

Congress of the United States
Washington, DC 20510

December 2, 2019

SNAP Certification Policy Branch
USDA Food and Nutrition Service
Program Development Division
3101 Park Center Drive
U.S. Department of Agriculture
Alexandria, VA 22302

RE: Notice of Proposed Rulemaking, *Supplemental Nutrition Assistance Program: Standardization of State Heating and Cooling Standard Utility Allowances*, 84 Fed. Reg. 52,809 (October 3, 2019) (to be codified at 7 C.F.R. 273), RIN 0584-AE69

Secretary Perdue:

We write to express our opposition to the proposed rule promulgated by the Department of Agriculture (“the Department”) entitled, *Supplemental Nutrition Assistance Program: Standardization of State Heating and Cooling Standard Utility Allowances*, 84 Fed. Reg. 52,809 (October 3, 2019) (to be codified at 7 C.F.R. 273) (“Proposed Rule”). As Members of Congress representing Washington state we share a commitment to guaranteeing that our constituents receive SNAP benefits in accordance with Congressional intent, which is to ensure that low-income people can afford nutritious food and thereby reduce hunger, malnutrition, poverty, and improve child and adult health and employment outcomes. With these interests in mind, we are concerned that the Proposed Rule, if finalized, would violate federal law and significantly reduce SNAP benefits without adequate basis. The Proposed Rule, which attempts to standardize the method for calculating Standard Utility Allowances (SUA) under SNAP, will result in over 350,000 Washington state families seeing a significant reduction in their SNAP benefits. As detailed below, this rule will hurt Washington state residents, harm public health, and negatively impact local economies.

I. The Proposed Rule removes necessary flexibility from states to calculate Standard Utility Allowances and significantly reduces SNAP benefit amounts

SNAP serves low-income individuals and families in our state who are overwhelmingly working adults, infants and children, elderly people, or individuals with disabilities. SNAP benefit amounts are based on countable gross income minus applicable deductions, and utility expenses are considered a deduction. Under 7 CFR § 273.9 (d)(6)(iii), states are allowed the flexibility to develop their own methodology for calculating SUA. Under the current method, states consider everyday utility costs such as heating, cooling, and electricity, and set utility allowances to cover most SNAP household energy expenses during the highest energy usage months.

The Proposed Rule – the third administrative action this year that would cut SNAP benefits – would take away this flexibility. This “one-size-fits-all” approach would set SUAs for all states

at the 80th percentile of utility costs for low-income households per state based on USDA's estimate from national survey data; this rule would force Washington state to lower the value of its SUA, thereby reducing many recipients' SNAP benefit amount.

Washington state currently offers a range of utility deductions to determine SNAP eligibility under a methodology that accurately represents utility expenses for Washingtonians. Washington's methodology was developed using information from the American Community Survey, Office of Financial Management, Energy Information Association, and annual costs per utility from local utility providers. These information sources and Washington's current methodology replaced an outdated market basket survey calculation. USDA has approved the state's current methodology and has not adequately explained why it now views it as inadequate or too high.

While the USDA contends that standardization is necessary to ensure that SUAs are not over- or underestimated, the approach selected by USDA uses data sources that will result in broad SNAP benefit reductions in Washington state and other states. Nationally, this will result in a cut of \$4.5 billion to SNAP over 5 years. Indeed, the Department's own Regulatory Impact Statement concludes that one in five SNAP households will see their benefits reduced. And, the distribution of these impacts tells an even more troubling story: those households who lose benefits will see an average deduction of \$32.20 per month, while the smaller proportion of those who see an increase will only see an average \$13.90 per month increase. Thus, far from achieving a workable, standardized solution with minimal impact on SNAP recipients and state agencies, this rule significantly reduces SNAP benefits overall.

II. The majority of Washington state SNAP households will see a significant and disproportionate reduction in benefits, including over 13,000 infant children

The impact of this rule in Washington state is disproportionately severe. A November 2019 analysis from the Washington State Department of Social and Health Services (DSHS) found that the proposed rule would result in an estimated monthly reduction in benefits of \$16,406,323. This translates to an average reduction of \$47 per month per household—significantly higher than the national average cut of \$32.20 per month—which will negatively impact over 350,000 families' health and our state's economy. Importantly, nearly 75 percent of Washington state SNAP households receive a utility allowance, meaning that *most* SNAP recipients will be impacted by this change. Further, in Washington state there are over 4,400 pregnant individuals, 13,000 infants, 78,000 children aged 1-5 years old, and over 162,000 school aged children receiving SNAP benefits who all stand to see their benefits significantly reduced under this rule.

Due to this reduction in benefits, individuals and families may require an increased need for support from other programs, such as WIC and local food pantries. Such a move undercuts Congressional intent of the SNAP program, which seeks to improve access to nutrition for low-income Americans. This rule would force families and children to go hungry or look elsewhere for assistance, with no guarantee that they would secure such assistance. Research from the National Academy of Sciences suggests that the existing SNAP formula is already inadequate for

families with children, who often exhaust this modest support before the end of the month.¹ The National Academy concurs that the Proposed Rule would only worsen this problem, not improve it. Subsequently, we must underscore the National Academy's assessment that SNAP is "of central importance for reducing child poverty," and is "by far the single most important tax and transfer program for reducing deep poverty" in children.²

III. The Proposed Rule would, if finalized, violate the Administrative Procedure Act and is contrary to Congressional intent

The Proposed Rule, if enacted, would violate the Administrative Procedure Act. The Administrative Procedure Act ("APA") prohibits agency action that is "arbitrary, capricious" or "not in accordance with law." 5 U.S.C. § 706(2)(A). Agency action can be arbitrary and capricious if the agency failed to consider all "relevant factors," *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977), or ignored "an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43-44 (1983).

Here, the Department's proposal entirely fails to consider an important aspect, namely, the administrative impact the Proposed Rule would have on state social benefits systems. The Department claims, without evidence, that "[b]ecause they would no longer need to calculate or update [SUA] annually, the Department anticipates lower administrative burden on State Agencies."³ Throughout the Regulatory Impact Statement, the Department repeatedly claims that the effect on State agencies will not be "measurable" or is otherwise negligible. This is incorrect.

The Proposed Rule has *substantial* direct compliance costs for Washington state. According to Washington's Department of Social and Health Services (DSHS), because this rule would implicate approximately three-quarters of all SNAP recipient households and the state would drop the option to mandate the use of SUA, the state would need to hire an additional 52 full-time employees (FTEs) to verify utility expenses at application and recertification. This additional burden will increase application processing times and increase churn at application review. Beyond this, additional operational impacts include expending staff time to update existing training and provide clarified processes for field staff.

Relatedly, we must stress the impact this rule could have on our constituents when considering the various other rules that have not yet gone into effect. SNAP participation will be negatively impacted by the Categorical Eligibility proposed rule as well as the Department of Homeland Security's Inadmissibility on Public Charge Grounds rule. Indeed, the Regulatory Impact

¹ NATIONAL ACADEMIES OF SCIENCES, MEDICINE, AND ENGINEERING, A ROADMAP TO REDUCING CHILD POVERTY (2019), <http://fedcapgroup.org/wp-content/uploads/2019/11/Roadmap-to-Reducing-Child-Poverty-NAP.pdf>

² *Id.* at 117.

³ *Supplemental Nutrition Assistance Program: Standardization of State Heating and Cooling Standard Utility Allowances*, 84 Fed. Reg. 52,809 (October 3, 2019) (to be codified at 7 C.F.R. 273), Regulatory Impact Analysis, 0584-AE69 at 18.

Statement for this rule directly acknowledges that it is not possible to fully assess the potential impacts precisely because of these other rules' negative interlocking impacts on SNAP participation.

Further, if the agency action contradicts congressional intent of an underlying law, the action can be set aside as "not in accordance with law." 5 U.S.C. § 706(2)(A); *see also FCC v. NextWave Pers. Comm. Inc.*, 537 U.S. 293, 300 (2003). Here, the Proposed Rule's altering of SUA methodology is at odds with the underlying intent of the Farm Bill and subsequent amendments. The Agricultural Improvement Act of 2018 (P.L. 115-334) preserved the current SUA methodology after the President's FY 2019 Budget included a request for a change similar to the Proposed Rule. After extensive negotiations, the final Farm Bill conference report did not include the President's requested change and was overwhelmingly passed by the Senate (87-13) and the House (369-47) on a bipartisan basis before being signed into law in December 2018 – more votes from Congress than any other Farm Bill in history. As such, this law represents a bipartisan consensus that directs food and farm policy for a five-year period particularly as it relates to the proper SUA methodology. USDA's legal and policy justifications for this proposed rule are tenuous, and more importantly, vastly outweighed by the proposed rule's negative impacts on food security and increased costs to state agencies.

IV. Washington state will incur substantial direct compliance costs that were not considered by USDA in violation of Executive Order 13132

As discussed, the Proposed Rule will substantially increase administrative costs to Washington state. These costs were not considered in a federalism summary impact statement by the Department as required under Executive Order 13132. Specifically, the Executive Order mandates that:

no agency shall promulgate any regulation that has federalism implications, that imposes substantial direct compliance costs on State and local governments, and that is not required by statute, unless: (1) funds necessary to pay the direct costs incurred by the State and local governments in complying with the regulation are provided by the Federal Government; or (2) the agency, prior to the formal promulgation of the regulation, (a) consulted with State and local officials early in the process of developing the proposed regulation; (b) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of the Office of Management and Budget (OMB) a federalism summary impact statement, which consists of a description of the extent of the agency's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met; and (c) makes available to the [OMB] Director any written communications submitted to the agency by State and local officials.

Exec. Order No. 13,132, 64 Fed. Reg. 43,257 (Aug. 10, 1999).

The Proposed Rule does not contain a federalism summary impact statement, despite acknowledging that the rule has federalism implications.⁴ Further, the Department claims, without citing any data or analysis, that the Proposed Rule “does not impose substantial direct compliance costs on State and local governments” and therefore that a federalism summary is not required. The Department is incorrect.

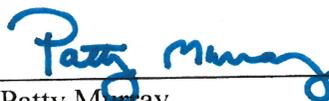
As stated in Section III, the rule has substantial direct compliance costs that were not taken into account in the Regulatory Impact Statement or elsewhere in the rule. Accordingly, a federalism summary impact statement should be provided.

V. We urge you to rescind the Proposed Rule and work with Congress and State and local governments to address SUA

We are particularly concerned by the Department’s lack of collaboration with Congress and State and local governments in developing this rule. The Proposed Rule invites states to submit comments regarding “any alternatives to the standards proposed” but nevertheless also concludes that it is exempt from related Executive Order 12372, which requires intergovernmental consultation with State and local officials. By exempting itself from consultation with State and local governments at early stages of rule development, but simultaneously requesting comments now, the Department does not appear inclined to accept State and local government alternative proposals.

On behalf of our constituents, we strongly urge you to rescind this Proposed Rule as it would hurt some of Washington state’s most vulnerable community members, particularly infants and children under 5 years old. We invite you to work together with Congress on improving the administration of SNAP. If you have any questions please contact Jaron Goddard at jaron_goddard@murray.senate.gov or at (202) 224-6935.

Sincerely,



Patty Murray
United States Senator



Maria Cantwell
United States Senator

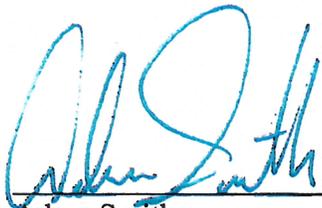


Kim Schrier, M.D.
Member of Congress

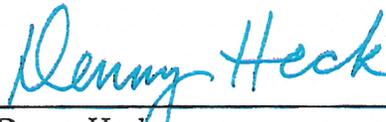


Suzan DelBene
Member of Congress

⁴ *Supplemental Nutrition Assistance Program: Standardization of State Heating and Cooling Standard Utility Allowances*, 84 Fed. Reg. 52813 (proposed Oct. 3, 2019).



Adam Smith
Member of Congress



Denny Heck
Member of Congress



Derek Kilmer
Member of Congress



Rick Larsen
Member of Congress



Pramila Jayapal
Member of Congress