

# Encouraging Moderation in State Policies on Collecting Food Stamp Claims

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When a private creditor seeks to collect from low-income people, its priorities are clear: obtain as much money as possible as fast as possible. Many low-income people and their advocates therefore may expect that state food stamp agencies' efforts to collect food stamp claims are similarly single-minded. In fact, states are responding to a much more complex set of pressures. Food stamp claims are not debts to states: most or all of the money collected goes to the federal government. Although the Food and Nutrition Service of the U.S. Department of Agriculture (USDA) pushes states to establish and collect claims, this pressure is not nearly as strong, and the consequences of states' failures are not nearly as severe, as those associated with food stamp quality control (QC). Moreover, even the Food and Nutrition Service's goals are more complex than those of a typical private creditor. True, the Food and Nutrition Service feels a responsibility to collect on federal debts entrusted to its oversight. However, it has faced intense criticism for carrying large uncollected claim balances on its books.<sup>1</sup> Outstanding balances can be reduced *either* through collection *or* by writing off claims. More broadly, the agency seeks to make states' claims collection systems more efficient and cost-effective.<sup>2</sup>

In this article I survey the options that states have under federal regulations to adopt claims collection policies that reduce hardship for current and former food stamp recipients and the arguments that advocates may mobilize to encourage their states to implement those options.<sup>3</sup>

## I. The Food and Nutrition Service's July 2000 Food Stamp Claims Regulations

On July 6, 2000, the Food and Nutrition Service promulgated new rules concerning food stamp claims.<sup>4</sup> Although one purpose of these regulations was to implement the claims provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, the new rules went much farther. In completely rewriting the Food Stamp Program's long-standing claims regulations, the Food and Nutrition Service added new dimensions to the goals of the claims process. The regulations also

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<sup>1</sup>David A. Super, *The Quiet "Welfare" Revolution: Resurrecting the Food Stamp Program in the Wake of the 1996 Welfare Law*, 79 NEW YORK UNIVERSITY LAW REVIEW 1271, 1303 (2004).

<sup>2</sup>"We aim to strike the optimal balance among various competing goals including program integrity, fiscal accountability, practical claim management, and the rights of individuals and households." Food Stamp Program: Recipient Claim Establishment and Collection Standards, Final Rule, 65 Fed. Reg. 41752, 41753 (July 6, 2000).

<sup>3</sup>The checklist at the end of this article consists of questions to ask when representing individuals with alleged food stamp overissuances. For a discussion of opportunities for advocacy for individual clients with alleged food stamp claims, see Jonathan Givner & Gary Smith, *Overpaid but Underfed: The Revised Regulations Regarding Overpayment Collection in the Federal Food Stamp Program*, 34 CLEARINGHOUSE REVIEW 697 (March–April 2001).

<sup>4</sup>Food Stamp Program, *supra* note 2.

give states new flexibility to tailor their claims collection with the goal of creating highly efficient debt management systems. Many states still operate under essentially the same policies and procedures that they followed under the former, less flexible, regulations.

Rules governing claims collection operated in a manner analogous to certification policy. Many aspects of certification policy have been prescribed at the federal level and focused on precisely calculating each household's new benefit amount with little regard to the administrative cost of doing so. The claims process was largely governed by federal regulations, leaving few important decisions to states. States were expected to pursue most claims with little regard to whether that was the most efficient approach. The primary means of recovering claims was recoupment of ongoing benefits—effectively reducing the cost of the program to the federal government. States had little discretion about which claims to pursue, and the rules made little allowance for individual circumstances.

Just as certification has become more flexible and more attuned to reducing administrative burdens on state agencies and households, so, too, has claims policy. The new rules on claims abandon the idea that claims collection's goal is to achieve mathematical perfection in the allocation of benefits. Instead states are asked to develop and to follow a model of collections akin to that used in private-sector businesses. Each state is expected to develop and implement an efficient machinery for moving claims from detection to final disposition. The content of that process, however, is largely up to states.<sup>5</sup> The Food and Nutrition Service now is less concerned about the details of states' systems on claims than it is about states having a meaningful busi-

ness strategy that governs the states' systems. The agency stresses that the goal "is to ensure efficient and effective claims referral management while maximizing State agency flexibility."<sup>6</sup> This strategy can, and is expected to, incorporate waiver and compromise policies that increase the efficiency of the system and that can have the added benefit of serving low-income households. The agency declares that "we do not regulate the type or amount of claim that can or cannot be compromised."<sup>7</sup> The agency's more pragmatic outlook offers opportunities to advocate more moderate policies on state claims.

For example, private businesses can and do write off large numbers of claims against customers when collection would be cost-ineffective or when other business reasons call for ceasing collections. In the same vein, the Food and Nutrition Service's new rules give states far more flexibility to determine which claims to pursue and which to abandon. In approving state plans under the new rules, the Food and Nutrition Service shows a great willingness to defer to states' judgments about which claims to pursue and which to abandon. The rules' clear priority is not maximizing collections but rather maintaining an efficient and effective claims process. States can effectively argue that disposing of relatively small claims makes sound business sense.

Yet, with all of the other changes in food stamp policy that they have been implementing over the past few years, most states have not explored in depth the options under the new regulations on claims. Since many states have now completed implementing the 2002 Farm Bill, advocates may succeed in persuading them to reexamine some of the new options on claims.

<sup>5</sup>"To accomplish this, we need to afford State agencies a certain degree of flexibility while maintaining enough control to ensure effective claims management." *Id.* at 41753–54.

<sup>6</sup>*Id.* at 41758.

<sup>7</sup>Transcript of remarks of Tim O'Connor, Acting Director, Program Accountability Division, Food and Nutrition Service, U.S. Department of Agriculture (USDA), Center for Law and Social Policy Audio Conference (May 2, 2000), at 6. The Food and Nutrition Service had proposed restrictions in this area but in its final rule "decided to delete this proposal and allow State agencies to continue to compromise any claim." 65 Fed. Reg. at 41764.

In the following sections I identify ways that the options under the regulations on claims can help states address policy concerns. I focus on how the new options allow states to reduce burdens on their often overstretched staffs, redesign claims policy to reinforce rather than undercut states' other programmatic goals, and improve their claims performance as measured under the Food and Nutrition Service's standards.

## II. State Options to Reduce Burdens on State Agency Staffs

With the continuing state budget crisis, many agencies' staffs are strained to, or beyond, the breaking point. Administrators have little ability to augment their dedicated claims staff. States are leery of imposing on frontline eligibility workers additional burdens that can distract them from meeting processing standards and payment accuracy goals. Transferring responsibilities for identifying and establishing claims from eligibility workers to central office staff may be difficult to manage and may cause errors that lead to costly requests for fair hearings. USDA's interest in improving the efficiency of claims processing thus comes at a crucial time for many states.

Under the new rule, states need not pursue a claim that is below the Food and Nutrition Service cost-effectiveness criteria of \$125.<sup>8</sup> States also have significant flexibility to set their own cost-effectiveness criteria.<sup>9</sup> To date, few states have taken advantage of this discretion. In USDA's North East Region, however, several states have approved plans going well beyond the standards in the federal rules. For example, Maine does not establish

claims under \$200 against participating households. Connecticut does not establish claims under \$500 against nonparticipating households. And New York City applies a \$500 cost-effectiveness standard in establishing claims against both participating and nonparticipating households.<sup>10</sup>

Missouri also is a leader in this area. Relying upon a methodology in a Food and Nutrition Service study in the 1990s, that state's food stamp agency determined that establishing claims cost an average of \$60; collecting against nonrecipient households—when possible—cost an additional \$30, but only one in five such claims could be collected.<sup>11</sup> Accordingly Missouri finds it cost-effective to establish only claims of \$450 or more against households not currently receiving food stamps.<sup>12</sup>

When setting their own cost-effectiveness criteria, states may want to establish different cost-effectiveness thresholds for establishing claims depending on the cause of the overissuance. Arguably the costliest type of claim to pursue is one resulting from an agency error. Households with agency-error overissuances are more likely to become indignant when the state proposes recoupment and more likely to request a costly fair hearing. Both Maryland and Virginia have cost-effectiveness thresholds that are more than twice as high for agency-error claims as for those resulting from fraud or inadvertent household errors. States also may want to consider setting higher cost-effectiveness thresholds for inadvertent household-error claims than for those resulting from fraud. The risk of a hearing request, and a reversal, is higher in an inadvertent household-error case;

<sup>8</sup>7 C.F.R. § 273.18(e)(2)(ii) (2005).

<sup>9</sup>*Id.* § 273.18(e)(2)(i).

<sup>10</sup>Responses to David A. Super, Questions for FNS Regional Office on State Claims Procedures from the North East Regional Office (July 8, 2003) (on file with Super).

<sup>11</sup>See MYLES MAXFIELD, OPTIMAL THRESHOLDS IN THE COLLECTION OF FOOD STAMP PROGRAM CLAIMS (1996), available at [www.nal.usda.gov/foodstamp/FOODSTAMPREPORTS/FSP-241.PDF](http://www.nal.usda.gov/foodstamp/FOODSTAMPREPORTS/FSP-241.PDF).

<sup>12</sup>Family Support Division, Missouri Department of Social Services Income Maintenance Memo No. 100, Changes to Food Stamp Claims Procedures (Sept. 28, 2004), available at [www.dss.state.mo.us/dfs/im/memos/memos\\_04/im100\\_04.html](http://www.dss.state.mo.us/dfs/im/memos/memos_04/im100_04.html). Missouri multiplies its 20 percent collection rate by its \$90 average total costs of collection to reach \$450. Since Missouri may collect claims through recoupment from virtually all current recipients, its cost-effectiveness threshold for those claims is only the \$60 average establishment costs. Once Missouri decides not to establish a claim against a given household, however, it does not reverse its decision if the household returns to food stamps: doing so would entail costly record keeping that would defeat the purpose of the cost-effectiveness standard.

because the events giving rise to a fraud claim already were established in the disqualification hearing, much less remains open to contest in those cases. Establishing fraud claims serves deterrence policies that are absent when the household did not know that it was violating the program's rules.

States should note that one option under the regulations actually *increases* the burdens on their staff and should be viewed with caution. The regulations allow states to resume collection of terminated or written-off claims when new collection opportunities become available (e.g., the recipient returns to the Food Stamp Program or receives other federal benefits that may be attached).<sup>13</sup> The chances of significant collections through this option are questionable. Having terminated or written-off claims suddenly come back to life, however, is likely to pose workload management problems for a claims unit. This can complicate states' efforts to process more current claims efficiently.<sup>14</sup>

### III. State Options to Allow Policies on Claims to Support Other Program Priorities

The claims process implicates two important policies that states pursue in their administration of the Food Stamp Program generally. First, states stress program integrity and the importance of claimants honestly disclosing their circumstances. Second, states operate the Food Stamp Program to help ensure that low-income households have sufficient nutrition, that they are food-secure. At times, such as when a member of a household in severe need commits an act that requires disqualification from the program, these purposes can conflict.

Ordinarily, however, states can pursue these goals in harmony. Providing the maximum benefits legally permissible to households that deal with the program honestly can accentuate the difference between them and those households that engage in fraud. This both helps meet the honest households' food needs and sends a clearer message to all households about the importance of program integrity.

Federal regulations do not permit a state simply to ignore claims against honest households resulting from their inadvertent errors or from the errors of the state agency. Those regulations do, however, give a statewide latitude to compromise or waive claims to ameliorate the impact of collecting from households with non-fraud claims.<sup>15</sup> These options include compromising claims to avoid hardship, distinguishing between current and former recipients, and reducing claims to the amounts that households can repay in three years.

#### A. Compromising Claims Based on Hardship or Inability to Pay

Federal rules allow states to establish standards for compromising claims based on the inability to pay.<sup>16</sup> More generally, federal rules give states broad authority to compromise any claim.<sup>17</sup> Although many approaches are possible, one well-tested policy is the Supplemental Security Income (SSI) Program's policy on waiving claims. In its preamble to the new regulations on claims, the Food and Nutrition Service describes this policy and notes that applying it is within states' discretion.

In SSI, a claim may be waived if:

- (a) The overpaid individual was without fault in connection with the overpayment, and

<sup>13</sup>7 C.F.R. § 273.18(e)(8)(ii)(G) (2005).

<sup>14</sup>Under *Stone v. Hamilton*, 308 F.3d 751 (7th Cir. 2003), states may not recoup agency-error claims that arose prior to the 1996 welfare law. Any state contemplating a procedure for reviving old claims would need a mechanism to ensure its compliance with *Stone*.

<sup>15</sup>USDA's authority to settle, compromise, or deny claims springs from 7 U.S.C. § 2022(a)(1) (2000). This authority includes the power to waive claims if the secretary determines that to do so would serve the purposes of the Food Stamp Act. *Id.* USDA has delegated this authority to waive or compromise claims to the states. 7 C.F.R. §§ 271.3, 271.4(b) (2005).

<sup>16</sup>7 C.F.R. § 273.18(e)(3)(M), (7) (2005).

<sup>17</sup>*Id.* § 271.4(b).

(b) adjustment or recovery of the overpayment would either:

- (1) defeat the purpose of the SSI program; or
- (2) be against equity and good conscience; or
- (3) impede efficient or effective administration of the SSI program due to the small amount involved.<sup>18</sup>

The Food and Nutrition Service recognizes the “merit” of public comments recommending that states be required to apply this policy in food stamps and acknowledges that such an approach is allowable under food stamp regulations. Rather than require this approach, the agency leaves the decision of how to compromise claims up to the states.<sup>19</sup>

Several states have tailored and supplemented the SSI approach to fit the Food Stamp Program’s goals and their own administrative needs. Rhode Island has a compromise policy in the spirit of the SSI example.<sup>20</sup> It focuses on the ability to pay and on whether paying would cause financial, physical, or mental hardship. Nevada’s hardship policy waives claims permanently where the household faces hardship. Among the conditions that may support such a finding are “Medical hardship which compromises the client’s ability to repay the debt[, c]ollection would jeopardize the client’s ability to provide shelter/housing and other basic necessities for immediate family members (dependents)[, or the household having g]ross income [that] is less than 100% of the federal poverty income guidelines.”<sup>21</sup> Oregon considers requests to compromise claims to avoid hardship if the cost of

administration and collection of the full amount is more than the current balance, if the claimant’s ability to pay the remaining balance is low because the claimant’s income is less than twice the federal poverty income guidelines or the claimant’s income and liquid resources are small relative to the remaining balance, or if the claim resulted from an administrative error, an inadvertent household error, or circumstances beyond the claimant’s control.<sup>22</sup>

Whatever policy a state adopts, it should issue clear compromise criteria to its eligibility workers and claims staff. Being accustomed to certification policy, which endeavors to give a single correct answer to each potential problem, staff naturally would be reluctant to apply broadly discretionary compromise and waiver policies. Any waiver decision inevitably has some subjective elements, but a clear standard such as the one for SSI waivers or these states’ formula will be most effective.

Having no waiver policy at all is not a desirable option. The Food and Nutrition Service’s regulations still require the state to notify households about the state’s waiver authority.<sup>23</sup> Clients are likely to be confused and resentful toward workers and claims staff if they seek waivers only to discover that no waivers are granted. Moreover, in *Bliek v. Palmer*, the Eighth Circuit held that due process principles required a state to inform recipients that it had the discretion to waive, reduce, or settle a claim.<sup>24</sup> In particular, the court held that recipients with agency-error overissuances “who depend on the state to help them meet their basic nutritional needs and

<sup>18</sup>65 Fed. Reg. at 41752, 41,765.

<sup>19</sup>*Id.*; see *Ellender v. Schweiker*, 575 F. Supp. 590 (S.D.N.Y. 1983) (discussing the Supplemental Security Income waiver process).

<sup>20</sup>Super, *supra* note 10.

<sup>21</sup>Division of Welfare and Supportive Services, Nevada Department of Health and Human Services, Eligibility and Payments Manual, Manual Transmittal Letter No. 01/19 29 (Oct. 1, 2001), [www.welfare.state.nv.us/elig\\_pay/epr\\_manual/f\\_100.pdf](http://www.welfare.state.nv.us/elig_pay/epr_manual/f_100.pdf).

<sup>22</sup>Oregon Department of Human Services, Family Services Manual, ch. 13(C)(3)(l), [www.dhs.state.or.us/policy/selfsufficiency/em\\_firstpage.htm](http://www.dhs.state.or.us/policy/selfsufficiency/em_firstpage.htm).

<sup>23</sup>7 C.F.R. § 273.18(e)(3)(iv)(M) (2005).

<sup>24</sup>*Bliek v. Palmer*, 102 F.3d 1472 (8th Cir. 1997).

who have justifiably relied on the accuracy of past food stamp issuances ... have a significant interest in being fully informed of the state's authority to settle the claim so that they might ask the state to exercise its authority either before or at the fair hearing."<sup>25</sup> The court rejected the state's argument that it had made a policy decision not to grant any waivers under its discretion.

### **B. Distinguishing Between Current and Former Recipients**

States may select separate compromise and waiver standards for current recipients (who are subject to recoupment) and those not now receiving food stamps (but who may be subject to tax refund intercepts and other means of collection). Although collecting from current recipients obviously is easier, the fact that they still qualify for food stamps indicates that they are at risk of food insecurity.

Former recipients may be better able to pay. Some have earnings and could be owed income tax refunds that the Treasury Offset Program can intercept. One large tax intercept can produce more collections than several years of monthly recoupments and can do so without affecting a household's monthly food budget.<sup>26</sup>

### **C. Compromising All Nonfraud Claims at the Amount that a Household Can Pay Within Three Years**

Federal rules allow states to compromise claims that may not be collected within three years.<sup>27</sup> Thus, if a household is participating, the state may compromise or waive the amount of the claim that exceeds thirty-six times the monthly

recoupment amount.<sup>28</sup> These regulations recognize that little useful purpose is served by continuing to collect from a household after three years. Apart from the most serious cases of fraud, penalties in the Food Stamp Program generally end well short of three years. After that length of time, the household may not even remember just what occasioned the overissuance in the first place. Here again Maine, New Hampshire, and other North East Region states have taken advantage of the option to focus their attention on more current claims.

### **IV. State Options to Improve the State's Ratings for Claims Performance**

Under the Food and Nutrition Service's prior policy, the sole goal of the claims process was collection. A state that collected a large amount was considered a high performer no matter how inefficiently or haphazardly its process operated. States derived no advantage from waiving or expunging old claims; as a result, the program built up a huge and growing backlog of claims on which no collection action was pending. USDA's Office of the Inspector General and congressional overseers saw this backlog of unresolved claims as an indication that the Food Stamp Program was sloppily administered.<sup>29</sup> They pointed out that well-run private businesses did not maintain large outstanding balances of collectibles: they collected them, compromised them, or wrote them off.

Responding to these criticisms, the Food and Nutrition Service's July 2000 rules fundamentally changed the claims process by expanding its goals. The primary pur-

<sup>25</sup>*Bliek*, 102 F.3d at 1477.

<sup>26</sup>To be sure, many of the tax refunds that the Treasury Offset Program intercepts result from the earned income tax credit (EITC), which is also an important income support for low-wage working families. Intercepting an EITC may force a household to postpone important purchases or efforts to pay off accumulated bills. It does not, however, directly affect the household's ability to purchase sufficient food each month.

<sup>27</sup> 7 C.F.R. § 273.18(e)(7)(i) (2005).

<sup>28</sup>Allotment reduction for agency-error claims and inadvertent household-error claims is limited to the greater of \$10 or 10 percent of a household's allotment. 7 U.S.C. § 2022(b)(3) (2000). Over a thirty-six-month period, the state can estimate that it will collect the greater of \$360 or 360 percent of a household's monthly allotment.

<sup>29</sup>See note 1, *supra*.

pose of these new regulations is to make the food stamp claims system more efficient, applying some of the principles of large private businesses. The Food and Nutrition Service hopes and expects that greater efficiency will increase overall collections. The priority, however, is to show good stewardship of public resources by taking prompt and decisive action, one way or the other, on all claims. Thus a state with large collections but a huge, unmanaged backlog of claims can expect no better than a mixed review from the agency. By contrast, a state that compromises or waives many relatively unproductive claims to focus its energies on collecting those that remain is following the agency's model much more faithfully. Advocates who understand how the agency evaluates states' claims performance can develop proposals that will both help many households and improve the state's ratings.

The Food and Nutrition Service's rules give it broad discretion to evaluate states' performance in pursuing claims.<sup>30</sup> In practice, it evaluates states each federal fiscal year based on seven different ratios:

- claims *collected* to the state's projected overissuances for that year;
- claims *collected* to the state's projected overissuances for the immediately preceding fiscal year;
- claims *established* to the state's projected overissuances for that year;<sup>31</sup>
- claims *established* to the state's total food stamp issuance for that year;
- claims *collected* to claims *established* for that year;
- claims *collected* to the state's *total outstanding balance* of claims; and

- claims *referred* to the Treasury Offset Program to *total outstanding balance* of claims.<sup>32</sup>

This system differs sharply from the traditional food stamp QC system—the Food and Nutrition Service's primary method of assessing state performance on program integrity. First, a state rated poorly faces no fiscal penalties. Instead the Food and Nutrition Service asks the state to work to improve its performance in problem areas. Indeed, the agency may not legally base fiscal penalties on its claims performance ratings because they have not been promulgated as rules under the Administrative Procedure Act.<sup>33</sup>

Second, these measures are not designed to criticize states close to the national average. The Food and Nutrition Service divides the states into five quintiles on each of these six criteria. States in the fourth or fifth quintile on any one of these criteria are asked to find ways of improving their performance in that area. Although this still means that twenty states are being asked to improve in each area each year, it does not mean that states need to rise above the national average to score satisfactorily on a given measure.

And, third, the claims evaluation system offers a much more nuanced appraisal of states' performance. Instead of, in effect, rating states as "good" or "bad" the way QC does, these measures recognize the true variety of state performances. Most states score well on some measures and lower on others. All but six states were found in need of improvement in at least one area of claims activity in fiscal year 2003, the most recent for which data are available; two of those six states had been cited the previous year. Conversely the Food and Nutrition Service found only one state in need of improvement in all

<sup>30</sup>7 C.F.R. § 273.18(a)(3), (d)(2) (2005).

<sup>31</sup>A claim is considered established when the state sends a household a notice alleging the claim, and the household acknowledges the debt, fails to request a hearing, or requests a hearing but loses. A state's overissuances are projected from the overissuances established through the food stamp quality control (QC) system.

<sup>32</sup>Memorandum from Karen J. Walker, Director, Program Accountability Division, USDA, to Directors, Food Stamp Program, All Regions (Sept. 22, 2004) (on file with David A. Super).

<sup>33</sup>Administrative Procedure Act, 5 U.S.C. § 553(c) (2000); see 7 U.S.C. § 2013(c) (2000) (requiring USDA to follow notice-and-comment rule making when setting standards in the Food Stamp Program).

areas. Thus, although the agency finds something to criticize about almost every state each year, the agency also notes accomplishments of almost every state each year. The profusion of measures and the near certainty of both good and bad scores effectively give states considerable flexibility.

Policy changes to improve a state's performance on one measure can hurt a state on others. In particular, increasing the amount of claims that a state establishes will help on some measures but hurt on others. Thus, for example, when Hawaii improved its claims establishment from 2002 to 2003, it improved on some measures but fell into the bottom quintile on its ratio of claims collected to those established.

A state can, however, clearly improve its rating under these formulas by taking any of three steps: (1) reducing its QC error rate; (2) increasing collections; or (3) reducing its outstanding balances by collecting, compromising, or waiving claims. Improvements in error rates appear to be the single most important cause of improvements in states' claims performance ratings. Of the three ways of achieving unambiguously better ratings, the amount of claims compromised or waived is the most readily within the state's control. For example, New Mexico achieved a 45 percent reduction in its outstanding balance in a single year, primarily through compromise and waiver.<sup>34</sup> In addition to improving the state's standing under the sixth and seventh measures above, an aggressive policy of compromise and

waiver can free up the state agency's claims staff to improve collections and certification staff to improve the state's error rate.

All ratios are calculated in terms of dollars; establishing and collecting one \$3,000 claim gives the state as much credit as establishing and collecting ten \$300 claims but is almost certainly less work and less costly. The ratios also do not differentiate among fraud, inadvertent household error, and agency-error claims.<sup>35</sup> Nationally the average amount of fraud claims is far greater than that of inadvertent household-error claims; that amount in turn is considerably larger than the typical agency-error claim.<sup>36</sup> A state that sets a higher cost-effectiveness threshold for establishing nonfraud claims, and a more generous policy for compromising and waiving those claims, reduces the *number* of outstanding claims far more than the *amount* of those claims. This frees up more staff resources to increase the collection of the remaining claims while foreclosing relatively little in potential collections. Households that engage in fraud also may be more likely to have substantial employment and hence qualify for large tax refunds that can be intercepted through the Treasury Offset Program. A senior Food and Nutrition Service official says that "many times it is important for program integrity to give priority to fraud and larger claims. We have no problem with and even encourage States to address these claims differently when submitting any claim referral plans."<sup>37</sup>



<sup>34</sup>State Operations Branch, Program Accountability Division, Food and Nutrition Service, USDA, FY 04 Claims Standard (unpublished spreadsheet on file with David A. Super). At the beginning of the 2002 fiscal year, New Mexico's outstanding claim balance was \$9 million. Over the course of the year, it collected about \$1 million, a drop of 36 percent from 2001 and only about three quarters as much as the new claims it established that year. Nonetheless, it preserved its rating on the collections to outstanding balance measure by writing off \$4.5 million in claims.

<sup>35</sup>States are, however, allowed to retain 35 percent of what they collect from fraud claims, 20 percent of collections of inadvertent household error claims, and none of agency error claims. 7 U.S.C. § 2025(a) (2000).

<sup>36</sup>One study performed for the Food and Nutrition Service found that only 2 percent of participating households were ineligible for food stamps. On average, overpaid eligible households receive \$65 more in food stamps than they should have. This has the effect of raising the combined total of their income and food stamps from 79 percent of the poverty line to 85 percent of the poverty line. CAROLE TRIPPE & CATHERINE PALERMO, MATHEMATICA POLICY RESEARCH, FOOD STAMP PAYMENT ERRORS: HOW BIG ARE THEY, WHAT IS THEIR IMPACT, AND WHAT DO WE KNOW ABOUT HOUSEHOLDS WITH THESE ERRORS? (2000). Thus, in most cases, the overissued benefits went to extremely needy households. A more recent study of somewhat larger errors found that they, too, went overwhelmingly to households below or near the poverty line. OFFICE OF ANALYSIS, NUTRITION, AND EVALUATION, FOOD AND NUTRITION SERVICE, IMPACT OF FOOD STAMP PAYMENT ERRORS ON FOOD STAMP PURCHASING POWER (2005), available at [www.fns.usda.gov/oane/MENU/Published/FSP/FILES/ProgramIntegrity/HouseholdWell-Being.pdf](http://www.fns.usda.gov/oane/MENU/Published/FSP/FILES/ProgramIntegrity/HouseholdWell-Being.pdf).

<sup>37</sup>O'Connor, *supra* note 7, at 6.

The Food and Nutrition Services new rules on claims seek a more efficient claims process, but not necessarily a harsher or more burdensome one. The Food and Nutrition Service makes clear that it wants states to set policy on claims and to operate in accordance with that policy. However, it gives states broad latitude in formulating that policy. The agency does not want cases languishing due to inattention or negligence, but it makes clear that states have broad discretion to establish policies that sort and filter claims so that states can focus their limited resources on high-priority cases. To date, most states have barely scratched the surface of the options available to streamline how they process claims. With

the initial round of Farm Bill implementation winding up and their budgets and staff remaining under severe pressure, this is an opportune time for states to reshape their policies on claims to suit their resources and policy preferences better.

#### Author's Note

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## Food Stamp Overissuance Checklist

- 1. Is there an overissuance?** Did the payment in question result from the household or the food stamp office violating food stamp regulations? If not, there is no overissuance. 7 C.F.R. § 273.18(b). Similarly, if the claim is based on alleged trafficking, is the food stamp office jumping to conclusions from data in its electronic benefit transfer system? *Id.* § 273.18(a)(1)(ii).
- 2. Was the overissuance correctly calculated?** Did the food stamp office apply all applicable income exclusions under 7 U.S.C. § 2014(d) and 7 C.F.R. § 273.9(b)(5), (c)? Did the food stamp office properly disregard amounts of income that could not be anticipated with reasonable certainty on the basis of information known to the household twenty days before the food stamp office determined the household's benefits for the month in question as 7 U.S.C. §§ 273.10(c)(1), 273.12(a)–(c) require? See *id.* § 273.18(c)(1)(ii)(A).
- 3. Does the claim include stale amounts?** The food stamp office *must* exclude any benefits issued more than six years before it “became aware of the overpayment” and (except in the case of an intentional program violation) *may* exclude benefits issued more than twelve months before it became aware of the claim. *Id.* § 273.18(c)(1)(i).
- 4. Did the food stamp office properly offset any underissuances or expunged benefits?** This should include the amount by which the household was underissued during the period for which the overissuance took place. The food stamp office should thoroughly review its records to find any benefits that might have been expunged from a household member's electronic benefit transfer account. *Id.* § 273.18(c)(1)(ii)(C), (D).
- 5. Is anyone in the current food stamp household liable for the overissuance?** All adult members of a food stamp household are jointly and severally liable for overissuances to that household, and the food stamp office can recoup benefits from an entire household even if only one member is responsible for a prior overissuance. An individual is *not*, however, responsible for a prior overissuance if the individual was not a member of the overissued household during the month in question or was not an adult at the time of the overissuance (regardless of the individual's current age). *Id.* § 273.18(a)(4)(i).

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## Food Stamp Overissuance Checklist (*Continued*)

- 6. Is the claim stale because it was not established in the quarter after the quarter in which it was discovered?** Whether this regulation is intended to work in favor of recipients is unclear; however, one can also make a due process claim that excessive delay in establishing claims that the food stamp office knows it wants to pursue tends to undermine the household's ability to defend itself since records are more likely to be lost, memories dimmed, and so on. The food stamp office can hardly claim that the government interest should allow it to delay establishing the claim since federal regulations establish the quarter-after-the-quarter standard. *Id.* § 273.18(d)(1).
- 7. Would pursuing the claim be cost-ineffective?** This is difficult to show if the household can readily be subject to recoupment from current benefits but otherwise is worth considering for relatively small claims. *Id.* § 273.18(e)(2).
- 8. Was the notice establishing the claim legally sufficient?** A notice that is vague or silent on the reason for the claim, the method by which it was calculated, or the opportunity to have the claim waived may violate federal regulations. *Id.* § 273.18(e)(3)(iv); see *Mayhew v. Cohen*, 604 F. Supp. 850 (E.D. Pa. 1984). A notice that is vague on the consequences of failing to respond may violate due process (or may be insufficient to preclude a later challenge to the validity of the claim). See generally 7 U.S.C. § 2022(a)(1) (establishing the U.S. Department of Agriculture's authority to settle, compromise, or deny claims); 7 C.F.R. §§ 271.2, 271.4(b) (delegating that authority to state food stamp agencies). Also, under *Bliek v. Palmer*, 102 F.3d 1472 (8th Cir. 1997), notices concerning claims should inform households that they have the right to request that the claim be waived even if the food stamp agency would be disinclined to grant such a waiver. See *Ellender v. Schweiker*, 575 F. Supp. 590 (S.D.N.Y. 1983) (similar principles applied in Supplemental Security Income context).
- 9. Should the claim be reduced, compromised, or waived for inability to pay?** The economic circumstances of many low-income households make repaying overissuances a serious hardship. 7 C.F.R. § 273.18(e)(3)(iv)(M), (7)(i).
- 10. Did the food stamp office fail to retain proper records relevant to the claim?** Without these records, the household may be unable to defend itself properly against the asserted overissuance. *Id.* §§ 271.2(e)-(f), 273.2(f)(6).