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Angela Kline, Director
Food and Nutrition Service
Program Development Division,
SNAP, FNS, USDA, Room 812,
3101 Park Center Drive, Alexandria,
Virginia 22302

Re: FNS' Proposed Regulations to Implement the Fleeing Felon provisions of the 2008 Farm Bill. RIN 0584–AE01.

Dear Ms. Kline:

We are writing to offer comments on USDA's proposed Supplemental Nutrition Assistance Program (SNAP) regulation which would implement eligibility requirements for the fleeing felon provisions of the 2008 Farm Bill. Our organizations work with many SNAP households who depend upon this critical federal benefit to alleviate hunger and ensure adequate nutrition for low-income households. We have seen many individuals erroneously disqualified from SNAP participation under the existing fleeing felon rules and so welcome these clarifications.

We commend FNS for fulfilling its charge from Congress to define the terms "fleeing felon" and what it means for law enforcement to be "actively seeking," but suggest an easier, proven approach, which is to adopt the standards utilized by the Social Security Administration as a result of the class action settlement in *Martinez v. Astrue,* U.S. District Court, Northern District of California, Case No 08-CV-48735-CW, outlined below.

This Bill became necessary because state and local agencies administering this "fleeing felon" rule were disqualifying many more individuals from receiving SNAP benefits than was intended. This included individuals who had very old warrants that law enforcement had no intention of enforcing, who were disqualified on the basis of inaccurate warrants or those that were the result of identity theft, where the underlying crime resulting in the warrant was not a felony, and where the individual was not evading arrest or prosecution. In fact, they were engaging in behavior completely inconsistent with any intent to flee. They walked into their social service agency, presented their identification, address, social security number and date of birth. They signed forms allowing the agency to share information with

other state and federal agencies. Often, these individuals did not even realize that a warrant still existed. However, once apprised, they were denied SNAP benefits until they "cleared up" the warrant. This was often logistically or financially difficult or impossible to accomplish.

As a result of the Farm Bill of 2008, Congress made clear that these were not the individuals whom they meant to disqualify from receiving SNAP benefits. The intention was to limit this disqualification to those individuals who were truly seeking to avoid law enforcement authorities, and for whom law enforcement was actively seeking to enforce the warrant, via arrest and/or extradition. As Senator Harkin explained the need for those provisions of the 2008 Farm Bill:

> *"[T]his rule occasionally denies food assistance to the wrong people — innocent people whose identities may have been stolen by criminals or those whose offenses were so minor or so long ago that law enforcement has no interest in pursuing them. If the issuing authority does not care to apprehend the applicant when notified of his or her whereabouts, there is no public purpose served by denying food assistance benefits. Unfortunately, inadequate guidance to States has resulted in exactly that. This provision would correct this by requiring USDA to clarify the terms used and make sure that States are not incorrectly disqualifying needy people who are not being actively pursued by law enforcement authorities."*[1]

Martinez provides a workable, proven eligibility standard for determining fleeing felon status.

The 1996 law restricting eligibility of fleeing felons applied to multiple benefit programs, including both SNAP and Social Security/Supplemental Security Income benefits.[2] In developing the proposed rule, USDA could have adopted another federal agency's approach to implement this provision. This makes particular sense where many low-income individuals participate in both programs, and SSA and USDA have been called upon to streamline cross-program eligibility.

The Social Security Administration (SSA) suspends or denies benefits to an individual only if a law enforcement officer presents an outstanding felony arrest warrant for any of three categories of the National Crime Information Center (NCIC) Uniform Offense Classification Codes: Escape (4901), Flight to Avoid (prosecution, confinement, *etc.*) (4902), and Flight-Escape (4999). This was the settlement agreed to by the Department of Justice and the Social Security Administration in *Martinez v. Astrue.*[3]

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[1] 154 Cong. Rec. S4752, (daily ed. May 22, 2008).
[2] Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Section 821.
[3] *Martinez v. Astrue,* Civ. No. 08-CV-04735 CW (2009). *Martinez* was a national class action lawsuit that challenged SSA's policy interpretations of provisions in the Social Security Act dealing with fleeing felons.

We believe the settlement in *Martinez* provides a simple, easy-to-administer test for determining fleeing felon status. By using particular warrant codes, it spares SNAP administering agencies and their workers from having to engage in time-consuming, administratively burdensome and highly subjective determinations. It also effectively prevents those individuals who truly are fleeing felons from obtaining SNAP benefits, contrary to Congressional intent. By limiting intent to flee to those felony warrants where flight is part of the underlying warrant, the determination of fleeing felon status is appropriately placed with law enforcement authorities who have the expertise to make these determinations. In contrast, SNAP eligibility workers have no training or background on determining intent to flee, the third prong in FNS' proposed four-part test. State and local agencies administering SNAP benefits should also favor the bright line test provided under Martinez because it will create a clear standard for workers and be administratively efficient. We therefore strongly urge FNS to adopt this simple, proven test for fleeing felon that has been adopted by SSA.

In the event FNS retains its proposed four-part test for determining fleeing felon status in the final rules, key clarifications are needed.

While we believe that adoption of the *Martinez* test is a superior, proven method of determining fleeing felon status, FNS' proposed four-part test contains many positive features. For example, the proposed rule, or statements in the preamble, clarify that:

- before a state agency determines that an individual is a fleeing felon, each one of the four factors must be present and verified;
- the primary responsibility is on the state agency, not the household, to verify fleeing felon status;
- an individual should not be terminated or have their SNAP application delayed pending verification of any one of these four criteria (although FNS should clarify that expedited processing and issuance of SNAP benefits should also not be delayed);
- where the household reports that a member is a fleeing felon or probation/parole violator, this is not sufficient evidence of what is essentially a legal determination and SNAP benefits should not be denied or terminated unless the state agency independently determines their status under the four-part test; and
- warrants subject to potential SNAP disqualification are limited to those for which the *underlying crime* is a felony.

However, there are certain areas where clarifications are needed in the regulations themselves to ensure that the rule is not applied in a manner than inadvertently disqualifies

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In the final settlement, SSA agreed to limit fleeing felon status to the three types of felony warrants that contain within their elements the required evidence of flight or escape.

persons who do not satisfy the four part fleeing felon test. The regulation itself should:

- specify that the existence of a felony warrant is not a sufficient basis for disqualification. Instead, the underlying crime must be a felony. While the preamble to the proposed rules contains the correct language,[4] this clarification is needed in the regulation itself.
- specify that, in order to meet its burden, the agency must document one or more actions that indicate both that (1) the individual was aware of the warrant; and (2) acted to avoid arrest.
- Make clear that a change of residence after the issuance of a warrant is *not* sufficient evidence of acting to avoid arrest, even if not associated with a divorce, domestic violence, or some other unusual circumstance. The preamble contains particularly troubling language that "actions indicating avoidance of arrest could include moving to a new residence after the warrant was issued, particularly a residence for which the individual is not the owner or holder of the lease..." [5]

  While Americans are generally quite mobile, according to American Community Survey data from 2009-2010, mobility is greatly affected by homeownership versus rental status, and by income. Renters move at almost six times the rate of homeowners. Approximately 29% of renters moved in the last year, but only 5% of homeowners did so.[6] Income also affects mobility. Persons living below the Federal Poverty Level (FPL) have a mobility rate (moved within the last year) over twice as high than persons living at or above 150% of FPL.[7]

  Because both income and homeownership are significantly impacted by race/ethnicity, any rule that suggests moving is an indicator of intent to flee will have a disparate impact on non-white, low-income households.[8] Similarly, the unemployed move more often, and this group is a legislative target of the SNAP program so we are concerned that efforts by job seekers to move where work is available could be misinterpreted as evidence of fleeing felon status.

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[4] "Section 6(k) of the Food and Nutrition Act of 2008 ("the Act") provides that certain individuals are not eligible for Supplemental Nutrition Assistance Program (SNAP) benefits. Such individuals include an individual fleeing to avoid prosecution, custody or confinement after conviction *for committing a crime or attempting to commit a crime that is a felony....*" Summary to Proposed Rules, Fed. Reg. 76, No. 161, Aug. 19, 2011, p. 51907(emphasis added).

[5] Federal Reg. 76,161 (Aug. 19, 2011) at p. 51909

[6] U. S. Census Bureau, American Community Survey Report, 2010.
http://www.census.gov/hhes/migration/data/cps/files/cps2010/tab01-01.xls

[7] 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 or above 150% FPL. 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

[8] Looking at mobility by race, white/non-hispanics were less mobile than other racial and ethnic groups (14%), with blacks (19%) and Asians/Pacific Islanders (20%) having the highest mobility rates. *Id.*

- Clarify that in order to satisfy the fourth criterion of "actively seeking," law enforcement authorities must be actively taking steps to secure the individual's arrest or extradition. It is not enough for the law enforcement agency to state it "intends to enforce the warrant." Thus, the language in proposed 7 C.F.R. § 273.11 (n)(1)(3)(i) (2010) defining "actively seeking" and the subsequent language in subsection (4) regarding intent to enforce will lead to inconsistent applications by state agencies. FNS may have meant to create a 30 day "holding period" during which time the SNAP application is processed or continued and the agency waits to see if law enforcement actually follows up on its stated intent, but these seemingly conflicting instructions will lead to erroneous denials and delays in issuance of SNAP benefits.

The proposed rule fails to provide needed guidelines for determining if an individual is in violation of parole or probation.

We commend FNS for attempting to define a probation or parole violator, but do not believe that state agencies and their workers are equipped to make the determination of whether the individual has ***in fact*** violated a condition of his or her probation or parole and whether law enforcement is actively seeking them. Proposed 7 C.F.R. § 273.11(n)(2). As the Court in *Clark v. Astrue,* 602 F. 3d 140, 147 (2nd Cir. 2010), noted,

> The trigger at issue here requires a determination that one "is violating a condition of probation or parole". . . . 42 U.S.C. §§ 1382(e)(4)(A)(ii), 402(x)(1)(A)(v). *The issue before us is whether the fact of a warrant, issued on the basis of "probable cause" or "reasonable suspicion" to believe that one is violating a condition of probation or parole, is equivalent to a determination that one is in fact violating a condition of probation or parole. We find that it is not* and therefore that the Administration's practice is contrary to the plain meaning of the Act. (emphasis added).

The issuance of a warrant for an alleged parole or probation violation occurs on the basis of probable cause to believe a violation has occurred. It is not equivalent to, and cannot be substituted for, a finding that the violation has in fact occurred. Such a determination can only be made by a court or by an impartial tribunal, and not by a SNAP benefits worker. At a minimum, the proposed rule should clarify that there must be an independent determination by a court or tribunal that there has been a parole or probation violation, before the agency can deny benefits to an individual.

We appreciate the steps FNS has taken thus far to clarify the determination of fleeing felon status, and urge you to consider these comments in support of adoption of the *Martinez* standard.

Sincerely,

Patti Prunhuber
Public Interest Law Project

/s/
Steven Weiss
Bay Area Legal Aid

/s/
Luan Huynh
East Bay Community Law Center

/s/
Madeline Neighly
National Employment Law Project

/s/
Jane Fischberg,
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