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Angela Kline, FNS, Program Development
Division, SNAP, FNS, USDA, Room 812,
3101 Park Center Drive, Alexandria,
Virginia 22302.

Re: Comments, Fleeing Felon Proposed Regulations, 76 Fed.Reg. 51907

Dear Ms. Kline:

On behalf of the Legal Services of Northern California (LSNC), we submit comments to the proposed regulations to Clarify the Eligibility of Fleeing Felons, published at 76 Fed. Reg. 51907. LSNC serves low-income individuals, including SNAP recipients, who will be directly affected by the proposed USDA regulations.

LSNC clients have been denied access to much needed food benefits because of the inability to correct erroneous records and mistaken identity. They have also been denied when the individuals were unaware of outstanding warrants, often issued long after the person left the jurisdiction, who then lacked the resources to return to the jurisdiction and could not be extradited. One client near the Oregon border was barred from both food and cash assistance because he could not afford a bus ticket to go back to address a parole violation warrant. California offered to purchase his bus ticket to clear the warrant and lift his bar on benefits, if the Oregon parole officer or other state official would agree to meet the bus at the other end. Oregon was so disinterested in his return that they would not even agree to do this, yet the client remained barred as a fleeing felon. A older, frail man, this client became severely ill, and was repeatedly hospitalized and turned back onto the streets with no way to end this cycle.

We appreciate the commitment USDA has made to clarify and provide uniform standards for disqualifying individuals from SNAP if they are a "fleeing felon" or probation/parole violators, in order to prevent innocent individuals from being disqualified for SNAP benefits. Overall, we support the proposed rules defining "fleeing felon," "actively seeking" and the criteria to identify a parole and probation violators. Having clear and enforceable timeframes to make the eligibility determination of these factors, and which puts the burden on state SNAP agencies and law enforcement, is greatly needed. In general, the proposed provisions are very clear and helpful, and should be retained in the final rules. In particular, emphasizing that all identified objective factors of being a "fleeing felon" must be met prior to disqualification will end the draconian practice of disqualifying individuals based solely on their "fleeing" because the county welfare department told them there was an outstanding warrant against them.

Our main recommendation is that the USDA adopt the three NCIC warrant codes described in the *Martinez v. Astrue* (SSI) lawsuit as the sole standard for determining active fleeing status, if the individual's identity is confirmed. This approach has the advantage that the three categories of outstanding warrants have the

administrative efficiency of being limited to the worst of the offenses, undisputed fleeing status, and the greatest desire of law enforcement to pursue the individual. The settlement standard provides bright-line rule that leaves very little discretion that could lead to uneven, unfair, or inappropriate application. It also promotes consistent interpretation across federal agencies, which have a high volume of crossover applicant/recipients. Although using Martinez codes alone should be sufficient, an acceptable addition would be any time law enforcement affirmatively contacts the agency and indicates they are seeking an individual, and the state agency confirms an identity match. We do not believe having an state SNAP agency do any affirmative search is required by law, and should not be part of the final regulations for the reasons set forth in more detail below.

We also are very concerned that the proposed regulations have no explanation of how to handle expedited service requests. In particular, if the agency does not adopt the Martinez codes as defining fleeing, the final rules must cover this topic.

Our full recommendations are below.

Definition of “fleeing” and “actively seeking”

The 2008 Farm Bill provision sought to ensure that the fleeing felon restriction is targeted at those truly seeking to avoid law enforcement authorities. In the proposed rules, USDA sets forth four criteria that must exist before a state agency determines that a person to be a “fleeing” felon.

- 1.) There has to be a felony warrant for the individual;
- 2.) The individual has to be aware of, or should reasonably have been able to expect that, a warrant has or would have been issued;
- 3.) The individual has to take some type of action to avoid being arrested or jailed; and
- 4.) A law enforcement agency must be actively seeking the individual.

A person would be deemed to be fleeing if law enforcement presents a warrant with NCIC Uniform Offense Classification Codes. Use of the Martinez settlement’s codes to determine that the warrant is for an actively fleeing felon provides the most simple, accurate, and administratively easy approach to defining the term. Direct contact by law enforcement to enforce a warrant where the underlying crime is a felony, could also be used, but poses a number of issues, discussed below.

If the USDA continues to decline to rely solely upon the Martinez codes, the proposed rules help remedy a current problem that agencies presume that a felony warrant is a warrant for an underlying felony crime. The mere indication that a warrant is a “felony warrant” does not necessarily mean that the underlying offense was a felony. For example, some states may automatically consider every bench warrant issued by a judge to be a “felony warrant,” simply because a Judge issued the warrant. These warrants can be issued for non-felony offenses. Indeed, they may be misdemeanors or even simple infractions, such as failure to appear in court, including for traffic tickets or as witnesses, or for failure to pay court fees. These warrants may never even be served. Therefore, it is an important element that there is a felony warrant for the individual.

Verifying a “true match” – that the warrant for a felony crime is actually for the individual applying for benefits – is also key. Agencies have inappropriately barred people with common names or victims of identity theft, when the agencies inappropriately relied solely upon database “hits.” Databases rarely provide information that is specific enough to be certain that the person sought is the one who has appeared at the SNAP office. We fully support USDA’s proposal to place the responsibility on the state agency to verify that an individual is a fleeing felon. Applicants have practical and financial barriers to trying to get this information from law enforcement. In some cases, the law enforcement agency may be more willing to provide the information to the state agency, as well as being able to transmit more quickly the information, either directly to the worker or to an agency email or fax.

Aware of Warrant

Again, we recommend using the Martinez codes to determine the issue of actively fleeing. This is a very difficult, subjective criteria. Unless there is direct proof that the person was actually served and fled it response, this criteria is virtually impossible to establish. Since, ultimately, law enforcement must be actively seeking the individual, we recommend that the final rule skip this portion of the rule, as whether the person originally intended to flee or not, unless they are being actively sought, the law does not intend to bar the individual from receiving benefits. Some individuals may originally have intended to flee, but now no longer have the resources to resolve the warrant, and law enforcement is not extraditing them. Under these circumstances, they are no longer fleeing. Eliminating this subjective portion of the standard would relieve agencies of a burden of verifying an amorphous criterion that, in the end, is not determinative of the eligibility decision.

If not willing to eliminate this criterion, however, we also support the proposed rule requirement that the individual must be aware of the warrant at the time they left the jurisdiction, and left for the purpose of avoiding prosecution or confinement. Many states, including California, have interpreted the term “fleeing” to include *anyone* with an outstanding warrant, thus greatly broadening it beyond those actually fleeing, in the intended sense of avoiding prosecution or confinement. Although California state regulations provide that the existence of a warrant for arrest is a rebuttable presumption of fleeing, the counties typically tell applicants who had no idea that a warrant had been issued that once the county informs them there is an outstanding warrant, that they are considered fleeing. This is true even if the individuals state that they intend to resolve the warrant. Further, counties treat the individual as fleeing even if the issuing jurisdiction states it has no intent of extraditing the individual or pursuing the applicant. (See instructions to counties, ACIN I-58-08.¹) The counties generally do not take any further steps to ensure an identity match or underlying felony warrant.² Thus, a computer match alone is *not* sufficient to deny food stamps.

In many cases, people do not even know that there is a warrant out for them. This can occur when a warrant was issued but never served (perhaps because the individual had relocated for unrelated reasons), and is particularly common for relatively minor offenses, such as bouncing a check, which the issuing jurisdiction may have little interest in pursuing. Also, many jurisdictions leave warrants in the system that have been resolved if money is still owed.

Action Taken to Avoid Arrest or Confinement

For the same reason as stated above, we recommend that the USDA limit fleeing felons to the Martinez code. At a minimum, it should eliminate the subjective, individual criteria, and instead rely on the two objective ones (active warrant and enforcement.) If maintaining this criterion, the requirement that the individual takes action to avoid arrest or confinement should also be retained in the final rule. Simply leaving the jurisdiction of the issuing authority is insufficient for a state to determine that an individual is fleeing, absent evidence that the specific reason the individual left was in an effort to evade justice. An individual who leaves the jurisdiction for other, valid, reasons, such as a new job, fleeing an abusive partner, etc., is also not fleeing from prosecution.

We have the following concerns about the proposed rules to determine the subjective intent to flee:

- 1) Being interviewed by law enforcement regarding a crime does not mean that the person is aware that a warrant for a felony was issued. The individual may not be aware that there was a subsequent conclusion to make arrest/issue a warrant, may not be aware it was a felony, etc.

¹ <http://www.cdss.ca.gov/lettersnotices/entres/getinfo/acin08/I-58-08.pdf> (QUESTION: Since the warrant is not extraditable, does it change the fact that he has an active felony warrant? ANSWER: No. Per MPP section 63-102(f)(4), the client is a “Fleeing Felon” and the regulations apply, thereby making him ineligible for food stamp benefits.)

² In fact, California instructions to the counties states that even if the “individual may or may not claim to be aware of the outstanding warrant; however, to be eligible for food stamps, s/he would need to take whatever action is necessary and provide documentation to substantiate that the outstanding warrant no longer exists.” (http://www.cdss.ca.gov/getinfo/acin00/pdf/I-49_00.pdf.)

- 2) Third parties statements re: serving of a warrant can be equally unreliable. The proposed rules should be change to permit only the use of law enforcement business records or affidavits to confirm attempt to serve and facts indicating that person was aware of warrant or to support to the reliability of third party statements. For example, coming to the door and being told the person is not there, does not mean the person was aware that law enforcement came to serve a warrant. If they were told it was to serve a warrant (highly unlikely), they also will not know whether it was for a felony.
- 3) Moving without other intent to avoid prosecution or confinement is not indicative of anything. The preamble suggests that the distance of the move could be a factor. Low-income individuals are particularly mobile. Persons living below the Federal Poverty Level (FPL) have a mobility rate (moved within the last year) over twice as much for persons living at or above 150% of FPL.³ Many of those low-income renters sub-let from other renters and therefore do not have their names on the lease. Often, they move to be closer to family or to areas where they believe they will have greater work opportunities or lower housing costs. Moving after being served may or may not be an indicator, as often low-income individuals have difficulty navigating bureaucracies. They may misunderstand what was required to clear the warrant, or may have in fact cleared it but not been removed from the system. Any usage of moving as an indicator of fleeing must be in conjunction with other objective evidence.

“Actively Seeking”

The agency is proposing to define “actively seeking” as a law enforcement agency stating that: (1) it intends to enforce an outstanding warrant within 20 days of submitting a request to a State agency for information about a specific individual; or (2) it intends to enforce an outstanding warrant within 30 days of the date of a request from a State agency about a specific warrant.

The proposed regulations do not describe what is to happen if an agency is making these inquiries, under this timeframe, but the individual has requested expedited services. Individuals who appear eligible for expedited services, based on the application and/or agency screening, should be granted such services (if otherwise eligible) and not denied while the agency attempts to determine if law enforcement. Again, limiting application of the rule to cases with Martinez codes, with identity confirmation, avoids this issue by providing an immediate means of determining that the warrant is for a fleeing, the person is fleeing, and that law enforcement is actively seeking enforcement. Such a provision is crucial because so few of the cases with “data match” hits are actually being actively pursued by law enforcement.

If not adopting the Martinez codes, and providing for expedited services, this time line is adequate with one modification. A law enforcement agency statement that it intends to enforce the warrant should not be sufficient. Rather “actively seeking” should be defined as the agency actually acting within this period, such as providing information on the assigned enforcement officer, how and when they are estimated to arrive, etc..

We also recommend that USDA clarify the timeframe for receiving such a response. So, for example, if a worker contacts the law enforcement agency on the 1st day of the application, the applicant should not have to wait 30 days for a statement whether or not the law enforcement agency intends to enforce the warrant within the next 20-30 days. Such a rule would force a 30 day holding period on all applications for those states, like California, which affirmatively checks applications against databases. The agency should have the same timeframe an applicant has for verification, i.e. 10 days in which to get the information. If the agency cannot obtain the information within 10 days of learning of a warrant, it must not deny based on the

³ The mobility rate (moved within the last year) for persons living below the Federal Poverty level (FPL) is 24%; 17% for those between 100 and 149% of FPL and 10% for those persons living at 150% FPL and above. Perhaps due to the recession and the unemployed moving to seek work, this spread has grown wider in the last year than it was ten years ago. See, U.S. Census Mobility Report for March 1999 to March 2000, at <http://www.census.gov/prod/2001pubs/p20-538.pdf>

fleeing felon provision. Any information received after that time can be processed for subsequent periods of eligibility.

Procedure to Determine Fleeing Status

In order to comply with requirements of the statute, the proposed rule also establishes procedures that state agencies will use to determine potential fleeing felon status. The proposed rule lists three ways that a state agency may become aware of a household's potential "fleeing" felon or probation or parole status:

- 1.) Through a statement by the household, such as checking it off a block on an application or report form that a household member is a fleeing felon or violating parole;
- 2.) Through a data match with the FBI's data base NCIC or another database of outstanding warrants; or
- 3.) Through a law enforcement officer who contacts a State agency specifically seeking information on a particular individual for whom he or she has a warrant, in accordance with the provisions of Section 11(e)(8)(E) of the Act.

Because we agree that state agencies should not rely solely on the statement of the household that a member is a fleeing felon or parole or probation violator, we recommend that the final rule states that applicants not be asked this question. We have found that people are confused by the technical terms, whether there is a warrant, whether it is for an underlying felony (as opposed to a felony warrant for underlying misdemeanors and infractions), etc. Other than the Martinez codes, the third method, where law enforcement makes inquiries of the state, is obviously the most reliable and critical for the apprehension of fleeing felons. It is also consistent with the intent of the law, to apprehend those fleeing felons whom law enforcement are actively seeking. State agencies should not be required to look for evidence, including doing routine matches against any database; they are only obligated to act on knowledge they receive.

While we feel that the Martinez codes alone, or at most, those codes plus active law enforcement efforts, are sufficient to establish the fleeing status, the second method USDA proposes, in which state data matches are subject to additional verification, provides a burdensome, but acceptable, means to verify that the applicant is both fleeing and actively sought. (It is burdensome in the sense that, at the end of the day, the crucial factor would be whether law enforcement was seeking the individual, thus making the third factor, law enforcement response, key.)

The applicant check box approach does not add to these methods, but rather risks inappropriate denials or terminations, or worse, fraud referrals for misunderstandings that were not intent to defraud. We therefore recommend completely eliminating that option.

If USDA does not take this approach, the final regulations must make it clear that if an applicant checks the box on the application that they are a fleeing felon, the agency must then seek additional information to verify the statement. This can include providing a definition of a felony and explaining that this only applies when the underlying offense is a felony, not when the warrant may appear to be a "felony warrant." The application should also include a checkbox for "Unsure" or "Maybe." And the agency then must still verify the warrant is for an underlying felony and that law enforcement is actively seeking to enforce it. Additionally, USDA should clarify the standards for when a fraud referral (for checking "no" on the application box) should occur: i.e. when there is evidence that the person was fully aware of the existence and nature of the warrant, and that they were fleeing to avoid prosecution or confinement. Any credible lack of awareness of the warrant, or that the warrant was a fleeing, or that they were not fleeing, voids fraudulent intent and should never be the basis of a fraud referral.

Identify Individuals in Violation of a Condition of Probation or Parole

The agency is proposing that the disqualification apply to all identified probation or parole violations if law enforcement is "actively seeking" to enforce the warrant. The same procedures used to determine if individual is a fleeing felon should be applied to probation and parole violators.

California currently uses a standard that the existence of an arrest warrant for violation or parole is equivalent to a determination that the subject of the warrant is in fact violating a condition of probation or parole.⁴ In fact, it is simply the means of initiating the process for determining whether someone is violating a condition of probation or parole. The warrant is generally issued *ex parte* based on probable cause. An individual brought in pursuant to a warrant is then entitled to receive notice of the charges constituting the alleged violation of probation and a hearing before a judge should he choose to contest it. The U.S. Supreme Court has held that an individual is entitled to notice of the specific charges constituting the alleged violation and a hearing on those charges before parole can be revoked.⁵ A year later, the Court issued a similar ruling with respect to probation violations.⁶

Unlike the case of a warrant, where a warrant for an underlying felony is sufficient without a finding of guilt, in the case of probation or parole there must be a finding of a violation before the individual is ineligible for benefits. Therefore, workers will need to confirm with appropriate authorities that there has been a finding of a violation before denying benefits to the individual.

Further, there is no consistent meaning for violation of parole or probation across states and it can be different depending on the crime or the jurisdiction. Without a uniform definition of parole or probation violation under SNAP, the final rule must explain how to determine if an individual is in violation of parole or probation in order to prevent uneven or improper application in various states.

Transitional Benefits

The agency is also proposing to add a requirement to the regulations that if the individual is found to be a fleeing felon or parole or probation violator that they act to remove the individual from transitional benefits. This could occur even though it might result in a decrease in benefits, if the state opted to have mid-certification changes during the transitional benefit period.

USDA should rescind this portion of the proposed rules. The act discusses disqualifying the individual, but transitional benefits are for the household. There are many other circumstances in which individuals in households could be disqualified after commencing the transitional benefits. The important program goal of enforcing warrants for felonies and parole/probation violations is met by having state agencies cooperate in the location and apprehension of these individuals. However, to reduce the benefits would unfairly penalize this category of individuals, as transitional households are not required to report changes, and other transitional households have people who are not eligible for other reasons, such as institution. At most, the USDA should clarify the rule that state agencies are not required to affirmatively search for these warrants/violations during the course of the transitional period, and only terminate the benefits if law enforcement contacts the state agency seeking enforcement of a felony warrant or a post-hearing parole/probation violation. As always, the details of the state's program must be set out in the state plan.

⁴ **QUESTION:** Is evidence of an existing arrest warrant for violation of probation/parole sufficient to discontinue or deny food stamps without verification that the violations have already been investigated and officially established by the courts responsible for the supervision of probation as referenced in section (2) of the handbook at MPP 63-402.224(b)? **ANSWER:** Yes. Per the Code of Federal Regulations 7(CFR) 272.1(c)(vii), "...If a law enforcement officer provides documentation indicating that a household member ... has violated a condition of probation or parole, the State agency shall terminate the participation of the member..." An active arrest warrant for "violation of probation or parole" is sufficient verification that the household member was in violation of his/her probation or parole. http://www.cdss.ca.gov/lettersnotices/entres/getinfo/acin08/I-05_08.pdf.

⁵ *Morrissey v. Brewer*, 408 U.S. 471 (1972).

⁶ *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

Additional Recommendations

In addition to the proposals made by the Agency, we also recommend that:

- If, after reasonable effort to confirm the identity of the applicant/participant, a “match” is still uncertain, the agency shall determine that there is insufficient evidence to find that the individual is a fleeing felon, and close the investigation. USDA should set a timeframe for this period, and provide that benefits be granted during the timeframe if needed to timely approve an application; any benefits issued during the investigation shall not be considered an overissuance.
- A reminder that states are only obligated to act on knowledge they receive; they are not required to look for evidence, and thus should not conduct routine matches against any database;
- A reminder that for those states which have a fleeing felon question on the application, that the terms must be clearly defined on the form. This would include an explanation of the definition of a felony and the fact that the provision applies only when the underlying offense is a felony, not when the warrant may appear to be a “felony warrant.” It must also include a definition of “fleeing” as defined in the proposed rules. The application should also include an “unsure” or “maybe” option, in order to prevent inappropriate fraud referrals.
- Clarification to state agencies that they are only required to investigate cases where the individual affirmatively answers the question on an application, or in cases where the state has other reason to believe the individual may fall under this provision.
- If allowing database “hits” to start an investigation, clarify that before taking action against an individual, states should ensure that there is an appropriate identity match to the database. This may be done by requesting mug shots of the wanted person, verifying the whereabouts of the applicant at the time in question, asking the issuing authority for additional information about the wanted person, and verifying information provided by the applicant or participant
- Alternatively, the agency may continue investigating, but in the meantime, it must provide the individual any benefits to which he or she is otherwise eligible.

While it is important to prevent dangerous criminals from escaping authorities, little purpose is served by denying SNAP to individuals in whom law enforcement has no interest. Clarifying the provision to protect the innocent in no way diminishes the public purpose of apprehending true fugitives who are actively being pursued by law enforcement. If law enforcement has no interest in the individual, neither the food stamp administering agency nor the citizen can be expected to investigate and resolve the matter. We applaud USDA’s clarification that would protect the innocent without compromising the effectiveness of the provision

Thank you for considering these comments.

Sincerely,

Jodie Berger,
Regional Counsel