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Hon. Thomas J. Vilsack
Secretary
U.S. Department of Agriculture
1400 Independence Ave SW
Washington, DC 20250

Attention: Special Supplemental Nutrition Program for Women, Infants, and Children (WIC): Online Ordering and Transactions and Food Delivery Revisions To Meet the Needs of a Modern, Data-Driven Program (RIN 0584-AE85, Docket No. FNS-2022-0015)

Dear Secretary Vilsack:

We write to comment on the USDA's NPRM "Special Supplemental Nutrition Program for Women, Infants, and Children (WIC): Online Ordering and Transactions and Food Delivery Revisions To Meet the Needs of a Modern, Data-Driven Program" (RIN 0584-AE85), pursuant to the notice-and-comment process outlined in and protected by 5 U.S.C. § 553(c). The proposed rule is arbitrary and capricious. In particular, the rule unlawfully attempts to shunt off crucial aspects of the proposal, including aspects that could greatly affect its overall cost, to a technical guidance document. The proposal also attempts to give the Department the option to pursue costly additions to the WIC program as if on a whim, without a sign of reasonable consideration of cost. Finally, the proposed rule fails to provide a reasonable estimate of its cost, depriving the public of the ability to comment intelligently on the rule and failing to show a serious evaluation of the downsides of such a costly proposal. For these reasons, the Department should not and cannot go forward with this rule. Thank you for your consideration of this pressing matter.

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I. The Proposed Rule Abuses Technical Guidance Documents.

The proposed rule attempts to place critical substantive information in technical guidance documents rather than in the proposed rule. In doing so, the Department renders the proposed rule arbitrary and capricious. Specifically, the Department writes that the rule:

> "would require vendors to authenticate EBT transactions in accordance with State agency policies. The Department also proposes a new provision at § 246.12(bb)(2) to require that State agencies' transaction authentication policies are in compliance with standards established by the Department. Together, these provisions will provide State agencies the flexibility to develop transaction authentication policies that are appropriate and secure for the specific technologies they choose to adopt while ensuring a level of consistency across State agencies.
>
> Taken together, the creation of § 246.12(h)(3)(xxxii) and (bb)(2) along with the revisions to § 246.12(h)(3)(vi) would provide WIC State agencies the flexibility to allow internet-based transactions using modern and appropriate authentication technologies, and allow the Department the flexibility to develop the necessary technical and security requirements in technical documents that can be updated as the industry innovates. The Department proposes similar edits to § 246.12(v)(1)(iv), which would ensure that transactions at authorized farmers and farmers' markets also occur in accordance with the procedures established by the State agency and developed according to standards established by the Department."[1]

This information is, however, essential to determining the full cost of the proposed rule. The administration of online ordering in WIC is not a budget-neutral task, and the procedures followed could crucially affect the amount of fraud and abuse that occur in WIC. The "standards established by the Department" mentioned here would come in the form of technical documents that will be published after the rule and which are not subject to notice-and-comment. States would be given a great deal of flexibility in their administration of online ordering in WIC. The Department touts this as an essential aspect of the proposed rule:

> "The Department proposes revising current WIC regulations to allow State agencies to develop virtual methods of oversight to ensure that their monitoring and investigative methods are appropriate for the types of vendors authorized (e.g., internet vendors) and current environmental conditions (e.g., during a pandemic). WIC State agencies are responsible for all vendor management and oversight, and the Department proposes to provide the flexibility necessary to use technology to streamline these efforts and develop new methods of oversight for new types of vendors."[2]

The Department has a legal obligation to ensure that WIC benefits are delivered only to their intended recipients. The Department therefore must ensure that States produce systems of oversight and accountability that ensure the public and the Department that benefits are being

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[1] 88 FR 11518-519.
[2] 88 FR 11520.

properly delivered. In the absence of legally binding obligations of state policies, states could, out of ignorance or a desire to expand the WIC program beyond its statutory purpose (especially in a manner that would take pressure off state-run and state-funded food security or welfare programs), put into place guidelines that could allow WIC benefits to be delivered to people other than those for whom they were intended. For example, allowing contact-free delivery with a PIN entry could easily allow WIC benefits to be given to other people who have been given a WIC beneficiary's PIN or password. WIC benefits, in this case, become open to resale at the expense of ensuring nutrition for pregnant women, infants, and children.

The Department has given no indication that its guidelines will be stringent enough to prevent these situations, and indeed, it is legally impossible that the Department's guidelines are stringent enough: technical guidance documents, by law, "must not set new legal standards or impose new requirements."[3] An agency cannot use guidance documents to "express[] a change in substantive law or policy (that is not an interpretation) which the agency intends to make binding, or administers with binding effect."[4] Either the Department will misuse guidance documents and have them bind States, or it will not bind states to a publicly known and statutorily supported legal standard of oversight and accountability for online ordering.

It is important to note that this potential abuse could carry great cost. Overall, only about half of those who are eligible for WIC benefits are enrolled in the program at any given time.[5] The enrollment process itself does not present a substantial burden to participation, as the vast majority of those eligible for WIC benefits—more than 80 percent—are enrolled at some point around the birth of the child. As children age, the participation rate drops steadily, to less than a quarter of eligible 4-year-olds, suggesting that many families do not place sufficiently high value the WIC-provided foods to put forth even modest efforts to maintain these benefits. Allowing online ordering will undoubtedly entice some of these families to maintain their benefits for longer. If, however, the identification requirements and other program integrity measures put in place for online ordering are too lenient, it will also entice some of these families, who have already shown that they place low value on the WIC benefits themselves, to maintain their participation in the program but allow the food to be obtained by others for whom it is not intended. If even a tenth of those who would be eligible but not participating in WIC at any given time were to choose to participate in such a scheme, it would raise program costs by roughly 5 percent, or $1 billion over the five years from 2024 to 2028. Fraud could lead to shifts like this if proper integrity measures are not put in place in even a handful of recipient-heavy states; permissive verification policies could easily lead to growth on the order of a 10% increase in the redemption rate, and further growth in use of benefits among recipients toward fraudulent ends.

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[3] Office of the Federal Register, "A Guide to the Rulemaking Process," 11, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.

[4] *General Elec. Co. v. E.P.A*, 290 F.3d 377, 382-83 (D.C. Cir. 2002) (internal quotations omitted).

[5] "National and State Level Estimates of WIC Eligibility and Program Reach in 2020," Food and Nutrition Service, U.S. Department of Agriculture, https://www.fns.usda.gov/wic/eligibility-and-program-reach-estimates-2020

Thus the Department has proposed two wrongs. First, by making such guidelines mere guidelines, the Department has failed to ensure, by way of a binding rule, that the public's funds are being spent only on approved uses toward the support and health of WIC recipients only. Second, by depriving the public of these documents, which contain crucial information about how the public can expect the programs to be administered, the Department has deprived the public of the ability to comment intelligently on the proposed rule. The guidance documents' contents could spell the difference between the Department favoring efficient, effective, and trustworthy programs on the one hand or allowing states to engage in de facto expansion of WIC beyond its statutory bounds by allowing WIC food to be delivered to people other than the intended recipients. Such important information would "effectively [be] a legislative rule that the agency should only have promulgated through the notice and comment requirements of [the Administrative Procedure Act]" and therefore is not lawfully able to be placed in a guidance document.[6] Further, as *GE v. EPA* notes, "[i]f a document expresses a change in substantive law or policy (that is not an interpretation) which the agency intends to make binding, or administers with binding effect, the agency may not rely upon the statutory exemption for policy statements, but must observe the APA's legislative rulemaking procedures."[7] Given that such documents would, in order to have the intended effect, clearly bind state WIC agencies to follow procedures that sufficiently ensure accountability, the standard of bindingness set in *GE* is met. Planning to promulgate a guidance document containing such crucial information without any public notice or opportunity for comment violates the Administrative Procedure Act and "deprives [the public] of […] the right to comment intelligently" on the proposal as published.[8]

WIC is an entitlement: the federal government has agreed to a certain level of funding for all items delivered to recipients by State-run WIC agencies. Such a commitment binds the purse of the taxpayer to fund whatever benefits State agencies distribute. It is thus incumbent on the Department, under EO 12866 and the Administrative Procedure Act, to ensure that these benefits are administered in a manner that protects the taxpayers' funds and actively prevents fraud and abuse. The Department leaves the door wide open for State agencies to pursue less intensive, easier, cheaper, or simply more permissive processes of verification and accountability in the distribution of benefits to recipients. This is not a responsible move, and it is one which is not acknowledged or justified by the Department in the proposal. The Department cannot lawfully proceed with the proposed rule; any rule of this sort must include the necessary information about ensuring safe, efficient, and non-fraudulent delivery of goods only to the intended recipient(s), and then afterwards give the public the opportunity to evaluate the impact of the proposed rule as a whole. To do anything else would be arbitrary and capricious.

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[6] Gwendolyn McKee, "Judicial Review of Agency Guidance Documents: Rethinking the Finality Doctrine," Administrative Law Review 60:2, 398-391, https://www.administrativelawreview.org/wp-content/uploads/2014/04/Judicial-Review-of-Agency-Guidance-Documents-Rethinking-the-Finality-Doctrine.pdf.
[7] *GE v. EPA*, 382-383 (internal quotations omitted).
[8] *Ohio Val. Envir. Coalition v. U.S. Army Corps of Engineering*, 674 F. Supp. 2d 783, 804 (E.D. Va. 2009).

II. Offering Free Delivery Cannot Be Done Without Notice-And-Comment.

The Department requests public comment on the topic of delivery fees. In particular, it requests comment on:

> "whether State agencies should have the option to pay for fees associated with online shopping in a retail food delivery system with either (1) non-Federal funding at State agency discretion and/or (2) Federal funding in situations where it is deemed necessary to meet special needs (e.g., participant access or other needs as identified by the State agency). The Department requests input from stakeholders that includes a discussion of how this option would impact equitable access to online shopping for WIC participants, the rationale for State agencies to pay these fees (e.g., to ensure participant access to online shopping in certain areas within the State agency's jurisdiction, to transition from a direct distribution or home food delivery system), possible models for paying for such fees (including whether there should be any limits on the amount of delivery fees paid by the WIC State agency), and any considerations necessary to pay for fees for different vendor types (e.g., above-50-percent, internet, brick-and-mortar)."[9]

It is ridiculous that the Department would even consider such an unlawful action. The Department is required to lay out, in its estimate of the impact of the rule, the costs and benefits of the rule to the best of its knowledge and such that all reasonably foreseeable costs are accounted for. But the rule does not provide sufficient explanation for such a cost. The Department writes, in its attempt to estimate this cost, that:

> "Based on data from a recent Mercatus report, the Department estimates that, when faced with delivery fees, 33 percent of WIC online shopping orders will be placed for home delivery while the remaining 67 percent will opt for in-store or curbside pickup. While many shoppers prefer curbside pickup regardless of the fees associated with delivery, this analysis estimates the share of online WIC shoppers choosing home delivery will increase from 33 percent to 45 percent if State agencies pay for delivery fees on behalf of participants."[10]

First, this section cites the Mercatus Report, a report which is not publicly available, and does not cite a particular finding but instead engages in a vague gesture at the report. There is no way for the public to know if this is a reasonable estimate of the amount of consumers who would opt for home delivery. Likewise, there is no reason given for their estimate of an increase from 33% to 45% delivery in the event that states pay for it. This kind of reasoning, devoid of specific references to data and declining to make "a rational connection between the facts found and the

[9] 88 FR 11521.
[10] 88 FR 11550.

choice made" is capricious and arbitrary on its face.[11] Claims of reasoning without any evidence or account of said reasoning amount to a failure to provide reasoning at all; as we have said, it is a principle of administrative law that the public and the judiciary alike can evaluate a rule "only upon the grounds on which the agency acted" and not upon what it "*could* have considered."[12] Ultimately, it is notable that when a good is free and gives added utility to the consumer at no cost, there is little economic reason not to opt to accept it. The baseline percentage in the estimate thus should not be 45%, but 100%; the Department has at least presented no compelling reason for why their estimate is better than ours, and ours has reasoning behind it, whereas the Department's has none.

The Department has not given the public sufficient information about the costs and downsides of paying for delivery to evaluate the proposed rule. That is, the Department has not given the public sufficient information to go forward with the option of paying for delivery. The Department cannot lawfully pay for delivery in the final rule. But even more importantly, the Department could not reasonably pursue this expensive and unnecessary option even if it had given the public sufficient information. WIC exists to ensure that recipient women, infants, and children are able to be given essential nutrition; it does not exist to provide recipients with optional goods or services, of which food delivery is one. This option would extend far beyond the purpose of WIC and would force taxpayers—many of whom cannot themselves afford food delivery—to supply recipients with this unnecessary perk.

III. The Department Does Not Reasonably Estimate the Cost of the Proposed Rule.

The Department writes, in its RIA, that the proposed rule would lead to greater food costs in the form of federal transfers to States because:

> "The Department estimates that allowing WIC online shopping will increase Federal WIC food spending, in the form of transfers, by a total of $392 million over 5 years. This is driven by an understanding that shoppers typically pay higher prices for online groceries and an expectation that online shopping would moderately increase WIC benefit redemption by making the WIC shopping experience more convenient for some participants."[13]

It is not, however, reasonable for the Department to subsidize the price-increases associated with online shopping in this way. Just as it is not within the purview of the Department to pay for

[11] *Motor Vehicle Manufacturers Assoc. of the United States, Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
[12] *Michigan v. Envtl. Prot. Agency*, 576 U.S. 743, 759-60 (2015).
[13] 88 FR 11524.

food delivery, it is likewise not within the purview of the Department to pay for the higher prices associated with online ordering. The Department goes to great lengths to justify the ability to use WIC benefits remotely via online ordering, but nowhere does the Department explicitly justify having the taxpayer fund the higher prices of foods and goods ordered online. It is not clear why taxpayers, via the proposed rule, should pay whatever prices vendors might set for their online-ordered goods. Indeed, there is no buffer or check instituted against vendors deliberately making the price increases for WIC goods higher than others, knowing that such price hikes will be paid for by the agency. Ultimately, WIC does not have congressional authorization to pay grocery store employees to go through a grocery store with a cart or basket and find, select, and collect a WIC recipient's choices for him or her. It is not reasonable, without a given reason, for the government to pay, by way of entitlement expansion, for such activity which is an option most non-WIC recipients cannot afford and which involves using vendor employees as servile labor for the simple task of grocery collection. This cost, which, we repeat, is never justified by the Department, amounts to a 24% increase in cost purely on account of the use of online transactions (the compounded effect of a 10% increase in the redemption rate and a 13% increase in prices of goods redeemed). Given, too, that this 10% increase in redemption is not justified and has no discernible data behind it, the increase in redemption could be much higher. For example, with the whole wheat bread and whole grain redemption rate around 44%, the increase could be as much as 127% (that is, an increase of 56% of the full benefit for a total of 100%, i.e., full redemption of all WIC whole wheat bread and whole grain benefit).[14]

Further, the Department does not reasonably establish the parameters that led to its online shopping direct-cost calculation. The Department begins with a model of growth of online grocery shopping among SNAP recipients "[b]ased on internal, unpublished data on monthly online SNAP redemptions in FY 2021."[15] The public is deprived of this data and also of its significance: the amount of SNAP online ordering cannot be used to estimate the amount of WIC online ordering without knowing how SNAP product prices changed with respect to online ordering and the degree of price change in the WIC basket of goods versus the goods able to be purchased with SNAP. The public is deprived of sufficient information about this data and the program it studies in order to comment intelligently on it, and consequently, on the rule itself. Further, there is no rationale given for thinking that SNAP participants are similar to WIC ones. Given that WIC participants are largely pregnant women or women with infants, it would seem probable (and therefore worthy of reasonable consideration) that the proportion of WIC participants opting for online delivery would be much higher than for SNAP. This is on top of the fact that the SNAP online delivery option is only a pilot, and therefore the program likely has poor uptake due to lack of information. The Department further clouds the cost estimate by, without any reason, estimating that "participants who use any WIC benefits online will, on

[14] 88 FR 11541.
[15] 88 FR 11540, Note 13.

average, increase their overall benefit redemption by 10 percent."[16] There is no basis for this "estimate" at all; it is quintessentially arbitrary, and given that it has a massive bearing on the largest component of the Department's already-shaky estimate, it poisons the entire RIA. An agency cannot pretend to have given the public evidence of its reasoned consideration of cost when it simply says that it considered cost and throws out numbers with no source or grounding in reason. This is especially egregious because the rule was deemed significant by OMB: a significant regulation requires at minimum a thorough explanation of what the costs are, where the amounts come from, and how the Department came to model such costs over time. This practice is unlawful and has been condemned repeatedly in the courts.[17]

The public and the judiciary alike can evaluate the reasonableness of the proposal "only upon the grounds on which the agency acted" and not on those it merely "*could* have considered."[18] Because the public has been given no indication what the agency considered in calculating cost (that is, what did and did not lead the agency to come up with the numbers that it did), the calculation provided does not measure up to the kind of reasoned consideration of cost which "reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions."[19]

More than that, however, the RIA contains no reason to think that this will be the actual cost of the proposed rule. The calculation does not contain an explanation for the expected end to the ballooning cost to the federal government over the next five years. Why does the Department's model not expect that the costs will continue to increase? As one can see below, a simple linear regression of the predicted cost of the proposed rule shows the annual costs increasing by over $100 million every 3 years, exceeding $250 million per year by 2032 (Figure 1).[20]

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[16] 88 FR 11541.
[17] See, e.g., *Parhat v. Gates*, quoting Lewis Carroll, The Hunting of the Snark 3 (1876): "the fact that the government has 'said it thrice' does not make [it] true." *Parhat v. Gates*, 532 F.3d 834, 848 (D.C. Cir. 2008).
[18] *Michigan v. Envtl. Prot. Agency*, 576 U.S. 743, 753, 760 (2015).
[19] *Michigan v. EPA*, 753.
[20] This could presumably continue until 100% of transactions occur online. Given that the $142 million number in 2028 represents 20% of WIC recipients transacting online 50% of the time, this number is merely 10% of the total potential amount of online ordering. Thus the line in the chart would continue until it reaches $1.42 billion in additional cost in 2068 and every year from then on.

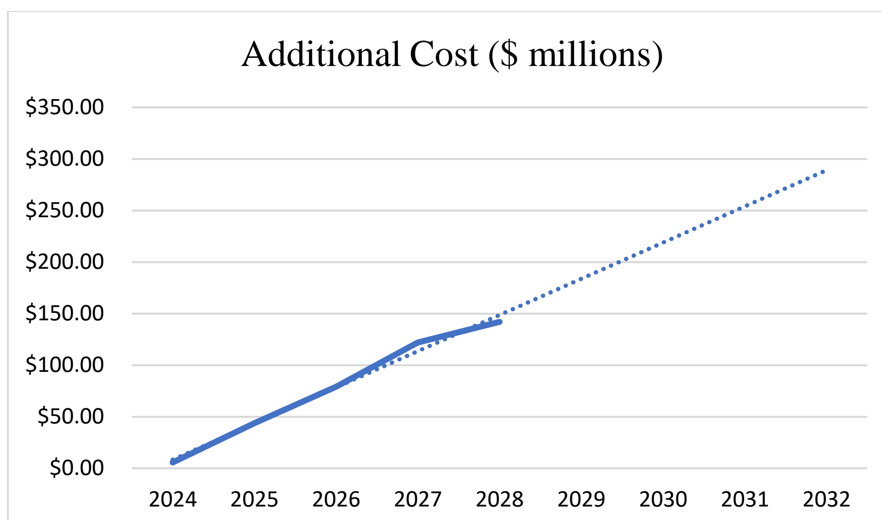

Figure 1. Department's 5-year annual cost projection in solid blue, linear regression in dots.

The Department has given no reason to think that the cost increases will cease. The R-squared value of this regression is 0.9902. An R-squared value of 1 represents a perfect fit; therefore, there is no reasonable interpretation, given what the Department has presented to the public, that these costs will not continue to balloon out-of-control.

The agency's failure to sufficiently substantiate its cost estimates makes the proposal itself unreasonable, arbitrary, and capricious. The Department has not examined the costs and benefits of the proposal in a reasonable way, and indeed, a reasonable analysis of the arbitrary data provided shows that the proposal seems poised to saddle the taxpayers with billions in runaway ballooning costs over time.

For all of the reasons detailed above, we urge the U.S. Department of Agriculture not to go forward with the proposed rule.

Respectfully submitted,

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