

Withdrawal of Proposed Rule Addressing BBCE Loophole Violates the APA; the Rule Must be Restored

To: FGA Partners

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Date: July 6, 2021

Key Points

- The Broad-Based Categorical Eligibility (BBCE) loophole allows millions of people to receive the benefits of the Supplemental Nutrition Assistance Program (SNAP), referred to as “food stamps,” even though they fail to meet the federal eligibility criteria, wasting billions of taxpayer dollars.
- On July 24, 2019, the Trump administration, through USDA’s Food and Nutrition Service (FNS) proposed a rule to address this loophole, creating a clear nationwide standard for categorical eligibility that aimed to extend automatic approval for food stamps only to those households that truly need it. Then, on June 10, 2021, the Biden administration suddenly withdrew the rule.
- FNS, now under the Biden administration, failed to provide an adequate explanation for its decision to withdraw the proposed rule aimed at addressing the BBCE loophole. Absent such an explanation, the agency’s action was “arbitrary and capricious” and therefore, unlawful. The proposed rule should be restored.

Background on the BBCE Loophole

The Supplemental Nutrition Assistance Program (SNAP) is a federal welfare program administered by states that is intended to provide funds only to truly needy low-income households to be used to purchase food via an electronic benefit transfer (EBT) card.¹ Under federal law, eligibility for SNAP benefits, sometimes referred to as “food stamps,” may be determined in one of two ways.

First, approval for food stamps may be granted if an applicant meets specific eligibility requirements outlined in federal law.² This includes certain household income and asset limits verified through an established eligibility determination process.³

Second, eligibility for food stamps may also be obtained by merely showing one’s eligibility for or receipt of “benefits” from other specified low-income assistance programs.⁴ By doing so, one may receive automatic eligibility for food stamps, referred to as “categorical eligibility,” without having to undergo the financial eligibility determination process typically required.⁵ This second method is generally referred to as “Broad-Based Categorical Eligibility,” or BBCE.⁶

BBCE is codified in Section 5(a) of the Food and Nutrition Act of 2008 (7 U.S.C. 2014(a)) which provides categorical eligibility for food stamps to households in which each member receives “benefits” under a state program funded under Temporary Assistance for Needy Families (TANF), also referred to as “cash welfare.”⁷ As alluded to above, in defining “benefits” the law is extremely broad considering any cash assistance as well as non-cash or in-kind benefits or services from any TANF-funded program to constitute “benefits” justifying categorical eligibility.⁸ For instance, based on the current language, merely receiving a welfare brochure funded through a cash welfare program could enable a household to receive automatic approval for food stamps.^{9 10 11}

Thus, as a result of this broad interpretation a loophole has been created that, based on government estimates, currently allows approximately 1.7 million households to receive food stamps even though their household income, assets, or both are higher than the statutorily-authorized amount.¹² Other studies have shown that as of 2018, these loopholes have enabled more than five million people to obtain food stamps without meeting federal eligibility criteria.¹³ Clearly, people who do not truly need food stamps are receiving them, wasting billions of taxpayer dollars.

Trump Administration Proposes Rule to Address the Loophole & the Biden Administration Arbitrarily Withdraws the Rule

On July 24, 2019, the Trump administration proposed a rule to address this loophole, refining the categorical eligibility requirements based on receipt of cash welfare to define “benefits” to mean “ongoing” and “substantial” benefits, while limiting the types of non-cash TANF benefits which may confer categorical eligibility to only those that focus on subsidized employment, work supports, and childcare.¹⁴ In addition, the proposed rule defined “ongoing” benefits as those that a household receives or is authorized to receive for a period of at least six months and “substantial” benefits as those valued at a minimum of \$50 per month.¹⁵ Finally, the proposed revision created a requirement that state agencies inform the federal government of all non-cash TANF benefits they rely upon to confer categorical eligibility.¹⁶ Through these changes, the proposed revision created a clear nationwide standard for categorical eligibility that aimed to extend automatic approval for food stamps only to those households that truly need it, and not based merely on the receipt of nominal, one-time benefits or services.¹⁷

On June 10, 2021, the Biden administration suddenly withdrew the rule claiming it had done so “[a]fter reviewing and considering the comments received” during the comment period the Trump administration engaged in back in 2019.¹⁸ In an attempt to justify the sudden withdrawal, the Biden administration, through USDA’s Food and Nutrition Service (FNS), provided three reasons for its sudden reversal. First, it claimed that the proposed rule did not sufficiently justify the impact it would have on the 1.7 million households that would ultimately lose their food stamps.¹⁹ Second, that the proposed revision “did not adequately mitigate the disproportionate impact the rule would have had on households with an elderly member.”²⁰ Third, that the “concerns raised regarding program integrity were not adequately supported by data and do not justify the [implementation] costs to State agencies.”²¹

At issue is whether the sudden withdrawal of this proposed rule violates the Administrative Procedure Act (APA) by failing to follow the rulemaking process.



The Arbitrary and Capricious Decision to Withdraw the Proposed Rule Violates the APA and the Rule Must be Restored

The withdrawal of this proposed rule which followed a notice and comment period is subject to judicial review under the APA.²² According to the U.S. Supreme Court, the decision to withdraw a rule must be set aside if “the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”²³ While an agency is free to decide not to proceed with a proposed rule, it is not allowed to withdraw a proposal for “no reason whatsoever.”²⁴

Here, FNS has sought to explain its sudden withdrawal of the proposed rule by claiming it had done so after reviewing and considering, for a second time, comments received back in 2019, only this time, under a new presidential administration.²⁵ In just two sentences FNS provides the reasons for its decision to reverse the rule it had championed less than two years earlier.²⁶

First, FNS claims that the proposed rule did not sufficiently justify the impact it would have on the 1.7 million households that would ultimately lose their food stamps as a result of the new rule because they don’t actually qualify for food stamps based on their household income and/or assets.²⁷ In other words, FNS, now under the leadership of a new president, does not disagree with the facts that drove it to promulgate this rule under the previous president, namely, that there are roughly 1.7 million households taking advantage of a loophole in order to receive benefits they are not actually entitled to receive based upon their income and assets, and that promulgating this rule will stop this fraud, whether the fraud is intentional or not, from continuing. Where the new FNS now disagrees is whether removing these households in order to save billions of taxpayer dollars is justified at all. The rationale behind their opinion is that it is unjustifiable to save billions of dollars by stopping individuals from receiving welfare who are not actually entitled to receive it is unclear because FNS failed to articulate it in its statement.

As the Supreme Court has made clear, in order to comply with the APA when withdrawing a rule, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a “rational connection between the facts found and the choice made.”²⁸ Here, the FNS decision does not have a rational connection between the facts found, and the choice it is making. The rule must be reinstated.

Second, FNS claims that the proposed revision “did not adequately mitigate the disproportionate impact the rule would have had on households with an elderly member.”²⁹ In support of this claim the FNS offers no facts or data at all, just an assertion. This will not suffice. As the D.C. Circuit Court has made clear, the agency action must be “adequately explained” and “coheren[t].”³⁰ Without facts to support the assertion, neither is achieved.

Third, FNS claims that the “concerns raised regarding program integrity were not adequately supported by data and do not justify the [implementation] costs to State agencies.”³¹ Yet, as stated above, even the short statement the FNS published in the register when withdrawing the proposed rule included and agreed with the most relevant data justifying implementation and citing that data in their own statement, that is, that there are 1.7 million households receiving food stamps as a result

of the loophole this rule would address.³² Again, as the Supreme Court stated in *State Farm*, "normally, an agency rule would be arbitrary and capricious if the agency . . . offered an explanation for its decision that runs counter to the evidence before the agency."³³ Here the FNS claim that there is no data to support the concerns giving rise to the proposed rule is without merit since the data that supports those concerns was referenced by the FNS in its own withdrawal statement. Clearly, this explanation for the sudden reversal, like the other two, does not meet the threshold requirements under the APA.

Bottom Line

FNS failed to provide an adequate explanation for its decision to withdraw the proposed rule aimed at addressing the BBCE loophole. Absent such an explanation, the agency's action was "arbitrary and capricious" and therefore, unlawful. The proposed rule must be restored.

¹ Congressional Research Service (CRS), "The Supplemental Nutrition Assistance Program (SNAP): Categorical Eligibility," Congressional Research Service, R42054, (2019), <https://fas.org/sgp/crs/misc/R42054.pdf>.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ "Broad-Based Categorical Eligibility (BBCE)," Food and Nutrition Service (FNS), United States Department of Agriculture (USDA), (2020), <https://www.fns.usda.gov/snap/broad-based-categorical-eligibility>.

⁷ "Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program (SNAP)," 84 FR 35570 (2019), pg. 35570-35582, Doc. No. 2019-15670, <https://www.federalregister.gov/documents/2019/07/24/2019-15670/revision-of-categorical-eligibility-in-the-supplemental-nutrition-assistance-program-snap#footnote-11%E2%80%8912-p35572>.

⁸ *Ibid.*

⁹ "Broad-Based Categorical Eligibility (BBCE)," Food and Nutrition Service (FNS), United States Department of Agriculture (USDA), (2020), <https://www.fns.usda.gov/snap/broad-based-categorical-eligibility>.

¹⁰ Jonathan Ingram, Nic Horton, "Closing the Door to Food Stamp Fraud: How ending broad-based categorical eligibility can protect the truly needy," Foundation for Government Accountability (2018), <https://thefga.org/paper/closing-the-door-to-food-stamp-fraud-how-ending-broad-based-categorical-eligibility-can-protect-the-truly-needy/>.

¹¹ Scott Centorino, "Ten opportunities for welfare reform states can pursue no matter who is in the White House," Foundation for Government Accountability (2021), <https://thefga.org/paper/ten-opportunities-welfare-reform/>.

¹² "Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program (SNAP)," 84 FR 35570 (2019), pg. 35570-35582, Doc. No. 2019-15670, <https://www.federalregister.gov/documents/2019/07/24/2019-15670/revision-of-categorical-eligibility-in-the-supplemental-nutrition-assistance-program-snap#footnote-11%E2%80%8912-p35572>.

¹³ Jonathan Ingram and Nic Horton, "Closing the Door to Food Stamp Fraud: How ending broad-based categorical eligibility can protect the truly needy," (2018), <https://thefga.org/paper/closing-the-door-to-food-stamp-fraud-how-ending-broad-based-categorical-eligibility-can-protect-the-truly-needy/>.

¹⁴ "Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program (SNAP)," 84 FR 35570 (2019), pg. 35570-35582, Doc. No. 2019-15670, <https://www.federalregister.gov/documents/2019/07/24/2019-15670/revision-of-categorical-eligibility-in-the-supplemental-nutrition-assistance-program-snap#footnote-11%E2%80%8912-p35572>.

¹⁵ "Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program (SNAP); Withdrawal," 86 FR 30795 (2021), pg. 30795-30796, Doc. No. 2021-12183, <https://www.federalregister.gov/documents/2021/06/10/2021-12183/revision-of-categorical-eligibility-in-the-supplemental-nutrition-assistance-program-snap-withdrawal>.

¹⁶ "Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program (SNAP)," 84 FR 35570 (2019), pg. 35570-35582, Doc. No. 2019-15670, <https://www.federalregister.gov/documents/2019/07/24/2019-15670/revision-of-categorical-eligibility-in-the-supplemental-nutrition-assistance-program-snap#footnote-11%E2%80%8912-p35572>.

¹⁷ *Ibid.*

¹⁸ "Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program (SNAP); Withdrawal," 86 FR 30795 (2021), pg. 30795-30796, Doc. No. 2021-12183, <https://www.federalregister.gov/documents/2021/06/10/2021-12183/revision-of-categorical-eligibility-in-the-supplemental-nutrition-assistance-program-snap-withdrawal>.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Env'tl. Integrity Project v. McCarthy*, 139 F.Supp. 3d 25 (DC Cir. 2015).

²³ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins Co.*, 463 U.S. 29, 43 (1983).

²⁴ *Env'tl. Integrity Project v. McCarthy*, 139 F.Supp. 3d 25 (DC Cir. 2015) (quoting *Int'l Union, United Mine Workers of Am. V. United States DOL*, 358 F.3d 40 (DC Cir. 2004)).



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²⁵ “Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program (SNAP); Withdrawal,” 86 FR 30795 (2021), pg. 30795-30796, Doc. No. 2021-12183, <https://www.federalregister.gov/documents/2021/06/10/2021-12183/revision-of-categorical-eligibility-in-the-supplemental-nutrition-assistance-program-snap-withdrawal>.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

²⁹ “Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program (SNAP); Withdrawal,” 86 FR 30795 (2021), pg. 30795-30796, Doc. No. 2021-12183, <https://www.federalregister.gov/documents/2021/06/10/2021-12183/revision-of-categorical-eligibility-in-the-supplemental-nutrition-assistance-program-snap-withdrawal>.

³⁰ Amneal Pharms. LLC v. FDA, 285 F.Supp. 3d 328, 346 (D.C. Cir. 2018).

³¹ “Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program (SNAP); Withdrawal,” 86 FR 30795 (2021), pg. 30795-30796, Doc. No. 2021-12183, <https://www.federalregister.gov/documents/2021/06/10/2021-12183/revision-of-categorical-eligibility-in-the-supplemental-nutrition-assistance-program-snap-withdrawal>.

³² Ibid.

³³ Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins Co., 463 U.S. 29, 43 (1983).