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DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 271, 272, 273, 274, and 278

RIN 0584-AE45

Supplemental Nutrition Assistance Program (SNAP) Photo Electronic Benefit Transfer (EBT) Card Implementation Requirements

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Proposed rule.

SUMMARY: Under Section 7(h)(9) of the Food and Nutrition Act of 2008, as amended (the Act), States have the option to require that a Supplemental Nutrition Assistance Program (SNAP) Electronic Benefit Transfer (EBT) card contains a photo of one or more household members. The Act and existing program regulations further provide that a State that implements a photo on the EBT card shall establish procedures to ensure that any other appropriate member of the household or any authorized representative of the household may use the card. This proposed rule would provide clear parameters on these requirements. In addition, this rule proposes to amend program regulations to codify guidance that was issued December 29, 2014, requiring States that intend to implement the photo EBT card option to submit a comprehensive Implementation Plan that addresses certain operational issues to ensure State implementation is consistent with all Federal requirements and that program access is protected for participating households. In this proposed rule, the United States Department of Agriculture (the Department or USDA) would clarify that the State option to place a photo on an EBT card is a function

of issuance. Pursuant to this, State agencies would be prohibited from having photo EBT card requirements affect the eligibility process. This includes ensuring that the option is appropriately implemented in a manner that does not impose additional conditions of eligibility or adversely impact the ability of appropriate household members to access the nutrition assistance they need. Failure to cooperate may result in penalties, including loss of federal financial participation. The proposed rule would also codify other program updates to reflect the current operations of the program.

DATES: Written comments must be received on or before [insert date 60 days from date of publication in the Federal Register] to be assured of consideration.

ADDRESSES: The Food and Nutrition Service, USDA, invites interested persons to submit written comments on this proposed rule. Comments may be submitted in writing by one of the following methods:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- Mail: Send comments to Vicky T. Robinson, Chief, Retailer Management and Issuance Branch, Rm. 426, Food and Nutrition Service, 3101 Park Center Drive, Alexandria, Virginia 22302.
- All written comments submitted in response to this proposed rule will be included in the record and will be made available to the public. Please be advised that the substance of the comments and the identity of the individuals or entities submitting the comments will be subject to public disclosure. FNS will make the written comments publicly available on the Internet via <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Vicky T. Robinson, Chief, Retailer Management and Issuance Branch, Rm. 426, Food and Nutrition Service, 3101 Park Center Drive, Alexandria, Virginia 22302, 703-305-2476.

SUPPLEMENTARY INFORMATION:

Background

Acronyms or abbreviations

In the discussion of this proposed rule, we use the following acronyms or other abbreviations to stand in for certain words or phrases:

<u>Phrase</u>	<u>Acronym, Abbreviation, or Symbol</u>
Code of Federal Regulations	CFR
Electronic Benefit Transfer	EBT
Food and Nutrition Act of 2008, as amended	Act
Food and Nutrition Service	FNS
Personal Identification Number	PIN
Point of Sale	POS
Supplemental Nutrition Assistance Program	SNAP
United States Code	U.S.C.
U. S. Department of Agriculture	the Department or USDA

Under Section 7(h)(9) of the Act, 7 U.S.C. 2016(h)(9), States have the option to require that a SNAP EBT card contain a photo of one or more household members. The statute also stipulates that if a State agency chooses to place photographs on EBT cards,

the State must establish procedures to ensure that any appropriate member of the household or any authorized representative of the household may utilize the card.

Pursuant to this statutory provision, existing regulations in 7 CFR 274.8(b)(5)(iv) provide that should a State agency require a photo on EBT cards, it must also establish procedures to ensure this same participant access is maintained. However, recent State implementation of the photo EBT card option revealed significant legal and operational complexities and challenges associated with having a photo on the card that, in the Department's view, calls for more regulatory guidance in this area. As a result, the Department is proposing to amend regulations in several areas to more explicitly define participant protections that must be maintained as well as implementation requirements if the State agency elects to implement a photo EBT card. In particular, this proposed regulation would clarify that the State option to place a photograph on an EBT card is a function of issuance. Pursuant to this, State agencies would be prohibited from having photo EBT card requirements affect the household eligibility or the certification process. Moreover, this rule would clarify the right of all household members and their authorized representatives to use the EBT card, regardless of whether their photo is on the card, and further define the responsibility of State agencies to ensure that retailers understand photo EBT requirements when processing transactions involving SNAP.

Implications of Photo EBT Card Option

While the photo EBT card option was provided to States through the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, few States have implemented the option to date. However, recent efforts have shown that implementation of the photo EBT card option involves complex legal, operational, and civil rights issues that, if not well planned and implemented, can adversely affect access for program participants. Recent photo EBT card rollouts have had major implementation issues, raising concerns about program access, and leading to confusion in the retailer community.

These issues in turn prompted the Department to issue guidance on the subject on December 29, 2014. This proposed rule would expand on and codify this guidance to help ensure clients' access to benefits is maintained in practice and that sufficient measures are taken to ensure access before the photo EBT option is rolled out.

There has been some question as to whether adding the photo to an EBT card adds value to the integrity of SNAP. Statute requires that any household member or any authorized representative must be able to use the EBT card, regardless of whether their photo is on the card. For this reason, and because trafficking often involves a willing retailer, placing a photo on the EBT card will have limited impact in addressing fraud. In fact, some State agencies have investigated the possible benefits of adding the photo and, upon further analysis, decided it was not worth the cost to do so. Nevertheless, the Act provides States with the option to implement the photo on the EBT card and these proposed regulations are intended to fill the existing policy gaps in this area for the reasons cited above.

Discussion of the Rule's Provisions

State Agency Requirements for Photo EBT Card Implementation

This proposed rule provides that State agencies would be required to meet certain requirements in order to implement a photo EBT card policy. The implementation requirements firmly establish SNAP policy that the photo EBT card option is a function of issuance and not a condition of eligibility; certification policy may not be impacted by the implementation of the option; all appropriate household members and authorized representatives, as defined in 7 CFR 273.2(n)(3), shall continue to be able to use the EBT card; program access is not inhibited at retail stores; and program access and program integrity are ensured through all stages of the process. A State considering a photo EBT card policy will need to lay out how it will operationalize the policy and develop and implement an Implementation Plan and photo EBT option that upholds all SNAP requirements.

To establish the requirements for the photo EBT card provisions, a new section would be codified in 7 CFR 274.8(f), addressing all the requirements associated with implementing a photo EBT card policy. Changes are also proposed to paragraphs within 7 CFR Part 273 to further clarify that photo EBT card processes do not impact the certification of eligible households.

Minimum Requirements

Implementation of the photo EBT card option takes substantial resources and requires substantial changes to State systems and procedures. Due to these challenges, States that

have recently implemented photo EBT card implementations have had significant issues with providing timely, accurate, and fair service to SNAP applicants and participants and with meeting other statutory and regulatory requirements. For this reason, the Department would require that States demonstrate to FNS successful administration of SNAP based on SNAP performance standards to be eligible to implement the photo EBT card option. Successful program administration would be based on an evaluation of metrics related to program access, the State's payment error rate, the State's Case and Procedural Error Rate, application processing timeliness, including 7-day expedited service and the 30-day processing standards, timeliness of recertification actions, and other metrics, as determined by the Secretary, that may be relevant to the implementation of a State's photo EBT card option. States would need to document in the Implementation Plan that they are meeting FNS performance expectations. The Department is interested in comments from the public about other metrics that FNS should consider in the context of determining successful program administration including metrics related to access to benefits. These performance standards will allow FNS to evaluate whether clients are receiving timely, accurate, and fair service before the State may be eligible to implement a photo EBT card option. This provision would be codified in 7 CFR 274.8(f)(1).

Function of Issuance

The proposed rule clarifies that the photo EBT card option is a function of issuance and not a condition of certification. Any implementation of the photo EBT card option

must not impact certification of households. State agencies shall not deny or terminate a household based solely on whether one or more household members comply with the requirement to have a photo on the EBT card.

The State agency's photo EBT card policy must not affect the certification process for purposes of determining eligibility regardless of whether an individual has his/her photo placed on the EBT card. For example, an application would be considered complete and be subject to 7 and 30-day processing timelines regardless of the status of the photo. Application processing timeliness requirements would not be different for photo EBT cards. This provision would be codified in 7 CFR 274.8(f)(2).

Voluntary vs Mandatory

The proposed rule would allow for State agencies to implement the SNAP photo EBT card on a mandatory or voluntary basis. Regardless of whether the photo is mandatory or voluntary, clients must be informed that their household's certification will not be impacted by whether they agree to the photo. If the policy is mandatory, State agencies must establish which member(s) of the household would be required to be photographed and must establish procedures that allow eligible nonexempt household members who do not agree to the photo to come into compliance at a later time. The photo may be of the head of household and/or other participating nonexempt household member(s). State agencies must issue benefits to compliant or exempt household members and, as noted earlier, non-compliance with a photo requirement by household members who choose not to be photographed must not negatively impact the household's eligibility determination.

If the policy is voluntary, clients would be able to elect to have their photo on the household EBT card but would not be required to do so and would not have to be in an exempted category to opt out of the photo option. State agencies implementing a voluntary photo EBT card policy would be required to make clients aware of the voluntary nature of the photo and the fact that benefit issuance would not be impacted by their decision to have or not have a photo on their card. In voluntary implementations, households would opt in to have a photo on their cards rather than opt out of the option. Therefore, EBT cards with photos would not be the default.

FNS has concerns that States implementing voluntary photo EBT card policies to date have been unsuccessful in communicating the nature of the program to clients and remains concerned about how such lack of information could affect SNAP households, especially those with non-applicant heads of household. The Department is seeking comment about suggestions for how to strengthen the requirements on States to provide clear and effective information that ensures clients understand the State's photo EBT policies. Additionally, to ensure States' implementation of the photo EBT option does not create disparate impacts on members of any protected class, as proposed, States would not be allowed to photograph non-applicants or put their photo on an EBT card, regardless of whether the State's program is voluntary or mandatory. As proposed, States could not offer non-applicant heads of households the option to opt in to have their photos taken to ensure that clients would not be pressured by States, intentionally or inadvertently, to have a photo taken. Nevertheless, FNS would like to better understand if there is any potential benefit of allowing non-applicants to have their photograph taken

under a voluntary implementation and whether such benefits outweigh potential problems.

These provisions would be codified in 7 CFR 274.8(f)(3) and 7 CFR 27.8(f)(4).

Exemptions

Because recent implementation by States showed inconsistency and confusion in the application of State-defined exemption criteria, the Department is making clear in this proposed rule who must be exempted from photo EBT card requirements. State implementation showed there were circumstances where even exempt clients as defined by those States, such as the elderly, disabled, or domestic violence victims, were not actually exempted from the photo EBT requirement. In addition, many clients were not clearly informed that they were exempt under the State's exemption criteria and were under the impression that they had to comply with the State's photo EBT card policy in order to receive program benefits.

To ensure that a State's photo EBT card requirement will not place undue burden on vulnerable clients, the proposed rule requires States implementing a mandatory implementation to exempt, at a minimum, the elderly, the disabled, children under 18, homeless households, and victims of domestic violence. FNS proposes that victims of domestic violence would be able to self-attest and States would not be permitted to require clients to submit documentation to verify that they have been victims of domestic violence. The ability to self-attest must be applied equally regardless of whether the victim is a female or male. A State agency may establish additional exempted categories,

including, but not limited to, categories described in hardship criteria as specified in 7 CFR 273.2(e)(2).

As noted in the previous section, as proposed, non-applicants shall not be required nor permitted to have their photographs taken or put on EBT cards. This provision would be codified in 7 CFR 274.8(f)(4).

Serving Clients with Hardship

The proposed rule requires that State agencies have sufficient capacity and a process to issue photo EBT cards, taking into account households that face hardship situations as determined by the State agency and that would receive non photo EBT cards. These hardship conditions include, but are not limited to: illness, transportation difficulties, care of a household member, hardships due to residency in a rural area, prolonged severe weather, or work or training hours which prevent the household from having photos taken in-office.

Issuance of Photo EBT Card

There are a variety of SNAP policy and operational questions that States must consider in developing their issuance process for photo EBT cards, including the technical aspects relating to software, hardware, and the taking, storage, and security of photos.

The proposed rule would require that States demonstrate sufficient capacity to issue photo EBT cards before they may receive an authorization from FNS to implement the option. As noted in the previous section on hardship, any State implementing a photo

EBT card option would have to establish a process to issue cards to households that may not be able to reach a local office due to a hardship condition. Furthermore, the process for issuing and activating photo EBT cards must not inhibit or delay access to benefits nor cause a gap in access to benefits for any eligible households. Any card issued as part of the implementation of the photo EBT card option may not count against the household as part of the maximum threshold of replacement cards as specified in 7 CFR 274.6(b)(5) and 7 CFR 274.6(b)(6). Most importantly, as noted earlier, non-compliance with a photo requirement cannot impact the eligibility determination of the household as the photo EBT card option is an issuance function, not a condition of eligibility.

States that have recently implemented a photo EBT policy have struggled with operational challenges during the transition from regular EBT cards to photo EBT cards. In one State, some clients lost access to their benefits during the period between the deactivation of their previous EBT card and activation of the new EBT photo card. This proposed rule would require that States implementing the photo EBT card option establish a process to ensure that the replacement of cards does not disrupt households' access to benefits, consistent with the requirements of 7 U.S.C. 2016(h)(9). Additionally, State card issuance procedures developed for new SNAP households would need to ensure adherence to the application processing standards of 7 days in the case of expedited households and 30 days for all other households, as required by 7 CFR 273.2(g) and 7 CFR 273.2(i).

As proposed, if a household meets expedited criteria in 7 CFR 273.2(i), the State must issue benefits and issue the EBT card to the entire household without delay. Regardless of whether the State's photo EBT policy is voluntary or mandatory, the State could not

delay, hold in abeyance, or prorate benefits for any household that meets expedited criteria in order to obtain a photo on the EBT card. Under a mandatory implementation, a non-exempt household member could be required to comply at the next recertification after expedited benefits have been issued to the household. If the non-exempt household member is not in compliance by the time the household is recertified, then the State could determine whether that member's share of benefits must be held in abeyance prospectively. Under the proposed rule, State agencies implementing a photo EBT card option must also meet the card replacement issuance card requirements stipulated in 7 CFR 274.6, which, among other things require States to issue replacement EBT cards within 2 business days following notice by the household that the card has been lost, stolen, or damaged.

This provision would be codified in 7 CFR 274.8(f)(6).

Prorating Household Benefits when Photo EBT Card is Mandatory

State agencies would not be able to deny benefits to an entire household because a nonexempt household member(s), required by the State to be photographed, refuses to be photographed. Unless the household meets expedited criteria, this proposed rule would require the State to issue a prorated share of benefits to the remaining household members, so they can use their share of the benefits that they are entitled to receive.

As proposed, for multi-person households, that would be a straight pro-ration of benefits. The State would divide the household's benefit allotment by the household size and multiply that number by the number of household members to be issued benefits. To illustrate, if a four-person household's monthly benefit allotment is \$200 and one

nonexempt household member does not comply with the requirement to have a photo placed on the EBT card, the \$200 would be divided by 4 to equal \$50, and then multiplied by 3 to equal \$150. The \$150 amount would be posted and available for use by the household. Any decision that impacts benefits under this provision would be subject to fair hearings in accordance with 7 CFR 273.15. For a single person household, the State agency would hold the entire benefit in abeyance until the household complies. This proposed provision is addressed in 7 CFR 274.8(f)(7) of the regulation.

Benefits Held for Noncompliance

FNS proposes that the pro-rated benefit amounts held for noncompliance with a State's photo EBT card requirement would be tracked and retained for future issuance by the State agency if and when any noncompliant household member(s) that previously chose not to be photographed comes into compliance. The pro-rated benefits withheld for that individual or individuals must promptly be issued within two business days of the time the individual(s) comes into compliance. Benefits withheld for non-compliance would not remain authorized for perpetuity and States must treat such benefits in accordance with the same timeframe used for handling expungements under 7 CFR 274.2(h)(2). This would allow States to better manage benefits that have not been issued.

This proposed provision is addressed in 7 CFR 274.8(f)(8) of the regulation.

Household and Authorized Representatives Card Usage

The Food and Nutrition Act requires States implementing photo EBT to "establish procedures to ensure that any other appropriate member of the household or any

authorized representative of the household may utilize the card.” All household members, authorized representatives as defined in 7 CFR 273.2(n)(3), and non-applicants applying on behalf of others have a right to access SNAP benefits by using the household EBT card with a valid PIN even if their picture is not on the card or there is no picture on the card. The State agency must take steps to ensure that individuals who are not pictured on the card can continue to access SNAP benefits in accordance with the Section 7(h)(9)(B) of the Act.

The ability for authorized representatives to use the card is particularly critical to ensure food access for the elderly, disabled, or other homebound recipients who may have difficulty getting to grocery stores and require assistance in obtaining food.

This provision would be codified in 7 CFR 274.8(f)(9).

Client and Staff Training

This proposed rule would require that States ensure all staff and clients are trained on photo EBT card requirements. At a minimum, this training would include information about whether the photo EBT card is voluntary or mandatory, that all appropriate household members and authorized representatives are able to use the card, and with regards to mandatory implementation, which household members (if any) must comply with the photo requirement, which household members and/or household applicant categories are exempt. This proposed rule would also require that all retailer and client notices pertaining to the photo EBT card must also clearly describe the following statutory and regulatory requirement: all household members and any authorized representative of the household regardless of whether they are pictured on the card, may

utilize the card without having to submit additional verification of identity as long as the transaction is secured by the use of the PIN. This proposed rule would also stipulate that State agencies may not specifically reference groups exempt from the photo requirement in any materials designed for retailers, as providing the categories of exempt groups may encourage speculation as to the age or circumstances of cardholders. External stakeholder materials should simply note that EBT cards without a photo are also valid. This provision would be codified in 7 CFR 274.8(f)(10).

Retailer Education and Responsibilities

Although retailer participation in SNAP is authorized and managed by USDA, this rule, as proposed, recognizes State agencies opting to implement a photo EBT card would impact SNAP transactions at the point of sale. Per the statutory requirement, State agencies are required to ensure access to benefits by household members other than the member(s) whose photo is on the card, as well as authorized representatives. Therefore, in paragraph 7 CFR 274.8(f)(10), this proposed rule would require State agencies to provide information to all retailers about the State agencies' implementation and operational plans so retailers are prepared for the changes, as well as to convey the Federal rules stipulating that all household members and authorized representatives must be allowed to use the EBT card regardless of the picture on the card. Furthermore, Federal rules prohibit retailers from treating SNAP participants differently from other customers at the point of sale. According to the equal treatment regulation in 7 CFR 278.2(b), SNAP customers cannot be singled out for special treatment in any way.

A State agency would need to provide documentary evidence that all retailers in the State and contiguous areas, including smaller independent retailers, have received notices from the State that explain the statutory and regulatory requirements related to photos on EBT cards described above and have a full understanding of those requirements. State agencies would be required to describe in the Implementation Plan when they will provide FNS with this documentary evidence in advance of implementation. This provision would be codified in 7 CFR 274.8(f)(11).

Interoperability

Section 7(j) of the Act requires that EBT cards be interoperable, which means that they can be used in any State regardless of where the benefits were issued. Without sufficient education for clients and retailers in both the implementing State and neighboring States, the implementation of the photo EBT card option could inhibit this required access to benefits. For example, a SNAP recipient who lives in a State with a photo EBT card may find it more convenient or cost effective to shop in another bordering State that does not have photo EBT cards. Likewise, a SNAP recipient may live in a State without a photo EBT card requirement, but shop in a State with such a card requirement. To ensure interoperability, clients, and retailers must be fully informed that the photo EBT cards remain interoperable and that authorized retailers must accept EBT cards from all States as long as the household member or authorized representative presents the valid PIN. Before introducing the new photo EBT cards, this proposed rule would require State agencies to conduct sufficient outreach to clients and retailers,

including those in contiguous areas, to ensure access to benefits is not inhibited and all parties understand their rights and responsibilities.

This provision would be codified in 7 CFR 274.8(f)(12).

Advance Planning Document

As the Act allows for photo EBT cards, appropriate implementation and administration of this option is an allowable State administrative cost which FNS would reimburse at approximately 50 percent. To ensure that FNS does not exceed the SNAP budget authority for State administration, States should be aware that any EBT contract modifications that increase costs must be approved by FNS before they may be signed. Increased EBT costs, whether contractual or resulting from other sources, also require an Implementation Advance Planning Document Update. This provision would be codified in 7 CFR 274.8(f)(13).

Implementation Plan

In 7 CFR 274.8(f)(14), this proposed rule would require State agencies to submit an Implementation Plan prior to photo EBT implementation that delineates how the State will operationalize this option. Upon receipt of the State's Implementation Plan, FNS would review the plan and either issue an approval, request modifications before an approval could be granted, or issue an approval subject to conditions. In cases where the Department finds that the steps outlined in the Implementation Plan are not sufficient for a successful implementation, the Department might issue an approval subject to conditions, such as requiring the State agency to demonstrate a rollout in a pilot in a

selected region of the State before the State may be approved to implement statewide or, FNS might approve the Implementation Plan for a statewide implementation upon the completion of an appropriate successful pilot project that establishes the State agency's ability to implement a full statewide rollout. Should a State be required to implement a pilot before statewide implementation, that requirement would be documented as a condition of the State's Implementation Plan approval, along with any information that the State must report to FNS before the State may be granted approval to implement statewide.

FNS expects that the process for FNS review and approval of photo EBT Implementation Plans will take at least 120 days. Obtaining FNS approval of the Implementation Plan is the first step States must take. However, a State may not actually issue EBT cards with photos until FNS has given the State an authorization to do so as described below. The multi-step approval process ensures that the State carries out the steps detailed in the Implementation Plan and has the opportunity to make any adjustments needed prior to issuing EBT cards with photos. Similarly if FNS has approved an Implementation Plan subject to conditions, such as requiring the State agency to conduct a pilot prior to statewide implementation, the State may not issue EBT cards with photos in the context of the pilot until FNS has given the State an authorization to do so. Approval from FNS would also be necessary for a State to proceed from pilot to statewide implementation. Any movement to implement without prior approval would be viewed as a violation of program requirements and could result in additional penalties including a loss of Federal financial participation.

FNS would not consider a State eligible or authorize a State to proceed with a photo EBT card option unless that State meets performance requirements noted earlier and established in 7 CFR 274.8(f)(1). States would need to demonstrate in the Implementation Plan that they are meeting FNS performance expectations. The Implementation Plan would also be required to include a description of the State's card issuance procedures, a detailed description of how client protections such as processing timelines and benefit access will be preserved, specific information about exempted recipients, a description of how the State will obtain photographs for the EBT card, training materials and training plans for State staff, examples of letters and other materials communicating the policy to recipients and to retailers, a proposed timeline for implementation, and any other information as required by the Secretary. If a State agency plans to disclose SNAP applicant or client data in accordance with 7 CFR 272.1(c) for purposes of implementing photo EBT cards, such as to obtain photos from another source like the State's Department of Motor Vehicles the proposed rule requires the State to also include any necessary memoranda of understanding as part of its Implementation Plan. Any information collected for the purpose of SNAP must be securely stored and can only be shared in accordance with 7 CFR 272.1(c).

State Implementation Plans would also be required to describe: the specific action steps that the State agency and its EBT contractor must take in order to implement the photo EBT card option as planned, together with the anticipated timetable for each step; the State's capacity to issue photo EBT cards; and the submission of the documentation that all retailers, including small and independent retailers, would receive notice from the State about the photo EBT card policy. The plan would also need to describe how the

State will ensure that the photo EBT cards are provided to clients and activated at the same time or before the active non-photo cards are deactivated. With regard to the State's capacity to issue photo EBT cards, the plan would include the description of the capacity at the facility where photo EBT cards will be produced, both for transitional and ongoing production, and assurance that the State and its EBT contractor will continue to meet regulatory timeliness requirements for all EBT card issuances. The Implementation Plan should also describe measures against which the photo EBT card implementation will be evaluated for the post-implementation evaluation required by 7 CFR 274.8(f)(16), and how the requisite data will be collected.

The State would also be required to include in its plan for FNS review all applicable written policy changes necessary to implement the photo EBT card option, as well as copies of all materials that will be used to inform clients, retailers and other stakeholders regarding photo EBT card implementation. Along with these materials, the States would need to provide a detailed description of how the notifications, communication, policies, and procedures regarding the implementation of the photo EBT card option will comply with all applicable civil rights laws.

Finally, the State would need to provide a description of the mechanisms in place to handle complaint calls and questions from clients, retailers, and external stakeholders and address any other issues related to the photo EBT card option, as well as detail how substantive information about those complaints will be tracked and reported. A State would not be authorized to issue EBT cards with photos until FNS grants the State an authorization to implement as specified by 7 CFR 274.8(f)(15).

Upon approval of the Implementation Plan, the State would be allowed to proceed with tasks described in the Implementation Plan, as modified by the approval, but not proceed to issuing actual cards until FNS provides authorization to implement.

An approved Implementation Plan would be considered public and would be posted on the FNS website. The Department is interested in receiving comments on any benefits and concerns of posting the approved Implementation Plan.

Authorization to Issue Photo EBT Cards

The authorization to implement would allow the State agency to begin issuing EBT cards with photos. After the Implementation Plan is approved, FNS will review State actions at an appropriate time interval to ensure that the process and steps outlined by the State agency in the Implementation Plan have in fact been carried out in a satisfactory manner. For example, prior to obtaining authorization to implement, a State would need to confirm and/or demonstrate that robust client and retailer outreach, as detailed in its Implementation Plan, has been completed.

If FNS finds that the State agency has not acted in accordance with the steps outlined in the State's photo EBT Implementation Plan, FNS could deny authorization for the State to issue EBT cards with photos until the State has done so in a satisfactory manner. FNS could also require the State to implement in a phased manner, which may include criteria as determined by the Secretary. This provision would be codified in 7 CFR 274.8(f)(15).

Post-Implementation Assessment and Evaluation

As already noted, 7 CFR 274.8(f)(16) would require States to submit to FNS a post-implementation evaluation conducted by from an independent evaluator, which describes the State's implementation to date, including any issues that arose and how they were addressed, the degree to which State staff, clients and retailers properly understood and implemented the relevant policies and procedures, and in the case of a mandatory implementation, the number of clients that complied with adding the photo or did not comply, and the number that had their share of the benefits withheld from issuance and for how long. The evaluation must include, at a minimum, a survey of retailers and clients to measure their understanding of the State's photo EBT policy, and a report which includes the number of households and percent of households with photo EBT cards in the State and the number and scope of complaints related to photo EBT implementation, including a detailed summary of the types of complaints, the SNAP performance metrics as established in section 7 CFR 274.8(f)(1) and other information as determined by the Secretary.

For States implementing a mandatory implementation, the report must also detail the amounts and percent of benefits withheld for non-compliance, the number of households affected by the withholding of benefits due to noncompliance, the number and percent of persons exempt from the photo EBT card requirement, and the number and percent of exempted households and persons who opted to have the photo on the EBT card.

State agencies would be required to deliver this report to FNS within 120 days of implementation. This report would cover the first 90 days of implementation. The Department reserves the right to conduct its own review of the State's implementation.

Ongoing Monitoring

Based on observed implementation to date, there is cause for concern about possible impacts of photo EBT implementations, both as they are first implemented and over time. There is a need for additional assurance on an ongoing basis that state implementation of photo EBT cards is carried out in a manner consistent with all relevant laws and regulations, including Federal civil rights laws, that protect households' ability to access or utilize SNAP benefits for which they are eligible, and in a manner that does not adversely impact program participation.

As set forth in the proposed rule, in addition to the post-implementation report, a State agency that has implemented a photo EBT policy would be required to provide to FNS, on an ongoing basis, data on established metrics to monitor the impact of the photo EBT policy. The reporting requirements might require State agencies to conduct additional surveys, evaluations, or reviews of their operations, as determined by the Secretary. These ongoing reporting requirements would include information on the amounts and percent of benefits withheld for non-compliance, the number of households affected by the withholding of benefits due to non-compliance, the number and percent of household exempt from the photo EBT card requirement, benefit redemption rates, participation rates, the number and percent of households exempt from photo EBT cards who opted out of the photo requirement, the number and percent of exempted households who opted to have the photo on the EBT card, and any other information as requested by the Secretary. We are interested in receiving comments on other data that should be required from States on an ongoing basis, how frequently States should be required to report, or any other feedback relevant to the ongoing monitoring of this policy. As with other

Program information and plans, this information would be available to the public upon request, subject to the Freedom of Information Act provisions.

While staff, client, and retailer education is a critical component, it is not always a perfect indicator of whether actual barriers to access exist in practice. In the context of housing discrimination, “testers” have been utilized to proactively determine whether fair housing laws are being upheld consistently. One question is whether a similar mechanism should be used to ensure that, in practice, SNAP participants and their authorized representatives are able to use their benefits to purchase food at authorized retailers, regardless of whether they are pictured on the EBT card. We invite comment on this question as well as on the topic of how to verify appropriate implementation on an ongoing basis, particularly on ongoing mechanisms for identifying access issues resulting from photo EBT cards.

Modifying Implementation of Photo EBT Option

As part of FNS’s management and oversight responsibilities, FNS regularly conducts management evaluation reviews of State agencies’ administration and operation of SNAP to determine compliance with program requirements. FNS will conduct management evaluation reviews, as appropriate, to monitor State implementation of photo EBT cards.

If FNS identifies deficiencies in a State’s implementation or operations, FNS may require a corrective action plan consistent with 7 CFR 275.16 to reduce or eliminate deficiencies. If a State does not take appropriate actions to address the deficiencies, FNS would consider possible actions such as such as requiring an updated photo EBT

Implementation Plan, suspension of implementation and/or withholding funds in accordance with 7 CFR 276.4. Along these lines the Department is seeking comments on whether a State should be required to stop or suspend issuing photos on EBT cards if the State agency fails to establish procedures to ensure that all members of the household or any authorized representatives of the household are able to utilize the card, and what requirements, if any, should apply to that process.

Provisions Beyond 7 CFR 274.8(f)

Beyond Part 7 CFR 274.8(f), changes are proposed to 7 CFR Parts 271, 272, 273, and other paragraphs within Parts 274 and 278. While some of these changes are related to photo EBT card requirements, others involve updating SNAP regulations or enhancing integrity provisions.

7 CFR Part 271

The Department proposes to amend the definition of Identification (ID) card in 7 CFR 271.2. ID card in this definition refers to a card that was issued when program benefits were issued in the form of food stamp coupons. This ID card, which was used to establish the recipient as eligible to receive food stamp coupons, such as when picking up coupons at the State office or other central location is no longer widely used in the program. Today, program benefits are automatically deposited into the household's EBT account each month and are redeemed through EBT cards. The PIN on the EBT card establishes whether a household recipient or authorized representative can redeem

program benefits. However, this ID is still used in Alaska to identify households that are dependent upon hunting and fishing for subsistence. The definition for Identification (ID) would be amended to reflect only cases in which ID cards are currently used in the Program.

7 CFR Part 272

The Department proposes changes to 7 CFR Part 272 to ensure that regulatory language is in line with current program operations. In alignment with the change to 7 CFR 271.2, FNS proposes removing all references to “ID card” associated with the obsolete paper coupons. It would result in the removal of 7 CFR 272.1(g)(30) and 7 CFR 272.1(g)(47).

7 CFR Part 273

FNS proposes several changes to 7 CFR Part 273. The Department proposes adding language in 7 CFR 273.2(a)(1) to clarify that the implementation of the photo EBT card option cannot be treated as a condition of eligibility as it is a function of issuance. Further, this paragraph would be amended to ensure that, for the purpose of certification, States shall not treat households subject to a photo EBT card policy differently from households not subject to a photo EBT card policy. To ensure that expedited and standard application processing requirements are still met in photo EBT card situations, 7 CFR 273.2(a)(2) would be revised by adding that State agencies shall ensure that processing times are not delayed by implementation of the photo EBT card option. Third, the Department proposes to clarify the rules governing interviews in 7 CFR

273.2(e). State agencies may not require an in person interview solely for the purpose of taking a photo. Since this option is a function of issuance and not a condition of eligibility, households must be treated equally with regards to certification activities regardless of whether they are subject to or choose to comply with a photo requirement. However, households may be called in for a photo to be taken as a matter of issuance, not eligibility. In 7 CFR 273.2(n)(2), the reference to the ID card would be removed as it is obsolete. In 7 CFR 273.2(n)(3), the proposed language would change the word ID to EBT card. The proposal would change “its ID card and benefits” to “the EBT card.”

7 CFR Part 274

The Department proposes changes to 7 CFR 274.8(b)(5)(ii) to modify EBT cards in States implementing the photo EBT card option, in accordance with 7 CFR 274.8(f). States would be required to add text to all EBT cards to ensure retailers are aware that all household members and authorized representatives must be allowed to use the EBT card even if their photo is not on the card or no photo is on the card. Experience has shown that, when a photo is included on the EBT card, some retailers believe the card may only be used by the person pictured. In concert with other required measures to ensure that retailers understand the State’s photo EBT implementation, adding a statement on photo EBT cards would help alleviate confusion at retailer checkout and ensure compliance with the Federal statute that requires all household members and authorized members be able to access program benefits. This rule would propose that the States print the text: “Any user with valid PIN can use SNAP benefits on card and need not be pictured.” or alternative text approved by FNS. The Department is willing to consider alternative

language suggested by States as long as it achieves the same goal of clearly informing retailers and clients as to the correct policy in this area.

7 CFR Part 278

The Department is proposing changes in Part 278 to remove language that is no longer in line with program operations and update language to enhance program integrity. The Department has recently become aware of instances in which SNAP authorized retailers, unauthorized retailers, and other individuals have purchased multiple EBT cards illegally. Generally, these individuals are not SNAP recipients. Frequently they use three or more EBT cards at a time and use the cards to purchase a large amount of eligible foods that are then used to replenish store inventory or sold as inventory to other retailers or restaurants. To address this area of potential fraud in which individuals use multiple cards they have procured illegally, the Department is proposing new language to require retailers to ask for identification of anyone who presents three or more EBT cards at checkout. Specifically, this proposed rule would require SNAP authorized retailers to ask these individuals for photo identification, such as a driver's license, and an explanation as to why multiple cards are being used. Furthermore, should the store believe there is a potential for fraud, retailers would be allowed to record information from the individual's identification, EBT card number, and reason for using three or more EBT cards. The retailers would be required to report this information to the USDA OIG Fraud Hotline. If the retailer suspects fraud is being committed and the individual refuses to show identification, the retailer has the option to deny a sale when three or more EBT cards are being used during a transaction. The Department understands that occasionally

an individual or an individual shopping for an elderly client working for an authorized group home or other authorized facility may use multiple cards in order to purchase food legally for clients. Given these concerns regarding program access and program integrity, the Department is interested in comments from the public on whether there are other possible approaches to preventing individuals from using multiple EBT cards that they have obtained illegally, such as establishing a dollar threshold for individuals using three or more cards. These changes are proposed in 7 CFR 278.2(h).

The Department also proposes the removal of two paragraphs, (i) and (k) in 7 CFR 278.2. The paragraphs refer to an outdated method of establishing identity and operations based on paper coupons. These paragraphs currently represent a redundancy and could cause confusion as they refer to an ID card that is only used in Alaska. This process has been replaced by the EBT system. Furthermore, the proof of eligibility is established through EBT and other systems implemented by State agencies.

7 CFR 274.7(i) already addresses this procedure by establishing that State agencies shall implement a method to ensure that access to prepared meals and hunting fishing equipment is limited to eligible households. Eligible households are defined in 7 CFR 274.7(g) and (h).

Procedural Matters

Executive Order 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental,

public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

This proposed rule has been determined to be significant and was reviewed by the Office of Management and Budget (OMB) in conformance with Executive Order 12866.

Regulatory Impact Analysis

As required for all rules that have been designated as Significant by the Office of Management and Budget, a Regulatory Impact Analysis (RIA) was developed for this proposed rule. The full RIA is included in the supporting documents of the rule docket at www.regulations.gov. The following summarizes the conclusions of the regulatory impact analysis.

Need for Action: This proposed rule would incorporate into regulation and expand on guidance that was issued December 29, 2014 to certain State agencies. Based on observed implementation to date, there is cause for concern about possible impacts of photo EBT programs, both as they are first implemented and over time. This guidance requires States that intend to implement the photo EBT card option to submit a comprehensive Implementation Plan for FNS approval that addresses key operational issues to ensure State implementation complies with all Federal requirements and that program access is protected for participating households.

In this proposed rule, the Department would clarify that the State option to place a photo on an EBT card is a function of issuance. Pursuant to this, State agencies would be prohibited from having photo EBT requirements affect the eligibility process. This

includes ensuring that the photo EBT option is implemented in a manner that does not impose additional conditions of eligibility or adversely impact the ability of eligible Americans to access the nutrition assistance they need.

Benefits: The Department anticipates that this proposed rule will provide qualitative benefits to State Agencies, SNAP participants, and authorized retailers. The Act and existing program regulations provide that States that implement a photo on the EBT card must establish procedures to ensure that any other appropriate member of the household or any authorized representative of the household may use the card. This proposed rule will provide clear parameters for States wishing to implement photo EBT to ensure that State implementation is consistent with all Federal requirements and that program access is protected for participating households, which will safeguard the rights of clients, provide training to staff, clients, and retailers, and improve program administration.

Costs: States choosing the photo EBT option may incur additional administrative costs, which may vary based on the size and scope of the State's operations and whether implementation of the photo EBT card option is mandatory or voluntary. Regardless of whether the option is mandatory or voluntary, all States that implement photo EBT cards will incur certain implementation costs to include: preparing an implementation plan, communications and training for program staff, clients, and retailers, ongoing training costs to maintain an understanding of Photo EBT policies, programming costs for mandatory policies, and costs for the post-implementation assessment, evaluation and ongoing monitoring. States with mandatory photo EBT will also incur costs associated with prorating and storing benefits for noncompliant household members that choose not to be photographed. The Department estimates the total cost to be approximately \$9.8 million

over five years, assuming six States choose to implement a mandatory Photo EBT policy. Costs would be lower if some or all of these States choose to implement voluntary, rather than mandatory, Photo EBT policies. The estimate of six States is based on information from State legislatures that are either currently considering or discussing the possibility of considering such a policy. Given the projected timelines for these legislative actions, the Department assumes that the costs of implementing a Photo EBT system will be phased in over a five year period, as all six States are unlikely to approve and implement the policy in the same year. The two States that have already implemented photo EBT as a State option will not be required to retroactively submit Implementation Plans, but may continue to incur minimal costs associated with ongoing training and monitoring required for program staff, clients, and retailers.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601-612) requires agencies to analyze the impact of rulemaking on small entities and consider alternatives that would minimize any significant impacts on a substantial number of small entities. Pursuant to that review, it has been certified that this proposed rule would not have a significant impact on a substantial number of small entities. This proposed rule primarily impacts State agencies. As part of the requirements, State agencies would have to educate retailers about the photo EBT card. There will not be a substantial impact on small entities such as small retailers since the treatment of clients with EBT cards and photo EBT cards do not vary. Minimal changes will be required of retailers. Retailers will need to be aware that some

clients may present photo EBT cards but clients shall not be treated any differently. In addition, retailers will be required to request identification of individuals using three or more EBT cards. This is not expected to create a burden on retailers.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local and Tribal governments and the private sector. Under section 202 of the UMRA, the Department generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures by State, local or Tribal governments, in the aggregate, or the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, Section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the most cost effective or least burdensome alternative that achieves the objectives of the rule.

This proposed rule does not contain Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local and Tribal governments or the private sector of \$100 million or more in any one year. Thus, the proposed rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12372

The Supplemental Nutrition Assistance Program is listed in the Catalog of Federal Domestic Assistance Programs under 10.551. For the reasons set forth in the final rule in

7 CFR part 3015, subpart V, and related Notice (48 FR 29115, June 24, 1983), this program is included in the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

Executive Order 13132

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under Section (6)(b)(2)(B) of Executive Order 13121.

The Department has determined that this proposed rule does not have Federalism implications. This rule does not impose substantial or direct compliance costs on State and local governments. Therefore, under Section 6(b) of the Executive Order, a Federalism summary impact statement is not required.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This proposed rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full and timely implementation. This proposed rule is intended to have retroactive effect unless so specified in the Effective Dates section of the final rule. State agencies that have already implemented a photo EBT card must meet all requirements of regulations except the requirement to submit an Implementation Plan

prior to State's planned implementation date. Prior to any judicial challenge to the provisions of the final rule, all applicable administrative procedures must be exhausted.

Executive Order 13175

Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. On February 18, 2015, the agency held a consultation. During the consultation, no comments were received on the proposal. We are unaware of any current Tribal laws that could be in conflict with the proposed rule.

Civil Rights Impact Analysis

FNS has reviewed this proposed rule in accordance with USDA Regulation 4300-4, "Civil Rights Impact Analysis," to identify any major civil rights impacts the rule might have on program participants on the basis of religion, age, race, color, national origin, sex, political beliefs, or disability. After a careful review of the rule's intent and provisions and understanding the intent of this rule is to in part to protect the civil rights of recipients, FNS has determined that this rule is not expected to adversely affect the participation of protected individuals in the Supplemental Nutrition Assistance Program.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; 5 CFR 1320) requires the Office of Management and Budget (OMB) to approve all collections of information by a Federal agency before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number.

In accordance with the Paperwork Reduction Act of 1995, this proposed rule does not contain information collections that are subject to review and approval by the Office of Management and Budget.

This rule proposes reporting requirements for States to submit to FNS an Implementation Plan, a post-implementation evaluation of the photo EBT implementation, and related on-going measures. As the PRA requirements are applicable to collection of information from ten or more respondents, there are no information collection requirements that are subject to OMB review at this time. Should the number of estimated respondents reach ten or more, FNS will publish a notice for comment and submit the applicable requirements to OMB for review and approval.

E-Government Act Compliance

The Department is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects

7 CFR Part 271

Food stamps, Grant programs—Social programs, Reporting and recordkeeping requirements.

7 CFR Part 273

Administrative practice and procedure, Aliens, Claims, Employment, Food stamps, Fraud, Government employees, Grant programs-social programs, Income taxes, Reporting and recordkeeping requirements, Students, Supplemental Security Income (SSI), Wages

7 CFR Part 274

Food stamps, Grant programs-social programs, Reporting and recordkeeping requirements

7 CFR 278

Banks, banking, Food stamps, Grant programs-social programs, Penalties, Reporting and recordkeeping requirements, Surety bonds

Accordingly, 7 CFR parts 271, 273, 274, 278 are proposed to be amended as follows:

1. The authority citation for parts 271, 273, 274 and 278 is revised to read as follows:

Authority: 7 U.S.C. 2011-2036c

PART 271—GENERAL INFORMATION AND DEFINITIONS

2. In § 271.2, revise the definition of Identification (ID) card to read as follows

§ 271.2 Definitions

“*Identification (ID) card* means a card for the purposes of 7 CFR 278.2(j).”

PART 272—REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

§ 272.1 [Amended]

3. In § 272.1, remove and reserve paragraphs (g)(30) and (47).

PART 273—CERTIFICATION OF ELIGIBLE HOUSEHOLD

4. In § 273.2:

- a. Amend paragraph (a)(1) by adding to the end of the third sentence the words “, including in the implementation of a photo EBT card policy”
- b. Amend paragraph (a)(2) by adding a new fourth sentence before the last sentence the words “”
- c. Amend paragraph (e)(1) by adding a new fourth sentence after the third sentence.
- d. Amend paragraph (n)(2) by removing in the third sentence the words “and on the food stamp identification (ID) card, as provided in 7 CFR 274.10(a)(1) of this chapter” and by removing the last sentence.
- e. Amend paragraph (n)(3) by removing the word “ID card and benefits” and adding it its place adding the word “EBT card.”

The additions read as follows:

§ 273.2 Office operations and application processing.

(a) * * *

(1) * * * The State agency’s photo EBT card policy must not affect the certification process for purposes of determining eligibility regardless whether an individual has his/her photo placed on the EBT card. * * *

(2) * * * States must meet application processing timelines, regardless of whether a State agency implements a photo EBT card policy. * * *

* * * * *

(e) * * * State agencies may not require an in person interview solely to take a photo. *

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PART 274—ISSUANCE AND USE OF PROGRAM BENEFITS

5. In § 274.8:

a. Redesignate paragraphs (b)(5)(ii) through (iv) as paragraphs (b)(5)(iii) through (v), respectively, and adding a new paragraph (b)(5)(ii).

b. Add paragraph (f).

The additions read as follows:

§ 274.8 Functional and technical EBT system requirements.

* * * * *

(b) * * *

(5) * * *

(ii) State agencies that implement the photo EBT card option in accordance with paragraph (f) of this section must print on the EBT cards the text “Any user with valid PIN can use SNAP benefits on card and need not be pictured.” or similar alternative text approved by FNS.

* * * * *

(f) *State agency requirements for photo EBT card implementation* -- (1) *Minimum requirements*. Prior to implementation, State agencies must be performing sufficiently well in program administration to be eligible to implement the photo EBT card option. Prior to implementation, State agencies must demonstrate to FNS successful administration of SNAP based on SNAP performance standards. Successful program administration will take into account at a minimum the metrics related to program access, the State's payment error rate, the State's Case and Procedural Error Rate, application processing timeliness, including both the 7-day expedited processing and the 30-day processing standards, timeliness of recertification actions, and other metrics, as determined by the Secretary, that may be relevant to the State agency's implementation of photo EBT cards.

(2) *Function of issuance*. The photo EBT card option is a function of issuance and not a condition of eligibility. Any implementation of the option to place a photo on the EBT card must not impact the certification of households. An application will be considered complete with or without a photo and a case shall be certified regardless of the status of a photo in accordance with timeframes established under 7 CFR 273.2. If a State agency chooses to implement a voluntary photo EBT card policy, issuance shall not be impacted. If a State agency chooses to implement a mandatory photo EBT card policy, a State agency may not deny or terminate a household because a household member who is exempted by paragraph (f)(4) of this section does not comply with the requirement to place a photo on the EBT card.

(3) *Voluntary vs mandatory*. (i) State agencies shall have the option to implement a photo on EBT cards on a mandatory or voluntary basis. Regardless of whether the photo is

mandatory or voluntary, the certification process must not be altered in order to facilitate photos, and clients must be informed that certification will not be impacted by whether or not a photo is on the card.

(ii) Under mandatory implementation, State agencies must exempt certain clients, as stated in paragraph (f)(4) of this section. State agencies must establish which member(s) of the household would be required to be photographed and the procedures that allow eligible nonexempt household members who do not agree to the photo to come into compliance at a later time.

(iii) Under voluntary implementation, clients must be clearly informed of the voluntary nature of the option. Applicant members of households are not required to be in an exempted category to opt out of the photo requirement. States shall not require a photo be taken during a voluntary implementation and clients must opt in to have a photo on their card.

(4) *Exemptions.* Under a mandatory implementation, the State agency must exempt, at a minimum, the elderly, the disabled, children under 18, homeless households, and victims of domestic violence. A victim of domestic violence shall be able to self-attest and cannot be required to submit documentation to prove domestic violence. The ability to self-attest must be applied equally regardless of if the victim is a female or male. Non-applicants cannot have a photo taken for an EBT card whether or not they desire to have their photo taken. A State agency may establish additional exempted categories.

(5) *Serving clients with hardship.* State agencies must have sufficient capacity and a process to issue photo EBT cards, taking into account households that meet hardship

conditions and who would receive non photo EBT card. Examples of hardship conditions include, but are not limited to: illness, transportation difficulties, care of a household member, hardships due to residency in a rural area, prolonged severe weather, or work or training hours which prevent the household from being available during having photos taken in-office.

- (6) *Issuance of photo EBT card.* (i) States can require households to come in to be photographed, but cannot do so for the purposes of certification. The amount of time provided to households to come in and be photographed needs to be sufficient and reasonable and be documented in the Implementation Plan as required in paragraph (f)(14) of this section. If a household meets expedited criteria, the State must issue the benefits to the entire household without delay. Regardless of whether the State's photo EBT policy is voluntary or mandatory, the State may not delay, hold in abeyance, or prorate benefits for any household that meets expedited criteria in order to obtain a photo on the EBT card. Card issuance procedures for new SNAP households must ensure adherence to application processing standards as required in 7 CFR 273.2(g) and (i). Additionally, State agencies shall not store photos that are collected in conjunction with its photo EBT card policy but are not placed on an EBT card.
- (ii) The process for issuing and activating photo EBT cards must not disrupt, inhibit or delay access to benefits nor cause a gap in access for ongoing benefits for eligible households.

(iii) Any card issued as part of the implementation of the photo EBT card option may not count against the household as part of the card replacement threshold defined in 7 CFR 274.6(b)(5).

(7) *Prorating household benefits when photo EBT cards are mandatory.* For multi-person households, State agencies shall not withhold benefits for an entire household because nonexempt household members do not comply with the photo EBT card policy. If benefits of the nonexempt household member(s) are to be withheld, a prorated share of benefits shall be issued to the household member(s) that are in compliance with or are exempt from the photo requirement. Benefits that are not issued as a result of individual(s) not being in compliance with the photo requirement must be held and promptly issued once individual(s) comply with the requirement to have their photo placed on the card. For example, if there are four household members and one household member is not in compliance with the photo requirement, $\frac{3}{4}$ of the household's monthly benefit allotment must be issued, and $\frac{1}{4}$ of the benefit allotment must be held in abeyance and allowed to accrue until the household member complies. For a single person household, the State agency would hold all the benefits in abeyance until the household complies.

(8) *Benefits held for noncompliance.* Benefits held for noncompliance with the photo EBT card requirement must be withheld from issuance in accordance with paragraph (f)(6) of this section. Benefits withheld for non-compliance shall not remain authorized for perpetuity and States must treat such benefits in accordance with the same timeframe used for handling expungements under 7 CFR 274.2(h)(2). If the noncompliant member comes into compliance, the non-expired benefits must be

issued within two business days of when the client has their photo taken by the State agency. Any action to withhold benefits from issuance is subject to fair hearings in accordance with 7 CFR 273.15.

- (9) *Household and authorized representatives card usage.* The State agency must establish procedures to ensure that all appropriate household members and any authorized representatives, as defined in 7 CFR 273.2(n)(3), can access SNAP benefits for the household regardless of who is pictured on the card or if there is no picture.
- (10) *Client and staff training.* State agencies must ensure staff and clients are properly trained on photo EBT card requirements. At a minimum, this training shall include: whether the State option is voluntary or mandatory, who must comply with the photo requirement, which household members are exempt, and that all appropriate household members and authorized representatives are able to use the card regardless of who is pictured on the card or if there is no picture.
- (i) All staff and client training materials must clearly describe the following statutory and regulatory requirements:
- (A) Retailers must allow all appropriate household members and any authorized representative of the household, regardless of whether they are pictured on the card, to utilize the card without having to submit additional verification of identity as long as the transaction is secured by the use of the PIN;
- (B) EBT cards with or without a photo are valid in any State; and
- (C) Retailers must treat all SNAP clients in the same manner as non-SNAP clients;

(ii) State agencies may not specifically reference which categories of individuals are exempt from the photo EBT requirement in any materials to retailers.

(11) *Retailer education and responsibility.* State agencies must conduct sufficient education of retailers if photos are used on cards. The State agency must clearly inform all retailers in the State and contiguous areas of implementation. State agency communications with retailers must clearly state:

(i) All household members, authorized representatives, and individuals authorized by the household are entitled to use the EBT card regardless of the picture on the card if the EBT card is presented with the valid PIN;

(ii) Retailers must treat all SNAP clients in the same manner as non-SNAP clients in accordance with 7 CFR 278.2(b);

(iii) Retailers must not prohibit appropriate household members or authorized representatives from using an EBT card because they are not pictured on the card or there is no picture on the card;

(iv) EBT cards from any State are valid with or without a photo.

(12) *Interoperability.* Interoperability of EBT cards will remain the same regardless of whether or not there is a photo and regardless of which State issued the card. State agencies must conduct sufficient education of clients and retailers, including retailers in contiguous areas, to inform them that the photo EBT cards remain interoperable and authorized retailers must accept EBT cards from all States as long as the household member or authorized representative uses a valid PIN.

(13) *Advance Planning Document.* Appropriate implementation and administration of the photo EBT card consistent with all applicable requirements is an allowable State

administrative cost that FNS shall reimburse at 50 percent in accordance with 7 CFR 277.9. Increased costs related to placing photos on the EBT card, whether contractual or produced from other sources, require an Implementation Advance Planning Document Update.

(14) *Implementation Plan.* (i) State agencies must submit an Implementation Plan for approval prior to implementation that delineates how the State agency will operationalize the photo EBT option. FNS shall review the plan and issue an approval, request modifications prior to granting approval, or issue an approval subject to conditions. In cases where FNS finds that the steps outlined in the Implementation Plan are not sufficient for a successful implementation, FNS may issue an approval subject to conditions, such as requiring the State agency to implement a successful pilot in a selected region of the State before a statewide implementation. Should a State be required to implement a pilot before statewide implementation, that requirement would be documented in the State's Implementation Plan approval, along with any information the State must report to FNS before expansion approval would be provided by FNS.

(ii) State agencies must demonstrate successful administration of SNAP based on SNAP performance standards as established in paragraph (f)(1) of this section. State agencies shall not issue EBT cards with photos before the State's Implementation Plan is approved and the State agency has also received FNS authorization to proceed to issue photo EBT cards.

(iii) The Implementation Plan shall include but not be limited to a description of card issuance procedures, a detailed description of how client protections and ability to use

SNAP benefits will be preserved, specific information about exempted recipients and the State agency's exemption criteria, a description of how the State agency will obtain photographs for the EBT card, training materials and training plans for State agency staff, examples of letters and other materials communicating the policy to clients and retailers, and a timeline for the implementation. If the State agency plans to share SNAP client data in accordance with 7 CFR 272.1(c) for purposes of implementing its photo EBT card option, the State agency must also include any draft memoranda of understanding as part of its Implementation Plan. Any information collected must be securely stored and can only be shared for the purpose of SNAP in accordance with 7 CFR 272.1(c).

(iv) The Implementation Plan shall also address the anticipated timetable with specific action steps for the State agency and contractors, if any, that may be involved regarding implementation of the photo EBT card option, the State agency's capacity to issue photo EBT cards, and the logistics that shall allow for activation of the photo EBT card simultaneously or followed by deactivation of the active non-photo EBT card. This shall also include the description of the capacity at the facility where the photo EBT cards will be produced, both for transition and ongoing production, and confirmation that the State agency and any contractor will continue to meet regulatory time requirements for all EBT card issuances and replacements, including for expedited households. The Implementation Plan must also include indicators related to the photo EBT card implementation that will be collected and analyzed for the post implementation evaluation required by paragraph (f)(16) of this section.

(v) The State agency shall provide all applicable proposed written policy for staff to implement the photo EBT card option to FNS for review. State agencies shall include copies of all materials that will be used to inform clients, retailers and other stakeholders regarding photo EBT card implementation. In addition, the State agencies shall provide a detailed description of how the notifications, communication, policies, and procedures regarding the implementation of any new photo EBT card option will comply with applicable civil rights laws.

(vi) The State agency's Implementation Plan shall also include:

(A) An education component for retailers and clients to ensure all eligible household members and authorized representatives are able to use the EBT card and understand the timeframes associated with the implementation and rollout,

(B) A description of the resources that will be in place to handle complaint calls from clients, retailers, and external stakeholders, and

(C) A description of procedures to address unexpected events related to the photo EBT card option,

(D) Upon approval of the Implementation Plan by FNS, the State may proceed with tasks described in the Implementation Plan, as modified by the approval, but may not proceed to issuing actual cards until it receives FNS authorization to do so. FNS may also require the State to implement in a phased manner, which may include criteria as determined by the Secretary.

(15) *Authorization to issue photo EBT cards.* States agencies shall not be permitted to issue EBT cards with photos until FNS provides an explicit authorization to issue photo EBT cards. After an Implementation Plan is approved, FNS will review the

State agency's actions at an appropriate time interval to ensure that the process and steps outlined by the State agency in the Implementation Plan are fulfilled. In cases where the State agency has not acted consistently with the process and steps outlined in its photo EBT card Implementation Plan, FNS may deny authorization for the State agency to issue EBT cards with photos until the State agency has done so successfully.

(16) *Post implementation assessment and evaluation.* State agencies must submit to FNS a post-implementation assessment that provides FNS with a report of the results of its implementation, including any issues that arose and how they were resolved, the degree to which State agency staff, clients and retailers properly understood and implemented the new provisions.

(i) This report shall be delivered to FNS within 120 days of implementation. This report shall cover the first 90 days of implementation. The Department also reserves the right to conduct its own review of the State agency's implementation. The State agency's post-implementation report shall include at a minimum:

(A) A survey of clients conducted by an independent evaluator to demonstrate their clear understanding of the State agency's photo EBT policy;

(B) A survey of retailers conducted by an independent evaluator that demonstrates evidence that at least 80% of retailers, including smaller independent retailers, demonstrate a full understanding of the policies related to the photo EBT card;

(C) The amount and percent of benefits held for noncompliance if mandatory;

(D) The number and percent of households with photo EBT cards;

(E) The number of households affected by withholding for noncompliance, if mandatory;

(F) The number and percent of households exempt from the photo EBT card requirement if mandatory;

(G)????????????

(H) The number and percent of exempted households who opted for photo EBT cards if mandatory;

(I) The number and scope of complaints related to the implementation of the policy;

(J) The State agency's Case and Procedural Error Rate; and

(K) SNAP performance metrics as established in section 7 CFR 274.8(f)(1) and other SNAP performance metrics that may have been adversely affected by the implementation of the State agency's photo EBT card option, as determined by the Secretary.

(ii) Reserved.

(17) *Ongoing monitoring.* FNS will continue to monitor and evaluate the operation of the option and may require additional information from the State on an ongoing basis.

(18) *Modifying implementation of photo EBT option* If any review or evaluation of a State's operations, including photo EBT operation implementation, finds deficiencies, FNS may require a corrective action plan consistent with 7 CFR 275.16 to reduce or eliminate deficiencies. If a State does not take appropriate actions to address the deficiencies, FNS would consider possible actions such as requiring an updated photo EBT Implementation Plan, suspension of implementation and/or withholding funds in accordance with 7 CFR 276.4.

**PART 278—PARTICIPATION OF RETAIL FOOD STORES, WHOLESALE
FOOD CONCERNS AND INSURED FINANCIAL INSTITUTIONS**

6. In § 278.2, revise paragraph (h) and remove and reserve paragraphs (i) and (k).

The revision reads as follows:

§278.2 Participation of retail food stores.

* * * * *

(h) *Identifying benefit users.* Retailers must accept payment from EBT cardholders who have proper PIN regardless of which State the card is from or whether the individual is pictured on the card. However, benefits may not knowingly be accepted from persons who have no right to possession of benefits. Where photo EBT cards are in use, the person presenting the photo EBT card need not be pictured on the card, nor does the individual's name need to match the one on the card if States includes names on the card. Retailers shall ask for identification from any individual using three or more EBT cards and an explanation as to why multiple cards are being used. The identified individual's name does not need not match the name on the EBT cards, but rather is to be used for the limited purposes of reporting suspected fraud. Should a retailer believe that fraud is occurring the retailer may record the individual's information, such as a driver's license information, as well as the EBT card number, and the reason for using 3 or more cards.

If a retailer collects such information due to suspected fraud, the retailer shall be required to report the individual to the USDA OIG Fraud Hotline. If an individual presents 3 or more EBT cards and does not show identification when requested by the retailer, the retailer has the option to deny the sale if fraud is suspected.

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Dated: December 22, 2015.

Kevin Concannon
Under Secretary for Food, Nutrition, and
Consumer Services

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