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CENTER FOR LAW AND SOCIAL POLICY

MEMORANDUM

TO: Interested People
FROM: Paula Roberts
DATE: May 21, 2004
RE: Proposed Food Stamp Regulations that Involve Child Support Obligations

Many of the households participating in the Food Stamp Program (FSP) contain a person who either pays or receives child support. In 2002, Congress made changes in the food stamp laws that affect these households, especially those that contain a person who is paying child support.

The Farm Security and Rural Investment Act of 2002 (FSRIA) requires the United States Department of Agriculture (USDA) to establish an optional, simplified procedure for states to use in determining the amount of child support paid by a household. FSRIA also requires states to treat child support payments as an income exclusion rather than a deduction (as provided in current law) unless they choose to stay with a deduction option. Proposed regulations on these changes were issued on April 16, 2004 and are found at 69 Fed. Reg. 20724-20764 (April 16, 2004). Comments on these proposed regulations must be submitted by June 15, 2004.

Below is a summary of the regulations and a discussion of the issues raised by some of them.

BACKGROUND

General Considerations

Many of the households participating in the FSP contain a person who either pays or receives child support. For purposes of this memo, those who pay support will be referred to as “non-custodial parents” and those who receive support will be referred to as

“custodial parents.”¹ In addition, custodial parents are referred to as “she” and non-custodial parents as “he” as this is most often the case. However, a custodial parent can be male and a non-custodial parent can be female. Under current law:

- If a household contains a custodial parent, the amount of support received must be included in determining the household’s income. As a result, the receipt of child support affects both the household’s eligibility for the FSP and the amount of benefits the household will receive. 7 USC § 2014(d) and 7 CFR § 273.9(b)(2)(iii).
- If a household is determined to be eligible to participate in the FSP and it contains a non-custodial parent who is legally obligated to pay child support, the amount paid can be *deducted* from the household’s income for purposes of calculating the amount of benefits the household will receive. 7 USC § 2014(e)(4) and 7 CFR § 273.9(d)(7).

FSRIA requires states to use a different approach for child support payments made by a household that contains a non-custodial parent, unless the state affirmatively opts to retain the deduction approach. States should now *exclude* the amount of child support paid from the household’s countable income in determining program eligibility. 7 USC § 2014(d)(6). Thus, a household containing a non-custodial parent who pays child support that is currently ineligible for FSP participation can become eligible after the exclusion of the payment from household income. In other words, payment of child support can affect both program eligibility and benefit amount.

To implement both the existing laws and the FSRIA change, the food stamp agency needs access to accurate records of payment and disbursement. However, this is a cumbersome process since both the amount paid and the amount received can vary from month-to-month. For example, assume a situation in which both the custodial and non-custodial parents are living in households that receive food stamps. The non-custodial parent’s child support obligation is automatically withheld from his wages each month, and he gets a FSP deduction for the amount withheld. The custodial parent reports the receipt of child support, and so her household’s benefits are reduced. If the non-custodial parent loses his job, he will no longer be subject to income withholding. Unless he is able to make payments from another source, he will not be paying support and his household will no longer be eligible for the child support deduction. His household’s benefits should be adjusted accordingly. Likewise, the receiving parent would no longer have child support income and should receive more food stamp benefits. In the next month, the non-custodial parent may get a new job at lower wages. Withholding will begin again,

¹ In the typical case, the natural mother is the custodial parent and the natural father is the non-custodial parent. However, in some cases, the person receiving the support is not a parent: he or she may be a relative (e.g., a grandparent, aunt, or uncle) or another person who has custody of the child. In such cases, each natural parent may have a child support obligation and thus each natural parent may be a non-custodial parent. Regardless of the situation, as used herein, the term “custodial parent” refers to those who receive child support payments and the term “non-custodial parent” refers to all paying parents.

but the amount owed may be more than the allowable limit.² In this case, the non-custodial parent will be entitled to a different deduction and the custodial parent will have a lower amount of child support income to report than previously. If the non-custodial parent has sporadic employment, this cycle can repeat itself several times over the course of a certification period.

To date, the food stamp agency has relied primarily on self-reports by custodial and non-custodial parents to track child support payment information. 7 CFR § 273.12(a). FSRIA provides another option. In lieu of individual reporting, states can rely *solely* on information from the child support enforcement (IV-D) program if they wish. 7 USC § 2014(n). Moreover, FSRIA allows states to ignore—until the household’s next recertification—changes that affect the amount of the household’s child support deduction.³ 7 USC § 2014(f)(1)(C).

Child Support Cooperation Issues

Since 1996, states have had the ability to make child support cooperation germane to FSP eligibility for both custodial and non-custodial parents. Custodial parents who participate in the Temporary Assistance for Needy Families (TANF) program have long been subject to child support assignment and cooperation requirements in that program and its predecessor Aid to Families with Dependent Children (AFDC). Unless they have “good cause” for failing to do so, these custodial parents are required to cooperate with the state’s child support enforcement agency. 42 USC §§ 608(a)(2) and 654(29). Failure to cooperate can lead to the loss of some or all of the families’ TANF benefits. 42 USC § 608(a)(2). If this happens, the FSP benefits cannot be increased to reflect the loss in household income. 7 USC § 2017(d)(1) and 7 CFR § 273.11(j). In fact, the state has the option of decreasing the household’s FSP benefits. *Id.* Alternatively (or in addition), the state can disqualify a non-compliant custodial parent from participation in the FSP. 7 USC § 2015(i) and 7 CFR § 273.11(k) (This is called a “comparable disqualification.”)

In addition, a number of states have chosen to impose a child support cooperation requirement on non-TANF households receiving food stamps. In those states, custodial parents may be ineligible for food stamp benefits if they do not cooperate in establishing paternity and pursuing child support unless they can establish “good cause” for refusing to do so. 7 USC § 2015(l) and 7 CFR §§ 273.11(o). States also have the option to require non-custodial parents to cooperate with the child support program and may refuse to provide benefits to individuals who fail to meet their child support obligations. 7 USC §§ 2015(m) and 2015(n) and 7 CFR §§ 273.11(p) and 273.11(q).

Food Stamp households can contain both TANF and non-TANF members. For example, a cohabiting couple with no common children would be one FSP household.

² Federal law puts an upper limit on the amount of current support and arrears that can be withheld from a non-custodial parent’s income. States can set lower limits and many do. 42 USC § 666(b)(1).

³ The FSRIA change allows a state to pick and choose among the deductions it will leave unchanged until the next certification period, and the household is subject to this policy. However, the food stamp agency may not ignore changes in earned income or changes in shelter costs related to a change in residence.

The mother and children could be TANF recipients while the man is not. The man, however, could be a non-custodial parent who is required to pay support for children who live in another household. If they live in a state that has imposed child support cooperation requirements on non-custodial parents participating in the FSP, both the man and the woman could be subject to child support cooperation requirements.

THE PROPOSED REGULATIONS

Regulations Related to Reporting Child Support Obligations

1. The proposed regulations pose a number of problems for FSP applicant and recipient households containing a non-custodial parent if their state opts to rely *solely* on the state child support agency to report and verify child support information. 7 USC § 2014(n).

Proposed 7 CFR §§ 273.2(f)(1)(xii), 273.2(f)(8)(i)(A), and 273.12(a)(1)(vi) and (a)(4). Under current regulations, prior to the household's *initial FSP certification*, the state agency dealing with a household that contains a non-custodial parent must verify: 1) whether the non-custodial parent has a legally enforceable child support obligation; 2) the amount of that obligation; and 3) how much he or she actually pays each month. State food stamp agencies are *encouraged* to use data from their state child support enforcement program to obtain this information. There is a process for challenging this information should the household's records disagree with those of the state. 7 CFR § 273.2(f)(1)(xii). The proposed regulations amend the existing regulation to give states the option to rely *solely* on the records of the state child support enforcement program when the applicant household contains a non-custodial parent whose payments are processed exclusively through that system.

After initial certification, the household must report and verify any changes in child support status, including changes in the amount paid. 7 CFR § 273.12(a)(1)(vi). In most states, this will be done on a semi-annual basis.⁴ In cases where the household member pays all of his support through the state child support agency, FSRIA gives states the *option* to allow food stamp agencies to rely solely on the child support agency for this information. 7 USC § 2014(n). Under the proposed regulations, if a state chooses this option, the non-custodial parent's household will no longer have to provide and verify child support information. However, since this is sensitive information, the food stamp agency will have to obtain a release from the non-custodial parent authorizing the child support agency to provide payment records to the food stamp agency. The state must also specify in its state plan of operations that it has selected this option.

Issue 1. There is no clear provision allowing non-custodial parent households to challenge incorrect information. The proposed regulations assume that information contained in state child support records is always correct. This is not the case. For example, a child support order may be issued by a court in September but the order may not be entered in the child support system's database until November. If a non-custodial parent applies for food stamps in October, his child support obligation will not appear in

⁴ Part of the FSRIA FSP program simplification allows states to go to semi-annual reporting. Some 44 states are moving to such a system.

the child support records. In addition, if he makes an October child support payment, the child support agency will not yet have an order to match with the payment and will therefore have no record of payment. The money will go into the state's "undistributed collections" fund and sit until the order is entered into the child support system and an account is established. Only then will the payment be recorded and the records be accurate.

Indeed, the state's "undistributed collections" fund may contain many payments that, for a variety of reasons, may not be timely attributable to a particular account.⁵ In addition, payments are sometimes attributed to the wrong account. When this happens, it may take months before a correction is made. Thus, there is a need for some method of challenging child support agency records when a non-custodial parent has independent evidence that there is an error in those records.

Existing 7 CFR § 273.2(f)(1)(xiii) requires that the state give an *applicant* household the chance to challenge any discrepancy between its records and the state records. It appears that the same chance will be given post-certification under 7 CFR § 273.2(f)(8). An opportunity to challenge will also be offered to *recipient* households in states that do not opt to rely solely on child support agency records. However, it is not clear that this would still be the case if the state takes the FSRIA option to rely *solely on child support records*. The final regulations need to clarify this point and insure that FSP applicant and participant households have the chance to challenge child support agency records when those records are inaccurate.

Issue 2. The treatment of families not using the state's child support system needs clarification. Some custodial parents are required to use the state child support agency's service and others opt in. (See above.) However, unless the custodial parent is receiving TANF, or her household is participating in the FSP and the state has opted to impose a FSP child support cooperation requirement on custodial parents, the state has little ability to force the custodial parent into the state child support system if she does not wish to use it. The non-custodial parent has even less control over this decision.

However, if a state wishes to rely solely on the child support system's records, it will likely want to do so in the maximum number of cases. This creates an incentive to require households to use that system. Since the non-custodial parent has so little control over this decision, the final regulations need to clarify that if the custodial parent is not using the services of the state child support program, the non-custodial parent's household may not be adversely affected. Procedures need to be in place to obtain and verify information for these households outside the state child support system. Self-declaration is certainly one option.

⁵ A recent General Accounting Office study details this problem and finds that nearly every state has experienced some problems with undistributed collections. Some of the problems are not germane to this discussion, but many are. See General Accounting Office, BETTER DATA AND MORE INFORMATION ON UNDISTRIBUTED COLLECTIONS ARE NEEDED, GAO-04-377 (March 2004).

Moreover, the statute and its legislative history provide USDA with authority to develop alternative reporting systems and they should use this authority to do so.

Issue 3. Some families use the state child support system of another state to enforce their child support order and this is not addressed in the proposed regulations. The proposed regulations contemplate that all parties will be living in the same state and will be using the services of a single state’s child support system. In reality, between 25 and 33 percent of all cases are interstate. There is no reason why the FSP could not obtain information from another state—assuming it had proper authorization from the non-custodial parent. The final regulations should address this issue so that non-custodial parents with interstate cases could benefit if the state opts to rely on child support agency records in lieu of individual reporting.

Issue 4. The proposed regulations are silent on what happens if a non-custodial parent whose case is being enforced by the state child support enforcement system declines to authorize release of information to the food stamp agency. Under the proposed regulations, the state can request that a non-custodial parent authorize release of child support agency records to the FSP. The regulations are not clear what happens if the non-custodial parent declines to do so. Yet, in addition to privacy concerns, that parent may have legitimate reason for declining. For example, he may know that the child support agency’s case records are inaccurate and will yield incorrect information to the food stamp agency. The final regulations should clarify that the food stamp agency cannot penalize an individual who chooses not to give them access to child support records.

2. The proposed regulations also contain a number of related provisions which appear to raise no significant issues. These are:

Proposed 7 CFR § 273.9 (c)(19). Custodial parents must report the receipt of child support income. This obviously includes payments made pursuant to a court order. However, there has been some question about voluntary payments. The proposed regulations add a new section to the regulations to specify what income states have the option to disregard in making the food stamp eligibility and benefit determinations. The proposed regulation also lists income that a state *cannot* ignore. Included here is “child support payments made to the household from a non-household member.” The comments accompanying the regulations clarify that this includes voluntary contributions⁶ unless these contributions are not in excess of \$30 per quarter and are so infrequent as to qualify as irregular payments under 7 CFR § 273.9(c)(2).

Proposed 7 CFR § 273.12(a)(1)(vi). A state that chooses not to rely solely on information from the child support enforcement agency will continue to require a

⁶ In rare cases, a non-custodial parent makes regular voluntary payments to the custodial parent. This is perfectly legal so long as there is no formal order in place. However, these informal payments cannot be considered in determining whether the non-custodial parent is entitled to a FSP deduction/exclusion since they are not legally required. Under the proposed regulation, the custodial parent must report these as income. She must also report alimony and support paid by any other individual (e.g., her parent). Proposed 7 CFR § 273.9(c)(19) and comments at 69 Fed. Reg. 20744.

household containing a non-custodial parent who is legally obligated to pay support to a non-household member to report basic information about the existence of the order and the amount. The household must also provide payment information. Even in states that choose to rely on their child support agency records, there will still be households in which the obligation is not being enforced by that agency or state records are not available because it is an interstate case. Households in these situations will also have to file periodic status reports. The state may require that payment information be reported on a change report, a monthly report, or a quarterly report.

Proposed 7 CFR § 273.12 (b)(2). If the state has not opted to rely solely on the child support agency for information, it may be asking the household to submit a quarterly report. The quarterly report form for child support must be written in clear, simple language and be available in languages other than English when appropriate.

Regulations Related to the New Income Exclusion Option

1. As with the reporting requirements, some of the proposed regulations on income exclusion are problematic while others are not. Below is a discussion of those which raise significant issues.

It is very important for the food stamp agency to have accurate child support information because—under FSRIA—the information can affect the household’s eligibility for food stamps as well as the amount of benefits it will receive. As noted above, currently, once a household containing a non-custodial parent is found income-eligible for food stamps, it can deduct the amount of formal child support it pays from household income. This deduction reduces countable income and thus increases the amount of benefits the household can receive. 7 USC § 2014(e)(4). States can continue allowing families to take such a deduction under FSRIA. 7 CFR § 273.9 (d)(5).

However, FSRIA *allows* states to treat child support payments as an income *exclusion* instead. States that take this option, will begin with the household’s gross income, deduct the applicable exclusions (including child support) and determine the household’s net income. This figure will be used to determine *program eligibility*. Thus, a household which—in the past—had too much income to be eligible for food stamps might now be eligible. If a state chooses to stay with an income deduction, rather than moving to the more generous income exclusion, it must say so in its state plan of operations. 7 USC § 2014(d).

Proposed 7 CFR §§ 273.9(c)(17) and 273.9 (d)(5). The proposed regulations make clear that whichever option the state exercises, the amount that can be excluded includes any child support paid to or for a non-household member, including vendor payments and payments on arrears. Whatever support qualifies for a deduction under existing practice must count if the state switches to an exclusion policy. 69 Fed. Reg. 20745.

Issue 1. The treatment of large arrearage payments is not adequately dealt with. Typically, a child support payment includes current support and something toward

arrears. Occasionally, however, a large arrearage payment is made through a state or federal income tax intercept, foreclosure on a lien, or seizure of a bank account or other financial instrument. These are generally one-time payments and do not come out of recurring income. The proposed regulations contemplate a deduction/exclusion for the typical payments but do not provide guidance on how to deal with the large, one-time payments. This is a particular problem if the one-time payment is received in the month of application or recertification as the state has the option to disregard changes in amount until the next recertification period. Some guidance needs to be provided on what to do in this situation. The logical approach would be to cross-reference the regulations on treatment of non-recurring lump sum payments, thereby prorating the payments over the certification period.⁷

Issue 2. The regulations do not address the treatment of child support payments for reunited families. If a non-custodial parent falls behind in his child support payments and then reunites with the custodial parent, he may continue to pay child support until the arrears are paid off. This is particularly true if the arrears were assigned to the state when the custodial parent began receiving TANF and the state is keeping the arrears in order to reimburse itself for assistance provided to the family. When this happens, the payments are being made for a household member and thus do not qualify for either an exclusion or a deduction under the regulations as written. This is because only payments *for* a “non-household member” are allowable as an exclusion/deduction. If the money is actually being returned to the custodial parent, the situation is even more egregious. The household must report the child support income even though it cannot take a deduction/exclusion since the money is going to a “household member,” not a non-household member as required by the regulations.

This same issue can arise when there is a change of custody. If a child moves from one parent’s household to the household of the other parent, the new custodial parent may be required to pay arrears owed to the former custodial parent. At the same time, the old custodial parent may be required to pay support to the new custodial parent. Since the child is now in the household of the new custodial parent, he will not be able to deduct/exclude his arrearage payments. However, he will have to report any payments received from the old custodial parent as well as any of his arrears payments that are returned to him. The regulations should be amended to take this into account.

Proposed 7 CFR §§ 273.10(d)(8) and 273.10(e)(1)(i)(F). As noted above, if the state opts to treat child support as an income deduction, it must include current support, vendor payments, and arrears. It must then budget this amount. The proposed regulations allow the state to budget the sum prospectively or retrospectively regardless of how it budgets the household’s other deductions.

⁷ In the past, when USDA has simplified rules on one side of the equation, it does so on the other side as well. If that happens here, custodial parents who receive a large, lump sum arrears payment would also have a problem. The final regulations should address how these payments should be dealt with for both custodial and non-custodial parents so that fairness is achieved for both.

Issue 3. Guidance is needed on what to do when a large, one-time support payment is received. As noted above, there are certain methods of child support payment that involve large, one-time lump sums toward arrears. Guidance is needed on how such payments should be budgeted. These payments can neither be predicted in advance nor reasonably anticipated. Therefore, the guidance should compare them to other non-recurring lump sum payments and cross reference 7 CFR §§ 273.9(c)8) and 273.10(c).

Proposed 7 CFR §§ 273.9(d)(2) and 273.10(e)(1)(i)(B). FSP households with earnings are entitled to a standard deduction equal to 20 percent of gross earnings. This *deduction* is calculated before any other deduction to maximize its size. The child support deduction is taken *after* the earnings deduction (and several other deductions a household may be eligible for).

In a state which opts to treat child support payments as an income *exclusion* when the non-custodial parent pays child support from earnings, the situation is more complex. Here, the amount paid is excluded before the earnings disregard comes into play. This could reduce the household's earnings disregard unless some adjustment is made. The proposed regulations require such an adjustment. When earnings used to pay child support are excluded from gross income for eligibility purposes, they must be added back in to income for purposes of calculating the earned income disregard.

Issue 4. Some households receive income from several sources. What should the state do in this case? Household members may have earned income as well as unearned income and benefits from one or more public assistance programs such as TANF or SSI. Should the state presume that the child support payment comes from the earnings or from one of the other sources? Certainly if the non-custodial parent has earnings it should be presumed that the child support comes from those earnings and that this income should be readjusted in computing the earnings disregard. If the non-custodial parent has no earnings and child support is being paid from the earnings of another household member (e.g., the non-custodial parent's spouse or his parent), the earnings should also be readjusted in computing the earned income disregard. This issue needs to be clarified in the final regulations.

2. One of the proposed regulations in this area does not appear to raise any major issues.

Proposed 7 CFR §273.12(a). In a state that treats child support payments as an income deduction, when a change is reported, the FSP benefit must be quickly adjusted to reflect the change. FSRIA allows the state to choose not to make such changes until the household's next recertification. 7 USC § 2014(f)(1). The proposed regulations implement this change. They clarify that, whether the new information comes from the household or from the state child support agency, the state can wait until the next recertification to make any required benefit adjustments. 69 Fed. Reg. 20753.

Regulations Related to Transitional Benefits

Prior to FSRIA, federal regulations allowed states to provide three months of transitional food stamp benefits to families leaving TANF. During the transitional period, the household's benefits remained frozen at their previous level, adjusted for the loss of TANF income, and they were not subject to reporting requirements. However, if the household did report a loss of other income, then its benefits were adjusted. However, states were not allowed to provide transitional benefits to households that were sanctioned by TANF for non-cooperation and subject to a comparable FSP disqualification.

FSRIA provides statutory authority for an expanded, optional, five-month transitional FSP benefit for families leaving TANF. 7 USC § 2020(s). Such benefits are available to "mixed households" (those containing both TANF recipients and non-recipients) as well as "pure" TANF households. 69 Fed. Reg. 20755. However, if the family is leaving TANF due to a sanction (including child support) or every member of the household is ineligible to receive food stamps because of failure to meet a child support obligation, then transitional benefits are not available. 7 USC § 2020(s)(5). The proposed regulations implement this scheme.

Proposed 7 CFR § 273.12(f)(4). This section updates the previous regulation to include all of the limits on transitional benefits contained in the new law. This includes the restriction on such benefits for households in which every member is being sanctioned for child support non-cooperation. However, a FSP household with some eligible members may still qualify for transitional benefits. For example, in a cohabiting household where the mother and her children receive TANF and the man does not, if the mother and the children leave TANF for reasons other than a sanction, they are eligible for transitional benefits even if the man in the household is under sanction for failure to meet his child support obligation to children outside the household. However, if the TANF portion of the household is being removed from TANF for any disqualifying offense, and the man is under a FSP child support sanction, then every member of the household is under sanction and transitional benefits cannot be provided.

FSRIA also made a number of changes intended to simplify other aspects of FSP administration. For information on these changes, contact Stacy Dean at the Center on Budget and Policy Priorities.