a timely manner. FNS encourages State agencies that want to exercise this option to meet with their EBT processors to discuss which reports will be useful and identify their needs so that the EBT processors can determine the best way to support this process. Identifying and disqualifying anyone who commits an IPV by requesting multiple card replacements and trafficking SNAP benefits sends a strong message that abuse of the Program will not be tolerated.

FNS received one comment stating that the rule should direct State agencies to inquire whether an individual who repeatedly requests card replacements needs some accommodation and to investigate the feasibility of allowing restrictions on recipients with disabilities to only use their EBT cards in certain stores. FNS received five comments that the rule should provide much more detail about what the State agency should do to protect victims of crime, the homeless and persons with disabilities. One commenter was concerned that a State agency may require only in-person meetings to get information about excessive card replacements, thus placing severe hardship on the elderly and disabled. Another commenter was concerned about the noticing requirements to the homeless population, making this difficult and impractical to apply equitably to them. Another commenter stated that the homeless should not be excluded from providing an explanation for excessive requests for card replacements. These comments suggested that FNS should provide guidance on specific steps to protect vulnerable populations

and the definition of vulnerable population should be expanded to include other groups, such as illiterate populations and victims of domestic violence.

FNS expects that State agencies will work to ensure no undue hardships are placed on the elderly or disabled and the accommodations State agencies typically make available to comply with federal regulations will also be made available for them if a State agency invokes this option. The Agency thinks the rule is sufficiently clear in this regard. FNS does not have the legal authority to restrict or limit card usage to certain authorized retailers. This option to withhold the card is a tool for State agencies to monitor the integrity of the Program and FNS expects State agencies will follow all existing requirements and regulations if they choose to exercise this option.

The State agency should make every effort to reach those clients who are known to be homeless and to take that circumstance into consideration when these clients reach their card threshold. For example, if a State agency suspects that the client is in a vulnerable status group such as the elderly, disabled, or homeless and needs additional accommodation, the State agency may choose to contact the client for purposes of collecting information for the card replacement option; however, the State agency must still send a warning notice to the most recent address on file prior to requesting an explanation and providing the 5th EBT card replacement. Some State agencies also allow clients who do not list an address to pick up their notices in the local office. State agencies may opt to give written notice to homeless clients and discuss excessive card replacements when homeless clients come into the State agency office to request a card that exceeds the threshold. Those clients which are part of the vulnerable populations are not excluded from providing an explanation but may need accommodations to assist them in providing the explanation.

State agencies should take the household's circumstances into account when considering their explanation for needing multiple replacements. The regulation, as written, encompasses other vulnerable populations, such as those who are illiterate, those with language barriers and victims of domestic violence, which allows for State agencies to make a determination as they become aware of a client's circumstance. FNS has removed references that suggest that contact must be made by phone or in-person. While phone and in-person contact is acceptable, this will provide State agencies the flexibility to offer other contact options to those with special circumstances.

Several comments asked for FNS to clarify what sufficient additional evidence they would need to provide to warrant withholding a card sooner than the threshold. A commenter also stated that the evidence be specific to the individual, rather than a characteristic that they may share with others, such as residency or the food store where they shop. There are many circumstances a State may become aware of that would make them want to take action sooner. State agencies may in fact receive evidence that direct them to a particular household based on activity by one household member or transactions conducted at a store under suspicion of trafficking. A State agency may receive a complaint indicating that a client is selling their card for cash and then requesting a replacement card. Or a State agency may flag a client based on suspicious transaction activity that is indicative of trafficking. Some clients may already be under investigation and the State agency may already have additional evidence in their case when the client makes another card request. These are examples of cases where the State agency has additional evidence that may warrant noticing the client sooner than the determined threshold. By determining four cards within a 12-month period as excessive, FNS is providing State agencies with its expectation of how to respond systematically. The minimum threshold is not intended to preclude a State agency from initiating the process sooner for individual

households if they have additional evidence that warrants doing so, to ensure that potential trafficking situations are identified and acted upon quickly.

FNS received four comments that interrupting the household's access to benefits by delaying or denying a replacement card would deny the household its right to a predetermination hearing under 7 CFR 273.15, section 11(e)(10) of the Act, and due process clauses as interpreted by Goldberg v. Kelly, 397 US 254 (1970). Another commenter stated that, since these are adverse actions, if the client does not contact the State agency, the regulation must provide that the notice include information about fair hearing rights.

FNS does not agree that the rule fails to provide due process. FNS currently allows State agencies the choice to make cards available to clients either by coming to the office to pick them up or by mail. While most State agencies use a central mail process to issue cards, there are agencies which only use the over-the-counter method for issuing cards to clients. Other State agencies use the over-the-counter method but will mail cards in special circumstances. This has always been a State agency's option and FNS does not consider the over-the-counter method as interrupting a household's access to benefits or violating due process requirements. The cards and benefits are available for the client once the card is made available pursuant to current regulations at 7 CFR 274.6(b). Similarly, when the State agency chooses to withhold the card until the client makes contact, those agencies must make the card available, pursuant to 7 CFR 274.6(b) in this final rule, to the client once the client makes the required contact. Furthermore, as stated earlier, eligibility remains unaffected by this process. The benefits the household has been determined eligible to receive are made available on the EBT card as long as the household remains eligible and the client has access to the card by making the required contact with the

State agency. Therefore, because the withholding of a replacement card in accordance with this final rule is not an adverse action, Section 11(e)(10) of the Act and 7 CFR 273.15 do not apply.

Commenters also stated that there is the possibility of coercion because the threat of delay of benefits forces someone to incriminate themselves. FNS does not believe that this would be coercion because the client is not required to provide an explanation in order to receive their card. The card will be given to the client regardless of their willingness to answer questions or otherwise cooperate beyond making contact. State agencies are expected to clearly explain in their notice to clients that clients must contact the State agency but that they are not required to provide an explanation in order to receive a replacement card. Notices to clients should explain that the process is being used to yield useful, accurate information and will not be used in a way that might harass or coerce clients into making false statements.

FNS received one comment stating that the commenter was unclear how withholding the card improves trafficking prevention if FNS has the ability to track EBT data. By withholding the card, FNS believes it provides the State agency with the necessary tools to obtain sufficient information from a household in order to determine the nature of the excessive card replacement requests. This information allows the State agency to better determine whether the request is legitimate and indicates a need to educate the household on how to better manage their EBT card, or that an explanation is suspicious and warrants a referral for investigation.

Another commenter asked that further clarification should be provided concerning the analysis used to determine the four card threshold. FNS determined the minimum threshold of four cards within a 12-month period based on the fact that 98 percent of households use three or fewer cards within a year, with most (79 percent) using only one card.

Also, for those that exceed the fourth replacement card, their transaction activity is three times more likely to be flagged as trafficking by FNS' fraud detection system.

FNS received one comment that the rule is restrictive since State agencies are unable to make contact for subsequent replacement requests beyond the threshold level unless the pattern has changed. The commenter suggests that each person is limited to one call or visit to explain the circumstances for the request and this does not do much to deter fraud. If the State agency has spoken with the client or conducted an investigation and found no evidence of fraud, the agency may not continue to withhold that card. However, the State agency should continue to monitor additional card requests, and if the household continues to request additional cards and the pattern of card activity changes to indicate possible trafficking behavior, the State agency may notify the household that the State agency is withholding the EBT card and that the household must contact the State agency to provide an explanation before receiving another card.

FNS received multiple comments referencing the rule is too lenient and allowing four cards is too many. As noted above, the minimum threshold is based on an analysis by FNS of electronic transaction data, which demonstrates a statistically significant difference when a household requests a fourth replacement card indicating that transaction activity is three times more likely to be flagged as potential trafficking, compared to clients with three or fewer replacement cards. As the intent of the rule is to further strengthen program integrity, FNS believes that the threshold of four cards within a 12-month period is appropriate. However, FNS acknowledges that State agencies may want to initiate the process sooner if they have additional evidence that a household is suspected of trafficking, thus the final rule maintains this provision.

Required Excessive Replacement Card Notice

In new paragraph 7 CFR 274.6(b)(6), FNS has included a requirement in this interim rule that State agencies monitor requests for EBT card replacements and send a Excessive Replacement Card Notice to clients who request four cards in a 12-month period. If a client requests a fifth replacement card, the State agency shall refer the case to the State's fraud investigation unit, if they suspect the client is trafficking. If the State agency suspects the client's lack of understanding of how to manage an EBT card is the reason for requesting excessive replacement cards, no referral for investigation is warranted and, therefore, should not be made.

If the State agency chooses to exercise the option to withhold the replacement card until it is contacted by the client, and as long as the threshold used for the initial Withhold Replacement Card Warning Notice is on the fourth card replacement request, the State agency shall be exempt from sending the Excessive Replacement Card Notice, in accordance with 7 CFR 274.6(b)(6)(i). If the State agency chooses the option to withhold the replacement card and uses a threshold higher than the fourth card replacement request for the initial notice, the State agency must send the Excessive Replacement Card Notice upon the fourth card request in accordance with 7 CFR 274.6(b)(6). This interim rule provides a minimum requirement for the contents of the required Excessive Replacement Card Notice. States may contact FNS for specific examples. Paragraph 274.6(b)(6) is being published as an interim final rule in order to provide the opportunity for comment.

The decision to include paragraph 274.6(b)(6) as an interim rule is based on a comment received on the proposed regulation. The comment notes that FNS has touted the North Carolina agency's approach to handling multiple card replacements the State agency sends a letter to any

household requesting four or more cards in a 12-month period and if another request is made, refers the case to the State's fraud investigation unit. The commenter added that the model to use a letter to deter excessive card replacements has proven to be very effective and less burdensome for State agencies and should have been reflected in the proposed regulation. FNS agrees with the commenter that the North Carolina agency's model is a reasonable and simple process and is aware that the majority of State agencies are currently issuing notices based on this model.

FNS believes that all State agencies should be monitoring card replacement activity and that the requirement to issue an Excessive Replacement Card Notice, as set forth in this interim final rule, along with the option to withhold a replacement card until the client contacts the State agency, as set forth in the final rule, provide important tools for State agencies to use in monitoring and preventing trafficking of EBT cards. Since the majority of States currently send warning notices to households with four or more replacement card requests, FNS does not believe the noticing requirement will substantially increase the burden for State agencies overall.

Card Replacement Timeframes

Thirteen commenters addressed the provision prescribing a one business day timeframe when State agencies must make a replacement card available for pick up or place a replacement EBT card in the mail instead of when the client must actually receive the EBT card.

Some commenters believed the proposed change is unwarranted and would result in delaying benefits to needy households. Other commenters wanted FNS to require that State agencies replace EBT cards within 7 days when mailing cards instead of requiring that State agencies place the card in the mail within one business day.

Because State agencies do not have control over the length of time it takes the United States Postal Service (USPS) to get replacement EBT cards into the hands of SNAP households, FNS believes that prescribing when States must act on a card replacement request is a better approach to minimize possible delays that are beyond the States' control. In the end, FNS expects that the new provision will better ensure that SNAP households receive their replacement cards within a reasonable amount of time, while also giving FNS greater ability to hold State agencies accountable for delays within their control.

Another commenter felt the proposed requirement for placing the card in the mail within one day is too restrictive because State agencies need more days to investigate and verify instances of identity theft or other possible abuses. Another commenter felt State agencies should be able to determine their own timeframes for mailing or making replacement cards available, depending on the number of replacement cards requested, the reason for the request, and other factors. The commenter added that if the replacement is questionable, but does not prove fraud, the State agency would then be able to extend the timeframe to a longer period so the household is penalized. The proposed rule specifically provides State agencies the opportunity for further investigation, if there have been multiple card replacement requests before having to provide another card. As a result, State agencies now have the ability to delay a card replacement until contact is made for an individual household that meets the threshold for excessive card replacements or whose request is questionable based on available evidence. At the same time, FNS continues to believe clients who have legitimately lost their card or had it stolen must receive a replacement card within a reasonable amount of time to ensure they have access to benefits necessary to meet their dietary needs. Therefore, in an effort to take the different perspectives into consideration, FNS has decided to extend the timeframe by when

State agencies must act on card replacement requests that do not meet the criteria for further investigation to two business days instead of one.

Several commenters also requested FNS specifically prohibit the use of bulk mail, indicating that many State agencies use bulk mail postage to reduce costs, which results in delayed mailings as a State agency waits to amass enough items to reach the bulk rate minimum. As a result, bulk mail may not be delivered for several weeks, in contrast to the typical delivery time of 5 days for regular mail. Under the new provision, State agencies must meet the required two-day timeframe for acting on card replacement requests. Therefore, they cannot wait to amass enough replacement cards to reach the minimum requirement for bulk rate mailings. Furthermore, the use of first class mail for issuing cards is already required under 7 CFR 274.2(b). However, FNS is convinced of the importance of specifically requiring first class mail when mailing replacement cards in order to prevent excessive delays in getting clients the access they need to their benefits. Therefore, under §274.6, we are specifically requiring that State agencies issue replacement cards in accordance with the requirement under §274.2 to use first-class mail and sturdy non-forwarding envelopes when mailing EBT cards.

One commenter requested that FNS specifically prohibit mailing Personal Identification Numbers (PINs) with EBT cards, while another commenter asked that both the card and PIN be mailed within one business day. The proposed provision required that State agencies mail EBT cards and PINs in accordance with industry standards. In general, States agencies no longer mail assigned PINs and all provide clients with the ability to select their own PIN through an automated response unit. However, FNS understands that PINs must be mailed separately from EBT cards to prevent theft and fraudulent use of the card and that clients cannot access their benefits without the PIN. Therefore, for those State agencies that mail assigned PINs or provide

that option, we are specifically requiring that PINs and cards be mailed separately and PINs be mailed one business day after the card is mailed. This requirement applies to both initial issuance and card replacements.

Several other commenters felt State agencies should be required to explain to the household their options for mailing or picking up a replacement card and the timeframe associated with both. FNS wishes to clarify that State agencies are not required to provide both mailing and pick-up options, nor did FNS propose all State agencies should now offer both options. In general, State agencies rely mostly on one method or the other, providing the alternative option in only special circumstances. Because there are both advantages and disadvantages associated with each option, FNS continues to believe that State agencies are in the best position to decide which option better meets the needs of their SNAP population. Furthermore, training requirements in 7 CFR 274.2(e) already require State agencies to inform all households of the card replacement policies. Therefore, FNS will continue to rely on the existing provision for informing clients of the card replacement timeframes and possible options.

Finally, in response to a comment regarding the timeframes for cards other than those that are lost or stolen, FNS is including damaged cards in the card replacement provision in order to be consistent with related language in other provisions.

Clarify the Definition of Trafficking

In the proposed rule, FNS clarified the definition of trafficking to include the intent to sell SNAP benefits. FNS received numerous comments that the definition of trafficking should use the word “attempt” instead of “intent.” Commenters state that the word “intent” permits State agencies to take action based on what people are thinking and not what they are doing.

“Attempt” consists of the intent to do an act, an overt action beyond mere preparation, and the failure to complete the act. FNS also received numerous comments that the definition of “trafficking” should include the word “buy” as well as the word “sell”. FNS agrees with both of these comments and has made this change in the final regulation language.

FNS received one comment that the rule should make clear that the party found to have committed an IPV is the individual who violates, or attempts to violate, the Program. Other members of the household, including the head of household, should not be found to have committed an IPV if they are not involved in the activity. FNS agrees with this comment. FNS regulations under 7 CFR 273.16(b)(11) are clear that IPV’s are assigned to individuals who are found guilty and not the entire household. FNS expects State agencies to comply with FNS regulations and only the household member who committed the IPV is disqualified from the Program. As this perspective is already clear in regulation, no additional modifications are being made.

FNS received one comment that adding to a definition that already prohibits this behavior is an expansion, not a clarification. The comment further states that USDA already clarified in a policy memo that the regulations already prohibit this behavior. FNS agrees that it is amending the definition of “trafficking” to include the **attempt** to buy and sell benefits, thus giving State agencies expanded means to target both retailers and recipients who attempt to buy or sell SNAP benefits online or in person.

FNS received five comments regarding eliminating the reference to “coupons.” FNS also received one comment that the definition should include both recipients and retailers. A final rule titled, *Supplemental Nutrition Assistance Program (SNAP): Updated Trafficking Definition and Supplemental Nutrition Assistance Program – Food Distribution Program on Indian*

Reservations Dual Participation, 78 Fed. Reg. 11967 (Feb. 21, 2013) eliminates coupon terminology from the trafficking definition and applies the trafficking definition to both clients and retailers.

Procedural Matters

Executive Order 12866

This rule has been determined to be not significant and was reviewed by the Office of Management and Budget (OMB) in conformance with Executive Order 12866.

Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (RFA) of 1980, 5 U.S.C. 601-612. Pursuant to that review, it has been certified this rule would not have a significant impact on a substantial number of small entities. State agencies that distribute Supplemental Nutrition Assistance Program benefits are the entities affected by this change.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local and Tribal governments and the private sector. Under section 202 of the UMRA, the Department generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with ``Federal mandates" that may result in expenditures by State, local or Tribal governments, in the aggregate, or the private sector, of \$100 million or more in any one

year. When such a statement is needed for a rule, Section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the most cost effective or least burdensome alternative that achieves the objectives of the rule.

This final rule does not contain Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local and Tribal governments or the private sector of \$100 million or more in any one year. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12372

The Supplemental Nutrition Assistance Program is listed in the Catalog of Federal Domestic Assistance Programs under 10.551. For the reasons set forth in the final rule in 7 CFR part 3015, subpart V, and related Notice (48 FR 29115, June 24, 1983), this program is included in the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

Federalism Summary Impact Statement

Executive Order 13132, requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under Section (6)(b)(2)(B) of Executive Order 13132. FNS has considered this rule's impact on State and local agencies and has determined that because the majority of States currently send warning notices to households with four or more replacement card requests, this rule does not

have federalism implications under Executive Order 13132. This rule does not impose substantial or direct compliance costs on State and local governments. Therefore, under Section (6)(b) of the Executive Order, a federalism summary impact statement is not required.

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This final 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 and timely implementation. This rule is not intended to have retroactive effect unless so specified in the Dates section of the final rule. Prior to any judicial challenge to the provisions of the final rule, all applicable administrative procedures must be exhausted.

Civil Rights Impact Analysis

FNS has reviewed this final rule in accordance with the Department Regulation 4300-4, "Civil Rights Impact Analysis," to identify and address any major civil rights impacts the rule might have on minorities, women and persons with disabilities. After a careful review of the rule's intent and provisions, FNS has determined that this rule will not in any way limit or reduce the ability of protected classes of individuals to receive SNAP benefits on the basis of their race, color, national origin, sex, age, disability, religion or political belief nor will it have a differential impact on minority owned or operated business establishments, and women owned or operated business establishments that participate in SNAP.

Executive Order 13175

Executive Order 13175, requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. In November of 2011 and May of 2013, USDA engaged in a series of consultative sessions to obtain input by Tribal officials or their designees concerning the impact of this rule on the tribe or Indian Tribal governments, or whether this rule may preempt Tribal law. Reports from these sessions for consultation will be made part of the USDA annual reporting on Tribal Consultation and Collaboration.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR 1320) requires the Office of Management and Budget (OMB) approve all collections of information by a Federal agency before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number. This final and interim final rule contains information collections that are subject to review and approval by OMB. Therefore, FNS has submitted an information collection under 0584-NEW, which contains the burden information in the rule for OMB's review and approval. The new provisions in this rule, which increase current burden hours by 8,336 hours, will be merged into Supplemental Nutrition Assistance Program (SNAP) Forms: Applications, Periodic Reporting, Notices, OMB Control Number #0584-0064, expiration date 4/30/2016. These changes are

contingent upon OMB approval under the Paperwork Reduction Act of 1995. When the information collection requirements have been approved, the Department will publish a separate action in the Federal Register announcing OMB's approval.

Comments on the information collection in this final and interim final rule must be received by **[insert 60 days from date of publication in the Federal Register]**. Send comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for FNS, Washington, DC 20503. Please also send a copy of your comments to Jane Duffield, State Administration Branch, 3101 Park Center Drive, Alexandria, VA 22302. For further information, or for copies of the information collection requirements, please contact Jane Duffield at the address indicated above. Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the Agency's functions, including whether the information will have practical utility; (2) the accuracy of the Agency's estimate of the proposed information collection burden, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

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

Title: Supplemental Nutrition Assistance Program: Trafficking Controls and Fraud Investigations.

OMB Number: 0584-NEW

Expiration Date: Not Yet Determined

Type of Request: New Collection

Abstract:

This rule codifies provisions for State Agencies to issue warning notices to withhold replacement cards or a notice for excessive replacement cards.

Withhold Replacement Card Warning Notice: State agencies may require an individual member of a household to contact the State agency to provide an explanation in cases where the number of requests for card replacements is determined excessive. The State agency must notify the household in writing when it has reached the threshold, indicating that the next request for card replacement will require the client to contact the State agency to provide an explanation for the requests, before the replacement card will be issued. The State agency must also notify the household in writing once the threshold has been exceeded and the State agency is withholding the card until contact is made.

Excessive Replacement Card Notice: State agencies must monitor all client requests for EBT card replacements and send a notice, upon the fourth request in a 12-month period, alerting the household their account is being monitored for potential, suspicious activity. The State agency is exempt from sending this notice if they have chosen to exercise the option to withhold the replacement card until contact is made with the State agency.

The average burden per response and the annual burden hours are explained below and summarized in the charts which follow.

Respondents for this rule: State and Local Agencies; Households

Estimated Number of Respondents for this rule: 23,864

Estimated Number of Responses per Respondent for this rule: 2.49

Estimated Total Annual Responses: 59,528

Estimated Total Annual Burden on Respondents for this rule: 8,336

ESTIMATED ANNUAL BURDEN FOR 0584-NEW SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM: TRAFFICKING CONTROLS AND FRAUD, 7 CFR 274						
CFR	Title	Number of Respondents	Annual Reports	Total Annual Responses	Burden Hours per Response	Total Burden Hours
Affected Public: State and Local Agencies						
274.6(b)(5)	Withhold Replacement Card Warning Notice	26.5	449.26	11,905.5	0.0334	397.64
274.6(b)(5)	Replacement Card Withheld Notice	26.5	449.26	11,905.5	0.0334	397.64
274.6(b)(6)	Excessive Replacement Card Notice	26.5	449.26	11,905.5	0.0334	397.64
Subtotal		53	673.896	35,716.5	0.0334	1,193
Affected Public: Households						
274.6(b)(5)	Withhold Replacement Card Warning Notice	11,905.5	1	11,905.5	0.3	3,571.65
274.6(b)(5)	Replacement Card Withheld Notice	11,905.5	1	11,905.5	0.3	3,571.65
Subtotal		23,811	1	23,811	0.3	7,143.30
Grand Total		23,864	2.494	59,527.5	0.1400	8,336

The 8,336 burden hours will be merged with OMB #0584-0064

List of Subjects in 7 CFR Parts 271 and 274

Food stamps, Grant programs-social programs, Reporting and recordkeeping requirements

For the reasons set forth in the preamble, 7 CFR parts 271 and 274 are amended as follows:

1. The authority citation for 7 CFR parts 271 and 274 continue to read as follows:

Authority: 7 U.S.C. 2011-2036.

PART 271—GENERAL INFORMATION AND DEFINITIONS

2. In § 271.2, add paragraph (6) to the definition of “trafficking” to read as follows:

§ 271.2 Definitions.

* * * * *

Trafficking means: * * *

(6) Attempting to buy, sell, steal, or otherwise affect an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signatures, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone.

* * * * *

Part 274 - ISSUANCE AND USE OF PROGRAM BENEFITS

3. In §274.2, amend paragraph (b) by removing the last sentence and by revising paragraph (f) to read as follows:

§ 274.2 Providing benefits to participants.

* * * * *

(f) *EBT cards and Personal Identification Numbers (PINs)*. (1) State agencies which issue EBT cards by mail shall, at a minimum, use first class mail and sturdy nonforwarding envelopes or packages to send EBT cards to households.

(2) The State agency shall permit SNAP households to select their PIN.

(i) PIN assignment procedures shall be permitted in accordance with industry standards as long as PIN selection is available to clients if they so desire and clients are informed of this option.

(ii) If assigning a PIN by mail in conjunction with card issuance, State agencies shall mail the PIN separate from the card one business day after the card is mailed.

* * * * *

4. In § 274.6:

a. Revise paragraph (b) introductory text and add paragraphs (b)(4) and (5); and

b. Effective [insert date 120 days from date of publication in the Federal Register], add paragraph (b)(6).

The revision and additions read as follows:

§ 274.6 Replacement issuances and cards to households.

* * * * *

(b) *Providing replacement EBT cards or PINs.* The State agency shall make replacement EBT cards available for pick up or place the card in the mail within two business days following notice by the household to the State agency that the card has been lost, stolen or damaged unless the State agency implements a replacement procedure pursuant to paragraph (b)(5) of this section.

* * * * *

(4) *Replacement card.* The State agency shall issue replacement cards and PINs in accordance with § 274.2(f) of this chapter.

(5) *State option to withhold replacement card.* The State agency may require an individual member of a household to contact the State agency to provide an explanation in cases where the number of requests for card replacements is determined excessive. If they so require, the State

agency must establish a threshold for the number of card replacements during a specified period of time to be considered excessive. That threshold shall not be less than four cards requested within 12 months prior to the request, unless the State agency has additional evidence indicating a suspected trafficking violation, as defined at § 271.2 of this chapter. If a trafficking violation is suspected prior to the fourth card request, the State agency shall refer the client for investigation and, if deemed appropriate, may provide a notice to the client, requiring the individual or household to contact the State agency to provide an explanation prior to receiving a subsequent replacement card.

(i) The State agency shall notify the household in writing when it has reached the threshold, indicating that the next request for card replacement will require contact with the State agency to provide an explanation for the requests, before the replacement card will be issued. The State agency shall also notify the household in writing once the threshold has been exceeded that the State agency is withholding the card until contact is made. These notices must:

- (A) Be written in clear and simple language;
- (B) Meet the language requirements described at § 272.4(b) of this chapter;
- (C) Specify the number of cards requested and over what period of time;
- (D) Explain that the next request, or the current request if the threshold has been exceeded, requires contact with the State agency before another card is issued;
- (E) Provide all applicable information on how contact is to be made in order for the client to comply, such as whom to contact, a telephone number and address;
- (F) Include a statement that explains what is considered a misuse or fraudulent use of benefits and the possibility of referral to the fraud investigation unit for suspicious activity.

(ii) Following notification, should another card be requested, the State agency shall require that the household contact the State agency to provide an explanation for the requests. If the client makes contact, the State agency shall make the replacement EBT card available for pick up or place the card in the mail in accordance with § 274.2(f) of this chapter within two business days following household contact with the State agency, regardless of whether or not an explanation was provided.

(A) If a household does not contact the State agency in response to the State agency's notice, the State agency shall not issue a replacement card to the household and the case must be referred for investigation.

(B) The State agency shall educate the client on the proper use of the card if the explanation is deemed appropriate and the State agency shall not require contact upon subsequent requests, unless the pattern of card activity has changed since the initial contact and indicates possible trafficking activity.

(C) The State agency shall refer the individual for investigation in cases where the individual contacts the State agency but refuses to explain the card losses or the explanation provided appears to be indicative of trafficking in accordance with § 271.2 of this chapter. The State agency shall issue a replacement card to any household that makes the required contact so that the household has access to benefits in its EBT account while the investigation is underway and while awaiting a hearing, in accordance with § 273.16(e)(5).

(iii) In all cases, a State agency shall act to protect households containing homeless persons, elderly or disabled members, victims of crimes and other vulnerable persons who may lose EBT cards but are not committing fraud.

(6) Excessive Replacement Card Notice. The State agency shall monitor all client requests for EBT card replacements and send a notice, upon the fourth request in a 12-month period, alerting the household that their account is being monitored for potential, suspicious activity. If another replacement card is subsequently requested and trafficking is suspected, the State agency shall refer that case to the State's fraud investigation unit.

(i) The State agency shall be exempt from sending the Excessive Replacement Card Notice if they have chosen to exercise the option to withhold the replacement card until contact is made with the State agency, in accordance with paragraph (b)(5) of this section, as long as the State agency has chosen to use the minimum threshold, which requires sending the first warning notice on the fourth card replacement request within 12 months. If the State agency chooses to use a threshold higher than the fourth card replacement request, the State agency must send the Excessive Replacement Card Notice on the fourth card request in accordance with this section.

(ii) The State agency shall notify the household in writing upon their fourth card request that their case is being monitored. This notice shall, at a minimum:

(A) Be written in clear and simple language;

(B) Meet the language requirements described at § 272.4(b) of this chapter;

(C) Specify the number of cards requested and over what period of time;

(D) Explain that the transactions of the cardholder's account are being monitored for potential trafficking activity;

(E) Include a statement that explains what is considered a misuse or fraudulent use of benefits and the possibility of referral to the State's fraud investigation unit for suspicious activity.

(F) Provide contact information, including a telephone number, should the household have questions or concerns regarding the notice.

Audrey Rowe
Administrator
Food and Nutrition Service

Dated: August 7, 2013.

[FR Doc. 2013-20245 Filed 08/20/2013 at 8:45 am; Publication Date: 08/21/2013]