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Subtitle B—Regulations of the Department of Agriculture (Continued)

CHAPTER II—FOOD AND NUTRITION SERVICE, DEPARTMENT OF AGRICULTURE

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SUBCHAPTER A—CHILD NUTRITION PROGRAMS

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AUTHORITY: 42 U.S.C. 1751–1760, 1779.

SOURCE: 53 FR 29147, Aug. 2, 1988, unless otherwise noted.

Subpart A—General

§ 210.1 General purpose and scope.

(a) *Purpose of the program.* Section 2 of the National School Lunch Act (42 U.S.C. 1751), states: ''It is declared to be the policy of Congress, as a measure of national security, to safeguard the health and well-being of the Nation's children and to encourage the domestic consumption of nutritious agricultural commodities and other food, by assisting the States, through grants-in-aid and other means, in providing an adequate supply of food and other facilities for the establishment, maintenance, operation, and expansion of nonprofit school lunch programs.'' Pursuant to this act, the Department provides States with general and special cash assistance and donations of foods acquired by the Department to be used to assist schools in serving nutritious lunches to children each school day. In furtherance of Program objectives, participating schools shall serve lunches that are nutritionally adequate, as set forth in these regulations, and shall to the extent practicable, ensure that participating children gain a full understanding of the relationship between proper eating and good health.

(b) *Scope of the regulations.* This part sets forth the requirements for participation in the National School Lunch and Commodity School Programs. It specifies Program responsibilities of State and local officials in the areas of program administration, preparation and service of nutritious lunches, payment of funds, use of program funds, program monitoring, and reporting and recordkeeping requirements.

§ 210.2 Definitions.

For the purpose of this part:

Act means the National School Lunch Act, as amended.

Afterschool care program means a program providing organized child care services to enrolled school-age children afterschool hours for the purpose of care and supervision of children. Those programs shall be distinct from any extracurricular programs organized primarily for scholastic, cultural or athletic purposes.

Attendance factor means a percentage developed no less than once each school year which accounts for the difference between enrollment and attendance. The attendance factor may be developed by the school food authority, subject to State agency approval, or may be developed by the State agency. In the absence of a local or State attendance factor, the school food authority shall use an attendance factor developed by FNS. When taking the attendance factor into consideration, school food authorities shall assume that all children eligible for free and reduced price lunches attend school at the same rate as the general school population.

Average Daily Participation means the average number of children, by eligibility category, participating in the Program each operating day. These numbers are obtained by dividing (a) the total number of free lunches claimed during a reporting period by the number of operating days in the same period; (b) the total number of reduced price lunches claimed during a reporting period by the number of operating days in the same period; and (c) the total number of paid lunches claimed during a reporting period by the number of operating days in the same period.

Child means—(a) a student of high school grade or under as determined by the State educational agency, who is enrolled in an educational unit of high school grade or under as described in paragraphs (a) and (b) of the definition of ''School,'' including students who are mentally or physically disabled as defined by the State and who are participating in a school program established for the mentally or physically disabled; or (b) a person under 21 chronological years of age who is enrolled in an institution or center as described in paragraphs (c) and (d) of the definition of ''School;'' or (c) For purposes of reimbursement for meal supplements served in afterschool care programs, an individual enrolled in an afterschool care program operated by an eligible school who is 12 years of age or under, or in the case of children of migrant workers and children with disabilities, not more than 15 years of age.

CND means the Child Nutrition Division of the Food and Nutrition Service of the Department.

Commodity School Program means the Program under which participating schools operate a nonprofit lunch program in accordance with this part and receive donated food assistance in lieu of general cash assistance. Schools participating in the Commodity School Program shall also receive special cash and donated food assistance in accordance with § 210.4(c).

Days means calendar days unless otherwise specified.

Department means the United States Department of Agriculture.

Distributing agency means a State agency which enters into an agreement with the Department for the distribution to schools of donated foods pursuant to part 250 of this chapter.

Donated foods means food commodities donated by the Department for use in nonprofit lunch programs.

Fiscal year means a period of 12 calendar months beginning October 1 of any year and ending with September 30 of the following year.

FNS means the Food and Nutrition Service, United States Department of Agriculture.

FNSRO means the appropriate Regional Office of the Food and Nutrition Service of the Department.

Food component means one of the four food groups which comprise reimbursable meals planned under a food-based menu planning approach. The four food components are: meat/meat alternate; grains/breads; fruits/vegetables; and milk.

Food item means one of the five foods offered in lunches under a food-based menu planning approach: meat/meat alternate; grains/breads; two servings of fruits/vegetables; and milk.

Food service management company means a commercial enterprise or a nonprofit organization which is or may

be contracted with by the school food authority to manage any aspect of the school food service.

Free lunch means a lunch served under the Program to a child from a household eligible for such benefits under 7 CFR part 245 and for which neither the child nor any member of the household pays or is required to work.

Lunch means a meal service that meets the applicable nutrition standards and portion sizes in §210.10 for lunches.

Menu item means, under Nutrient Standard Menu Planning or Assisted Nutrient Standard Menu Planning, any single food or combination of foods. All menu items or foods offered as part of the reimbursable meal may be considered as contributing towards meeting the nutrition standards provided in §210.10, except for those foods that are considered as foods of minimal nutritional value as provided for in §210.11(a)(2) which are not offered as part of a menu item in a reimbursable meal. For the purposes of a reimbursable lunch, a minimum of three menu items must be offered, one of which must be an entree (a combination of foods or a single food item that is offered as the main course) and one of which must be fluid milk. Under offer versus serve, a student shall select, at a minimum, an entree and one other menu item. If more than three menu items are offered, the student may decline up to two menu items; however, the entree cannot be declined.

National School Lunch Program means the Program under which participating schools operate a nonprofit lunch program in accordance with this part. General and special cash assistance and donated food assistance are made available to schools in accordance with this part.

Net cash resources means all monies, as determined in accordance with the State agency's established accounting system, that are available to or have accrued to a school food authority's nonprofit school food service at any given time, less cash payable. Such monies may include, but are not limited to, cash on hand, cash receivable, earnings on investments, cash on deposit and the value of stocks, bonds or other negotiable securities.

Nonprofit, when applied to schools or institutions eligible for the Program, means exempt from income tax under section 501(c)(3) of the Internal Revenue Code of 1954, as amended; or, in the Commonwealth of Puerto Rico, certified as nonprofit by the Governor.

Nonprofit school food service means all food service operations conducted by the school food authority principally for the benefit of schoolchildren, all of the revenue from which is used solely for the operation or improvement of such food services.

Nutrient Standard Menu Planning/Assisted Nutrient Standard Menu Planning means ways to develop lunch menus based on the analysis for nutrients in the menu items and foods offered over a school week to determine if specific levels for a set of key nutrients and calories were met in accordance with §210.10(i)(5). However, for the purposes of Assisted Nutrient Standard Menu Planning, lunch menu planning and analysis are completed by other entities and must incorporate the production quantities needed to accommodate the specific service requirements of a particular school or school food authority in accordance with §210.10(j).

OIG means the Office of the Inspector General of the Department.

Point of Service means that point in the food service operation where a determination can accurately be made that a reimbursable free, reduced price or paid lunch has been served to an eligible child.

Program means the National School Lunch Program and the Commodity School Program.

Reduced price lunch means a lunch served under the Program: (a) to a child from a household eligible for such benefits under 7 CFR part 245; (b) for which the price is less than the school food authority designated full price of the lunch and which does not exceed the maximum allowable reduced price specified under 7 CFR part 245; and (c) for which neither the child nor any member of the household is required to work.

Reimbursement means Federal cash assistance including advances paid or payable to participating schools for lunches meeting the requirements of §210.10 and served to eligible children.

Revenue, when applied to nonprofit school food service, means all monies received by or accruing to the nonprofit school food service in accordance with the State agency's established accounting system including, but not limited to, children's payments, earnings on investments, other local revenues, State revenues, and Federal cash reimbursements.

School means: (a) An educational unit of high school grade or under, recognized as part of the educational system in the State and operating under public or nonprofit private ownership in a single building or complex of buildings; (b) any public or nonprofit private classes of preprimary grade when they are conducted in the aforementioned schools; or (c) any public or nonprofit private residential child care institution, or distinct part of such institution, which operates principally for the care of children, and, if private, is licensed to provide residential child care services under the appropriate licensing code by the State or a subordinate level of government, *except for* residential summer camps which participate in the Summer Food Service Program for Children, Job Corps centers funded by the Department of Labor, and private foster homes. The term ''residential child care institutions'' includes, but is not limited to: homes for the mentally, emotionally or physically impaired, and unmarried mothers and their infants; group homes; halfway houses; orphanages; temporary shelters for abused children and for runaway children; long-term care facilities for chronically ill children; and juvenile detention centers. A long-term care facility is a hospital, skilled nursing facility, intermediate care facility, or distinct part thereof, which is intended for the care of children confined for 30 days or more.

School food authority means the governing body which is responsible for the administration of one or more schools; and has the legal authority to operate the Program therein *or* be otherwise approved by FNS to operate the Program.

School week means the period of time used to determine compliance with the nutrition standards and the appropriate calorie and nutrient levels in § 210.10. Further, if applicable, school week is the basis for conducting Nutrient Standard Menu Planning or Assisted Nutrient Standard Menu Planning for lunches as provided in § 210.10(i) and § 210.10(j). The period shall be a normal school week of five consecutive days; however, to accommodate shortened weeks resulting from holidays and other scheduling needs, the period shall be a minimum of three consecutive days and a maximum of seven consecutive days. Weeks in which school lunches are offered less than three times shall be combined with either the previous or the coming week.

School year means a period of 12 calendar months beginning July 1 of any year and ending June 30 of the following year.

Secretary means the Secretary of Agriculture.

7 CFR part 3015 means the Uniform Federal Assistance Regulations published by the Department to implement OMB Circulars A–21, A–87, A–102, A–110, and A–122; and Executive Order 12372. (For availability of OMB Circulars referenced in this definition, see 5 CFR 1310.3.)

7 CFR part 3017 means the Department's regulation to implement Executive Order 12549, covering governmentwide rules on suspension and debarment as well as The Drug Free Workplace Act of 1988.

7 CFR part 3018 means the Department's Common Rule regarding Governmentwide New Restrictions on Lobbying. Part 3018 implements the requirements established by section 319 of the 1990 Appropriations Act for the Department of Interior and Related Agencies (Pub. L. 101–121).

7 CFR part 3052 means the Department's regulations implementing OMB Circular A–133, ''Audits of State, Local Governments, and Non-Profit Organizations.'' (For availability of OMB Circulars referenced in this definition, see 5 CFR 1310.3.)

State means any of the 50 States, District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and, as applicable, American Samoa and the Commonwealth of the Northern Marianas.

State agency means (a) the State educational agency; (b) any other agency of the State which has been designated by the Governor or other appropriate executive or legislative authority of the State and approved by the Department to administer the Program in schools, as specified in §210.3(b); or (c) the FNSRO, where the FNSRO administers the Program as specified in §210.3(c).

State educational agency means, as the State legislature may determine, (a) the chief State school officer (such as the State Superintendent of Public Instruction, Commissioner of Education, or similar officer), or (b) a board of education controlling the State department of education.

Student with disabilities means any child who has a physical or mental impairment as defined in §15b.3 of the Department's nondiscrimination regulations (7 CFR part 15b).

Subsidized lunch (paid lunch) means a lunch served to children who are either not eligible for or elect not to receive the free or reduced price benefits offered under 7 CFR part 245. The Department subsidizes each paid lunch with both general cash assistance and donated foods. Although a paid lunch student pays for a large portion of his or her lunch, the Department's subsidy accounts for a significant portion of the cost of that lunch.

Yogurt means commercially prepared coagulated milk products obtained by the fermentation of specific bacteria, that meet milk fat or milk solid requirements and to which flavoring foods or ingredients may be added. These products are covered by the Food and Drug Administration's Definition and Standard of Identity for yogurt, lowfat yogurt, and nonfat yogurt, 21 CFR 131.200, 21 CFR 131.203, and 21 CFR 131.206, respectively.

[53 FR 29147, Aug. 2, 1988, as amended at 54 FR 12580, Mar. 28, 1989; 56 FR 32939, July 17, 1991; 58 FR 42487, Aug. 10, 1993; 60 FR 31207, June 13, 1995; 62 FR 10189, Mar. 6, 1997; 64 FR 50740, Sept. 20, 1999; 65 FR 26912, May 9, 2000]

§210.3 Administration.

(a) *FNS*. FNS will act on behalf of the Department in the administration of the Program. Within FNS, the CND will be responsible for Program administration.

(b) *States*. Within the States, the responsibility for the administration of the Program in schools, as defined in §210.2, shall be in the State educational agency. If the State educational agency is unable to administer the Program in public or private nonprofit residential child care institutions or nonprofit private schools, then Program administration for such schools may be assumed by FNSRO as provided in paragraph (c) of this section, or such other agency of the State as has been designated by the Governor or other appropriate executive or legislative authority of the State and approved by the Department to administer such schools. Each State agency desiring to administer the Program shall enter into a written agreement with the Department for the administration of the Program in accordance with the applicable requirements of this part; part 235; part 245; parts 15, 15a, 15b, and 3015 of Departmental regulations; and FNS instructions.

(c) *FNSRO*. The FNSRO will administer the Program in nonprofit private schools or public or nonprofit private residential child care institutions if the State agency is prohibited by law from disbursing Federal funds paid to such schools. In addition, the FNSRO will continue to administer the Program in those States in which nonprofit private schools or public or nonprofit private residential child care institutions have been under continuous FNS administration since October 1, 1980, unless the administration of the Program in such schools is assumed by the State. The FNSRO will, in each State in which it administers the Program, assume all responsibilities of a State agency as set forth in this part and part 245 of this chapter as appropriate. References in this part to ''State agency'' include FNSRO, as applicable, when it is the agency administering the Program.

(d) *School food authorities*. The school food authority shall be responsible for the administration of the Program in schools. State agencies shall ensure that school food authorities administer the Program in accordance with the applicable requirements of this part;

part 245; parts 15, 15a, 15b, and 3015 of Departmental regulations; and FNS instructions.

Subpart B—Reimbursement Process for States and School Food Authorities

§ 210.4 Cash and donated food assistance to States.

(a) *General.* To the extent funds are available, FNS will make cash assistance available in accordance with the provisions of this section to each State agency for lunches and meal supplements served to children under the National School Lunch and Commodity School Programs. To the extent donated foods are available, FNS will provide donated food assistance to distributing agencies for each lunch served in accordance with the provisions of this part and part 250 of this chapter.

(b) *Assistance for the National School Lunch Program.* The Secretary will make cash and/or donated food assistance available to each State agency and distributing agency, as appropriate, administering the National School Lunch Program, as follows:

(1) *Cash assistance for lunches:* Cash assistance payments are composed of a *general* cash assistance payment, authorized under section 4 of the Act, and a *special* cash assistance payment, authorized under section 11 of the Act. General cash assistance is provided to each State agency for *all* lunches served to children in accordance with the provisions of the National School Lunch Program. Special cash assistance is provided to each State agency for lunches served under the National School Lunch Program to children determined eligible for free or reduced price lunches in accordance with part 245 of this chapter. The total general cash assistance paid to each State for any fiscal year shall not exceed the lesser of amounts reported to FNS as reimbursed to school food authorities in accordance with § 210.5(d)(3) or the total calculated by multiplying the number of lunches reported in accordance with § 210.5(d)(1) for each month of service during the fiscal year, by the applicable national average payment rate prescribed by FNS. The total special assistance paid to each State for any fiscal year shall not exceed the lesser of amounts reported to FNS as reimbursed to school food authorities in accordance with § 210.5(d)(3) or the total calculated by multiplying the number of free and reduced price lunches reported in accordance with § 210.5(d)(1) for each month of service during the fiscal year by the applicable national average payment rate prescribed by FNS. In accordance with section 11 of the Act, FNS will prescribe annual adjustments to the per meal national average payment rate (general cash assistance) and the special assistance national average payment rates (special cash assistance) which are effective on July 1 of each year. These adjustments, which reflect changes in the food away from home series of the Consumer Price Index for all Urban Consumers, are annually announced by Notice in July of each year in the FEDERAL REGISTER. FNS will also establish maximum per meal rates of reimbursement within which a State may vary reimbursement rates to school food authorities. These maximum rates of reimbursement are established at the same time and announced in the same Notice as the national average payment rates.

(2) *Donated food assistance.* For each school year, FNS will provide distributing agencies with donated foods for lunches served under the National School Lunch Program as provided under part 250 of this chapter. The per lunch value of donated food assistance is adjusted by the Secretary annually to reflect changes as required under section 6 of the Act. These adjustments, which reflect changes in the Price Index for Foods Used in Schools and Institutions, are effective on July 1 of each year and are announced by Notice in the FEDERAL REGISTER in July of each year.

(3) *Cash assistance for meal supplements.* For those eligible schools (as defined in § 210.10(n)(1)) operating after-school care programs and electing to serve meal supplements to enrolled children, funds shall be made available to each State agency, each school year in an amount no less than the sum of the products obtained by multiplying:

(i) The number of meal supplements served in the afterschool care program within the State to children from families that do not satisfy the income standards for free and reduced price school meals by 2.75 cents;

(ii) The number of meal supplements served in the afterschool care program within the State to children from families that satisfy the income standard for free school meals by 30 cents;

(iii) The number of meal supplements served in the afterschool care program within the State to children from families that satisfy the income standard for reduced price school meals by 15 cents.

(4) The rates in paragraph (b)(3) are the base rates established in August 1981 for the CACFP. FNS shall prescribe annual adjustments to these rates in the same Notice as the National Average Payment Rates for lunches. These adjustments shall ensure that the reimbursement rates for meal supplements served under this part are the same as those implemented for meal supplements in the CACFP.

(c) *Assistance for the Commodity School Program.* FNS will make special cash assistance available to each State agency for lunches served in commodity schools in the same manner as special cash assistance is provided in the National School Lunch Program. Payment of such amounts to State agencies is subject to the reporting requirements contained in §210.5(d). FNS will provide donated food assistance in accordance with part 250 of this chapter. Of the total value of donated food assistance to which it is entitled, the school food authority may elect to receive cash payments of up to 5 cents per lunch served in its commodity school(s) for donated foods processing and handling expenses. Such expenses include any expenses incurred by or on behalf of a commodity school for processing or other aspects of the preparation, delivery, and storage of donated foods. The school food authority may have all or part of these cash payments retained by the State agency for use on its behalf for processing and handling expenses by the State agency or it may authorize the State agency to transfer to the distributing agency all or any part of these payments for use on its behalf for these expenses. Payment of such amounts to State agencies is subject to the reporting requirements contained in §210.5(d). The total value of donated food assistance is calculated on a school year basis by adding:

(1) The applicable national average payment rate (general cash assistance) prescribed by the Secretary for the period of July 1 through June 30 multiplied by the total number of lunches served during the school year under the Commodity School Program; and

(2) The national per lunch average value of donated foods prescribed by the Secretary for the period of July 1 through June 30 multiplied by the total number of lunches served during the school year under the Commodity School Program.

[53 FR 29147, Aug. 2, 1988, as amended at 58 FR 42487, Aug. 10, 1993; 60 FR 31207, June 13, 1995; 65 FR 26912, May 9, 2000]

§210.5 Payment process to States.

(a) *Grant award.* FNS will specify the terms and conditions of the State agency's grant in a grant award document and will generally make payments available by means of a Letter of Credit issued in favor of the State agency. The State agency shall obtain funds for reimbursement to participating school food authorities through procedures established by FNS in accordance with 7 CFR part 3015. State agencies shall limit requests for funds to such times and amounts as will permit prompt payment of claims or authorized advances. The State agency shall disburse funds received from such requests without delay for the purpose for which drawn. FNS may, at its option, reimburse a State agency by Treasury Check. FNS will pay by Treasury Check with funds available in settlement of a valid claim if payment for that claim cannot be made within the grant closeout period specified in paragraph (d) of this section.

(b) *Cash-in-lieu of donated foods.* All Federal funds to be paid to any State in place of donated foods will be made available as provided in part 240 of this chapter.

(c) *Recovery of funds.* FNS will recover any Federal funds made available to the State agency under this part

which are in excess of obligations reported at the end of each fiscal year in accordance with the reconciliation procedures specified in paragraph (d) of this section. Such recoveries shall be reflected by a related adjustment in the State agency's Letter of Credit.

(d) *Substantiation and reconciliation process.* Each State agency shall maintain Program records as necessary to support the reimbursement payments made to school food authorities under § 210.7 and § 210.8 and the reports submitted to FNS under this paragraph. The State agency shall ensure such records are retained for a period of 3 years or as otherwise specified in § 210.23(c).

(1) *Monthly report.* Each State agency shall submit a final Report of School Program Operations (FNS–10) to FNS for each month. The final reports shall be limited to claims submitted in accordance with § 210.8 of this part. For the month of October, the final report shall include the total number of children approved for free lunches, the total number of children approved for reduced price lunches, and the total number of children enrolled in participating public schools, private schools, and residential child care institutions, respectively, as of the last day of operation in October. The final reports shall be postmarked and/or submitted no later than 90 days following the last day of the month covered by the report. States shall not receive Program funds for any month for which the final report is not submitted within this time limit unless FNS grants an exception. Upward adjustments to a State's report shall not be made after 90 days from the month covered by the report unless authorized by FNS. Downward adjustments to a State's report shall always be made regardless of when it is determined that such adjustments are necessary. FNS authorization is not required for downward adjustments. Any adjustments to a State's report shall be reported to FNS in accordance with procedures established by FNS.

(2) *Quarterly report.* Each State agency shall also submit to FNS a quarterly Financial Status Report (SF–269) on the use of Program funds. Such reports shall be postmarked and/or submitted no later than 30 days after the end of each fiscal year quarter.

(3) *End of year report.* Each State agency shall submit a final Financial Status Report (SF–269) for each fiscal year. This final fiscal year grant closeout report shall be postmarked and/or submitted to FNS within 120 days after the end of each fiscal year or part thereof that the State agency administered the Program. Obligations shall be reported only for the fiscal year in which they occur. FNS will not be responsible for reimbursing Program obligations reported later than 120 days after the close of the fiscal year in which they were incurred. Grant closeout procedures are to be carried out in accordance with 7 CFR part 3015.

[53 FR 29147, Aug. 2, 1988, as amended at 54 FR 12580, Mar. 28, 1989; 56 FR 32939, July 17, 1991]

§ 210.6 Use of Federal funds.

General. State agencies shall use Federal funds made available under the Program to reimburse or make advance payments to school food authorities in connection with lunches and meal supplements served in accordance with the provisions of this part; *except that*, with the approval of FNS, any State agency may reserve an amount up to one percent of the funds earned in any fiscal year under this part for use in carrying out special developmental projects. Advance payments to school food authorities may be made at such times and in such amounts as are necessary to meet the current fiscal obligations. All Federal funds paid to any State in place of donated foods shall be used as provided in part 240 of this chapter.

[53 FR 29147, Aug. 2, 1988, as amended at 58 FR 42487, Aug. 10, 1993]

§ 210.7 Reimbursement for school food authorities.

(a) *General.* Reimbursement payments to finance nonprofit school food service operations shall be made only to school food authorities operating under a written agreement with the State agency. Subject to the provisions of § 210.8(c), such payments may be made for lunches and meal supplements served in accordance with provisions of this part and part 245 in the calendar month preceding the calendar

month in which the agreement is executed. These reimbursement payments include general cash assistance for all lunches served to children under the National School Lunch Program and special cash assistance payments for free or reduced price lunches served to children determined eligible for such benefits under the National School Lunch and Commodity School Programs. Reimbursement payments shall also be made for meal supplements served to eligible children in after-school care programs in accordance with the rates established in §210.4(b)(3). Approval shall be in accordance with part 245 of this chapter.

(b) *Assignment of rates.* At the beginning of each school year, State agencies shall establish the per meal rates of reimbursement for school food authorities participating in the Program. These rates of reimbursement may be assigned at levels based on financial need; *except that*, the rates are not to exceed the maximum rates of reimbursement established by the Secretary under §210.4(b) and are to permit reimbursement for the total number of lunches in the State from funds available under §210.4. Within each school food authority, the State agency shall assign the same rate of reimbursement from general cash assistance funds for all lunches served to children under the Program. Assigned rates of reimbursement may be changed at any time by the State agency, *provided that* notice of any change is given to the school food authority. The total general and special cash assistance reimbursement paid to any school food authority for lunches served to children during the school year are not to exceed the sum of the products obtained by multiplying the total reported number of lunches, by type, served to eligible children during the school year by the applicable maximum per lunch reimbursements prescribed for the school year for each type of lunch.

(c) *Reimbursement limitations.* To be entitled to reimbursement under this part, each school food authority shall ensure that Claims for Reimbursement are limited to the number of free, reduced price and paid lunches and meal supplements that are served to children eligible for free, reduced price and paid lunches and meal supplements, respectively, for each day of operation.

(1) *Lunch count system.* To ensure that the Claim for Reimbursement accurately reflects the number of lunches and meal supplements served to eligible children, the school food authority shall, at a minimum:

(i) Correctly approve each child's eligibility for free and reduced price lunches and meal supplements based on the requirements prescribed under 7 CFR part 245;

(ii) Maintain a system to issue benefits and to update the eligibility of children approved for free or reduced price lunches and meal supplements. The system shall:

(A) Accurately reflect eligibility status as well as changes in eligibility made after the initial approval process due to verification findings, transfers, reported changes in income or household size, etc.; and

(B) Make the appropriate changes in eligibility after the initial approval process on a timely basis so that the mechanism the school food authority uses to identify currently eligible children provides a current and accurate representation of eligible children. Changes in eligibility which result in increased benefit levels shall be made as soon as possible but no later than 3 operating days of the date the school food authority makes the final decision on a child's eligibility status. Changes in eligibility which result in decreased benefit levels shall be made as soon as possible but no later than 10 operating days of the date the school food authority makes the final decision on the child's eligibility status.

(iii) Base Claims for Reimbursement on lunch counts, taken daily at the point of service, which correctly identify the number of free, reduced price and paid lunches served to eligible children;

(iv) Correctly record, consolidate and report those lunch and supplement counts on the Claim for Reimbursement; and

(v) Ensure that Claims for Reimbursement do not request payment for any excess lunches produced, as prohibited in §210.10(a)(2), or non-Program lunches (i.e., a la carte or adult

lunches) or for more than one meal supplement per child per day.

(2) *Point of service alternatives.*

(i) State agencies may authorize alternatives to the point of service lunch counts provided that such alternatives result in accurate, reliable counts of the number of free, reduced price and paid lunches served, respectively, for each serving day. State agencies are encouraged to issue guidance which clearly identifies acceptable point of service alternatives and instructions for proper implementation. School food authorities may select one of the State agency approved alternatives without prior approval.

(ii) In addition, on a case-by-case basis, State agencies may authorize school food authorities to use other alternatives to the point of service lunch count; provided that such alternatives result in an accurate and reliable lunch count system. Any request to use an alternative lunch counting method which has not been previously authorized under paragraph (2)(i) is to be submitted in writing to the State agency for approval. Such request shall provide detail sufficient for the State agency to assess whether the proposed alternative would provide an accurate and reliable count of the number of lunches, by type, served each day to eligible children. The details of each approved alternative shall be maintained on file at the State agency for review by FNS.

(d) The State agency shall reimburse the school food authority for meal supplements served in eligible schools (as defined in § 210.10(n)(1)) operating after-school care programs under the NSLP in accordance with the rates established in § 210.4(b).

[53 FR 29147, Aug. 2, 1988, as amended at 54 FR 12581, Mar. 28, 1989; 56 FR 32939, July 17, 1991; 58 FR 42487, Aug. 10, 1993; 60 FR 31207, June 13, 1995; 65 FR 26912, May 9, 2000]

§ 210.8 Claims for reimbursement.

(a) *Internal controls.* The school food authority shall establish internal controls which ensure the accuracy of lunch counts prior to the submission of the monthly Claim for Reimbursement. At a minimum, these internal controls shall include: an on-site review of the lunch counting and claiming system employed by each school within the jurisdiction of the school food authority; comparisons of daily free, reduced price and paid lunch counts against data which will assist in the identification of lunch counts in excess of the number of free, reduced price and paid lunches served each day to children eligible for such lunches; and a system for following up on those lunch counts which suggest the likelihood of lunch counting problems.

(1) *On-site reviews.* Every school year, each school food authority with more than one school shall perform no less than one on-site review of the lunch counting and claiming system employed by each school under its jurisdiction. The on-site review shall take place prior to February 1 of each school year. Further, if the review discloses problems with a school's meal counting or claiming procedures, the school food authority shall: ensure that the school implements corrective action; and, within 45 days of the review, conducts a follow-up on-site review to determine that the corrective action resolved the problems. Each on-site review shall ensure that the school's claim is based on the counting system authorized by the State agency under § 210.7(c) of this part and that the counting system, as implemented, yields the actual number of reimbursable free, reduced price and paid lunches, respectively, served for each day of operation.

(2) *School food authority claims review process.* Prior to the submission of a monthly Claim for Reimbursement, each school food authority shall review the lunch count data for each school under its jurisdiction to ensure the accuracy of the monthly Claim for Reimbursement. The objective of this review is to ensure that monthly claims include only the number of free, reduced price and paid lunches served on any day of operation to children currently eligible for such lunches.

(i) Any school food authority that was found by its most recent administrative review conducted in accordance with § 210.18, to have no meal counting and claiming violations may:

(A) Develop internal control procedures that ensure accurate meal counts. The school food authority shall submit any internal controls developed

in accordance with this paragraph to the State agency for approval and, in the absence of specific disapproval from the State agency, shall implement such internal controls. The State agency shall establish procedures to promptly notify school food authorities of any modifications needed to their proposed internal controls or of denial of unacceptable submissions. If the State agency disapproves the proposed internal controls of any school food authority, it reserves the right to require the school food authority to comply with the provisions of paragraph (a)(3) of this section; or

(B) Comply with the requirements of paragraph (a)(3) of this section.

(ii) Any school food authority that was identified in the most recent administrative review conducted in accordance with §210.18, or in any other oversight activity, as having meal counting and claiming violations shall comply with the requirements in paragraph (a)(3) of this section.

(3) *Edit checks*. (i) The following procedure shall be followed for school food authorities identified in paragraph (a)(2)(ii) of this section, by other school food authorities at State agency option, or, at their own option, by school food authorities identified in paragraph (a)(2)(i) of this section: the school food authority shall compare each school's daily counts of free, reduced price and paid lunches against the product of the number of children in that school currently eligible for free, reduced price and paid lunches, respectively, times an attendance factor.

(ii) School food authorities that are identified in subsequent administrative reviews conducted in accordance with §210.18 as not having meal counting and claiming violations and that are correctly complying with the procedures in paragraph (a)(3)(i) of this section have the option of developing internal controls in accordance with paragraph (a)(2)(i) of this section.

(4) *Follow-up activity*. The school food authority shall promptly follow-up through phone contact, on-site visits or other means when the internal controls used by schools in accordance with paragraph (a)(2)(i) of this section or the claims review process used by schools in accordance with paragraphs (a)(2)(ii) and (a)(3) of this section suggest the likelihood of lunch count problems. When problems or errors are identified, the lunch counts shall be corrected prior to submission of the monthly Claim for Reimbursement. Improvements to the lunch count system shall also be made to ensure that the lunch counting system consistently results in lunch counts of the actual number of reimbursable free, reduced price and paid lunches served for each day of operation.

(5) *Recordkeeping*. School food authorities shall maintain on file, each month's Claim for Reimbursement and all data used in the claims review process, by school. Records shall be retained as specified in §210.23(c) of this part. School food authorities shall make this information available to the Department and the State agency upon request.

(b) *Monthly claims*. To be entitled to reimbursement under this part, each school food authority shall submit to the State agency, a monthly Claim for Reimbursement, as described in paragraph (c) of this section.

(1) *Submission timeframes*. A final Claim for Reimbursement shall be postmarked or submitted to the State agency not later than 60 days following the last day of the full month covered by the claim. State agencies may establish shorter deadlines at their discretion. Claims not postmarked and/or submitted within 60 days shall not be paid with Program funds unless otherwise authorized by FNS.

(2) *State agency claims review process*. The State agency shall review each school food authority's Claim for Reimbursement, on a monthly basis, in an effort to ensure that monthly claims are limited to the number of free and reduced price lunches served, by type, to eligible children.

(i) The State agency shall, at a minimum, compare the number of free and reduced price lunches claimed to the number of children approved for free and reduced price lunches enrolled in the school food authority for the month of October times the days of operation times the attendance factor employed by the school food authority in accordance with paragraph (a)(3) of this section or the internal controls

used by schools in accordance with paragraph (a)(2)(i) of this section. At its discretion, the State agency may conduct this comparison against data which reflects the number of children approved for free and reduced price lunches for a more current month(s) as collected pursuant to paragraph (c)(2) of this section.

(ii) In lieu of conducting the claims review specified in paragraph (b)(2)(i) of this section, the State agency may conduct alternative analyses for those Claims for Reimbursement submitted by residential child care institutions. Such alternatives analyses shall meet the objective of ensuring that the monthly Claims for Reimbursement are limited to the numbers of free and reduced price lunches served, by type, to eligible children.

(3) *Follow-up activity*. The State agency shall promptly follow-up through phone contact, on-site visits, or other means when the claims review process suggests the likelihood of lunch count problems.

(4) *Corrective action*. The State agency shall promptly take corrective action with respect to any Claim for Reimbursement which includes more than the number of lunches served, by type, to eligible children. In taking corrective action, State agencies may make adjustments on claims filed within the 60-day deadline if such adjustments are completed within 90 days of the last day of the claim month and are reflected in the final Report of School Program Operations (FNS–10) for the claim month required under § 210.5(d) of this part. Upward adjustments in Program funds claimed which are not reflected in the final FNS–10 for the claim month shall not be made unless authorized by FNS. Except that, upward adjustments for the current and prior fiscal years resulting from any review or audit may be made, at the discretion of the State agency. Downward adjustments in amounts claimed shall always be made, without FNS authorization, regardless of when it is determined that such adjustments are necessary.

(c) *Content of claim*. The Claim for Reimbursement shall include data in sufficient detail to justify the reimbursement claimed and to enable the State agency to provide the Report of School Program Operations required under § 210.5(d) of this part. Such data shall include, at a minimum, the number of free, reduced price and paid lunches and meal supplements served to eligible children. The claim shall be signed by a school food authority official.

(1) *Consolidated claim*. The State agency may authorize a school food authority to submit a consolidated Claim for Reimbursement for all schools under its jurisdiction, *provided that*, the data on each school's operations required in this section are maintained on file at the local office of the school food authority and the claim separates consolidated data for commodity schools from data for other schools. Unless otherwise approved by FNS, the Claim for Reimbursement for any month shall include only lunches and meal supplements served in that month except if the first or last month of Program operations for any school year contains 10 operating days or less, such month may be combined with the Claim for Reimbursement for the appropriate adjacent month. However, Claims for Reimbursement may not combine operations occurring in two fiscal years. If a single State agency administers any combination of the Child Nutrition Programs, a school food authority shall be able to use a common claim form with respect to claims for reimbursement for meals served under those programs.

(2) *October data*. For the month of October, the State agency shall also obtain, either through the Claim for Reimbursement or other means, the total number of children approved for free lunches and meal supplements, the total number of children approved for reduced price lunches and meal supplements, and the total number of children enrolled in the school food authority as of the last day of operation in October. The school food authority shall submit this data to the State agency no later than December 31 of each year. State agencies may establish shorter deadlines at their discretion. In addition, the State agency may require school food authorities to provide this data for a more current month if for use in the State agency

claims review process under paragraph (c)(2) of this section.

(d) *Advance funds.* The State agency may advance funds available for the Program to a school food authority in an amount equal to the amount of reimbursement estimated to be needed for one month's operation. Following the receipt of claims, the State agency shall make adjustments, as necessary, to ensure that the total amount of payments received by the school food authority for the fiscal year does not exceed an amount equal to the number of lunches and meal supplements by reimbursement type served to children times the respective payment rates assigned by the State in accordance with §210.7(b). The State agency shall recover advances of funds to any school food authority failing to comply with the 60-day claim submission requirements in paragraph (b) of this section.

[53 FR 29147, Aug. 2, 1988, as amended at 54 FR 12581, Mar. 28, 1989; 56 FR 32940, July 17, 1991; 58 FR 42487, Aug. 10, 1993; 60 FR 31207, June 13, 1995; 64 FR 50740, Sept. 20, 1999]

Subpart C—Requirements for School Food Authority Participation

§210.9 Agreement with State agency.

(a) *Application.* An official of a school food authority shall make written application to the State agency for any school in which it desires to operate the Program. Applications shall provide the State agency with sufficient information to determine eligibility. The school food authority shall also submit for approval a Free and Reduced Price Policy Statement in accordance with part 245 of this chapter.

(b) *Agreement.* Each school food authority approved to participate in the program shall enter into a written agreement with the State agency that may be amended as necessary. Nothing in the preceding sentence shall be construed to limit the ability of the State agency to suspend or terminate the agreement in accordance with §210.25. If a single State agency administers any combination of the Child Nutrition Programs, that State agency shall provide each school food authority with a single agreement with respect to the operation of those programs. The agreement shall contain a statement to the effect that the ''School Food Authority and participating schools under its jurisdiction, shall comply with all provisions of 7 CFR parts 210 and 245.'' This agreement shall provide that each school food authority shall, with respect to participating schools under its jurisdiction:

(1) Maintain a nonprofit school food service and observe the limitations on the use of nonprofit school food service revenues set forth in §210.14(a) and the limitations on any competitive school food service as set forth in §210.11(b);

(2) Limit its net cash resources to an amount that does not exceed 3 months average expenditures for its nonprofit school food service or such other amount as may be approved in accordance with §210.19(a);

(3) Maintain a financial management system as prescribed under §210.14(c);

(4) Comply with the requirements of the Department's regulations regarding financial management (7 CFR part 3015);

(5) Serve lunches, during the lunch period, which meet the minimum requirements prescribed in §210.10;

(6) Price the lunch as a unit;

(7) Serve lunches free or at a reduced price to all children who are determined by the school food authority to be eligible for such meals under 7 CFR part 245;

(8) Claim reimbursement at the assigned rates only for reimbursable free, reduced price and paid lunches served to eligible children in accordance with 7 CFR part 210. Agree that the school food authority official signing the claim shall be responsible for reviewing and analyzing meal counts to ensure accuracy as specified in §210.8 governing claims for reimbursement. Acknowledge that failure to submit accurate claims will result in the recovery of an overclaim and may result in the withholding of payments, suspension or termination of the program as specified in §210.25. Acknowledge that if failure to submit accurate claims reflects embezzlement, willful misapplication of funds, theft, or fraudulent activity, the penalties specified in §210.26 shall apply;

(9) Count the number of free, reduced price and paid reimbursable meals

served to eligible children at the point of service, or through another counting system if approved by the State agency;

(10) Submit Claims for Reimbursement in accordance with § 210.8;

(11) Comply with the requirements of the Department's regulations regarding nondiscrimination (7 CFR parts 15, 15a, 15b);

(12) Make no discrimination against any child because of his or her eligibility for free or reduced price meals in accordance with the approved Free and Reduced Price Policy Statement;

(13) Enter into an agreement to receive donated foods as required by 7 CFR part 250;

(14) Maintain, in the storage, preparation and service of food, proper sanitation and health standards in conformance with all applicable State and local laws and regulations;

(15) Accept and use, in as large quantities as may be efficiently utilized in its nonprofit school food service, such foods as may be offered as a donation by the Department;

(16) Maintain necessary facilities for storing, preparing and serving food;

(17) Upon request, make all accounts and records pertaining to its school food service available to the State agency and to FNS, for audit or review, at a reasonable time and place. Such records shall be retained for a period of 3 years after the date of the final Claim for Reimbursement for the fiscal year to which they pertain, except that if audit findings have not been resolved, the records shall be retained beyond the 3 year period as long as required for resolution of the issues raised by the audit;

(18) Maintain files of currently approved and denied free and reduced price applications, respectively, and the names of children approved for free lunches based on documentation certifying that the child is included in a household approved to receive benefits under the Food Stamp Program, Food Distribution Program for Households on Indian Reservations (FDPIR) or Temporary Assistance for Needy Families (TANF).If the applications and/or documentation are maintained at the school food authority level, they shall be readily retrievable by school;

(19) Retain the individual applications for free and reduced price lunches and meal supplements submitted by families for a period of 3 years after the end of the fiscal year to which they pertain or as otherwise specified under paragraph (b)(17) of this section.

(20) No later than March 1, 1997, and no later than December 31 of each year thereafter, provide the State agency with a list of all elementary schools under its jurisdiction in which 50 percent or more of enrolled children have been determined eligible for free or reduced price meals as of the last operating day the preceding October. The State agency may designate a month other than October for the collection of this information, in which case the list must be provided to the State agency within 60 calendar days following the end of the month designated by the State agency. In addition, each school food authority shall provide, when available for the schools under its jurisdiction, and upon the request of a sponsoring organization of day care homes of the Child and Adult Care Food Program, information on the boundaries of the attendance areas for the elementary schools identified as having 50 percent or more of enrolled children certified eligible for free or reduced price meals.

(c) *Afterschool care requirements.* Those school food authorities with eligible schools (as defined in § 210.10(n)(1)) that elect to serve meal supplements during afterschool care programs, shall agree to:

(1) Serve meal supplements which meet the minimum requirements prescribed in § 210.10;

(2) Price the meal supplement as a unit;

(3) Serve meal supplements free or at a reduced price to all children who are determined by the school food authority to be eligible for free or reduced price school meals under 7 CFR part 245;

(4) If charging for meals, the charge for a reduced price meal supplement shall not exceed 15 cents;

(5) Claim reimbursement at the assigned rates only for meal supplements served in accordance with the agreement;

(6) Claim reimbursement for no more than one meal supplement per child per day;

(7) Review each afterschool care program two times a year; the first review shall be made during the first four weeks that the school is in operation each school year, except that an afterschool care program operating year round shall be reviewed during the first four weeks of its initial year of operation, once more during its first year of operation, and twice each school year thereafter; and

(8) Comply with all requirements of this part, except that, claims for reimbursement need not be based on ''point of service'' meal supplement counts (as required by § 210.9(b)(9)).

[53 FR 29147, Aug. 2, 1988, as amended at 54 FR 12581, Mar. 28, 1989; 56 FR 32941, July 17, 1991; 58 FR 42488, Aug. 10, 1993; 60 FR 31208, June 13, 1995; 62 FR 901, Jan. 7, 1997; 63 FR 9104, Feb. 24, 1998; 64 FR 50740, Sept. 20, 1999; 64 FR 72471, Dec. 28, 1999; 65 FR 26912, May 9, 2000]

§ 210.10 What are the nutrition standards and menu planning approaches for lunches and the requirements for afterschool snacks?

(a) *What are the general requirements*?

(1) *General nutrition requirements*. Schools must provide nutritious and well-balanced meals to all the children they serve.

(i) *Requirements for lunch*. For children age 2 or older, schools must offer lunches that meet, at a minimum, the nutrition standards in paragraph (b) of this section. Compliance with the nutrition standards and the appropriate nutrient and calorie levels is determined by averaging lunches planned to be offered over a school week. Under any menu planning approach, schools must plan and produce at least enough food to meet the appropriate calorie and nutrient levels for the ages/grades of the children in the school (see paragraphs (c), (d), (i)(1) or (l) of this section, depending on the menu planning approach used). Also, if schools use one of the food-based menu planning approaches, they must plan and produce at least enough food to offer each child the minimum quantities under the meal pattern (see paragraph (k) of this section). Schools offering lunches to infants must meet the meal pattern requirements in paragraph (o) of this section.

(ii) *Requirements for afterschool snacks*. Schools offering afterschool snacks in afterschool care programs must meet the meal pattern requirements in paragraph (n) of this section. Schools must plan and produce enough food to offer each child the minimum quantities under the meal pattern in paragraph (n) of this section. The component requirements for meal supplements served under the Child and Adult Care Food Program authorized under part 226 of this chapter also apply to afterschool snacks served in accordance with paragraph (n) of this section.

(2) *Unit pricing*. Schools must price each meal as a unit. Schools need to consider participation trends in an effort to provide one reimbursable lunch and, if applicable, one reimbursable afterschool snack for each child every day. If there are leftover meals, schools may offer them to the students but cannot get reimbursement for them.

(3) *Production and menu records*. Schools must keep production and menu records for the meals they produce. These records must show how the meals contribute to the required food components, food items or menu items every day. In addition, for lunches, these records must show how the lunches contribute to the nutrition standards in paragraph (b) of this section and the appropriate calorie and nutrient levels for the ages/grades of the children in the school (see paragraphs (c), (d), or (i)(1) or (l) of this section, depending on the menu planning approach used) over the school week. If applicable, schools or school food authorities must maintain nutritional analysis records to demonstrate that lunches meet, when averaged over each school week:

(i) The nutrition standards provided in paragraph (b) of this section; and

(ii) The nutrient and calorie levels for children for each age or grade group in accordance with paragraphs (c) or (i)(1) of this section or developed under paragraph (l) of this section.

(b) *What are the specific nutrition standards for lunches?* Children age 2 and above must be offered lunches that meet the following nutrition standards for their age/grade group:

(1) Provision of one-third of the Recommended Dietary Allowances (RDAs) for protein, calcium, iron, vitamin A and vitamin C in the appropriate levels for the ages/grades (see paragraphs (c), (d), (i)(1) or (l) of this section, depending on the menu planning approach used);

(2) Provision of the lunchtime energy allowances (calories) in the appropriate levels (see paragraphs (c), (d),(i)(1) or (l) of this section, depending on the menu planning approach used);

(3) These applicable recommendations from the 1995 Dietary Guidelines for Americans:

(i) Eat a variety of foods;

(ii) Limit total fat to 30 percent of total calories;

(iii) Limit saturated fat to less than 10 percent of total calories;

(iv) Choose a diet low in cholesterol;

(v) Choose a diet with plenty of grain products, vegetables, and fruits; and

(vi) Choose a diet moderate in salt and sodium.

(4) These measures of compliance with the applicable recommendations of the 1995 Dietary Guidelines for Americans:

(i) Limit the percent of calories from total fat to 30 percent of the actual number of calories offered;

(ii) Limit the percent of calories from saturated fat to less than 10 percent of the actual number of calories offered;

(iii) Reduce sodium and cholesterol levels; and

(iv) Increase the level of dietary fiber.

(5) School food authorities have several ways to plan menus. The minimum levels of nutrients and calories that lunches must offer depends on the menu planning approach used and the ages/grades served. The menu planning approaches are:

(i) Nutrient standard menu planning (see paragraphs (c) and (i) of this section);

(ii) Assisted nutrient standard menu planning (see paragraphs (c) and (j) of this section);

(iii) Traditional food-based menu planning (see paragraphs (d)(1) and (k) of this section);

(iv) Enhanced food-based menu planning (see paragraphs (d)(2) and (k) of this section); or

(v) Alternate menu planning (see paragraph (l) of this section).

(c) *What are the levels for nutrients and calories for lunches planned under the nutrient standard or assisted nutrient standard menu planning approaches*?

(1) *Required levels.* The required levels are:

MINIMUM NUTRIENT AND CALORIE LEVELS FOR SCHOOL LUNCHES
NUTRIENT STANDARD MENU PLANNING APPROACHES (SCHOOL WEEK AVERAGES)

	MINIMUM REQUIREMENTS			OPTIONAL
NUTRIENTS AND ENERGY ALLOWANCES	Preschool	Grades K-6	Grades 7-12	Grades K-3
Energy allowances (calories)	517	664	825	633
Total fat (as a percentage of actual total food energy)	[1]	[1, 2]	[2]	[1, 2]
Saturated fat (as a percentage of actual total food energy)	[1]	[1, 3]	[3]	[1, 3]
RDA for protein (g)	7	10	16	9
RDA for calcium (mg)	267	286	400	267
RDA for iron (mg)	3.3	3.5	4.5	3.3
RDA for Vitamin A (RE)	150	224	300	200
RDA for Vitamin C (mg)	14	15	18	15

[1] The Dietary Guidelines recommend that after 2 years of age "...children should gradually adopt a diet that, by about 5 years of age, contains no more than 30 percent of calories from fat."

[2] Not to exceed 30 percent over a school week

[3] Less than 10 percent over a school week

(2) *Optional levels.* Optional levels are:

OPTIONAL MINIMUM NUTRIENT AND CALORIE LEVELS FOR SCHOOL LUNCHES NUTRIENT STANDARD MENU PLANNING APPROACHES (SCHOOL WEEK AVERAGES)				
NUTRIENTS AND ENERGY ALLOWANCES	AGES 3-6	AGES 7-10	AGES 11-13	AGES 14 AND ABOVE
Energy allowances (calories)	558	667	783	846
Total fat (as a percentage of actual total food energy)	[1,2]	[2]	[2]	[2]
Saturated fat (as a percentage of actual total food energy)	[1,3]	[3]	[3]	[3]
RDA for protein (g)	7.3	9.3	15.0	16.7
RDA for calcium (mg)	267	267	400	400
RDA for iron (mg)	3.3	3.3	4.5	4.5
RDA for Vitamin A (RE)	158	233	300	300
RDA for Vitamin C (mg)	14.6	15	16.7	19.2

[1] The Dietary Guidelines recommend that after 2 years of age "...children should gradually adopt a diet that, by about 5 years of age, contains no more than 30 percent of calories from fat."

[2] Not to exceed 30 percent over a school week

[3] Less than 10 percent over a school week

(3) *Customized levels.* Schools may also develop a set of nutrient and calorie levels for a school week. These levels are customized for the age groups of the children in the particular school or school food authority.

(d) *What are the nutrient and calorie levels for lunches planned under the food-based menu planning approaches?*

(1) *Traditional approach.* For the traditional food-based menu planning approach, the required levels are:

MINIMUM NUTRIENT AND CALORIE LEVELS FOR SCHOOL LUNCHES TRADITIONAL FOOD-BASED MENU PLANNING APPROACH (SCHOOL WEEK AVERAGES)				
	MINIMUM REQUIREMENTS			RECOMMENDED
NUTRIENTS AND ENERGY ALLOWANCES	GROUP II PRESCHOOL AGES 3-4	GROUP III GRADES K-3 AGES 5-8	GROUP IV GRADES 4-12 AGES 9 AND OLDER	GROUP V GRADES 7-12 AGES 12 AND OLDER
Energy allowances (calories)	517	633	785	826
Total fat (as a percentage of actual total food energy)	[1]	[1,2]	[2]	[2]
Saturated fat (as a percentage of actual total food energy)	[1]	[1,3]	[3]	[3]
RDA for protein (g)	7	9	15	16
RDA for calcium (mg)	267	267	370	400
RDA for iron (mg)	3.3	3.3	4.2	4.5
RDA for Vitamin A (RE)	150	200	285	300
RDA for Vitamin C (mg)	14	15	17	18

[1] The Dietary Guidelines recommend that after 2 years of age "...children should gradually adopt a diet that, by about 5 years of age, contains no more than 30 percent of calories from fat."

[2] Not to exceed 30 percent over a school week

[3] Less than 10 percent over a school week

(2) *Enhanced approach.* For the enhanced food-based menu planning approach, the required levels are:

MINIMUM NUTRIENT AND CALORIE LEVELS FOR SCHOOL LUNCHES ENHANCED FOOD-BASED MENU PLANNING APPROACH (SCHOOL WEEK AVERAGES)				
	MINIMUM REQUIREMENTS			OPTIONAL
NUTRIENTS AND ENERGY ALLOWANCES	PRESCHOOL	GRADES K-6	GRADES 7-12	GRADES K-3
Energy allowances (calories)	517	664	825	633
Total fat (as a percentage of actual total food energy)	[1]	[1, 2]	[2]	[1,2]
Saturated fat (as a percentage of actual total food energy)	[1]	[1, 3]	[3]	[1,3]
RDA for protein (g)	7	10	16	9
RDA for calcium (mg)	267	286	400	267
RDA for iron (mg)	3.3	3.5	4.5	3.3
RDA for Vitamin A (RE)	150	224	300	200
RDA for Vitamin C (mg)	14	15	18	15

[1] The Dietary Guidelines recommend that after 2 years of age "...children should gradually adopt a diet that, by about 5 years of age, contains no more than 30 percent of calories from fat."

[2] Not to exceed 30 percent over a school week

[3] Less than 10 percent over a school week

(e) *Must schools offer choices at lunch?* FNS encourages schools to offer children a selection of foods and menu items at lunch. Choices provide variety and encourage consumption. Schools may offer choices of reimbursable lunches or foods within a reimbursable lunch. Children who are eligible for free or reduced price lunches must be allowed to take any reimbursable lunch or any choices offered as part of a reimbursable lunch. Schools may establish different unit prices for each lunch offered provided that the benefits made available to children eligible for free or reduced price lunches are not affected.

(f) *What are the requirements for lunch periods?*

(1) *Timing.* Schools must offer lunches meeting the requirements of this section during the period the school has designated as the lunch period. Schools must offer lunches between 10:00 a.m. and 2:00 p.m. Schools may request an exemption from these times only from FNS.

(2) *Lunch periods for young children.* With State agency approval, schools are encouraged to serve children ages one through five over two service periods. Schools may divide the quantities and/or the menu items, foods, or food items offered each time any way they wish.

(3) *Adequate lunch periods.* FNS encourages schools to provide sufficient lunch periods that are long enough to give all students enough time to be served and to eat their lunches.

(g) *What exceptions and variations are allowed in meals?*

(1) *Exceptions for medical or special dietary needs.* Schools must make substitutions in lunches and afterschool snacks for students who are considered to have a disability under 7 CFR part 15b and whose disability restricts their diet. Schools may also make substitutions for students who do not have a disability but who cannot consume the regular lunch or afterschool snack because of medical or other special dietary needs. Substitutions must be made on a case by case basis only when supported by a statement of the need for substitutions that includes recommended alternate foods, unless otherwise exempted by FNS. Such statement must, in the case of a student with a disability, be signed by a physician or, in the case of a student who is not disabled, by a recognized medical authority.

(2) *Variations for ethnic, religious, or economic reasons.* Schools should consider ethnic and religious preferences when planning and preparing meals. Variations on an experimental or continuing basis in the food components for the food-based menu planning approaches in paragraphs (k) or (n) of this section may be allowed by FNS. Any variations must be nutritionally

sound and needed to meet ethnic, religious, or economic needs.

(3) *Exceptions for natural disasters.* If there is a natural disaster or other catastrophe, FNS may temporarily allow schools to serve meals for reimbursement that do not meet the requirements in this section.

(h) *What must schools do about nutrition disclosure?* To the extent that school food authorities identify foods in a menu, or on the serving line or through other available means of communicating with program participants, school food authorities must identify products or dishes containing more than 30 parts fully hydrated alternate protein products (as specified in appendix A of this part) to less than 70 parts beef, pork, poultry or seafood on an uncooked basis, in a manner which does not characterize the product or dish solely as beef, pork, poultry or seafood. Additionally, FNS encourages schools to inform the students, parents, and the public about efforts they are making to meet the nutrition standards (see paragraph (b) of this section) for school lunches.

(i) *What are the requirements for lunches under the nutrient standard menu planning approach?*

(1) *Nutrient levels.*

(i) *Adjusting nutrient levels for young children.* Schools with children who are age 2 must at least meet the nutrition standards in paragraph (b) of this section and the preschool nutrient and calorie levels in paragraph (c)(1) of this section over a school week. Schools may also use the preschool nutrient and calorie levels in paragraph (c)(2) of this section or may calculate nutrient and calorie levels for two year olds. FNS has a method for calculating these levels in guidance materials for menu planning.

(ii) *Minimum levels for nutrients.* Lunches must at least offer the nutrient and calorie levels for the required grade groups in the table in paragraph (c)(1) of this section. Schools may also offer lunches meeting the nutrient and calorie levels for the age groups in paragraph (c)(2) of this section. If only one grade or age group is outside either of these established levels, schools may follow the levels for the majority of the children. Schools may also customize the nutrient and calorie levels for the children they serve. FNS has a method for calculating these levels in guidance materials for menu planning.

(2) *Reimbursable lunches.*

(i) *Contents of a reimbursable lunch.* A reimbursable lunch must include at least three menu items. One of those menu items must be an entree, and one must be fluid milk as a beverage. An entree is a combination of foods or is a single food item offered as the main course. All menu items or foods offered in a reimbursable lunch contribute to the nutrition standards in paragraph (b) of this section and to the levels of nutrients and calories that must be met in paragraphs (c) or (i)(1) of this section. Unless offered as part of a menu item in a reimbursable lunch, foods of minimal nutritional value (see appendix B to part 210) are not included in the nutrient analysis. Reimbursable lunches planned under the nutrient standard menu planning approach must meet the nutrition standards in paragraph (b) of this section and the appropriate nutrient and calorie levels in either paragraph (c) or paragraph (i)(1) of this section.

(ii) *Offer versus serve.* Schools must offer at least three menu items for lunches. Senior high (as defined by the State educational agency) school students must select at least two menu items and are allowed to decline a maximum of two menu items. The student must always take the entree. The price of a reimbursable lunch does not change if the student does not take a menu item or requests smaller portions. At the discretion of the school food authority, students below the senior high level may also participate in offer versus serve.

(3) *Doing the analysis.* Schools using nutrient standard menu planning must conduct the analysis on all menu items and foods offered in a reimbursable lunch. The analysis is conducted over a school week. Unless offered as part of a menu item in a reimbursable lunch, foods of minimal nutritional value (see appendix B to part 210) are not included in the nutrient analysis.

(4) *Software elements.*

(i) *The Child Nutrition Database.* The nutrient analysis is based on the Child Nutrition Database. This database is

part of the software used to do a nutrient analysis. Software companies or others developing systems for schools may contact FNS for more information about the database.

(ii) *Software evaluation*. FNS or an FNS designee evaluates any nutrient analysis software before it may be used in schools. FNS or its designee determines if the software, as submitted, meets the minimum requirements. The approval of software does not mean that FNS or USDA endorses it. The software must be able to do all functions after the basic data is entered. The required functions include weighted averages and the optional combined analysis of the lunch and breakfast programs.

(5) *Nutrient analysis procedures*.

(i) *Weighted averages*. Schools must include all menu items and foods offered in reimbursable lunches in the nutrient analysis. Menu items and foods are included based on the portion sizes and projected serving amounts. They are also weighted based on their proportionate contribution to the lunches offered. This means that menu items or foods more frequently offered are weighted more heavily than those not offered as frequently. Schools calculate weighting as indicated by FNS guidance and by the guidance provided by the software. Through September 30, 2003, schools are not required to conduct a weighted analysis.

(ii) *Analyzed nutrients*. The analysis includes all menu items and foods offered over a school week. The analysis must determine the levels of: Calories, protein, vitamin A, vitamin C, iron, calcium, total fat, saturated fat, sodium, cholesterol and dietary fiber.

(iii) *Combining the analysis of the lunch and breakfast programs*. At their option, schools may combine the analysis of lunches offered under this part and breakfasts offered under part 220 of this Chapter. The analysis is done proportionately to the levels of participation in each program based on FNS guidance.

(6) *Comparing the results of the nutrient analysis*. Once the procedures in paragraph (i)(5) of this section are completed, schools must compare the results of the analysis to the appropriate nutrient and calorie levels, by age/grade groups, in paragraph (c) of this section or those developed under paragraph (i)(1) of this section. This comparison determines the school week's average. Schools must also make comparisons to the nutrition standards in paragraph (b) of this section to determine how well they are meeting the nutrition standards over the school week.

(7) *Adjustments to the menus*. Once schools know the results of the nutrient analysis based on the procedures in paragraphs (i)(5) and (i)(6) of this section, they must adjust future menu cycles to reflect production and how often the menu items and foods are offered. Schools may need to reanalyze menus when the students' selections change and, consequently, production levels change. Schools may need to change the menu items and foods offered given the students' selections and may need to modify the recipes and other specifications to make sure that the nutrition standards in paragraph (b) and either paragraphs (c) or (i)(1) of this section are met.

(8) *Standardized recipes*. If a school follows the nutrient standard menu planning approach, it must develop and follow standardized recipes. A standardized recipe is a recipe that was tested to provide an established yield and quantity using the same ingredients for both measurement and preparation methods. Any standardized recipes developed by USDA/FNS are in the Child Nutrition Database. If a school has its own recipes, they must be standardized and analyzed to determine the levels of calories, nutrients, and dietary components listed in paragraph (i)(5)(ii) of this section. Schools must add any local recipes to their local database as outlined in FNS guidance.

(9) *Processed foods*. The Child Nutrition Database includes a number of processed foods. Schools may use purchased processed foods and menu items that are not in the Child Nutrition Database. Schools or the State agency must add any locally purchased processed foods and menu items to their local database as outlined in FNS guidance. Schools or the State agency must obtain the levels of calories, nutrients, and dietary components listed in paragraph (i)(5)(ii) of this section.

(10) *Menu substitutions.* Schools may need to substitute foods or menu items in a menu that was already analyzed. If the substitution(s) occurs more than two weeks before the planned menu is served, the school must reanalyze the revised menu. If the substitution(s) occurs two weeks or less before the planned menu is served, the school does not need to do a reanalysis. However, schools should always try to substitute similar foods.

(11) *Meeting the nutrition standards.* The school's analysis shows whether their menus are meeting the nutrition standards in paragraph (b) of this section and the appropriate levels of nutrients and calories in paragraph (c) of this section or customized levels developed under paragraph (i)(1) of this section. If the analysis shows that the menu(s) are not meeting these standards, the school needs to take action to make sure that the lunches meet the nutrition standards and the calorie, nutrient, and dietary component levels. Actions may include technical assistance and training and may be taken by the State agency, the school food authority or by the school as needed.

(12) *Other Child Nutrition Programs and nutrient standard menu planning.* School food authorities that operate the Summer Food Service Program (part 225 of this chapter) and/or the Child and Adult Care Food Program (part 226 of this chapter) may, with State agency approval, prepare lunches for these programs using the nutrient standard menu planning approach for children age two and over. FNS has guidance on the levels of nutrients and calories for adult lunches under the Child and Adult Care Food Program. However, afterschool snacks continue to use the appropriate program's meal pattern.

(j) *What are the requirements for lunches under the assisted nutrient standard menu planning approach?* (1) *Definition of assisted nutrient standard menu planning.* Some school food authorities may not be able to do all of the procedures necessary for nutrient standard menu planning. The assisted nutrient standard menu planning approach provides schools with menu cycles developed and analyzed by other sources. These sources include the State agency, other school food authorities, consultants, or food service management companies.

(2) *Elements of assisted nutrient standard menu planning.* School food authorities using menu cycles developed under assisted nutrient standard menu planning must follow the procedures in paragraphs (i)(1) through (i)(10) of this section. The menu cycles must also incorporate local food preferences and accommodate local food service operations. The menus cycles must meet the nutrition standards in paragraph (b) of this section and meet the nutrient and calorie levels for nutrient standard menu planning in paragraph (c) or paragraph (i)(1) of this section. The supplier of the assisted nutrient standard menu planning approach must also develop and provide recipes, food product specifications, and preparation techniques. All of these components support the nutrient analysis results of the menus cycles used by the receiving school food authorities.

(3) *State agency approval.* Prior to its use, the State agency must approve the initial menu cycle, recipes and other specifications of the assisted nutrient standard menu planning approach. The State agency needs to ensure that all the steps required for nutrient analysis were followed. School food authorities may also ask the State agency for assistance with implementation of their assisted nutrient standard menu planning approach.

(4) *Required adjustments.* After the initial service of the menu cycle developed under the assisted nutrient standard menu planning approach, the nutrient analysis must be reassessed and appropriate adjustments made as discussed in paragraph (i)(7) of this section.

(5) *Final responsibility for meeting the nutrition standards.* The school food authority using the assisted nutrient standard menu planning approach retains responsibility for meeting the nutrition standards in paragraph (b) of this section and the calorie and nutrient levels in paragraph (c) or paragraph (i)(1) of this section.

(6) *Adjustments to the menus.* If the nutrient analysis shows that the lunches offered are not meeting the nutrition

standards in paragraph (b) of this section and the calorie and nutrient levels in paragraph (c) or paragraph (i)(1) of this section, the State agency, school food authority or school must take action to make sure the lunches offered meet these requirements. Actions needed include technical assistance and training.

(7) *Other Child Nutrition Programs and assisted nutrient standard menu planning.* School food authorities that operate the Summer Food Service Program (part 225 of this chapter) and/or the Child and Adult Care Food Program (part 226 of this chapter) may, with State agency approval, prepare lunches for these programs using the assisted nutrient standard menu planning approach for children age two and over. FNS has guidance on the levels of nutrients and calories for adult lunches under the Child and Adult Care Food Program. However, afterschool snacks continue to use the appropriate program's meal pattern.

(k) *What are the requirements for lunches under the food-based menu planning approaches?* There are two menu planning approaches based on meal patterns, not nutrient analysis. These approaches are the traditional food-based menu planning approach and the enhanced food-based menu planning approach. Schools using one of these approaches offer food components in at least the minimum quantities required for the various grade groups.

(1) *Quantities for the traditional food-based menu planning approach*—(i) *Minimum quantities.* At a minimum, schools must offer five food items in the quantities in the following table:

TRADITIONAL FOOD-BASED MENU PLANNING APPROACH–MEAL PATTERN FOR LUNCHES					
	MINIMUM QUANTITIES				RECOMMENDED QUANTITIES
FOOD COMPONENTS AND FOOD ITEMS	GROUP I AGES 1-2 PRESCHOOL	GROUP II AGES 3-4 PRESCHOOL	GROUP III, AGES 5-8 GRADES K-3	GROUP IV AGES 9 AND OLDER GRADES 4-12	GROUP V AGES 12 AND OLDER GRADES 7-12
Milk (as a beverage)	6 fluid ounces	6 fluid ounces	8 fluid ounces	8 fluid ounces	8 fluid ounces
Meat or Meat Alternate (quantity of the edible portion as served):					
Lean meat, poultry, or fish	1 ounce	1 ½ ounces	1 ½ ounces	2 ounces	3 ounces
Alternate Protein Products[1]	1 ounce	1 ½ ounces	1 ½ ounces	2 ounces	3 ounces
Cheese	1 ounce	1 ½ ounces	1 ½ ounces	2 ounces	3 ounces
Large egg	½	¾	¾	1	1 ½
Cooked dry beans or peas	¼ cup	3/8 cup	3/8 cup	½ cup	¾ cup
Peanut butter or other nut or seed butters	2 tablespoons	3 tablespoons	3 tablespoons	4 tablespoons	6 tablespoons
Yogurt, plain or flavored, unsweetened or sweetened	4 ounces or ½ cup	6 ounces or ¾ cup	6 ounces or ¾ cup	8 ounces or 1 cup	12 ounces or 1 ½ cups
The following may be used to meet no more than 50% of the requirement and must be used in combination with any of the above:					
Peanuts, soynuts, tree nuts, or seeds, as listed in program guidance, or an equivalent quantity of any combination of the above meat/meat alternate (1 ounce of nuts/seeds = 1 ounce of cooked lean meat, poultry, or fish)	½ ounce = 50%	¾ ounce = 50%	¾ ounce = 50%	1 ounce = 50%	1 ½ ounces = 50%
Vegetable or Fruit: 2 or more servings of vegetables, fruits or both	½ cup	½ cup	½ cup	¾ cup	¾ cup
Grains/Breads: (servings per week): Must be enriched or whole grain. A serving is a slice of bread or an equivalent serving of biscuits, rolls, etc., or ½ cup of cooked rice, macaroni, noodles, other pasta products or cereal grains	5 servings per week[2] -- minimum of ½ serving per day	8 servings per week[2] -- minimum of 1 serving per day	8 servings per week[2] -- minimum of 1 serving per day	8 servings per week[2] -- minimum of 1 serving per day	10 servings per week[2] -- minimum of 1 serving per day

[1] Must meet the requirements in appendix A of this part.
[2] For the purposes of this table, a week equals five days.

(ii) *Use of Group IV quantities.* Schools that are able to provide quantities of food to children solely on the basis of their ages or grade level should do so.

Schools that cannot serve children on the basis of age or grade level must provide all school age children Group IV portions as specified in the table in paragraph (k)(1)(i) of this section. Schools serving children on the basis of age or grade level must plan and produce sufficient quantities of food to provide Groups I-IV no less than the amounts specified for those children in the table in paragraph (k)(1)(i) of this section, and sufficient quantities of food to provide Group V no less than the specified amounts for Group IV. FNS recommends that schools plan and produce sufficient quantities of food to provide Group V children the larger amounts specified in the table in paragraph (k)(1)(i) of this section. Schools that provide increased portion sizes for Group V may comply with children's requests for smaller portion sizes of the food items; however, schools must plan and produce sufficient quantities of food to at least provide the serving sizes required for Group IV. Schools must ensure that lunches are served with the objective of providing the per lunch minimums for each age and grade level as specified in the table in paragraph (k)(1)(i) of this section.

(2) *Quantities for the enhanced food-based menu planning approach.* Schools must at least offer five food items in the quantities in the following table:

ENHANCED FOOD-BASED MENU PLANNING APPROACH-MEAL PATTERN FOR LUNCHES					
	MINIMUM REQUIREMENTS				OPTION FOR
FOOD COMPONENTS AND FOOD ITEMS	AGES 1-2	PRESCHOOL	GRADES K-6	GRADES 7-12	GRADES K-3
Milk (as a beverage)	6 fluid ounces	6 fluid ounces	8 fluid ounces	8 fluid ounces	8 fluid ounces
Meat or Meat Alternate (quantity of the edible portion as served):					
Lean meat, poultry, or fish	1 ounce	1 ½ ounces	2 ounces	2 ounces	1 ½ ounces
Alternate protein products[1]	1 ounce	1 ½ ounces	2 ounces	2 ounces	1 ½ ounces
Cheese	1 ounce	1 ½ ounces	2 ounces	2 ounces	1 ½ ounces
Large egg	½	¾	1	1	¾
Cooked dry beans or peas	¼ cup	3/8 cup	½ cup	½ cup	3/8 cup
Peanut butter or other nut or seed butters	2 tablespoons	3 tablespoons	4 tablespoons	4 tablespoons	3 tablespoons
Yogurt, plain or flavored, unsweetened or sweetened	4 ounces or ½ cup	6 ounces or ¾ cup	8 ounces or 1 cup	8 ounces or 1 cup	6 ounces or ¾ cup
The following may be used to meet no more than 50% of the requirement and must be used in combination with any of the above:					
Peanuts, soynuts, tree nuts, or seeds, as listed in program guidance, or an equivalent quantity of any combination of the above meat/meat alternate (1 ounce of nuts/seeds equals 1 ounce of cooked lean meat, poultry or fish).	½ ounce =50%	¾ ounce =50%	1 ounce =50%	1 ounce =50%	¾ ounce =50%
Vegetable or Fruit: 2 or more servings of vegetables, fruits or both	½ cup	½ cup	¾ cup plus an extra ½ cup over a week[2]	1 cup	¾ cup
Grains/Breads (servings per week): Must be enriched or whole grain. A serving is a slice of bread or an equivalent serving of biscuits, rolls, etc., or ½ cup of cooked rice, macaroni, noodles, other pasta products or cereal grains	5 servings per week[2] – minimum of ½ serving per day	8 servings per week[2] – minimum of 1 serving per day	12 servings per week[2] – minimum of 1 serving per day[3]	15 servings per week[2]– minimum of 1 serving per day[3]	10 servings per week[2] –minimum of 1 serving per day[3]

[1] Must meet the requirements in appendix A of this part.
[2] For the purposes of this table, a week equals five days.
[3] Up to one grains/breads serving per day may be a dessert.

(3) *Requirements for the meat/meat alternate component.* The quantity of the meat/meat alternate component must be the edible portion as served. If the portion size of a food item for this component is excessive, the school must reduce that portion and supplement it with another meat/meat alternate to meet the full requirement. This component must be served in a main dish or in a main dish and only one other food item. Schools without daily choices in

this component should not serve any one meat alternate or form of meat (for example, ground, diced, pieces) more than three times in the same week.

(i) *Enriched macaroni*. Enriched macaroni with fortified protein as defined in appendix A to this part may be used to meet part of the meat/meat alternate requirement when used as specified in appendix A to this part. An enriched macaroni product with fortified protein as defined in appendix A to this part may be used to meet part of the meat/meat alternate component or the grains/breads component but not as both food components in the same lunch.

(ii) *Nuts and seeds*. Nuts and seeds and their butters are allowed as meat alternates in accordance with program guidance. Acorns, chestnuts, and coconuts must not be used because of their low protein and iron content. Nut and seed meals or flours may be used only as allowed under appendix A to this part. Nuts or seeds may be used to meet no more than one-half of the meat/meat alternate component with another meat/meat alternate to meet the full requirement.

(iii) *Yogurt*. Yogurt may be used to meet all or part of the meat/meat alternate requirement. Yogurt may be either plain or flavored, unsweetened or sweetened. Noncommercial and/or nonstandardized yogurt products, such as frozen yogurt, homemade yogurt, yogurt flavored products, yogurt bars, yogurt covered fruit and/or nuts or similar products are not creditable. Four ounces (weight) or ½ cup (volume) of yogurt equals one ounce of the meat/meat alternate requirement.

(4) *Requirements for the vegetable/fruit component*.

(i) *General*. Full strength vegetable or fruit juice may be used to meet no more than one-half of the vegetable/fruit requirement. Cooked dry beans or peas may be counted as either a vegetable or as a meat alternate but not as both in the same meal.

(ii) *Minimum quantities for the enhanced food-based menu planning*. Under the enhanced food-based menu planning approach, children in kindergarten through grade six are offered vegetables/fruits in minimum daily servings plus an additional one-half cup in any combination over a five day period.

(5) *Requirements for the grains/breads component*.

(i) *Enriched or whole grains*. All grains/breads must be enriched or whole grain or made with enriched or whole grain meal or flour.

(ii) *Daily and weekly servings*. The requirement for the grain/bread component is based on minimum daily servings plus total servings over a five day period. Schools serving lunch 6 or 7 days per week should increase the weekly quantity by approximately 20 percent (⅕th) for each additional day. When schools operate less than 5 days per week, they may decrease the weekly quantity by approximately 20 percent (⅕th) for each day less than five. The servings for biscuits, rolls, muffins, and other grain/bread varieties are specified in the Food Buying Guide for Child Nutrition Programs (PA 1331), an FNS publication.

(iii) *Minimums under the traditional food-based menu planning approach*. Schools must offer at least one-half serving of the grain/bread component to children in Group I and at least one serving to children in Groups II–V daily. Schools which serve lunch at least 5 days a week shall serve a total of at least five servings of grains/breads to children in Group I and eight servings per week to children in Groups II–V.

(iv) *Desserts under the enhanced food-based menu planning approach*. Under the enhanced food-based menu planning approach, schools may count up to one grain-based dessert per day for children in grades K–12 towards meeting the grains/breads component.

(6) *Offer versus serve*. Schools must offer all five required food items. Senior high (as defined by the State educational agency) school students may decline up to two of the five food items. At the school food authority's option, students below senior high may decline one or two of the five food items. The price of a reimbursable lunch does not change if the student does not take a menu item or requests smaller portions.

(7) *Meal pattern exceptions for outlying areas*. Schools in American Samoa, Puerto Rico and the Virgin Islands

may serve a starchy vegetable such as yams, plantains, or sweet potatoes to meet the grain/bread requirement.

(l) *What are the requirements for lunches planned using an alternate menu planning approach?*

(1) *Definition.* Alternate menu planning approaches are those adopted or developed by school food authorities or State agencies that differ from the standard approaches established in paragraphs (i) through (k) of this section. There are two types of alternate approaches. First, there are specific modifications provided in paragraph (l)(2) of this section. Second, there are major changes to the standard menu planning approaches or new menu planning approaches developed by school food authorities or State agencies (see paragraph (l)(3) of this section).

(2) *Use of modifications.* There are three modifications available to schools using one of the food-based menu planning approaches for lunches. State agencies may or may not require prior approval or may establish guidelines for using these modifications.

(i) *Modification to the meat/meat alternate component.* The required minimum quantities of the meat/meat alternate component in the food-based menu planning approaches may be offered as a weekly total with a one ounce (or its equivalent for certain meat alternates) minimum daily serving size. This modification does not apply if the minimum serving of meat/meat alternate is less than one ounce.

(ii) *Modification to age/grade groups under the traditional food-based menu planning approach.* Schools using the traditional food-based menu planning approach may:

(A) For children in grades K–6, use the portion sizes in Group IV in the table in paragraph (k)(1) of this section and follow the nutrient levels for children in grades K–6 in paragraphs (c)(1) and (d)(2) of this section; and/or

(B) For children in grades 7–12, use the portion sizes in Group IV in the table in paragraph (k)(1) of this section and follow the nutrient levels for children in grades 7–12 in paragraphs (c)(1) and (d)(2) of this section.

(iii) *Modification for the majority of children.* Under the traditional or enhanced food-based menu planning approaches, if only one age or grade is outside the established levels, schools may follow the levels for the majority of children for both quantities (see paragraph (k)) and the nutrition standards in paragraphs (b) and (d) of this section.

(3) *Use and approval of major changes or new alternate approaches.* Within the guidelines established for developing alternate menu planning approaches, school food authorities or State agencies may modify one of the established menu planning approaches in paragraphs (i) through (k) of this section or may develop their own menu planning approach. The alternate menu planning approach must be available in writing for review and monitoring purposes. No formal plan is required; guidance material, a handbook or protocol is sufficient. As appropriate, the material must address how the guidelines in paragraph (l)(4) of this section are met. A State agency that develops an alternate approach that is exempt from FNS approval under paragraph (l)(3)(iii) of this section must notify FNS in writing when implementing the alternate approach.

(i) *Approval of local level approaches.* Any school food authority-developed menu planning approach must have prior State agency review and approval.

(ii) *Approval of State agency approaches.* Unless exempt under paragraph (l)(3)(iii) of this section, any State agency-developed menu planning approach must have prior FNS approval.

(iii) *State agency approaches not subject to approval.* A State agency-developed menu planning approach does not need FNS approval if:

(A) Five or more school food authorities in the State use it; and

(B) The State agency maintains ongoing oversight of the operation and evaluation of the approach and makes any needed adjustments to its policies and procedures to ensure that the appropriate guidelines of paragraph (l)(4) of this section are met.

(4) *Elements for major changes or new approaches.* Any alternate menu planning approach must:

(i) Offer fluid milk, as provided in paragraph (m) of this section;

(ii) Include offer versus serve for senior high students. Alternate menu planning approaches should follow the offer versus serve procedures in paragraphs (i)(2)(ii) and (k)(6) of this section, as appropriate. If these requirements are not followed, the plan must indicate:

(A) The affected age/grade groups;

(B) The number and type of items (and, if applicable, the quantities for the items) that constitute a reimbursable lunch under offer versus serve;

(C) How such procedures will reduce plate waste; and

(D) How a reasonable level of calories and nutrients for the lunch as taken is provided;

(iii) Meet the Recommended Dietary Allowances and lunchtime energy allowances (nutrient levels) and indicate the age/grade groups served and how the nutrient levels are met for those age/grade groups;

(iv) Follow the requirements for competitive foods in § 210.11 and appendix B to this part;

(v) Follow the requirements for counting food items and products towards the meal patterns. These requirements are found in paragraphs (k)(3) through (k)(5) and paragraph (m) of this section, in appendices A through C to this part, and in instructions and guidance issued by FNS. This only applies if the alternate approach is a food-based menu planning approach;

(vi) Identify a reimbursable lunch at the point of service;

(A) To the extent possible, the procedures provided in paragraph (i)(2)(i) of this section for the nutrient standard or assisted nutrient standard menu planning approaches or for food-based menu planning approaches provided in paragraph (k) of this section must be followed. Any instructions or guidance issued by FNS that further defines the elements of a reimbursable lunch must be followed when using the existing regulatory provisions.

(B) Any alternate approach that deviates from the provisions in paragraph (i)(2)(i) or paragraph (k) of this section must indicate what constitutes a reimbursable lunch, including the number and type of items (and, if applicable, the quantities for the items) which comprise the lunch, and how a reimbursable lunch is to be identified at the point of service;

(vii) Explain how the alternate menu planning approach can be monitored under the applicable provisions of § 210.18 and § 210.19, including a description of the records that will be maintained to document compliance with the program's administrative and nutrition requirements. However, if the procedures under § 210.19 cannot be used to monitor the alternate approach, a description of procedures which will enable the State agency to assess compliance with the nutrition standards in paragraphs (b)(1) through (b)(4) of this section must be included; and

(viii) Follow the requirements for weighted analysis and for approved software for nutrient standard menu planning approaches as required by paragraphs (i)(4) and (i)(5) of this section unless a State agency-developed approach meets the criteria in paragraph (l)(3)(iii) of this section. Through September 30, 2003, schools are not required to conduct a weighted analysis.

(m) *What are the requirements for offering milk?*

(1) *Types of milk.* (i) Under all menu planning approaches for lunches, schools must offer students fluid milk. The types of milk offered must be consistent with the types of milk consumed in the previous year. However, if a particular type of milk constituted less than one percent (1%) of the total amount of milk consumed in the previous year, a school does not need to offer this type of milk. This does not preclude schools from offering additional types of milk.

(ii) All milk served in the Program must be pasteurized fluid milk which meets State and local standards for such milk. However, infants under 1 year of age must be served breast milk or iron-fortified infant formula. All milk must have vitamins A and D at levels specified by the Food and Drug Administration and must be consistent with State and local standards for such milk.

(2) *Inadequate milk supply.* If a school cannot get a supply of milk, it can still participate in the Program under the following conditions:

(i) If emergency conditions temporarily prevent a school that normally has a supply of fluid milk from obtaining delivery of such milk, the State agency may allow the school to serve meals during the emergency period with an alternate form of milk or without milk.

(ii) If a school is unable to obtain a supply of any type of fluid milk on a continuing basis, the State agency may approve the service of meals without fluid milk if the school uses an equivalent amount of canned milk or dry milk in the preparation of the meals. In Alaska, Hawaii, American Samoa, Guam, Puerto Rico, and the Virgin Islands, if a sufficient supply of fluid milk cannot be obtained, ''milk'' includes reconstituted or recombined milk, or as otherwise allowed by FNS through a written exception.

(n) *Supplemental food*. Eligible schools operating afterschool care programs may be reimbursed for one meal supplement served to an eligible child (as defined in § 210.2) per day.

(1) Eligible schools mean schools that:

(i) Operate school lunch programs under the National School Lunch Act;

(ii) Sponsor afterschool care programs as defined in § 210.2; and

(iii) Were participating in the Child and Adult Care Food Program as of May 15, 1989.

(2) Meal supplements shall contain two different components from the following four:

(i) A serving of fluid milk as a beverage, or on cereal, or used in part for each purpose;

(ii) A serving of meat or meat alternate. Nuts and seeds and their butters listed in program guidance are nutritionally comparable to meat or other meat alternates based on available nutritional data. Acorns, chestnuts, and coconuts are excluded and shall not be used as meat alternates due to their low protein content. Nut or seed meals or flours shall not be used as a meat alternate except as defined under appendix A: Alternate Foods for Meals of this part;

(iii) A serving of vegetable(s) or fruit(s) or full-strength vegetable or fruit juice, or an equivalent quantity of any combination of these foods. Juice may not be served when milk is served as the only other component;

(iv) A serving of whole-grain or enriched bread; or an equivalent serving of cornbread, biscuits, rolls, muffins, etc., made with whole-grain or enriched meal or flour; or a serving of cooked whole-grain or enriched pasta or noodle products such as macaroni, or cereal grains such as rice, bulgur, or corn grits; or an equivalent quantity of any combination of these foods.

(3) Infant supplements shall contain the following:

(i) Birth through 3 months: 4–6 fluid ounces of breast milk or iron fortified infant formula.

(ii) 4 through 7 months: 4–6 fluid ounces of breast milk or iron fortified infant formula.

(iii) 8 through 11 months: 2–4 fluid ounces of breast milk or iron fortified infant formula or full strength fruit juice; 0–½ slice of crusty bread or 0–2 cracker type products made from whole-grain or enriched meal or flour that are suitable for an infant for use as a finger food when appropriate. To improve the nutrition of participating children over one year of age, additional foods may be served with the meal supplements as desired.

(4) The minimum amounts of food components to be served as meal supplements as set forth in paragraphs (n)(2) and (n)(3) of this section are as follows. Select two different components from the four listed. (Juice may not be served when milk is served as the only other component.)

MEAL SUPPLEMENT CHART FOR CHILDREN

Snack (supplement) for children	Children 1 and 2	Children 3 through 5	Children 6 through 12
(Select two different components from the four listed)			
Milk, fluid	½ cup	½ cup	1 cup.
Meat or meat alternate [4]	½ ounce	½ ounce	1 ounce.
Juice or fruit or vegetable	½ cup	½ cup	¾ cup.
Bread and/or cereal: Enriched or whole grain bread or	½ slice	½ slice	1 slice.
Cereal: Cold dry or	¼ cup [1]	⅓ cup [2]	¾ cup [3].

MEAL SUPPLEMENT CHART FOR CHILDREN—Continued

Snack (supplement) for children	Children 1 and 2	Children 3 through 5	Children 6 through 12
Hot cooked	¼ cup	¼ cup	½ cup.

[1] ¼ cup (volume) or ⅓ ounce (weight), whichever is less.
[2] ⅓ cup (volume) or ½ ounce (weight), whichever is less.
[3] ¾ cup (volume) or 1 ounce (weight), whichever is less.
[4] Yogurt may be used as meat/meat alternate. You may serve 4 ounces (weight) or ½ cup (volume) of plain, or sweetened and flavored yogurt to fulfill the equivalent of 1 ounce of the meat/meat alternate component. For younger children, 2 ounces (weight) or ¼ cup (volume) may fulfill the equivalent of ½ ounce of the meat/meat alternate requirement.

Caution: Children under five years of age are at the highest risk of choking. USDA recommends that nuts and/or seeds be served to them ground or finely chopped in a prepared food.

SUPPLEMENTS FOR INFANTS

	Birth through 3 months	4 through 7 months	8 through 11 months
Supplement (snack)	4–6 fl. oz. breast milk [2, 3] or formula [1]	4–6 fl. oz. breast milk [2, 3] or formula [1]	2–4 fl. oz breast milk [2, 3], formula [1], or fruit juice [4]; 0–½ bread [5] or 0–2 crackers [5].

[1] Infant formula shall be iron-fortified.
[2] It is recommended that breast milk be served in place of formula from birth through 11 months.
[3] For some breastfed infants who regularly consume less than the minimum amount of breast milk per feeding, a serving of less than the minimum amount of breast milk may be offered with additional breast milk offered if the infant is still hungry.
[4] Fruit juice shall be full-strength.
[5] Bread and bread alternates shall be made from whole-grain or enriched meal or flour. A serving of this component shall be optional.

(o) *What are the requirements for the infant lunch pattern?*

(1) *Definitions.* (i) Infant cereal means any iron-fortified dry cereal especially formulated and generally recognized as cereal for infants which is routinely mixed with breast milk or iron-fortified infant formula prior to consumption.

(ii) Infant formula means any iron-fortified formula intended for dietary use solely as a food for normal, healthy infants. Formulas specifically formulated for infants with inborn errors of metabolism or digestive or absorptive problems are not included in this definition. Infant formula, when served, must be in liquid state at recommended dilution.

(2) *Requirements for lunches for infants under the age of one.* Infants under 1 year of age must be served an infant lunch as specified in this paragraph (o). Foods served in the infant lunch pattern must be of a texture and consistency appropriate for the particular age group served. Foods must be served to the infant during a span of time consistent with the infant's eating habits. For infants 4 through 7 months of age, solid foods are optional and should be introduced only when the infant is developmentally ready. Whenever possible, the school should consult with the infant's parents in making the decision to introduce solid foods. Solid foods should be introduced one at a time on a gradual basis with the intent of ensuring health and nutritional well-being. For infants 8 through 11 months of age, the total amount of food in the meal patterns in paragraph (o)(2)(iii) of this section must be provided to qualify for reimbursement. Additional foods may be served to infants 4 months of age and older with the intent of improving their overall nutrition. Breast milk, provided by the infant's mother, may be served in place of infant formula from birth through 11 months of age. Either breast milk or iron-fortified infant formula must be served for the entire first year. For some breastfed infants who regularly consume less than the minimum amount of breast milk per feeding, a serving of less than the minimum amount of breast milk may be offered with additional ounces offered if the infant is still hungry. The infant lunch pattern must have at least each of the following components in the amounts indicated for the appropriate age group:

(i) Birth through 3 months—4 to 6 fluid ounces of breast milk or iron-fortified infant formula.

(ii) 4 through 7 months:

(A) 4 to 8 fluid ounces of breast milk or iron-fortified infant formula;

(B) 0 to 3 tablespoons of iron-fortified dry infant cereal (optional); and

(C) 0 to 3 tablespoons of fruit or vegetable of appropriate consistency or a combination of both (optional).

(iii) 8 through 11 months:

(A) 6 to 8 fluid ounces of breast milk or iron-fortified infant formula;

(B) 2 to 4 tablespoons of iron-fortified dry infant cereal and/or 1 to 4 tablespoons of meat, fish, poultry, egg yolk, or cooked dry beans or peas, or ½ to 2 ounces (weight) of cheese or 1 to 4 ounces (weight or volume) of cottage cheese, cheese food or cheese spread of appropriate consistency; and

(C) 1 to 4 tablespoons of fruit or vegetable of appropriate consistency or a combination of both.

LUNCH PATTERN FOR INFANTS

	Birth through 3 months	4 through 7 months	8 through 11 months
Lunch	4-6 fluid ounces of breast milk[2,3] or formula[1]	4-8 fluid ounces of breast milk[2,3] or formula[1]; 0-3 tablespoons of infant cereal[1,4]; 0-3 tablespoons of fruit and/or vegetable[4]	6-8 fluid ounces of breast milk[2,3] or formula[1]; and 2-4 tablespoons of infant cereal[1]; and/or 1-4 tablespoons of meat, fish, poultry, egg yolk, cooked dry beans, or peas; or ½-2 ounces of cheese; or 1-4 tablespoons of cottage cheese, cheese food, or cheese spread; and 1-4 tablespoons of fruit and/or vegetable

[1] Infant formula and dry infant cereal must be iron-fortified.
[2] It is recommended that breast milk be served in place of formula from birth through 11 months.
[3] For some breastfed infants who regularly consume less than the minimum amount of breast milk per feeding, a serving of less than the minimum amount of breast milk may be offered, with additional breast milk offered if the infant is still hungry.
[4] A serving of this component is optional.

[60 FR 31208, June 13, 1995, 60 FR 57146, Nov. 14, 1995, as amended at; 62 FR 10189, Mar. 6, 1997; 64 FR 61773, Nov. 15, 1999; 65 FR 26913, May 9, 2000; 65 FR 31371, May 17, 2000; 65 FR 36317, June 8, 2000]

EDITORIAL NOTE: At 66 FR 65597, Dec. 20, 2001, in §210.10, the table after paragraph (o)(2) was amended by removing the word "tablespoons" before the words "of cottage cheese" in column 4 and adding the word "ounces" in its place. However in the 2001 revision of title 7, parts 210 through 299, that table is a photograph, thus the amendment could not be incorporated

§210.11 Competitive food services.

(a) *Definitions*. For the purpose of this section:

(1) *Competitive foods* means any foods sold in competition with the Program to children in food service areas during the lunch periods.

(2) *Food of minimal nutritional value* means: (i) In the case of artificially sweetened foods, a food which provides less than five percent of the Reference Daily Intakes (RDI) for each of eight specified nutrients per serving; and (ii) in the case of all other foods, a food which provides less than five percent of the RDI for each of eight specified nutrients per 100 calories and less than five percent of the RDI for each of eight specified nutrients per serving. The eight nutrients to be assessed for this purpose are—protein, vitamin A, vitamin C, niacin, riboflavin, thiamine, calcium, and iron. All categories of food of minimal nutritional value and petitioning requirements for changing the categories are listed in appendix B of this part.

(b) *General*. State agencies and school food authorities shall establish such rules or regulations as are necessary to control the sale of foods in competition with lunches served under the Program. Such rules or regulations shall prohibit the sale of foods of minimal nutritional value, as listed in appendix B of this part, in the food service areas during the lunch periods. The sale of other competitive foods may, at the discretion of the State agency and school food authority, be allowed in the food service area during the lunch period only if all income from the sale

of such foods accrues to the benefit of the nonprofit school food service or the school or student organizations approved by the school. State agencies and school food authorities may impose additional restrictions on the sale of and income from all foods sold at any time throughout schools participating in the Program.

[53 FR 29147, Aug. 2, 1988, as amended at 59 FR 23614, May 6, 1994]

§ 210.12 Student, parent and community involvement.

(a) *General.* School food authorities shall promote activities to involve students and parents in the Program. Such activities may include menu planning, enhancement of the eating environment, Program promotion, and related student-community support activities. School food authorities are encouraged to use the school food service program to teach students about good nutrition practices and to involve the school faculty and the general community in activities to enhance the Program.

(b) *Food service management companies.* School food authorities contracting with a food service management company shall comply with the provisions of § 210.16(a) regarding the establishment of an advisory board of parents, teachers and students.

(c) *Residential child care institutions.* Residential child care institutions shall comply with the provisions of this section, to the extent possible.

§ 210.13 Facilities management.

(a) *Health standards.* The school food authority shall ensure that food storage, preparation and service is in accordance with the sanitation and health standards established under State and local law and regulations.

(b) *Food safety inspections.*—(1) *In general.* Except as provided in paragraph (b)(2) of this section, schools shall, at least once during each school year, obtain a food safety inspection conducted by a State or local governmental agency responsible for food safety inspections.

(2) *Exception.* Paragraph (b)(1) of this section shall not apply to a school if a food safety inspection of the school is required by a State or local governmental agency responsible for food safety inspections.

(c) *Storage.* The school food authority shall ensure that the necessary facilities for storage, preparation and service of food are maintained. Facilities for the handling, storage, and distribution of purchased and donated foods shall be such as to properly safeguard against theft, spoilage and other loss.

[54 FR 29147, Aug. 2, 1988, as amended at 64 FR 50740, Sept. 20, 1999]

§ 210.14 Resource management.

(a) *Nonprofit school food service.* School food authorities shall maintain a nonprofit school food service. Revenues received by the nonprofit school food service are to be used only for the operation or improvement of such food service, *except that,* such revenues shall not be used to purchase land or buildings, unless otherwise approved by FNS, or to construct buildings. Expenditures of nonprofit school food service revenues shall be in accordance with the financial management system established by the State agency under § 210.19(a) of this part. School food authorities may use facilities, equipment, and personnel supported with nonprofit school food revenues to support a nonprofit nutrition program for the elderly, including a program funded under the Older Americans Act of 1965 (42 U.S.C. 3001 *et seq.*).

(b) *Net cash resources.* The school food authority shall limit its net cash resources to an amount that does not exceed 3 months average expenditures for its nonprofit school food service or such other amount as may be approved by the State agency in accordance with § 210.19(a).

(c) *Financial assurances.* The school food authority shall meet the requirements of the State agency for compliance with § 210.19(a) including any separation of records of nonprofit school food service from records of any other food service which may be operated by the school food authority as provided in paragraph (a) of this section.

(d) *Use of donated foods.* The school food authority shall enter into an agreement with the distributing agency to receive donated foods as required by part 250 of this chapter. In addition, the school food authority shall accept

and use, in as large quantities as may be efficiently utilized in its nonprofit school food service, such foods as may be offered as a donation by the Department.

[53 FR 29147, Aug. 2, 1988, as amended at 60 FR 31215, June 13, 1995]

§ 210.15 Reporting and recordkeeping.

(a) *Reporting summary*. Participating school food authorities are required to submit forms and reports to the State agency or the distributing agency, as appropriate, to demonstrate compliance with Program requirements. These reports include, but are not limited to:

(1) A Claim for Reimbursement and, for the month of October and as otherwise specified by the State agency, supporting data as specified in accordance with § 210.8 of this part;

(2) An application and agreement for Program operations between the school food authority and the State agency, and a Free and Reduced Price Policy Statement as required under § 210.9;

(3) A written response to reviews pertaining to corrective action taken for Program deficiencies;

(4) A commodity school's preference whether to receive part of its donated food allocation in cash for processing and handling of donated foods as required under § 210.19(b);

(5) A written response to audit findings pertaining to the school food authority's operation as required under § 210.22; and

(6) Information on civil rights complaints, if any, and their resolution as required under § 210.23.

(b) *Recordkeeping summary*. In order to participate in the Program, a school food authority shall maintain records to demonstrate compliance with Program requirements. These records include but are not limited to:

(1) Documentation of participation data by school in support of the Claim for Reimbursement and data used in the claims review process, as required under § 210.8(a), (b), and (c) of this part;

(2) Production and menu records and, if appropriate, nutrition analysis records as required under § 210.10, whichever is applicable.

(3) Participation records to demonstrate positive action toward providing one lunch per child per day as required under § 210.10(a)(2), whichever is applicable;

(4) Currently approved and denied applications for free and reduced price lunches and a description of the verification activities, including verified applications, and any accompanying source documentation in accordance with 7 CFR 245.6a of this Title.

[53 FR 29147, Aug. 2, 1988, as amended at 54 FR 12582, Mar. 28, 1989; 56 FR 32941, July 17, 1991; 60 FR 31215, June 13, 1995; 65 FR 26912, 26922, May 9, 2000]

§ 210.16 Food service management companies.

(a) *General*. Any school food authority (including a State agency acting in the capacity of a school food authority) may contract with a food service management company to manage its food service operation in one or more of its schools. However, no school or school food authority may contract with a food service management company to operate an a la carte food service unless the company agrees to offer free, reduced price and paid reimbursable lunches to all eligible children. Any school food authority that employs a food service management company in the operation of its nonprofit school food service shall:

(1) Adhere to the procurement standards specified in § 210.21 when contracting with the food service management company;

(2) Ensure that the food service operation is in conformance with the school food authority's agreement under the Program;

(3) Monitor the food service operation through periodic on-site visits;

(4) Retain control of the quality, extent, and general nature of its food service, and the prices to be charged the children for meals;

(5) Retain signature authority on the State agency-school food authority agreement, free and reduced price policy statement and claims;

(6) Ensure that all federally donated foods received by the school food authority and made available to the food service management company accrue only to the benefit of the school food

authority's nonprofit school food service and are fully utilized therein;

(7) Maintain applicable health certification and assure that all State and local regulations are being met by a food service management company preparing or serving meals at a school food authority facility; and

(8) Establish an advisory board composed of parents, teachers, and students to assist in menu planning.

(b) *Invitation to bid*. In addition to adhering to the procurement standards under § 210.21, school food authorities contracting with food service management companies shall ensure that:

(1) The invitation to bid or request for proposal contains a 21-day cycle menu developed in accordance with the provisions of § 210.10, to be used as a standard for the purpose of basing bids or estimating average cost per meal. If a school food authority has no capability to prepare a cycle menu, it may, with State agency approval, request that a 21-day cycle menu developed in accordance with the provisions of § 210.10, be developed and submitted by each food service management company which intends to submit a bid or proposal to the school food authority. The food service management company must adhere to the cycle for the first 21 days of meal service. Changes thereafter may be made with the approval of the school food authority.

(2) Any invitation to bid or request for proposal indicate that nonperformance subjects the food service management company to specified sanctions in instances where the food service management company violates or breaches contract terms. The school food authority shall indicate these sanctions in accordance with the procurement provisions stated in § 210.21.

(c) *Contracts*. Contracts that permit all income and expenses to accrue to the food service management company and ''cost-plus-a-percentage-of-cost'' and ''cost-plus-a-percentage-of-income'' contracts are prohibited. Contracts that provide for fixed fees such as those that provide for management fees established on a per meal basis are allowed. Contractual agreements with food service management companies shall include provisions which ensure that the requirements of this section are met. Such agreements shall also include the following:

(1) The food service management company shall maintain such records as the school food authority will need to support its Claim for Reimbursement under this part, and shall, at a minimum, report claim information to the school food authority promptly at the end of each month. Such records shall be made available to the school food authority, upon request, and shall be retained in accordance with § 210.23(c).

(2) The food service management company shall have State or local health certification for any facility outside the school in which it proposes to prepare meals and the food service management company shall maintain this health certification for the duration of the contract.

(3) No payment is to be made for meals that are spoiled or unwholesome at time of delivery, do not meet detailed specifications as developed by the school food authority for each food component specified in § 210.10, or do not otherwise meet the requirements of the contract. Specifications shall cover items such a grade, purchase units, style, condition, weight, ingredients, formulations, and delivery time.

(d) *Duration of contract*. The contract between a school food authority and food service management company shall be a of a duration of no longer than 1 year; and options for the yearly renewal of a contract signed after February 16, 1988, may not exceed 4 additional years. All contracts shall include a termination clause whereby either party may cancel for cause with 60-day notification.

[53 FR 29147, Aug. 2, 1988, as amended at 60 FR 31215, June 13, 1995; 65 FR 26912, May 9, 2000]

Subpart D—Requirements for State Agency Participation

§ 210.17 Matching Federal funds.

(a) *State revenue matching*. For each school year, the amount of State revenues appropriated or used specifically by the State for program purposes shall not be less than 30 percent of the funds received by such State under section 4 of the National School Lunch

Act during the school year beginning July 1, 1980; *provided that*, the State revenues derived from the operation of such programs and State revenues expended for salaries and administrative expenses of such programs at the State level are not considered in this computation. However, if the per capita income of any State is less than the per capita income of the United States, the matching requirements so computed shall be decreased by the percentage by which the State per capita income is below the per capita income of the United States.

(b) *Private school exemption*. No State in which the State agency is prohibited by law from disbursing State appropriated funds to nonpublic schools shall be required to match general cash assistance funds expended for meals served in such schools, or to disburse to such schools any of the State revenues required to meet the requirements of paragraph (a) of this section. Furthermore, the requirements of this section do not apply to schools in which the Program is administered by a FNSRO.

(c) *Territorial waiver*. American Samoa and the Commonwealth of the Northern Mariana Islands shall be exempted from the matching requirements of paragraph (a) of this section if their respective matching requirements are under $100,000.

(d) *Applicable revenues*. The following State revenues, appropriated or used specifically for program purposes which are expended for any school year shall be eligible for meeting the applicable percentage of the matching requirements prescribed in paragraph (a) of this section for that school year:

(1) State revenues disbursed by the State agency to school food authorities for program purposes, including revenue disbursed to nonprofit private schools where the State administers the program in such schools;

(2) State revenues made available to school food authorities and transferred by the school food authorities to the nonprofit school food service accounts or otherwise expended by the school food authorities in connection with the nonprofit school food service program; and

(3) State revenues used to finance the costs (other than State salaries or other State level administrative costs) of the nonprofit school food service program, i.e.:

(i) Local program supervision;

(ii) Operating the program in participating schools; and

(iii) The intrastate distribution of foods donated under part 250 of this chapter to schools participating in the program.

(e) *Distribution of matching revenues*. All State revenues made available under paragraph (a) of this section are to be disbursed to school food authorities participating in the Program, *except as* provided for under paragraph (b) of this section. Distribution of matching revenues may be made with respect to a class of school food authorities as well as with respect to individual school food authorities.

(f) *Failure to match*. If, in any school year, a State fails to meet the State revenue matching requirement, as prescribed in paragraph (a) of this section, the general cash assistance funds utilized by the State during that school year shall be subject to recall by and repayment to FNS.

(g) *Reports*. Within 120 days after the end of each school year, each State agency shall submit an Annual Report of Revenues (FNS–13) to FNS. This report identifies the State revenues to be counted toward the State revenue matching requirements specified in paragraph (a) of this section.

(h) *Accounting system*. The State agency shall establish or cause to be established a system whereby all expended State revenues counted in meeting the matching requirements prescribed in paragraph (a) of this section are properly documented and accounted for.

§ 210.18 Administrative reviews.

(a) *Implementation dates*. For the school year beginning July 1, 1992, each State agency shall conduct administrative reviews as prescribed under this section. However, FNS will approve a State agency's written request if FNS determines that the State agency has demonstrated good cause to delay implementation of the provisions specified under this section to January 1,

1993. At State agency discretion, State agencies may begin implementation of the provisions of this section on August 16, 1991. FNS review responsibilities are specified under § 210.29 of this part.

(b) *Definitions.* The following definitions are provided in order to clarify State agency administrative review requirements:

(1) *Administrative reviews* means the initial comprehensive on-site evaluation of all school food authorities participating in the Program in accordance with the provisions of this section. The term ''administrative review'' is used to reflect a review of both critical and general areas in accordance with paragraphs (g) and (h) of this section, and includes other areas of Program operations determined by the State agency to be important to Program performance.

(2) *Critical areas* means the following two performance standards described in detail in paragraph (g) of this section which serve as measures of compliance with Program regulations:

(i) Performance Standard 1—Certification/Counting/Claiming—All free, reduced price and paid lunches claimed for reimbursement are served only to children eligible for free, reduced price and paid lunches, respectively; and counted, recorded, consolidated and reported through a system which consistently yields correct claims.

(ii) *Performance Standard 2—Meal Elements.* Lunches claimed for reimbursement within the school food authority contain meal elements (food items/components, menu items or other items, as applicable) as required under § 210.10.

(3) *Documented corrective action* means written notification required of the school food authority to certify that the corrective action required for each violation has been completed and to notify the State agency of the dates of completion. Documented corrective action may be provided at the time of the review or may be submitted to the State agency within specified timeframes.

(4) *Follow-up reviews* means any visit(s) to the school food authority subsequent to the administrative review to ensure corrective actions are taken.

(5) *General areas* means the areas of review specified in paragraph (h) of this section.

(6) *Large school food authority* means, in any State:

(i) All school food authorities that participate in the Program and have enrollments of 40,000 children or more each; or

(ii) If there are less than two school food authorities with enrollments of 40,000 or more, the two largest school food authorities that participate in the Program and have enrollments of 2,000 children or more each.

(7) *Participation factor* means the percentages of children approved by the school for free lunches, reduced price lunches, and paid lunches, respectively, who are participating in the Program. The free participation factor is derived by dividing the number of free lunches claimed for any given period by the product of the number of children approved for free lunches for the same period times the operating days in that period. A similar computation is used to determine the reduced price and paid participation factors. The number of children approved for paid lunches is derived by subtracting the number of children approved for free and reduced price lunches for any given period from the total number of children enrolled in the reviewed school for the same period of time, if available. If such enrollment figures are not available, the most recent total number of children enrolled shall be used. If school food authority participation factors are unavailable or unreliable, State-wide data shall be employed.

(8) *Review period* means the period of time covered by the administrative review or follow-up review. The review period is specified in paragraph (f)(2) of this section.

(9) *Review threshold* means the degree of error in a critical area of review which, if exceeded during an administrative review or follow-up review of a school food authority, may trigger a follow-up review of that school food authority.

(10) *Small school food authority* means, in any State, a school food authority that participates in the Program and is

not a large school food authority, as defined in this section.

(c) *Timing of reviews.* The first year of the first 5-year review cycle began on July 1, 1992, or as otherwise authorized under paragraph (a) of this section and shall end on June 30, 1994. For each State agency, the first 5-year review cycle shall end on June 30, 1998. Administrative reviews and follow-up reviews shall be conducted as follows:

(1) *Administrative reviews.* At a minimum, State agencies shall conduct administrative reviews of all school food authorities at least once during each 5-year review cycle; provided that each school food authority is reviewed at least once every 6 years. The on-site portion of the administrative review shall be completed during the school year in which the review was begun.

(2) *Expanded review cycle.* State agencies are encouraged to conduct administrative reviews of large school food authorities and of any school food authorities which may benefit from a more frequent interval than the minimum 5-year cycle required in paragraph (c)(1) of this section.

(3) *Exceptions.* FNS may, on an individual school food authority basis, approve written requests for 1-year extensions to the 6-year review interval specified in paragraph (c)(1) of this section if FNS determines this requirement conflicts with efficient State agency management of the Program.

(4) *Follow-up reviews.* The State agency is encouraged to conduct first follow-up reviews in the same school year as the administrative review; but in no event shall first follow-up reviews be conducted later than December 31 of the school year following the administrative review. Subsequent follow-up reviews shall be scheduled in accordance with paragraph (i)(5) of this section.

(d) *Scheduling school food authorities.* The State agency shall use its own criteria to schedule school food authorities for administrative reviews; provided that the requirements of paragraph (c) of this section are met. State agencies are encouraged to take into consideration the findings of the claims review process required under § 210.8(b)(2) of this part in the selection of school food authorities.

(1) *Schedule of reviews.* To ensure no unintended overlap occurs, the State agency shall inform FNS of the anticipated schedule of school food authority reviews upon request.

(2) *Reporting follow-up review activity.* At such time as the State agency determines that a follow-up review is needed, the State agency shall notify FNS of the names of those large school food authorities exceeding any one of the critical area review thresholds specified in paragraph (i) of this section.

(3) *Exceptions.* In any school year in which FNS or OIG conducts a review or investigation of a school food authority in accordance with § 210.19(a)(5) of this part, the State agency shall, unless otherwise authorized by FNS, delay conduct of a scheduled administrative review until the following school year. The State agency shall document any exception authorized under this paragraph.

(e) *Number of schools to review.* The State agency is encouraged to review all schools meeting the school selection criteria specified in paragraph (e)(1) of this section. At a minimum, the State agency shall review the number of schools specified in paragraph (e)(1) of this section and shall select the schools to be reviewed on the basis of the school selection criteria specified in paragraph (e)(2) of this section.

(1) *Minimum number of schools.* Except for residential child care institutions, the State agency shall review all schools with a free average daily participation of 100 or more and a free participation factor of 100 percent or more. In no event shall the State agency review less than the minimum number of schools illustrated in table A:

TABLE A

No. of schools in the school food authority	Minimum no. of schools to be reviewed
1 to 5	1
6 to 10	2
11 to 20	3
21 to 40	4
41 to 60	6
61 to 80	8
81 to 100	10
101 or more	[1] 12

[1] Twelve plus 5 percent of the number of schools over 100. Fractions shall be rounded to the nearest whole number.

(2) *School selection criteria.*

(i) Selection of additional schools to meet the minimum number of schools required under paragraph (e)(1) of this section, shall be based on the following criteria:

(A) Elementary schools with a free average daily participation of 100 or more and a free participation factor of 97 percent or more;

(B) Secondary schools with a free average daily participation of 100 or more and a free participation factor of 77 percent or more; and

(C) Combination schools with a free average daily participation of 100 or more and a free participation factor of 87 percent or more. A combination school means a school with a mixture of elementary and secondary grades.

(ii) When the number of schools selected on the basis of the criteria established in paragraph (A) through paragraph (C) of this paragraph are not sufficient to meet the minimum number of schools required under paragraph (e)(1) of this section, the schools selected for review shall be selected on the basis of State agency criteria which may include low participation schools, recommendations from a food service director based on findings from the on-site visits or the claims review process required under § 210.8(a) of this part; or any school in which the daily lunch counts appear questionable, e.g., identical or very similar claiming patterns, and/or large changes in free lunch counts.

(3) *Pervasive problems.* If the State agency review finds pervasive problems in a school food authority, FNS may authorize the State agency to cease review activities prior to reviewing the required number of schools under paragraph (e)(1) of this section. Where FNS authorizes the State agency to cease review activity, FNS may either conduct the review activity itself or refer the school food authority to OIG.

(f) *Scope of review.* During the course of an administrative review, each State agency shall monitor compliance with the critical and general areas identified in paragraphs (g) and (h) of this section.

(1) *Review form.* State agencies shall use the administrative review form prescribed by FNS for the critical areas of review specified in paragraph (g) of this section. State agencies may use their own administrative review form for the general areas of review specified in paragraph (h) of this section.

(2) *Review period.*

(i) The review period for administrative reviews and follow-up reviews shall cover, at a minimum, the most recent month for which a Claim for Reimbursement was submitted; provided that such Claim for Reimbursement covers at least 10 operating days.

(ii) Subject to FNS approval, the State agency may conduct a review early in the school year, prior to the submission of a Claim for Reimbursement. In such cases, the review period shall be the prior month of operation in the current school year, provided that such month includes at least 10 operating days.

(3) *Audit findings.* To prevent duplication of effort, the State agency may use any recent and currently applicable findings from Federally-required audit activity or from any State-imposed audit requirements. Such findings may be used only insofar as they pertain to the reviewed school(s) or the overall operation of the school food authority and they are relevant to the review period. The State agency shall document the source and the date of the audit.

(g) *Critical areas of review.* The performance standards listed in this paragraph are deemed critical since compliance in these areas is directly linked to the service of a reimbursable lunch.

(1) *Performance Standard 1 (All free, reduced price and paid lunches claimed for reimbursement are served only to children eligible for free, reduced price and paid lunches, respectively; and are counted, recorded, consolidated and reported through a system which consistently yields correct claims.)* The State agency shall determine that the free and reduced price eligibility determinations are correct. In addition, the State agency shall determine that for each day of operation for the review period, the number of free, reduced price and paid lunches claimed for each reviewed school is not more than the number of lunches served to children eligible for free, reduced price and paid lunches, respectively, in those schools for the review

period. The State agency shall also determine that a lunch counting system is being used which accurately counts, records, consolidates and reports the reimbursable lunches served, by type.

(i) For each school reviewed, the State agency shall:

(A) Determine the number of children eligible for free, reduced price and paid lunches, by type, for the review period. To make this determination:

(*1*) The State agency shall:

(*i*) Review all approved free and reduced price applications for children in the reviewed schools back to the beginning of the school year to determine whether each child's application is complete and correctly approved in accordance with all applicable provisions of 7 CFR part 245; or

(*ii*) Review all approved free and reduced price applications effective for the review period for children in the reviewed schools; or

(*iii*) Review all approved free and reduced price applications effective on the day(s) the review is conducted for children in the reviewed schools.

(*2*) In lieu of reviewing all of the free and reduced price applications as required under paragraph (g)(1)(i)(A)(*1*) of this section, the State agency may review a statistically valid sample of those applications. If the State agency chooses to review a statistically valid sample of applications, the State agency shall ensure that the sample size is large enough so that there is a 95 percent chance that the actual error rate for all applications is not less than 2 percentage points less than the error rate found in the sample (i.e., the lower bound of the one-sided 95 percent confidence interval is no more than 2 percentage points less than the point estimate). In addition, the State agency shall determine the need for follow-up reviews and base fiscal action upon the error rate found in the sample.

(*3*) Evaluate whether the previous year's eligibility determinations are used after 30 operating days following the first day of school, or as otherwise established by the State agency; provided that the State agency-developed timeframe does not exceed the 30 operating day limit.

(*4*) In the case where children are determined eligible for free lunches based on documentation from the local food stamp, Food Distribution Program on Indian Reservations (FDPIR) or Temporary Assistance for Needy Families (TANF) office which certifies that the children are currently members of households receiving benefits under the Food Stamp Program, FDPIR or TANF, determine that the certification from the Food Stamp Program, FDPIR or TANF is official; all the information required under § 245.6 of this part is complete; and such children were enrolled in the school under review during the review period.

(B) Evaluate the system for issuing benefits and updating eligibility status by validating the mechanism(s) the reviewed school uses to provide benefits to eligible children, e.g., master list. The State agency shall determine whether the system is adequate and, within the timeframes established in § 210.7(c)(1)(ii)(B), reflects changes due to verification findings, transfers, reported changes in household size or income, or from a household's decision to decline school lunch benefits or any notification from the household that it is no longer certified to receive food stamp, Food Distribution Program for Households on Indian Reservations (FDPIR) or Temporary Assistance for Needy Families (TANF) benefits.

(C) Determine whether the lunch counting system yields correct claims. At a minimum, the State agency shall determine whether:

(*1*) The daily lunch counts, by type, for the review period are more than the product of the number of children determined by the school/school food authority to be eligible for free, reduced price, and paid lunches for the review period times an attendance factor. If the lunch count, for any type, appears questionable or significantly exceeds the product of the number of eligibles, for that type, times an attendance factor, documentation showing good cause must be available for review by the State agency.

(*2*) Each type of food service line provides accurate point of service lunch counts, by type, and those lunch counts are correctly counted and recorded. If an alternative counting system is employed (in accordance with § 210.7(c)(2)), the State agency shall ensure that it

provides accurate counts of reimbursable lunches, by type, and is correctly implemented as approved by the State agency.

(*3*) All lunches are correctly counted, recorded, consolidated and reported for the day they are served.

(ii) For each school food authority reviewed, the State agency shall review lunch count records to ensure that the lunch counts submitted by each reviewed school are correctly consolidated, recorded, and reported by the school food authority on the Claim for Reimbursement.

(2) *Performance Standard 2 (Lunches claimed for reimbursement within the school food authority contain meal elements (food items/components, menu items or other items, as applicable) as required under § 210.10.* For each school reviewed, the State agency must:

(i) For the day of the review, observe the serving line(s) to determine whether all required meal elements (food items/components, menu items or other items, as applicable) as required under § 210.10 are offered.

(ii) For the day of the review, observe a significant number of the Program lunches counted at the point of service for each type of serving line, to determine whether those lunches contain the required number of meal elements (food items/components, menu items or other items, as applicable) as required under § 210.10.

(iii) Review menu records for the review period to determine whether all required meal elements (food items/components, menu items or other items, as applicable) as required under § 210.10 have been offered.

(h) *General areas of review.* The general areas listed in this paragraph reflect major Program requirements. The general areas of review shall include, but are not limited to, the following areas:

(1) *Free and reduced price process.* In the course of the review of each school food authority, the State agency shall:

(i) Review the implementation of the free and reduced price policy statement to ensure it is implemented as approved.

(ii) Evaluate whether the required minimum number of applications are verified with respect to the selection method used.

(iii) Determine that applications for verification are selected through random or focused sampling in accordance with the provisions of § 245.6a of this title and FNS Instructions, and that no discrimination exists in the selection process.

(iv) Establish that verification is completed by December 15. If the administrative review occurs prior to the December 15 deadline, the State agency shall evaluate the verification activities that have occurred to date and assess whether these activities represent a good faith effort that will result in compliance with the requirements of § 245.6a of this title.

(v) Confirm that the verification process is complete for each application verified by or on behalf of the reviewed schools. Verification is considered complete either when a child's eligibility for the level of benefits for which he or she was approved is confirmed, changed to a higher level of benefit, or a letter of adverse action has been sent.

(vi) Ensure that verification records are maintained as required by § 245.6a(c) of this title.

(vii) Determine that, for each reviewed school, the lunch count system does not overtly identify children eligible for free and reduced price lunches.

(viii) Review a representative sample of denied applications to evaluate whether the determining official correctly denied applicants for free and reduced price lunches.

(2) *Food quantities.* For each school reviewed, the State agency must observe a significant number of Program lunches counted at the point of service for each type of serving line to determine whether those lunches appear to provide meal elements (food items/components, menu items or other items, as applicable) in the quantities required under § 210.10. If visual observation suggests that quantities are insufficient, the State agency shall require the reviewed schools to provide documentation demonstrating that the required amounts of food were available for service for each day of the review period.

(3) *Civil rights.* The State agency shall examine the school food authority's compliance with the civil rights provisions specified in § 210.23(b) of this part.

(4) *Monitoring responsibilities.* The State agency shall ensure that the school food authority conducts on-site reviews in accordance with § 210.8(a)(1) of this part and monitors claims in accordance with § 210.8(a)(2) and (a)(3) of this part.

(5) *Reporting and recordkeeping.* The State agency shall determine that the school food authority submits reports and maintains records as required under 7 CFR parts 210 and 245.

(i) *Follow-up reviews.* All school food authorities found to have a critical area violation in excess of any one of the review thresholds specified in this paragraph are subject to follow-up reviews. State agencies shall notify FNS of the names of large school food authorities exceeding critical area review thresholds in accordance with paragraph (d)(2) of this section. The State agency shall conduct a first follow-up review of any large school food authority found on an administrative review to have critical area violations in excess of any one of the review thresholds. State agencies shall also conduct a first follow-up review of at least 25 percent of the small school food authorities found on a review to have critical area violations in excess of any one of the review thresholds. State agencies shall conduct additional follow-up reviews of any school food authority which has a critical area violation exceeding a review threshold on the first follow-up or any subsequent follow-up review regardless of whether such review is conducted by FNS or the State agency.

(1) *Selection of small school food authorities.* In determining which small school food authorities to include in the follow-up review sample, State agencies shall select those school food authorities which have the most serious problems, including, but not limited to, systemic accountability problems, large overclaims, significant lunch pattern violations, etc.

(2) *Selection of schools.*

(i) If the critical area violation(s) responsible for follow-up review activity are limited to school food authority level problems (e.g. centralized application processing or centralized kitchen), the State agency may limit the follow-up review to the school food authority level.

(ii) If the critical area violation(s) responsible for follow-up review activity were identified in the review of a school(s), then State agencies shall review at least the minimum number of schools required under paragraph (e)(1) of this section. State agencies shall meet the minimum number of schools requirement by selecting those schools found, on a previous review, to have significant critical area violations. If any additional schools must be selected to meet the minimum required number, the State agency shall select from those schools which meet State agency-developed criteria identified under paragraph (e)(2)(ii) of this section.

(3) *Review thresholds.* The review thresholds apply only to the critical areas of review and are designed to limit follow-up reviews to those school food authorities with serious problems. The provisions of paragraph (i) of this section apply when:

(i) For Performance Standard 1—

(A) A number of the reviewed schools in a school food authority, as specified in Table B, have an inadequate system for certification, issuing benefits or updating eligibility status; or for counting, recording, consolidating or reporting lunches, by type; or

(B) The school food authority has an inadequate system for consolidating lunch counts, by type, or for reporting claims; or, if applicable, for certification, issuing benefits or updating eligibility status.

(C) At the school and school food authority level, a system for certification, issuing benefits or updating eligibility status is inadequate if 10 percent or more (but not less than 100 lunches) of the free and reduced price lunches claimed for the review period (for any school reviewed) are claimed incorrectly due to errors of certification, benefit issuance or updating of eligibility status.

TABLE B

Number of schools reviewed	Number of schools violating performance standard 1
1 to 5	1
6 to 10	2
11 to 20	3
21 to 30	4
31 to 40	5
41 to 50	6
51 to 60	7
61 to 70	8
71 to 80	9
81 to 90	10
91 to 100	11
101 or more	11*

*11 plus the number identified above for the appropriate increment.

(ii) For Performance Standard 2—10 percent or more of the total number of Program lunches observed in a school food authority are missing one or more of the required meal elements (food items/components, menu items or other items, as applicable) as required under § 210.10.

(4) *Scope of follow-up reviews.* On any follow-up review, the State agency is encouraged to review all of the critical and general areas of review specified in paragraph (g) and (h) of this section for those schools which were not reviewed during the administrative review. At a minimum, the State agency shall:

(i) For each school selected for review (or for the school food authority, as applicable,) review the critical areas for which the review thresholds were exceeded by the school food authority on a previous review;

(ii) Determine whether the school food authority has satisfactorily completed the corrective actions in accordance with paragraph (k) of this section required for both critical and general areas within the timeframes established by the State agency;

(iii) Evaluate whether these corrective actions resolved the problem(s); and

(iv) If the State agency did not evaluate the certification, count and milk/meal service procedures for the School Breakfast Program (7 CFR part 220) and/or the Special Milk Program for Children (7 CFR part 215) or offering meal supplements in after hour care programs (7 CFR part 210) in those schools selected for the administrative review and participating in those Programs, the State agency shall do so for those schools selected for the first follow-up review.

(5) *Critical area violations identified in a follow-up review.* Critical area violations identified on a follow-up review shall be addressed as follows:

(i) If, during a follow-up review, the State agency determines, that corrective actions have not been satisfactorily completed in accordance with the documented corrective action, the State agency shall: require the school food authority to resolve the problems and to submit documented corrective action to the State agency ; take fiscal action for critical area violations as specified in paragraph (m) of this section; and withhold Program payments in accordance with paragraph (l) of this section, until such time as a follow-up review, requested by the school food authority, indicates the problem has been corrected. If the State agency determines that the corrective actions have been completed as specified in the documented corrective action, but those corrective actions do not effectively resolve the problem, the State agency shall follow the requirements for new critical area violations specified in paragraphs (i)(5)(ii) and (iii) of this section.

(ii) If new critical area violations are observed that exceed a review threshold, the State agency shall: Require the school food authority to resolve the problems and to submit documented corrective action to the State agency; take fiscal action as specified in paragraph (m) of this section; and conduct a follow-up review within 6 operating months of the first follow-up review.

(iii) If new critical area violations are observed which do not exceed review thresholds, the State agency shall: Require the school food authority to resolve the problem and to submit documented corrective action to the State agency within specified timeframes; and take fiscal action in accordance with paragraph (m) of this section. If adequate documented corrective action is not received within those timeframes, the State agency shall withhold Program payments in accordance with paragraph (l) of this section, until such time as adequate

documented corrective action is received.

(6) *General area violations identified in a follow-up review.* General area violations identified in a follow-up review shall be addressed as follows:

(i) If, during a follow-up review, the State agency determines that corrective actions have not been taken in accordance with the documented corrective action, the State agency shall withhold Program payments in accordance with paragraph (l) of this section, until such time as the State agency receives adequate documented corrective action.

(ii) If the State agency determines that the corrective actions taken did not effectively resolve the problem, or if new general area violations are observed on a follow-up review, the State agency shall require the school food authority to resolve the problem and to submit documented corrective action to the State agency within specified timeframes. If adequate documented corrective action is not received within those timeframes, the State agency shall withhold Program payments in accordance with paragraph (l) of this section, until such time as adequate documented corrective action is received.

(7) *Exceptions.* FNS may, on an individual school food authority basis, approve written requests for exceptions to the follow-up review requirement specified in paragraph (i)(1) of this section if FNS determines that the requirement conflicts with efficient State agency management of the program.

(j) *Exit conference and notification.* The State agency shall hold an exit conference at the close of the administrative review and of any subsequent follow-up review to discuss the violations observed, the extent of the violations and a preliminary assessment of the actions needed to correct the violations. The State agency shall discuss an appropriate deadline(s) for completion of corrective action, provided that the deadline(s) results in the completion of corrective action on a timely basis. After every review, the State agency shall provide written notification of the review findings to the school food authority's Superintendent (or equivalent in a non-public school food authority) or authorized representative. The written notification shall include the review findings, the needed corrective actions, the deadlines for completion of the corrective action, and the potential fiscal action. As a part of the denial of all or a part of a Claim for Reimbursement or withholding payment in accordance with the provisions of this section, the State agency shall provide the school food authority a written notice which details the grounds on which the denial of all or a part of the Claim for Reimbursement or withholding payment is based. This notice, which shall be sent by certified mail, return receipt requested, shall also include a statement indicating that the school food authority may appeal the denial of all or a part of a Claim for Reimbursement or withholding payment and the entity (i.e., FNS or State agency) to which the appeal should be directed. The State agency shall notify the school food authority, in writing, of the appeal procedures as specified in § 210.18(q) for appeals of State agency findings, and for appeals of FNS findings, provide a copy of § 210.29(d)(3) of the regulations.

(k) *Corrective action.* Corrective action is required for any violation under either the critical or general areas of the review. Corrective action shall be applied to all schools in the school food authority, as appropriate, to ensure that previously deficient practices and procedures are revised system-wide.

Corrective actions may include training, technical assistance, recalculation of data to ensure the correctness of any claim that the school food authority is preparing at the time of the review, or other actions. Fiscal action shall be taken in accordance with paragraph (m) of this section.

(1) *Extensions of the timeframes.* If extraordinary circumstances arise where a school food authority is unable to complete the required corrective action within the timeframes specified by the State agency, the State agency may extend the timeframes upon written request of the school food authority.

(2) *Documented corrective action.* Documented corrective action is required

for any degree of violation of general or critical areas identified in an administrative review or on any follow-up review. Documented corrective action may be provided at the time of the review; however, it shall be postmarked or submitted to the State agency no later than 30 days from the deadline for completion of each required corrective action, as specified under paragraph (j) of this section or as otherwise extended by the State agency under paragraph (k)(1) of this section. The State agency shall maintain any documented corrective action on file for review by FNS.

(l) *Withholding payment.* At a minimum, the State agency shall withhold Program payments to a school food authority as follows:

(1) *Cause.* (i) The State agency shall withhold all Program payments to a school food authority if documented corrective action for critical area violation(s) which exceed the review threshold(s) is not provided within the deadlines specified in paragraph (k)(2) of this section; and/or

(ii) The State agency shall withhold all Program payments to a school food authority if, in the event that a follow-up review is not conducted, the State agency finds that corrective action for a critical area violation which exceeded the review threshold was not completed within the deadlines specified in paragraph (j) of this section or as otherwise extended by the State agency under paragraph (k)(1) of this section; and/or

(iii) The State agency shall withhold all Program payments to a school food authority if, on a follow-up review, the State agency finds a critical area violation which exceeded the review threshold on a previous review and continues to exceed the review threshold on a follow-up review.

(iv) The State agency may withhold payments at its discretion, if the State agency finds that documented corrective action is not provided within the deadlines specified in paragraph (k)(2) of this section, that corrective action is not complete or that corrective action was not taken as specified in the documented corrective action for a general area violation or for a critical area violation which did not exceed the review threshold.

(2) *Duration.* In all cases, Program payments shall be withheld until such time as corrective action is completed, and documented corrective action is received and deemed acceptable by the State agency or as otherwise specified in paragraph (i)(5) of this section. Subsequent to the State agency's acceptance of the corrective actions (and a follow-up review, when required), payments will be released for all lunches served in accordance with the provisions of this part during the period the payments were withheld. In very serious cases, the State agency will evaluate whether the degree of non-compliance warrants termination in accordance with § 210.25 of this part.

(3) *Exceptions.* The State agency may, at its discretion, reduce the amount required to be withheld from a school food authority pursuant to paragraph (l)(1)(i) through (iii) of this section by as much as 60 percent of the total Program payments when it is determined to be in the best interest of the Program. FNS may authorize a State agency to limit withholding of funds to an amount less than 40 percent of the total Program payments, if FNS determines such action to be in the best interest of the Program.

(4) *Failure to withhold payments.* FNS may suspend or withhold Program payments, in whole or in part, to those State agencies failing to withhold Program payments in accordance with paragraph (l)(1) of this section and may withhold administrative funds in accordance with § 235.11(b) of this title. The withholding of Program payments will remain in effect until such time as the State agency documents compliance with paragraph (l)(1) of this section to FNS. Subsequent to the documentation of compliance, any withheld administrative funds will be released and payment will be released for any lunches served in accordance with the provisions of this part during the period the payments were withheld.

(m) *Fiscal action.* For purposes of the critical areas of the administrative review and any follow-up reviews, fiscal action is required for all violations of Performance Standards 1 and 2. Except that, on an administrative review, the State agency may limit fiscal action from the point corrective action occurs

back through the beginning of the review period for errors identified under paragraphs (g)(1)(i)(A) and (g)(1)(i)(B) of this section, provided corrective action occurs. Fiscal action shall be taken in accordance with the provisions identified under § 210.19(c) of this part.

(n) *Miscellaneous reporting requirement*. Each State agency shall report to FNS the results of reviews by March 1 of each school year, on a form designated by FNS. In such annual reports, the State agency shall include the results of all administrative reviews and follow-up reviews conducted in the preceding school year.

(o) *Summary of reporting requirements*. Each State agency shall report to FNS:

(1) The names of those large school food authorities exceeding any one of the critical area review thresholds as described in paragraph (d)(2) of this section.

(2) The results of reviews by March 1 of each school year on a form designated by FNS, as specified under paragraph (n) of this section.

(p) *Recordkeeping*. Each State agency shall keep records which document the details of all reviews and demonstrate the degree of compliance with the critical and general areas of review. Records shall be retained by the State agency as specified in § 210.23(c) of this part. Such records shall include documentation of administrative reviews and follow-up reviews. As appropriate, the records shall include documented corrective action, and documentation of withholding of payments and fiscal action, including recoveries made. Additionally, the State agency must have on file:

(1) Criteria for selecting schools on first and follow-up reviews in accordance with paragraphs (e)(2)(ii) and (i)(2)(ii) of this section.

(2) Its system for selecting small school food authorities for follow-up reviews in accordance with paragraph (i)(1) of this section.

(3) Documentation demonstrating compliance with the statistical sampling requirements in accordance with paragraph (g)(1)(i)(A)(1) of this section, if applicable.

(q) *School food authority appeal of State agency findings*. Except for FNS-conducted reviews authorized under § 210.29(d)(2), each State agency shall establish an appeal procedure to be followed by a school food authority requesting a review of a denial of all or a part of the Claim for Reimbursement or withholding payment arising from administrative or follow-up review activity conducted by the State agency under § 210.18 of this part. State agencies may use their own appeal procedures provided the same procedures are applied to all appellants in the State and the procedures meet the following requirements: appellants are assured of a fair and impartial hearing before an independent official at which they may be represented by legal counsel; decisions are rendered in a timely manner not to exceed 120 days from the date of the receipt of the request for review; appellants are afforded the right to either a review of the record with the right to file written information, or a hearing which they may attend in person; and adequate notice is given of the time, date, place and procedures of the hearing. If the State agency has not established its own appeal procedures or the procedures do not meet the above listed criteria, the State agency shall observe the following procedures at a minimum:

(1) The written request for a review shall be postmarked within 15 calendar days of the date the appellant received the notice of the denial of all or a part of the Claim for Reimbursement or withholding of payment, and the State agency shall acknowledge the receipt of the request for appeal within 10 calendar days;

(2) The appellant may refute the action specified in the notice in person and by written documentation to the review official. In order to be considered, written documentation must be filed with the review official not later than 30 calendar days after the appellant received the notice. The appellant may retain legal counsel, or may be represented by another person. A hearing shall be held by the review official in addition to, or in lieu of, a review of written information submitted by the appellant only if the appellant so specifies in the letter of request for review. Failure of the appellant school food authority's representative to appear at

a scheduled hearing shall constitute the appellant school food authority's waiver of the right to a personal appearance before the review official, unless the review official agrees to reschedule the hearing. A representative of the State agency shall be allowed to attend the hearing to respond to the appellant's testimony and to answer questions posed by the review official;

(3) If the appellant has requested a hearing, the appellant and the State agency shall be provided with at least 10 calendar days advance written notice, sent by certified mail, return receipt requested, of the time, date and place of the hearing;

(4) Any information on which the State agency's action was based shall be available to the appellant for inspection from the date of receipt of the request for review;

(5) The review official shall be an independent and impartial official other than, and not accountable to, any person authorized to make decisions that are subject to appeal under the provisions of this section;

(6) The review official shall make a determination based on information provided by the State agency and the appellant, and on Program regulations;

(7) Within 60 calendar days of the State agency's receipt of the request for review, by written notice, sent by certified mail, return receipt requested, the review official shall inform the State agency and the appellant of the determination of the review official. The final determination shall take effect upon receipt of the written notice of the final decision by the school food authority;

(8) The State agency's action shall remain in effect during the appeal process;

(9) The determination by the State review official is the final administrative determination to be afforded to the appellant.

(r) *FNS review activity*. The term ''State agency'' and all the provisions specified in paragraphs (a)–(h) of this section refer to FNS when FNS conducts administrative reviews or follow-up reviews in accordance with § 210.29(d)(2). FNS will notify the State agency of the review findings and the need for corrective action and fiscal action. The State agency shall pursue any needed follow-up activity.

[56 FR 32942, July 17, 1991; 56 FR 55527, Oct. 28, 1991, as amended at 57 FR 38584, Aug. 26, 1992; 57 FR 40729, Sept. 4, 1992; 59 FR 1894, Jan. 13, 1994; 60 FR 31215, June 13, 1995; 60 FR 57147, Nov. 14, 1995; 64 FR 50740, 50741, Sept. 20, 1999; 64 FR 72471, Dec. 28, 1999; 65 FR 26922, May 9, 2000]

§ 210.19 Additional responsibilities.

(a) *General Program management*. Each State agency shall provide an adequate number of consultative, technical and managerial personnel to administer programs and monitor performance in complying with all Program requirements.

(1) *Compliance with nutrition standards*. (i) Beginning with School Year 1996–1997, State agencies shall evaluate compliance, over the school week, with the nutrition standards for lunches and, as applicable, for breakfasts. Review activity may be confined to lunches served under the Program unless a menu planning approach is used exclusively in the School Breakfast Program or unless the school food authority only offers breakfasts under the School Breakfast Program. For lunches, compliance with the requirements in § 210.10(b) and § 210.10(c), (d), or (i)(1) or the procedures developed under § 210.10(l), as applicable, is assessed. For breakfasts, see § 220.13(f)(3) of this chapter.

(A) These evaluations may be conducted at the same time a school food authority is scheduled for an administrative review in accordance with § 210.18. State agencies may also conduct these evaluations in conjunction with technical assistance visits, other reviews, or separately.

(B) The type of evaluation conducted by the State agency shall be determined by the menu planning approach chosen by the school food authority. At a minimum, the State agency shall review at least one school for each type of menu planning approach used in the school food authority.

(C) In addition, State agencies are encouraged to review breakfasts offered under the School Breakfast Program as well if the school food authority requires technical assistance from the State agency to meet the nutrition

standards or if corrective action is needed. Such review shall determine compliance with the appropriate requirements in § 220.13(f)(3) of this chapter and may be done at the time of the initial review or as part of a follow-up to assess compliance with the nutrition standards.

(ii) At a minimum, State agencies shall conduct evaluations of compliance with the nutrition standards in § 210.10 and § 220.8 of this Chapter at least once during each 5-year review cycle provided that each school food authority is evaluated at least once every 6 years, *except that* the first cycle shall begin July 1, 1996, and shall end on June 30, 2003. The compliance evaluation for the nutrition standards shall be conducted on the menu for any week of the current school year in which such evaluation is conducted. The week selected must continue to represent the current menu planning approach(es).

(iii) For school food authorities choosing the nutrient standard or assisted nutrient standard menu planning approaches provided in § 210.10(i), § 210.10(j), § 220.8(e) or § 220.8(f) of this chapter, or developed under the procedures in § 210.10(l) or § 220.8(h) of this chapter, the State agency shall assess the nutrient analysis to determine if the school food authority is properly applying the methodology in these paragraphs, as applicable. Part of this assessment shall be an independent review of menus and production records to determine if they correspond to the analysis conducted by the school food authority and if the menu, as offered, over a school week, corresponds to the nutrition standards set forth in § 210.10(b) and the appropriate calorie and nutrient levels in § 210.10(c) or § 210.10(i)(1), whichever is applicable.

(iv) For school food authorities choosing the food-based menu planning approaches provided in § 210.10(k) or § 220.8(g) of this chapter or developed under the procedures in § 210.10(l) or § 220.8(h) of this chapter, the State agency must determine if the nutrition standards in § 210.10 and § 220.8 of this chapter are met. The State agency shall conduct a nutrient analysis in accordance with the procedures in § 210.10(i) or § 220.8(e) of this chapter, as appropriate, except that the State agency may:

(A) Use the nutrient analysis of any school or school food authority that offers lunches or breakfasts using the food-based menu planning approaches provided in § 210.10(k) and § 220.8(g) of this chapter and that conducts its own nutrient analysis under the criteria for such analysis established in § 210.10 and § 220.8 of this chapter for the nutrient standard and assisted nutrient standard menu planning approaches; or

(B) Develop its own method for compliance reviews, subject to USDA approval.

(v) If the menu for the school week fails to comply with the nutrition standards specified in § 210.10(b) and/or § 220.8(a) and the appropriate nutrient levels in either § 210.10(c), § 210.10(d), or § 210.10(i)(1) whichever is applicable, and/or § 220.8(b), § 220.8(c) or § 220.8(e)(1) of this chapter, whichever is applicable, the school food authority shall develop, with the assistance and concurrence of the State agency, a corrective action plan designed to rectify those deficiencies. The State agency shall monitor the school food authority's execution of the plan to ensure that the terms of the corrective action plan are met.

(vi) For school food authorities following an alternate approach as provided under § 210.10(l) or § 220.8(h) of this chapter that does not allow for use of the monitoring procedures in paragraphs (a)(1)(ii) or (a)(1)(iii) of this section, the State agency shall monitor compliance following the procedures developed in accordance with § 210.10(l) or § 220.8(h) of this chapter, whichever is appropriate.

(vii) If a school food authority fails to meet the terms of the corrective action plan, the State agency shall determine if the school food authority is working in good faith towards compliance and, if so, may renegotiate the corrective action plan, if warranted. However, if the school food authority has not been acting in good faith to meet the terms of the corrective action plan and refuses to renegotiate the plan, the State agency shall determine if a disallowance of reimbursement funds as authorized under paragraph (c) of this section is warranted.

(2) *Assurance of compliance for finances.* Each State agency shall ensure that school food authorities comply with the requirements to account for all revenues and expenditures of their nonprofit school food service. School food authorities shall meet the requirements for the allowability of nonprofit school food service expenditures in accordance with this part and, as applicable, 7 CFR part 3015. The State agency shall ensure compliance with the requirements to limit net cash resources and shall provide for approval of net cash resources in excess of three months' average expenditures. Each State agency shall monitor, through review or audit or by other means, the net cash resources of the nonprofit school food service in each school food authority participating in the Program. In the event that net cash resources exceed 3 months' average expenditures for the school food authority's nonprofit school food service or such other amount as may be approved in accordance with this paragraph, the State agency may require the school food authority to reduce the price children are charged for lunches, improve food quality or take other action designed to improve the nonprofit school food service. In the absence of any such action, the State agency shall make adjustments in the rate of reimbursement under the Program.

(3) *Improved management practices.* The State agency shall work with the school food authority toward improving the school food authority's management practices where the State agency has found poor food service management practices leading to decreasing or low child participation and/or poor child acceptance of the Program or of foods served. If a substantial number of children who routinely and over a period of time do not favorably accept a particular item that is offered; return foods; or choose less than all food items/components or foods and menu items, as authorized under § 210.10, poor acceptance of certain menus may be indicated.

(4) *Program compliance.* Each State agency shall require that school food authorities comply with the applicable provisions of this part. The State agency shall ensure compliance through audits, administrative reviews, technical assistance, training guidance materials or by other means.

(5) *Investigations.* Each State agency shall promptly investigate complaints received or irregularities noted in connection with the operation of the Program, and shall take appropriate action to correct any irregularities. State agencies shall maintain on file, evidence of such investigations and actions. FNS and OIG may make reviews or investigations at the request of the State agency or where FNS or OIG determines reviews or investigations are appropriate.

(6) *Food service management companies.* Each State agency shall annually review each contract between any school food authority and food service management company to ensure compliance with all the provisions and standards set forth in § 210.16 of this part. Each State agency shall perform an onsite review of each school food authority contracting with a food service management company, at least once during each 5-year period. The State agency is encouraged to conduct such a review when performing reviews in accordance with § 210.18. Such reviews shall include an assessment of the school food authority's compliance with § 210.16 of this part. The State agency may require that all food service management companies that wish to contract for food service with any school food authority in the State register with the State agency. State agencies shall provide assistance upon request of a school food authority to assure compliance with Program requirements.

(b) *Donated food distribution information.* Information on schools eligible to receive donated foods available under section 6 of the National School Lunch Act (42 U.S.C. 1755) shall be prepared each year by the State agency with accompanying information on the average daily number of lunches to be served in such schools. This information shall be prepared as early as practicable each school year and forwarded no later than September 1 to the Distributing agency. The State agency shall be responsible for promptly revising the information to reflect additions or deletions of eligible schools, and for

providing such adjustments in participation as are determined necessary by the State agency. Schools shall be consulted by the Distributing agency with respect to the needs of such schools relating to the manner of selection and distribution of commodity assistance.

(c) *Fiscal action*. State agencies are responsible for ensuring Program integrity at the school food authority level. State agencies shall take fiscal action against school food authorities for Claims for Reimbursement that are not properly payable under this part including, if warranted, the disallowance of funds for failure to take corrective action in accordance with paragraph (a)(1) of this section. In taking fiscal action, State agencies shall use their own procedures within the constraints of this part and shall maintain all records pertaining to action taken under this section. The State agency may refer to FNS for assistance in making a claims determination under this part.

(1) *Definition*. Fiscal action includes, but is not limited to, the recovery of overpayment through direct assessment or offset of future claims, disallowance of overclaims as reflected in unpaid Claims for Reimbursement, submission of a revised Claim for Reimbursement, and correction of records to ensure that unfiled Claims for Reimbursement are corrected when filed. Fiscal action also includes disallowance of funds for failure to take corrective action in accordance with paragraph (a)(1) of this section.

(2) *General principles*. When taking fiscal action, State agencies shall consider the following:

(i) The State agency shall identify the school food authority's correct entitlement and take fiscal action when any school food authority claims or receives more Federal funds than earned under § 210.7 of this part. In order to take fiscal action, the State agency shall identify accurate counts of reimbursable lunches through available data, if possible. In the absence of reliable data, the State agency shall reconstruct the lunch accounts in accordance with procedures established by FNS. Such procedures will be based on the best available information including, participation factors for the review period, data from similar schools in the school food authority, etc.

(ii) Unless otherwise specified under § 210.18(m) of this part, fiscal action shall be extended back to the beginning of the school year or that point in time during the current school year when the infraction first occurred, as applicable. Based on the severity and longevity of the problem, the State agency may extend fiscal action back to previous school years, as applicable. The State agency shall ensure that any Claim for Reimbursement, filed subsequent to the reviews conducted under § 210.18 and prior to the implementation of corrective action, is limited to lunches eligible for reimbursement under this part.

(iii) In taking fiscal action, State agencies shall assume that children determined by the reviewer to be incorrectly approved for free and reduced price lunches participated at the same rate as correctly approved children in the corresponding lunch category.

(3) *Failure to collect*. If a State agency fails to disallow a claim or recover an overpayment from a school food authority, as described in this section, FNS will notify the State agency that a claim may be assessed against the State agency. In all such cases, the State agency shall have full opportunity to submit evidence concerning overpayment. If after considering all available information, FNS determines that a claim is warranted, FNS will assess a claim in the amount of such overpayment against the State agency. If the State agency fails to pay any such demand for funds promptly, FNS will reduce the State agency's Letter of Credit by the sum due in accordance with FNS' existing offset procedures for Letter of Credit. In such event, the State agency shall provide the funds necessary to maintain Program operations at the level of earnings from a source other than the Program.

(4) *Interest charge*. If an agreement cannot be reached with the State agency for payment of its debts or for offset of debts on its current Letter of Credit, interest will be charged against the State agency from the date the demand leter was sent, at the rate established by the Secretary of Treasury.

(5) *Use of recovered payment.* The amounts recovered by the State agency from school food authorities may be utilized during the fiscal year for which the funds were initially available, first, to make payments to school food authorities for the purposes of the Program; and second, to repay any State funds expended in the reimbursement of claims under the Program and not otherwise repaid. Any amounts recovered which are not so utilized shall be returned to FNS in accordance with the requirements of this part.

(6) *Exceptions.* The State agency need not disallow payment or collect an overpayment arising out of the situations described in paragraphs (c)(6) (i) and (ii) of this section; provided that the school food authority corrects the problem(s) to the satisfaction of the State agency:

(i) When any review or audit reveals that a school food authority is failing to meet the quantities for each meal element (food item/component, menu item or other items, as applicable) as required under § 210.10.

(ii) when any review or audit reveals that a school food authority is approving applications which indicate that the households' incomes are within the Income Eligibility Guidelines issued by the Department or the applications contain a food stamp or AFDC case number but the applications are missing the documentation specified under 7 CFR 245.2 (a–4) (3) and/or (4); or

(iii) when any review or audit reveals that a school food authority's failure to meet the nutrition standards of § 210.10 is unintentional and the school food authority is meeting the requirements of a corrective plan developed and agreed to under paragraph (a)(1)(iii) of this section.

(7) *Claims adjustment.* FNS will have the authority to determine the amount of, to settle, and to adjust any claim arising under the Program, and to compromise or deny such claim or any part thereof. FNS will also have the authority to waive such claims if FNS determines that to do so would serve the purposes of the Program. This provision shall not diminish the authority of the Attorney General of the United States under section 516 of title 28, U.S. Code, to conduct litigation on behalf of the United States.

(d) *Management evaluations.* Each State agency shall provide FNS with full opportunity to conduct management evaluations of all State agency Program operations and shall provide OIG with full opportunity to conduct audits of all State agency Program operations. Each State agency shall make available its records, including records of the receipt and disbursement of funds under the Program and records of any claim compromised in accordance with this paragraph, upon a reasonable request by FNS, OIG, or the Comptroller General of the United States. FNS and OIG retain the right to visit schools and OIG also has the right to make audits of the records and operations of any school. In conducting management evaluations, reviews or audits for any fiscal year, the State agency, FNS, or OIG may disregard any overpayment if the total overpayment does not exceed $600 or, in the case of State agency claims in State administered Programs, it does not exceed the amount established under State law, regulations or procedure as a minimum amount for which claim will be made for State losses but not to exceed $600. However, no overpayment is to be disregarded where there is substantial evidence of violations of criminal law or civil fraud statutes.

(e) *Additional requirements.* Nothing contained in this part shall prevent a State agency from imposing additional requirements for participation in the Program which are not inconsistent with the provisions of this part.

(f) *Cooperation with the Child and Adult Care Food Program.* On an annual basis, the State agency shall provide the State agency which administers the Child and Adult Care Food Program with a list of all elementary schools in the State participating in the National School Lunch Program in which 50 percent or more of enrolled children have been determined eligible for free or reduced price meals as of the last operating day of the previous October, or other month specified by the State agency. The first list shall be provided by March 15, 1997; subsequent lists shall be provided by February 1 of each year or, if data is based on a

month other than October, within 90 calendar days following the end of the month designated by the State agency. The State agency may provide updated free and reduced price enrollment data on individual schools to the State agency which administers the Child and Adult Care Food Program only when unusual circumstances render the initial data obsolete. In addition, the State agency shall provide the current list, upon request, to sponsoring organizations of day care homes participating in the Child and Adult Care Food Program.

[53 FR 29147, Aug. 2, 1988, as amended at 54 FR 12582, Mar. 28, 1989; 56 FR 32947, July 17, 1991; 57 FR 38586, Aug. 26, 1992; 59 FR 1894, Jan. 13, 1994; 60 FR 31215, June 13, 1995; 60 FR 57147, Nov. 14, 1995; 62 FR 901, Jan. 7, 1997; 63 FR 9104, Feb. 24, 1998; 64 FR 50741, Sept. 20, 1999; 65 FR 26912, 26922, May 9, 2000]

§ 210.20 Reporting and recordkeeping.

(a) *Reporting summary*. Participating State agencies shall submit forms and reports to FNS to demonstrate compliance with Program requirements. The reports include but are not limited to:

(1) Requests for cash to make reimbursement payments to school food authorities as required under § 210.5(a);

(2) Information on the amounts of Federal Program funds expended and obligated to date (SF–269) as required under § 210.5(d);

(3) Statewide totals on Program participation (FNS–10) as required under § 210.5(d);

(4) Information on State funds provided by the State to meet the State matching requirements (FNS–13) specified under § 210.17(g);

(5) The names of school food authorities in need of a follow-up review;

(6) Results of reviews and audits; and

(7) Results of the commodity preference survey and recommendations for commodity purchases as required under § 250.13(k) of this chapter.

(b) *Recordkeeping summary*. Participating State agencies are required to maintain records to demonstrate compliance with Program requirements. The records include but are not limited to:

(1) Accounting records and source documents to control the receipt, custody and disbursement of Federal Program funds as required under § 210.5(a);

(2) Documentation supporting all school food authority claims paid by the State agency as required under § 210.5(d);

(3) Documentation to support the amount the State agency reported having used for State revenue matching as required under § 210.17(h);

(4) Records supporting the State agency's review of net cash resources as required under § 210.19(a);

(5) Reports on the results of investigations of complaints received or irregularities noted in connection with Program operations as required under § 210.19(a)

(6) Records of all reviews and audits, including records of action taken to correct Program violations; and records of fiscal action taken, including documentation of recoveries made;

(7) State agency criteria for selecting schools for reviews and small school food authorities for follow-up reviews;

(8) Documentation of action taken to disallow improper claims submitted by school food authorities, as required by § 210.19(c) and as determined through claims processing, resulting from actions such as reviews, audits and USDA audits;

(9) Records of USDA audit findings, State agency's and school food authorities' responses to them and of corrective action taken as required by § 210.22(a);

(10) Records pertaining to civil rights responsibilities as defined under § 210.23(b); and

(11) Records pertaining to the annual food preference survey of school food authorities as required by § 250.13(k) of this chapter.

[53 FR 29147, Aug. 2, 1988, as amended at 56 FR 32948, July 17, 1991; 56 FR 55527, Oct. 28, 1991; 64 FR 50741, Sept. 20, 1999]

Subpart E—State Agency and School Food Authority Responsibilities

§ 210.21 Procurement.

(a) *General*. State agencies and school food authorities shall comply with the requirements of 7 CFR part 3015 concerning the procurement of supplies, food, equipment and other services

with Program funds. These requirements ensure that such materials and services are obtained for the Program efficiently and economically and in compliance with applicable laws and executive orders.

(b) *Contractual responsibilities.* The standards contained in 7 CFR part 3015 do not relieve the State agency or school food authority of any contractual responsibilities under its contracts. The State agency or school food authority is the responsible authority, without recourse to FNS, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in connection with the Program. This includes, but is not limited to source evaluation, protests, disputes, claims, or other matters of a contractual nature. Matters concerning violation of law are to be referred to the local, State, or Federal authority that has proper jurisdiction.

(c) *Procurement procedure.* The State agency or school food authority may use its own procurement procedures which reflect applicable State and local laws and regulations, *provided that* procurements made with Program funds adhere to the standards set forth in 7 CFR part 3015.

(d) *Buy American.*—(1) *Definition of domestic commodity or product.* In this paragraph (d), the term 'domestic commodity or product' means—

(i) An agricultural commodity that is produced in the United States; and

(ii) A food product that is processed in the United States substantially using agricultural commodities that are produced in the United States.

(2) *Requirement.* (i) *In general.* Subject to paragraph (d)(2)(ii) of this section, the Department shall require that a school food authority purchase, to the maximum extent practicable, domestic commodities or products.

(ii) *Limitations.* Paragraph (d)(2)(i) of this section shall apply only to—

(A) A school food authority located in the contiguous United States; and

(B) A purchase of domestic commodity or product for the school lunch program under this part.

(3) *Applicability to Hawaii.* Paragraph (d)(2)(i) of this section shall apply to a school food authority in Hawaii with respect to domestic commodities or products that are produced in Hawaii in sufficient quantities to meet the needs of meals provided under the school lunch program under this part.

[53 FR 29147, Aug. 2, 1988, as amended at 64 FR 50741, Sept. 20, 1999]

§ 210.22 Audits.

(a) *General.* State agencies and school food authorities shall comply with the requirements of 7 CFR part 3015 concerning the audit requirements for recipients and subrecipients of the Department's financial assistance.

(b) *Audit procedure.* These requirements call for organization-wide financial and compliance audits to ascertain whether financial operations are conducted properly; financial statements are presented fairly; recipients and subrecipients comply with the laws and regulations that affect the expenditures of Federal funds; recipients and subrecipients have established procedures to meet the objectives of federally assisted programs; and recipients and subrecipients are providing accurate and reliable information concerning grant funds. States and school food authorities shall use their own procedures to arrange for and prescribe the scope of independent audits, provided that such audits comply with the requirements set forth in 7 CFR part 3015.

§ 210.23 Other responsibilities.

(a) *Free and reduced price lunches and meal supplements.* State agencies and school food authorities shall ensure that lunches and meal supplements are made available free or at a reduced price to all children who are determined by the school food authority to be eligible for such benefits. The determination of a child's eligibility for free or reduced price lunches and meal supplements is to be made in accordance with 7 CFR part 245.

(b) *Civil rights.* In the operation of the Program, no child shall be denied benefits or be otherwise discriminated against because of race, color, national origin, age, sex, or disability. State agencies and school food authorities shall comply with the requirements of: Title VI of the Civil Rights Act of 1964; title IX of the Education Amendments

of 1972; section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975; Department of Agriculture regulations on nondiscrimination (7 CFR parts 15, 15a, and 15b); and FNS Instruction 113–6.

(c) *Retention of records.* State agencies and school food authorities may retain necessary records in their original form or on microfilm. State agency records shall be retained for a period of 3 years after the date of submission of the final Financial Status Report for the fiscal year. School food authority records shall be retained for a period of 3 years after submission of the final Claim for Reimbursement for the fiscal year. In either case, if audit findings have not been resolved, the records shall be retained beyond the 3-year period as long as required for the resolution of the issues raised by the audit.

[53 FR 29147, Aug. 2, 1988, as amended at 58 FR 42489, Aug. 10, 1993; 64 FR 50741, Sept. 20, 1999]

Subpart F—Additional Provisions

§ 210.24 Withholding payments.

In accordance with § 3015.103 of this title, the State agency shall withhold Program payments, in whole or in part, to any school food authority which has failed to comply with the provisions of this part. Program payments shall be withheld until the school food authority takes corrective action satisfactory to the State agency, or gives evidence that such corrective action will be taken, or until the State agency terminates the grant in accordance with § 210.25 of this part. Subsequent to the State agency's acceptance of the corrective actions, payments will be released for any lunches served in accordance with the provisions of this part during the period the payments were withheld.

[56 FR 32948, July 17, 1991]

§ 210.25 Suspension, termination and grant closeout procedures.

Whenever it is determined that a State agency has materially failed to comply with the provisions of this part, or with FNS guidelines and instructions, FNS may suspend or terminate the Program in whole, or in part, or take any other action as may be available and appropriate. A State agency may also terminate the Program by mutual agreement with FNS. FNS and the State agency shall comply with the provisions of the Department's Uniform Federal Assistance Regulations, 7 CFR part 3015, subpart N concerning grant suspension, termination and closeout procedures. Furthermore, the State agency shall apply these provisions to suspension or termination of the Program in school food authorities.

[53 FR 29147, Aug. 2, 1988. Redesignated at 56 FR 32948, July 17, 1991]

§ 210.26 Penalties.

Whoever embezzles, willfully misapplies, steals, or obtains by fraud any funds, assets, or property provided under this part whether received directly or indirectly from the Department, shall if such funds, assets, or property are of a value of $100 or more, be fined no more than $25,000 or imprisoned not more than 5 years or both; or if such funds, assets, or property are of a value of less than $100, be fined not more than $1,000 or imprisoned not more than 1 year or both. Whoever receives, conceals, or retains for personal use or gain, funds, assets, or property provided under this part, whether received directly or indirectly from the Department, knowing such funds, assets, or property have been embezzled, willfully misapplied, stolen, or obtained by fraud, shall be subject to the same penalties.

[53 FR 29147, Aug. 2, 1988. Redesignated at 56 FR 32948, July 17, 1991, as amended at 64 FR 50741, Sept. 20, 1999]

§ 210.27 Educational prohibitions.

In carrying out the provisions of the Act, the Department shall not impose any requirements with respect to teaching personnel, curriculum, instructions, methods of instruction, or materials of instruction in any school as a condition for participation in the Program.

[53 FR 29147, Aug. 2, 1988. Redesignated at 56 FR 32948, July 17, 1991, as amended at 64 FR 50741, Sept. 20, 1999]

§ 210.28 Pilot project exemptions.

Those State agencies or school food authorities selected for the pilot projects mandated under section 18(d) of the Act may be exempted by the Department from some or all of the counting and free and reduced price application requirements of this part and 7 CFR part 245, as necessary, to conduct an approved pilot project. Additionally, those schools selected for pilot projects that also operate the School Breakfast Program (7 CFR part 220) and/or the Special Milk Program for Children (7 CFR part 215), may be exempted from the counting and free and reduced price application requirements mandated under these Programs. The Department shall notify the appropriate State agencies and school food authorities of its determination of which requirements are exempted after the Department's selection of pilot projects.

[55 FR 41504, Oct. 12, 1990. Redesignated at 56 FR 32948, July 17, 1991. Further redesignated at 64 FR 50741, Sept. 20, 1999]

§ 210.29 Management evaluations.

(a) *Management evaluations.* FNS will conduct a comprehensive management evaluation of each State agency's administration of the National School Lunch Program.

(b) *Basis for evaluations.* FNS will evaluate all aspects of State agency management of the Program using tools such as State agency reviews as required under § 210.18 or § 210.18a of this part; reviews conducted by FNS in accordance with § 210.18 of this part; FNS reviews of school food authorities and schools authorized under § 210.19(a)(4) of this part; follow-up reviews and actions taken by the State agency to correct violations found during reviews; FNS observations of State agency reviews; and audit reports.

(c) *Scope of management evaluations.* The management evaluation will determine whether the State agency has taken steps to ensure school food authority compliance with Program regulations, and whether the State agency is administering the Program in accordance with Program requirements and good management practices.

(1) *Local compliance.* FNS will evaluate whether the State agency has actively taken steps to ensure that school food authorities comply with the provisions of this part.

(2) *State agency compliance.* FNS will evaluate whether the State agency has fulfilled its State level responsibilities, including, but not limited to the following areas: use of Federal funds; reporting and recordkeeping; agreements with school food authorities; review of food service management company contracts; review of the claims payment process; implementation of the State agency's monitoring responsibilities; initiation and completion of corrective action; recovery of overpayments; disallowance of claims that are not properly payable; withholding of Program payments; oversight of school food authority procurement activities; training and guidance activities; civil rights; and compliance with the State Administrative Expense Funds requirements as specified in 7 CFR part 235.

(d) *School food authority reviews.* FNS will examine State agency administration of the Program by reviewing local Program operations. When conducting these reviews under paragraph (d)(2) of this section, FNS will follow all the administrative review requirements specified in § 210.18(a)–(h) of this part. When FNS conducts reviews, the findings will be sent to the State agency to ensure all the needed follow-up activity occurs. The State agency will, in all cases, be invited to accompany FNS reviewers.

(1) *Observation of State agency reviews.* FNS may observe the State agency conduct of any review and/or any follow-up review as required under this part. At State agency request, FNS may assist in the conduct of the review.

(2) *Section 210.18 reviews.* FNS will conduct administrative reviews or follow-up reviews in accordance with § 210.18(a)–(h) of this part which will count toward meeting the State agency responsibilities identified under § 210.18 of this part.

(3) *School food authority appeal of FNS findings.* When administrative or follow-up review activity conducted by FNS in accordance with the provisions

of paragraph (d)(2) of this section results in the denial of all or part of a Claim for Reimbursement or withholding of payment, a school food authority may appeal the FNS findings by filing a written request with the Chief, Administrative Review Branch, U.S. Department of Agriculture, Food and Nutrition Service, 3101 Park Center Drive, Alexandria, Virginia, 22302, in accordance with the appeal procedures specified in this paragraph:

(i) The written request for a review of the record shall be postmarked within 15 calendar days of the date the appellant received the notice of the denial of all or a part of the Claim for Reimbursement or withholding payment and the envelope containing the request shall be prominently marked ''REQUEST FOR REVIEW''. FNS will acknowledge the receipt of the request for appeal within 10 calendar days. The acknowledgement will include the name and address of the FNS Administrative Review Officer (ARO) reviewing the case. FNS will also notify the State agency of the request for appeal.

(ii) The appellant may refute the action specified in the notice in person and by written documentation to the ARO. In order to be considered, written documentation must be filed with the ARO not later than 30 calendar days after the appellant received the notice. The appellant may retain legal counsel, or may be represented by another person. A hearing shall be held by the ARO in addition to, or in lieu of, a review of written information submitted by the appellant only if the appellant so specifies in the letter of request for review. Failure of the appellant school food authority's representative to appear at a scheduled hearing shall constitute the appellant school food authority's waiver of the right to a personal appearance before the ARO, unless the ARO agrees to reschedule the hearing. A representative of FNS shall be allowed to attend the hearing to respond to the appellant's testimony and to answer questions posed by the ARO;

(iii) If the appellant has requested a hearing, the appellant shall be provided with a least 10 calendar days advance written notice, sent by certified mail, return receipt requested, of the time, date, and place of the hearing;

(iv) Any information on which FNS's action was based shall be available to the appellant for inspection from the date of receipt of the request for review;

(v) The ARO shall be an independent and impartial official other than, and not accountable to, any person authorized to make decisions that are subject to appeal under the provisions of this section;

(vi) The ARO shall make a determination based on information provided by FNS and the appellant, and on Program regulations;

(vii) Within 60 calendar days of the receipt of the request for review, by written notice, sent by certified mail, return receipt requested, the ARO shall inform FNS, the State agency and the appellant of the determination of the ARO. The final determination shall take effect upon receipt of the written notice of the final decision by the school food authority;

(viii) The action being appealed shall remain in effect during the appeal process;

(ix) The determination by the ARO is the final administrative determination to be afforded to the appellant.

(4) *Coordination with State agency*. FNS will coordinate school food authority selection with the State agency to ensure that no unintended overlap exists and to ensure reviews are conducted in a consistent manner.

(e) *Management evaluation findings*. FNS will consider the results of all its review activity within each State, including school food authority reviews, in performing management evaluations and issuing management evaluation reports. FNS will communicate the findings of the management evaluation to appropriate State agency personnel in an exit conference. Subsequent to the exit conference, the State agency will be notified in writing of the management evaluation findings and any needed corrective actions or fiscal sanctions in accordance with the provisions § 210.25 of this part and/or 7 CFR part 235.

[56 FR 32949, July 17, 1991, as amended at 57 FR 38586, Aug. 26, 1992. Redesignated at 64 FR 50741, Sept. 20, 1999]

§ 210.30 Regional office addresses.

School food authorities desiring information concerning the Program should write to their State educational agency or to the appropriate Regional Office of FNS as indicated below:

(a) In the States of Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont: Northeast Regional Office, FNS, U.S. Department of Agriculture, 10 Causeway Street, Room 501, Boston, Massachusetts 02222–1065.

(b) In the States of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee: Southeast Regional Office, FNS, U.S. Department of Agriculture, 61 Forsyth Street SW, Room 8T36, Atlanta, Georgia 30303.

(c) In the States of Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin: Midwest Regional Office, FNS, U.S. Department of Agriculture, 77 West Jackson Boulevard, 20th Floor, Chicago, Illinois 60604–3507.

(d) In the States of Arkansas, Louisiana, New Mexico, Oklahoma, and Texas: Southwest Regional Office, FNS, U.S. Department of Agriculture, 1100 Commerce Street, Room 5–C–30, Dallas, Texas 75242.

(e) In the States of Alaska, American Samoa, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon, the Commonwealth of the Northern Mariana Islands, and Washington: Western Regional Office, FNS, U.S. Department of Agriculture, 550 Kearny Street, Room 400, San Francisco, California 94108.

(f) In the States of Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Puerto Rico, Virginia, Virgin Islands, and West Virginia: Mid-Atlantic Regional Office, FNS, U.S. Department of Agriculture, 300 Corporate Boulevard, Robbinsville, New Jersey 08691–1598.

(g) In the States of Colorado, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah, and Wyoming: Mountain Plains Regional Office, FNS, U.S. Department of Agriculture, 1244 Speer Boulevard, Suite 903, Denver, Colorado 80204.

[53 FR 29147, Aug. 2, 1988. Redesignated at 55 FR 41503, Oct. 12, 1990. Further redesignated at 56 FR 32948, July 17, 1991. Further redesignated at 64 FR 50741, Sept. 20, 1999; 65 FR 12434, Mar. 9, 2000]

§ 210.31 OMB control numbers.

The following control numbers have been assigned to the information collection requirements in 7 CFR part 210 by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96–511.

7 CFR section where requirements are described	Current OMB control No.
210.3(b)	0584–0327
210.5(d)	0584–0006
210.5(d)(1)	0584–0002
210.5(d)(2)	0584–0341
210.5(d)(3)	0584–0341
210.6(b)	0584–0006
210.8	0584–0006 0584–0284
210.9	0584–0006 0584–0026 0584–0329
210.10(b)	0584–0006
210.10(i)(1)	0584–0006
210.14(c)	0584–0006
210.16	0584–0006
210.17	0584–0006
210.17(g)	0584–0075
210.18	0584–0006
210.19	0584–0006
210.22	0584–0006
210.23(c)	0584–0006
210.24	0584–0006
210.27	0584–0006

[53 FR 29147, Aug. 2, 1990. Redesignated at 55 FR 41503, Oct. 12, 1990. Further redesignated at 56 FR 32948, July 17, 1991. Further redesignated at 64 FR 50741, Sept. 20, 1999]

APPENDIX A TO PART 210—ALTERNATE FOODS FOR MEALS

I. ENRICHED MACARONI PRODUCTS WITH FORTIFIED PROTEIN

1. Schools may utilize the enriched macaroni products with fortified protein defined in paragraph 3 as a food item in meeting the meal requirements of this part under the following terms and conditions:

(a) One ounce (28.35 grams) of a dry enriched macaroni product with fortified protein may be used to meet not more than one-half of the meat or meat alternate requirements specified in § 210.10, when served in combination with 1 or more ounces (28.35

grams) of cooked meat, poultry, fish, or cheese. The size of servings of the cooked combination may be adjusted for various age groups.

(b) Only enriched macaroni products with fortified protein that bear a label containing substantially the following legend shall be so utilized: ''One ounce (28.35 grams) dry weight of this product meets one-half of the meat or meat alternate requirements of lunch or supper of the USDA child nutrition programs when served in combination with 1 or more ounces (28.35 grams) of cooked meat, poultry, fish, or cheese. In those States where State or local law prohibits the wording specified, a legend acceptable to both the State or local authorities and FNS shall be substituted.''

(c) Enriched macaroni product may not be used for infants under 1 year of age.

2. Only enriched macaroni products with fortified protein that have been accepted by FNS for use in the USDA Child Nutrition Programs may be labeled as provided in paragraph 1(b) of this appendix. Manufacturers seeking acceptance of their product shall furnish FNS a chemical analysis, the Protein Digestibility-Corrected Amino Acid Score (PDCAAS), and such other pertinent data as may be requested by FNS, except that prior to November 7, 1994, manufacturers may submit protein efficiency ratio analysis in lieu of the PDCAAS. This information is to be forwarded to: Director, Nutrition and Technical Services Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, room 607, Alexandria, VA 22302. All laboratory analyses are to be performed by independent or other laboratories acceptable to FNS. (FNS prefers an independent laboratory.) All laboratories shall retain the ''raw'' laboratory data for a period of 1 year. Such information shall be made available to FNS upon request. Manufacturers must notify FNS if there is a change in the protein portion of their product after the original testing. Manufacturers who report such a change in protein in a previously approved product must submit protein data in accordance with the method specified in this paragraph.

3. The product should not be designed in such a manner that would require it to be classified as a Dietary Supplement as described by the Food and Drug Administration (FDA) in 21 CFR part 105. To be accepted by FNS, enriched macaroni products with fortified protein must conform to the following requirements:

(a)(1) Each of these foods is produced by drying formed units of dough made with one or more of the milled wheat ingredients designated in 21 CFR 139.110(a) and 139.138(a), and other ingredients to enable the finished food to meet the protein requirements set out in paragraph 3.(a)(2)(i) under Enriched Macaroni Products with Fortified Protein in this appendix. Edible protein sources, including food grade flours or meals made from nonwheat cereals or from oilseeds, may be used. Vitamin and mineral enrichment nutrients are added to bring the food into conformity with the requirements of paragraph (b) under Enriched Macaroni Products with Fortified Protein in this appendix. Safe and suitable ingredients, as provided for in paragraph (c) under Enriched Macaroni Products with Fortified Protein in this appendix, may be added. The proportion of the milled wheat ingredient is larger than the proportion of any other ingredient used.

(2) Each such finished food, when tested by the methods described in the pertinent sections of ''Official Methods of Analysis of the AOAC International,'' (formerly the Association of Official Analytical Chemists), 15th Ed. (1990) meets the following specifications. This publication is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the AOAC International, 2200 Wilson Blvd., suite 400, Arlington, VA 22201–3301. This publication may be examined at the Food and Nutrition Service, Nutrition and Technical Services Division, 3101 Park Center Drive, room 607, Alexandria, Virginia 22302 or the Office of the Federal Register, 800 North Capital Street, NW., suite 700, Washington, DC.

(i) The protein content (N x 6.25) is not less than 20 percent by weight (on a 13 percent moisture basis) as determined by the appropriate method of analysis in the AOAC manual cited in (a)(2) under Enriched Macaroni Products with Fortified Protein in this appendix. The protein quality is not less than 95 percent that of casein as determined on a dry basis by the PDCAAS method as described below:

(A) The PDCAAS shall be determined by the methods given in sections 5.4.1, 7.2.1. and 8.0 as described in ''Protein Quality Evaluation, Report of the Joint FAO/WHO Expert Consultation on Protein Quality Evaluation,'' Rome, 1990, as published by the Food and Agriculture Organization (FAO) of the United Nations/World Health Organization (WHO). This report is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of this report may be obtained from the Nutrition and Technical Services Division, Food and Nutrition Service, 3101 Park Center Drive, room 607, Alexandria, Virginia 22302. This report may also be inspected at the Office of the Federal Register 800 North Capitol St., NW., suite 700, Washington, DC.

(B) The standard used for assessing protein quality in the PDCAAS method is the amino acid scoring pattern established by FAO/WHO and United Nations University (UNU) in 1985 for preschool children 2 to 5 years of age which has been adopted by the National Academy of Sciences, Recommended Dietary Allowances (RDA), 1989.

(C) To calculate the PDCAAS for an individual food, the test food must be analyzed for proximate analysis and amino acid composition according to AOAC methods.

(D) The PDCAAS may be calculated using FDA's limited data base of published true digestibility values (determined using humans and rats). The true digestibility values contained in the WHO/FAO report referenced in paragraph 3.(a)(2)(i)(A) under Enriched Macaroni Products with Fortified Protein in this appendix may also be used. If the digestibility of the protein is not available from these sources it must be determined by a laboratory according to methods in the FAO/WHO report (sections 7.2.1 and 8.0).

(E) The most limiting essential amino acid (that is, the amino acid that is present at the lowest level in the test food compared to the standard) is identified in the test food by comparing the levels of individual amino acids in the test food with the 1985 FAO/WHO/UNU pattern of essential amino acids established as a standard for children 2 to 5 years of age.

(F) The value of the most limiting amino acid (the ratio of the amino acid in the test food over the amino acid value from the pattern) is multiplied by the percent of digestibility of the protein. The resulting number is the PDCAAS.

(G) The PDCAAS of food mixtures must be calculated from data for the amino acid composition and digestibility of the individual components by means of a weighted average procedure. An example for calculating a PDCAAS for a food mixture of varying protein sources is shown in section 8.0 of the FAO/WHO report cited in paragraph 3.(a)(2)(i)(A) under Enriched Macaroni Products with Fortified Protein in this appendix.

(H) For the purpose of this regulation, each 100 grams of the product (on a 13 percent moisture basis) must contain protein in amounts which is equivalent to that provided by 20 grams of protein with a quality of not less than 95 percent casein. The equivalent grams of protein required per 100 grams of product (on a 13 percent moisture basis) would be determined by the following equation:

$$X = \frac{a \times b}{c}$$

X=grams of protein required per 100 grams of product

a=20 grams (amount of protein if casein)

b=.95 [95% × 1 (PDCAAS of casein)

c=PDCAAS for protein used in formulation

(ii) The total solids content is not less than 87 percent by weight as determined by the methods described in the ''Official Methods of Analysis of the AOAC International'' cited in paragraph (a)(2) under Enriched Macaroni Products with Fortified Protein in this appendix.

(b)(1) Each pound of food covered by this section shall contain 5 milligrams of thiamine, 2.2 milligrams of riboflavin, 34 milligrams of niacin or niacinamide, and 16.5 milligrams of iron.

(2) Each pound of such food may also contain 625 milligrams of calcium.

(3) Only harmless and assimilable forms of iron and calcium may be added. The enrichment nutrients may be added in a harmless carrier used only in a quantity necessary to effect a uniform distribution of the nutrients in the finished food. Reasonable overages, within the limits of good manufacturing practice, may be used to assure that the prescribed levels of the vitamins and mineral(s) in paragraphs (b)(1) and (2) under Enriched Macaroni Products with Fortified Protein in this appendix are maintained throughout the expected shelf life of the food under customary conditions of distribution.

(c) Ingredients that serve a useful purpose such as to fortify the protein or facilitate production of the food are the safe and suitable ingredients referred to in paragraph (a) under Enriched Macaroni Products with Fortified Protein in this appendix. This does not include color additives, artificial flavorings, artificial sweeteners, chemical preservatives, or starches. Ingredients deemed suitable for use by this paragraph are added in amounts that are not in excess of those reasonably required to achieve their intended purposes. Ingredients are deemed to be safe if they are not food additives within the meaning of section 201(s) of the Federal Food, Drug and Cosmetic Act, or in case they are food additives if they are used in conformity with regulations established pursuant to section 409 of the act.

(d)(1) The name of any food covered by this section is ''Enriched Wheat _____ Macaroni Product with Fortified Protein'', the blank being filled in with appropriate word(s) such as ''Soy'' to show the source of any flours or meals used that were made from non-wheat cereals or from oilseeds. In lieu of the words ''Macaroni Product'' the words ''Macaroni'', ''Spaghetti'', or ''Vermicelli'' as appropriate, may be used if the units conform in shape and size to the requirements of 21 CFR 139.110 (b), (c), or (d).

(2) When any ingredient not designated in the part of the name prescribed in paragraph (d)(1) under Enriched Macaroni Products with Fortified Protein in this appendix, is added in such proportion as to contribute 10 percent or more of the quantity of protein contained in the finished food, the name shall include the statement ''Made with _____'', the blank being filled in with the name of each such ingredient, e.g. ''Made with nonfat milk''.

(3) When, in conformity with paragraph (d)(1) or (d)(2) under Enriched Macaroni Products with Fortified Protein in this appendix, two or more ingredients are listed in

the name, their designations shall be arranged in descending order of predominance by weight.

(4) If a food is made to comply with a section of 21 CFR part 139, but also meets the compositional requirements of the Enriched Macaroni with Fortified Protein Appendix, it may alternatively bear the name set out in the other section.

(e) Each ingredient used shall declare its common name as required by the applicable section of 21 CFR part 101. In addition, the ingredients statement shall appear in letters not less than one half the size of that required by 21 CFR 101.105 for the declaration of net quantity of contents, and in no case less than one-sixteenth of an inch in height.

II. Alternate Protein Products

A. What Are the Criteria for Alternate Protein Products Used in the National School Lunch Program?

1. An alternate protein product used in meals planned under the food-based menu planning approaches in §210.10(k), must meet all of the criteria in this section.

2. An alternate protein product whether used alone or in combination with meat or other meat alternates must meet the following criteria:

a. The alternate protein product must be processed so that some portion of the non-protein constituents of the food is removed. These alternate protein products must be safe and suitable edible products produced from plant or animal sources.

b. The biological quality of the protein in the alternate protein product must be at least 80 percent that of casein, determined by performing a Protein Digestibility Corrected Amino Acid Score (PDCAAS).

c. The alternate protein product must contain at least 18 percent protein by weight when fully hydrated or formulated. (''When hydrated or formulated'' refers to a dry alternate protein product and the amount of water, fat, oil, colors, flavors or any other substances which have been added).

d. Manufacturers supplying an alternate protein product to participating schools or institutions must provide documentation that the product meets the criteria in paragraphs A2. a through c of this appendix.

e. Manufacturers should provide information on the percent protein contained in the dry alternate protein product and on an as prepared basis.

f. For an alternate protein product mix, manufacturers should provide information on:

(1) the amount by weight of dry alternate protein product in the package;

(2) hydration instructions; and

(3) instructions on how to combine the mix with meat or other meat alternates.

B. How Are Alternate Protein Products Used in the National School Lunch Program?

1. Schools, institutions, and service institutions may use alternate protein products to fulfill all or part of the meat/meat alternate component discussed in §210.10.

2. The following terms and conditions apply:

a. The alternate protein product may be used alone or in combination with other food ingredients. Examples of combination items are beef patties, beef crumbles, pizza topping, meat loaf, meat sauce, taco filling, burritos, and tuna salad.

b. Alternate protein products may be used in the dry form (nonhydrated), partially hydrated or fully hydrated form. The moisture content of the fully hydrated alternate protein product (if prepared from a dry concentrated form) must be such that the mixture will have a minimum of 18 percent protein by weight or equivalent amount for the dry or partially hydrated form (based on the level that would be provided if the product were fully hydrated).

C. How Are Commercially Prepared Products Used in the National School Lunch Program?

Schools, institutions, and service institutions may use a commercially prepared meat or meat alternate product combined with alternate protein products or use a commercially prepared product that contains only alternate protein products.

[51 FR 34874, Sept. 30, 1986; 51 FR 41295, Nov. 14, 1986, as amended at 53 FR 29164, Aug. 2, 1988; 59 FR 51086, Oct. 7, 1994; 60 FR 31216; June 13, 1995; 61 FR 37671, July 19, 1996; 65 FR 12434, Mar. 9, 2000; 65 FR 26912, May 9, 2000]

Appendix B to Part 210—Categories of Foods of Minimal Nutritional Value

(a) *Foods of minimal nutritional value*—Foods of minimal nutritional value are:

(1) Soda Water—A class of beverages made by absorbing carbon dioxide in potable water. The amount of carbon dioxide used is not less than that which will be absorbed by the beverage at a pressure of one atmosphere and at a temperature of 60° F. It either contains no alcohol or only such alcohol, not in excess of 0.5 percent by weight of the finished beverage, as is contributed by the flavoring ingredient used. No product shall be excluded from this definition because it contains artificial sweeteners or discrete nutrients added to the food such as vitamins, minerals and protein.

(2) *Water Ices*—As defined by 21 CFR 135.160 Food and Drug Administration Regulations except that water ices which contain fruit or fruit juices are not included in this definition.

(3) *Chewing Gum*—Flavored products from natural or synthetic gums and other ingredients which form an insoluble mass for chewing.

(4) *Certain Candies*—Processed foods made predominantly from sweeteners or artifical sweeteners with a variety of minor ingredients which characterize the following types:

(i) *Hard Candy*—A product made predominantly from sugar (sucrose) and corn syrup which may be flavored and colored, is characterized by a hard, brittle texture, and includes such items as sour balls, fruit balls, candy sticks, lollipops, starlight mints, after dinner mints, sugar wafers, rock candy, cinnamon candies, breath mints, jaw breakers and cough drops.

(ii) *Jellies and Gums*—A mixture of carbohydrates which are combined to form a stable gelatinous system of jelly-like character, and are generally flavored and colored, and include gum drops, jelly beans, jellied and fruit-flavored slices.

(iii) *Marshmallow Candies*—An aerated confection composed as sugar, corn syrup, invert sugar, 20 percent water and gelatin or egg white to which flavors and colors may be added.

(iv) *Fondant*—A product consisting of microscopic-sized sugar crystals which are separated by thin film of sugar and/or invert sugar in solution such as candy corn, soft mints.

(v) *Licorice*—A product made predominantly from sugar and corn syrup which is flavored with an extract made from the licorice root.

(vi) *Spun Candy*—A product that is made from sugar that has been boiled at high temperature and spun at a high speed in a special machine.

(vii) *Candy Coated Popcorn*—Popcorn which is coated with a mixture made predominantly from sugar and corn syrup.

(b) *Petitioning Procedures*—Reconsideration of the list of foods of minimal nutritional value identified in paragraph (a) of this section may be pursued as follows:

(1) Any person may submit a petition to FNS requesting that an individual food be exempted from a category of foods of minimal nutritional value listed in paragraph (a). In the case of artificially sweetened foods, the petition must include a statement of the percent of Reference Daily Intake (RDI) for the eight nutrients listed in §210.11(a)(2) ''Foods of minimal nutritional value,'' that the food provides per serving and the petitioner's source of this information. In the case of all other foods, the petition must include a statement of the percent of RDI for the eight nutrients listed in §210.11(a)(2) ''Foods of minimal nutritional value,'' that the food provides per serving and per 100 calories and the petitioner's source of this information. The Department will determine whether or not the individual food is a food of minimal nutritional value as defined in §210.11(a)(2) and will inform the petitioner in writing of such determination, and the public by notice in the FEDERAL REGISTER as indicated below under paragraph (b)(3) of this section. In determining whether an individual food is a food of minimal nutritional value, discrete nutrients added to the food will not be taken into account.

(2) Any person may submit a petition to FNS requesting that foods in a particular category of foods be classified as foods of minimal nutritional value as defined in §210.11(a)(2). The petition must identify and define the food category in easily understood language, list examples of the food contained in the category and include a list of ingredients which the foods in that category usually contain. If, upon review of the petition, the Department determines that the foods in that category should not be classified as foods of minimal nutritional value, the petitioners will be so notified in writing. If, upon review of the petition, the Department determines that there is a substantial likelihood that the foods in that category should be classified as foods of minimal nutritional value as defined in §210.11(a)(2), the Department shall at that time inform the petitioner. In addition, the Department shall publish a proposed rule restricting the sale of foods in that category, setting forth the reasons for this action, and soliciting public comments. On the basis of comments received within 60 days of publication of the proposed rule and other available information, the Department will determine whether the nutrient composition of the foods indicates that the category should be classified as a category of foods of minimal nutritional value. The petitioner shall be notified in writing and the public shall be notified of the Department's final determination upon publication in the FEDERAL REGISTER as indicated under paragraph (b)(3) of this section.

(3) By May 1 and November 1 of each year, the Department will amend appendix B to exclude those individual foods identified under paragraph (b)(1) of this section, and to include those categories of foods identified under paragraph (b)(2) of this section, *provided*, that there are necessary changes. The schedule for amending appendix B is as follows:

Actions for publication	Publication	
	May	November
Deadline for receipt of petitions by USDA.	Nov. 15	May 15.
USDA to notify petitioners of results of Departmental review and publish proposed rule (if applicable).	Feb. 1	Aug. 1.
60 Day comment period	Feb. 1 through Apr. 1.	Aug. 1 through Oct. 1.

Actions for publication	Publication	
	May	November
Public notice of amendment of appendix B by.	May 1	Nov. 1.

(4) Written petitions should be sent to the Chief, Technical Assistance Branch, Nutrition and Technical Services Division, FNS, USDA, Alexandria, Virginia 22302, on or before November 15 or May 15 of each year. Petitions must include all information specified in paragraph (b) of this appendix and §220.12(b) (1) or (2) as appropriate.

[53 FR 29147, Aug. 2, 1988, as amended at 54 FR 18465, May 1, 1989; 59 FR 23614, May 6, 1994]

APPENDIX C TO PART 210—CHILD NUTRITION LABELING PROGRAM

1. The Child Nutrition (CN) Labeling Program is a voluntary technical assistance program administered by the Food and Nutrition Service in conjunction with the Food Safety and Inspection Service (FSIS), and Agricultural Marketing Service (AMS) of the U.S. Department of Agriculture, and National Marine Fisheries Service of the U.S. Department of Commerce (USDC) for the Child Nutrition Programs. This program essentially involves the review of a manufacturer's recipe or product formulation to determine the contribution a serving of a commercially prepared product makes toward meal pattern requirements and a review of the CN label statement to ensure its accuracy. CN labeled products must be produced in accordance with all requirements set forth in this rule.

2. Products eligible for CN labels are as follows:

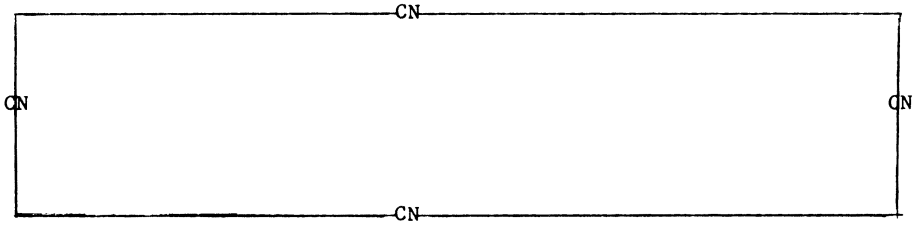
(a) Commercially prepared food products that contribute significantly to the meat/meat alternate component of meal pattern requirements of 7 CFR 210.10, 225.20, and 226.20 and are served in the main dish.

(b) Juice drinks and juice drink products that contain a minimum of 50 percent full-strength juice by volume.

3. For the purpose of this appendix the following definitions apply:

(a) ''CN label'' is a food product label that contains a CN label statement and CN logo as defined in paragraph 3 (b) and (c) below.

(b) The ''CN logo'' (as shown below) is a distinct border which is used around the edges of a ''CN label statement'' as defined in paragraph 3(c).



(c) The ''CN label statement'' includes the following:

(1) The product identification number (assigned by FNS),

(2) The statement of the product's contribution toward meal pattern requirements of 7 CFR 210.10, §220.8 or §220.8a, whichever is applicable, §§225.20, and 226.20. The statement shall identify the contribution of a specific portion of a meat/meat alternate product toward the meat/meat alternate, bread/bread alternate, and/or vegetable/fruit component of the meal pattern requirements. For juice drinks and juice drink products the statement shall identify their contribution toward the vegetable/fruit component of the meal pattern requirements,

(3) Statement specifying that the use of the CN logo and CN statement was authorized by FNS, and

(4) The approval date.

For example:

CN

000000

This 3.00 oz serving of raw beef pattie provides when cooked
CN 2.00 oz equivalent meat for Child Nutrition Meal Pattern CN
Requirements. (Use of this logo and statement authorized
by the Food and Nutrition Service, USDA 05-84.)

CN

(d) *Federal inspection* means inspection of food products by FSIS, AMS or USDC.

4. Food processors or manufacturers may use the CN label statement and CN logo as defined in paragraph 3 (b) and (c) under the following terms and conditions:

(a) The CN label must be reviewed and approved at the national level by FNS and appropriate USDA or USDC Federal agency responsible for the inspection of the product.

(b) The CN labeled product must be produced under Federal inspection by USDA or USDC. The Federal inspection must be performed in accordance with an approved partial or total quality control program or standards established by the appropriate Federal inspection service.

(c) The CN label statement must be printed as an integral part of the product label along with the product name, ingredient listing, the inspection shield or mark for the appropriate inspection program, the establishment number where appropriate, and the manufacturer's or distributor's name and address. The inspection marking for CN labeled non-meat, non-poultry, and non-seafood products with the exception of juice drinks and juice drink products is established as follows:

INSPECTED BY THE
U.S. DEPT. OF AGRICULTURE
IN ACCORDANCE WITH
FNS REQUIREMENTS

(d) Yields for determining the product's contribution toward meal pattern requirements must be calculated using the *Food Buying Guide for Child Nutrition Programs* (Program AID Number 1331).

5. In the event a company uses the CN logo and CN label statement inappropriately, the company will be directed to discontinue the use of the logo and statement and the matter will be referred to the appropriate agency for action to be taken against the company.

6. Products that bear a CN label statement as set forth in paragraph 3(c) carry a warranty. This means that if a food service authority participating in the Child Nutrition Programs purchases a CN labeled product and uses it in accordance with the manufacturer's directions, the school or institution will not have an audit claim filed against it for the CN labeled product for noncompliance with the meal pattern requirements of 7 CFR 210.10, §220.8 or §220.8a, whichever is applicable, §§225.20, and 226.20. If a State or Federal auditor finds that a product that is CN labeled does not actually meet the meal pattern requirements claimed on the label, the auditor will report this finding to FNS. FNS will prepare a report of the findings and send it to the appropriate divisions of FSIS and AMS of the USDA, National Marine Fisheries Services of the USDC, Food and Drug Administration, or the Department of Justice for action against the company. Any or all of the following courses of action may be taken:

(a) The company's CN label may be revoked for a specific period of time;

(b) The appropriate agency may pursue a misbranding or mislabeling action against the company producing the product;

(c) The company's name will be circulated to regional FNS offices;

(d) FNS will require the food service program involved to notify the State agency of the labeling violation.

7. FNS is authorized to issue operational policies, procedures, and instructions for the CN Labeling Program. To apply for a CN label and to obtain additional information on CN label application procedures write to: CN Labels, U.S. Department of Agriculture, Food and Nutrition Service, Nutrition and Technical Services Division, 3101 Park Center Drive, Alexandria, Virginia 22302.

[51 FR 34874, Sept. 30, 1986, as amended at 53 FR 29164, Aug. 2, 1988; 60 FR 31216, June 13, 1995; 65 FR 26912, May 9, 2000]

PART 215—SPECIAL MILK PROGRAM FOR CHILDREN

Sec.

215.1 General purpose and scope.
215.2 Definitions.
215.3 Administration.
215.4 Payments of funds to States and FNSROs.
215.5 Method of payment to States.
215.6 Use of funds.
215.7 Requirements for participation.
215.8 Reimbursement payments.
215.9 Effective date for reimbursement.
215.10 Reimbursement procedures.

215.11 Special responsibilities of State agencies.
215.12 Claims against schools or child-care institutions.
215.13 Management evaluations and audits.
215.13a Determining eligibility for free milk in child-care institutions.
215.14 Nondiscrimination.
215.14a Procurement standards.
215.15 Suspension, termination and grant closeout procedures.
215.16 Program information.
215.17 Information collection/recordkeeping—OMB assigned control numbers.

AUTHORITY: 42 U.S.C. 1772 and 1779.

§ 215.1 General purpose and scope.

This part announces the policies and prescribes the general regulations with respect to the Special Milk Program for Children, under the Child Nutrition Act of 1966, as amended, and sets forth the general requirements for participation in the program. The Act reads in pertinent part as follows:

Section 3(a)(1) There is hereby authorized to be appropriated for the fiscal year ending June 30, 1970, and for each succeeding fiscal year such sums as may be necessary to enable the Secretary of Agriculture, under such rules and regulations as he may deem in the public interest, to encourage consumption of fluid milk by children in the United States in (A) nonprofit schools of high school grade and under, except as provided in paragraph (2), which do not participate in a meal service program authorized under this Act or the National School Lunch Act, and (B) nonprofit nursery schools, child care centers, settlement houses, summer camps, and similar nonprofit institutions devoted to the care and training of children, which do not participate in a meal service program authorized under this Act or the National School Lunch Act.

(2) The limitation imposed under paragraph (1)(A) for participation of nonprofit schools in the special milk program shall not apply to split-session kindergarten programs conducted in schools in which children do not have access to the meal service program operating in schools the children attend as authorized under this Act or the National School Lunch Act (42 U.S.C. 1751 *et seq.*).

(3) For the purposes of this section ''United States'' means the fifty States, Guam, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, and the District of Columbia.

(4) The Secretary shall administer the special milk program provided for by this section to the maximum extent practicable in the same manner as he administered the special milk program provided for by Pub. L. 89–642, as amended, during the fiscal year ending June 30, 1969.

(5) Any school or nonprofit child care institution which does not participate in a meal service program authorized under this Act or the National School Lunch Act shall receive the special milk program upon their request.

(6) Children who qualify for free lunches under guidelines established by the Secretary shall, at the option of the school involved (or of the local educational agency involved in the case of a public school) be eligible for free milk upon their request.

(7) For the fiscal year ending June 30, 1975, and for subsequent school years, the minimum rate of reimbursement for a half-pint of milk served in schools and other eligible institutions shall not be less than 5 cents per half-pint served to eligible children, and such minimum rate of reimbursement shall be adjusted on an annual basis each school year to reflect changes in the Producer Price Index for Fresh Processed Milk published by the Bureau of Labor Statistics of the Department of Labor.

(8) Such adjustment shall be computed to the nearest one-fourth cent.

(9) Notwithstanding any other provision of this section, in no event shall the minimum rate of reimbursement exceed the cost to the school or institution of milk served to children.

[52 FR 7562, Mar. 12, 1987]

§ 215.2 Definitions.

For the purpose of this part, the term:

(a) *Act* means the Child Nutrition Act of 1966.

(b) *Adults* means those persons not included under the definition of children.

(c) [Reserved]

(d) *Child and Adult Care Food Program* means the program authorized by section 17 of the National School Lunch Act, as amended.

(e) *Child-care institution* means any nonprofit nursery school, child-care center, settlement house, summer camp, service institution participating in the Summer Food Program for Children pursuant to part 225 of this chapter, institution participating in the Child and Adult Care Food Program pursuant to part 226 of this chapter, or similar nonprofit institution devoted to the care and training of children. The term ''child-care institution'' also includes a nonprofit agency to which such institution has delegated authority for the operation of a milk program

in the institution. It does not include any institution falling within the definition of ''School'' in paragraph (v) of this section.

(e–1) *Children* means persons under 19 chronological years of age in child-care institutions as defined in § 215.2(e); or persons under 21 chronological years of age attending schools as defined in § 215.2(v)(3) and (4) of this part; or students, including students who are mentally or physically disabled as defined by the State and who are participating in a school program established for the mentally or physically disabled, of high school grade or under as determined by the State educational agency in schools as defined in § 215.2(v)(1) and (2) of this part.

(e–2) *CND* means the Child Nutrition Division of the Food and Nutrition Service of the Department.

(f) *FNS* means the Food and Nutrition Service of the U.S. Department of Agriculture.

(g) *FNSRO* means Food and Nutrition Services Regional Offices, of the Food and Nutrition Service of the U.S. Department of Agriculture.

(h) *Cost of milk* means the net purchase price paid by the school or child-care institution to the milk supplier for milk delivered to the school or child-care institution. This shall not include any amount paid to the milk supplier for servicing, rental of or installment purchase of milk service equipment.

(i) *Department* means the U.S. Department of Agriculture.

(i–1) *Disclosure* means individual children's program eligibility information obtained through the free milk eligibility process that is revealed or used for a purpose other than for the purpose for which the information was obtained. The term refers to access, release, or transfer of personal data about children by means of print, tape, microfilm, microfiche, electronic communication or any other means.

(j) *Family* means a group of related or nonrelated individuals, who are not residents of an institution or boarding house, but who are living as one economic unit.

(j–1) *Free milk* means milk for which neither the child nor any member of his family pays or is required to work in the school or child-care institution or in its food service.

(k) *Fiscal year* means the period of 12 calendar months beginning October 1, 1977, and each October 1 of any calendar year thereafter and ending September 30 of the following calendar year.

(k–1) *Medicaid* means the State medical assistance program under title XIX of the Social Security Act (42 U.S.C. 1396 *et seq.*).

(l) *Milk* means pasteurized fluid types of unflavored or flavored whole milk, lowfat milk, skim milk, or cultured buttermilk which meet State and local standards for such milk. In Alaska, Hawaii, American Samoa, Guam, Puerto Rico, the Trust Territory of the Pacific Islands, and the Virgin Islands, if a sufficient supply of such types of fluid milk cannot be obtained, *milk* shall include reconstituted or recombined milk. All milk should contain vitamins A and D at levels specified by the Food and Drug Administration and consistent with State and local standards for such milk.

(m) *National School Lunch Program* means the program under which general cash-for-food assistance and special cash assistance are made available to schools pursuant to part 210 of this chapter.

(n) *Needy children* means: (1) Children who attend schools participating in the Program and who meet the School Food Authority's eligibility standards for free milk approved by the State agency, or FNSRO where applicable, under part 245 of this chapter; and (2) children who attend child-care institutions participating in the Program and who meet the eligibility standards for free milk approved by the State agency, or FNSRO where applicable, under § 215.13a of this part.

(o) [Reserved]

(p) *Nonpricing program* means a program which does not sell milk to children. This shall include any such program in which children are normally provided milk, along with food and other services, in a school or child-care institution financed by a tuition, boarding, camping or other fee, or by private donations or endowments.

(q) *Nonprofit milk service* means milk service maintained by or on behalf of

the school or child-care institution for the benefit of the children, all of the income from which is used solely for the operation or improvement of such milk service.

(r) *Nonprofit* means exempt from income tax under the Internal Revenue Code, as amended.

(s) *OA* means the Office of Audit of the United States Department of Agriculture.

(s–1) *OIG* means the Office of the Inspector General of the Department.

(t) *Pricing program* means a program which sells milk to children. This shall include any such program in which maximum use is made of Program reimbursement payments in lowering, or reducing to ''zero,'' wherever possible, the price per half pint which children would normally pay for milk.

(u) *Program* means the Special Milk Program for Children.

(u–1) *Reimbursement* means financial assistance paid or payable to participating schools and child-care institutions for milk served to eligible children.

(v) *School* means: (1) An educational unit of high school grade or under, recognized as part of the educational system in the State and operating under public or nonprofit private ownership in a single building or complex of buildings; (2) any public or nonprofit private classes of preprimary grade when they are conducted in the aforementioned schools; (3) any public or nonprofit private residential child care institution, or distinct part of such institution, which operates principally for the care of children, and, if private, is licensed to provide residential child care services under the appropriate licensing code by the State or a subordinate level of government, *except for* residential summer camps which participate in the Summer Food Service Program for Children, Job Corps centers funded by the Department of Labor, and private foster homes. The term *residential child care institutions* includes, but is not limited to: Homes for the mentally, emotionally or physically impaired, and unmarried mothers and their infants; group homes; halfway houses; orphanages; temporary shelters for abused children and for runaway children; long-term care facilities for chronically ill children; and juvenile detention centers. A long-term care facility is a hospital, skilled nursing facility, intermediate care facility, or distinct part thereof, which is intended for the care of children confined for 30 days or more; or (4) with respect to the Commonwealth of Puerto Rico, nonprofit child care centers certified as such by the Governor of Puerto Rico.

(w) *School Breakfast Program* means the program authorized by section 4 of the Child Nutrition Act of 1966, as amended.

(w–1) *School Food Authority* means the governing body which is responsible for the administration of one or more schools and which has the legal authority to operate a milk program therein. The term ''School Food Authority'' also includes a nonprofit agency to which such governing body has delegated authority for the operation of a milk program in a school.

(x) *School year* means the period of 12 calendar months beginning July 1, 1977, and each July 1 of any calendar year thereafter and ending June 30 of the following calendar year.

(x–1) *7 CFR part 3015* means the Uniform Federal Assistance Regulations published by the Department to implement OMB Circulars A–21, A–87, A–102, A–110, and A–122; and Executive Order 12372. (For availability of OMB Circulars referenced in this definition, see 5 CFR 1310.3.)

(x–2) *7 CFR part 3017* means the Department's regulation to implement Executive Order 12549, covering governmentwide rules on suspension and debarment as well as The Drug Free Workplace Act of 1988.

(x–3) *7 CFR part 3018* means the Department's Common Rule regarding Governmentwide New Restrictions on Lobbying. Part 3018 implements the requirements established by section 319 of the 1990 Appropriations Act for the Department of Interior and Related Agencies (Pub. L. 101–121).

(x–4) *7 CFR part 3052* means the Department's regulations implementing OMB Circular A–133, ''Audits of State, Local Governments, and Non-Profit Organizations.'' (For availability of OMB Circulars referenced in this definition, see 5 CFR 1310.3.)

(x–5) *Split-session* means an educational program operating for approximately one-half of the normal school day.

(y) *State* means any of the 50 States, District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and, as applicable, American Samoa and the Commonwealth of the Northern Marianas.

(z) *State agency* means the State educational agency or any other State agency that has been designated by the Governor or other appropriate executive or legislative authority of the State and approved by the Department to administer the Program.

(aa) *State Children's Health Insurance Program (SCHIP)* means the State medical assistance program under title XXI of the Social Security Act (42 U.S.C. 1397aa *et seq.*).

(bb) *Summer Food Service Program for Children* means the program authorized by section 13 of the National School Lunch Act, as amended.

(Sec. 11, Pub. L. 95–166, 91 Stat. 1337 (42 U.S.C. 1772, 1753, 1766; sec. 10(a), Pub. L. 95–627, 92 Stat. 3623 (42 U.S.C. 1760; sec. 10(d)), Pub. L. 95–627, 92 Stat. 3624 (42 U.S.C. 1757); sec. 14, Pub. L. 95–627, 92 Stat. 3625–3626; sec. 205, Pub. L. 96–499, The Omnibus Reconciliation Act of 1980, 94 Stat. 2599; secs. 807 and 808, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1772, 1784, 1760))

[32 FR 12587, Aug. 31, 1967]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 215.2, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 215.3 Administration.

(a) Within the Department, FNS shall act on behalf of the Department in the administration of the Program. Within FNS, CND shall be responsible for Program administration.

(b) Within the States, to the extent practicable and permissible under State law, responsibility for the administration of the Program in schools and child-care institutions shall be in the educational agency of the State: *Provided, however,* That another State agency, upon request by the Governor or other appropriate State executive or legislative authority, may be approved to administer the Program in schools as defined in § 215.2(v)(3) or § 215.2(v)(4) or in child-care institutions.

(c) FNSRO shall administer the Program in any school as defined in § 215.2(v)(1), § 215.2(v)(2) or § 215.2(v)(3) or in any child-care institution as defined in § 215.2(e) wherein the State agency is not permitted by law to disburse Federal funds paid to it under the Program; *Provided, however,* That FNSRO shall also administer the Program in all other schools and child-care institutions which have been under continuous FNS administration since October 1, 1980 unless the administration of such schools and institutions is assumed by a State agency. References in this part to ''FNSRO where applicable'' are to FNSRO as the agency administering the Program to schools or child-care institutions within certain States.

(d) Each State agency desiring to take part in the Program shall enter into a written agreement with the Department for the administration of the Program in the State in accordance with the provisions of this part. Such agreement shall cover the operation of the Program during the period specified therein and may be extended at the option of the Department.

(Secs. 804, 816 and 817, Pub. L. 97–35; 95 Stat. 521–535 (42 U.S.C. 1753, 1756, 1759, 1771 and 1785))

[Amdt. 14, 41 FR 31174, July 27, 1976, as amended by Amdt. 24, 47 FR 14133 Apr. 2, 1982; Amdt. 36, 54 FR 2989, Jan. 23, 1989]

§ 215.4 Payments of funds to States and FNSROs.

(a) For each fiscal year, the Secretary shall make payments to each State agency at such times as he may determine from the funds appropriated for Program reimbursement. Subject to § 215.11(c)(2), the total of these payments for each State for any fiscal year shall be limited to the amount of reimbursement payable to School Food Authorities and child care institutions under § 215.8 of this part for the total number of half-pints of milk served under the Program to eligible children from October 1 to September 30.

(b) Each State agency shall be responsible for controlling Program reimbursement payments so as to keep within the funds made available to it,

and for the timely reporting to FNS of the number of half pints of milk actually served. The Secretary shall increase or decrease the available level of funding by adjusting the State agency's Letter of Credit when appropriate.

(Pub. L. 97–370, 96 Stat. 1806)

[Amdt. 14, 41 FR 31174, July 27, 1976, as amended by Amdt. 30, 49 FR 18986, May 4, 1984]

§ 215.5 Method of payment to States.

(a) Funds to be paid to any State shall be made available by means of Letters of Credit issued by FNS in favor of the State agency. The State agency shall:

(1) Obtain funds needed to reimburse School Food Authorities and child-care institutions through presentation by designated State officials of a Payment Voucher on Letter of Credit (Treasury Form GFO 7578) in accordance with procedures prescribed by FNS and approved by the U.S. Treasury Department; (2) submit requests for funds only at such times and in such amounts as will permit prompt payment of claims; (3) use the funds received from such requests without delay for the purpose for which drawn. Notwithstanding the foregoing provisions, if funds are made available by Congress for the operation of the Program under a continuing resolution, Letters of Credit shall reflect only the amount available for the effective period of the resolution.

(b) [Reserved]

(c) The State agency shall release to FNS any Federal funds made available to it under the Program which are unobligated at the end of each fiscal year. Release of funds by the State agency shall be made as soon as practicable but in no event later than 30 days following demand by FNSRO, and shall be reflected by a related adjustment in the State agency's Letter of Credit.

[Amdt. 13, 39 FR 28416, Aug. 7, 1974, as amended by Amdt. 14, 41 FR 31174, July 27, 1976]

§ 215.6 Use of funds.

(a) Federal funds made available under the Program shall be used to encourage the consumption of milk through reimbursement payments to schools and child-care institutions in connection with the purchase and service of milk to children in accordance with the provisions of this part: *Provided, however*, That, with the approval of FNS, any State agency, or FNSRO where applicable, may reserve for use in carrying out special developmental projects an amount equal to not more than 1 per centum of the Federal funds so made available for any fiscal year.

(b) Whoever embezzles, willfully misapplies, steals, or obtains by fraud any funds, assets, or property provided under this part, whether received directly or indirectly from the Department, shall: (1) If such funds, assets, or property are of a value of $100 or more, be fined not more than $25,000 or imprisoned not more than 5 years or both; or (2) if such funds, assets, or property are of a value of less than $100, be fined not more than $1,000 or imprisoned not more than one year or both.

(c) Whoever receives, conceals, or retains to his use or gain funds, assets, or property provided under this part, whether received directly or indirectly from the Department, knowing such funds, assets, or property have been embezzled, willfully misapplied, stolen, or obtained by fraud, shall be subject to the same penalties provided in paragraph (b) of this section.

(Sec. 10(a), Pub. L. 95–627, 92 Stat. 3623 (42 U.S.C. 1760; sec. 10(d)(3), Pub. L. 95–627, 92 Stat. 3624 (42 U.S.C. 1757); sec. 14, Pub. L. 95–627, 92 Stat. 3625–3626; 44 U.S.C. 3506))

[Amdt. 14, 41 FR 31174, July 27, 1976, as amended by Amdt. 18, 44 FR 37898, June 29, 1979; 47 FR 746, Jan. 7, 1982; 64 FR 50741, Sept. 20, 1999]

§ 215.7 Requirements for participation.

(a) Any school or nonprofit child care institution shall receive the Special Milk Program upon request provided it does not participate in a meal service program authorized under the Child Nutrition Act of 1966 or the National School Lunch Act; except that schools with such meal service may receive the Special Milk Program upon request only for the children attending split-session kindergarten programs who do not have access to the meal service. Each School Food Authority or child-care institution shall make written application to the State agency, or FNSRO where applicable, for any

school or child-care institution in which it desires to operate the Program, if such school or child-care institution did not participate in the Program in the prior fiscal year.

(b) Any School Food Authority or child care institution participating in the Program may elect to serve free milk to children eligible for free meals. Upon application for the Program, each School Food Authority or child care institution:

(1) Shall be required by the State agency, or FNSRO where applicable, to state whether or not it wishes to provide free milk in the schools or institutions participating under its jurisdiction and

(2) If it so wishes to provide free milk, shall also submit for approval a free milk policy statement which, if for a school, shall be in accordance with part 245 of this chapter or, if for a child care institution, shall be in accordance with § 215.13a of this part.

(c) The application shall include information in sufficient detail to enable the State agency, or FNSRO where applicable, to determine whether the School Food Authority or child-care institution is eligible to participate in the Program and extent of the need for Program payments.

(d) Each school food authority or child care institution approved to participate in the program shall enter into a written agreement with the State agency or FNSRO, as applicable, that may be amended as necessary. Nothing in the preceding sentence shall be construed to limit the ability of the State agency to suspend or terminate the agreement in accordance with § 215.15. If a single State agency administers any combination of the Child Nutrition Programs, that State agency shall provide each SFA with a single agreement with respect to the operation of those programs. Such agreement shall provide that the School Food Authority or child-care institution shall, with respect to participating schools and child-care institutions under its jurisdiction:

(1) Operate a nonprofit milk service. However, school food authorities may use facilities, equipment, and personnel supported with funds provided to a school food authority under this part to support a nonprofit nutrition program for the elderly, including a program funded under the Older Americans Act of 1965 (42 U.S.C. 3001 *et seq.*).

(2) If electing to provide free milk (i) serve milk free to all eligible children, at times that milk is made available to nonneedy children under the Program; and (ii) make no discrimination against any needy child because of his inability to pay for the milk.

(3) Comply with the requirements of the Department's regulations respecting nondiscrimination (7 CFR part 15);

(4) Claim reimbursement only for milk as defined in this part and in accordance with the provisions of § 215.8 and § 215.10;

(5) Submit Claims for Reimbursement in accordance with § 215.10 of this part and procedures established by the State agency or FNSRO where applicable;

(6) Maintain a financial management system as prescribed by the State agency, or FNSRO where applicable;

(7) Upon request, make all records pertaining to its milk program available to the State agency and to FNS or OA for audit and administrative review, at any reasonable time and place. Such records shall be retained for a period of three years after the end of the fiscal year to which they pertain, except that, if audit findings have not been resolved, the records shall be retained beyond the three-year period as long as required for the resolution of the issues raised by the audit;

(8) Retain the individual applications for free milk submitted by families for a period of three years after the end of the fiscal year to which they pertain, except that, if audit findings have not been resolved, the records shall be retained beyond the three-year period as long as required for the resolution of the issues raised by the audit.

(e) *State requirements.* Nothing contained in this part shall prevent a State agency from imposing additional requirements for participation in the

Program which are not inconsistent with the provision of this part.

(Sec. 11, Pub. L. 95–166, 91 Stat. 1337 (42 U.S.C. 1772, 1753, 1766); sec. 5, Pub. L. 95–627, 92 Stat. 3619 (42 U.S.C. 1772); secs. 801, 803, 812; Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1753, 1759(a), 1773, 1758); 44 U.S.C. 3506)

[Amdt. 13, 39 FR 28416, Aug. 7, 1974, as amended by Amdt. 14, 41 FR 31174, July 27, 1976; Amdt. 16, 43 FR 1059, Jan. 6, 1978; 44 FR 10700, Feb. 23, 1979; Amdt. 17, 44 FR 33047, June 8, 1979; 46 FR 51635, Oct. 20, 1981; 47 FR 745, Jan. 7, 1982; Amdt. 30, 49 FR 18986, 18987, May 4, 1984; 52 FR 7562, Mar. 12, 1987; 52 FR 15298, Apr. 28, 1987; 64 FR 50741, Sept. 20, 1999]

§215.8 Reimbursement payments.

(a) [Reserved]

(b)(1) The rate of reimbursement per half-pint of milk purchased and (i) served in nonpricing programs to all children; (ii) served to all children in pricing programs by institutions and School Food Authorities not electing to provide free milk; and (iii) served to children other than needy children in pricing programs by institutions and School Food Authorities electing to provide free milk shall be the rate announced by the Secretary for the applicable school year. However, in no event shall the reimbursement for each half-pint (236 ml.) of milk served to children exceed the cost of the milk to the school or child care institution.

(2) The rate of reimbursement for milk purchased and served free to needy children in pricing programs by institutions and School Food Authorities electing to provide free milk shall be the average cost of milk, i.e., the total cost of all milk purchased during the claim period, divided by the total number of purchased half-pints.

(c) Schools and child-care institutions having pricing programs shall use the reimbursement payments received to reduce the price of milk to children.

(Sec. 11, Pub. L. 95–166, 91 Stat. 1337 (42 U.S.C. 1772, 1753, 1766); sec. 5, Pub. L. 95–627, 92 Stat. 3619 (42 U.S.C. 1772); Omnibus Reconciliation Act of 1980, sec. 209, Pub. L. 96–499, 94 Stat. 2599; secs. 807 and 808, Pub. L. 97–35, 95 Stat. 521–535, 42 U.S.C. 1772, 1784, 1760; secs. 805 and 819, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1773))

[Amdt. 13, 39 FR 28416, Aug. 7, 1974, as amended by Amdt. 16, 43 FR 1060, Jan. 6, 1978; 44 FR 10700, Feb. 23, 1979; Amdt. 17, 44 FR 33047, June 8, 1979; 46 FR 51365, Oct. 20, 1981; Amdt. 23, 47 FR 14134, Apr. 2, 1982]

§215.9 Effective date for reimbursement.

(a) A State Agency, or FNSRO where applicable, may grant written approval to begin operations under the Program prior to the receipt of the application from the School Food Authority or child-care institution. Such written approval shall be attached to the subsequently filed application, and the agreement executed by the School Food Authority or child-care institution shall be effective from the date upon which the School Food Authority or child-care institution was authorized to begin operations: *Provided, however,* That such effective date shall not be earlier than the calendar month preceding the calendar month in which the agreement is executed by the State Agency or by the Department.

(b) Reimbursement payments pursuant to §215.8 shall be made for milk purchased and served to children at any time during the effective period of an agreement between a School Food Authority or child care institution and the State agency or the Department.

(Sec. 11, Pub. L. 95–166, 91 Stat. 1337 (42 U.S.C. 1772, 1753, 1766))

[32 FR 12587, Aug. 31, 1967, as amended by Amdt. 5, 37 FR 14686, July 22, 1972; Amdt. 13, 39 FR 28417, Aug. 7, 1974; Amdt. 16, 43 FR 1060, Jan. 6, 1978; 44 FR 10700, Feb. 23, 1979]

§ 215.10 Reimbursement procedures.

(a) To be entitled to reimbursement under this part, each School Food Authority shall submit to the State agency, or FNSRO where applicable, a monthly Claim for Reimbursement.

(b) Claims for Reimbursement shall include data in sufficient detail to justify the reimbursement claimed and to enable the State agency to provide the Reports of School Program Operations required under § 215.11(c)(2). Unless otherwise approved by FNS, the Claim for Reimbursement for any month shall include only milk served in that month except if the first or last month of Program operations for any year contains 10 operating days or less, such month may be added to the Claim for Reimbursement for the appropriate adjacent month; however, Claims for Reimbursement may not combine operations occurring in two fiscal years. If a single State agency administers any combination of the Child Nutrition Programs, the SFA shall be able to use a common claim form with respect to claims for reimbursement for meals served under those programs. A final Claim for Reimbursement shall be postmarked and/or submitted to the State agency, or FNSRO where applicable, not later than 60 days following the last day of the full month covered by the claim. State agencies may establish shorter deadlines at their discretion. Claims not postmarked and/or submitted within 60 days shall not be paid with Program funds unless FNS determines that an exception should be granted. The State agency, or FNSRO where applicable, shall promptly take corrective action with respect to any Claim for Reimbursement as determined necessary through its claim review process or otherwise. In taking such corrective action, State agencies may make upward adjustments in Program funds claimed on claims filed within the 60 day deadline if such adjustments are completed within 90 days of the last day of the claim month and are reflected in the final Report of School Program Operations (FNS–10) for the claim month which is required under § 215.11(c)(2). Upward adjustments in Program funds claimed which are not reflected in the final FNS–10 for the claim month shall not be made unless authorized by FNS. Downward adjustments in Program funds claimed shall always be made, without FNS authorization, regardless of when it is determined that such adjustments are necessary.

(c) [Reserved]

(d) In submitting a Claim for Reimbursement, each School Food Authority or child-care institution shall certify that the claim is true and correct; that records are available to support the claim; that the claim is in accordance with the existing agreement; and that payment therefor has not been received.

(e) Milk served to adults is not eligible for reimbursement.

(f) Any School Food Authority or child care institution which operates both a nonpricing and pricing milk program in the same school or child care institution, may elect to claim reimbursement for:

(1) All milk purchased and served to children under the Program at the nonpricing rate prescribed in § 215.8(b) (1), or (2) only milk purchased and served to children in the pricing program at the rates prescribed in § 215.8(b) (1) and (2) for pricing programs.

(Sec. 11, Pub. L. 95–166, 91 Stat. 1337 (42 U.S.C. 1772, 1753, 1766); Pub. L. 97–370, 96 Stat. 1806)

[Amdt. 13, 39 FR 28417, Aug. 7, 1974, as amended by Amdt. 14, 41 FR 31175, July 27, 1976; Amdt. 16, 43 FR 1060, Jan. 6, 1978; 44 FR 10700, Feb. 23, 1979; 45 FR 82622, Dec. 16, 1980; 48 FR 20896, May 10, 1983; Amdt. 30, 49 FR 18986, May 4, 1984; 64 FR 50742, Sept. 20, 1999]

§ 215.11 Special responsibilities of State agencies.

(a) [Reserved]

(b) *Program assistance.* Each State agency, or FNSRO where applicable, shall provide Program assistance, as follows:

(1) Consultive, technical, and managerial personnel to administer the Program and monitor performance of schools and child-care institutions and to measure progress toward achieving Program goals.

(2) Visits to participating schools and child-care institutions to ensure compliance with Program regulations and with the Department's nondiscrimination regulations (part 15 of this title),

issued under title VI of the Civil Rights Act of 1964. State agencies shall conduct reviews of schools participating in the Program for compliance with the provisions of this part when such schools are being reviewed under the provisions identified under § 210.18(i) of this title. Compliance reviews of participating schools shall focus on the reviewed school's compliance with the required certification, counting and milk service procedures. School food authorities may appeal a denial of all or a part of the Claim for Reimbursement or withholding of payment arising from review activity conducted by the State agency under § 210.18 of this title or by FNS under § 210.30(d)(2) of this title. Any such appeal shall be subject to the procedures set forth under § 210.18(q) of this title or § 210.30(d)(3) of this title, as appropriate.

(3) Documentation of such Program assistance shall be maintained on file by the State agency, or FNSRO where applicable.

(c) *Records and reports.* (1) Each State agency shall maintain Program records as necessary to support the reimbursement payments made to child care institutions or School Food Authorities under § 215.8 and § 215.10 and the reports submitted to FNS under § 215.11(c)(2). The records may be kept in their original form or on microfilm, and shall be retained for a period of three years after the date of submission of the final Financial Status Report for the fiscal year, except that if audit findings have not been resolved, the records shall be retained beyond the three-year period as long as required for the resolution of the issues raised by the audit.

(2) Each State agency shall submit to FNS a final Report of School Program Operations (FNS–10) for each month which shall be limited to claims submitted in accordance with § 215.10(b) and which shall be postmarked and/or submitted no later than 90 days following the last day of the month covered by the report. States shall not receive Program funds for any month for which the final report is not submitted within this time limit unless FNS grants an exception. Upward adjustments to a State agency's report shall not be made after 90 days from the month covered by the report unless authorized by FNS. Downward adjustments shall always be made, without FNS authorization, regardless of when it is determined that such adjustments are necessary. Adjustments shall be reported to FNS in accordance with procedures established by FNS. Each State agency shall also submit to FNS a quarterly Financial Status Report (SF–269) on the use of Program funds. Such reports shall be postmarked and/or submitted no later than 30 days after the end of each fiscal year quarter. Obligations shall be reported only for the fiscal year in which they occur. A final Financial Status Report for each fiscal year shall be postmarked and/or submitted to FNS within 120 days after the end of the fiscal year. FNS shall not be responsible for reimbursing unpaid program obligations reported later than 120 days after the close of the fiscal year in which they were incurred.

(d) *Compliance.* State agencies, or FNSROs where applicable, shall require School Food Authorities and child-care institutions to comply with applicable provisions of this part.

(e) *Investigations.* Each State Agency shall promptly investigate complaints received or irregularities noted in connection with the operation of the Program and shall take appropriate action to correct any irregularities. State Agencies shall maintain on file evidence of such investigations and actions. The Office of Investigation of the Department (OI) shall make investigations at the request of the State Agency or if CND or FNSRO determines investigations by OI are appropriate.

(Sec. 11, Pub. L. 95–166, 91 Stat. 1337 (42 U.S.C. 1772, 1753, 1766); 44 U.S.C. 3506; sec. 812, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1759a))

[32 FR 12587, Aug. 31, 1967, as amended by Amdt. 13, 39 FR 28417, Aug. 7, 1974; Amdt. 14, 41 FR 31175, July 27, 1976; 47 FR 745, Jan. 7, 1982; Amdt. 25, 47 FR 18564, Apr. 30, 1982; Amdt. 30, 49 FR 18987, May 4, 1984; 56 FR 32949, July 17, 1991; 57 FR 38586, Aug. 26, 1992]

§ 215.12 Claims against schools or child-care institutions.

(a) State agencies, or FNSROs where applicable, shall disallow any portion of a claim and recover any payment made to a School Food Authority or

child-care institution that was not properly payable under this part. State agencies will use their own procedures to disallow claims and recover overpayments already made.

(b) [Reserved]

(c) The State Agency may refer any matter in connection with this section to FNSRO and CND for determination of the action to be taken.

(d) Each State agency shall maintain all records pertaining to action taken under this section. Such records shall be retained for a period of three years after the date of the submission of the final Financial Status Report, except that, if audit findings have not been resolved, the records shall be retained beyond the three-year period as long as required for the resolution of the issues raised by the audit.

(e) If CND does not concur with the State Agency action in paying a claim or a reclaim, or in failing to collect an overpayment FNSRO shall assert a claim against the State Agency for the amount of such claim, reclaim or overpayment. In all such cases, the State Agency shall have full opportunity to submit to CND evidence or information concerning the action taken. If in the determination of CND, the State Agency's action was unwarranted, the State Agency shall promptly pay to FNS the amount of the claim, reclaim, or overpayment.

(f) The amounts recovered by the State Agency from schools and child-care institutions may be utilized, first, to make reimbursement payments for milk served during the fiscal year for which the funds were initially available, and second, to repay any State funds expended in the reimbursement of claims under the program and not otherwise repaid. Any amounts recovered which are not so utilized shall be returned to FNS in accordance with the requirements of § 215.5(c).

(g) With respect to schools or child-care institutions in which FNSRO administers the Program, when FNSRO disallows a claim or a portion of a claim, or makes a demand for refund of an alleged overpayment, it shall notify the School Food Authority or child-care institutions of the reasons for such disallowance or demand and the School Food Authority or child-care institutions shall have full opportunity to submit evidence or to file reclaim for any amount disallowed or demanded in the same manner afforded in this section to schools or child-care institutions administered by State Agencies.

(h) The Secretary shall have the authority to determine the amount of, to settle, and to adjust any claims arising under the Program, and to compromise or deny such claim or any part thereof. The Secretary shall also have the authority to waive such claims if the Secretary determines that to do so would serve the purposes of the Program. This provision shall not diminish the authority of the Attorney General of the United States under section 516 of Title 28, U.S. Code, to conduct litigation on behalf of the United States.

(47 FR 745, Jan. 7, 1982 (44 U.S.C. 3506; secs. 804, 816 and 817, Pub. L. 97–35; 95 Stat. 521–535 (42 U.S.C. 1753, 1756, 1759, 1771 and 1785))

[32 FR 12587, Aug. 31, 1967, as amended by Amdt. 5, 37 FR 14686, July 22, 1972; Amdt. 13, 39 FR 28418, Aug. 7, 1974; Amdt. 14, 41 FR 31175, July 27, 1976; 47 FR 745, Jan. 7, 1982; Amdt. 24, 47 FR 14133, Apr. 2, 1982]

§ 215.13 Management evaluations and audits.

(a) State agencies and school food authorities shall comply with the requirements of part 3015 of this title concerning the audit requirements for recipients and subrecipients of the Department's financial assistance.

(b) These requirements call for organization-wide financial and compliance audits to ascertain whether financial operations are conducted properly; financial statements are presented fairly; recipients and subrecipients comply with the laws and regulations that affect the expenditures of Federal funds; recipients and subrecipients have established procedures to meet the objectives of federally assisted programs; and recipients and subrecipients are providing accurate and reliable information concerning grant funds. States and school food authorities shall use their own procedures to arrange for and prescribe the scope of independent audits, provided that such audits comply with the requirements set forth in part 3015 of this title.

(c) Each State agency shall provide FNS with full opportunity to conduct management evaluations (including visits to schools and child-care institutions) of any operations of the State agency under the Program and shall provide OA with full opportunity to conduct audits (including visits to schools and child-care institutions) of all operations of the State agency under the Program. Each State agency shall make available its records, including records of the receipt and expenditure of funds under the Program, upon a reasonable request by FNS or OA. OA shall also have the right to make audits of the records and operations of any school or child-care institution.

(d) In conducting management evaluations, reviews or audits for any fiscal year, the State agency, FNS, or OIG may disregard any overpayment if the total overpayment does not exceed $600 or, in the case of State agency claims in State administered Programs, it does not exceed the amount established under State law, regulations or procedure as a minimum amount for which claim will be made for State losses but not to exceed $600. However, no overpayment is to be disregarded where there is substantial evidence of violations of criminal law or civil fraud statutes.

(Secs. 805 and 819, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1773); sec. 812, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1759a))

[Amdt. 14, 41 FR 31175, July 27, 1976, as amended at 43 FR 58925, Dec. 22, 1978; Amdt. 23, 47 FR 14135, Apr. 2, 1982; Amdt. 25, 47 FR 18564, Apr. 30, 1982; Amdt. 36, 54 FR 2990, Jan. 23, 1989; 57 FR 38586, Aug. 26, 1992; 59 FR 1894, Jan. 13, 1994; 64 FR 50742, Sept. 20, 1999]

§215.13a Determining eligibility for free milk in child-care institutions.

(a) *General*. Child care institutions which operate pricing programs may elect to make free milk available, as set forth in §215.7(d)(2), to children who meet the approved eligibility criteria. Such child care institutions shall determine the children who are eligible for free milk and assure that there is no physical segregation of, or other discrimination against, or overt identification of, children unable to pay the full price for milk.

(b) *Action by State agencies and FNSROs*. Each State agency, or FNSRO where applicable, upon application for the program by a child care institution operating a pricing program, and annually thereafter, shall require the institution to state whether or not it wishes to serve free milk to eligible children at times that milk is provided under the Program. It shall annually require each child care institution electing to provide free milk to submit a free milk policy statement and shall provide such institutions with a prototype free milk policy statement and a copy of the State's family-size income standards for determining eligibility for free meals and milk under the National School Lunch and School Breakfast Programs to assist the institutions in meeting its responsibilities.

(c) *Action by institutions*. Each child care institution which operates a pricing program shall inform the State agency, or FNSRO where applicable, at the time it applies for Program participation and at least annually thereafter, whether or not it wishes to provide free milk. Institutions electing to provide free milk shall annually submit a written free milk policy statement for determining free milk eligibility of children under their jurisdiction, which shall contain the items specified in paragraph (d) of this section. Such institutions shall not be approved for Program participation of their agreements renewed unless the free milk policy has been reviewed and approved. Pending approval or a revision of a policy statement, the existing policy shall remain in effect.

(d) *Policy statement*. A free milk policy statement as required in paragraph (c) of this section shall contain the following:

(1) The specific criteria to be used in determining eligibility for free milk. These criteria shall give consideration to economic need as reflected by family size and income. The criteria used by the child-care institution may not result in the eligibility of children from families whose incomes exceed the State's family-size income standards for determining eligibility for free meals under the National School Lunch and School Breakfast Programs.

(2) The method by which the child-care institution will collect information from families in order to determine a child's eligibility for free milk.

(3) The method by which the child-care institution will collect milk payments so as to prevent the overt identification of children receiving free milk.

(4) A hearing procedure substantially like that outlined in part 245 of this chapter.

(5) An assurance that there will be no discrimination against free milk recipients and no discrimination against any child on the basis of race, color, or national origin.

(e) *Public announcement of eligibility criteria.* Each child care institution which elects to make free milk available under the Program shall annually make a public announcement of the availability of free milk to children who meet the approved eligibility criteria to the information media serving the area from which its attendance is drawn. The public announcement must also state that milk is available to all children in attendance without regard to race, color, or national origin.

(f) *Is a Privacy Act notice required on the free milk application?* Each free milk application must include substantially the following statement: ''Unless you include your child's case number for the Food Stamp Program, the Food Distribution Program on Indian Reservations (or other identifier for the Food Distribution Program on Indian Reservations) or the Temporary Assistance for Needy Families Program, you must include the social security number of the adult household member signing the application or indicate that the household member does not have a social security number. This is required by section 9 of the National School Lunch Act. The social security number is not mandatory, but the application cannot be approved if a social security number is not given or an indication is not made that the signer does not have a social security number. The social security number will be used in the administration and enforcement of the program.''

(g) *Disclosure of program eligibility information to State Medicaid (Medicaid) and the State Children's Health Insurance Program (SCHIP)* Program eligibility information about children eligible for free milk may be disclosed to Medicaid and SCHIP as described in this section.

(1) *Who decides whether to disclose program eligibility information to Medicaid and/or SCHIP?* The State agency may elect to allow child care institutions to disclose children's free milk eligibility information to Medicaid and SCHIP. Child care institutions may then elect to do so. Children's program eligibility information may only be disclosed to Medicaid or SCHIP when both the State agency and the child care institution so elect, the parent/guardian does not decline to have their eligibility information disclosed as described in paragraph (g)(5), and the requirements in this paragraph (g) are met.

(2) *What information may we disclose for use by Medicaid and SCHIP?* The State agency or child care institution, as appropriate, may disclose children's names, eligibility status (whether they are eligible for free milk), and any other eligibility information obtained through the free milk application or obtained through direct certification to persons directly connected with the administration of Medicaid or SCHIP.

(3) *Who are persons ''directly connected'' with the administration of Medicaid and SCHIP?* State employees and persons authorized under Federal and State Medicaid and SCHIP requirements to carry out initial processing of Medicaid or SCHIP applications or to make eligibility determinations are persons directly connected with the administration of Medicaid and SCHIP for purposes of disclosure of children's free milk eligibility information.

(4) *What are the restrictions on how Medicaid and SCHIP use children's free milk eligibility information?* Medicaid and SCHIP agencies and health insurance program operators receiving children's free milk eligibility information may only use the information to seek to enroll children in Medicaid or SCHIP. The Medicaid and SCHIP enrollment process may include targeting and identifying children from low-income households who are potentially eligible for Medicaid or SCHIP for the purpose of seeking to enroll them in Medicaid or SCHIP.

(5) *Must we notify households of potential disclosure to Medicaid or SCHIP?* The State agency or child care institution, as appropriate, must notify parents/guardians that their children's free milk eligibility information will be disclosed to Medicaid and/or SCHIP unless the parent/guardian elects not to have their information disclosed. Additionally, the State agency or sponsor, as appropriate, must give parents/guardians an opportunity to elect not to have their information disclosed to Medicaid or SCHIP. Only the parent or guardian who is a member of the household or family for purposes of the free and reduced price meal or free milk application may decline the disclosure of eligibility information. The notification must inform parents/guardians that they are not required to consent to the disclosure, that the information, if disclosed, will be used to identify children eligible for and to seek to enroll children in a health insurance program, and that their decision will not affect their children's eligibility for free milk. The notification may be included in the letter/notice to parents/guardians that accompanies the free milk application, on the application itself or in a separate notice provided to parents/guardians. The notice must give parents/guardians adequate time to respond. For children determined eligible through direct certification, the notice of potential disclosure may be included in the document informing parents/guardians of their children's eligibility for free milk through direct certification.

(6) *May social security numbers be disclosed?* The State agency or child care institution, as appropriate, may disclose social security numbers to any programs or persons authorized to receive all program eligibility information under this paragraph (g), provided parents/guardians have not declined to have their information disclosed. However State agencies and child care institutions that plan to disclose social security numbers must give notice of the planned use of the social security numbers. This notice must be in accordance with section 7(b) of the Privacy Act of 1974 (5 U.S.C. 552a note). The application must include substantially the following language for disclosures of social security numbers to Medicaid or SCHIP: ''The social security number may also be disclosed to Medicaid and the State Children's Health Insurance Program for the purpose of identifying and seeking to enroll eligible children in one of these health insurance programs.'' This language is in addition to the notice required in paragraph (f) of this section. State agencies and child care institutions are responsible for drafting the appropriate notice for disclosures of social security numbers.

(7) *Are agreements required before disclosing program eligibility information?* The State agency or child care institution, as appropriate, must have a written agreement with the State or local agency or agencies administering Medicaid or SCHIP prior to disclosing children's free milk eligibility information. At a minimum, the agreement must:

(i) Identify the health insurance program or health agency receiving children's eligibility information;

(ii) Describe the information that will be disclosed;

(iii) Require that the Medicaid or SCHIP agency use the information obtained and specify that the information must only be used to seek to enroll children in Medicaid or SCHIP;

(iv) Describe how the information will be protected from unauthorized uses and disclosures;

(v) Describe the penalties for unauthorized disclosure; and

(vi) Be signed by both the Medicaid or SCHIP program or agency and the State agency or child care institution, as appropriate.

(8) *What are the penalties for unauthorized disclosure or misuse of information?* In accordance with section 9(b)(2)(C)(v) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1758(b)(2)(C)(v)), any individual who publishes, divulges, discloses or makes known in any manner, or to any extent not authorized by statute or this section, any information obtained under this paragraph (g) will be fined not more than $1,000 or imprisoned for up to 1 year, or both.

(9) *What are the State agency's responsibilities regarding disclosures?* State agencies that elect to allow disclosure

of children's free milk eligibility information to Medicaid or SCHIP, as provided in this paragraph (g), must ensure that any child care institution acting in accordance with that option:

(i) Has a written agreement with the State or local agency or agencies administering health insurance programs for children under titles XIX and XXI of the Social Security Act (42 U.S.C. 1396 et seq. and 1397aa et seq.) that requires the health agencies to use children's free milk eligibility information to seek to enroll children in those health insurance programs; and

(ii) Notifies each household of the information that will be disclosed, that the information disclosed will be used only to seek to enroll children in Medicaid or SCHIP and provides each parent/guardian with an opportunity to elect not to have the information disclosed.

(Sec. 11, Pub. L. 95–166, 91 Stat. 1337 (42 U.S.C. 1772, 1753, 1766); sec. 5, Pub. L. 95–627, 92 Stat. 3619 (42 U.S.C. 1772))

[Amdt. 14, 41 FR 31176, July 27, 1976, as amended by Amdt. 16, 43 FR 1060, Jan. 6, 1978; 44 FR 10700, Feb. 23, 1979; Amdt. 17, 44 FR 33047, June 8, 1979; 66 FR 2201, Jan. 11, 2001]

§ 215.14 Nondiscrimination.

The Department's regulations on nondiscrimination in federally assisted programs are set forth in part 15 of this title. The Department's agreements with State agencies, the State agencies' agreements with School Food Authorities and child-care institutions and the FNSRO agreements with School Food Authorities administering nonprofit private schools and with child-care institutions shall contain the assurances required by such regulations. When different types of milk are served to children, (a) a uniform price for each type of milk served shall be charged to all non-needy children in the school or child-care institution who purchase milk, and (b) needy children shall be given the opportunity to select any type of milk offered.

(44 U.S.C. 3506)

[Amdt. 13, 39 FR 28418, Aug. 7, 1974, as amended at 47 FR 745, Jan. 7, 1982]

§ 215.14a Procurement standards.

(a) *Requirements.* State agencies and School Food Authorities shall comply with the requirements of the Office of Management and Budget (OMB) Circular A–102 and the Department's Uniform Federal Assistance Regulations, 7 CFR part 3015, subpart S (46 FR 55658) concerning the procurement of supplies, food, equipment and other services with Program funds. These requirements are adopted by FNS to ensure that such materials and services are obtained for the Program efficiently and economically and in compliance with applicable laws and executive orders.

(b) *Contractual responsibilities.* The standards contained in OMB Circular A–102 and 7 CFR part 3015, do not relieve the State agency or School Food Authority of any contractual responsibilities under its contract. The State agency or School Food Authority is the responsible authority, without recourse to FNS, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in connection with the Program. This includes but is not limited to: Source evaluation, protests, disputes, claims, or other matters of a contractual nature. Matters concerning violation of law are to be referred to the local, State or Federal authority that has proper jurisdiction.

(c) *Procurement procedure.* The State agency or School Food Authority may use their own procurement procedures which reflect applicable State and local laws and regulations, provided that procurements made with Program funds adhere to the standards set forth in OMB Circular A–102 and 7 CFR part 3015.

(Pub. L. 79–396, 60 Stat. 231 (42 U.S.C. 1751); Pub. L. 89–642, 80 Stat. 885–890 (42 U.S.C. 1773); Pub. L. 91–248, 84 Stat. 207 (42 U.S.C. 1759))

[Amdt. 27, 48 FR 19355, Apr. 29, 1983]

§ 215.15 Suspension, termination and grant closeout procedures.

Whenever it is determined that a State agency has materially failed to comply with the provisions of this

part, or with FNS guidelines and instructions, FNS may suspend or terminate the Program in whole, or in part, or take any other action as may be available and appropriate. A State agency may also terminate the Program by mutual agreement with FNS. FNS and the State agency shall comply with the provisions of the Department's Uniform Federal Assistance Regulations, 7 CFR part 3015, subpart N concerning grant suspension, termination and closeout procedures. Furthermore, the State agency, or FNSRO where applicable, shall apply these provisions to suspension or termination of the Program in School Food Authorities.

[Amdt. 30, 49 FR 18987, May 4, 1984]

§ 215.16 Program information.

School Food Authorities and childcare institutions desiring information concerning the Program should write to their State educational agency, or the appropriate Food and Nutrition Service Regional Office of FNS as indicated below:

(a) In the States of Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont: Northeast Regional Office, FNS, U.S. Department of Agriculture, 10 Causeway Street, Room 501, Boston, Massachusetts 02222–1065.

(b) In the States of Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Puerto Rico, Virginia, Virgin Islands, and West Virginia: Mid-Atlantic Regional Office, FNS, U.S. Department of Agriculture, 300 Corporate Boulevard, Robbinsville, New Jersey 08691–1598.

(c) In the States of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee: Southeast Regional Office, FNS, U.S. Department of Agriculture, 61 Forsyth Street SW., Room 8T36, Atlanta, Georgia 30303.

(d) In the States of Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin: Midwest Regional Office, FNS, U.S. Department of Agriculture, 77 West Jackson Boulevard, 20th Floor, Chicago, Illinois 60604–3507.

(e) In the States of Arkansas, Louisiana, New Mexico, Oklahoma, Texas: Southwest Regional Office, Food and Nutrition Service, U.S. Department of Agriculture, 1100 Commerce Street, Room 5–C–30, Dallas, Texas 75242.

(f) In the States of Alaska, American Samoa, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon, The Commonwealth of the Northern Mariana Islands, and Washington: Western Regional Office, FNS, U.S. Department of Agriculture, 550 Kearny Street, Room 400, San Francisco, California 94108.

(g) In the States of Colorado, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah, and Wyoming: Mountain Plains Regional Office, FNS, U.S. Department of Agriculture, 1244 Speer Boulevard, Suite 903, Denver, Colorado 80204.

(Sec. 11, Pub. L. 95–166, 91 Stat. 1337 (42 U.S.C. 1772, 1753, 1766); sec. 10(a), Pub. L. 95–627, 92 Stat. 3623 (42 U.S.C. 1760); sec. 10(d)(3), Pub. L. 95–627, 92 Stat. 3624 (42 U.S.C. 1757); sec. 14, Pub. L. 95–627, 92 Stat. 3625–3626); secs. 804, 816, 817 and 819, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1753, 1756, 1759, 1771, 1773 and 1785)

[Amdt. 14, 41 FR 31178, July 27, 1976, as amended by Amdt. 18, 44 FR 37898, June 29, 1979; Amdt. 27, 48 FR 195, Jan. 4, 1983; Amdt. 36, 54 FR 2990, Jan. 23, 1989; 65 FR 12435, Mar. 9, 2000]

§ 215.17 Information collection/recordkeeping—OMB assigned control numbers.

7 CFR section where requirements are described	Current OMB control number
215.3(d)	0584–0327
215.5(a)	0584–0005
	0584–0002
215.5(c)	0584–0341
215.7 (a), (c)	0584–0005
215.7 (b)(2)	0584–0026
215.7(d)	0584–0329
	0584–0005
215.10 (a), (b), (d)	0584–0005
	0584–0284
215.11 (b), (c)(1), (e)	0584–0005
215.11(c)(2)	0584–0002
	0584–0341
215.12 (a), (d), (e), (g)	0584–0005
215.13(a)	0584–0005
215.13a(a)–(e)	0584–0026
215.14	0584–0005
215.14a(a)–(c)	0584–0005
215.15	0584–0005

[50 FR 53258, Dec. 31, 1985]

PART 220—SCHOOL BREAKFAST PROGRAM

Sec.
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AUTHORITY: 42 U.S.C. 1773, 1779, unless otherwise noted.

§ 220.1 General purpose and scope.

This part announces the policies and prescribes the regulations necessary to carry out the provisions of section 4 of the Child Nutrition Act of 1966, as amended, which authorizes payments to the States to assist them to initiate, maintain, or expand nonprofit breakfast programs in schools.

[Amdt. 25, 41 FR 34758, Aug. 17, 1976]

§ 220.2 Definitions.

For the purpose of this part the term:

(a) *Act* means the Child Nutrition Act of 1966, as amended.

(b) *Breakfast* means a meal which meets the nutritional requirements set out in § 220.8, and which is served to a child in the morning hours. The meal shall be served at or close to the beginning of the child's day at school.

(c) *Child* means: (1) A student of high school grade or under as determined by the State educational agency, who is enrolled in an educational unit of high school grade or under as described in paragraphs (1) and (2) of the definition of ''School'', including students who are mentally or physically disabled as defined by the State and who are participating in a school program established for the mentally or physically disabled; or (2) a person under 21 chronological years of age who is enrolled in an institution or center as described in paragraphs (3) and (4) of the definition of ''School''.

(c–1) *Competitive foods* means any foods sold in competition with the School Breakfast Program to children in food service areas during the breakfast period.

(d) *CND* means the Child Nutrition Division of the Food and Nutrition Service of the Department.

(e) *Department* means the U.S. Department of Agriculture.

(f) *Distributing agency* means a State, Federal, or private agency which enters into an agreement with the Department for the distribution of commodities pursuant to part 250 of this chapter.

(g) *Fiscal year* means the period of 15 calendar months beginning July 1, 1976, and ending September 30, 1977; and the period of 12 calendar months beginning October 1, 1977, and each October 1 of any calendar year thereafter and ending September 30 of the following calendar year.

(h) *FNS* means the Food and Nutrition Service of the Department.

(i) *FNSRO* means the appropriate Food and Nutrition Service Regional Office of the Food and Nutrition Service of the Department.

(i-1) *Foods of minimal nutritional value* means: (1) In the case of artificially sweetened foods, a food which provides less than five percent of the Reference Daily Intake (RDI) for each of eight specified nutrients per serving; (2) in the case of all other foods, a food that provides less than five percent of the RDI for each of eight specified nutrients per 100 calories and less than five percent of the RDI for each of eight specified nutrients per serving. The eight nutrients to be assessed for this

purpose are: Protein, vitamin A, vitamin C, niacin, riboflavin, thiamin, calcium and iron. Categories of foods of minimal nutritional value are listed in appendix B of this part.

(j) *Free breakfast* means a breakfast for which neither the child nor any member of his family pays or is required to work in the school or in the school's food service.

(k) *Infant cereal* means any iron fortified dry cereal especially formulated and generally recognized as cereal for infants that is routinely mixed with breast milk or iron-fortified infant formula prior to consumption.

(l) *Infant formula* means any iron-fortified infant formula intended for dietary use solely as a food for normal healthy infants excluding those formulas specifically formulated for infants with inborn errors of metabolism or digestive or absorptive problems. Infant formula, as served, must be in liquid state at recommended dilution.

(m) *Menu item* means, under Nutrient Standard Menu Planning or Assisted Nutrient Standard Menu Planning, any single food or combination of foods. All menu items or foods offered as part of the reimbursable meal may be considered as contributing towards meeting the nutrition standards provided in § 220.8, except for those foods that are considered as foods of minimal nutritional value as provided for in § 220.2(i–1) which are not offered as part of a menu item in a reimbursable meal. For the purposes of a reimbursable breakfast, a minimum of three menu items must be offered, one of which shall be fluid milk served as a beverage or on cereal or both; under offer versus serve, a student may decline only one menu item.

(n) *Milk* means pasteurized fluid types of unflavored or flavored whole milk, lowfat milk, skim milk, or cultured buttermilk which meet State and local standards for such milk except that, in the meal pattern for infants (0 to 1 year of age), milk means breast milk or iron-fortified infant formula. In Alaska, Hawaii, American Samoa, Guam, Puerto Rico, the Trust Territory of the Pacific Islands, and the Virgin Islands, if a sufficient supply of such types of fluid milk cannot be obtained, ''milk'' shall include reconstituted or recombined milk. All milk should contain vitamins A and D at levels specified by the Food and Drug Administration and consistent with State and local standards for such milk.

(o) *National School Lunch Program* means the Program authorized by the National School Lunch Act.

(o–1) *Net cash resources* means all monies as determined in accordance with the State agency's established accounting system, that are available to or have accrued to a School Food Authority's nonprofit school food service at any given time, less cash payable. Such monies may include but are not limited to, cash on hand, cash receivable, earnings or investments, cash on deposit and the value of stocks, bonds or other negotiable securities.

(o–2) *Nonprofit school food service* means all food service operations conducted by the School Food Authority principally for the benefit of school children, all of the revenue from which is used solely for the operation or improvement of such food service.

(p) *Nonprofit* when applied to schools or institutions eligible for the Program means exempt from income tax under section 501(c)(3) of the Internal Revenue Code of 1954, as amended; or in the Commonwealth of Puerto Rico, certified by the Governor.

(p–1) *Nutrient Standard Menu Planning/Assisted Nutrient Standard Menu Planning* means ways to develop breakfast menus based on the analysis for nutrients in the menu items and foods offered over a school week to determine if specific levels for a set of key nutrients and calories were met in accordance with § 220.8(e)(5). However, for the purposes of Assisted Nutrient Standard Menu Planning, breakfast menu planning and analysis are completed by other entities and must incorporate the production quantities needed to accommodate the specific service requirements of a particular school or school food authority in accordance with § 220.8(f).

(q) *OA* means the Office of Audit of the Department.

(q–1) *OI* means the Office of Investigation of the Department.

(q–2) OIG means the Office of the Inspector General of the Department.

(r) *Program* means the School Breakfast Program.

(s) *Reduced price breakfast* means a breakfast which meets all of the following criteria: (1) The price shall be less than the full price of the breakfast, (2) the price shall be 30 cents or lower, and (3) neither the child nor any member of his family shall be required to supply an equivalent value in work for the school or the school's food service.

(t) *Reimbursement* means financial assistance paid or payable to participating schools for breakfasts meeting the requirements of § 220.8 served to eligible children at rates assigned by the State agency, or FNSRO where applicable. The term ''reimbursement'' also includes financial assistance made available through advances to School Food Authorities.

(t–1) *Revenue* when applied to nonprofit school food service means all monies received by or accruing to the nonprofit school food service in accordance with the State agency's established accounting system including, but not limited to, children's payments, earnings on investments, other local revenues, State revenues, and Federal cash reimbursements.

(u) *School* means: (1) An educational unit of high school grade or under, recognized as part of the educational system in the State and operating under public or nonprofit private ownership in a single building or complex of buildings; (2) any public or nonprofit private classes of preprimary grade when they are conducted in the aforementioned schools; or (3) any public or nonprofit private residential child care institution, or distinct part of such institution, which operates principally for the care of children, and, if private, is licensed to provide residential child care services under the appropriate licensing code by the State or a subordinate level of government, *except for* residential summer camps which participate in the Summer Food Service Program for Children, Job Corps centers funded by the Department of Labor, and private foster homes. The term ''residential child care institutions'' includes, but is not limited to: Homes for the mentally, emotionally or physically impaired, and unmarried mothers and their infants; group homes; halfway houses; orphanages; temporary shelters for abused children and for runaway children; long-term care facilities for chronically ill children; and juvenile detention centers. A long-term care facility is a hospital, skilled nursing facility, intermediate care facility, or distinct part thereof, which is entended for the care of children confined for 30 days or more.

(v) *School Breakfast Program* means the program authorized by section 4 of the Child Nutrition Act of 1966.

(v–1) *School in severe need* means a school determined to be eligible for rates of reimbursement in excess of the prescribed National Average Payment Factors, based upon the criteria set forth in § 220.9(e).

(w) *School Food Authority* means the governing body which is responsible for the administration of one or more schools and which has legal authority to operate a breakfast program therein.

(w–1) *School week* means the period of time used to determine compliance with the nutrition standards and the appropriate calorie and nutrient levels in § 220.8. Further, if applicable, school week is the basis for conducting Nutrient Standard Menu Planning or Assisted Nutrient Standard Menu Planning for breakfasts as provided in § 220.8(e) and § 220.8(f). The period shall be a normal school week of five consecutive days; however, to accommodate shortened weeks resulting from holidays and other scheduling needs, the period shall be a minimum of three consecutive days and a maximum of seven consecutive days. Weeks in which school breakfasts are offered less than three times shall be combined with either the previous or the coming week.

(x) *Secretary* means the Secretary of Agriculture.

(x–1) *7 CFR part 3015* means the Uniform Federal Assistance Regulations published by the Department to implement OMB Circulars A–21, A–87, A–102, A–110, and A–122; and Executive Order 12372. (For availability of OMB Circulars referenced in this definition, see 5 CFR 1310.3.)

(x–2) *7 CFR part 3017* means the Department's regulation to implement

Executive Order 12549, covering governmentwide rules on suspension and debarment as well as The Drug Free Workplace Act of 1988.

(x–3) *7 CFR part 3018* means the Department's Common Rule regarding Governmentwide New Restrictions on Lobbying. Part 3018 implements the requirements established by section 319 of the 1990 Appropriations Act for the Department of Interior and Related Agencies (Pub. L. 101–121).

(x–4) *7 CFR part 3052* means the Department's regulations implementing A–133, ''Audits of State, Local Governments, and Non-Profit Organizations.'' (For availability of OMB Circulars referenced in this definition, see 5 CFR 1310.3.)

(y) *State* means any of the 50 States, District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and, as applicable, American Samoa and the Commonwealth of the Northern Marianas.

(z) *State agency* means: (1) The State educational agency or (2) such other agency of the State as has been designated by the Governor or other appropriate executive or legislative authority of the State and approved by the Department to administer the Program in schools as defined in § 220.2(u)(3) of this part.

(aa) *State educational agency* means, as the State legislature may determine: (1) The chief State school officer (such as the State Superintendent of Public Instruction, Commissioner of Education, or similar officer), or (2) a board of education controlling the State department of education.

(bb) *Yogurt* means commercially prepared coagulated milk products obtained by the fermentation of specific bacteria, that meet milk fat or milk solid requirements and to which flavoring foods or ingredients may be added. These products are covered by the Food and Drug Administration's Definition and Standard of Identity for yogurt, lowfat yogurt, and nonfat yogurt, 21 CFR 131.200, 21 CFR 131.203, and 21 CFR 131.206, respectively.

(Sec. 6, Pub. L. 95–627, 92 Stat. 3620 (42 U.S.C. 1760); sec. 205, Pub. L. 96–499, The Omnibus Reconciliation Act of 1980, 94 Stat. 2599; secs. 801, 803, 812; Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1753, 1759(a), 1773, 1758; secs. 807 and 808, Pub. L. 97–35, 95 Stat. 521–535, 42 U.S.C. 1772, 1784, 1760; sec. 819, Pub. L. 97–35; 95 Stat. 533 (42 U.S.C. 1759a, 1773 and 1757))

[Amdt. 25, 41 FR 34758, Aug. 17, 1976]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 220.2, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 220.3 Administration.

(a) Within the Department, FNS shall act on behalf of the Department in the administration of the Program covered by this part. Within FNS, CND shall be responsible for administration of the Program.

(b) Within the States, responsibility for the administration of the Program in schools as defined in § 220.2(u)(1), (u)(2) and (u)(4) shall be in the State educational agency, except that FNSRO shall administer the Program with respect to nonprofit private schools as defined in § 220.2(u)(1) of any State wherein the State educational agency is not permitted by law to disburse Federal funds paid to it under the Program; *Provided, however,* That FNSRO shall also administer the Program in all other nonprofit private schools which have been under continuous FNS administration since October 1, 1980, unless the administration of such private schools is assumed by a State agency.

(c) Within the States, responsibility for the administration of the Program in schools as defined in § 220.2(u)(3) shall be in the State educational agency, or if the State educational agency cannot administer the Program in such schools, such other agency of the State as has been designated by the Governor

or other appropriate executive or legislative authority of the State and approved by the Department to administer the Program in such schools: *Provided, however*, That FNSRO shall administer the Program in such schools if the State agency is not permitted by law to disburse Federal funds paid to it under the Program to such schools; and *Provided, further*, That FNSRO shall also administer the Program in all other such schools which have been under continuous FNS administration since October 1, 1980, unless the administration of such schools is assumed by a State agency.

(d) References in this part to ''FNSRO where applicable'' are to FNSRO as the agency administering the Program.

(e) Each State agency desiring to take part in any of the programs shall enter into a written agreement with the Department for the administration of the Program in the State in accordance with the provisions of this part. Such agreement shall cover the operation of the Program during the period specified therein and may be extended at the option of the Department.

(Sec. 804, 816 and 817, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1753, 1756, 1759, 1771 and 1785); 44 U.S.C. 3506)

[Amdt. 25, 41 FR 34759, Aug. 17, 1976, as amended at 47 FR 745, Jan. 7, 1982; Amdt. 42, 47 FR 14133, Apr. 2, 1982; Amdt. 56, 54 FR 2990, Jan. 23, 1989]

§ 220.4 Payment of funds to States and FNSROs.

(a) To the extent funds are available, the Secretary shall make breakfast assistance payments to each State agency for breakfasts served to children under the Program. Subject to § 220.13(b)(2), the total of these payments for each State for any fiscal year shall be limited to the total amount of reimbursement payable to eligible schools within the State under this part for the fiscal year.

(b) The Secretary shall prescribe by July 1 of each fiscal year annual adjustments to the nearest one-fourth cent in the national average per breakfast factors for all breakfasts and for free and reduced price breakfasts, that shall reflect changes in the cost of operating a breakfast program.

(c) In addition to the funds made available under paragraph (a) of this section, funds shall be made available to the State agencies, and FNSROs where applicable, in such amounts as are needed to finance reimbursement rates assigned in accordance with the provisions of § 220.9(c).

(Secs. 801, 803, 812; Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1753, 1759(a), 1773, 1758); Pub. L. 97–370, 96 Stat. 1806)

[38 FR 35554, Dec. 28, 1973, as amended at 40 FR 30923, July 24, 1975; 46 FR 51367, Oct. 20, 1981; 48 FR 20896, May 10, 1983; Amdt. 49, 49 FR 18987, May 4, 1984]

§ 220.5 Method of payment to States.

Funds to be paid to any State for the School Breakfast Program shall be made available by means of Letters of Credit issued by FNS in favor of the State agency. The State agency shall:

(a) Obtain funds needed for reimbursement to School Food Authorities through presentation by designated State officials of a payment Voucher on Letter of Credit in accordance with procedures prescribed by FNS and approved by the U.S. Treasury Department; (b) submit requests for funds only at such times and in such amounts, as will permit prompt payment of claims or authorized advances; and (c) use the funds received from such requests without delay for the purpose for which drawn.

[Amdt. 25, 41 FR 34759, Aug. 17, 1976]

§ 220.6 Use of funds.

(a) Federal funds made available under the School Breakfast Program shall be used by State agencies, or FNSROs where applicable, to reimburse or make advance payments to School Food Authorities in connection with breakfasts served in accordance with the provisions of this part. However, with the approval of FNS, any State agency, or FNSRO where applicable, may reserve for use in carrying out special developmental projects an amount up to 1 per centum of the funds earned in any fiscal year under the School Breakfast Program. Advance payments to School Food Authorities may be made at such times and in such amounts as are necessary to meet current obligations.

(b) Whoever embezzles, willfully misapplies, steals, or obtains by fraud any funds, assets, or property provided under this part, whether received directly or indirectly from the Department, shall—

(1) If such funds, assets, or property are of a value of $100 or more, be fined not more than $25,000 or imprisoned not more than 5 years or both; or

(2) If such funds, assets, or property are of a value of less than $100, be fined not more than $1,000 or imprisoned not more than one year or both.

(c) Whoever receives, conceals, or retains to his use or gain funds, assets, or property provided under this part, whether received directly or indirectly from the Department, knowing such funds, assets, or property have been embezzled, willfully misapplied, stolen, or obtained by fraud, shall be subject to the same penalties provided in paragraph (b) of this section.

(Sec. 10(a), Pub. L. 95–627, 92 Stat. 3623 (42 U.S.C. 1760); sec. 10(d)(3), Pub. L. 95–627, 92 Stat. 3624 (42 U.S.C. 1757); sec. 14, Pub. L. 95–627, 92 Stat. 3625–3626)

[40 FR 30923, July 24, 1975, as amended by Amdt. 25, 41 FR 34759, Aug. 17, 1976; Amdt. 28, 44 FR 37899, June 29, 1979; 64 FR 50742, Sept. 20, 1999]

§ 220.7 Requirements for participation.

(a) The School Food Authority shall make written application to the State agency, or FNSRO where applicable, for any school in which it desires to operate the School Breakfast Program, if such school did not participate in the Program in the prior fiscal year. The School Food Authority shall also submit for approval, either with the application or at the request of the State agency, or FNSRO where applicable, a free and reduced price policy statement in accordance with part 245 of this chapter. A School Food Authority which simultaneously makes application for the National School Lunch Program and the School Breakfast Program shall submit one free and reduced price policy statement which shall provide that the terms, conditions, and eligibility criteria set forth in such policy statement shall apply to the service of free and reduced price lunches and to the service of free and reduced price breakfasts. If, at the time application is made for the School Breakfast Program, a School Food Authority has an approved free and reduced price policy statement on file with the State agency, or FNSRO where applicable, for the National School Lunch Program, it need only confirm in writing that such approved policy statement will also apply to the operation of its School Breakfast Program. Applications for the School Breakfast Program shall not be approved in the absence of an approved free and reduced price policy statement.

(a–1) A school which also either participates in the National School Lunch Program or only receives donations of commodities for its nonprofit lunch program under the provisions of part 250 of this chapter (commodity only school) shall apply the same set of eligibility criteria so that children who are eligible for free lunches shall also be eligible for free breakfasts and children who are eligible for reduced price lunches shall also be eligible for reduced price breakfasts.

(a–2) Schools shall, at least once during each school year, obtain a food safety inspection conducted by a State or local governmental agency responsible for food safety inspections. However, this requirement shall not apply to a school if a food safety inspection of the school is required by a State or local governmental agency responsible for food safety inspections.

(b) Applications shall solicit information in sufficient detail to enable the State agency to determine whether the School Food Authority is eligible to participate in the Program and extent of the need for Program payments.

(c) Within the funds available to them, State agencies, or FNSRO's where applicable, shall approve for participation in the School Breakfast Program any school making application and agreeing to carry out the program in accordance with this part. State agencies, or FNSRO's where applicable, have a positive obligation, however, to extend the benefits of the School Breakfast Program to children attending schools in areas where poor economic conditions exist.

(d) Any School Food Authority may employ a food service management

company (or other nonprofit agency or nonprofit organization) in the conduct of its feeding operation in one or more of its schools. A School Food Authority that employs a food service management company shall remain responsible for seeing that the feeding operation is in conformance with its agreement with the State Agency or the FNS Regional Office. The contract between the School Food Authority and the food service management company shall expressly provide that:

(1) The food service management company shall maintain such records (supported by invoices, receipts, or other evidence) as the School Food Authority will need to meet its responsibilities under this part, and shall report thereon to the School Food Authority promptly at the end of each month;

(2) Any federally donated commodities received by the School Food Authority and made available to the food service management company shall enure only to the benefit to the School Food Authority's nonprofit school food service and be utilized therein; and

(3) The books and records of the food service management company pertaining to the School Food Authority's feeding operation shall be available for a period of 3 years from the date of the submission of the final Financial Status Report, for inspection and audit by representatives of the State agency, of the Department, and of the General Accounting Office at any reasonable time and place, except that if audit findings have not been resolved, the records shall be retained beyond the three-year period as long as required for the resolution of the issues raised by the audit.

(e) Each school food authority approved to participate in the program shall enter into a written agreement with the State agency or the Department through the FNSRO, as applicable, that may be amended as necessary. Nothing in the preceding sentence shall be construed to limit the ability of the State agency or the FNSRO to suspend or terminate the agreement in accordance with § 220.18. If a single State agency administers any combination of the Child Nutrition Programs, that State agency shall provide each SFA with a single agreement with respect to the operation of those programs. Such agreements shall provide that the School Food Authority shall, with respect to participating schools under its jurisdiction:

(1)(i) Maintain a nonprofit school food service; (ii) in accordance with the financial management system established under § 220.13(i) of this part, use all revenues received by such food service only for the operation or improvement of that food service *Except that*, facilities, equipment, and personnel support with funds provided to a school food authority under this part may be used to support a nonprofit nutrition program for the elderly, including a program funded under the Older Americans Act of 1965 (42 U.S.C. 3001 *et seq.*); (iii) revenues received by the nonprofit school food service shall not be used to purchase land or buildings or to contruct buildings; (iv) limit its net cash resources to an amount that does not exceed three months average expenditure for its nonprofit school food service or such other amount as may be approved by the State agency; and (v) observe the limitations on any competitive food service as set forth in § 220.12 of this part;

(2) Serve breakfasts which meet the minimum requirements prescribed in § 220.8, during a period designated as the breakfast period by the school;

(3) Price the breakfast as a unit;

(4) Supply breakfast without cost or at reduced price to all children who are determined by the School Food Authority to be unable to pay the full price thereof in accordance with the free and reduced price policy statements approved under part 245 of this chapter;

(5) Make no discrimination against any child because of his inability to pay the full price of the breakfasts;

(6) Claim reimbursement at the assigned rates only for breakfasts served in accordance with the agreement;

(7) Submit Claims for Reimbursement in accordance with § 220.11 of this part and procedures established by the State agency, or FNSRO where applicable;

(8) Maintain, in the storage, preparation and service of food, proper sanitation and health standards in conformance with all applicable State and local laws and regulations;

(9) Purchase, in as large quantities as may be efficiently utilized in its nonprofit school food service, foods designated as plentiful by the State Agency, or CFPDO, where applicable;

(10) Accept and use, in as large quantities as may be efficiently utilized in its nonprofit school food service, such foods as may be offered as a donation by the Department;

(11) Maintain necessary facilities for storing, preparing, and serving food;

(12) Maintain a financial management system as prescribed by the State agency, or FNSRO where applicable;

(13) Upon request, make all accounts and records pertaining to its nonprofit school food service available to the State agency, to FNS and to OA for audit or review at a reasonable time and place. Such records shall be retained for a period of three years after the end of the fiscal year to which they pertain, except that if audit findings have not been resolved, the records shall be retained beyond the three-year period as long as required for the resolution of the issues raised by the audit;

(14) Retain the individual application for free and reduced price breakfasts submitted by families for a period of three years after the end of the fiscal year to which they pertain; and

(15) Comply with the requirements of the Department's regulations respecting nondiscrimination (7 CFR part 15).

(f) Nothing contained in this part shall prevent the State Agency from imposing additional requirements for participation in the program which are not inconsistent with the provisions of this part.

(44 U.S.C. 3506; sec. 819, Pub. L. 97–35, 95 Stat. 533 (42 U.S.C. 1759a, 1773 and 1757); Pub. L. 79–396, 60 Stat. 231 (42 U.S.C. 1751); Pub. L. 89–647, 80 Stat. 885–890 (42 U.S.C. 1773); Pub. L. 91–248, 84 Stat. 207 (42 U.S.C. 1759))

[32 FR 34, Jan. 5, 1967]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 220.7, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 220.8 What are the nutrition standards and menu planning approaches for breakfasts?

(a) *What are the nutrition standards for breakfasts for children age 2 and over?* School food authorities must ensure that participating schools provide nutritious and well-balanced breakfasts. For children age 2 and over, breakfasts, when averaged over a school week, must meet the nutrition standards and the appropriate nutrient and calorie levels in this section. The nutrition standards are:

(1) Provision of one-fourth of the Recommended Dietary Allowances (RDA) for protein, calcium, iron, vitamin A and vitamin C in the appropriate levels (see paragraphs (b), (c), (e)(1), or (h) of this section);

(2) Provision of the breakfast energy allowances (calories) for children in the appropriate levels (see paragraphs (b), (c), (e)(1), or (h) of this section);

(3) These applicable recommendations of the 1995 Dietary Guidelines for Americans:

(i) Eat a variety of foods;

(ii) Limit total fat to 30 percent of total calories;

(iii) Limit saturated fat to less than 10 percent of total calories;

(iv) Choose a diet low in cholesterol;

(v) Choose a diet with plenty of grain products, vegetables, and fruits; and

(vi) Choose a diet moderate in salt and sodium.

(4) These measures of compliance with the applicable recommendations of the 1995 Dietary Guidelines for Americans:

(i) Limit the percent of calories from total fat to 30 percent of the actual number of calories offered;

(ii) Limit the percent of calories from saturated fat to less than 10 percent of the actual number of calories offered;

(iii) Reduce sodium and cholesterol levels; and

(iv) Increase the level of dietary fiber.

(5) School food authorities have several ways to plan menus. The minimum levels of nutrients and calories that breakfasts must offer depends on the menu planning approach used and the age/grades served. The menu planning approaches are:

(i) Nutrient standard menu planning (see paragraphs (b) and (e) of this section);

(ii) Assisted nutrient standard menu planning (see paragraphs (b) and (f) of this section);

(iii) Traditional food-based menu planning (see paragraphs (c) and (g)(1) of this section);

(iv) Enhanced food-based menu planning (see paragraphs (c) and (g)(2) of this section); or

(v) Alternate menu planning as provided for in paragraph (h) of this section.

(6) Schools must keep production and menu records for the breakfasts they produce. These records must show how the breakfasts contribute to the required food components, food items or menu items every day. In addition, these records must show how the breakfasts contribute to the nutrition standards in paragraph (a) of this section and the appropriate calorie and nutrient levels (see paragraphs (c), (d) or (h) of this section, depending on the menu planning approach used) over the school week. If applicable, schools or school food authorities must maintain nutritional analysis records to demonstrate that breakfasts, when averaged over each school week, meet:

(i) The nutrition standards provided in paragraph (a) of this section; and

(ii) The nutrient and calorie levels for children for each age or grade group in accordance with paragraphs (b), (e)(1) of this section or developed under paragraph (h) of this section.

(b) *What are the levels for nutrients and calories for breakfasts planned under the nutrient standard or assisted nutrient standard menu planning approaches?*

(1) The required levels are:

MINIMUM NUTRIENT AND CALORIE LEVELS FOR SCHOOL BREAKFASTS
NUTRIENT STANDARD MENU PLANNING APPROACHES (SCHOOL WEEK AVERAGES)

	MINIMUM REQUIREMENTS		OPTIONAL
NUTRIENTS AND ENERGY ALLOWANCES	PRESCHOOL	GRADES K-12	GRADES 7-12
Energy allowances (calories)	388	554	618
Total fat (as a percentage of actual total food energy)	[1]	[1,2]	[2]
Saturated fat (as a percentage of actual total food energy)	[1]	[1,3]	[3]
RDA for protein (g)	5	10	12
RDA for calcium (mg)	200	257	300
RDA for iron (mg)	2.5	3	3.4
RDA for Vitamin A (RE)	113	197	225
RDA for Vitamin C (mg)	11	13	14

[1] The Dietary Guidelines recommend that after 2 years of age "...children should gradually adopt a diet that, by about 5 years of age, contains no more than 30 percent of calories from fat."
[2] Not to exceed 30 percent over a school week
[3] Less than 10 percent over a school week

(2) Optional levels are:

OPTIONAL MINIMUM NUTRIENT AND CALORIE LEVELS FOR SCHOOL BREAKFASTS NUTRIENT STANDARD MENU PLANNING APPROACHES (SCHOOL WEEK AVERAGES)				
NUTRIENTS AND ENERGY ALLOWANCES	AGES 3-6	AGES 7-10	AGES 11-13	AGES 14 AND ABOVE
Energy allowances (calories)	419	500	588	625
Total fat (as a percentage of actual total food energy)	[1,2]	[2]	[2]	[2]
Saturated fat (as a percentage of actual total food energy)	[1,3]	[3]	[3]	[3]
RDA for protein (g)	5.5	7	11.25	12.5
RDA for calcium (mg)	200	200	300	300
RDA for iron (mg)	2.5	2.5	3.4	3.4
RDA for Vitamin A (RE)	119	175	225	225
RDA for Vitamin C (mg)	11.00	11.25	12.5	14.4

[1]The Dietary Guidelines recommend that after 2 years of age "...children should gradually adopt a diet that, by about 5 years of age, contains no more than 30 percent of calories from fat."
[2] Not to exceed 30 percent over a school week
[3] Less than 10 percent over a school week

(3) Schools may also develop a set of nutrient and calorie levels for a school week. These levels are customized for the age groups of the children in the particular school.

(c) *What are the nutrient and calorie levels for breakfasts planned under the food-based menu planning approaches?*

(1) *Traditional approach.* For the traditional food-based menu planning approach, the required levels are:

MINIMUM NUTRIENT AND CALORIE LEVELS FOR SCHOOL BREAKFASTS TRADITIONAL FOOD-BASED MENU PLANNING APPROACH (SCHOOL WEEK AVERAGES)			
NUTRIENTS AND ENERGY ALLOWANCES	AGE 2	AGES 3,4,5	GRADES K-12
Energy allowances (calories)	325	388	554
Total fat (as a percentage of actual total food energy)	[1]	[1]	[1,2]
Saturated fat (as a percentage of actual total food energy)	[1]	[1]	[1,3]
RDA for protein (g)	4	5	10
RDA for calcium (mg)	200	200	257
RDA for iron (mg)	2.5	2.5	3
RDA for Vitamin A (RE)	100	113	197
RDA for Vitamin C (mg)	10	11	13

[1] The Dietary Guidelines recommend that after 2 years of age "...children should gradually adopt a diet that, by about 5 years of age, contains no more than 30 percent of calories from fat."
[2] Not to exceed 30 percent over a school week.
[3] Less than 10 percent over a school week.

(2) *Enhanced approach.* For the enhanced food-based menu planning approach, the required levels are:

MINIMUM NUTRIENT AND CALORIE LEVELS FOR SCHOOL BREAKFASTS ENHANCED FOOD-BASED MENU PLANNING APPROACH (SCHOOL WEEK AVERAGES)			
	REQUIRED FOR		OPTION FOR
NUTRIENTS AND ENERGY ALLOWANCES	PRESCHOOL	GRADES K-12	GRADES 7-12
Energy allowances (calories)	388	554	618
Total fat (as a percentage of actual total food energy)	[1]	[1,2]	[2]
Saturated fat (as a percentage of actual total food energy)	[1]	[1, 3]	[3]
RDA for protein (g)	5	10	12
RDA for calcium (mg)	200	257	300
RDA for iron (mg)	2.5	3	3.4
RDA for Vitamin A (RE)	113	197	225
RDA for Vitamin C (mg)	11	13	14

[1] The Dietary Guidelines recommend that after 2 years of age "...children should gradually adopt a diet that, by about 5 years of age, contains no more than 30 percent of calories from fat."
[2] Not to exceed 30 percent over a school week.
[3] Less than 10 percent over a school week.

(d) *What exceptions and variations are allowed in reimbursable breakfasts?* (1) *Exceptions for medical or special dietary needs.* Schools must make substitutions in breakfasts for students who are considered to have a disability under 7 CFR Part 15b and whose disability restricts their diet. Schools may also make substitutions for students who do not have a disability but who cannot consume the regular breakfast because of medical or other special dietary needs. Substitutions must be made on a case by case basis only when supported by a statement of the need for substitutions that includes recommended alternate foods, unless otherwise exempted by FNS. Such statement must, in the case of a student with a disability, be signed by a physician or, in the case of a student who is not disabled, by a recognized medical authority.

(2) *Variations for ethnic, religious, or economic reasons.* Schools should consider ethnic and religious preferences when planning and preparing breakfasts. Variations on an experimental or continuing basis in the food components for the food-based menu planning approaches in paragraph (g) may be allowed by FNS. Any variations must be nutritionally sound and needed to meet ethnic, religious, or economic needs.

(3) *Exceptions for natural disasters.* If there is a natural disaster or other catastrophe, FNS may temporarily allow schools to serve breakfasts for reimbursement that do not meet the requirements in this section.

(e) *What are the requirements for the nutrient standard menu planning approach?*

(1) *Nutrient levels.*

(i) *Adjusting nutrient levels for young children.* Schools with children who are age 2 must at least meet the nutrition standards in paragraph (a) of this section and the preschool nutrient and calorie levels in paragraph (b)(1) of this section over a school week. Schools may also use the preschool nutrient and calorie levels in paragraph (b)(2) of this section or may calculate nutrient and calorie levels for two year olds. FNS has a method for calculating these levels in menu planning guidance materials.

(ii) *Minimum levels for nutrients.* Breakfasts must at least offer the nutrient and calorie levels for the required grade groups in the table in paragraph (b)(1) of this section. Schools may also offer breakfasts meeting the nutrient and calorie levels for the age groups in paragraph (b)(2) of this section. If only one grade or age group is outside the established levels, schools may follow the levels for the majority of the children. Schools may also customize the nutrient and calorie levels for the children they serve. FNS has a method for calculating these levels in guidance materials for menu planning.

(2) *Reimbursable breakfasts.*

(i) *Contents of a reimbursable breakfast.* A reimbursable breakfast must include at least three menu items. All menu

items or foods offered in a reimbursable breakfast contribute to the nutrition standards in paragraph (a) of this section and to the levels of nutrients and calories that must be met in paragraphs (c) or (e)(1) of this section. Unless offered as part of a menu item in a reimbursable breakfast, foods of minimal nutritional value (see appendix B to part 220) are not included in the nutrient analysis. Reimbursable breakfasts planned under the nutrient standard menu planning approach must meet the nutrition standards in paragraph (a) of this section and the appropriate nutrient and calorie levels in paragraph (b) or (e)(1) of this section.

(ii) *Offer versus serve.* Schools must offer at least three menu items. At their option, school food authorities may allow students to select only two menu items and to decline a maximum of one menu item. The price of a reimbursable breakfast does not change if the student does not take a menu item or requests smaller portions.

(3) *Doing the analysis.* Schools using nutrient standard menu planning must conduct the analysis on all menu items and foods offered in a reimbursable breakfast. The analysis is conducted over a school week. Unless offered as part of a menu item in a reimbursable breakfast, foods of minimal nutritional value (see appendix B to part 220) are not included in the nutrient analysis.

(4) *Software elements.*

(i) *The Child Nutrition Database.* The nutrient analysis is based on the Child Nutrition Database. This database is part of the software used to do a nutrient analysis. Software companies or others developing systems for schools may contact FNS for more information about the database.

(ii) *Software evaluation.* FNS or an FNS designee evaluates any nutrient analysis software before it may be used in schools. FNS or its designee determines if the software, as submitted, meets the minimum requirements. The approval of software does not mean that FNS or USDA endorses it. The software must be able to do all functions after the basic data is entered. The required functions include weighted averages and the optional combined analysis of the lunch and breakfast programs.

(5) *Nutrient analysis procedures.*

(i) *Weighted averages.* Schools must include all menu items and foods offered in reimbursable breakfasts in the nutrient analysis. Menu items and foods are included based on the portion sizes and projected serving amounts. They are also weighted based on their proportionate contribution to the breakfasts offered. This means that menu items or foods more frequently offered are weighted more heavily than those not offered as frequently. Schools calculate weighting as indicated by FNS guidance and by the guidance provided by the software. Through September 30, 2003, schools are not required to conduct a weighted analysis.

(ii) *Analyzed nutrients.* The analysis includes all menu items and foods offered over a school week. The analysis must determine the levels of: Calories, protein, vitamin A, vitamin C, iron, calcium, total fat, saturated fat, sodium, cholesterol and dietary fiber.

(iii) *Combining the analysis of the lunch and breakfast programs.* At their option, schools may combine the analysis of breakfasts offered under this part and lunches offered under part 210 of this chapter. The analysis is done proportionately to the levels of participation in each program based on FNS guidance.

(6) *Comparing the results of the nutrient analysis.* Once the procedures in paragraph (i)(5) of this section are completed, schools must compare the results of the analysis to the appropriate nutrient and calorie levels, by age/grade groups, in paragraph (b) of this section or those developed under paragraph (e)(1) of this section. This comparison determines the school week's average. Schools must also make comparisons to the nutrition standards in paragraph (a) of this section to determine how well they are meeting the nutrition standards over the school week.

(7) *Adjustments to the menus.* Once schools know the results of the nutrient analysis based on the procedures in paragraphs (e)(5) and (e)(6) of this section, they must adjust future menu cycles to reflect production and how often the menu items and foods are offered. Schools may need to reanalyze menus when the students' selections

and, consequently, production levels change. Schools may need to change the menu items and foods offered given the students' selections and may need to modify the recipes and other specifications to make sure that the nutrition standards in paragraph (a) and either paragraph (b) or (e)(1) of this section are met.

(8) *Standardized recipes.* If a school follows the nutrient standard menu planning approach, it must develop and follow standardized recipes. A standardized recipe is a recipe that was tested to provide an established yield and quantity using the same ingredients for both measurement and preparation methods. Any standardized recipes developed by USDA/FNS are in the Child Nutrition Database. If a school has its own recipes, they must be standardized and analyzed to determine the levels of calories, nutrients, and dietary components listed in paragraph (e)(5)(ii) of this section. Schools must add any local recipes to their local database as outlined in FNS guidance.

(9) *Processed foods.* The Child Nutrition Database includes a number of processed foods. Schools may use purchased processed foods and menu items that are not in the Child Nutrition Database. Schools or the State agency must add any locally purchased processed foods and menu items to their local database as outlined in FNS guidance. Schools or State agencies must obtain the levels of calories, nutrients, and dietary components listed in paragraph (e)(5)(ii) of this section.

(10) *Menu substitutions.* Schools may need to substitute foods or menu items in a menu that was already analyzed. If the substitution(s) occurs more than two weeks before the planned menu is served, the school must reanalyze the revised menu. If the substitution(s) occurs two weeks or less before the planned menu is served, the school does not need to do a reanalysis. However, schools should always try to substitute similar foods.

(11) *Meeting the nutrition standards.* The school's analysis shows whether their menus are meeting the nutrition standards in paragraph (a) of this section and the appropriate levels of nutrients and calories in paragraph (b) of this section or customized levels developed under paragraph (e)(1) of this section. If the analysis shows that the menu(s) are not meeting these standards, the school needs to take action to make sure that the breakfasts meet the nutrition standards and the calorie, nutrient, and dietary component levels. Actions may include technical assistance and training and may be taken by the State agency, the school food authority or by the school as needed.

(12) *Other Child Nutrition Programs and nutrient standard analysis menu planning.* School food authorities that operate the Summer Food Service Program (part 225 of this chapter) and/or the Child and Adult Care Food Program (part 226 of this chapter) may, with State agency approval, prepare breakfasts for these programs using the nutrient standard menu planning approach for children age two and over. FNS has guidance on the levels of nutrient and calories for adult breakfasts offered under the Child and Adult Care Food Program.

(f) *What are the requirements for the assisted nutrient standard menu planning approach?*

(1) *Definition of assisted nutrient standard menu planning.* Some school food authorities may not be able to do all of the procedures necessary for nutrient standard menu planning. The assisted nutrient standard menu planning approach provides schools with menu cycles developed and analyzed by other sources. These sources include the State agency, other schools, consultants, or food service management companies.

(2) *Elements of assisted nutrient standard menu planning.* School food authorities using menu cycles developed under assisted nutrient standard menu planning must follow the procedures in paragraphs (e)(1) through (e)(10) of this section. The menu cycles must also incorporate local food preferences and accommodate local food service operations. The menu cycles must meet the nutrition standards in paragraph (a) of this section and meet the applicable nutrient and calorie levels for nutrient standard menu planning in paragraphs (b) or (e)(1) of this section. The supplier of the assisted nutrient standard menu planning approach must also develop

and provide recipes, food product specifications, and preparation techniques. All of these components support the nutrient analysis results of the menu cycles used by the receiving school food authorities.

(3) *State agency approval.* Prior to its use, the State agency must approve the initial menu cycle, recipes and other specifications of the assisted nutrient standard menu planning approach. The State agency needs to make sure all the steps required for nutrient analysis were followed. School food authorities may also ask the State agency for assistance with implementation of their assisted nutrient standard menu planning approach.

(4) *Required adjustments.* After the initial service of the menu cycle developed under the assisted nutrient standard menu planning approach, the nutrient analysis must be reassessed and appropriate adjustments made as discussed in paragraph (e)(7) of this section.

(5) *Final responsibility for meeting the nutrition standards.* The school food authority using the assisted nutrient standard menu planning approach retains final responsibility for meeting the nutrition standards in paragraph (a) of this section and the applicable calorie and nutrient levels in paragraphs (b) or (e)(1) of this section.

(6) *Adjustments to the menus.* If the nutrient analysis shows that the breakfasts offered are not meeting the nutrition standards in paragraph (a) of this section and the applicable calorie and nutrient levels in paragraphs (b) or (e)(1) of this section, the State agency, school food authority or school must take action to make sure the breakfasts offered meet these requirements. Actions needed include technical assistance and training.

(7) *Other Child Nutrition Programs and assisted nutrient analysis menu planning.* School food authorities that operate the Summer Food Service Program (part 225 of this chapter) and/or the Child and Adult Care Food Program (part 226 of this chapter) may, with State agency approval, prepare breakfasts for these programs using the assisted nutrient standard menu planning approach for children age two and over. FNS has guidance on the levels of nutrients and calories for adult breakfasts offered under the Child and Adult Care Food Program.

(g) *What are the requirements for the food-based menu planning approaches?* (1) *Food items.* There are two menu planning approaches based on meal patterns, not nutrient analysis. These approaches are the traditional food-based menu planning approach and the enhanced food-based menu planning approach. Schools using one of these approaches must offer these food items in at least the portions required for various age/grade groups:

(i) A serving of fluid milk as a beverage or on cereal or used partly for both;

(ii) A serving of fruit or vegetable or both, or full-strength fruit or vegetable juice; and

(iii) Two servings from one of the following components or one serving from each component:

(A) Grains/breads; and/or

(B) Meat/meat alternate.

(2) *Quantities for the traditional food-based menu planning approach.* At a minimum, schools must offer the food items in the quantities specified for the appropriate age/grade group in the following table:

TRADITIONAL FOOD-BASED MENU PLANNING APPROACH-MEAL PATTERN FOR BREAKFASTS			
FOOD COMPONENTS AND FOOD ITEMS	AGES 1-2	AGES 3,4 AND 5	GRADES K-12
MILK (fluid) (as a beverage, on cereal or both)	4 fluid ounces	6 fluid ounces	8 fluid ounces
JUICE/FRUIT/VEGETABLE: Fruit and/or vegetable; or full-strength fruit juice or vegetable juice	¼ cup	½ cup	½ cup
SELECT ONE SERVING FROM EACH OF THE FOLLOWING COMPONENTS, TWO FROM ONE COMPONENT, OR AN EQUIVALENT COMBINATION:			
GRAINS/BREADS :			
Whole-grain or enriched bread	½ slice	½ slice	1 slice
Whole-grain or enriched biscuit, roll, muffin, etc.	½ serving	½ serving	1 serving
Whole-grain, enriched or fortified cereal	¼ cup or 1/3 ounce	1/3 cup or ½ ounce	¾ cup or 1 ounce
MEAT OR MEAT ALTERNATES:			
Meat/poultry or fish	½ ounce	½ ounce	1 ounce
Alternate protein products[1]	½ ounce	½ ounce	1 ounce
Cheese	½ ounce	½ ounce	1 ounce
Large egg	½	½	½
Peanut butter or other nut or seed butters	1 tablespoon	1 tablespoon	2 tablespoons
Cooked dry beans and peas	2 tablespoons	2 tablespoons	4 tablespoons
Nuts and/or seeds (as listed in program guidance)[2]	½ ounce	½ ounce	1 ounce
Yogurt, plain or flavored, unsweetened or sweetened	2 ounces or ¼ cup	2 ounces or ¼ cup	4 ounces or ½ cup

[1] Must meet the requirements in appendix A of this part.

[2] No more than 1 ounce of nuts and/or seeds may be served in any one breakfast.

(3) *Quantities for the enhanced food-based menu planning approach.* At a minimum, schools must offer the food items in the quantities specified for the appropriate age/grade group in the following table:

ENHANCED FOOD-BASED MENU PLANNING APPROACH-MEAL PATTERN FOR BREAKFASTS				
FOOD COMPONENTS AND FOOD ITEMS	REQUIRED FOR			OPTION FOR
	AGES 1-2	PRESCHOOL	GRADES K-12	GRADES 7-12
Milk (fluid) (as a beverage, on cereal or both)	4 fluid ounces	6 fluid ounces	8 fluid ounces	8 fluid ounces
JUICE/FRUIT/VEGETABLE: Fruit and/or vegetable; or full-strength fruit juice or vegetable juice	¼ cup	½ cup	½ cup	½ cup
SELECT ONE SERVING FROM EACH OF THE FOLLOWING COMPONENTS, TWO FROM ONE COMPONENT OR AN EQUIVALENT COMBINATION:				
GRAINS/BREADS:				
Whole-grain or enriched bread	½ slice	½ slice	1 slice	1 slice
Whole-grain or enriched biscuit, roll, muffin, etc.	½ serving	½ serving	1 serving	1 serving
Whole-grain, enriched or fortified cereal	¼ cup or 1/3 ounce	1/3 cup or ½ ounce	¾ cup or 1 ounce	¾ cup or 1 ounce plus an additional serving of one of the Grains/Breads above.
MEAT OR MEAT ALTERNATES:				
Meat/poultry or fish	½ ounce	½ ounce	1 ounce	1 ounce
Alternate protein products[1]	½ ounce	½ ounce	1 ounce	1 ounce
Cheese	½ ounce	½ ounce	1 ounce	1 ounce
Large egg	½	½	½	½
Peanut butter or other nut or seed butters	1 tablespoon	1 tablespoon	2 tablespoons	2 tablespoons
Cooked dry beans and peas	2 tablespoons	2 tablespoons	4 tablespoons	4 tablespoons
Nuts and/or seeds (as listed in program guidance)[2]	½ ounce	½ ounce	1 ounce	1 ounce
Yogurt, plain or flavored, unsweetened or sweetened	2 ounces or ¼ cup	2 ounces or ¼ cup	4 ounces or ½ cup	4 ounces or ½ cup

[1] Must meet the requirements in appendix A of this part.
[2] No more than 1 ounce of nuts and/or seeds may be served in any one breakfast.

(4) *Offer versus serve.* Each school must offer all four required food items listed in paragraph (g)(1) of this section. At the option of the school food authority, each school may allow students to refuse one food item from any component. The refused food item may be any of the four items offered to the student. A student's decision to accept all four food items or to decline one of the four food items must not affect the charge for a reimbursable breakfast.

(5) *Meal pattern exceptions for outlying areas.* Schools in American Samoa, Puerto Rico and the Virgin Islands may serve a starchy vegetable such as yams, plantains, or sweet potatoes to meet the grain/bread requirement.

(h) *What are the requirements for alternate menu planning approaches?*

(1) *Definition.* Alternate menu planning approaches are those adopted or developed by school food authorities or State agencies that differ from the standard approaches established in paragraphs (e) through (g) of this section.

(2) *Use and approval of major changes or new alternate approaches.* Within the guidelines established for developing alternate menu planning approaches, school food authorities or State agencies may modify one of the established

menu planning approaches in paragraphs (e) through (g) of this section or may develop their own menu planning approach. The alternate menu planning approach must be available in writing for review and monitoring purposes. No formal plan is required; guidance material, a handbook or protocol is sufficient. As appropriate, the material must address how the guidelines in paragraph (h)(3) of this section are met. A State agency that develops an alternate approach that is exempt from FNS approval under paragraph (h)(2)(iii) of this section must notify FNS in writing when implementing the alternate approach.

(i) *Approval of local level plans.* Any school food authority-developed menu planning approach must have prior State agency review and approval.

(ii) *Approval of State agency plans.* Unless exempt under paragraph (h)(2)(iii) of this section, any State agency-developed menu planning approach must have prior FNS approval.

(iii) *State agency plans not subject to approval.* A State agency-developed menu planning approach does not need FNS approval if:

(A) Five or more school food authorities in the State use it; and

(B) The State agency maintains ongoing oversight of the operation and evaluation of the approach and makes any needed adjustments to its policies and procedures to ensure that the appropriate guidelines in paragraph (h)(3) of this section are met.

(3) *Elements for major changes or new approaches.* Any alternate menu planning approach must:

(i) offer fluid milk, as provided in paragraph (i) of this section;

(ii) include the procedures for offer versus serve if the school food authority chooses to implement the offer versus serve option. Alternate approaches should follow the offer versus serve procedures in paragraphs (e)(2)(ii) and (g)(4) of this section, as appropriate. If these requirements are not followed, the approach must indicate:

(A) The affected age/grade groups;

(B) The number and type of items (and, if applicable, the quantities for the items) that constitute a reimbursable breakfast under offer versus serve;

(C) How such procedures will reduce plate waste; and

(D) How a reasonable level of calories and nutrients for the breakfast as taken is provided.

(iii) Meet the Recommended Dietary Allowances and breakfast energy allowances (nutrient levels) and indicate the age/grade groups served and how the nutrient levels are met for those age/grade groups;

(iv) Follow the requirements for competitive foods in §§220.2(i–1) and 220.12 and appendix B to this part;

(v) Follow the requirements for counting food items and products towards meeting the meal patterns. These requirements are found in paragraphs (g) and (i) of this section, in appendices A through C to this part, and in instructions and guidance issued by FNS. This only applies if the alternate approach is a food-based menu planning approach.

(vi) Identify a reimbursable breakfast at the point of service.

(A) To the extent possible, the procedures provided in paragraph (e)(2)(i) of this section for nutrient standard or assisted nutrient standard menu planning approaches or for food-based menu planning approaches provided in paragraph (g) of this section must be followed. Any instructions or guidance issued by FNS that further defines the elements of a reimbursable breakfast must be followed when using the existing regulatory provisions.

(B) Any alternate approach that deviates from the provisions in paragraph (e)(2)(i) or paragraph (g) of this section must indicate what constitutes a reimbursable breakfast, including the number and type of items (and, if applicable, the quantities for the items) which comprise the breakfast, and how a reimbursable breakfast is to be identified at the point of service.

(vii) explain how the alternate menu planning approach can be monitored under the applicable provisions of §210.18 and §210.19 of this chapter, including a description of the records that will be maintained to document compliance with the program's administrative and nutrition requirements. However, if the procedures under §210.19 of this chapter cannot be used to monitor the alternate approach, a

description of review procedures which will enable the State agency to assess compliance with the nutrition standards in paragraphs (a)(1) through (a)(4) of this section must be included; and

(viii) follow the requirements for weighted analysis and for approved software for nutrient standard menu planning as required by paragraphs (e)(4) and (e)(5) of this section unless a State agency-developed approach meets the criteria in paragraph (h)(2)(iii) of this section. Through September 30, 2003, schools are not required to conduct a weighted analysis.

(i) *What are the requirements for offering milk?*

(1) *Serving milk*. A serving of milk as a beverage or on cereal or used in part for each purpose must be offered for breakfasts.

(2) *Inadequate milk supply*. If a school cannot get a supply of milk, it can still participate in the Program under the following conditions:

(i) If emergency conditions temporarily prevent a school that normally has a supply of fluid milk from obtaining delivery of such milk, the State agency may allow the school to serve breakfasts during the emergency period with an alternate form of milk or without milk.

(ii) If a school is unable to obtain a supply of any type of fluid milk on a continuing basis, the State agency may allow schools to substitute canned or dry milk in the required quantities in the preparation of breakfasts. In Alaska, Hawaii, American Samoa, Guam, Puerto Rico, and the Virgin Islands, if a sufficient supply of fluid milk cannot be obtained, ''milk'' includes reconstituted or recombined milk, or otherwise as allowed by FNS through a written exception.

(j) *What are the requirements for the infant meal pattern?* Schools must offer infants ages birth through 11 months of age an infant breakfast. Foods included in the infant breakfast pattern must be of texture and consistency appropriate for the age group served. Foods must be served to the infant during a span of time consistent with the infant's eating habits. For infants 4 through 7 months of age, solid foods are optional and should be introduced only when the infant is developmentally ready. Whenever possible, the school should consult with the infant's parents in making the decision to introduce solid foods. Solid foods should be introduced one at a time on a gradual basis with the intent of ensuring health and nutritional well-being. For infants 8 through 11 months of age, the total amount of food in the meal patterns in paragraph (j)(3) of this section must be provided to qualify for reimbursement. Additional foods may be served to infants 4 months of age and older with the intent of improving their overall nutrition. Breast milk, provided by the infant's mother, may be served in place of infant formula from birth through 11 months of age. Either breast milk or iron-fortified infant formula must be served for the entire first year. For some breastfed infants who regularly consume less than the minimum amount of breast milk per feeding, a serving of less than the minimum amount of breast milk may be offered, with additional ounces offered if the infant is still hungry. The infant breakfast pattern must have at least each of the following components in the amounts indicated for the appropriate age group:

(1) Birth through 3 months—4 to 6 fluid ounces of breast milk or iron-fortified infant formula.

(2) 4 through 7 months—4 to 8 fluid ounces of breast milk or iron-fortified infant formula; and 0 to 3 tablespoons of iron-fortified dry infant cereal (optional).

(3) 8 through 11 months—6 to 8 fluid ounces of breast milk or iron-fortified infant formula; 2 to 4 tablespoons of iron-fortified dry infant cereal; and 1 to 4 tablespoons of fruit or vegetable of appropriate consistency or a combination of both.

BREAKFAST PATTERN FOR INFANTS

	Birth through 3 months	4 through 7 months	8 through 11 months
Breakfast	4-6 fluid ounces formula[1] or breast milk[2,3]	4-8 fluid ounces of formula[1] or breast milk[2,3]; 0-3 tablespoons of infant cereal[1,4]	6-8 fluid ounces of formula[1] or breast milk[2,3] ; and 2-4 tablespoons of infant cereal[1]; and 1-4 tablespoons of fruit and/or vegetable

[1] Infant formula and dry infant cereal must be iron-fortified.
[2] It is recommended that breast milk be served in place of formula from birth through 11 months.
[3] For some breastfed infants who regularly consume less than the minimum amount of breast milk per feeding, a serving of less than the minimum amount of breast milk may be offered, with additional breast milk offered if the infant is still hungry.
[4] A serving of this component is optional.

(k) *What about serving additional foods?* Schools may offer additional foods with breakfasts to children over one year of age.

(l) *Must schools offer choices at breakfast?* FNS encourages schools to offer children a selection of foods and menu items at breakfast. Choices provide variety and encourage consumption. Schools may offer choices of reimbursable breakfasts or foods within a reimbursable breakfast. When a school offers a selection of more than one type of breakfast or when it offers a variety of food components, menu items or foods and milk for choice as a reimbursable breakfast, the school must offer all children the same selection(s) regardless of whether the child is eligible for free or reduced price breakfasts or must pay the designated full price. The school may establish different unit prices for each type of breakfast offered provided that the benefits made available to children eligible for free or reduced price breakfasts are not affected.

(m) *What must schools do about nutrition disclosure?* To the extent that school food authorities identify foods in a menu, or on the serving line or through other available means of communicating with program participants, school food authorities must identify products or dishes containing more than 30 parts fully hydrated alternate protein products (as specified in appendix A of this part) to less than 70 parts beef, pork, poultry or seafood on an uncooked basis, in a manner which does not characterize the product or dish solely as beef, pork, poultry or seafood. Additionally, FNS encourages schools to inform the students, parents, and the public about efforts they are making to meet the nutrition standards (see paragraph (a) of this section) for school breakfasts.

[65 FR 26923, May 9, 2000, as amended at 65 FR 36317, June 8, 2000]

§ 220.9 Reimbursement payments.

(a) State agencies, or FNSRO's where applicable, shall make reimbursement payments to schools only in connection with breakfasts meeting the requirements of § 220.8, and reported in accordance with § 220.11(b) of this part. School Food Authorities shall plan for and prepare breakfasts on the basis of participation trends, with the objective of providing one breakfast per child per day. Production and participation records shall be maintained to demonstrate positive action toward this objective. In recognition of the fluctuation in participation levels which makes it difficult to precisely estimate the number of breakfasts needed and to reduce the resultant waste, any excess breakfasts that are prepared may be served to eligible children and may be claimed for reimbursement unless the State agency, or FNSRO where applicable, determines that the School Food Authority has failed to plan and prepare breakfasts with the objective of providing one breakfast per child per day. In no event shall the School Food Authority claim reimbursement for

free and reduced price breakfasts in excess of the number of children approved for free and reduced price meals.

(b) The rates of reimbursement for breakfasts served to eligible children in schools not in severe need are the applicable national average payment factors for breakfasts. The maximum rates of reimbursement for breakfasts served to eligible children in schools determined to be in severe need are those prescribed by the Secretary. National average payment factors and maximum rates of reimbursement for the School Breakfast Program shall be prescribed annually by the Secretary in the FEDERAL REGISTER.

(c) The total reimbursement for breakfasts served to eligible children in, (1) schools not in severe need, and (2) severe need schools in State's with State Breakfast mandates as provided for in § 220.9(e)(3) (i) and (ii) in any School Food Authority during the school year shall not exceed the sum of the products obtained by multiplying the total numbers of such free, reduced price and paid breakfasts, respectively, by the applicable rate of reimbursement for each type of breakfast as prescribed for the school year.

(d) For any school year, severe need reimbursement payments to any School Food Authority except as provided for in paragraph (c) of this section shall be the lesser of: (1) The cost of providing free and reduced price breakfast to eligible children in schools determined to be in severe need, less the reduced price payments received by such schools; or (2) the number of free and the number of reduced price breakfasts, respectively, that are served to eligible children in schools determined to be in severe need, multiplied by the applicable severe need reimbursement rates for such breakfasts.

(e) *Severe need schools.* The State agency, or FNSRO where applicable, shall determine whether a school is in severe need based on the following eligibility criteria: (1) The reimbursement rate per meal established by the Secretary is insufficient to cover the costs of the school's breakfast program; (2) the school is participating in or desiring to initiate a breakfast program; and (3) 40 percent or more of the lunches served to students at the school in the second preceding school year were served free or at a reduced price. In addition, schools which are required by State law to serve breakfasts and which fail to satisfy the required 40 percent eligibility criteria are eligible for severe need reimbursement rates only for the following limited time periods:

(i) In States where the State legislature meets annually, the schools may receive severe need reimbursement rates until July 1, 1983; and (ii) in States where the State legislature meets biennially, the schools may receive severe need reimbursement rates until July 1, 1984. State agencies shall maintain on file, and have available for review and audits, their eligibility criteria for determining the severe need of schools and the source of the data to be used in making individual determinations. The State agency, or FNSRO where applicable, shall be responsible for establishing systems for determining breakfast costs where such costs are necessary to the determination of whether or not a school is in severe need.

(Sec. 6, Pub. L. 95–627, 92 Stat. 3620 (42 U.S.C. 1776; secs. 801, 803, 812; Pub. L. 97–35, 95 Stat. 521–535, 42 U.S.C. 1753, 1759(a), 1758, 1773; sec. 819, Pub. L. 97–35, 95 Stat. 533 (42 U.S.C. 1759a, 1773 and 1757); 44 U.S.C. 3506))

[Amdt. 25, 41 FR 34760, Aug. 17, 1976, as amended by Amdt. 29, 44 FR 48159, Aug. 17, 1979; Amdt. No. 38, 46 FR 50928, Oct. 16, 1981; 46 FR 51368, Oct. 20, 1981; 47 FR 746, Jan. 7, 1982; 47 FR 31375, July 20, 1982; 48 FR 40196, 40197, Sept. 6, 1983; 60 FR 31222, June 13, 1995; 65 FR 26923, May 9, 2000]

§ 220.10 Effective date for reimbursement.

Reimbursement payments under the School Breakfast Program may be made only to School Food Authorities operating under an agreement with the State Agency or the Department, and may be made only after execution of the agreement. Such payments may include reimbursement in connection with breakfasts served in accordance with provisions of the program in the calendar month preceding the calendar

month in which the agreement is executed.

[32 FR 35, Jan. 5, 1967, as amended by Amdt. 9, 37 FR 9613, May 13, 1972]

§ 220.11 Reimbursement procedures.

(a) To be entitled to reimbursement under this part, each School Food Authority shall submit to the State agency, or FNSRO where applicable, a monthly Claim for Reimbursement.

(b) Claims for Reimbursement shall include data in sufficient detail to justify the reimbursement claimed and to enable the State agency to provide the Reports of School Program Operations required under § 220.13(b)(2). Unless otherwise approved by FNS, the Claim for Reimbursement for any month shall include only breakfasts served in that month except if the first or last month of Program operations for any year contains 10 operating days or less, such month may be added to the Claim for Reimbursement for the appropriate adjacent month; however, Claims for Reimbursement may not combine operations occurring in two fiscal years. If a single State agency administers any combination of the Child Nutrition Programs, the SFA shall be able to use a common claim form with respect to claims for reimbursement for meals served under those programs. A final Claim for Reimbursement shall be postmarked and/or submitted to the State agency, or FNSRO where applicable, not later than 60 days following the last day of the full month covered by the claim. State agencies may establish shorter deadlines at their discretion. Claims not postmarked and/or submitted within 60 days shall not be paid with Program funds unless FNS determines that an exception should be granted. The State agency, or FNSRO where applicable, shall promptly take corrective action with respect to any Claim for Reimbursement as determined necessary through its claim review process or otherwise. In taking such corrective action, State agencies may make upward adjustments in Program funds claimed on claims filed within the 60 day deadline if such adjustments are completed within 90 days of the last day of the claim month and are reflected in the final Report of School Program Operations (FNS–10) for the claim month which is required under § 220.13(b)(2). Upward adjustments in Program funds claimed which are not reflected in the final FNS–10 for the claim month shall not be made unless authorized by FNS. Downward adjustments in Program funds claimed shall always be made, without FNS authorization, regardless of when it is determined that such adjustments are necessary.

(c) Where a school participates in both the National School Lunch Program and the School Breakfast Program, the State agency or FNSRO, where applicable, may authorize the submission of one claim for reimbursement to cover both programs.

(d) [Reserved]

(e) Notwithstanding any other provision of this section, the State agency, or FNSRO where applicable, may advance funds available for the School Breakfast Program to a School Food Authority in an amount equal to the reimbursement estimated for the total number of breakfasts, including free and reduced price breakfasts, to be served to children for 1 month. The State agency, or FNSRO where applicable, shall require School Food Authorities who receive advances of funds under the provisions of this paragraph to make timely submissions of claims for reimbursement on a monthly basis and shall suspend advances of funds in the absence of such timely submissions. Following the receipt of claims the State agency, or FNSRO where applicable, shall make such adjustments as are necessary in such advances of funds to insure that the total amount of reimbursement received by a School Food Authority for the fiscal year will not exceed an amount equal to the number of breakfasts, including free and reduced price breakfast, served to children times the respective rates of reimbursement assigned by the State

agency, or FNSRO where applicable, in accordance with § 220.9.

(Title 1, Chapter I, Pub. L. 96–38, 93 Stat. 98 (42 U.S.C. 1776a); secs. 807 and 808, Pub. L. 97–35, 95 Stat. 521–535, 42 U.S.C. 1772, 1784, 1760; sec. 819, Pub. L. 97–35, 95 Stat. 533 (42 U.S.C. 1759a, 1773, 1757); Pub. L. 97–370, 96 Stat. 1806)

[32 FR 35, Jan. 5, 1967, as amended by Amdt. 9, 37 FR 9613, May 13, 1972; 40 FR 30924, July 24, 1975; 45 FR 82622, Dec. 16, 1980; 47 FR 31376, July 20, 1982; 48 FR 40196, Sept. 6, 1983; Amdt. 49, 49 FR 18987, May 4, 1984; 64 FR 50742, Sept. 20, 1999]

§ 220.12 Competitive food services.

(a) State agencies and School Food Authorities shall establish such rules or regulations as are necessary to control the sale of foods in competition with breakfasts served under the Program. Such rules or regulations shall prohibit the sale of foods of minimal nutritional value, as listed in appendix B of this part, in the food service areas during the breakfast periods. The sale of other competitive foods may, at the discretion of the State agency and the School Food Authority, be allowed in the food service area during the breakfast period only if all income from the sale of such foods accrues to the benefit of the nonprofit school food service or the school or student organizations approved by the school. State agencies and School Food Authorities may impose additional restrictions on the sale of and income from all foods sold at any time throughout schools participating in the School Breakfast Program.

(b)(1) Any person may submit a petition to FNS requesting that an individual food be exempted from a category of foods of minimal nutritional value listed in appendix B. In the case of artificially sweetened foods, the petition must include a statement of the percent of RDI for the eight nutrients listed in § 220.2(i–1) that the food provides per serving and the petitioner's source of this information. In the case of all other foods, the petition must include a statement of the percent of RDI for the eight nutrients listed in § 220.2(i–1) that the food provides per serving and per 100 calories and the petitioner's source of this information. The Department will determine whether or not the individual food is a food of minimal nutritional value as defined § 220.2(i–1), and will inform the petitioner in writing of such determination, and the public by notice in the FEDERAL REGISTER as indicated under paragraph (b)(3) of this section. In determining whether an individual food is a food of minimal nutritional value, discrete nutrients added to the food will not be taken into account.

(2) Any person may submit a petition to FNS requesting that foods in a particular category of foods be classified as foods of minimal nutritional value as defined in § 220.2(i–1). The petition must identify and define the food category in easily understood language, list examples of the foods contained in the category and include a list which the foods in that category usually contain. If, upon review of the petition, the Department determines that the foods in that category should not be classified as foods of minimal nutritional value, the petitioner will be so notified in writing. If upon review of the petition, the Department determines that there is a substantial likelihood that the foods in that category should be classified as foods of minimal nutritional value as defined in § 220.2(i–1), the Department shall at that time inform the petitioner. In addition, the Department shall publish a proposed rule restricting the sale of the foods in that category, setting forth the reasons for this action, and soliciting public comments. On the basis of comments received within 60 days of publication of the proposed rule and other available information, the Department will determine whether the nutrient composition of the foods indicates that the category should be classified as a category of foods of minimal nutritional value.

The petitioner shall be notified in writing and the public shall be notified of the Department's final determination upon publication in the FEDERAL REGISTER as indicated under section (b)(3) of this section.

(3) By May 1 and November 1 of each year, the Department shall amend appendix B to exclude those individual foods identified under paragraph (b)(1) of this section, and to include those categories of foods identified under

paragraph (b)(2) of this section, *Provided* That there are necessary changes.

(Sec. 819, Pub. L. 97–35, 95 Stat. 533 (42 U.S.C. 1759a, 1773 and 1757))

[Amdt. 32, 45 FR 6771, Jan. 29, 1980, as amended by Amdt. 34, 45 FR 76937, Nov. 21, 1980; 50 FR 20547, May 17, 1985; 59 FR 23614, May 6, 1994]

§ 220.13 Special responsibilities of State agencies.

(a) [Reserved]

(a–1) Each State agency, or FNSRO where applicable, shall require each School Food Authority of a school participating in the School Breakfast Program to develop and file for approval a free and reduced price policy statement in accordance with paragraph (a) of § 220.7.

(b) *Records and reports.* (1) Each State agency shall maintain Program records as necessary to support the reimbursement payments made to School Food Authorities under § 220.9 and the reports submitted to FNS under § 220.13(b)(2). The records may be kept in their original form or on microfilm, and shall be retained for a period of three years after the date of submission of the final Financial Status Report for the fiscal year, except that if audit findings have not been resolved, the records shall be retained beyond the three-year period as long as required for the resolution of the issues raised by the audit.

(2) Each State agency shall submit to FNS a final Report of School Program Operations (FNS–10) for each month which shall be limited to claims submitted in accordance with § 220.11(b) and which shall be postmarked and/or submitted no later than 90 days following the last day of the month covered by the report. States shall not receive Program funds for any month for which the final report is not submitted within this time limit unless FNS grants an exception. Upward adjustments to a State agency's report shall not be made after 90 days from the month covered by the report unless authorized by FNS. Downward adjustments shall always be made, without FNS authorization, regardless of when it is determined that such adjustments are necessary. Adjustments shall be reported to FNS in accordance with procedures established by FNS. Each State agency shall also submit to FNS a quarterly Financial Status Report (SF–269) on the use of Program funds. Such reports shall be postmarked and/or submitted no later than 30 days after the end of each fiscal year quarter. Obligations shall be reported only for the fiscal year in which they occur. A final Financial Status Report for each fiscal year shall be postmarked and/or submitted to FNS within 120 days after the end of the fiscal year. FNS shall not be responsible for reimbursing unpaid Program obligations reported later than 120 days after the close of the fiscal year in which they were incurred.

(c) Each State agency shall promptly investigate complaints received or irregularities noted in connection with the operation of either program, and shall take appropriate action to correct any irregularities. State Agencies shall maintain on file evidence of such investigations and actions. FNS or OI shall make investigations at the request of the State Agency or where FNS or OI determines investigations are appropriate.

(d) The State agency shall release to FNS any Federal funds made available to it under the Act which are unobligated at the end of each fiscal year. Any such funds shall remain available to FNS for the purposes of the programs authorized by the Act until expended. Release of funds by the State Agency shall be made as soon as practicable, but in any event not later than 30 days following demand by FNSRO and shall be reflected by related adjustment in the State Agency's Letter of Credit.

(e) State agencies shall provide School Food Authorities with monthly information on foods available in plentiful supply, based on information provided by the Department.

(f) Each State agency shall provide program assistance as follows:

(1) Each State agency or FNSRO where applicable shall provide consultative, technical, and managerial personnel to administer programs, monitor performance, and measure progress toward achieving program goals.

(2) State agencies shall conduct reviews of schools participating in the

Program for compliance with the provisions of this part when such schools are being reviewed under the provisions identified under § 210.18(i) of this title. Compliance reviews of participating schools shall focus on the reviewed school's compliance with the required certification, counting and breakfast service procedures. School food authorities may appeal a denial of all or a part of the Claim for Reimbursement or withholding of payment arising from review activity conducted by the State agency under § 210.18 of this title or by FNS under § 210.30(d)(2) of this title. Any such appeal shall be subject to the procedures set forth under § 210.18(q) of this title or § 210.30(d)(3) of this title, as appropriate.

(3) For the purposes of compliance with the nutrition standards in § 220.8(a) and the nutrient and calorie levels in § 220.8(b) or (c) or those developed under § 220.8(e)(1) or (h), the State agency shall follow the provisions specified § 210.19(a)(1) of this chapter.

(4) Such assistance shall include visits to participating schools to ensure compliance with program regulations and with the Department's nondiscrimination regulations (part 15 of this title), issued under title VI, of the Civil Rights Act of 1964.

(5) Documentation of such assistance shall be maintained on file by the State agency, or FNSRO where applicable.

(g) State agencies shall adequately safeguard all assets and assure that they are used solely for authorized purposes.

(h) [Reserved]

(i) Each State agency, or FNS where applicable, shall establish a financial management system under which School Food Authorities shall account for all revenues and expenditures of their nonprofit school food service. The system shall prescribe the allowability of nonprofit school food service expenditures in accordance with this part and, as applicable, the cost principles contained in OMB Circular A–87 and 7 CFR part 3015. The system shall permit determination of school food service net cash resources, and shall include any criteria for approval of net cash resources in excess of three months average expenditures. In addition, School Food Authorities shall be required to account separately for other food services which are operated by the School Food Authority.

(j) During audits, supervisory assistance reviews, or by other means, State agencies, or FNSROs where applicable, shall be responsible for monitoring the net cash resources of the nonprofit school food service of each School Food Authority participating in the Program. In the event that such resources exceed three months average expenditures for the School Food Authority's nonprofit school food service, or such amount as may be approved by the State agency or FNSRO where applicable, the State agency or FNSRO where applicable, may require the School Food Authority to reduce children's prices, improve food quality or take other actions designed to improve the nonprofit school food service. In the absence of any such action, adjustments in the rates of reimbursement under the Program shall be made.

(k)State agencies shall require compliance by School Food Authorities with applicable provisions of this part.

(44 U.S.C. 3506; sec. 812, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1759a); sec. 819, Pub. L. 97–35, 95 Stat. 533 (42 U.S.C. 1759a, 1773 and 1757); Pub. L. 79–396, 60 Stat. 231 (42 U.S.C. 1751); Pub. L. 89–642, 80 Stat 885–890 (42 U.S.C. 1773); Pub. L. 91–248, 84 Stat. 207 (42 U.S.C. 1759))

[32 FR 37, Jan. 5, 1967. Redesignated by Amdt. 2, 33 FR 14513, Sept. 27, 1968]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 220.13, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 220.14 Claims against school food authorities.

(a) State agencies shall disallow any portion of a claim and recover any payment made to a School Food Authority that was not properly payable under this part. State agencies will use their own procedures to disallow claims and recover overpayments already made.

(b) [Reserved]

(c) The State agency may refer to CND through the FNSRO for determination any action it proposes to take under this section.

(d) The State agency shall maintain all records pertaining to action taken

under this section. Such records shall be retained for a period of 3 years after the end of the fiscal year to which they pertain.

(e) If CND does not concur with the State agency's action in paying a claim or a reclaim, or in failing to collect an overpayment, CND shall assert a claim against the State agency for the amount of such claim, reclaim, or overpayment. In all such cases the State agency shall have full opportunity to submit to CND evidence or information concerning the action taken. If, in the determination of CND, the State agency's action was unwarranted, the State agency shall promptly pay to FNS the amount of the claim, reclaim, or overpayment.

(f) The amounts recovered by the State agency from Schools may be utilized, first, to make payments to School Food Authorities for the purposes of the related program during the fiscal year for which the funds were initially available, and second to repay any State funds expended in the reimbursement of claims under the program and not otherwise repaid. Any amounts recovered which are not so utilized shall be returned to FNS in accordance with the requirements of this part.

(g) With respect to School Food Authorities of schools in which the program is administered by FNSRO, when FNSRO disallows a claim or a portion of a claim, or makes a demand for refund of an alleged overpayment, it shall notify the School Food Authority of the reasons for such disallowance or demand and the School Food Authority shall have full opportunity to submit evidence or to file reclaims for any amounts disallowed or demanded in the same manner as that afforded in this section to School Food Authorities of schools in which the program is administered by State agencies.

(h) In the event that the State agency or FNSRO, where applicable, finds that a school is failing to meet the requirements of § 220.8(g), § 220.8(i)(2) and (i)(3), whichever is applicable, the State agency or FNSRO need not disallow payment or collect an overpayment arising out of such failure, if the State agency or FNSRO takes such other action as, in its opinion, will have a corrective effect.

(i) The Secretary shall have the authority to determine the amount of, to settle, and to adjust any claim arising under the Program, and to compromise or deny such claim or any part thereof. The Secretary shall also have the authority to waive such claims if the Secretary determines that to do so would serve the purposes of the Program. This provision shall not diminish the authority of the Attorney General of the United States under section 516 of Title 28, U.S. Code, to conduct litigation on behalf of the United States.

(44 U.S.C. 3506; secs. 804, 816 and 817, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1753, 1756, 1759, 1771 and 1785))

[32 FR 37, Jan. 5, 1967. Redesignated by Amdt. 2, 33 FR 14513, Sept. 27, 1968, and amended by Amdt. 9, 37 FR 9614, May 13, 1972; 40 FR 30925, July 24, 1975. Redesignated and amended by Amdt. 25, 41 FR 34757, 34760, Aug. 17, 1976; 47 FR 746, Jan. 7, 1982; Amdt. 42, 47 FR 14134, Apr. 2, 1982; 60 FR 31222, June 13, 1995; 65 FR 26931, May 9, 2000]

§ 220.15 Management evaluations and audits.

(a) State agencies and school food authorities shall comply with the requirements of part 3015 of this title concerning the audit requirements for recipients and subrecipients of the Department's financial assistance.

(b) These requirements call for organization-wide financial and compliance audits to ascertain whether financial operations are conducted properly; financial statements are presented fairly; recipients and subrecipients comply with the laws and regulations that affect the expenditures of Federal funds; recipients and subrecipients have established procedures to meet the objectives of federally assisted programs; and recipients and subrecipients are providing accurate and reliable information concerning grant funds. States and school food authorities shall use their own procedures to arrange for and prescribe the scope of independent audits, provided that such audits comply with the requirements set forth in part 3016 of this title.

(c) Each State agency shall provide FNS with full opportunity to conduct management evaluations (including visits to schools) of all operations of the State agency under the programs

covered by this part and shall provide OA with full opportunity to conduct audits (including visits to schools) of all operations of the State agency under such programs. Each State agency shall make available its records, including records of the receipt and expenditure of funds under such programs, upon a reasonable request by FNS or OA. OA shall also have the right to make audits of the records and operations of any school.

(d) In conducting management evaluations, reviews or audits for any fiscal year, the State agency, FNS, or OIG may disregard any overpayment if the total overpayment does not exceed $600 or, in the case of State agency claims in State administered Programs, it does not exceed the amount established under State law, regulations or procedure as a minimum amount for which claim will be made for State losses but not to exceed $600. However, no overpayment is to be disregarded where there is substantial evidence of violations of criminal law or civil fraud statutes.

(Secs. 805 and 819, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1773); sec. 812, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1759a))

[40 FR 30925, July 24, 1975. Redesignated and amended by Amdt. 25, 41 FR 34757, 34760, Aug. 17, 1976; 43 FR 59825, Dec. 22, 1978; Amdt. 41, 47 FR 14135, Apr. 2, 1982; Amdt. 43, 47 FR 18564, Apr. 30, 1982; Amdt. 56, 54 FR 2990, Jan. 23, 1989; 57 FR 38587, Aug. 26, 1992; 59 FR 1894, Jan. 13, 1994; 64 FR 50742, Sept. 20, 1999]

§ 220.16 Procurement standards.

(a) *Requirements*. State agencies and School Food Authorities shall comply with the requirements of the Office of Management and Budget (OMB) Circular A–102 and the Department's Uniform Federal Assistance Regulations, 7 CFR part 3015, subpart S (46 FR 55658) concerning the procurement of supplies, food, equipment and other services with Program funds. These requirements are adopted by FNS to ensure that such materials and services are obtained for the Program efficiently and economically and in compliance with applicable laws and executive orders.

(b) *Contractual responsibilities*. The standards contained in OMB Circular A–102 and 7 CFR 3015, do not relieve the State agency or School Food Authority of any contractual responsibilities under its contract. The State agency or School Food Authority is the responsible authority, without recourse to FNS, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in connection with the Program. This includes but is not limited to: source evaluation, protests, disputes, claims, or other matters of a contractual nature. Matters concerning violation of law are to be referred to the local, State or Federal authority that has proper jurisdiction.

(c) *Procurement procedure*. The State agency or School Food Authority may use their own procurement procedures which reflect applicable State and local laws and regulations, provided that procurements made with Program funds adhere to the standards set forth in OMB Circular A–102 and 7 CFR part 3015.

(d) *Buy American*.—(1) *Definition of domestic commodity or product*. In this paragraph (d), the term ''domestic commodity or product'' means—

(i) An agricultural commodity that is produced in the United States; and

(ii) A food product that is processed in the United States substantially using agricultural commodities that are produced in the United States.

(2) *Requirement*.—(i) *In general*. Subject to paragraph (d)(2)(ii) of this section, the Department shall require that a school food authority purchase, to the maximum extent practicable, domestic commodities or products.

(ii) *Limitations*. Paragraph (d)(2)(i) of this section shall apply only to—

(A) A school food authority located in the contiguous United States; and

(B) A purchase of domestic commodity or product for the school breakfast program under this part.

(3) *Applicability to Hawaii*. Paragraph (d)(2)(i) of this section shall apply to a school food authority in Hawaii with respect to domestic commodities or products that are produced in Hawaii in sufficient quantities to meet the needs of meals provided under the

school breakfast program under this part.

(Pub. L. 79–396, 60 Stat. 231 (42 U.S.C. 1751); Pub. L. 89–642, 80 Stat. 885–890 (42 U.S.C. 1773); Pub. L. 91–248, 84 Stat. 207 (42 U.S.C. 1759))

[Amdt. 45, 48 FR 19355, Apr. 29, 1983, as amended at 64 FR 50743, Sept. 20, 1999]

§ 220.17 Prohibitions.

(a) In carrying out the provisions of this part, the Department shall not impose any requirements with respect to teaching personnel, curriculum, instructions, methods of instruction, and materials of instruction in any school as a condition for participation in the Program.

(b) The value of assistance to children under the Act shall not be considered to be income or resources for any purposes under any Federal or State laws, including, but not limited to, laws relating to taxation, welfare, and public assistance programs. Expenditure of funds from State and local sources for the maintenance of food programs for children shall not be diminished as a result of funds received under the Act.

[32 FR 37, Jan. 5, 1967. Redesignated by Amdt. 2, 33 FR 14513, Sept. 27, 1968. Redesignated and amended by Amdt. 25, 41 FR 34757, 34760, Aug. 17, 1976; 64 FR 50743, Sept. 20, 1999]

§ 220.18 Suspension, termination and grant closeout procedures.

Whenever it is determined that a State agency has materially failed to comply with the provisions of this part, or with FNS guidelines and instructions, FNS may suspend or terminate the Program in whole, or in part, or take any other action as may be available and appropriate. A State agency may also terminate the Program by mutual agreement with FNS. FNS and the State agency shall comply with the provisions of the Department's Uniform Federal Assistance Regulations, 7 CFR part 3015, subpart N concerning grant suspension, termination and closeout procedures. Furthermore, the State agency or FNSRO were applicable, shall apply these provisions to suspension or termination of the Program in School Food Authorities.

[Amdt. 49, 49 FR 18988, May 4, 1984]

§ 220.19 Free and reduced price breakfasts.

The determination of the children to whom free and reduced price breakfasts are to be served because of inability to pay the full price thereof, and the serving of the breakfasts to such children, shall be effected in accordance with part 245 of this chapter.

[Amdt. 25, 41 FR 34760, Aug. 17, 1976]

§ 220.20 Program information.

School Food Authorities desiring information concerning the program should write to their State educational agency or to the appropriate Food and Nutrition Service Regional Office as indicated below:

(a) In the States of Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Puerto Rico, Virginia, Virgin Islands, and West Virginia: Mid-Atlantic Regional Office, FNS, U.S. Department of Agriculture, 300 Corporate Boulevard, Robbinsville, New Jersey 08691–1598.

(b) In the States of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee: Southeast Regional Office, FNS, U.S. Department of Agriculture, 161 Forsyth Street SW., Room 8T36, Atlanta, Georgia 30303.

(c) In the States of Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin: Midwest Regional Office, FNS, U.S. Department of Agriculture, 77 West Jackson Boulevard, 20th Floor, Chicago, Illinois 60604–3507.

(d) In the States of Arkansas, Louisiana, New Mexico, Oklahoma, and Texas: Southwest Regional Office, FNS, U.S. Department of Agriculture, 1100 Commerce Street, Room 5–C–30, Dallas, Texas 75242.

(e) In the States of Alaska, American Samoa, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon, the Commonwealth of the Northern Mariana Islands, and Washington: Western Regional Office, FNS, U.S. Department of Agriculture, 550 Kearny Street, Room 400, San Francisco, California 94108.

(f) In the States of Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont: Northeast Regional Office, FNS, U.S. Department of Agriculture, 10 Causeway Street, Room 501, Boston, Massachusetts 02222–1065.

(g) In the States of Colorado, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah, and Wyoming: Mountain Plains Regional Office, FNS, U.S. Department of Agriculture, 1244 Speer Boulevard, Suite 903, Denver, Colorado 80204.

(Sec. 10(a), Pub. L. 95–627, 92 Stat. 3623 (42 U.S.C. 1760); sec. 10(d)(3), Pub. L. 95–627, 92 Stat. 3624 (42 U.S.C. 1757); sec. 14, Pub. L. 95–627, 92 Stat. 3625–3626; secs. 804, 816, 817 and 819, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1753, 1756, 1759, 1771, 1773, and 1785))

[32 FR 37, Jan. 5, 1967. Redesignated at 49 FR 18988, May 4, 1984]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 220.20, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 220.21 Information collection/recordkeeping—OMB assigned control numbers.

7 CFR section where requirements are described	Current OMB control number
220.3(e)	0584–0327
220.5	0584–0012
220.7(a)–(e)	0584–0329 0584–0012 0584–0026
220.8(f)	0584–0012
220.9(a)	0584–0012
220.11 (a), (b), (e)	0584–0012 0584–0002 0584–0341
220.12(b)	0584–0012
220.13 (a–1)–(c), (f)	0584–0026 0584–0002 0584–0341 0584–0012
220.14(d)	0584–0012
220.15	0584–0012

[Amdt. 56, 54 FR 2990, Jan. 23, 1989]

APPENDIX A TO PART 220—ALTERNATE FOODS FOR MEALS

I. FORMULATED GRAIN-FRUIT PRODUCTS

1. Schools may utilize the formulated grain-fruit products defined in paragraph 3 as a food component in meeting the meal requirements of this part under the following terms and conditions:

(a) Formulated grain-fruit products may be used to meet *one* bread/bread alternate and the fruit/vegetable requirement in the breakfast pattern specified in § 220.8.

(b) Only individually wrapped formulated grain-fruit products which bear a label conforming to the following legend shall be utilized. ''This product conforms to U.S.D.A. Child Nutrition Program specifications. For breakfast, it meets the requirements for fruit/vegetable/juice and one bread/bread alternate.''

2. Only formulated grain-fruit products that have been accepted by the Food and Nutrition Service (FNS) for use in the USDA child nutrition programs may be labeled as provided in paragraph 1.(b) of this appendix. Manufacturers seeking acceptance of their product shall furnish FNS a chemical analysis, protein efficiency ratio analysis, and such other pertinent data as may be requested by FNS. This information shall be forwarded to: Director, Nutrition and Technical Services Staff, Food and Nutrition Service, U.S. Department of Agriculture, Alexandria, Virginia 22302. All laboratory analyses are to be performed by independent or other laboratories acceptable to FNS. (FNS prefers an independent laboratory.) All laboratories shall retain the ''raw'' laboratory data for a period of one year. Such information shall be made available to FNS upon request.

3. To be accepted by FNS, products must have the following characteristics and meet the following nutritional specifications:

(a) Types. There are two types of products: one is a grain-type product and the other a grain-fruit type product.

(b) Ingredients. A grain-type product shall have grain as its primary ingredient. A grain-fruit type product shall have fruit as its primary ingredient. Both types of products must have at least 25 percent of their weight derived from grain. All ingredients and/or components shall comply with pertinent requirements or standards of the USDA and the Food, Drug, and Cosmetic Act, as amended, and any regulations issued thereunder.

(c) Nutritional specifications. Each serving of the product shall meet the minimum compositional requirements in the following table. The requirements as specified for those nutrients not limited by maximum values will be deemed to have been met if reasonable overages of the vitamins and minerals, within the limits of good manufacturing practice, are present to insure that the required levels are maintained throughout the expected shelf life under customary conditions of distribution and storage. An exception will be made for vitamins or minerals which occur naturally in an ingredient at such concentration that the level specified will be substantially exceeded in the final product. Such excess will be permitted

but no lable claim of nutritional advantage can be made for overages for any nutrients. Analytical methods employed should be according to the standard procedures defined in the Association of Official Analytical Chemists, 1970, ''Official Methods of Analysis,'' 11th edition, Washington, DC or by appropriate analytical procedures FNS considers reliable.

NUTRITIONAL LEVELS OF GRAIN-FRUIT PRODUCTS [1]

Nutrient	Unit	Minimum	Maximum
Weight	Ounce	2	4.0
PER	Casein=2.5	2.0	.....
Moisture	Percent weight	.....	40.0
Fat [2]	.....do	.....	22.0
Fiber	.....do	.....	0.8
Protein (N×6.25)	Gram	5.0	.....
Energy	Kilocalorie	250	.....
Vitamin A [3]	International unit	1,115	1,675.0
Vitamin E	.....do	5	.....
Vitamin B_{12}	Microgram	1.25	.....
Thiamin	Milligram	.26	.....
Riboflavin	.....do	.13	.....
Vitamin B_6	.....do	.26	.....
Vitamin C	.....do	20	.....
Niacin	.....do	2.65	.....
Folacin	.....do	.04	.....
Iron [4]	.....do	4.4	.....
Calcium	.....do	120	.....
Phosphorus	.....do	120	.....
Magnesium	.....do	30	.....

[1] These specifications are based on a nutrient level for acceptable products plus ½ pint of fluid milk (as defined in § 220.2 of the regulations (7 CFR part 220)) to provide at least 25 percent of the Recommended Dietary Allowances (RDA), 1968, for 10– to 12–year-old boys and girls for specified nutrients except magnesium and kilocalories. Magnesium and kilocalories—at least 13 percent of this RDA.

[2] Although the maximum fat in these specifications is 22 percent, consideration should be given to the development of formulated items containing less fat. Most medical authorities recommend keeping the dietary intake of fats at about ⅓ of the day's calories. At least 5 percent of the total calories shall be from linoleic acid.

[3] Vitamin A levels above the maximum of 1,675 I.U. will be allowed in products containing this nutrient as a natural food, and if the vitamin has not been added to the ingredients or foods.

[4] Recommended sources of iron are ferric ammonium citrate, ferrous fumarate, ferrous sulfates ($FeSO_4$ or $FeSO_4$ $7H_2O$), ferrous gluconate, reduced iron, or other sources known to have a similar relative biological value.

II. ALTERNATE PROTEIN PRODUCTS

A. What Are the Criteria for Alternate Protein Products Used in the School Breakfast Program?

1. An alternate protein product used in meals planned under the food-based menu planning approaches in § 220.8(g), must meet all of the criteria in this section.

2. An alternate protein product whether used alone or in combination with meat or other meat alternates must meet the following criteria:

a. The alternate protein product must be processed so that some portion of the nonprotein constituents of the food is removed. These alternate protein products must be safe and suitable edible products produced from plant or animal sources.

b. The biological quality of the protein in the alternate protein product must be at least 80 percent that of casein, determined by performing a Protein Digestibility Corrected Amino Acid Score (PDCAAS).

c. The alternate protein product must contain at least 18 percent protein by weight when fully hydrated or formulated. (''When hydrated or formulated'' refers to a dry alternate protein product and the amount of water, fat, oil, colors, flavors or any other substances which have been added).

d. Manufacturers supplying an alternate protein product to participating schools or institutions must provide documentation that the product meets the criteria in paragraphs A.2. a through c of this appendix.

e. Manufacturers should provide information on the percent protein contained in the dry alternate protein product and on an as prepared basis.

f. For an alternate protein product mix, manufacturers should provide information on:

(1) The amount by weight of dry alternate protein product in the package;

(2) Hydration instructions; and

(3) instructions on how to combine the mix with meat or other meat alternates.

B. How Are Alternate Protein Products Used in the School Breakfast Program?

1. Schools, institutions, and service institutions may use alternate protein products to fulfill all or part of the meat/meat alternate component discussed in § 220.8. The following terms and conditions apply:

a. The alternate protein product may be used alone or in combination with other food ingredients. Examples of combination items are beef patties, beef crumbles, pizza topping, meat loaf, meat sauce, taco filling, burritos, and tuna salad.

b. Alternate protein products may be used in the dry form (nonhydrated), partially hydrated or fully hydrated form. The moisture content of the fully hydrated alternate protein product (if prepared from a dry concentrated form) must be such that the mixture will have a minimum of 18 percent protein by weight or equivalent amount for the dry or partially hydrated form (based on the level that would be provided if the product were fully hydrated).

C. How Are Commercially Prepared Products Used in the School Breakfast Program?

Schools, institutions, and service institutions may use a commercially prepared meat or other meat alternate products combined with alternate protein products or use a

commercially prepared product that contains only alternate protein products.

(Secs. 804, 816, 817, and 819, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1753, 1756, 1759, 1771, 1773 and 1785))

[Amdt. 18, 39 FR 11249, Mar. 27, 1974, as amended at 40 FR 37027, Aug. 25, 1975; Amdt. 45, 48 FR 195, Jan. 4, 1983; Amdt. 57, 54 FR 13048, Mar. 30, 1989; 60 FR 31222, June 13, 1995; 65 FR 12436, Mar. 9, 2000; 65 FR 26923, May 9, 2000]

APPENDIX B TO PART 220—CATEGORIES OF FOODS OF MINIMAL NUTRITIONAL VALUE

(1) Soda Water—A class of beverages made by absorbing carbon dioxide in potable water. The amount of carbon dioxide used is not less than that which will be absorbed by the beverage at a pressure of one atmosphere and at a temperature of 60° F. It either contains no alcohol or only such alcohol, not in excess of 0.5 percent by weight of the finished beverage, as is contributed by the flavoring ingredient used. No product shall be excluded from this definition because it contains artificial sweeteners or discrete nutrients added to the food such as vitamins, minerals and protein.

(2) *Water ices*. As defined by 21 CFR 135.160 Food and Drug Administration Regulations except that water ices which contain fruit or fruit juices are not included in this definition.

(3) *Chewing gum*. Flavored products from natural or synthetic gums and other ingredients which form an insoluble mass for chewing.

(4) *Certain candies*. Processed foods made predominantly from sweeteners or artificial sweeteners with a variety of minor ingredients which characterize the following types:

(a) *Hard candy*. A product made predominantly from sugar (sucrose) and corn syrup which may be flavored and colored, is characterized by a hard, brittle texture, and includes such items as sour balls, fruit balls, candy sticks, lollipops, starlight mints, after dinner mints, sugar wafers, rock candy, cinnamon candies, breath mints, jaw breakers and cough drops.

(b) *Jellies and gums*. A mixture of carbohydrates which are combined to form a stable gelatinous system of jelly-like character, and are generally flavored and colored, and include gum drops, jelly beans, jellied and fruit-flavored slices.

(c) *Marshmallow candies*. An aerated confection composed of sugar, corn syrup, invert sugar, 20% water and gelatin or egg white to which flavors and colors may be added.

(d) *Fondant*. A product consisting of microscopic-sized sugar crystals which are separated by a thin film of sugar and/or invert sugar in solution such as candy corn, soft mints.

(e) *Licorice*. A product made predominantly from sugar and corn syrup which is flavored with an extract made from the licorice root.

(f) *Spun candy*. A product that is made from sugar that has been boiled at high temperature and spun at a high speed in a special machine.

(g) *Candy coated popcorn*. Popcorn which is coated with a mixture made predominantly from sugar and corn syrup.

SCHEDULE FOR AMENDING APPENDIX B

Actions for publication	Publication	
	May	November
Deadline for receipt of petitions by USDA.	Nov. 15	May 15.
USDA to notify petitioners of results of Departmental review and publish proposed rule (if applicable).	Feb. 1	Aug. 1.
60 Day Comment Period.	Feb 1 through Apr. 1.	Aug. 1 through Oct. 1.
Public Notice of Amendment of Appendix B by.	May 1	Nov. 1.

Written petitions should be sent to the Chief, Technical Assistance Branch, Nutrition and Technical Services Divisions, FNS, USDA, Alexandria, Virginia 22302 on or before November 15 or May 15 of each year. Petitions must include all information specified in §210.15b(b) (1) or (2), and §220.12(b) (1) or (2) as appropriate.

(Sec. 17, Pub. L. 95–166, 91 Stat. 1345 (42 U.S.C. 1779); secs. 804, 816, 817 and 819, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1753, 1756, 1759, 1771, 1773 and 1785))

[Amdt. 32, 45 FR 6772, Jan. 29, 1980, as amended at 45 FR 72081, Oct. 31, 1980; 45 FR 76937, Nov. 21, 1980; Amdt. 45, 48 FR 195, Jan. 4, 1983; 54 FR 18466, May 1, 1989]

APPENDIX C TO PART 220—CHILD NUTRITION (CN) LABELING PROGRAM

1. The Child Nutrition (CN) Labeling Program is a voluntary technical assistance program administered by the Food and Nutrition Service (FNS) in conjunction with the Food Safety and Inspection Service (FSIS), and Agricultural Marketing Service (AMS) of the U.S. Department of Agriculture (USDA), and National Marine Fisheries Service of the U.S. Department of Commerce (USDC) for the Child Nutrition Programs. This program essentially involves the review of a manufacturer's recipe or product formulation to determine the contribution a serving of a commercially prepared product makes toward meal pattern requirements

and a review of the CN label statement to ensure its accuracy. CN labeled products must be produced in accordance with all requirements set forth in this rule.

2. Products eligible for CN labels are as follows:

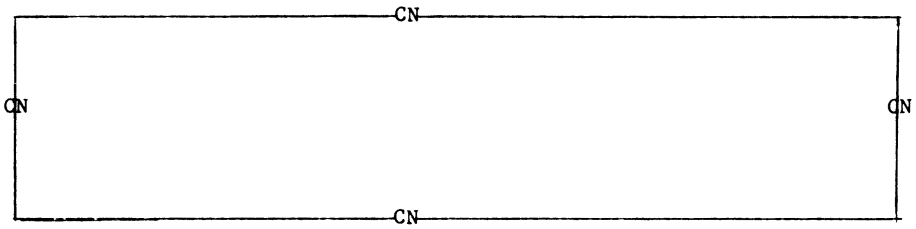
(a) Commercially prepared food products that contribute significantly to the meat/meat alternate component of meal pattern requirements of 7 CFR 210.10 or 210.10a, whichever is applicable, 225.21, and 226.20 and are served in the main dish.

(b) Juice drinks and juice drink products that contain a minimum of 50 percent full-strength juice by volume.

3. For the purpose of this appendix the following definitions apply:

(a) ''CN label'' is a food product label that contains a CN label statement and CN logo as defined in paragraph 3 (b) and (c) below.

(b) The ''CN logo'' (as shown below) is a distinct border which is used around the edges of a ''CN label statement'' as defined in paragraph 3(c).



(c) The ''CN label statement'' includes the following:

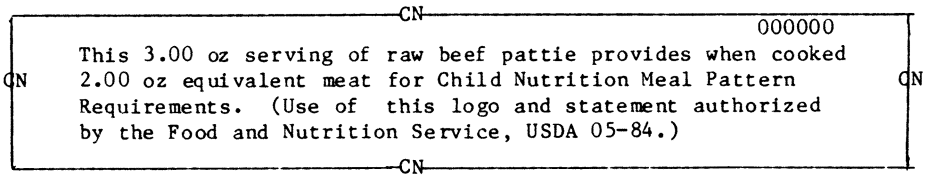
(1) The product identification number (assigned by FNS),

(2) The statement of the product's contribution toward meal pattern requirements of 7 CFR 210.10 or 210.10a, whichever is applicable, 220.8, 225.21, and 226.20. The statement shall identify the contribution of a specific portion of a meat/meat alternate product toward the meat/meat alternate, bread/bread alternate, and/or vegetable/fruit component of the meal pattern requirements. For juice drinks and juice drink products the statement shall identify their contribution toward the vegetable/fruit component of the meal pattern requirements,

(3) Statement specifying that the use of the CN logo and CN statement was authorized by FNS, and

(4) The approval date.

For example:



(d) *Federal inspection* means inspection of food products by FSIS, AMS or USDC.

4. Food processors or manufacturers may use the CN label statement and CN logo as defined in paragraph 3 (b) and (c) under the following terms and conditions:

(a) The CN label must be reviewed and approved at the national level by the Food and Nutrition Service and appropriate USDA or USDC Federal agency responsible for the inspection of the product.

(b) The CN labeled product must be produced under Federal inspection by USDA or USDC. The Federal inspection must be performed in accordance with an approved partial or total quality control program or standards established by the appropriate Federal inspection service.

(c) The CN label statement must be printed as an integral part of the product label along with the product name, ingredient listing, the inspection shield or mark for the appropriate inspection program, the establishment number where appropriate, and the manufacturer's or distributor's name and address.

(1) The inspection marking for CN labeled non-meat, non-poultry, and non-seafood

products with the exception of juice drinks and juice drink products is established as follows:

INSPECTED BY THE U.S. DEPT. OF AGRICULTURE IN ACCORDANCE WITH FNS REQUIREMENTS

(d) Yields for determining the product's contribution toward meal pattern requirements must be calculated using the *Food Buying Guide for Child Nutrition Programs* (Program Aid Number 1331).

5. In the event a company uses the CN logo and CN label statement inappropriately, the company will be directed to discontinue the use of the logo and statement and the matter will be referred to the appropriate agency for action to be taken against the company.

6. Products that bear a CN label statement as set forth in paragraph 3(c) carry a warranty. This means that if a food service authority participating in the child nutrition programs purchases a CN labeled product and uses it in accordance with the manufacturer's directions, the school or institution will not have an audit claim filed against it for the CN labeled product for noncompliance with the meal pattern requirements of 7 CFR 210.10 or 210.10a, whichever is applicable, 220.8, 225.21, and 226.20. If a State or Federal auditor finds that a product that is CN labeled does not actually meet the meal pattern requirements claimed on the label, the auditor will report this finding to FNS. FNS will prepare a report of the findings and send it to the appropriate divisions of FSIS and AMS of the USDA, National Marine Fisheries Services of the USDC, Food and Drug Administration, or the Department of Justice for action against the company.

Any or all of the following courses of action may be taken:

(a) The company's CN label may be revoked for a specific period of time;

(b) The appropriate agency may pursue a misbranding or mislabeling action against the company producing the product;

(c) The company's name will be circulated to regional FNS offices;

(d) FNS will require the food service program involved to notify the State agency of the labeling violation.

7. FNS is authorized to issue operational policies, procedures, and instructions for the CN Labeling Program.

To apply for a CN label and to obtain additional information on CN label application procedures write to: CN Labels, U.S. Department of Agriculture, Food and Nutrition Service, Nutrition and Technical Services Division, 3101 Park Center Drive, Alexandria, Virginia 22302.

(National School Lunch Act, secs. 9, 13, 17; 42 U.S.C. 1758, 1761, 1766; 7 CFR 210.10, 220.8, 225.21, 226.20)

[49 FR 18457, May 1, 1984; 49 FR 45109, Nov. 15, 1984; 60 FR 31222, June 13, 1995; 65 FR 26923, May 9, 2000]

PART 225—SUMMER FOOD SERVICE PROGRAM

Subpart A—General

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225.2 Definitions.
225.3 Administration.

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225.5 Payments to State agencies and use of Program funds.
225.6 State agency responsibilities.
225.7 Program monitoring and assistance.
225.8 Records and reports.
225.9 Program assistance to sponsors.
225.10 Audits and management evaluations.
225.11 Corrective action procedures.
225.12 Claims against sponsors.
225.13 Appeal procedures.

Subpart C—Sponsor and Site Provisions

225.14 Requirements for sponsor participation.
225.15 Management responsibilities of sponsors.
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APPENDIX A TO PART 225—ALTERNATE FOODS FOR MEALS

APPENDIX B TO PART 225 [RESERVED]

APPENDIX C TO PART 225—CHILD NUTRITION (CN) LABELING PROGRAM

AUTHORITY: Secs. 9, 13 and 14, National School Lunch Act, as amended (42 U.S.C. 1758, 1761 and 1762a).

SOURCE: 54 FR 18208, Apr. 27, 1989, unless otherwise noted.

Subpart A—General

§ 225.1 General purpose and scope.

This part establishes the regulations under which the Secretary will administer a Summer Food Service Program. Section 13 of the Act authorizes the Secretary to assist States through grants-in-aid to conduct nonprofit food service programs for children during the summer months and at other approved times. The primary purpose of the Program is to provide food service to children from needy areas during periods when area schools are closed for vacation.

§ 225.2 Definitions.

Act means the National School Lunch Act, as amended.

Administrative costs means costs incurred by a sponsor related to planning, organizing, and managing a food service under the Program, and excluding interest costs and operating costs.

Adult means, for the purposes of the collection of social security numbers as a condition of eligibility for Program meals, any individual 21 years of age or older.

Advance payments means financial assistance made available to a sponsor for its operating costs and/or administrative costs prior to the end of the month in which such costs will be incurred.

Areas in which poor economic conditions exist means:

(a) The local areas from which an open site and restricted open site draw their attendance in which at least 50 percent of the children are eligible for free or reduced-price school meals under the National School Lunch Program and the School Breakfast Program, as determined:

(1) By information provided from departments of welfare and education, zoning commissions, census tracts, and organizations determined by the State agency to be migrant organizations;

(2) By the number of free and reduced-price lunches or breakfasts served to children attending public and nonprofit private schools located in the areas of Program sites; or

(3) From other appropriate sources; or

(b) A closed enrolled site.

Camps means residential summer camps and nonresidential day camps which offer a regularly scheduled food service as part of an organized program for enrolled children. Nonresidential camp sites shall offer a continuous schedule of organized cultural or recreational programs for enrolled children between meal services.

Children means (a) persons 18 years of age and under, and (b) persons over 18 years of age who are determined by a State educational agency or a local public educational agency of a State to be mentally or physically handicapped and who participate in a public or nonprofit private school program established for the mentally or physically handicapped.

Closed enrolled site means a site which is open only to enrolled children, as opposed to the community at large, and in which at least 50 percent of the enrolled children at the site are eligible for free or reduced price school meals under the National School Lunch Program and the School Breakfast Program, as determined by approval of applications in accordance with § 225.15(f).

Continuous school calendar means a situation in which all or part of the student body of a school is (a) on a vacation for periods of 15 continuous school days or more during the period October through April and (b) in attendance at regularly scheduled classes during most of the period May through September.

Costs of obtaining food means costs related to obtaining food for consumption by children. Such costs may include, in addition to the purchase price of agricultural commodities and other food, the cost of processing, distributing, transporting, storing, or handling any food purchased for, or donated to, the Program.

Current income means income, as defined in § 225.15(f)(4)(vi), received during the month prior to application for free meals. If such income does not accurately reflect the household's annual income, income must be based on the projected annual household income. If the prior year's income provides an accurate reflection of the household's current annual income, the prior year may be used as a base for the projected annual income.

Department means the U.S. Department of Agriculture.

Disclosure means individual children's program eligibility information obtained through the free and reduced price meal eligibility process that is revealed or used for a purpose other than for the purpose for which the information was obtained. The term refers to access, release, or transfer of personal data about children by means of print, tape, microfilm, microfiche, electronic communication or any other means.

Documentation means:

(a) The completion of the following information on a free meal application:

(1) Names of all household members;

(2) Income received by each household member, identified by source of income (such as earnings, wages, welfare, pensions, support payments, unemployment compensation, social security and other cash income);

(3) The signature of an adult household member; and

(4) The social security number of the adult household member who signs the application, or an indication that he/she does not possess a social security number; or

(b) For a child who is a member of a household receiving food stamp, FDPIR, or TANF benefits, ''documentation'' means completion of only the following information on a free meal application:

(1) The name(s) and appropriate food stamp, FDPIR, or TANF case number(s) for the child(ren); and

(2) the signature of an adult member of the household.

Experienced site means a site which, as determined by the State agency, has successfully participated in the Program in the prior year.

Experienced sponsor means a sponsor which, as determined by the State agency, has successfully participated in the Program in the prior year.

Family means a group of related or nonrelated individuals who are not residents of an institution or boarding house but who are living as one economic unit.

FDPIR household means any individual or group of individuals which is currently certified to receive assistance as a household under the Food Distribution Program on Indian Reservations.

Fiscal year means the period beginning October 1 of any calendar year and ending September 30 of the following calendar year.

FNS means the Food and Nutrition Service of the Department.

FNSRO means the appropriate FNS Regional Office.

Food service management company means any commercial enterprise or nonprofit organization with which a sponsor may contract for preparing unitized meals, with or without milk, for use in the Program, or for managing a sponsor's food service operations in accordance with the limitations set forth in § 225.15. Food service management companies may be: (a) Public agencies or entities; (b) private, nonprofit organizations; or (c) private, for-profit companies.

Food stamp household means any individual or group of individuals which is currently certified to receive assistance as a household under the Food Stamp Program.

Household means ''family,'' as defined in this section.

Income accruing to the program means all funds used by a sponsor in its food service program, including but not limited to all monies, other than program payments, received from Federal, State and local governments, from food sales to adults, and from any other source including cash donations or grants. Income accruing to the Program will be deducted from combined operating and administrative costs.

Income standards means the family-size and income standards prescribed annually by the Secretary for determining eligibility for reduced price meals under the National School Lunch Program and the School Breakfast Program.

Meals means food which is served to children at a food service site and which meets the nutritional requirements set out in this part.

Medicaid means the State medical assistance program under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.).

Milk means whole milk, lowfat milk, skim milk, and buttermilk. All milk must be fluid and pasteurized and must

meet State and local standards for the appropriate type of milk. Milk served may be flavored or unflavored. In Alaska, Hawaii, American Samoa, Guam, Puerto Rico, the Trust Territory of the Pacific Islands, the Northern Mariana Islands, and the Virgin Islands of the United States, if a sufficient supply of such types of fluid milk cannot be obtained, reconstituted or recombined milk may be used. All milk should contain Vitamins A and D at the levels specified by the Food and Drug Administration and at levels consistent with State and local standards for such milk.

Needy children means children from families whose incomes are equal to or below the Secretary's Guidelines for Determining Eligibility for Reduced Price School Meals.

New site means a site which did not participate in the Program in the prior year, or, as determined by the State agency, a site which has experienced significant staff turnover from the prior year.

New sponsor means a sponsor which did not participate in the Program in the prior year, or, as determined by the State agency, a sponsor which has experienced significant staff turnover from the prior year.

NYSP means the National Youth Sports Program administered by the National Collegiate Athletic Association.

NYSP feeding site means a site at which all of the children receiving Program meals are enrolled in the NYSP and which qualifies for Program participation on the basis of documentation that the site meets the definition of ''areas in which poor economic conditions exist'' as provided in this section.

OIG means the Office of the Inspector General of the Department.

Open site means a site at which meals are made available to all children in the area and which is located in an area in which at least 50 percent of the children are from households that would be eligible for free or reduced price school meals under the National School Lunch Program and the School Breakfast Program, as determined in accordance with paragraph (a) of the definition of *Areas in which poor economic conditions exist*.

Operating costs means the cost of operating a food service under the Program,

(a) Including the (1) cost of obtaining food, (2) labor directly involved in the preparation and service of food, (3) cost of nonfood supplies, (4) rental and use allowances for equipment and space, and (5) cost of transporting children in rural areas to feeding sites in rural areas, but

(b) Excluding (1) the cost of the purchase of land, acquisition or construction of buildings, (2) alteration of existing buildings, (3) interest costs, (4) the value of in-kind donations, and (5) administrative costs.

Private nonprofit means tax exempt under the Internal Revenue Code of 1986, as amended.

Private nonprofit organization means an organization (other than private nonprofit residential camps, school food authorities, or colleges or universities participating in the NYSP) which meets the definition of ''private nonprofit'' in this section and which:

(a) Administers the Program:

(1) At no more than 25 sites, with not more than 300 children being served at any approved meal service at any one site; or

(2) With a waiver granted by the State in accordance with § 225.6(b)(ii), not more than 500 children being served at any approved meal service at any one site;

(b) Operates in areas where a school food authority has not indicated that it will operate the Program in the current year;

(c) Exercises full control and authority over the operation of the Program at all sites under its sponsorship;

(d) Provides ongoing year-round activities for children or families;

(e) Demonstrates that it possesses adequate management and the fiscal capacity to operate the Program; and

(f) Meets applicable State and local health, safety, and sanitation standards.

Program means the Summer Food Service Program for Children authorized by Section 13 of the Act.

Program funds means Federal financial assistance made available to State

agencies for the purpose of making Program payments.

Program payments means financial assistance in the form of start-up payments, advance payments, or reimbursement paid to sponsors for operating and administrative costs.

Restricted open site means a site which is initially open to broad community participation, but at which the sponsor restricts or limits attendance for reasons of security, safety or control. Site eligibility for a restricted open site shall be documented in accordance with paragraph (a) of the definition of *Areas in which poor economic conditions exist*.

Rural means (a) any area in a county which is not a part of a Metropolitan Statistical Area or (b) any ''pocket'' within a Metropolitan Statistical Area which, at the option of the State agency and with FNSRO concurrence, is determined to be geographically isolated from urban areas.

School food authority means the governing body which is responsible for the administration of one or more schools and which has the legal authority to operate a lunch program in those schools. In addition, for the purpose of determining the applicability of food service management company registration and bid procedure requirements, ''school food authority'' also means any college or university which participates in the Program.

Secretary means the Secretary of Agriculture.

Self-preparation sponsor means a sponsor which prepares the meals that will be served at its site(s) and does not contract with a food service management company for unitized meals, with or without milk, or for management services.

Session means a specified period of time during which an enrolled group of children attend camp.

Site means a physical location at which a sponsor provides a food service for children and at which children consume meals in a supervised setting.

Special account means an account which a State agency may require a vended sponsor to establish with the State agency or with a Federally insured bank. Operating costs payable to the sponsor by the State agency are deposited in the account and disbursement of monies from the account must be authorized by both the sponsor and the food service management company.

Sponsor means a public or private nonprofit school food authority, a public or private nonprofit residential summer camp, a unit of local, municipal, county or State government, a public or private nonprofit college or university currently participating in the NYSP, or a private nonprofit organization which develops a special summer or other school vacation program providing food service similar to that made available to children during the school year under the National School Lunch and School Breakfast Programs and which is approved to participate in the Program. Sponsors are referred to in the Act as ''service institutions''.

Start-up payments means financial assistance made available to a sponsor for administrative costs to enable it to effectively plan a summer food service, and to establish effective management procedures for such a service. These payments shall be deducted from subsequent administrative cost payments.

State means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Northern Mariana Islands.

State agency means the State educational agency or an alternate agency that has been designated by the Governor or other appropriate executive or legislative authority of the State and which has been approved by the Department to administer the Program within the State, or, in States where FNS administers the Program, FNSRO.

State Children's Health Insurance Program (SCHIP) means the State medical assistance program under title XXI of the Social Security Act (42 U.S.C. 1397aa et seq.).

TANF means the State funded program under part A of title IV of the Social Security Act that the Secretary determines complies with standards established by the Secretary that ensure that the standards under the State program are comparable to or more restrictive than those in effect on June 1,

1995. This program is commonly referred to as Temporary Assistance for Needy Families, although States may refer to the program by another name.

Unit of local, municipal, county or State government means an entity which is so recognized by the State constitution or State laws, such as the State administrative procedures act, tax laws, or other applicable State laws which delineate authority for government responsibility in the State.

Vended sponsor means a sponsor which purchases from a food service management company the unitized meals, with or without milk, which it will serve at its site(s), or a sponsor which purchases management services, subject to the limitations set forth in § 225.15, from a food service management company.

Yogurt means commercially prepared coagulated milk products obtained by the fermentation of specific bacteria, that meet milk fat or milk solid requirements and to which flavoring foods or ingredients may be added. These products are covered by the Food and Drug Administration's Standard of Identity for yogurt, lowfat yogurt, and nonfat yogurt, (21 CFR 131.200), (21 CFR 131.203), (21 CFR 131.206), respectively.

[54 FR 18208, Apr. 27, 1989, as amended at 54 FR 27153, June 28, 1989; 55 FR 13466, Apr. 10, 1990; 61 FR 25553, May 22, 1996; 64 FR 72483, Dec. 28, 1999; 64 FR 72895, Dec. 29, 1999; 66 FR 2202, Jan. 11, 2001]

§ 225.3 Administration.

(a) *Responsibility within the Department.* FNS shall act on behalf of the Department in the administration of the Program.

(b) *State administered programs.* Within the State, responsibility for the administration of the Program shall be in the State agency. Each State agency must notify the Department by November 1 of the fiscal year regarding its intention to administer the Program. Each State agency desiring to take part in the Program shall enter into a written agreement with FNS for the administration of the Program in accordance with the provisions of this part. The agreement shall cover the operation of the Program during the period specified therein and may be extended by written consent of both parties. The agreement shall contain an assurance that the State agency will comply with the Department's nondiscrimination regulations (7 CFR part 15) issued under title VI of the Civil Rights Act of 1964, and any Instructions issued by FNS pursuant to those regulations, title IX of the Education Amendments of 1972, and section 504 of the Rehabilitation Act of 1973. However, if a State educational agency is not permitted by law to disburse funds to any of the nonpublic schools in the State, the Secretary shall disburse the funds directly to such schools within the State for the same purposes and subject to the same conditions as the disbursements to public schools within the State by the State educational agency.

(c) *Regional office administered programs.* The Secretary shall not administer the Program in the States, except that if a FNSRO has continuously administered the Program in any State since October 1, 1980, FNS shall continue to administer the Program in that State. In States in which FNSRO administers the Program, it shall have all of the responsibilities of a State agency and shall earn State administrative and Program funds as set forth in this part. A State in which FNS administers the Program may, upon request to FNS, assume administration of the Program.

[54 FR 18208, Apr. 27, 1989, as amended at 55 FR 13466, Apr. 10, 1990; 64 FR 72483, Dec. 28, 1999]

Subpart B—State Agency Provisions

§ 225.4 Program management and administration plan.

(a) Not later than February 15 of each year, each State agency shall submit to FNSRO a Program management and administration plan for that fiscal year.

(b) Each plan shall be acted on or approved by March 15 or, if it is submitted late, within 30 calendar days of receipt of the plan. If the plan initially submitted is not approved, the State agency and FNS shall work together to ensure that changes to the plan, in the form of amendments, are submitted so that the plan can be approved within 60

calendar days following the initial submission of the plan. Upon approval of the plan, the State agency shall be notified of the level of State administrative funding which it is assured of receiving under § 225.5(a)(3).

(c) Approval of the Plan by FNS shall be a prerequisite to the withdrawal of Program funds by the State from the Letter of Credit and to the donation by the Department of any commodities for use in the State's Program.

(d) The Plan must include, at a minimum, the following information:

(1) The State's administrative budget for the fiscal year, and the State's plan to comply with any standards prescribed by the Secretary for the use of these funds;

(2) The State's plan for use of Program funds and funds from within the State to the maximum extent practicable to reach needy children;

(3) The State's plans for providing technical assistance and training to eligible sponsors;

(4) The State's plans for monitoring and inspecting sponsors, feeding sites, and food service management companies and for ensuring that such companies do not enter into contracts for more meals than they can provide effectively and efficiently;

(5) The State's plan for timely and effective action against Program violators;

(6) The State's plan for ensuring the fiscal integrity of sponsors not subject to auditing requirements prescribed by the Secretary;

(7) The State's plan for ensuring compliance with the food service managment company procurement monitoring requirements set forth at § 225.6(h); and

(8) An estimate of the State's need, if any, for monies available to pay for the cost of conducting health inspections and meal quality tests.

[54 FR 18208, Apr. 27, 1989, as amended at 55 FR 13466, Apr. 10, 1990; 64 FR 72483, Dec. 28, 1999]

§ 225.5 Payments to State agencies and use of Program funds.

(a) *State administrative funds.* (1) *Administrative funding formula.* For each fiscal year, FNS shall pay to each State agency for administrative expenses incurred in the Program an amount equal to

(i) 20 percent of the first $50,000 in Program funds properly payable to the State in the preceding fiscal year;

(ii) 10 percent of the next $100,000 in Program funds properly payable to the State in the preceding fiscal year;

(iii) 5 percent of the next $250,000 in Program funds properly payable to the State in the preceding fiscal year; and

(iv) 2½ percent of any remaining Program funds properly payable to the State in the preceding fiscal year,

Provided, however, That FNS may make appropriate adjustments in the level of State administrative funds to reflect changes in Program size from the preceding fiscal year as evidenced by information submitted in the State Program management and administration plan and any other information available to FNS. If a State agency fails to submit timely and accurate reports under § 225.8(c) of this part, State administrative funds payable under this paragraph shall be subject to sanction. For such failure, FNS may recover, withhold, or cancel payment of up to one hundred percent of the funds payable to the State agency under this paragraph during the fiscal year.

(2) *Use of State administrative funds.* State administrative funds paid to any State shall be used by State agencies to employ personnel, including travel and related expenses, and to supervise and give technical assistance to sponsors in their initiation, expansion, and conduct of any food service for which Program funds are made available. State agencies may also use administrative funds for such other administrative expenses as are set forth in their approved Program management and administration plan.

(3) *Funding assurance.* At the time FNS approves the State's management and administration plan, the State shall be assured of receiving State administrative funding equal to the lesser of the following amounts: 80 percent of the amount obtained by applying the formula set forth in paragraph (a)(1) of this section to the total amount of Program payments made within the State during the prior fiscal year; or, 80 percent of the amount obtained by

applying the formula set forth in paragraph (a)(1) to the amount of Program funds estimated to be needed in the management and administration plan. The State agency shall be assured that it will receive no less than this level unless FNS determines that the State agency has failed or is failing to meet its responsibilities under this part.

(4) *Limitation.* In no event may the total payment for State administrative costs in any fiscal year exceed the total amount of expenditures incurred by the State agency in administering the Program.

(b) *State administrative funds Letter of Credit.* (1) At the beginning of each fiscal year, FNS shall make available to each participating State agency by Letter of Credit an initial allocation of State administrative funds for use in that fiscal year. This allocation shall not exceed one-third of the administrative funds provided to the State in the preceding fiscal year. For State agencies which did not receive any Program funds during the preceding fiscal year, the amount to be made available shall be determined by FNS.

(2) Additional State administrative funds shall be made available upon the receipt and approval by FNS of the State's Program management and administration plan. The amount of such funds, plus the initial allocation, shall not exceed 80 percent of the State administrative funds determined by the formula set forth in paragraph (a)(1) of this section and based on the estimates set forth in the approved Program management and administration plan.

(3) Any remaining State administrative funds shall be paid to each State agency as soon as practicable after the conduct of the funding assessment described in paragraph (c) of this section. However, regardless of whether such assessment is made, the remaining administrative funds shall be paid no later than September 1. The remaining administrative payment shall be in an amount equal to that determined to be needed during the funding evaluation or, if such evaluation is not conducted, the amount owed the State in accordance with paragraph (a)(1) of this section, less the amounts paid under paragraphs (b) (1) and (2) of this section.

(c) *Administrative funding evaluation.* FNSRO shall conduct data on the need for Program and State administrative funding within any State agency *if* the funding needs estimated in a State's management and administration plan are no longer accurate. Based on this data, FNS may make adjustments in the level of State administrative funding paid or payable to the State agency under paragraph (b) of this section to reflect changes in the size of the State's Program as compared to that estimated in its management and administration plan. The data shall be based on approved Program participation levels and shall be collected during the period of Program operations. As soon as possible following this data collection, payment of any additional administrative funds owed shall be made to the State agency. The payment may reflect adjustments made to the level of State administrative funding based on the information collected during the funding assessment. However, FNS shall not decrease the amount of a State's administrative funds as a result of this assessment unless the State failed to make reasonable efforts to administer the Program as proposed in its management and administration plan or the State incurred unnecessary expenses.

(d) *Letter of Credit for Program payments.* (1) Not later than April 15 of each fiscal year, FNS shall make available to each participating State in a Letter of Credit an amount equal to 65 percent of the preceding fiscal year's Program payments for operating costs plus 65 percent of the preceding fiscal year's Program payments for administrative costs in the State. This amount may be adjusted to reflect changes in reimbursement rates made pursuant to § 225.9(d)(8). However, the State shall not withdraw funds from this Letter of Credit until its Program management and administration plan is approved by FNS.

(2) Based on the State agency's approved management and administration plan, FNS shall, if necessary, adjust the State's Letter of Credit to ensure that 65 percent of estimated current year Program operating and administrative funding needs is available. Such adjustment shall be made no

later than May 15, or within 90 days of FNS receipt of the State agency's management and administration plan, whichever date is later.

(3) Subsequent to the adjustment provided for in paragraph (d)(2) of this section, FNS will, if necessary, make one additional adjustment to ensure that the State agency's Letter of Credit contains at least 65 percent of the Program operating and administrative funds needed during the current fiscal year. Such adjustment may be based on the administrative funding assessment provided for in paragraph (c) of this section, if one is conducted, or on any additional information which demonstrates that the funds available in the Letter of Credit do not equal at least 65 percent of current year Program needs. In no case will such adjustments be made later than September 1. Funds made available in the Letter of Credit shall be used by the State agency to make Program payments to sponsors.

(4) The Letter of Credit shall include sufficient funds to enable the State agency to make advance payments to sponsors serving areas in which schools operate under a continuous school calendar. These funds shall be made available no later than the first day of the month prior to the month during which the food service will be conducted.

(5) FNS shall make available any remaining Program funds due within 45 days of the receipt of valid claims for reimbursement from sponsors by the State agency. However, no payment shall be made for claims submitted later than 60 days after the month covered by the claim unless an exception is granted by FNS.

(6) Each State agency shall release to FNS any Program funds which it determines are unobligated as of September 30 of each fiscal year. Release of funds by the State agency shall be made as soon as practicable, but in no event later than 30 calendar days following demand by FNS, and shall be accomplished by an adjustment in the State agency's Letter of Credit.

(e) *Adjustment to Letter of Credit*. Prior to May 15 of each fiscal year, FNS shall make any adjustments necessary in each State's Letter of Credit to reflect actual expenditures in the preceding fiscal year's Program.

(f) *Health inspection funds*. If the State agency's approved management and administration plan estimates a need for health inspection funding, FNS shall make available by letter of credit an amount up to one percent of Program funds estimated to be needed in the management and administration plan. Such amount may be adjusted, based on the administrative funding assessment provided for in paragraph (c) of this section, if such assessment is conducted. Health inspection funds shall be used solely to enable State or local health departments or other governmental agencies charged with health inspection functions to carry out health inspections and meal quality tests, provided that if these agencies cannot perform such inspections or tests, the State agency may use the funds to contract with an independent agency to conduct the inspection or meal quality tests. Funds so provided but not expended or obligated shall be returned to the Department by September 30 of the same fiscal year.

§ 225.6 State agency responsibilities.

(a) *General responsibilities*. (1) The State agency shall provide sufficient qualified consultative, technical, and managerial personnel to administer the Program, monitor performance, and measure progress in achieving Program goals. The State agency shall assign Program responsibilities to personnel to ensure that all applicable requirements under this part are met.

(2) By February 1 of each fiscal year, each State agency shall announce the purpose, eligibility criteria, and availability of the Program throughout the State, through appropriate means of communication. As part of this effort, each State agency shall identify rural areas, Indian tribal territories, and areas with a concentration of migrant farm workers which qualify for the Program and actively seek eligible applicant sponsors to serve such areas. State agencies shall identify priority outreach areas in accordance with FNS guidance and target outreach efforts in

these areas. State agencies shall identify priority outreach areas in accordance with FNS guidance and target outreach efforts in these areas.

(3) Each State agency shall require applicant sponsors submitting Program application site information sheets, Program agreements, or a request for advance payments, and sponsors submitting claims for reimbursement to certify that the information submitted on these forms is true and correct and that the sponsor is aware that deliberate misrepresentation or withholding of information may result in prosecution under applicable State and Federal statutes.

(4) In addition to the warnings specified in paragraph (a)(3) of this section, State agencies may include the following information on applications and pre-application materials distributed to prospective sponsors:

(i) The criminal penalties and provisions established in section 12(g) of the National School Lunch Act (42 U.S.C. 1760(g)) that states substantially: Whoever embezzles, willfully misapplies, steals, or obtains by fraud any funds, assets, or property that are the subject of a grant or other form of assistance under this Act or the Child Nutrition Act of 1966 (42 U.S.C. 1771 *et seq.*), whether received directly or indirectly from the United States Department of Agriculture, or whoever receives, conceals, or retains such funds, assets, or property to personal use or gain, knowing such funds, assets, or property have been embezzled, willfully misapplied, stolen, or obtained by fraud shall, if such funds, assets, or property are of the value of $100 or more, be fined not more than $25,000 or imprisoned not more than five years, or both, or, if such funds, assets, or property are of a value of less than $100, shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

(ii) The procedures for termination from Program participation of any site or sponsor which is determined to be seriously deficient in its administration of the Program. In addition, the application may also state that appeals of sponsor or site terminations will follow procedures mandated by the State agency and will also meet the minimum requirements of 7 CFR 225.13.

(b) *Approval of sponsor applications.* (1) Each State agency must inform all of the previous year's sponsors which meet current eligibility requirements and all other potential sponsors of the deadline date for submitting a written application for participation in the Program. The State agency must require that all applicant sponsors submit written applications for Program participation to the State agency by June 15. However, the State agency may establish an earlier deadline for the Program application submission.Sponsors applying for participation in the Program due to an unanticipated school closure during the period from October through April (or at any time of the year in an area with a continuous school calendar) shall be exempt from the application submission deadline.

(2) Each State agency shall inform potential sponsors of the procedure for applying for advance operating and administrative costs payments as provided for in § 225.9(c). Where applicable, each State agency shall inform sponsors of the procedure for applying for start-up payments provided for in § 225.9(a).

(3) Within 30 days of receiving a complete and correct application, the State agency shall notify the applicant of its approval or disapproval. If an incomplete application is received, the State agency shall so notify the applicant within 15 days and shall provide technical assistance for the purpose of completing the application. Any disapproved applicant shall be notified of its right to appeal under § 225.13.

(4) The State agency shall determine the eligibility of sponsors applying for participation in the Program in accordance with the applicant sponsor eligibility criteria outlined in § 225.14. However, State agencies may approve the application of an otherwise eligible applicant sponsor which does not provide a year-round service to the community which it proposes to serve under the Program only if it meets one or more of the following criteria: It is a residential camp; it proposes to provide a food service for the children of migrant workers; a failure to do so would deny the Program to an area in which poor

economic conditions exist; a significant number of needy children will not otherwise have reasonable access to the Program; or it proposes to serve an area affected by an unanticipated school closure during the period from October through April (or at any time of the year in an area with a continuous school calendar). In addition, the State agency may approve a sponsor for participation during an unanticipated school closure without a prior application if the sponsor participated in the program at any time during the current year or in either of the prior two calendar years.

(5) The State agency must use the following priority system in approving applicants to operate sites that propose to serve the same area or the same enrolled children:

(i) Public or nonprofit private school food authorities;

(ii) Public agencies and private nonprofit organizations that have demonstrated successful program performance in a prior year;

(iii) New public agencies; and

(iv) New private nonprofit organizations.

(v) If two or more sponsors that qualify under paragraph (b)(5)(ii) of this section apply to serve the same area, the State agency must determine on a case-by-case basis which sponsor or sponsors it will select to serve the needy children in the area. The State agency should consider the resources and capabilities of each applicant.

(6) The following limitations apply on the number of sites and children that may be served per day:

(i) The State agency must not approve any school food authority or public agency to operate more than 200 sites or to serve more than an average of 50,000 children per day. However, the State agency may approve exceptions if the applicant can demonstrate that it has the capability of managing a program larger than these limits.

(ii) The State agency must not approve any private nonprofit organization to operate more than 25 sites. In addition, the State agency must not approve any private nonprofit organization to serve more than 300 children at any one site for any approved meal service. However, the State agency may grant a waiver to allow up to 500 children served at any one site operated by a private nonprofit organization. To be approved for the waiver, the private nonprofit organization must demonstrate that it is fully capable of managing a site with more than 300 children and that there are no other sponsors capable of serving the children in excess of 300.

(7) The State agency shall review each applicant's administrative budget as a part of the application approval process in order to assess the applicant's ability to operate in compliance with these regulations within its projected reimbursement. In approving the applicant's administrative budget, the State agency shall take into consideration the number of sites and children to be served, as well as any other relevant factors. A sponsor's administrative budget shall be subject to review for adjustments by the State agency if the sponsor's level of site participation or the number of meals served to children changes significantly.

(8) Applicants which qualify as camps shall be approved for reimbursement only for meals served free to enrolled children who meet the Program's eligibility standards.

(9) The State agency shall not approve the application of any applicant sponsor identifiable through its organization or principals as a sponsor which has been determined to be seriously deficient as described in § 225.11(c). However, the State agency may approve the application of a sponsor which has been disapproved or terminated in prior years in accordance with this paragraph if the applicant demonstrates to the satisfaction of the State agency that it has taken appropriate corrective actions to prevent recurrence of the deficiencies.

(10) If the sponsor's application to participate is denied, the official making the determination of denial must notify the applicant sponsor in writing stating all of the grounds on which the State agency based the denial. Pending the outcome of a review of a denial, the State agency shall proceed to approve other applicants in accordance with its responsibilities under paragraph (b)(5)

of this section, without regard to the application under review.

(11) The State agency shall not approve the application of any applicant sponsor which submits fraudulent information or documentation when applying for Program participation or which knowingly withholds information that may lead to the disapproval of its application. Complete information regarding such disapproval of an applicant shall be submitted by the State agency through FNSRO to OIG.

(c) *Content of sponsor application.*

(1) *Application forms.* The applicant shall submit a written application to the State agency for participation in the Program as a sponsor. Sponsors proposing to serve an area affected by an unanticipated school closure during the period from October through April (or at any time of the year in an area with a continuous school calendar) may be exempt, at the discretion of the State agency, from submitting a new application if they have participated in the program at any time during the current year or in either of the prior two calendar years. The State agency may use the application form developed by FNS, or it may develop an application form, for use in the Program. Application shall be made on a timely basis in accordance with the deadline date established under § 225.6(b)(1).

(2) *Requirements for new sponsors, new sites, and, as determined by the State agency, sponsors and sites which have experienced significant operational problems in the prior year.*—(i) *Site information sheets.* At a minimum, the application submitted by new sponsors and by sponsors which, in the determination of the State agency, have experienced significant operational problems in the prior year shall include a site information sheet, as developed by the State agency, for each site where a food service operation is proposed. The site information sheet for new sponsors and new sites, and for sponsors and sites which, in the determination of the State agency, have experienced significant operational problems in the current year must demonstrate or describe the following:

(A) An organized and supervised system for serving meals to attending children;

(B) The estimated number and types of meals to be served and the times of service;

(C) Arrangements, within standards prescribed by the State or local health authorities, for delivery and holding of meals until time of service, and arrangements for storing and refrigerating any leftover meals until the next day;

(D) Arrangements for food service during periods of inclement weather;

(E) Access to a means of communication for making necessary adjustments in the number of meals delivered in accordance with the number of children attending daily at each site;

(F) Whether the site is rural, as defined in § 225.2, or non-rural, and whether the site's food service will be self-prepared or vended;

(G) For open sites and restricted open sites, documentation supporting the eligibility of each site as serving an area in which poor economic conditions exist. However, for sites that a sponsor proposes to serve during an unanticipated school closure during the period from October through April (or at any time of the year in an area with a continuous school calendar), any site which has participated in the Program at any time during the current year or in either of the prior two calendar years shall be considered eligible without new documentation;

(H) For closed enrolled sites, the projected number of children enrolled and the projected number of children eligible for free and reduced price meals for each of these sites;

(I) For NYSP sites, certification from the sponsor that all of the children who will receive Program meals are enrolled participants in the NYSP;

(J) For camps, the number of children enrolled in each session who meet the Program's income standards. If such information is not available at the time of application, it shall be submitted as soon as possible thereafter and in no case later than the filing of the camp's claim for reimbursement for each session;

(K) For those sites at which applicants will serve children of migrant workers, certification from a migrant organization which attests that the site serves children of migrant worker

families. If the site also serves non-migrant children, the sponsor shall certify that the site predominantly serves migrant children; and

(L) For a site that serves homeless children, information sufficient to demonstrate that the site is not a residential child care institution, as defined in paragraph (c) of the definition of *school* in § 210.2 of this chapter. If cash payments, food stamps, or any in-kind service are required of any meal recipient at these sites, sponsors must describe the method(s) used to ensure that no such payments or services are received for any Program meal served to children. In addition, sponsors must certify that such sites employ meal counting methods which ensure that reimbursement is claimed only for meals served to children.

(ii) *Other application requirements.* New sponsors and sponsors which in the determination of the State agency have experienced significant operational problems in the prior year shall also include in their applications:

(A) Information in sufficient detail to enable the State agency to determine whether the applicant meets the criteria for participation in the Program as set forth in § 225.14; the extent of Program payments needed, including a request for advance payments and start-up payments, if applicable; and a staffing and monitoring plan;

(B) A complete administrative and operating budget for State agency review and approval. The administrative budget shall contain the projected administrative expenses which a sponsor expects to incur during the operation of the Program, and shall include information in sufficient detail to enable the State agency to assess the sponsor's ability to operate the Program within its estimated reimbursement. A sponsor's approved administrative budget shall be subject to subsequent review by the State agency for adjustments in projected administrative costs;

(C) A summary of how meals will be obtained (e.g., self-prepared at each site, self-prepared and distributed from a central kitchen, purchased from a school food authority, competitively procured from a food service management company, etc.). If an invitation for bid is required under § 225.15(g), sponsors shall also submit a schedule for bid dates, and a copy of their invitation for bid; and

(D) For each applicant which seeks approval under § 225.14(b)(3) as a unit of local, municipal, county or State government, or under § 225.14(b)(5) as a private nonprofit organization, certification that it will directly operate the Program in accordance with § 225.14(d)(3).

(3) *Requirements for experienced sponsors and experienced sites.*—(i) *Site information sheets.* At a minimum, the application submitted by experienced sponsors shall include a site information sheet, as developed by the State agency, for each site where a food service operation is proposed. The site information sheet for experienced sponsors and experienced sites must demonstrate or describe the information below. The State agency also may require experienced sponsors and experienced sites to provide any of the information required in paragraph (c)(2) of this section.

(A) The estimated number and types of meals to be served and the times of service;

(B) For open sites and restricted open sites, new documentation supporting the eligibility of each site as serving an area in which poor economic conditions exist shall be submitted. Such documentation shall be submitted every three years when school data are used. When census data are used, such documentation shall be submitted when new census data are available, or earlier if the State agency believes that an area's socioeconomic status has changed significantly since the last census. For sites that a sponsor proposes to serve during an unanticipated school closure during the period from October through April (or at any time of the year in an area with a continuous school calendar), any site which has participated in the Program at any time during the current year or in either of the prior two calendar years shall be considered eligible without new documentation of serving an area in which poor economic conditions exist;

(C) For closed enrolled sites, the projected number of children enrolled and

the projected number of children eligible for free and reduced price school meals for each of these sites; and

(D) For camps, the number of children enrolled in each session who meet the Program's income standards. If such information is not available at the time of application, it shall be submitted as soon as possible thereafter and in no case later than the filing of the camp's claim for reimbursement for each session.

(ii) *Other application requirements.* Experienced sponsors shall also include on their applications:

(A) The extent of Program payments needed, including a request for advance payments and start-up payments, if applicable, and a staffing and monitoring plan;

(B) A complete administrative and operating budget for State agency review and approval. The administrative budget shall contain the projected administrative expenses which a sponsor expects to incur during the operation of the Program, and shall include information in sufficient detail to enable the State agency to assess the sponsor's ability to operate the Program within its estimated reimbursement. A sponsor's approved administrative budget shall be subject to subsequent review by the State agency for adjustments in projected administrative costs; and

(C) If an invitation for bid is required under §225.15(g), a schedule for bid dates. Sponsors shall also submit a copy of the invitation for bid if it is changed from the previous year. If the method of procuring meals is changed, sponsors shall submit a summary of how meals will be obtained (e.g., self-prepared at each site, self-prepared and distributed from a central kitchen, purchased from a school food authority, competitively procured from a food service management company, etc.).

(4) *Free meal policy statement.*

(i) Each applicant must submit a statement of nondiscrimination in its policy for serving meals to children. The statement must consist of an assurance that all children are served the same meals and that there is no discrimination in the course of the food service. A school sponsor must submit the policy statement only once, with the initial application to participate as a sponsor. However, if there is a substantive change in the school's free and reduced price policy, a revised policy statement must be provided at the State agency's request. In addition to the policy of service/nondiscrimination statement described in paragraph (c)(3) of this section, all applicants except camps must include a statement that the meals served are free at all sites.

(ii) In addition to the policy of service/nondiscrimination statement described in paragraph (c)(3) of this section, all applicants that are camps that charge separately for meals must include the following:

(A) A statement that the eligibility standards conform to the Secretary's family size and income standards for reduced price school meals;

(B) A description of the method or methods to be used in accepting applications from families for Program meals. Such methods must ensure that households are permitted to apply on behalf of children who are members of households receiving food stamp, FDPIR, or TANF benefits using the categorical eligibility procedures described in §225.15(f);

(C) A description of the method used by camps for collecting payments from children who pay the full price of the meal while preventing the overt identification of children receiving a free meal;

(D) An assurance that the camp will establish a hearing procedure for families wishing to appeal a denial of an application for free meals. Such hearing procedures shall meet the requirements set forth in paragraph (c)(5) of this section;

(E) An assurance that, if a family requests a hearing, the child shall continue to receive free meals until a decision is rendered; and

(F) An assurance that there will be no overt identification of free meal recipients and no discrimination against any child on the basis of race, color, national origin, sex, age, or handicap.

(5) *Hearing procedures statement.*Each applicant that is a camp shall submit with its application a copy of its hearing procedures. At a minimum, these procedures shall provide:

(i) That a simple, publicly announced method will be used for a family to make an oral or written request for a hearing;

(ii) That the family will have the opportunity to be assisted or represented by an attorney or other person;

(iii) That the family will have an opportunity to examine the documents and records supporting the decision being appealed both before and during the hearing;

(iv) That the hearing will be reasonably prompt and convenient for the family;

(v) That adequate notice will be given to the family of the time and place of the hearing;

(vi) That the family will have an opportunity to present oral or documentary evidence and arguments supporting its position;

(vii) That the family will have an opportunity to question or refute any testimony or other evidence and to confront and cross-examine any adverse witnesses;

(viii) That the hearing shall be conducted and the decision made by a hearing official who did not participate in the action being appealed;

(ix) That the decision shall be based on the oral and documentary evidence presented at the hearing and made a part of the record;

(x) That the family and any designated representative shall be notified in writing of the decision;

(xi) That a written record shall be prepared for each hearing which includes the action being appealed, any documentary evidence and a summary of oral testimony presented at the hearing, the decision and the reasons for the decision, and a copy of the notice sent to the family; and

(xii) That the written record shall be maintained for a period of three years following the conclusion of the hearing, during which it shall be available for examination by the family or its representatives at any reasonable time and place.

(d) *Approval of sites.* (1) When evaluating a proposed food service site, the State agency shall ensure that:

(i) If not a camp, the proposed site serves an area in which poor economic conditions exist, as defined by § 225.2;

(ii) The area which the site proposes to serve is not or will not be served in whole or in part by another site, unless it can be demonstrated to the satisfaction of the State agency that each site will serve children not served by any other site in the same area for the same meal;

(iii) The site is approved to serve no more than the number of children for which its facilities are adequate and;

(iv) If it is a site proposed to operate during an unanticipated school closure, it is a non-school site.

(2) When approving the application of a site which will serve meals prepared by a food service management company, the State agency shall establish for each meal service an approved level for the maximum number of children's meals which may be served under the Program. These approved levels shall be established in accordance with the following provisions:

(i) The initial maximum approved level shall be based upon the historical record of attendance at the site if such a record has been established in prior years and the State agency determines that it is accurate. The State agency shall develop a procedure for establishing initial maximum approved levels for sites when no accurate record from prior years is available.

(ii) The maximum approved level shall be adjusted, if warranted, based upon information collected during site reviews. If attendance at the site on the day of the review is significantly below the site's approved level, the State agency should consider making a downward adjustment in the approved level with the objective of providing only one meal per child.

(iii) The sponsor may seek an upward adjustment in the approved level for its sites by requesting a site review or by providing the State agency with evidence that attendance exceeds the sites' approved levels.

(iv) Whenever the State agency establishes or adjusts approved levels of meal service for a site, it shall document the action in its files, and it shall provide the sponsor with immediate written confirmation of the approved level.

(v) Upon approval of its application or any adjustment to its maximum approved levels, the sponsor shall inform the food service management company with which it contracts of the approved level for each meal service at each site served by the food service management company. This notification of any adjustments in approved levels shall take place within the time frames set forth in the contract for adjusting meal orders. Whenever the sponsor notifies the food service management company of the approved levels or any adjustments to these levels for any of its sites, the sponsor shall clearly inform the food service management company that an approved level of meal service represents the maximum number of meals which may be served at a site and is not a standing order for a specific number of meals at that site. When the number of children attending is below the site's approved level, the sponsor shall adjust meal orders with the objective of serving only one meal per child as required under § 225.15(b)(3).

(e) *State-Sponsor Agreement.* A sponsor approved for participation in the Program must enter into a written agreement with the State agency. If the sponsor is a school food authority that operates more than one child nutrition program (e.g., the National School Lunch Program, the School Breakfast Program, or the Child and Adult Care Food Program) under a single State agency, a single permanent agreement that includes all the child nutrition programs must be executed with the State agency, as described in § 210.9(b) of this chapter. All sponsors must agree in writing to:

(1) Operate a nonprofit food service during the period specified, as follows:

(i) From May through September for children on school vacation;

(ii) At any time of the year, in the case of sponsors administering the Program under a continuous school calendar system; or

(iii) During the period from October through April, if it serves an area affected by an unanticipated school closure due to a natural disaster, major building repairs, court orders relating to school safety or other issues, labor-management disputes, or, when approved by the State agency, a similar cause.

(2) For school food authorities, offer meals which meet the requirements and provisions set forth in § 225.16 during times designated as meal service periods by the sponsor, and offer the same meals to all children;

(3) For all other sponsors, serve meals which meet the requirements and provisions set forth in § 225.16 during times designated as meal service periods by the sponsor, and serve the same meals to all children;

(4) Serve meals without cost to all children, except that camps may charge for meals served to children who are not served meals under the Program;

(5) Issue a free meal policy statement in accordance with § 225.6(c);

(6) Meet the training requirement for its administrative and site personnel, as required under § 225.15(d)(1);

(7) Claim reimbursement only for the type or types of meals specified in the agreement and served without charge to children at approved sites during the approved meal service period, except that camps shall claim reimbursement only for the type or types of meals specified in the agreement and served without charge to children who meet the Program's income standards. The agreement shall specify the approved levels of meal service for the sponsor's sites if such levels are required under § 225.6(d)(2). No permanent changes may be made in the serving time of any meal unless the changes are approved by the State agency;

(8) Submit claims for reimbursement in accordance with procedures established by the State agency, and those stated in § 225.9;

(9) In the storage, preparation and service of food, maintain proper sanitation and health standards in conformance with all applicable State and local laws and regulations;

(10) Accept and use, in quantities that may be efficiently utilized in the Program, such foods as may be offered as a donation by the Department;

(11) Have access to facilities necessary for storing, preparing, and serving food;

(12) Maintain a financial management system as prescribed by the State agency;

(13) Maintain on file documentation of site visits and reviews in accordance with § 225.15(d) (2) and (3);

(14) Upon request, make all accounts and records pertaining to the Program available to State, Federal, or other authorized officials for audit or administrative review, at a reasonable time and place. The records shall be retained for a period of 3 years after the end of the fiscal year to which they pertain, unless audit or investigative findings have not been resolved, in which case the records shall be retained until all issues raised by the audit or investigation have been resolved;

(15) Maintain children on site while meals are consumed; and

(16) Retain final financial and administrative responsibility for its program.

(f) *Special Account*. In addition, the State agency may require any vended sponsor to enter into a special account agreement with the State agency. The special account agreement shall stipulate that the sponsor shall establish a special account with a State agency or Federally insured bank for operating costs payable to the sponsor by the State. The agreement shall also stipulate that any disbursement of monies from the account must be authorized by both the sponsor and the food service management company. The special account agreement may contain such other terms, agreed to by both the sponsor and the food service management company, which are consistent with the terms of the contract between the sponsor and the food service management company. A copy of the special account agreement shall be submitted to the State agency and another copy maintained on file by the sponsor. Any charges made by the bank for the account described in this section shall be considered an allowable sponsor administrative cost.

(g) *Food service management company registration*. A State agency may require each food service management company, operating within the State, to register based on State procedures. A State agency may further require the food service management company to certify that the information submitted on its application for registration is true and correct and that the food service management company is aware that misrepresentation may result in prosecution under applicable State and Federal statutes.

(h) *Monitoring of food service management company procurements*. (1) The State agency shall ensure that sponsors' food service management company procurements are carried out in accordance with §§ 225.15(g) and 225.17 of this part.

(2) Each State agency shall develop a standard form of contract for use by sponsors in contracting with food service management companies. Sponsors which are public entities, sponsors with exclusive year-round contracts with a food service management company, and sponsors whose food service management company contract(s) do not exceed $10,000 in aggregate value may use their existing or usual form of contract, provided that such form of contract has been submitted to and approved by the State agency. The standard contract developed by the State agency shall expressly and without exception provide that:

(i) All meals prepared by a food service management company shall be unitized, with or without milk or juice, unless the State agency has approved, pursuant to paragraph (h)(3) of this section, a request for exceptions to the unitizing requirement for certain components of a meal;

(ii) A food service management company entering into a contract with a sponsor under the Program shall not subcontract for the total meal, with or without milk, or for the assembly of the meal;

(iii) The sponsor shall provide to the food service management company a list of State agency approved food service sites, along with the approved level for the number of meals which may be claimed for reimbursement for each site, established under § 225.6(d)(2), and shall notify the food service management company of all sites which have been approved, cancelled, or terminated subsequent to the submission of the initial approved site list and of any changes in the approved level of meal service for a site. Such notification

shall be provided within the time limits mutually agreed upon in the contract;

(iv) The food service management company shall maintain such records (supported by invoices, receipts, or other evidence) as the sponsor will need to meet its responsibilities under this part, and shall submit all required reports to the sponsor promptly at the end of each month, unless more frequent reports are required by the sponsor;

(v) The food service management company must have State or local health certification for the facility in which it proposes to prepare meals for use in the Program. It must ensure that health and sanitation requirements are met at all times. In addition, the food service management company must ensure that meals are inspected periodically to determine bacteria levels present in the meals and that the bacteria levels found to be present in the meals conform with the standards set by local health authorities. The results of the inspections must be submitted promptly to the sponsor and to the State agency.

(vi) The meals served under the contract shall conform to the cycle menus and meal quality standards and food specifications approved by the State agency and upon which the bid was based;

(vii) The books and records of the food service management company pertaining to the sponsor's food service operation shall be available for inspection and audit by representatives of the State agency, the Department and the U.S. General Accounting Office at any reasonable time and place for a period of 3 years from the date of receipt of final payment under the contract, except that, if audit or investigation findings have not been resolved, such records shall be retained until all issues raised by the audit or investigation have been resolved;

(viii) The sponsor and the food service management company shall operate in accordance with current Program regulations;

(ix) The food service management company shall be paid by the sponsor for all meals delivered in accordance with the contract and this part. However, neither the Department nor the State agency assumes any liability for payment of differences between the number of meals delivered by the food service management company and the number of meals served by the sponsor that are eligible for reimbursement;

(x) Meals shall be delivered in accordance with a delivery schedule prescribed in the contract;

(xi) Increases and decreases in the number of meals ordered shall be made by the sponsor, as needed, within a prior notice period mutually agreed upon;

(xii) All meals served under the Program shall meet the requirements of § 225.16;

(xiii) In cases of nonperformance or noncompliance on the part of the food service management company, the company shall pay the sponsor for any excess costs which the sponsor may incur by obtaining meals from another source;

(xiv) If the State agency requires the sponsor to establish a special account for the deposit of operating costs payments in accordance with the conditions set forth in § 225.6(f), the contract shall so specify;

(xv) The food service management company shall submit records of all costs incurred in the sponsor's food service operation in sufficient time to allow the sponsor to prepare and submit the claim for reimbursement to meet the 60-day submission deadline; and

(xvi) The food service management company shall comply with the appropriate bonding requirements, as set forth in § 225.15(g) (6)–(8).

(3) All meals prepared by a food service management company shall be unitized, with or without milk or juice, unless the sponsor submits to the State agency a request for exceptions to the unitizing requirement for certain components of a meal. These requests shall be submitted to the State agency in writing in sufficient time for the State agency to respond prior to the sponsor's advertising for bids. The State agency shall notify the sponsor in writing of its determination in a timely manner.

(4) Each State agency shall have a representative present at all food service management company procurement bid openings when sponsors are expected to receive more than $100,000 in Program payments.

(5) Copies of all contracts between sponsors and food service management companies, along with a certification of independent price determination, shall be submitted to the State agency prior to the beginning of Program operations. Sponsors shall also submit to the State agency copies of all bids received and their reason for selecting the food service management company chosen.

(6) All bids in an amount which exceeds the lowest bid shall be submitted to the State agency for approval before acceptance. All bids totaling $100,000 or more shall be submitted to the State agency for approval before acceptance. State agencies shall respond to a request for approval of such bids within 5 working days of receipt.

(7) Failure by a sponsor to comply with the provisions of this paragraph or § 225.15(g)(1) shall be sufficient grounds for the State agency to terminate participation by the sponsor in accordance with § 225.18(b).

(i) *Meal pattern exceptions*. The State agency shall review and act upon requests for exceptions to the meal pattern in accordance with the guidelines and limitations set forth in § 225.16.

[54 FR 18208, Apr. 27, 1989, as amended at 55 FR 13467, Apr. 10, 1990; ; 64 FR 72484, Dec. 28, 1999; 64 FR 72896, Dec. 29, 1999]

§ 225.7 Program monitoring and assistance.

(a) *Training*. Prior to the beginning of Program operations, each State agency shall make available training in all necessary areas of Program administration to sponsor personnel, food service management company representatives, auditors, and health inspectors who will participate in the Program in that State. Prior to Program operations, the State agency shall ensure that the sponsor's supervisory personnel responsible for the food service receive training in all necessary areas of Program administration and operations. This training shall reflect the fact that individual sponsors or groups of sponsors require different levels and areas of Program training. State agencies are encouraged to utilize in such training, and in the training of site personnel, sponsor personnel who have previously participated in the Program. Training should be made available at convenient locations. State agencies are not required to conduct this training for sponsors operating the Program during unanticipated school closures during the period from October through April (or at any time of the year in an area with a continuous school calendar).

(b) *Program materials*. Each State agency shall develop and make available all necessary Program materials in sufficient time to enable applicant sponsors to prepare adequately for the Program.

(c) *Food specifications and meal quality standards*. With the assistance of the Department, each State agency shall develop and make available to all sponsors minimum food specifications and model meal quality standards which shall become part of all contracts between vended sponsors and food service management companies.

(d) *Program monitoring and assistance*. The State agency shall conduct Program monitoring and provide Program assistance according to the following provisions:

(1) *Pre-approval visits*. The State agency shall conduct pre-approval visits of sponsors and sites, as specified below, to assess the applicant sponsor's or site's potential for successful Program operations and to verify information provided in the application. The State agency shall visit prior to approval:

(i) All applicant sponsors which did not participate in the program in the prior year. However, if a sponsor is a school food authority, has been reviewed by the State agency under the National School Lunch Program during the preceding 12 months, and had no significant deficiencies noted in that review, a pre-approval visit may be conducted at the discretion of the State agency. In addition, pre-approval visits of sponsors proposing to operate the Program during unanticipated school closures during the period from October through April (or at any time

of the year in an area with a continuous school calendar) may be conducted at the discretion of the State agency;

(ii) All applicant sponsors which, as a result of operational problems noted in the prior year, the State agency has determined need a pre-approval visit; and

(iii) All sites which the State agency has determined need a pre-approval visit.

(2) *Sponsor and site reviews*—(i) *General*. The State agency must review sponsors and sites to ensure compliance with Program regulations, the Department's non-discrimination regulations (7 CFR part 15) and any other applicable instructions issued by the Department. In determining which sponsors and sites to review, the State agency must, at a minimum, consider the sponsors' and sites' previous participation in the Program, their current and previous Program performance, and the results of previous reviews of the sponsor and sites. When the same school food authority personnel administer this Program as well as the National School Lunch Program (7 CFR part 210), the State agency is not required to conduct a review of the Program in the same year in which the National School Lunch Program operations have been reviewed and determined to be satisfactory. Reviews shall be conducted as follows:

(ii) *Frequency and number of required reviews*. State agencies shall:

(A) Conduct a review of every new sponsor at least once during the first year of operation;

(B) Annually review a number of sponsors whose program reimbursements, in the aggregate, accounted for at least one-half of the total program meal reimbursements in the State in the prior year;

(C) Annually review every sponsor which experienced significant operational problems in the prior year;

(D) Review each sponsor at least once every three years; and

(E) As part of each sponsor review, conduct reviews of at least 10 percent of each sponsor's sites, or one site, whichever number is greater.

(3) *Follow-up reviews*. The State agency shall conduct follow-up reviews of sponsors and sites as necessary.

(4) *Monitoring system*. Each State agency shall develop and implement a monitoring system to ensure that sponsors, including site personnel, and the sponsor's food service management company, if applicable, immediately receive a copy of any review reports which indicate Program violations and which could result in a Program disallowance.

(5) *Records*. Documentation of Program assistance and the results of such assistance shall be maintained on file by the State agency.

(6) *Food service management company facility visits*. As a part of the review of any vended sponsor which contracts for the preparation of meals, the State agency shall inspect the food service management company's facilities. Each State agency shall establish an order of priority for visiting facilities at which food is prepared for the Program. The State agency shall respond promptly to complaints concerning facilities. If a food service management company fails to correct violations noted by the State agency during a review, the State agency shall notify the sponsor and the food service management company that reimbursement shall not be paid for meals prepared by the food service management company after a date specified in the notification. Funds provided for in § 225.5(f) may be used for conducting food service management company facility inspections.

(7) *Forms for reviews by sponsors*. Each State agency shall develop and provide monitor review forms to all approved sponsors. These forms shall be completed by sponsor monitors. The monitor review form shall include, but not be limited to, the time of the reviewer's arrival and departure, the site supervisor's signature, a certification statement to be signed by the monitor, the number of meals prepared or delivered, the number of meals served to children, the deficiencies noted, the corrective actions taken by the sponsor, and the date of such actions.

(8) *Statistical monitoring*. State agencies may use statistical monitoring

procedures in lieu of the site monitoring requirements prescribed in paragraph (d)(2) of this section to accomplish the monitoring and technical assistance aspects of the Program. State agencies which use statistical monitoring procedures may use the findings in evaluating claims for reimbursement. Statistical monitoring may be used for some or all of a State's sponsors. Use of statistical monitoring does not eliminate the requirements for reviewing sponsors as specified in paragraph (d)(2) of this section.

(9) *Corrective actions.* Corrective actions which the State agency may take when Program violations are observed during the conduct of a review are discussed in § 225.11. The State agency shall conduct follow-up reviews as appropriate when corrective actions are required.

(e) *Other facility inspections and meal quality tests.* In addition to those inspections required by paragraph (d)(6) of this section, the State agency may also conduct, or arrange to have conducted: inspections of self-preparation and vended sponsors' food preparation facilities; inspections of food service sites; and meal quality tests. The procedures for carrying out these inspections and tests shall be consistent with procedures used by local health authorities. For inspections of food service management companies' facilities not conducted by State agency personnel, copies of the results shall be provided to the State agency. The company and the sponsor shall also immediately receive a copy of the results of these inspections when corrective action is required. If a food service management company fails to correct violations noted by the State agency during a review, the State agency shall notify the sponsor and the food service management company that reimbursement shall not be paid for meals prepared by the food service management company after a date specified in the notification. Funds provided for in § 225.5(f) may be used for conducting these inspections and tests.

(f) *Financial management.* Each State agency shall establish a financial management system, in accordance with the Department's Uniform Financial Assistance Regulations (7 CFR part 3015) and FNS guidance, to identify allowable Program costs and to establish standards for sponsor recordkeeping and reporting. The State agency shall provide guidance on these financial management standards to each sponsor.

(g) *Nondiscrimination.* (1) Each State agency shall comply with all requirements of title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and the Department's regulations concerning nondiscrimination (7 CFR parts 15, 15a and 15b), including requirements for racial and ethnic participation data collection, public notification of the nondiscrimination policy, and reviews to assure compliance with such policy, to the end that no person shall, on the grounds of race, color, national origin, sex, age, or handicap, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under, the Program.

(2) Complaints of discrimination filed by applicants or participants shall be referred to FNS or the Secretary of Agriculture, Washington, DC 20250. A State agency which has an established grievance or complaint handling procedure may resolve sex and handicap discrimination complaints before referring a report to FNS.

[54 FR 18208, Apr. 27, 1989, as amended at 55 FR 13468, Apr. 10, 1990; 64 FR 72485, Dec. 28, 1999; 64 FR 72898, Dec. 29, 1999]

§ 225.8 Records and reports.

(a) Each State agency shall maintain complete and accurate current accounting records of its Program operations which will adequately identify funds authorizations, obligations, unobligated balances, assets, liabilities, income, claims against sponsors and efforts to recover overpayments, and expenditures for administrative and operating costs. These records shall be retained for a period of three years after the date of the submission of the final Program Operations and Financial Status Report (SF–269), except that, if audit findings have not been resolved, the affected records shall be retained beyond the three year period until such time as any issues raised by the audit

findings have been resolved. The State agency shall also retain a complete record of each review or appeal conducted, as required under § 225.13, for a period of three years following the date of the final determination on the review or appeal. Records may be kept in their original form or on microfilm.

(b) Each State agency shall submit to FNS a final report on the Summer Food Service Program Operations (FNS–418) for each month no more than 90 days following the last day of the month covered by the report. States shall not receive Program funds for any month for which the final report is not postmarked and/or submitted within this time limit unless FNS grants an exception. Upward adjustments to a State's report shall not be made after 90 days from the month covered by the report unless authorized by FNS. Downward adjustments shall always be made without FNS authorization, regardless of when it is determined that such adjustments need to be made. Adjustments to a State's report shall be reported to FNS in accordance with procedures established by FNS. Each State agency shall also submit to FNS a quarterly Financial Status Report (SF–269) on the use of Program funds. Such reports shall be submitted no later than 30 days after the end of each fiscal year quarter. Obligations shall be reported only for the fiscal year in which they occur. Action may be taken against the State agency, in accordance with § 225.5(a)(1), for failure to submit accurate and timely reports.

(c) The State agency must submit to FNS a final Financial Status Report no later than 120 days after the end of the fiscal year, on a form (SF–269) provided by FNS. Any requested increase in reimbursement levels for a fiscal year resulting from corrective action taken after submission of the final Program Operations and Financial Status Reports shall be submitted to FNS for approval. The request shall be accompanied by a written explanation of the basis for the adjustment and the actions taken to minimize the need for such adjustments in the future. If FNS approves such an increase, it will make payment, subject to availability of funds. Any reduction in reimbursement for that fiscal year resulting from corrective action taken after submission of the final fiscal year Program Operations and Financial Status Reports shall be handled in accordance with the provisions of § 225.12(d), except that amounts recovered may not be used to make Program payments.

(d)(1) By May 1 of each year, State agencies must submit to the appropriate FNSRO a list of potential private nonprofit organization sponsors. The list must include the following information for each applicant sponsor:

(i) Name and address;

(ii) Geographical area(s) proposed to be served;

(iii) Proposed number of sites; and

(iv) Any available details of each proposed site including address, dates of operation, and estimated daily attendance.

(2) State agencies must also notify the appropriate FNSRO within 5 working days after they approve each private nonprofit organization to participate as a SFSP sponsor. When State agencies notify the FNSRO of sponsor approval, they must provide the following information:

(i) Any changes to site locations, dates of operation, and estimated daily attendance that was previously provided;

(ii) The hours and type(s) of approved meal service at each site;

(iii) The type of site approval—open, restricted open, closed enrolled, or camp; and

(iv) Any other important details about each site that would help the FNSRO plan reviews, including whether the site is rural or urban, or vended or self-preparation.

[54 FR 18208, Apr. 27, 1989, as amended at 55 FR 13469, Apr. 10, 1990; 64 FR 72485, Dec. 28, 1999; 65 FR 82251, Dec. 28, 2000]

§ 225.9 Program assistance to sponsors.

(a) *Start-up payments.* At their discretion, State agencies may make start-up payments to sponsors which have executed Program agreements. Start-up payments shall not be made more than two months before the sponsor is scheduled to begin food service operations and shall not exceed 20 percent of the sponsor's approved administrative budget. The amount of the start-

up payment shall be deducted from the first advance payment for administrative costs or, if the sponsor does not receive advance payments, from the first administrative reimbursement.

(b) *Commodity assistance.* (1) Sponsors eligible to receive commodities under the Program include: Self-preparation sponsors; sponsors which have entered into an agreement with a school or school food authority for the preparation of meals; and sponsors which are school food authorities and have competitively procured Program meals from the same food service management company from which they competitively procured meals for the National School Lunch Program during the last period in which school was in session. The State agency shall make available to these sponsors information on available commodities. Sponsors shall use in the Program food donated by the Department and accepted by sponsors.

(2) Not later than June 1 of each year, State agencies shall prepare a list of the sponsors which are eligible to receive commodities and the average daily number of eligible meals to be served by each of these sponsors. If the State agency does not handle the distribution of commodities donated by the Department, this list shall be forwarded to the agency of the State responsible for the distribution of commodities. The State agency shall be responsible for promptly revising the list to reflect additions or terminations of sponsors and for adjusting the average daily participation data as it deems necessary.

(c) *Advance payments.* At the sponsor's request, State agencies shall make advance payments to sponsors which have executed Program agreements in order to assist these sponsors in meeting operating costs and administrative expenses. For sponsors operating under a continuous school calendar, all advance payments shall be forwarded on the first day of each month of operation. Advance payments shall be made by the dates specified in paragraphs (c) (1) and (2) of this section for all other sponsors whose requests are received at least 30 days prior to those dates. Requests received less than 30 days prior to those dates shall be acted upon within 30 days of receipt. When making advance payments, State agencies shall observe the following criteria:

(1) *Operating costs.* (i) State agencies shall make advance payments for operating costs by June 1, July 15, and August 15. Except for school food authorities, sponsors must conduct training sessions before receiving the second advance payment. Training sessions must cover Program duties and responsibilities for the sponsor's staff and for site personnel.A sponsor shall not receive advance operating cost payments for any month in which it will participate in the Program for less than ten days.

(ii) To determine the amount of the advance payment to any sponsor, the State agency shall employ whichever of the following methods will result in the larger payment:

(A) The total operating costs paid to the sponsor for the same calendar month in the preceding year; or

(B) For vended sponsors, 50 percent of the amount determined by the State agency to be needed that month for meals, and, for self-preparation sponsors, 65 percent of the amount determined by the State agency to be needed that month for meals.

(2) *Administrative costs.* (i) State agencies shall make advance payments for administrative costs by June 1 and July 15. To be eligible for the second advance payment, the sponsor must certify that it is operating the number of sites for which the administrative budget was approved and that its projected administrative costs do not differ significantly from the approved budget. A sponsor shall not receive advance administrative costs payments for any month in which it will participate in the Program for less than 10 days. However, if a sponsor operates for less than 10 days in June but for at least 10 days in August, the second advance administrative costs payment shall be made by August 15.

(ii) Each payment shall equal one-third of the total amount which the State agency determines the sponsor will need to administer its program. For sponsors which will operate for 10 or more days in only one month and, therefore, will qualify for only one advance administrative costs payment,

the payment shall be no less than one-half, and no more than two-thirds, of the total amount which the State agency determines the sponsor will need to administer its program.

(3) *Advance payment estimates.* When determining the amount of advance payments payable to the sponsor, the State agency shall make the best possible estimate based on the sponsor's request and any other available data. Under no circumstances may the amount of the advance payment for operating or administrative costs exceed the amount estimated by the State agency to be needed by the sponsor to meet operating or administrative costs, respectively.

(4) *Limit.* The sum of the advance operating and administrative costs payments to a sponsor for any one month shall not exceed $40,000 unless the State agency determines that a larger payment is necessary for the effective operation of the Program and the sponsor demonstrates sufficient administrative and managerial capability to justify a larger payment.

(5) *Deductions from advance payments.* The State agency shall deduct from either advance operating payments or advance administrative payments the amount of any previous payment which is under dispute or which is part of a demand for recovery under § 225.12.

(6) *Withholding of advance payments.* If the State agency has reason to believe that a sponsor will not be able to submit a valid claim for reimbursement covering the month for which advance payments have already been made, the subsequent month's advance payment shall be withheld until a valid claim is received.

(7) *Repayment of excess advance payments.* Upon demand of the State agency, sponsors shall repay any advance Program payments in excess of the amount cited on a valid claim for reimbursement.

(d) *Reimbursements.* Sponsors shall not be eligible for reimbursements for operating and administrative costs unless they have executed an agreement with the State agency. All reimbursements shall be in accordance with the terms of this agreement. Reimbursements shall not be paid for meals served at a site before the sponsor has received written notification that the site has been approved for participation in the Program. Income accruing to a sponsor's program shall be deducted from combined operating and administrative costs. The State agency may make full or partial reimbursement upon receipt of a claim for reimbursement, but shall first make any necessary adjustments in the amount to be paid. The following requirements shall be observed in submitting and paying claims:

(1) School food authorities that operate the Program, and operate more than one child nutrition program under a single State agency, must use a common claim form (as provided by the State agency) for claiming reimbursement for meals served under those programs.

(2) No reimbursement may be issued until the sponsor certifies that it operated all sites for which it is approved and that there has been no significant change in its projected administrative costs since its preceding claim and, for a sponsor receiving an advance payment for only one month, that there has been no significant change in its projected administrative costs since its initial advance administrative costs payment.

(3) Sponsors which operate less than 10 days in the final month of operations shall submit a combined claim for the final month and the immediate preceding month within 60 days of the last day of operation.

(4) The State agency shall forward reimbursements within 45 days of receiving valid claims. If a claim is incomplete or invalid, the State agency shall return the claim to the sponsor within 30 days with an explanation of the reason for disapproval. If the sponsor submits a revised claim, final action shall be completed within 45 days of receipt.

(5) Claims for reimbursement shall report information in accordance with the financial management system established by the State agency, and in sufficient detail to justify the reimbursement claimed and to enable the State agency to provide the Reports of Summer Food Service Program Operations required under § 225.8(b). In submitting a claim for reimbursement, each sponsor shall certify that the

claim is correct and that records are available to support this claim. Failure to maintain such records may be grounds for denial of reimbursement for meals served and/or administrative costs claimed during the period covered by the records in question. The costs of meals served to adults performing necessary food service labor may be included in the claim. Under no circumstances may a sponsor claim the cost of any disallowed meals as operating costs.

(6) A final Claim for Reimbursement shall be postmarked and/or submitted to the State agency not later than 60 days after the last day of the month covered by the claim. State agencies may establish shorter deadlines at their discretion. Claims not filed within the 60 day deadline shall not be paid with Program funds unless FNS determines that an exception should be granted. The State agency shall promptly take corrective action with respect to any Claim for Reimbursement as determined necessary through its claim review process or otherwise. In taking such corrective action, State agencies may make upward adjustments in Program funds claimed on claims filed within the 60 day deadline if such adjustments are completed within 90 days of the last day of the month covered by the claim and are reflected in the final Program Operations Report (FNS–418). Upward adjustments in Program funds claimed which are not reflected in the final FNS–418 for the month covered by the claim cannot be made unless authorized by FNS. Downward adjustments in Program funds claimed shall always be made without FNS authorization, regardless of when it is determined that such adjustments are necessary.

(7) Payments to a sponsor for operating costs must equal the lesser of the following totals:

(i) The actual operating costs incurred by the sponsor; or

(ii) The sum of the amounts derived by multiplying the number of meals, by type, actually served under the sponsor's program to eligible children by the current rates for each meal type, as adjusted in accordance with paragraph (d)(9) of this section.

(8) Payments to a sponsor for administrative costs must equal the lowest of the following totals:

(i) The amount estimated in the sponsor's approved administrative budget (taking into account any amendments);

(ii) The actual administrative costs incurred by the sponsor; or

(iii) The sum of the amounts derived by multiplying the number of meals, by type, actually served under the sponsor's program to eligible children by the current administrative rates for each meal type, as adjusted in accordance with paragraph (d)(9) of this section. Sponsors must be eligible to receive additional administrative reimbursement for each meal served to participating children at rural or self-preparation sites, and the rates for such additional administrative reimbursement must be adjusted in accordance with paragraph (d)(9) of this section.

(9) On each January 1, or as soon thereafter or as practicable, FNS will publish a notice in the FEDERAL REGISTER announcing any adjustment to the reimbursement rates described in paragraphs (d)(7)(ii) and (d)(8)(iii) of this section. Adjustments will be based upon changes in the series for food away from home of the Consumer Price Index(CPI) for all urban consumers since the establishment of the rates. Higher rates will be established for Alaska and Hawaii, based on the CPI for those States.

(10) Sponsors of camps shall be reimbursed only for meals served to children in camps whose eligibility for Program meals is documented. Sponsors of NYSP sites shall only claim reimbursement for meals served to children enrolled in the NYSP.

(11) If a State agency has reason to believe that a sponsor or food service management company has engaged in unlawful acts in connection with Program operations, evidence found in audits, reviews, or investigations shall be a basis for nonpayment of the applicable sponsor's claims for reimbursement.

(e) The sponsor may claim reimbursement for any meals which are examined for meal quality by the State

agency, auditors, or local health authorities and found to meet the meal pattern requirements.

(f) The sponsor shall not claim reimbursement for meals served to children at any site in excess of the site's approved level of meal service, if one has been established under § 225.6(d)(2). However, the total number of meals for which operating costs are claimed may exceed the approved level of meal service if the meals exceeding this level were served to adults performing necessary food service labor in accordance with paragraph (d)(5) of this section. In reviewing a sponsor's claim, the State agency shall ensure that reimbursements for second meals are limited to the percentage tolerance established in § 225.15(b)(4).

[54 FR 18208, Apr. 27, 1989, as amended at 55 FR 13469, Apr. 10, 1990; 64 FR 72485, Dec. 28, 1999]

§ 225.10 Audits and management evaluations.

(a) *Audits.* State agencies shall arrange for audits of their own operations to be conducted in accordance with the Department's Uniform Federal Assistance Regulations (7 CFR part 3015). Unless otherwise exempt, sponsors shall arrange for audits to be conducted in accordance with 7 CFR part 3015. State agencies shall provide OIG with full opportunity to audit the State agency and sponsors. Each State agency shall make available its records, including records of the receipt and expenditure of funds, upon a reasonable request from OIG. While OIG shall rely to the fullest extent feasible upon State-sponsored audits of sponsors, it shall, when considered necessary, (1) make audits on a State-wide basis, (2) perform on-site test audits, and (3) review audit reports and related working papers of audits performed by or for State agencies.

(b) *Management evaluations.* (1) State agencies shall provide FNS with full opportunity to conduct management evaluations (including visits to sponsors) of all operations of the State agency. Each State agency shall make available its records, including records of the receipts and expenditures of funds, upon a reasonable request by FNS.

(2) The State agency shall fully respond to any recommendations made by FNSRO pursuant to the management evaluation.

(3) FNSRO may require the State agency to submit on 20 days notice a corrective action plan regarding serious problems observed during any phase of the management evaluation.

(c) *Disregards.* In conducting management evaluations or audits for any fiscal year, the State agency, FNS or OIG may disregard overpayment which does not exceed $100 or, in the case of State agency administered programs, does not exceed the amount established by State law, regulations or procedures as a minimum for which claims will be made for State losses generally. No overpayment shall be disregarded, however, when there are unpaid claims for the same fiscal year from which the overpayment can be deducted or when there is substantial evidence of violation of criminal law or civil fraud statutes.

§ 225.11 Corrective action procedures.

(a) *Purpose.* The provisions in this section shall be used by the State agency to improve Program performance.

(b) *Investigations.* Each State agency shall promptly investigate complaints received or irregularities noted in connection with the operation of the Program, and shall take appropriate action to correct any irregularities. The State agency shall maintain on file all evidence relating to such investigations and actions. The State agency shall inform the appropriate FNSRO of any suspected fraud or criminal abuse in the Program which would result in a loss or misuse of Federal funds. The Department may make investigations at the request of the State agency, or where the Department determines investigations are appropriate.

(c) *Denial of applications and termination of sponsors.* Except as specified below, the State agency shall not enter into an agreement with any applicant sponsor identifiable through its corporate organization, officers, employees, or otherwise, as an institution which participated in any Federal child nutrition program and was seriously deficient in its operation of any such

program. The State agency shall terminate the Program agreement with any sponsor which it determines to be seriously deficient. However, the State agency shall afford a sponsor reasonable opportunity to correct problems before terminating the sponsor for being seriously deficient. The State agency may approve the application of a sponsor which has been disapproved or terminated in prior years in accordance with this paragraph if the sponsor demonstrates to the satisfaction of the State agency that the sponsor has taken appropriate corrective actions to prevent recurrence of the deficiencies. Serious deficiencies which are grounds for disapproval of applications and for termination include, but are not limited to, any of the following:

(1) Noncompliance with the applicable bid procedures and contract requirements of Federal child nutrition program regulations;

(2) The submission of false information to the State agency;

(3) Failure to return to the State agency any start-up or advance payments which exceeded the amount earned for serving meals in accordance with this part, or failure to submit all claims for reimbursement in any prior year, provided that failure to return any advance payments for months for which claims for reimbursement are under dispute from any prior year shall not be grounds for disapproval in accordance with this paragraph; and

(4) Program violations at a significant proportion of the sponsor's sites. Such violations include, but are not limited to, the following:

(i) Noncompliance with the meal service time restrictions set forth at § 225.16(c);

(ii) Failure to maintain adequate records;

(iii) Failure to adjust meal orders to conform to variations in the number of participating children;

(iv) The simultaneous service of more than one meal to any child;

(v) The claiming of Program payments for meals not served to participating children;

(vi) Service of a significant number of meals which did not include required quantities of all meal components;

(vii) Excessive instances of off-site meal consumption;

(viii) Continued use of food service management companies that are in violation of health codes.

(d) *Meal service restriction*. With the exception for residential camps set forth at § 225.16(b)(1)(ii), the State agency shall restrict to one meal service per day:

(1) Any food service site which is determined to be in violation of the time restrictions for meal service set forth at § 225.16(c) when corrective action is not taken within a reasonable time as determined by the State agency; and

(2) All sites under a sponsor if more than 20 percent of the sponsor's sites are determined to be in violation of the time restrictions set forth at § 225.16(c). If this action results in children not receiving meals under the Program, the State agency shall make reasonable effort to locate another source of meal service for these children.

(e) *Meal disallowances*. (1) If the State agency determines that a sponsor has failed to plan, prepare, or order meals with the objective of providing only one meal per child at each meal service at a site, the State agency shall disallow the number of children's meals prepared or ordered in excess of the number of children served.

(2) If the State agency observes meal service violations during the conduct of a site review, the State agency shall disallow as meals served to children all of the meals observed to be in violation.

(3) The State agency shall also disallow children's meals which are in excess of a site's approved level established under § 225.6(d)(2).

(f) *Corrective action and termination of sites*. (1) Whenever the State agency observes violations during the course of a site review, it shall require the sponsor to take corrective action. If the State agency finds a high level of meal service violations, the State agency shall require a specific immediate corrective action plan to be followed by the sponsor and shall either conduct a follow-up visit or in some other manner verify that the specified corrective action has been taken.

(2) The State agency shall terminate the participation of a sponsor's site if

the sponsor fails to take action to correct the Program violations noted in a State agency review report within the timeframes established by the corrective action plan.

(3) The State agency shall immediately terminate the participation of a sponsor's site if during a review it determines that the health or safety of the participating children is imminently threatened.

(4) If the site is vended, the State agency shall within 48 hours notify the food service management company providing meals to the site of the site's termination.

[54 FR 18208, Apr. 27, 1989, as amended at 55 FR 13469, Apr. 10, 1990]

§ 225.12 Claims against sponsors.

(a) The State agency shall disallow any portion of a claim for reimbursement and recover any payment to a sponsor not properly payable under this part, except as provided for in § 225.10(c). State agencies may consider claims for reimbursement not properly payable if a sponsor's records do not justify all costs and meals claimed. However, the State agency shall notify the sponsor of the reasons for any disallowance or demand for repayment.

(b) Minimum State agency collection procedures for unearned payments shall include:

(1) Written demand to the sponsor for the return of improper payments;

(2) If after 30 calendar days the sponsor fails to remit full payment or agree to a satisfactory repayment schedule, a second written demand for the return of improper payments, sent by certified mail, return receipt requested;

(3) If after 60 calendar days following the original written demand, the sponsor fails to remit full payment or agree to a satisfactory repayment schedule, a third written demand for the return of improper payments, sent by certified mail, return receipt requested;

(4) If after 90 calendar days following the original written demand, the sponsor fails to remit full payment or agree to a satisfactory repayment schedule, the State agency shall refer the claim against the sponsor to the appropriate State or Federal authorities for pursuit of legal remedies.

(c) If FNS does not concur with the State agency's action in paying a sponsor or in failing to collect an overpayment, FNS shall notify the State agency of its intention to assert a claim against the State agency. In all such cases, the State agency shall have full opportunity to submit evidence concerning the action taken. The State agency shall be liable to FNS for failure to collect an overpayment unless FNS determines that the State agency has conformed with this part in issuing the payment and has exerted reasonable efforts in accordance with paragraph (b) of this section to recover the improper payment.

(d) The amounts recovered by the State agency from sponsors may be utilized to make Program payments to sponsors for the period for which the funds were initially available and/or to repay the State for any of its own funds used to make payments on claims for reimbursement. Any amounts recovered which are not so utilized shall be returned to FNS in accordance with the requirements of this part.

§ 225.13 Appeal procedures.

(a) Each State agency shall establish a procedure to be followed by an applicant appealing: A denial of an application for participation; a denial of a sponsor's request for an advance payment; a denial of a sponsor's claim for reimbursement (except for late submission under § 225.9(d)(5)); a State agency's refusal to forward to FNS an exception request by the sponsor for payment of a late claim or a request for an upward adjustment to a claim; a claim against a sponsor for remittance of a payment; the termination of the sponsor or a site; a denial of a sponsor's application for a site; a denial of a food service management company's application for registration, if applicable; or the revocation of a food service management company's registration, if applicable. Appeals shall not be allowed on decisions made by FNS with respect to late claims or upward adjustments under § 225.9(d)(5).

(b) At a minimum, appeal procedures shall provide that:

(1) The sponsor or food service management company be advised in writing

of the grounds upon which the State agency based the action. The notice of action, which shall be sent by certified mail, return receipt requested, shall also state that the sponsor or food service management company has the right to appeal the State's action;

(2) The sponsor or food service management company be advised in writing that the appeal must be made within a specified time and must meet the requirements of paragraph (b)(4) of this section. The State agency shall establish this period of time at not less than one week nor more than two weeks from the date on which the notice of action is received;

(3) The appellant be allowed the opportunity to review any information upon which the action was based;

(4) The appellant be allowed to refute the charges contained in the notice of action either in person or by filing written documentation with the review official. To be considered, written documentation must be submitted by the appellant within seven days of submitting the appeal, must clearly identify the State agency action being appealed, and must include a photocopy of the notice of action issued by the State agency;

(5) A hearing be held by the review official in addition to, or in lieu of, a review of written information submitted by the appellant only if the appellant so specifies in the letter appealing the action. The appellant may retain legal counsel or may be represented by another person. Failure of the appellant's representative to appear at a scheduled hearing shall constitute the appellant's waiver of the right to a personal appearance before the review official, unless the review official agrees to reschedule the hearing. A representative of the State agency shall be allowed to attend the hearing to respond to the appellant's testimony and written information and to answer questions from the review official;

(6) If the appellant has requested a hearing, the appellant and the State agency shall be provided with at least 5 days advance written notice, sent by certified mail, return receipt requested, of the time and place of the hearing;

(7) The hearing be held within 14 days of the date of the receipt of the request for review, but, where applicable, not before the appellant's written documentation is received in accordance with paragraphs (b) (4) and (5) of this section;

(8) The review official be independent of the original decision-making process;

(9) The review official make a determination based on information provided by the State agency and the appellant, and on Program regulations;

(10) Within 5 working days after the appellant's hearing, or within 5 working days after receipt of written documentation if no hearing is held, the reviewing official make a determination based on a full review of the administrative record and inform the appellant of the determination of the review by certified mail, return receipt requested;

(11) The State agency's action remain in effect during the appeal process. However, participating sponsors and sites may continue to operate the Program during an appeal of termination, and if the appeal results in overturning the State agency's decision, reimbursement shall be paid for meals served during the appeal process. However, such continued Program operation shall not be allowed if the State agency's action is based on imminent dangers to the health or welfare of children. If the sponsor or site has been terminated for this reason, the State agency shall so specify in its notice of action; and

(12) The determination by the State review official is the final administrative determination to be afforded to the appellant.

(c) The State agency shall send written notification of the complete appeal procedures and of the actions which are appealable, as specified in paragraph (a) of this section, to each potential sponsor applying to participate and to each food service management company applying to register in accordance with § 225.6(g).

(d) A record regarding each review shall be kept by the State agency, as required under § 225.8(a). The record shall document the State agency's

compliance with these regulations and shall include the basis for its decision.

[54 FR 18208, Apr. 27, 1989, as amended at 64 FR 72486, Dec. 28, 1999]

Subpart C—Sponsor and Site Provisions

§ 225.14 Requirements for sponsor participation.

(a) *Applications.* Sponsors shall make written application to the State agency to participate in the Program. Such application shall be made on a timely basis in accordance with the requirements of § 225.6(b)(1). Sponsors proposing to operate a site during an unanticipated school closure during the period from October through April (or at any time of the year in an area with a continuous school calendar) may be exempt, at the discretion of the State agency, from submitting a new application if they have participated in the program at any time during the current year or in either of the prior two calendar years.

(b) *Sponsor eligibility.* Applicants eligible to sponsor the Program include:

(1) Public or nonprofit private school food authorities;

(2) Public or nonprofit private residential summer camps;

(3) Units of local, municipal, county, or State governments;

(4) Public or private nonprofit colleges or universities which are currently participating in the National Youth Sports Program; and

(5) Private nonprofit organizations as defined in § 225.2.

(c) *General requirements.* No applicant sponsor shall be eligible to participate in the Program unless it:

(1) Demonstrates financial and administrative capability for Program operations and accepts final financial and administrative responsibility for total Program operations at all sites at which it proposes to conduct a food service;

(2) Has not been seriously deficient in operating the Program;

(3) Will conduct a regularly scheduled food service for children from areas in which poor economic conditions exist, or qualifies as a camp;

(4) Has adequate supervisory and operational personnel for overall monitoring and management of each site, including adequate personnel to conduct the visits and reviews required in §§ 225.15(d) (2) and (3);

(5) Provides an ongoing year-round service to the community which it proposes to serve under the Program, except as provided for in § 225.6(b)(4);

(6) Certifies that all sites have been visited and have the capability and the facilities to provide the meal service planned for the number of children anticipated to be served; and

(7) Enters into a written agreement with the State agency upon approval of its application, as required in § 225.6(e).

(d) *Requirements specific to sponsor types.* (1) If the sponsor is a camp, it must certify that it will collect information on participants' eligibility to support its claim for reimbursement.

(2) If the sponsor administers the Program at sites that provide summer school sessions, it must ensure that these sites are open to children enrolled in summer school and to all children residing in the area served by the site.

(3) Sponsors which are units of local, municipal, county or State government, and sponsors which are private nonprofit organizations, will only be approved to administer the Program at sites where they have direct operational control. Operational control means that the sponsor shall be responsible for:

(i) Managing site staff, including the hiring, terminating, and determining conditions of employment for site staff; and

(ii) Exercising management control over Program operations at sites throughout the period of Program participation by performing the functions specified in § 225.15.

(4) If the sponsor administers homeless feeding sites, it must:

(i) Document that the site is not a residential child-care institution as defined in paragraph (c) of the definition of 'School' contained in § 210.2 of this chapter;

(ii) Document that the primary purpose of the homeless feeding site is to provide shelter and meals to homeless families; and

(iii) Certify that these sites employ meal counting methods to ensure that

reimbursement is claimed only for meals served to homeless and nonhomeless children.

(5) If the sponsor administers NYSP sites, it must ensure that all children at these sites are enrolled participants in the NYSP.

(6) If the sponsor is a private nonprofit organization, it must certify that it:

(i) Administers the Program:

(A) At no more than 25 sites, with not more than 300 children being served at any approved meal service at any one site, or

(B) With a waiver granted by the State agency in accordance with § 225.6(b)(6)(ii), not more than 500 children being served at any approved meal service at any one site;

(ii) Operates in areas where a school food authority has not indicated that it will operate the Program in the current year;

(iii) Exercises full control and authority over the operation of the Program at all sites under its sponsorship;

(iv) Provides ongoing year-round activities for children or families;

(v) Demonstrates that it possesses adequate management and the fiscal capacity to operate the Program; and

(vi) Meets applicable State and local health, safety, and sanitation standards.

[54 FR 18208, Apr. 27, 1989, as amended at 55 FR 13469, Apr. 10, 1990; 64 FR 72486, Dec. 28, 1999; 64 FR 72898, Dec. 29, 1999; 65 FR 50128, Aug. 17, 2000]

§ 225.15 Management responsibilities of sponsors.

(a) *General.* (1) Sponsors shall operate the food service in accordance with: the provisions of this part; any instructions and handbooks issued by FNS under this part; and any instructions and handbooks issued by the State agency which are not inconsistent with the provisions of this part.

(2) Sponsors shall not claim reimbursement under parts 210, 215, 220, or 226 of this chapter. In addition, the sponsor must ensure that records of any site serving homeless children accurately reflect commodity allotments received as a ''charitable institution'', as defined in §§ 250.3 and 250.41 of this chapter. Commodities received for Program meals must be based only on the number of eligible children's meals served. Sponsors may use funds from other Federally-funded programs to supplement their meal service but must, in calculating their claim for reimbursement, deduct such funds from total operating and administrative costs in accordance with the definition of ''income accruing to the Program'' at § 225.2 and with the regulations at § 225.9(d). Sponsors which are school food authorities may use facilities, equipment and personnel supported by funds provided under this part to support a nonprofit nutrition program for the elderly, including a program funded under the Older Americans Act of 1965 (42 U.S.C. 3001 *et seq.*).

(3) No sponsor may contract out for the management responsibilities of the Program described in this section.

(b) *Meal Ordering.* (1) Each sponsor shall, to the maximum extent feasible, utilize either its own food service facilities or obtain meals from a school food service facility. If the sponsor obtains meals from a school food service facility, the applicable requirements of this part shall be embodied in a written agreement between the sponsor and the school.

(2) Upon approval of its application or any adjustment in the approved levels of meal service for its sites established under § 225.6(d)(2), vended sponsors shall inform their food service management company of the approved level at each site for which the food service management company will provide meals.

(3) Sponsors shall plan for and prepare or order meals on the basis of participation trends with the objective of providing only one meal per child at each meal service. The sponsor shall make the adjustments necessary to achieve this objective using the results from its monitoring of sites. For sites for which approved levels of meal service have been established in accordance with § 225.6(d)(2), the sponsor shall adjust the number of meals ordered or prepared with the objective of providing only one meal per child whenever the number of children attending the site is below the approved level. The sponsor shall not order or prepare meals for children at any site in excess

of the site's approved level, but may order or prepare meals above the approved level if the meals are to be served to adults performing necessary food service labor in accordance with § 225.9(d)(4). Records of participation and of preparation or ordering of meals shall be maintained to demonstrate positive action toward meeting this objective.

(4) In recognition of the fluctuation in participation levels which makes it difficult to estimate precisely the number of meals needed and to reduce the resultant waste, sponsors may claim reimbursement for a number of second meals which does not exceed two percent of the number of first meals served to children for each meal type (i.e., breakfasts, lunches, supplements, or suppers) during the claiming period. The State agency shall disallow all claims for second meals if it determines that the sponsor failed to plan and prepare or order meals with the objective of providing only one meal per child at each meal service. Second meals shall be served only after all participating children at the site's meal service have been served a meal.

(c) *Records and claims.* (1) Sponsors shall maintain accurate records which justify all costs and meals claimed. Failure to maintain such records may be grounds for denial of reimbursement for meals served and/or administrative costs claimed during the period covered by the records in question. The sponsor's records shall be available at all times for inspection and audit by representatives of the Secretary, the Comptroller General of the United States, and the State agency for a period of three years following the date of submission of the final claim for reimbursement for the fiscal year.

(2) Sponsors shall submit claims for reimbursement in accordance with this part. All final claims must be submitted to the State agency within 60 days following the last day of the month covered by the claim.

(d) *Training and monitoring.* (1) Each sponsor shall hold Program training sessions for its administrative and site personnel and shall allow no site to operate until personnel have attended at least one of these training sessions. The State agency may waive these training requirements for operation of the Program during unanticipated school closures during the period from October through April (or at any time of the year in an area with a continuous school calendar). Training of site personnel shall, at a minimum, include: the purpose of the Program; site eligibility; recordkeeping; site operations; meal pattern requirements; and the duties of a monitor. Each sponsor shall ensure that its administrative personnel attend State agency training provided to sponsors, and sponsors shall provide training throughout the summer to ensure that administrative personnel are thoroughly knowledgeable in all required areas of Program administration and operation and are provided with sufficient information to enable them to carry out their Program responsibilities. Each site shall have present at each meal service at least one person who has received this training.

(2) Sponsors shall visit each of their sites at least once during the first week of operation under the Program and shall promptly take such actions as are necessary to correct any deficiencies.

(3) Sponsors shall review food service operations at each site at least once during the first four weeks of Program operations, and thereafter shall maintain a reasonable level of site monitoring. Sponsors shall complete a monitoring form developed by the State agency during the conduct of these reviews.

(e) *Media Release.* Each sponsor shall annually announce in the media serving the area from which it draws its attendance the availability of free meals. Camps and other programs not eligible under § 225.2 (paragraph (a) of ''areas in which poor economic conditions exist'') shall annually announce to all participants the availability of free meals for eligible children. All media releases issued by camps and other programs not eligible under § 225.2 (paragraph (a) of ''areas in which poor economic conditions exist'') shall include: the Secretary's family-size and income standards for reduced price school meals labelled ''SFSP Income Eligibility Standards''; a statement that children

who are members of households receiving food stamp, FDPIR, or TANF benefits are automatically eligible to receive free meal benefits at eligible program sites; and a statement that meals are available without regard to race, color, national origin, sex, age, or handicap.

(f) *Application for free Program meals.*—(1) *Purpose of application form.* The application is used to determine the eligibility of children attending camps and the eligibility of sites that are not open sites as defined in paragraph (a) of the definition of ''areas in which poor economic conditions exist'', in § 225.2. In these situations, parents or guardians of children enrolled in camps or these other sites must be given application forms to provide information described in paragraph (f)(2) or (f)(3) of this section, as applicable. Applications are not necessary if other information sources are available and can be used to determine eligibility of individual children in camps or sites.

(2) *Application procedures based on household income.* The household member completing the application on behalf of the child enrolled in the Program must provide the following information:

(i) The names of all children for whom application is made;

(ii) The names of all other household members;

(iii) The social security number of the adult household member who signs the application or an indication that the household member does not have a social security number;

(iv) The income received by each household member identified by source of income;

(v) The signature of an adult household member;

(vi) The date the application is completed and signed.

(3) *Application based on the household's receipt of food stamp, FDPIR, or TANF benefits.* Households may apply on the basis of receipt of food stamp, FDPIR, or TANF benefits by providing the following information:

(i) The name(s) and food stamp, FDPIR, or TANF case number(s) of the child(ren) who are enrolled in the Program; and

(ii) The signature of an adult household member.

(4) *Information or notices required on application forms.* Application forms or descriptive materials given to households about applying for free meals must contain the following information:

(i) The family-size and income levels for reduced price school meal eligibility with an explanation that households with incomes less than or equal to these values are eligible for free Program meals (NOTE: The income levels for free school meal eligibility must not be included on the application or in other materials given to the household).

(ii) A statement that a child who is a member of a household that receives food stamp, FDPIR, or TANF benefits is automatically eligible to receive free meals in the Program;

(iii) A statement that reads, ''In certain cases, foster children are eligible for free meals regardless of household income. If such children are living with you and you wish to apply for such meals, please contact us.'';

(iv) The following statement that provides notice to the household member whose social security number is disclosed: ''Unless you include your child's case number for the Food Stamp Program, the Food Distribution Program on Indian Reservations (or other identifier for the Food Distribution Program on Indian Reservations) or the Temporary Assistance for Needy Families Program, you must include the social security number of the adult household member signing the application or indicate that the household member does not have a social security number. This is required by section 9 of the National School Lunch Act. The social security number is not mandatory, but the application cannot be approved if a social security number is not given or an indication is not made that the signer does not have a social security number. The social security number will be used in the administration and enforcement of the program.''

(v) The statement used to inform the household about the use of social security numbers must comply with the Privacy Act of 1974 (Pub. L. 93–579). If a State or local agency plans to use the

social security numbers for uses not described in paragraph (f)(4)(iv) of this section, the notice must be revised to explain those uses.

(vi) Examples of income that should be provided on the application, including: Earnings, wages, welfare benefits, pensions, support payments, unemployment compensation, social security, and other cash income;

(vii) A notice placed immediately above the signature block stating that the person signing the application certifies that all information provided is correct, that the household is applying for Federal benefits in the form of free Program meals, that Program officials may verify the information on the application, and that purposely providing untrue or misleading statements may result in prosecution under State or Federal criminal laws; and

(viii) A statement that if food stamp, FDPIR, or TANF case numbers are provided, they may be used to verify the current food stamp, FDPIR, or TANF certification for the children for whom free meals benefits are claimed.

(5) *Verifying information on Program applications*. Households selected to verify information on their Program applications must be notified in writing. State agencies must ensure that the notice of information about the use of social security numbers provided on applications complies with section 7 of Pub. L. 93–579 (Privacy Act of 1974). Households must be informed of the following:

(i) They must provide a social security number for each adult household member, or indicate that an adult household member does not have a social security number, or provide proof that they are receiving food stamp, FDPIR, or TANF benefits;

(ii) They will lose Program benefits or be terminated from participation if they do not cooperate with the verification process;

(iii) Social security numbers may be used to determine the correctness of information on applications and continued eligibility for Program benefits;

(iv) They will be given the name and phone number of an official who can assist in the verification process;

(v) Verification may occur during program reviews, audits, and investigations;

(vi) Verification may include contacting employers, food stamp or welfare offices, or State employment offices to determine the accuracy of statements on the application about income, receipt of food stamp, FDPIR, TANF, or unemployment benefits; and

(vii) They may lose benefits or face claims or legal action if incorrect information is reported on the application.

(g) *Disclosure of program eligibility information to State Medicaid (Medicaid) and the State Children's Health Insurance Program (SCHIP)*. Program eligibility information about children eligible for free and reduced price meals may be disclosed to Medicaid and SCHIP as described in this section.

(1) *Who decides whether to disclose program eligibility information to Medicaid and/or SCHIP?* The State agency may elect to allow sponsors to disclose children's free and reduced price meal eligibility information to Medicaid and SCHIP. Sponsors may then elect to do so. Children's program eligibility information may only be disclosed to Medicaid or SCHIP when both the State agency and the sponsor so elect, the parent/guardian does not decline to have their eligibility information disclosed as described in paragraph (g)(5), and the requirements in this paragraph (g) are met. y

(2) *What information may we disclose for use by Medicaid and SCHIP?* The State agency or sponsor, as appropriate, may disclose children's names, eligibility status (whether they are eligible for free or reduced price meals), and any other eligibility information obtained through the free and reduced price meal application or obtained through direct certification to persons directly connected with the administration of Medicaid or SCHIP.

(3) *Who are persons ''directly connected'' with the administration of Medicaid and SCHIP?* State employees and persons authorized under Federal and State Medicaid and SCHIP requirements to carry out initial processing of Medicaid or SCHIP applications or to make eligibility determinations are

persons directly connected with the administration of Medicaid and SCHIP for purposes of disclosure of children's free and reduced price meal eligibility information.

(4) *What are the restrictions on how Medicaid and SCHIP use children's free and reduced price meal eligibility information?* Medicaid and SCHIP agencies and health insurance program operators receiving children's free and reduced price meal eligibility information may only use the information to enroll children in Medicaid or SCHIP. The Medicaid and SCHIP enrollment process may include targeting and identifying children from low-income households who are potentially eligible for Medicaid or SCHIP for the purpose of seeking to enroll them in Medicaid or SCHIP.

(5) *What are the requirements for notifying households of potential disclosure to Medicaid or SCHIP?* The State agency or sponsor, as appropriate, must notify parents/guardians that their children's free or reduced price meal eligibility information will be disclosed to Medicaid and/or SCHIP unless the parent/guardian elects not to have their information disclosed. Additionally, the State agency or sponsor, as appropriate, must give parents/guardians an opportunity to elect not to have their information disclosed to Medicaid or SCHIP. Only the parent or guardian who is a member of the household or family for purposes of the free and reduced price meal or free milk application may decline the disclosure of eligibility information. The notification must inform parents/guardians that they are not required to consent to the disclosure, that the information, if disclosed, will be used to identify children eligible for and seek to enroll children in a health insurance program, and that their decision will not affect their children's eligibility for free or reduced price meals. The notification may be included in the letter/notice to parents/guardians that accompanies the free and reduced price application, on the application itself or in a separate notice provided to parents/guardians. The notice must give parents/guardians adequate time to respond. For children determined eligible through direct certification, the notice of potential disclosure may be included in the document informing parents/guardians of their children's eligibility for free meals through direct certification.

(6) *May social security numbers be disclosed?* The State agency or sponsor, as appropriate, may disclose social security numbers to any programs or persons authorized to receive all program eligibility information under this paragraph (g), provided parents/guardians have not declined to have their information disclosed. However, State agencies and sponsors that plan to disclose social security numbers must give notice of the planned use of the social security number. This notice must be in accordance with section 7(b) of the Privacy Act of 1974 (5 U.S.C. 552a note). The application must include substantially the following language for disclosures of social security numbers to Medicaid or SCHIP: ''The social security number may also be disclosed to Medicaid and the State Children's Health Insurance Program for the purpose of identifying and seeking to enroll eligible children in one of these health insurance programs.'' This language is in addition to the notice required in paragraph (f)(4)(iv) of this section. State agencies and sponsors are responsible for drafting the appropriate notice for disclosures of social security numbers.

(7) *Are agreements required before disclosing program eligibility information?* The State agency or sponsor, as appropriate, must have a written agreement with the State or local agency or agencies administering Medicaid or SCHIP prior to disclosing children's free and reduced price eligibility information. At a minimum, the agreement must:

(i) Identify the health insurance program or health agency receiving children's eligibility information;

(ii) Describe the information that will be disclosed;

(iii) Require that the Medicaid or SCHIP agency use the information obtained and specify that the information must only be used to seek to enroll children in Medicaid or SCHIP;

(iv) Describe how the information will be protected from unauthorized uses and disclosures;

(v) Describe the penalties for unauthorized disclosure; and

(vi) Be signed by both the Medicaid or SCHIP program or agency and the State agency or sponsor, as appropriate.

(8) *What are the penalties for unauthorized disclosure or misuse of information?* In accordance with section 9(b)(2)(C)(v) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1758(b)(2)(C)(v)), any individual who publishes, divulges, discloses or makes known in any manner, or to any extent not authorized by statute or this section, any information obtained under this paragraph (g) will be fined not more than $1,000 or imprisoned for up to 1 year, or both.

(9) *What are the State agency's responsibilities regarding disclosures?* State agencies that elect to allow disclosure of children's free and reduced price meal eligibility information to Medicaid or SCHIP, as provided in this paragraph (g), must ensure that any sponsor acting in accordance with that option:

(i) Has a written agreement with the State or local agency or agencies administering health insurance programs for children under titles XIX and XXI of the Social Security Act (42 U.S.C. 1396 *et seq.* and 1397aa *et seq.*) that requires the health agencies to use children's free and reduced price meal eligibility information to seek to enroll children in those health insurance programs; and

(ii) Notifies each household of the information that will be disclosed, that the information disclosed will be used only to seek to enroll children in Medicaid or SCHIP and provides each parent/guardian with an opportunity to elect not to have the information disclosed.

(h) *Food service management companies.* (1) Failure by a sponsor to comply with the provisions of this section shall be sufficient grounds for the State agency to terminate that sponsor's participation in accordance with § 225.18.

(2) Any sponsor may contract with a food service management company to manage the sponsor's food service operations and/or for the preparation of unitized meals with or without milk or juice. Exceptions to the unitizing requirement may only be made in accordance with the provisions set forth at § 225.6(h)(3).

(3) Any vended sponsor shall be responsible for ensuring that its food service operation is in conformity with its agreement with the State agency and with all the applicable provisions of this part.

(4) In addition to any applicable State or local laws governing bid procedures, and with the exceptions identified in this paragraph, each sponsor which contracts with a food service management company shall comply with the competitive bid procedures described in this paragraph. Sponsors which are schools or school food authorities and which have an exclusive contract with a food service management company for year-round service, and sponsors whose total contracts with food service management companies will not exceed $10,000, shall not be required to comply with these procedures. These exceptions do not relieve the sponsor of the responsibility to ensure that competitive procurement procedures are followed in contracting with any food service management company. Each sponsor whose proposed contract is subject to the specific bid procedures set forth in this paragraph shall ensure, at a minimum, that:

(i) All proposed contracts are publicly announced at least once, not less than 14 calendar days prior to the opening of bids, and the announcement includes the time and place of the bid opening;

(ii) The bids are publicly opened;

(iii) The State agency is notified, at least 14 calendar days prior to the opening of the bids, of the time and place of the bid opening;

(iv) The invitation to bid does not specify a minimum price;

(v) The invitation to bid contains a cycle menu approved by the State agency upon which the bid is based;

(vi) The invitation to bid contains food specifications and meal quality standards approved by the State agency upon which the bid is based;

(vii) The invitation to bid does not specify special meal requirements to meet ethnic or religious needs unless such special requirements are necessary to meet the needs of the children to be served;

(viii) Neither the invitation to bid nor the contract provides for loans or any other monetary benefit or term or condition to be made to sponsors by food service management companies;

(ix) Nonfood items are excluded from the invitation to bid, except where such items are essential to the conduct of the food service;

(x) Copies of all contracts between sponsors and food service management companies, along with a certification of independent price determination, are submitted to the State agency prior to the beginning of Program operations;

(xi) Copies of all bids received are submitted to the State agency, along with the sponsor's reason for choosing the successful bidder; and

(xii) All bids in an amount which exceeds the lowest bid and all bids totaling $100,000 or more are submitted to the State agency for approval before acceptance. State agencies shall respond to a request for approval of such bids within 5 working days of receipt.

(5) Each food service management company which submits a bid over $100,000 shall obtain a bid bond in an amount not less than five (5) percent nor more than ten (10) percent, as determined by the sponsor, of the value of the contract for which the bid is made. A copy of the bid bond shall accompany each bid.

(6) Each food service management company which enters into a food service contract for over $100,000 with a sponsor shall obtain a performance bond in an amount not less than ten (10) percent nor more than twenty-five (25) percent of the value of the contract, as determined by the State agency, of the value of the contract for which the bid is made. Any food service management company which enters into more than one contract with any one sponsor shall obtain a performance bond covering all contracts if the aggregate amount of the contracts exceeds $100,000. Sponsors shall require the food service management company to furnish a copy of the performance bond within ten days of the awarding of the contract.

(7) Food service management companies shall obtain bid bonds and performance bonds only from surety companies listed in the current Department of the Treasury Circular 570. No sponsor or State agency shall allow food service management companies to post any ''alternative'' forms of bid or performance bonds, including but not limited to cash, certified checks, letters of credit, or escrow accounts.

(i) *Other responsibilities*. Sponsors shall comply with all of the meal service requirements set forth in § 225.16.

[54 FR 18208, Apr. 27, 1989, as amended at 55 FR 13470, Apr. 10, 1990; 61 FR 25553, May 22, 1996; 64 FR 72486, Dec. 28, 1999; 64 FR 72898, Dec. 29, 1999; 65 FR 82251, Dec. 28, 2000; 66 FR 2202, Jan. 11, 2001]

§ 225.16 Meal service requirements.

(a) *Sanitation*. Sponsors shall ensure that in storing, preparing, and serving food, proper sanitation and health standards are met which conform with all applicable State and local laws and regulations. Sponsors shall ensure that adequate facilities are available to store food or hold meals. Within two weeks of receiving notification of their approval, but in any case prior to commencement of Program operation, sponsors shall submit to the State agency a copy of their letter advising the appropriate health department of their intention to provide a food service during a specific period at specific sites.

(b) *Meal services*. The meals which may be served under the Program are breakfast, lunch, supper, and supplements, referred to from this point as ''snacks''. No sponsor may be approved to provide more than two snacks per day. A sponsor may only be reimbursed for meals served in accordance with this section.

(1) *Camps*. Sponsors of camps shall only be reimbursed for meals served in camps to children from families which meet the eligibility standards for this Program. The sponsor shall maintain a copy of the documentation establishing the eligibility of each child receiving meals under the Program. Meal service at camps shall be subject to the following provisions:

(i) Each day a camp may serve up to three meals or two meals and one snack;

(ii) Residential camps are not subject to the time restrictions for meal service set forth at paragraphs (c) (1) and (2) of this section; and

(iii) A camp shall be approved to serve these meals only if it has the administrative capability to do so; if the service period of the different meals does not coincide or overlap; and, where applicable, if it has adequate food preparation and holding facilities.

(2) *NYSP Sites*. Sponsors of NYSP sites shall only be reimbursed for meals served to enrolled NYSP participants at these sites.

(3) *Restrictions on the number and type of meals served*. Food service sites other than camps and sites that primarily serve migrant children may serve either:

(i) One meal each day, a breakfast, a lunch, or snack; or

(ii) Two meals each day, if one is a lunch and the other is a breakfast or a snack.

(4) *Sites which serve children of migrant families*. Food service sites that primarily serve children from migrant families may be approved to serve each day up to three meals or two meals and one snack. These sites shall serve children in areas where poor economic conditions exist as defined in § 225.2. A sponsor which operates in accordance with this part shall receive reimbursement for all meals served to children at these sites. A site which primarily serves children from migrant families shall only be approved to serve more than one meal each day if it has the administrative capability to do so; if the service period of the different meals does not coincide or overlap; and, where applicable, if it has adequate food preparation and holding facilities.

(c) *Time restrictions for meal service*. (1) Three hours must elapse between the beginning of one meal service, including snacks, and the beginning of another, except that 4 hours must elapse between the service of a lunch and supper when no snack is served between lunch and supper. The service of supper shall begin no later than 7 p.m., unless the State agency has granted a waiver of this requirement due to extenuating circumstances. These waivers shall be granted only when the State agency and the sponsor ensure that special arrangements shall be made to monitor these sites. In no case may the service of supper extend beyond 8 p.m. The time restrictions in this paragraph shall not apply to residential camps.

(2) The duration of the meal service shall be limited to two hours for lunch or supper and one hour for all other meals.

(3) Meals served outside of the period of approved meal service shall not be eligible for Program payments.

(4) Any permanent or planned changes in meal service periods must be approved by the State agency.

(5) Meals which are not prepared at the food service site shall be delivered no earlier than one hour prior to the beginning of the meal service (unless the site has adequate facilities for holding hot or cold meals within the temperatures required by State or local health regulations) and no later than the beginning of the meal service.

(6) The sponsor shall claim for reimbursement only the type(s) of meals for which it is approved under its agreement with the State agency.

(d) *Meal patterns*. The meal requirements for the Program are designed to provide nutritious and well-balanced meals to each child. Sponsors shall ensure that meals served meet all of the requirements. Except as otherwise provided in this section, the following tables present the minimum requirements for meals served to children in the Program. Children age 12 and up may be served larger portions based on the greater food needs of older boys and girls.

(1) *Breakfast*. The minimum amount of food components to be served as breakfast are as follows:

Food components	Minimum amount
Vegetables and Fruits	
Vegetable(s) and/or fruit(s) or	½ cup.[1]
Full-strength vegetable or fruit juice or an equivalent quantity of any combination of vegetable(s), fruits(s), and juice.	½ cup (4 fluid ounces).

Food components	Minimum amount
Bread and Bread Alternates[2]	
Bread or	1 slice.
Cornbread, biscuits, rolls, muffins, etc. or	1 serving.[3]
Cold dry cereal or	¾ cup or 1 ounce.[4]
Cooked cereal or cereal grains or	½ cup.
Cooked pasta or noodle products or an equivalent quantity of any combination of bread/bread alternate.	½ cup.
Milk[5]	
Milk, fluid	1 cup (½ pint, 8 fluid ounces).
Meat and Meat Alternates (Optional)	
Lean meat or poultry or fish or	1 ounce.
Alternate protein product[6] or	1 ounce.
Cheese or	1 ounce.
Egg (large) or	½.
Cooked dry beans or peas or	¼ cup.
Peanut butter or an equivalent quantity of any combination of meat/meat alternate or	2 tablespoons.
Yogurt, plain or flavored, unsweetened or sweetened	4 ounces or ½ cup.

[1] For the purposes of the requirement outlined in this table, a cup means a standard measuring cup.
[2] Bread, pasta or noodle products, and cereal grains (such as rice, bulgur, or corn grits) shall be whole-grain or enriched; cornbread, biscuits, rolls, muffins, etc., shall be made with whole-grain or enriched meal or flour; cereal shall be whole-grain, enriched or fortified.
[3] Serving sizes and equivalents will be in guidance materials to be distributed by FNS to State agencies.
[4] Either volume (cup) or weight (ounces), whichever is less.
[5] Milk shall be served as a beverage or on cereal or used in part for each purpose.
[6] Must meet the requirements in appendix A of this part.

(2) *Lunch or supper*. The minimum amounts of food components to be served as lunch or supper are as follows:

Food components	Minimum amount
Meat and Meat Alternates	
Lean meat or poultry or fish or	2 ounces.
Alternate protein products[1] or	2 ounces.
Cheese or	2 ounces.
Egg (large) or	1.
Cooked dry beans or peas or	½ cup.[2]
Peanut butter or soynut butter or other nut or seed butters or	4 tablespoons.
Peanuts or soynuts or tree nuts or seed[3] or	1 ounce=50%.[4]
Yogurt, plain or flavored, unsweetened or sweetened or an equivalent quantity of any combination of the above meat/meat alternates.	8 ounces or 1 cup.
Vegetables and Fruits	
Vegetable(s) and/or fruit(s)[5]	¾ cup total.
Bread and Bread Alternatives[6]	
Bread or	1 slice.
Cornbread, biscuits, rolls, muffins, etc. or	1 serving.[7]
Cooked pasta or noodle products or	½ cup.
Cooked cereal grains or an equivalent quantity of any combination of bread/bread alternate	½ cup.
Milk	
Milk, fluid, served as a beverage	1 cup (½ pint, 8 fluid ounces).

[1] Must meet the requirements of appendix A of this part.
[2] For the purposes of the requirement outlined in this table, a cup means a standard measuring cup.
[3] Tree nuts and seeds that may be used as meat alternate are listed in program guidance.
[4] No more than 50% of the requirement shall be met with nuts or seeds. Nuts or seeds shall be combined with another meat/meat alternate to fulfill the requirement. For purposes of determining combinations, 1 ounce of nuts or seeds is equal to 1 ounce of cooked lean meat, poultry or fish.
[5] Serve 2 or more kinds of vegetable(s) and/or fruits or a combination of both. Full strength vegetable or fruit juice may be counted to meet not more than one-half of this requirement.
[6] Bread, pasta or noodle products, and cereal grains (such as rice, bulgur, or corn grits) shall be whole-grain or enriched; cornbread, biscuits, rolls, muffins, etc., shall be made with whole-grain or enriched meal or flour; cereal shall be whole-grain, enriched or fortified.
[7] Serving sizes and equivalents will be in guidance materials to be distributed by FNS to State agencies.

(3) *Snacks*. The minimum amounts of food components to be served as snacks are as follows. Select two of the following four components. (Juice may not be served when milk is served as the only other component.)

Food components	Minimum amount
Meat and Meat Alternates	
Lean meat or poultry or fish or	1 ounce.
Alternate protein products [1] or	1 ounce.
Cheese or	1 ounce.
Egg (large) or	½.
Cooked dry beans or peas or	¼ cup [2].
Peanut butter or soynut butter or other nut or seed butters or	2 tablespoons.
Peanuts or soynuts or tree nuts or seeds [3] or	1 ounce.
Yogurt, plain or flavored, unsweetened or sweetened or an equivalent quantity of any combination of the above meat/meat alternates.	4 ounce or ½ cup.
Vegetables and Fruits	
Vegetable(s) and/or fruit(s) or	¾ cup.
Full-strength vegetable or fruit juice or an equivalent quantity or any combination of vegetable(s), fruits(s) and juice.	¾ cup (6 fluid ounces).
Bread and Bread Alternates [4]	
Bread or	1 slice.
Cornbread, biscuits, rolls, muffins, etc. or	1 serving.[5]
Cold dry cereal or	¾ cup or 1 ounce.[6]
Cooked cereal or	½ cup.
Cooked cereal grains or an equivalent quantity of any combination of bread/bread alternate	½ cup.
Milk [7]	
Milk, fluid	1 cup (½ pint, 8 fluid ounces).

[1] Must meet the requirements in appendix A of this part.
[2] For the purposes of the requirement outlined in this table, a cup means a standard measuring cup.
[3] Tree nuts and seeds that may be used as meat alternates are listed in program guidance.
[4] Bread, pasta or noodle products, and cereal grains (such as rice, bulgur, or corn grits) shall be whole-grain or enriched; cornbread, biscuits, rolls, muffins, etc., shall be made with whole-grain or enriched meal or flour; cereal shall be whole-grain, enriched or fortified.
[5] Serving sizes and equivalents will be in guidance materials to be distributed by FNS to State agencies.
[6] Either volume (cup) or weight (ounces), whichever is less.
[7] Milk should be served as a beverage or on cereal, or used in part for each purpose.

(e) *Meat or meat alternate*. Meat or meat alternates served under the Program are subject to the following requirements and recommendations.

(1) The required quantity of meat or meat alternate shall be the quantity of the edible portion as served. These foods must be served in a main dish, or in a main dish and one other menu item.

(2) Cooked dry beans or peas may be used as a meat alternate or as a vegetable, but they may not be used to meet both component requirements in a meal.

(3) Enriched macaroni with fortified protein may be used to meet part but not all of the meat/meat alternate requirement. The Department will provide guidance to State agencies on the part of the meat/meat alternate requirement which these foods may be used to meet. If enriched macaroni with fortified protein is served as a meat alternate it shall not be counted toward the bread requirement.

(4) If the sponsor believes that the recommended portion size of any meat or meat alternate is too large to be appealing to children, the sponsor may reduce the portion size of that meat or meat alternate and supplement it with another meat or meat alternate to meet the full requirement.

(5) Nuts and seeds and their butters listed in program guidance are nutritionally comparable to meat or other meat alternates based on available nutritional data. Acorns, chestnuts, and coconuts shall not be used as meat alternates due to their low protein content. Nut and seed meals or flours shall not be used as a meat alternate except as defined in this section under paragraph (e)(3) and in this part under Appendix A: Alternate Foods for Meals.

As noted in paragraph (d)(2) of this section, nuts or seeds may be used to meet no more than one-half of the meat/meat alternate requirement for lunch or supper. Therefore, nuts or seeds must be combined with another meat/meat alternate to fulfill the requirement. For the supplemental food pattern, nuts or seeds may be used to fulfill all of the meat/meat alternate requirement.

(f) *Exceptions to and variations from the meal pattern.*—(1) *Meals provided by school food authorities.*—(i) *Meal pattern substitution.* School food authorities that are Program sponsors and that participate in the National School Lunch or School Breakfast Program during any time of the year may substitute the meal pattern requirements of the regulations governing those programs (Parts 210 and 220 of this chapter, respectively) for the meal pattern requirements in this section.

(ii) *Offer versus serve.* School food authorities that are Program sponsors may permit a child to refuse one or more items that the child does not intend to eat. The school food authority must apply this ''offer versus serve'' option under the rules followed for the National School Lunch Program, as described in part 210 of this chapter. The reimbursements to school food authorities for Program meals served under the ''offer versus serve'' must not be reduced because children choose not to take all components of the meals that are offered.

(2) *Children under 6.* The State agency may authorize the sponsor to serve food in smaller quantities than are indicated in paragraph (d) of this section to children under six years of age if the sponsor has the capability to ensure that variations in portion size are in accordance with the age levels of the children served. Sponsors wishing to serve children under one year of age shall first receive approval to do so from the State agency. In both cases, the sponsor shall follow the age-appropriate meal pattern requirements contained in the Child and Adult Care Food Program regulations (7 CFR part 226).

(3) *Statewide substitutions.* In American Samoa, Puerto Rico, Guam, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Northern Mariana Islands, the following variations from the meal requirements are authorized: A serving of a starchy vegetable—such as ufi, tanniers, yams, plantains, or sweet potatoes—may be substituted for the bread requirements.

(4) *Individual substitutions.* Substitutions may be made by sponsors in food listed in paragraph (d) of this section if individual participating children are unable, because of medical or other special dietary needs, to consume such foods. Such substitutions shall be made only when supported by a statement from a recognized medical authority which includes recommended alternate foods. Such statement shall be kept on file by the sponsor.

(5) *Special variations.* FNS may approve variations in the food components of the meals on an experimental or a continuing basis for any sponsor where there is evidence that such variations are nutritionally sound and are necessary to meet ethnic, religious, economic, or physical needs.

(6) *Temporary unavailability of milk.* If emergency conditions prevent a sponsor normally having a supply of milk from temporarily obtaining milk deliveries, the State agency may approve the service of breakfasts, lunches or suppers without milk during the emergency period.

(7) *Continuing unavailability of milk.* The inability of a sponsor to obtain a supply of milk on a continuing basis shall not bar it from participation in the Program. In such cases, the State agency may approve service of meals without milk, provided that an equivalent amount of canned, whole dry or nonfat dry milk is used in the preparation of the milk components set forth in paragraph (d) of this section. In addition, the State agency may approve the use of nonfat dry milk in meals served to children participating in activities which make the service of fluid milk impracticable, and in locations which are unable to obtain fluid milk. Such authorization shall stipulate that nonfat dry milk be reconstituted at normal dilution and under sanitary conditions consistent with State and local health regulations.

(8) *Additional foods.* To improve the nutrition of participating children, additional foods may be served with each meal.

[54 FR 18208, Apr. 27, 1989, as amended at 54 FR 27153, June 28, 1989; Amdt. 2, 55 FR 1377, Jan. 14, 1990; 55 FR 13470, Apr. 10, 1990; 61 FR 37672, July 19, 1996; 62 FR 10191, Mar. 6, 1997; 64 FR 72487, Dec. 28, 1999; 64 FR 72487, Dec. 28, 1999; 65 FR 12437, Mar. 9, 2000; 65 FR 82251, Dec. 28, 2000]

Subpart D—General Administrative Provisions

§ 225.17 Procurement standards.

(a) State agencies and sponsors shall comply with the standards prescribed in the Department's Uniform Federal Assistance Regulations at 7 CFR part 3015, subpart S, in the procurement of food, supplies, goods, and other services with Program payments.

(b) The State agency shall make available to sponsors information on 7 CFR part 3015.

(c) Sponsors may use their own procurement procedures which reflect applicable State and local laws and regulations, provided that procurements made with Program funds conform with provisions of this section, as well as with procurement requirements which may be established by the State agency, with approval of FNS, to prevent fraud, waste, and Program abuse.

(d) The State agency shall ensure that all sponsors are aware of the following practices specified in 7 CFR part 3015, with respect to minority business enterprises:

(1) Including qualified minority business enterprises on solicitation lists,

(2) Soliciting minority business enterprises whenever they are potential sources,

(3) When economically feasible, dividing total requirements into smaller tasks or quantities so as to permit maximum participation by minority business enterprises,

(4) Establishing delivery schedules which will assist minority business enterprises to meet deadlines, and

(5) Using the services and assistance of the Small Business Administration, and the Office of Minority Business Enterprise of the Department of Commerce as required.

§ 225.18 Miscellaneous administrative provisions.

(a) *Grant closeout procedures.* Grant closeout procedures for the Program shall be in accordance with the Department's Uniform Federal Assistance Regulations (7 CFR part 3015), subpart N.

(b) *Termination for cause.* (1) FNS may terminate a State agency's participation in the Program in whole, or in part, whenever it is determined that the State agency has failed to comply with the conditions of the Program. FNS shall promptly notify the State agency in writing of the termination and reason for the termination, together with the effective date, and shall allow the State 30 calendar days to respond. In instances where the State does respond, FNS shall inform the State of its final determination no later than 30 calendar days after the State responds.

(2) A State agency shall terminate a sponsor's participation in the Program by written notice whenever it is determined by the State agency that the sponsor has failed to comply with the conditions of the Program.

(3) When participation in the Program has been terminated for cause, any funds paid to the State agency or a sponsor or any recoveries by FNS from the State agency or by the State agency from a sponsor shall be in accordance with the legal rights and liabilities of the parties.

(c) *Termination for convenience.* FNS and the State agency may agree to terminate the State agency's participation in the Program in whole, or in part, when both parties agree that the continuation of the Program would not produce beneficial results commensurate with the further expenditure of funds. The two parties shall agree upon the termination conditions, including the effective date, and in the case of partial termination, the portion to be terminated. The State agency shall not incur new obligations for the terminated portion after the effective date, and shall cancel as many outstanding obligations as possible. The Department shall allow full credit to the State agency for the Federal share of the noncancellable obligation properly incurred by the State agency prior to

termination. A State agency may terminate a sponsor's participation in the manner provided for in this paragraph.

(d) *Maintenance of effort*. Expenditure of funds from State and local sources for the maintenance of food programs for children shall not be diminished as a result of funds received under the Act and a certification to this effect shall become part of the agreement provided for in § 225.3(c).

(e) *Program benefits*. The value of benefits and assistance available under the Program shall not be considered as income or resources of recipients and their families for any purpose under Federal, State or local laws, including, but not limited to, laws relating to taxation, welfare, and public assistance programs.

(f) *State requirements*. Nothing contained in this part shall prevent a State agency from imposing additional operating requirements which are not inconsistent with the provisions of this part, provided that such additional requirements shall not deny the Program to an area in which poor economic conditions exist, and shall not result in a significant number of needy children not having access to the Program. Prior to imposing any additional requirements, the State agency must receive approval from FNSRO.

(g) *Fraud penalty*. Whoever embezzles, willfully misapplies, steals, or obtains by fraud any funds, assets, or property that are the subject of a grant or other form of assistance under this part, whether received directly or indirectly from the Department, or whoever receives, conceals, or retains such funds, assets, or property to his use or gain, knowing such funds, assets, or property have been embezzled, willfully misapplied, stolen or obtained by fraud shall, if such funds, assets, or property are of the value of $100 or more, be fined not more than $100,000 or imprisoned not more than five years, or both, or if such funds, assets, or property are of a value of less than $100, shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

(h) *Claims adjustment authority*. The Secretary shall have the authority to determine the amount of, to settle, and to adjust any claim arising under the Program, and to compromise or deny such claim or any part thereof. The Secretary shall also have the authority to waive such claims if the Secretary determines that to do so would serve the purposes of the Program. This provision shall not diminish the authority of the Attorney General of the United States under section 516 of title 28, U.S. Code, to conduct litigation on behalf of the United States.

[54 FR 18208, Apr. 27, 1989, as amended at 55 FR 13471, Apr. 10, 1990; 64 FR 72488, Dec. 28, 1999]

§ 225.19 Regional office addresses.

Persons desiring information concerning the Program may write to the appropriate State agency or Regional Office of FNS as indicated below:

(a) In the States of Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont: Northeast Regional Office, FNS, U.S. Department of Agriculture, 10 Causeway Street, Room 501, Boston, MA 02222–1065.

(b) In the States of Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Puerto Rico, Virginia, Virgin Islands, and West Virginia: Mid-Atlantic Regional Office, FNS, U.S. Department of Agriculture, Mercer Corporate Park, 300 Corporate Boulevard, Robbinsville, NJ 08691–1598.

(c) In the States of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee: Southeast Regional Office, FNS, U.S. Department of Agriculture, 61 Forsyth Street, SW., Room 8T36, Atlanta, GA 30303–3415.

(d) In the States of Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin: Midwest Regional Office, FNS, U.S. Department of Agriculture, 77 West Jackson Boulevard, 20th Floor, Chicago, IL 60604–3507.

(e) In the States of Arkansas, Louisiana, New Mexico, Oklahoma and Texas: Southwest Regional Office, FNS, U.S. Department of Agriculture, 1100 Commerce Street, Room 5–C–30, Dallas, TX 75242–9980.

(f) In the States of Colorado, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah and Wyoming: Mountain Plains Regional

Office, FNS, U.S. Department of Agriculture, 1244 Speer Boulevard, Suite 903, Denver, CO 80204–3581.

(g) In the States of Alaska, American Samoa, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon, the Commonwealth of the Northern Mariana Islands, and Washington: Western Regional Office, FNS, U.S. Department of Agriculture, 550 Kearney Street, Room 400, San Francisco, CA 94108–2518.

[54 FR 18208, Apr. 27, 1989, as amended at 55 FR 13471, Apr. 10, 1990; 65 FR 12439, Mar. 9, 2000; 65 FR 82251, Dec. 28, 2000]

§ 225.20 Information collection/recordkeeping—OMB assigned control numbers.

7 CFR section where requirements are described	Current OMB control No.
225.3–225.4.	0584–0280
225.6–225.10	0584–0280
225.12–225.13	0584–0280
225.15–225.18	0584–0280

[61 FR 25554, May 22, 1996]

APPENDIX A TO PART 225—ALTERNATE FOODS FOR MEALS

ALTERNATE PROTEIN PRODUCTS

A. What Are the Criteria for Alternate Protein Products Used in the Summer Food Service Program?

1. An alternate protein product used in meals planned under the provisions in § 225.16 must meet all of the criteria in this section.

2. An alternate protein product whether used alone or in combination with meat or other meat alternates must meet the following criteria:

a. The alternate protein product must be processed so that some portion of the nonprotein constituents of the food is removed. These alternate protein products must be safe and suitable edible products produced from plant or animal sources.

b. The biological quality of the protein in the alternate protein product must be at least 80 percent that of casein, determined by performing a Protein Digestibility Corrected Amino Acid Score (PDCAAS).

c. The alternate protein product must contain at least 18 percent protein by weight when fully hydrated or formulated. (''When hydrated or formulated'' refers to a dry alternate protein product and the amount of water, fat, oil, colors, flavors or any other substances which have been added).

d. Manufacturers supplying an alternate protein product to participating schools or institutions must provide documentation that the product meets the criteria in paragraphs A. 2. a through c of this appendix.

e. Manufacturers should provide information on the percent protein contained in the dry alternate protein product and on an as prepared basis.

f. For an alternate protein product mix, manufacturers should provide information on:

(1) The amount by weight of dry alternate protein product in the package;

(2) Hydration instructions; and

(3) Instructions on how to combine the mix with meat or other meat alternates.

B. How Are Alternate Protein Products Used in the Summer Food Service Program?

1. Schools, institutions, and service institutions may use alternate protein products to fulfill all or part of the meat/meat alternate component discussed in § 225.20.

2. The following terms and conditions apply:

a. The alternate protein product may be used alone or in combination with other food ingredients. Examples of combination items are beef patties, beef crumbles, pizza topping, meat loaf, meat sauce, taco filling, burritos, and tuna salad.

b. Alternate protein products may be used in the dry form (nonhydrated), partially hydrated or fully hydrated form. The moisture content of the fully hydrated alternate protein product (if prepared from a dry concentrated form) must be such that the mixture will have a minimum of 18 percent protein by weight or equivalent amount for the dry or partially hydrated form (based on the level that would be provided if the product were fully hydrated).

C. How Are Commercially Prepared Products Used in the Summer Food Service Program?

Schools, institutions, and service institutions may use a commercially prepared meat or meat alternate products combined with alternate protein products or use a commercially prepared product that contains only alternate protein products.

[65 FR 12439, Mar. 9, 2000]

APPENDIX B TO PART 225 [RESERVED]

APPENDIX C TO PART 225—CHILD NUTRITION (CN) LABELING PROGRAM

1. The Child Nutrition (CN) Labeling Program is a voluntary technical assistance program administered by the Food and Nutrition Service (FNS) in conjunction with the Food Safety and Inspection Service (FSIS) and Agricultural Marketing Service (AMS) of the U.S. Department of Agriculture (USDA), and National Marine Fisheries Service of the U.S. Department of Commerce (USDC) for the Child Nutrition Programs.

This program essentially involves the review of a manufacturer's recipe or product formulation to determine the contribution a serving of a commercially prepared product makes toward meal pattern requirements and a review of the CN label statement to ensure its accuracy. CN labeled products must be produced in accordance with all requirements set forth in this rule.

2. Products eligible for CN labels are as follows:

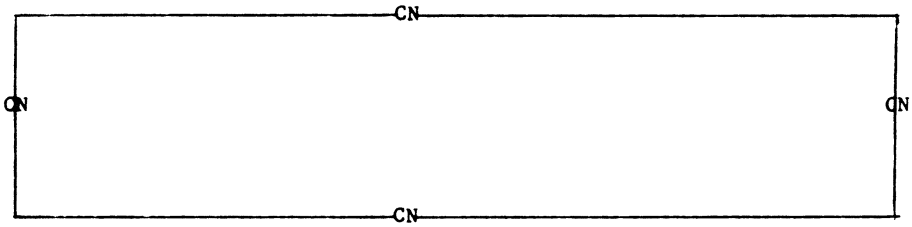
(a) Commercially prepared food products that contribute significantly to the meat/meat alternate component of meal pattern requirements of 7 CFR 210.10, 225.16, and 226.20 and are served in the main dish.

(b) Juice drinks and juice drink products that contain a minimum of 50 percent full strength juice by volume.

3. For the purpose of this appendix the following definitions apply:

(a) *CN label* is a food product label that contains a CN label statement and CN logo as defined in paragraph 3(b) and (c) below.

(b) The *CN logo* (as shown below) is a distinct border which is used around the edges of a ''CN label statement'' as defined in paragraph 3(c).



(c) The *CN label statement* includes the following:

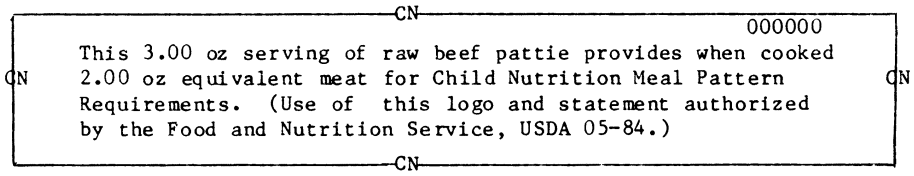
(1) The product identification number (assigned by FNS);

(2) The statement of the product's contribution toward meal pattern requirements of 7 CFR 210.10, 220.8, 225.16, and 226.20. The statement shall identify the contribution of a specific portion of a meat/meat alternate product toward the meat/meat alternate, bread/bread alternate, and/or vegetable/fruit component of the meal pattern requirements. For juice drinks and juice drink products the statement shall identify their contribution toward the vegetable/fruit component of the meal pattern requirements.

(3) Statement specifying that the use of the CN logo and CN statement was authorized by FNS, and

(4) The approval date.

For example:



(d) *Federal inspection* means inspection of food products by FSIS, AMS or USDC.

4. Food processors or manufacturers may use the CN label statement and CN logo as defined in paragraph 3 (b) and (c) under the following terms and conditions:

(a) The CN label must be reviewed and approved at the national level by the Food and Nutrition Service and appropriate USDA or USDC Federal agency responsible for the inspection of the product.

(b) The CN labeled product must be produced under Federal inspection by USDA or USDC. The Federal inspection must be performed in accordance with an approved partial or total quality control program or standards established by the appropriate Federal inspection service.

(c) The CN label statement must be printed as an integral part of the product label along with the product name, ingredient listing, the inspection shield or mark for the appropriate inspection program, the establishment number where appropriate and the

manufacturer's or distributor's name and address.

(1) The inspection marking for CN labeled non-meat, non-poultry, and non-seafood products with the exception of juice drinks and juice drink products is established as follows:

INSPECTED BY THE U.S. DEPT. OF AGRICULTURE IN ACCORDANCE WITH FNS REQUIREMENTS

(d) Yields for determining the product's contribution toward meal pattern requirements must be calculated using the Food Buying Guide for Child Nutrition Programs (Program Aid Number 1331).

5. In the event a company uses the CN logo and CN label statement inappropriately, the company will be directed to discontinue the use of the logo and statement and the matter will be referred to the appropriate agency for action to be taken against the company.

6. Products that bear a CN label statement as set forth in paragraph 3(c) carry a warranty. This means that if a food service authority participating in the child nutrition programs purchases a CN labeled product and uses it in accordance with the manufacturer's directions, the school or institution will not have an audit claim filed against it for the CN labeled product for noncompliance with the meal pattern requirements of 7 CFR 210.10, 220.8, 225.16, and 226.20. If a State or Federal auditor finds that a product that is CN labeled does not actually meet the meal pattern requirements claimed on the label, the auditor will report this finding to FNS. FNS will prepare a report on the findings and send it to the appropriate divisions of FSIS and AMS of the USDA, National Marine Fisheries Service of the USDC, Food and Drug Administration, or the Department of Justice for action against the company. Any or all of the following courses of action may be taken: (a) The company's CN label may be revoked for a specific period of time; (b) The appropriate agency may pursue a misbranding or mislabeling action against the company producing the product; (c) The company's name will be circulated to regional FNS offices; and (d) FNS will require the food service program involved to notify the State agency of the labeling violation.

7. FNS is authorized to issue operational policies, procedures, and instructions for the CN Labeling Program. To apply for a CN label and to obtain additional information on CN label application procedures, write to: CN Labels, U.S. Department of Agriculture, Food and Nutrition Service, Nutrition and Technical Services Division, 3101 Park Center Drive, Alexandria, Virginia 22302.

PART 226—CHILD AND ADULT CARE FOOD PROGRAM

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APPENDIX C TO PART 226—CHILD NUTRITION (CN) LABELING PROGRAM

AUTHORITY: Secs. 9, 11, 14, 16, and 17, National School Lunch Act, as amended (42 U.S.C. 1758, 1759a, 1762a, 1765 and 1766).

SOURCE: 47 FR 36527, Aug. 20, 1982, unless otherwise noted.

Subpart A—General

§ 226.1 General purpose and scope.

This part announces the regulations under which the Secretary of Agriculture will carry out the Child and Adult Care Food Program. Section 17 of the National School Lunch Act, as amended, authorizes assistance to States through grants-in-aid and other means to initiate, maintain, and expand nonprofit food service programs for children or adult participants in nonresidential institutions which provide care. The Program is intended to enable such institutions to integrate a nutritious food service with organized care services for enrolled participants. Payments will be made to State agencies or FNS Regional Offices to enable them to reimburse institutions for food service to enrolled participants.

[53 FR 52587, Dec. 28, 1988, as amended by Amdt. 22, 55 FR 1377, Jan. 14, 1990]

§ 226.2 Definitions.

AFDC assistance unit means any individual or group of individuals which is currently certified to receive assistance under the Aid to Families with Dependent Children Program in a State where the standard of eligibility for AFDC benefits does not exceed the income eligibility guidelines for free meals under this part.

Act means the National School Lunch Act, as amended.

Administrative costs means costs incurred by an institution related to planning, organizing, and managing a food service under the Program, and allowed by the State agency financial management instruction. These administrative costs may include administrative expenses associated with outreach and recruitment of unlicensed family or group day care homes and the allowable licensing-related expenses of such homes.

Adult means, for the purposes of the collection of social security numbers as a condition of eligibility for free or reduced-price meals, any individual 21 years of age or older.

Adult day care center means any public or private nonprofit organization or any proprietary title XIX or title XX center (as defined in this section) which (a) is licensed or approved by Federal, State or local authorities to provide nonresidential adult day care services to functionally impaired adults (as defined in this section) or persons 60 years of age or older in a group setting outside their homes or a group living arrangement on a less than 24-hour basis and (b) provides for such care and services directly or under arrangements made by the agency or organization whereby the agency or organization maintains professional management responsibility for all such services. Such centers shall provide a structured, comprehensive program that provides a variety of health, social and related support services to enrolled adult participants through an individual plan of care.

Adult day care facility means a licensed or approved adult day care center under the auspices of a sponsoring organization.

Adult participant means a person enrolled in an adult day care center who is functionally impaired (as defined in this section) or 60 years of age or older.

Advanced payments means financial assistance made available to an institution for its Program costs prior to the month in which such costs will be incurred.

CACFP child care standards means the Child and Adult Care Food Program child care standards developed by the Department for alternate approval of child care centers, outside-school-hours care centers, and day care homes by the State agency under the provisions of § 226.6(d)(2) and (3).

Child care center means any public or private nonprofit organization, or any proprietary title XX center, as defined in this section (''Proprietary title XX center''), licensed or approved to provide nonresidential child care services to enrolled children, primarily of preschool age, including but not limited to day care centers, settlement houses, neighborhood centers, Head Start centers and organizations providing day

care services for children with handicaps. Child care centers may participate in the Program as independent centers or under the auspices of a sponsoring organization.

Child care facility means a licensed or approved child care center, day care home, or outside-school-hours care center under the auspices of a sponsoring organization.

Children means (a) persons 12 years of age and under, (b) children of migrant workers 15 years of age and under, and (c) persons with mental or physical handicaps, as defined by the State, enrolled in an institution or a child care facility serving a majority of persons 18 years of age and under.

Claiming percentage means the ratio of the number of enrolled participants in an institution in each reimbursement category (free, reduced-price or paid) to the total of enrolled participants in the institution.

Current income means income received during the month prior to application for free or reduced-price meals. If such income does not accurately reflect the household's annual income, income shall be based on the projected annual household income. If the prior year's income provides an accurate reflection of the household's current annual income, the prior year may be used as a base for the projected annual income.

Day care home means an organized nonresidential child care program for children enrolled in a private home, licensed or approved as a family or group day care home and under the auspices of a sponsoring organization.

Department means the U.S. Department of Agriculture.

Disclosure means individual children's program eligibility information obtained through the free and reduced price meal eligibility process that is revealed or used for a purpose other than for the purpose for which the information was obtained. The term refers to access, release, or transfer of personal data about children by means of print, tape, microfilm, microfiche, electronic communication or any other means.

Documentation means:

(a) The completion of the following information on a free and reduced-price application:

(1) Names of all household members;

(2) Income received by each household member, identified by source of income (such as earnings, wages, welfare, pensions, support payments, unemployment compensation, social security and other cash income);

(3) The signature of an adult household member; and

(4) The social security number of the adult household member who signs the application, or an indication that he/she does not possess a social security number; or

(b) For a child who is a member of a food stamp or FDPIR household or an AFDC assistance unit, ''documentation'' means the completion of only the following information on a free and reduced price application:

(1) The name(s) and appropriate food stamp, FDPIR or AFDC case number(s) for the child(ren); and

(2) The signature of an adult member of the household; or

(c) For a child in a tier II day care home who is a member of a household participating in a Federally or State supported child care or other benefit program with an income eligibility limit that does not exceed the eligibility standard for free or reduced price meals:

(1) The name(s), appropriate case number(s) (if the program utilizes case numbers), and name(s) of the qualifying program(s) for the child(ren), and the signature of an adult member of the household; or

(2) If the sponsoring organization or day care home possesses it, official evidence of the household's participation in a qualifying program (submission of a free and reduced price application by the household is not required in this case); or

(d) For an adult participant who is a member of a food stamp or FDPIR household or is an SSI or Medicaid participant, as defined in this section, ''documentation'' means the completion of only the following information on a free and reduced price application:

(1) The name(s) and appropriate food stamp or FDPIR case number(s) for the

participant(s) or the adult participant's SSI or Medicaid identification number, as defined in this section; and

(2) The signature of an adult member of the household; or

(e) For a child who is a Head Start participant, the Head Start statement of income eligibility issued upon initial enrollment in the Head Start Program or, if such statement is unavailable, other documentation from Head Start officials that the child's family meets the Head Start Program's low-income criteria.

Enrolled child means a child whose parent or guardian has submitted to an institution a signed document which indicates that the child is enrolled for child care. In addition, for the purposes of calculations made by sponsoring organizations of family day care homes in accordance with §§ 226.13(d)(3)(ii) and 226.13(d)(3)(iii), ''enrolled child'' (or ''child in attendance'') means a child whose parent or guardian has submitted a signed document which indicates that the child is enrolled for child care; who is present in the day care home for the purpose of child care; and who has eaten at least one meal during the claiming period.

Enrolled participant means an ''Enrolled child'' (as defined in this section) or ''Adult participant'' (as defined in this section).

Expansion payments means financial assistance made available to a sponsoring organization for its administrative expenses associated with expanding a food service program to day care homes located in low-income or rural areas. These expansion payments may include administrative expenses associated with outreach and recruitment of unlicensed family or group day care homes and the allowable licensing-related expenses of such homes.

Family means, in the case of children, a group of related or nonrelated individuals, who are not residents of an institution or boarding house, but who are living as one economic unit or, in the case of adult participants, the adult participant, and if residing with the adult participant, the spouse and dependent(s) of the adult participant.

FDPIR household means any individual or group of individuals which is currently certified to receive assistance as a household under the Food Distribution Program on Indian Reservations.

Fiscal Year means a period of 12 calendar months beginning October 1 of any year and ending with September 30 of the following year.

FNS means the Food and Nutrition Service of the Department.

FNSRO means the appropriate Regional Office of the Food and Nutrition Service.

Food service equipment assistance means Federal financial assistance formerly made available to State agencies to assist institutions in the purchase or rental of equipment to enable institutions to establish, maintain or expand food service under the Program.

Food service management company means an organization other than a public or private nonprofit school, with which an institution may contract for preparing and, unless otherwise provided for, delivering meals, with or without milk for use in the Program.

Food Stamp household means any individual or group of individuals which is currently certified to receive assistance as a household under the Food Stamp Program.

Free meal means a meal served under the Program to a participant from a family which meets the income standards for free school meals; or to a child who is automatically eligible for free meals by virtue of food stamp, FDPIR, or AFDC recipiency; or to a child who is a Head Start participant; or to an adult participant who is automatically eligible for free meals by virtue of food stamp or FDPIR recipiency or is a SSI or Medicaid participant. Regardless of whether the participant qualified for free meals by virtue of meeting one of the criteria of this definition, neither the participant nor any member of their family shall be required to pay or to work in the food service program in order to receive a free meal.

Functionally impaired adult means chronically impaired disabled persons 18 years of age or older, including victims of Alzheimer's disease and related disorders with neurological and organic brain dysfunction, who are physically or mentally impaired to the extent that their capacity for independence and their ability to carry out activities

of daily living is markedly limited. Activities of daily living include, but are not limited to, adaptive activities such as cleaning, shopping, cooking, taking public transportation, maintaining a residence, caring appropriately for one's grooming or hygiene, using telephones and directories, or using a post office. Marked limitations refer to the severity of impairment, and not the number of limited activities, and occur when the degree of limitation is such as to seriously interfere with the ability to function independently.

Group living arrangement means residential communities which may or may not be subsidized by federal, State or local funds but which are private residences housing an individual or a group of individuals who are primarily responsible for their own care and who maintain a presence in the community but who may receive on-site monitoring.

Household means ''family'', as defined in § 226.2 (''Family'').

Head Start participant means a child currently receiving assistance under a Federally-funded Head Start Program who is categorically eligible for free meals in the CACFP by virtue of meeting Head Start's low-income criteria.

Income standards means the family-size and income standards prescribed annually by the Secretary for determining eligibility for free and reduced-price meals under the National School Lunch Program and the School Breakfast Program.

Income to the program means any funds used in an institution's food service program, including, but not limited to all monies, other than Program payments, received from other Federal, State, intermediate, or local government sources; participant's payments for meals and food service fees; income from any food sales to adults; and other income, including cash donations or grants from organizations or individuals.

Independent center means a child care center, outside-school-hours care center or adult day care center which enters into an agreement with the State agency to assume final administrative and financial responsibility for Program operations.

Infant cereal means any iron-fortified dry cereal specially formulated for and generally recognized as cereal for infants that is routinely mixed with breast milk or iron-fortified infant formula prior to consumption.

Infant formula means any iron-fortified formula intended for dietary use solely as a food for normal, healthy infants; excluding those formulas specifically formulated for infants with inborn errors of metabolism or digestive or absorptive problems. Infant formula, as served, must be in liquid state at recommended dilution.

Institution means a sponsoring organization, child care center, outside-school-hours care center or adult day care center which enters into an agreement with the State agency to assume final administrative and financial responsibility for Program operations.

Key Element Reporting System (KERS) means a comprehensive national system for reporting critical key element performance data on the operation of the program in institutions.

Low-income area means a geographical area in which at least 50 percent of the children are eligible for free or reduced price school meals under the National School Lunch Program and the School Breakfast Program, as determined in accordance with paragraphs (b) and (c), definition of tier I day care home.

Meals means food which is served to enrolled participants at an institution, child care facility or adult day care facility and which meets the nutritional requirements set forth in this part.

Medicaid means *Title XIX* of the Social Security Act.

Medicaid participant means an adult participant who receives assistance under title XIX of the Social Security Act, the Grant to States for Medical Assistance Programs—Medicaid.

Milk means pasteurized fluid types of unflavored or flavored whole milk, lowfat milk, skim milk, or cultured buttermilk which meet State and local standards for such milk, except that, in the meal pattern for infants (0 to 1 year of age), milk means breast milk or iron-fortified infant formula. In Alaska, Hawaii, American Samoa,

Guam, Puerto Rico, the Trust Territory of the Pacific Islands, the Northern Mariana Islands, and the Virgin Islands if a sufficient supply of such types of fluid milk cannot be obtained, ''milk'' shall include reconstituted or recombined milk. All milk should contain vitamins A and D at levels specified by the Food and Drug Administration and be consistent with State and local standards for such milk.

Nonpricing program means an institution in which there is no separate identifiable charge made for meals served to participants.

Nonprofit food service means all food service operations conducted by the institution principally for the benefit of enrolled participants, from which all of the Program reimbursement funds are used solely for the operations or improvement of such food service.

Nonresidential means that the same participants are not maintained in care for more than 24 hours on a regular basis.

OIG means the Office of the Inspector General of the Department.

Operating costs means expenses incurred by an institution in serving meals to participants under the Program, and allowed by the State agency financial management instruction.

Outside-school-hours care center means a public or private nonprofit organization, or a proprietary title XX center, as defined in this section (''Proprietary title XX center''), licensed or approved to provide organized nonresidential child care services to enrolled children outside of school hours. Outside-school-hours care centers may participate in the Program as independent centers or under the auspices of a sponsoring organization.

Participants means ''Children'' or ''Adult participants'' as defined in this section.

Personal property means property of any kind except real property. It may be tangible—having physical existence—or intangible—having no physical existence such as patents, inventions, and copyrights.

Pricing program means an institution in which a separate identifiable charge is made for meals served to participants.

Program means the Child and Adult Care Food Program authorized by section 17 of the National School Lunch Act, as amended.

Program payments means financial assistance in the form of start-up payments, expansion payments, advance payments, or reimbursement paid or payable to institutions for operating costs and administrative costs.

Proprietary title XIX center means any private, for profit center (a) providing nonresidential adult day care services for which it receives compensation from amounts granted to the States under title XIX of the Social Security Act and (b) in which title XIX beneficiaries were not less than 25 percent of enrolled eligible participants in the calendar month preceding initial application or annual reapplication for Program participation.

Proprietary title XX center means any private, for profit center:

(a) Providing nonresidential child care services for which it receives compensation from amounts granted to the States under title XX of the Social Security Act, and in which title XX child care beneficiaries constitute no less than 25 percent of enrolled eligible participants or licensed capacity, whichever is less, during the calendar month preceding initial application or annual reapplication for Program participation; or,

(b) Providing nonresidential adult day care services for which it receives compensation from amounts granted to the States under title XX of the Social Security Act and in which adult beneficiaries were not less than 25 percent of enrolled eligible participants during the calendar month preceding initial application or annual reapplication for Program participation.

Reduced-price meal means a meal served under the Program to a participant from a family which meets the income standards for reduced-price school meals. Any separate charge imposed shall be less than the full price of the meal, but in no case more than 40 cents for a lunch or supper, 30 cents for a breakfast, and 15 cents for a supplement, and for which neither the participant nor any member of his family is required to work in the food service program.

Reimbursement means Federal financial assistance paid or payable to institutions for Program costs within the rates assigned by the State agency.

Rural area means any geographical area in a county which is not a part of a Metropolitan Statistical Area or any ''pocket'' within a Metropolitan Statistical Area which, at the option of the State agency and with FNSRO concurrence, is determined to be geographically isolated from urban areas.

SSI participant means an adult participant who receives assistance under title XVI of the Social Security Act, the Supplemental Security Income (SSI) for the Aged, Blind and Disabled Program.

School year means a period of 12 calendar months beginning July 1 of any year and ending June 30 of the following year.

Sponsoring organization means a public or nonprofit private organization which is entirely responsible for the administration of the food program in: (a) One or more day care homes; (b) a child care center, outside-school-hours care centers, or adult day care center which is a legally distinct entity from the sponsoring organization; (c) two or more child care centers, outside-school-hours care centers, or adult day care centers; or (d) any combination of child care centers, adult day care centers, day care homes, and outside-school-hours care centers. The term ''sponsoring organization'' also includes a for-profit organization which is entirely responsible for administration of the Program in any combination of two or more child care centers, adult day care centers and outside-school-hours care centers which are part of the same legal entity as the sponsoring organization, and which are proprietary title XIX or XX centers, as defined in this section (''Proprietary Title XIX center'', ''Proprietary Title XX center'').

Start-up payments means financial assistance made available to a sponsoring organization for its administrative expenses associated with developing or expanding a food service program in day care homes and initiating successful Program operations. These start-up payments may include administrative expenses associated with outreach and recruitment of unlicensed family or group day care homes and the allowable licensing-related expenses of such homes.

State means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Northern Mariana Islands.

State agency means the State educational agency or any other State agency that has been designated by the Governor or other appropriate executive, or by the legislative authority of the State, and has been approved by the Department to administer the Program within the State or in States in which FNS administers the Program, FNSRO. This also may include a State agency other than the existing CACFP State Agency, when such agency is designated by the Governor of the State to administer only the adult day care component of the CACFP.

State Children's Health Insurance Program (SCHIP) means the State medical assistance program under title XXI of the Social Security Act (42 U.S.C. 1397aa et seq.).

Tier I day care home means (a) a day care home that is operated by a provider whose household meets the income standards for free or reduced-price meals, as determined by the sponsoring organization based on a completed free and reduced price application, and whose income is verified by the sponsoring organization of the home in accordance with § 226.23(h)(6);

(b) A day care home that is located in an area served by a school enrolling elementary students in which at least 50 percent of the total number of children enrolled are certified eligible to receive free or reduced price meals; or

(c) A day care home that is located in a geographic area, as defined by FNS based on census data, in which at least 50 percent of the children residing in the area are members of households which meet the income standards for free or reduced price meals.

Tier II day care home means a day care home that does not meet the criteria for a *Tier I day care home*.

Title XVI means Title XVI of the Social Security Act which authorizes the Supplemental Security Income for the

Aged, Blind, and Disabled Program—SSI.

Title XIX means Title XIX of the Social Security Act which authorizes the Grants to States for Medical Assistance Programs—Medicaid.

Title XX means Title XX of the Social Security Act.

Uniform Federal Assistance Regulations means the Department's regulations, 7 CFR part 3015, establishing Department-wide policies and standards for administration of grants and cooperative agreements.

Verification means a review of the information reported by institutions to the State agency regarding the eligibility of participants for free or reduced-price meals, and, in addition, for a pricing program, confirmation of eligibility for free or reduced-price benefits under the program. Verification for a pricing program shall include confirmation of income eligibility and, at State discretion, any other information required on the application which is defined as documentation in § 226.2. Such verification may be accomplished by examining information (e.g., wage stubs, etc.) provided by the household or other sources of information as specified in § 226.23(h)(2)(iv). However, if a food stamp, FDPIR or AFDC case number is provided for a child, verification for such child shall include only confirmation that the child is included in a currently certified food stamp or FDPIR household or AFDC assistance unit. If a Head Start statement of income eligibility is provided for a child, verification for such child shall include only confirmation that the child is a Head Start participant. For an adult participant, if a food stamp or FDPIR case number or SSI or Medicaid assistance identification number is provided, verification for such participant shall include only confirmation that the participant is included in a currently certified food stamp or FDPIR household or is a current SSI or Medicaid participant.

Yogurt means commercially coagulated milk products obtained by the fermentation of specific bacteria, that meet milk fat or milk solid requirements to which flavoring foods or ingredients may be added. These products are covered by the Food and Drug Administration's Standard of Identity for yogurt, lowfat yogurt, and nonfat yogurt, (21 CFR 131.200), (21 CFR 131.203), (21 CFR 131.206), respectively.

[47 FR 36527, Aug. 20, 1982; 47 FR 46072, Oct. 15, 1982, as amended at 48 FR 21529, May 13, 1983; 48 FR 41142, Sept. 14, 1983; 50 FR 19310, May 8, 1985; 51 FR 31316, Sept. 3, 1986; 52 FR 36906, Oct. 2, 1987; 53 FR 52587, Dec. 28, 1988; 54 FR 27153, June 28, 1989; Amdt. 22, 55 FR 1377, Jan. 14, 1990; 61 FR 25554, May 22, 1996; 62 FR 901, Jan. 7, 1997; 62 FR 23617, May 1, 1997; 63 FR 9104, Feb. 24, 1998; 63 FR 9727, Feb. 26, 1998; 64 FR 61775, Nov. 15, 1999; 66 FR 2203, Jan. 11, 2001]

§ 226.3 Administration.

(a) Within the Department, FNS shall act on behalf of the Department in the administration of the Program.

(b) Within the States, responsibility for the administration of the Program shall be in the State agency, except that if FNS has continuously administered the Program in any State since October 1, 1980, FNS shall continue to administer the Program in that State. A State in which FNS administers the Program may, upon request to FNS, assume administration of the Program.

(c) Each State agency desiring to take part in the Program shall enter into a written agreement with the Department for the administration of the Program in the State in accordance with the provisions of this part. This agreement shall cover the operation of the Program during the period specified therein and may be extended by consent of both parties.

(d) FNSRO shall, in each State in which it administers the Program, have available all funds and assume all responsibilities of a State agency as set forth in this part.

Subpart B—Assistance to States

§ 226.4 Payments to States and use of funds.

(a) *Availability of funds.* For each fiscal year based on funds provided to the Department, FNS shall make funds available to each State agency to reimburse institutions for their costs in connection with food service operations, including administrative expenses, under this part. Funds shall be made available in an amount no less than the sum of the totals obtained

under paragraphs (b), (c), (d), (e) and (h) of this section. However, in any fiscal year, the aggregate amount of assistance provided to a State under this part shall not exceed the sum of the Federal funds provided by the State to participating institutions within the State for that fiscal year and any funds used by the State under paragraphs (h) and (j) of this section.

(b) *Center funds.* For meals served to participants in child care centers, adult day care centers and outside-school-hours care centers, funds shall be made available to each State agency in an amount no less than the sum of the products obtained by multiplying:

(1) The number of breakfasts served in the Program within the State to participants from families that do not satisfy the eligibilty standards for free and reduced-price school meals enrolled in institutions by the national average payment rate for breakfasts for such participants under section 4 of the Child Nutrition Act of 1966;

(2) The number of breakfasts served in the Program within the State to participants from families that satisfy the eligibilty standards for free school meals enrolled in institutions by the national average payment rate for free breakfasts under section 4 of the Child Nutrition Act of 1966;

(3) The number of breakfasts served to participants from families that satisfy the eligibilty standard for reduced-price school meals enrolled in institutions by the national average payment rate for reduced-price school breakfasts under section 4 of the Child Nutrition Act of 1966;

(4) The number of lunches and suppers served in the Program within the State by the national average payment rate for lunches under section 4 of the National School Lunch Act. (All lunches and suppers served in the State are funded under this provision);

(5) The number of lunches and suppers served in the Program within the State to participants from families that satisfy the eligibilty standard for free school meals enrolled in institutions by the national average payment rate for free lunches under section 11 of the National School Lunch Act;

(6) The number of lunches and suppers served in the Program within the State to participants from families that satisfy the eligibilty standard for reduced-price school meals enrolled in institutions by the national average payment rate for reduced-price lunches under section 11 of the National School Lunch Act;

(7) The number of supplements served in the Program within the State to participants from families that do not satisfy the eligibilty standards for free and reduced-price school meals enrolled in institutions by 2.75 cents;

(8) The number of supplements served in the Program within the State to participants from families that satisfy the eligibilty standard for free school meals enrolled in institutions by 30 cents;

(9) The number of supplements served in the Program within the State to participants from families that satisfy the eligibilty standard for reduced-price school meals enrolled in institutions by 15 cents.

(c) *Day care home funds.* For meals served to children in day care homes, funds shall be made available to each State agency in an amount no less than the sum of products obtained by multiplying:

(1) The number of breakfasts served in the Program within the State to children enrolled in tier I day care homes by the current tier I day care home rate for breakfasts;

(2) The number of breakfasts served in the Program within the State to children enrolled in tier II day care homes that have been determined eligible for free or reduced price meals by the current tier I day care home rate for breakfasts;

(3) The number of breakfasts served in the Program within the State to children enrolled in tier II day care homes that do not satisfy the eligibility standards for free or reduced price meals, or to children from whose households applications were not collected, by the current tier II day care home rate for breakfasts;

(4) The number of lunches and suppers served in the Program within the State to children enrolled in tier I day care homes by the current tier I day care home rate for lunches/suppers;

(5) The number of lunches and suppers served in the Program within the

State to children enrolled in tier II day care homes that have been determined eligible for free or reduced price meals by the current tier I day care home rate for lunches/suppers;

(6) The number of lunches and suppers served in the Program within the State to children enrolled in tier II day care homes that do not satisfy the eligibility standards for free or reduced price meals, or to children from whose households applications were not collected, by the current tier II day care home rate for lunches/suppers;

(7) The number of supplements served in the Program within the State to children enrolled in tier I day care homes by the current tier I day care home rate for supplements;

(8) The number of supplements served in the Program within the State to children enrolled in tier II day care homes that have been determined eligible for free or reduced price meals by the current tier I day care home rate for supplements; and

(9) The number of supplements served in the Program within the State to children enrolled in tier II day care homes that do not satisfy the eligibility standards for free or reduced price meals, or to children from whose households applications were not collected, by the current tier II day care home rate for supplements.

(d) *Administrative funds.* For administrative payments to day care home sponsoring organizations, funds shall be made available to each State agency in an amount not less than the product obtained each month by multiplying the number of day care homes participating under each sponsoring organization within the State by the applicable rates specified in § 226.12(a)(3).

(e) *Start-up and expansion funds.* For start-up and expansion payments to eligible sponsoring organizations, funds shall be made available to each State agency in an amount equal to the total amount of start-up and expansion payments made in the most recent period for which reports are available for that State or on the basis of estimates by FNS.

(f) *Funding assurance.* FNS shall ensure that, to the extent funds are appropriated, each State has sufficient Program funds available for providing start-up, expansion and advance payments in accordance with this part.

(g) *Rate adjustments.* FNS shall publish a notice in the FEDERAL REGISTER to announce each rate adjustment. FNS shall adjust the following rates on the specified dates:

(1) The rates for meals served in tier I and tier II day care homes shall be adjusted annually, on July 1 (beginning July 1, 1997), on the basis of changes in the series for food at home of the Consumer Price Index for All Urban Consumers published by the Department of Labor. Such adjustments shall be rounded to the nearest lower cent based on changes measured over the most recent twelve-month period for which data are available. The adjustments shall be computed using the unrounded rate in effect for the preceding school year.

(2) The rate for supplements served in child care centers, adult day care centers and outside-school-hours care centers shall be adjusted annually, on July 1, on the basis of changes in the series for food away from home of the Consumer Price Index for All Urban Consumers published by the Department of Labor. Such adjustments shall be made to the nearest $.0025 based on changes measured over the most recent twelve-month period for which data are available.

(3) The rate for administrative payments to day care home sponsoring organizations shall be adjusted annually, on July 1, on the basis of changes in the series for all items of the Consumer Price Index for All Urban Consumers published by the Department of Labor. Such adjustments shall be made to the nearest dollar based on changes measured over the most recent twelve-month period for which data are available.

(h) *Audit funds.* For the expense of conducting audits and reviews under § 226.8, funds shall be made available to each State agency in an amount equal to two percent of the Program reimbursement provided to institutions within the State during the second fiscal year preceding the fiscal year for which these funds are to be made available. The amount of assistance provided to a State under this paragraph in any fiscal year may not exceed the

State's expenditures under § 226.8 during such fiscal year.

(i) *Method of funding.* FNS shall authorize funds for State agencies in accordance with the Uniform Federal Assistance Regulations.

(j) *Special developmental projects.* The State agency may use in carrying out special developmental projects an amount not to exceed one percent of Program funds used in the second prior fiscal year. Special developmental projects shall conform to FNS guidance and be approved in writing by FNS.

[47 FR 36527, Aug. 20, 1982, as amended at 52 FR 36906, Oct. 2, 1987; 53 FR 52588, Dec. 28, 1988; 62 FR 902, Jan. 7, 1997; 63 FR 9728, Feb. 26, 1998]

§ 226.5 Donation of commodities.

(a) USDA foods available under section 6 of this Act, section 416 of the Agricultural Act of 1949 (7 U.S.C. 1431) or purchased under section 32 of the Act of August 24, 1935 (7 U.S.C. 1431), section 709 of the Food and Agriculture Act of 1965 (7 U.S.C. 1446a–1), or other authority, and donated by the Department shall be made available to each State.

(b) The value of such commodities donated to each State for each school year shall be, at a minimum, the amount obtained by multiplying the number of reimbursable lunches and suppers served in participating institutions in that State during the preceding school year by the rate for commodities established under section 6(e) of the Act for the current school year. Adjustments shall be made at the end of each school year to reflect the difference between the number of reimbursable lunches and suppers served during the preceding year and the number served during the current year, and subsequent commodity entitlement shall be based on the adjusted meal counts. At the discretion of FNS, current-year adjustments may be made for significant variations in the number of reimbursable meals served. Such current-year adjustments will not be routine and will only be made for unusual problems encountered in a State, such as a disaster that necessitates institutional closures for a prolonged period of time. CACFP State agencies electing to receive cash-in-lieu of commodities will receive payments based on the number of reimbursable meals actually served during the current school year.

[47 FR 36527, Aug. 20, 1982, as amended at 62 FR 23618, May 1, 1997]

Subpart C—State Agency Provisions

§ 226.6 State agency administrative responsibilities.

(a) *State agency personnel.* Each State agency shall provide sufficient consultative, technical and managerial personnel to administer the Program, provide sufficient training and technical assistance to institutions and monitor performance to facilitate expansion and effective operation of the Program.

(b) *Application approval.* Each State agency shall establish an application procedure to determine the eligibility under this part of applicant institutions, and facilities for which applications are submitted by sponsoring organizations. State agencies, by written consent of the State agency and the institutions, shall renew agreements with institutions not less frequently than annually. A State agency may not execute an agreement to be effective during two fiscal years but may nevertheless establish an ongoing renewal process for the purpose of reviewing and approving applications from participating institutions throughout the fiscal year. As a minimum, such application approval process shall include:

(1) Renewal of the Program agreement;

(2) For child care centers, adult day care centers and outside-school-hours care centers, submission of current eligibility information on enrolled participants.

(3) For sponsoring organizations of day care homes, submission of the current total number of children enrolled, and an assurance that day care home providers' children enrolled in the Program are eligible for free or reduced-price meals;

(4) Issuance of a nondiscrimination policy statement and media release;

(5) For sponsoring organizations, submission of a management plan;

(6) Submission of an administrative budget;

(7) Submission of documentation that all child care centers, adult day care centers, outside-school-hours care centers, and day care homes for which application is made are in compliance with Program licensing/approval provisions;

(8) For proprietary title XX child care centers, submission of documentation that they are currently providing nonresidential day care services for which they receive compensation under title XX of the Social Security Act, and certification that not less than 25 percent of enrolled children or 25 percent of licensed capacity, whichever number is less, in each such center during the most recent calendar month were title XX beneficiaries. In the case of title XIX or title XX adult day care centers, submission of documentation that they are currently providing nonresidential day care services for which they receive compensation under title XIX or title XX of the Social Security Act, and certification that not less than 25 percent of enrolled adult participants in each such center during the most recent calendar month were title XIX or title XX beneficiaries;

(9) Statement of institutional preference to receive commodities or cash-in-lieu of commodities;

(10) Institutional choice to receive all, part, or none of advance payment. Any institution applying for participation in the Program shall be notified of approval or disapproval by the State agency in writing within 30 calendar days of filing a complete and correct application. If an institution submits an incomplete application, the State agency shall notify the institution within 15 calendar days of receipt of the application and shall provide technical assistance, if necessary, to the institution for the purpose of completing its application. Any disapproved applicant shall be notified of its right to appeal under paragraph (j) of this section.

(c) *Denial of applications and termination of institutions.* The State agency shall not enter into an agreement with any applicant institution which the State agency determines to have been seriously deficient at any time in its operation of any Federal child nutrition program. However, the State agency may enter into an agreement with such an institution when with FNS concurrence it determines that the deficiencies have been corrected. The State agency shall terminate the program agreement with any institution which it determines to be seriously deficient. However, the State agency shall afford an institution every reasonable opportunity to correct problems before terminating the institution for being seriously deficient. The State agency shall notify FNS whenever it has denied an application from or terminated the participation of a seriously deficient institution. This notification shall be made within 15 days of the review official's decision upholding the State's action or, if the institution elects not to appeal the decision, within 15 days of the expiration of the appeal right. FNS will maintain a list of these institutions and will notify all other State agencies of these institutions' ineligibility to participate in the program. FNS may determine independently that an institution has been seriously deficient in its operation of any Federal child nutrition program and include such institution on the list of ineligible institutions if appropriate corrective action is not taken. State agencies shall not enter into an agreement with any institution included on this list of ineligible institutions and shall terminate any participating institution included on the list within 30 days of the receipt of notification by FNS of the institution's ineligible status. Once included on this list, an institution shall be ineligible to participate in the program until such time as FNS, in consultation with the appropriate State agency, determines that the serious deficiency which resulted in the ineligible status has been corrected. Any institution which is identifiable with a seriously deficient institution through its corporate organization, officers, employees, or otherwise shall also be considered to be ineligible unless it is demonstrated to the satisfaction of the State agency, with FNS concurrence, that good cause exists for considering the institution distinct from the seriously deficient institution. Denial or termination actions taken on the basis of FNS notification of ineligible status shall not be subject to administrative

review as provided in § 226.6(k). However, an institution which FNS has determined to be seriously deficient and which has not taken acceptable corrective action may request an administrative review of this determination by an FNS review official in accordance with the appeal procedures set forth in § 226.6(k) and will not be included on the list of ineligible institutions unless FNS' determination is upheld by the review official. Serious deficiencies, which are grounds for disapproval of applications and for termination include, but are not limited to, any of the following:

(1) Noncompliance with the applicable bid procedures and contract requirements of Federal child nutrition program regulations;

(2) The submission of false information to the State agency;

(3) Failure to return to the State agency any advance payments which exceeded the amount earned for serving eligible meals, or failure to return disallowed start-up or expansion payments;

(4) Failure to maintain adequate records;

(5) Failure to adjust meal orders to conform to variations in the number of participants;

(6) The claiming of Program payments for meals not served to participants;

(7) Service of a significant number of meals which did not include required quantities of all meal components;

(8) Continued use of food service management companies that are in violation of health codes;

(9) Failure of a sponsoring organization to disburse payments to its facilities in accordance with its management plan;

(10) A history of administrative or financial mismanagement in any Federal child nutrition program;

(11) The claiming of Program payment for meals served by a proprietary title XX child care center during a calendar month in which less than 25 percent of enrolled children or 25 percent of licensed capacity, whichever number is less, were title XX beneficiaries. In the case of an adult day care center, the claiming of Program payment for meals served by a proprietary title XIX or title XX center during a calendar month in which less than 25 percent of enrolled adult participants were title XIX or title XX beneficiaries.

(d) *Licensing/approval for child care centers, outside-school-hours care centers and day care homes.* This section prescribes State agency responsibilities to ensure that child care centers and day care homes meet the licensing/approval criteria set forth in this part. Sponsoring organizations shall submit to the State agency documentation that facilities under their jurisdiction are in compliance with licensing/approval requirements. Independent centers shall submit such documentation to the State agency on their own behalf.

(1) *General.* Each State agency shall establish procedures to annually review information submitted by institutions to ensure that all participating child care centers, day care homes, and outside-school-hours care centers either:

(i) Are licensed or approved by Federal, State, or local authorities, provided that institutions which are approved for Federal programs on the basis of State or local licensing shall not be eligible for the Program if their licenses lapse or are terminated; or

(ii) Are complying with applicable procedures to renew licensing or approval in situations where the State agency has no information that licensing or approval will be denied; or

(iii) Receive Title XX funds for providing child care, if licensing or approval is not available; or

(iv) Demonstrate compliance with applicable State or local child care standards to the State agency, if licensing is not available and title XX funds are not received; or

(v) Demonstrate compliance with CACFP child care standards to the State agency, if licensing or approval is not available and Title XX funds are not received.

(2) *CACFP child care standards.* (i) When licensing or approval is not available, independent child care centers, and sponsoring organizations on behalf of their child care centers or day care homes, may elect to demonstrate compliance, annually, with the following CACFP child care standards or

other standards specified in paragraph (d)(3) of this section:

(A) *Staff/child ratios.* (*1*) Day care homes provide care for no more than 12 children at any one time. One home caregiver is responsible for no more than 6 children ages 3 and above, or no more than 5 children ages 0 and above. No more than 2 children under the age of 3 are in the care of 1 caregiver. The home provider's own children who are in care and under the age of 14 are counted in the maximum ratios of caregivers to children.

(*2*) Child care centers and outside-school-hours care centers do not fall below the following staff/child ratios:

(*i*) For children under 6 weeks of age—1:1

(*ii*) For children ages 6 weeks up to 3 years—1:4

(*iii*) For children ages 3 years up to 6 years—1:6

(*iv*) For children ages 6 years up to 10 years—1:15

(*v*) For children ages 10 and above—1:20

(B) *Nondiscrimination.* Day care services are available without discrimination on the basis of race, color, national origin, sex, age, or handicap.

(C) *Safety and sanitation.* (*1*) A current health/sanitation permit or satisfactory report of an inspection conducted by local authorities within the past 12 months shall be submitted.

(*2*) A current fire/building safety permit or satisfactory report of an inspection conducted by local authorities within the past 12 months shall be submitted.

(*3*) Fire drills are held in accordance with local fire/building safety requirements.

(D) *Suitability of facilities.* (*1*) Ventilation, temperature, and lighting are adequate for children's safety and comfort.

(*2*) Floors and walls are cleaned and maintained in a condition safe for children.

(*3*) Space and equipment, including rest arrangements for preschool age children, are adequate for the number of age range of participating children.

(E) *Social services.* Independent centers, and sponsoring organizations in coordination with their facilities, have procedures for referring families of children in care to appropriate local health and social service agencies.

(F) *Health services.* (*1*) Each child is observed daily for indications of difficulties in social adjustment, illness, neglect, and abuse, and appropriate action is initiated.

(*2*) A procedure is established to ensure prompt notification of the parent or guardian in the event of a child's illness or injury, and to ensure prompt medical treatment in case of emergency.

(*3*) Health records, including records of medical examinations and immunizations, are maintained for each enrolled child. (Not applicable to day care homes.)

(*4*) At least one full-time staff member is currently qualified in first aid, including artificial respiration techniques. (Not applicable to day care homes.)

(*5*) First aid supplies are available.

(*6*) Staff members undergo initial and periodic health assessments.

(G) *Staff training.* The institution provides for orientation and ongoing training in child care for all caregivers.

(H) *Parental involvement.* Parents are afforded the opportunity to observe their children in day care.

(I) *Self-evaluation.* The institution has established a procedure for periodic self-evaluation on the basis of CACFP child care standards.

(ii) When licensing or approval is not available, independent outside-school-hours care centers, and sponsoring organizations on behalf of their outside-school-hours care centers, may elect to demonstrate compliance with child care standards developed by the State agency which shall include, as a minimum, information on: (A) Fire/safety, (B) sanitation, (C) organized activities, (D) kitchen and restroom facilities, (E) appropriateness of games and materials, (F) availability of emergency medical care, and (G) child-staff ratios as indicated in §226.6(d)(2)(i)(A). For items (A) and (B), of this paragraph, appropriate State or local permits are required.

(3) *Alternate approval procedures.* Each State agency shall establish procedures to review information submitted by institutions for centers or homes for which licensing or approval is not

available in order to establish eligibility for the Program. Licensing or approval is not available when (i) no Federal, State, or local licensing/approval standards have been established for child care centers, outside-school-hours care centers, or day care homes; or (ii) no mechanism exists to determine compliance with licensing/approval standards. In these situations, independent centers, and sponsoring organizations on behalf of their facilities, may choose to demonstrate compliance with either CACFP child care standards, applicable State child care standards, or applicable local child care standards. State agencies shall provide information about applicable State child care standards and CACFP child care standards to institutions, but may require institutions electing to demonstrate compliance with applicable local child care standards to identify and submit these standards. The State agency may permit independent centers, and sponsoring organizations on behalf of their facilities, to submit self-certification forms, and may grant approval without first conducting a compliance review at the center or facility. But the State agency shall require submission of health/sanitation and fire/safety permits or certificates for all independent centers and facilities seeking alternate child care standards approval. Compliance with applicable child care standards are subject to review in accordance with § 226.6(n).

(e) *Licensing/approval for adult day care centers.* This paragraph prescribes State agency responsibilities to ensure that adult day care centers meet the licensing/approval criteria set forth in this part. Sponsoring organizations shall submit to the State agency documentation that facilities under their jurisdiction are in compliance with licensing/approval requirements. Independent adult day care centers shall submit such documentation to the State agency on their own behalf. Each State agency shall establish procedures to annually review information submitted by institutions to ensure that all participating adult day care centers either:

(1) Are licensed or approved by Federal, State or local authorities, provided that institutions which are approved for Federal programs on the basis of State or local licensing shall not be eligible for the Program if their licenses lapse or are terminated; or

(2) Are complying with applicable procedures to renew licensing or approval in situations where the State agency has no information that licensing or approval will be denied.

(f) *Annual requirements.* State agencies shall require institutions to comply with applicable provisions of this part. Each State agency shall annually:

(1) Enter into and execute a written Program agreement with each institution, or renew such agreement with the written concurrence of the institution. The Program agreement shall provide that the institution shall accept final financial and administrative responsibility for management of an effective food service, comply with all requirements under this part, and comply with all requirements of title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975 and the Department's regulations concerning nondiscrimination (7 CFR parts 15, 15a and 15b), including requirements for racial and ethnic participation data collection, public notification of the nondiscrimination policy, and reviews to assure compliance with such policy, to the end that no person shall, on the grounds of race, color, national origin, sex, age, or handicap be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under the Program.

(2) Require each sponsoring organization to submit a management plan with its application for review and approval. Such a plan shall include: detailed information on the organizational administrative structure; the staff assigned to Program management and monitoring; administrative budget; procedures which will be used by the sponsoring organization to administer the Program in and disburse payments to the child care facilities under its jurisdiction; and, for sponsoring organizations of day care homes, a description of the system for making tier I

day care home determinations, and a description of the system of notifying tier II day care homes of their options for reimbursement. For initial implementation of the two-tiered reimbursement structure for day care homes, by April 1, 1997, each sponsoring organization of day care homes shall submit an amendment to its plan, subject to review and approval by the State agency, describing its systems for making tier I day care home determinations and for notifying tier II day care homes of their options for reimbursement.

(3) Require each institution to submit an administrative budget. Each sponsoring organization shall be required to incorporate this budget into its management plan.

(4) Determine that all meal procurements with food service management companies are in conformance with the bid and contractual requirements of § 226.22.

(5) Inquire as to the preference of institutions for commodities or cash-in-lieu of commodities.

(6) Provide institutions with information on foods available in plentiful supply, based on information provided by the Department.

(7) Inform institutions with separate meal charges of their responsibility to ensure that free and reduced-price meals are served to participants unable to pay the full price and provide to all institutions a copy of the income standards to be used by institutions for determining the eligibility of participants for free and reduced-price meals under the Program.

(8) Perform verification of the eligibility of participants for free and reduced-price meals in participating institutions in accordance with the procedures outlined in § 226.23(h). State agencies verifying the information on free and reduced-price applications shall ensure that verification activities are applied without regard to race, color, national origin, sex, age, or handicap.

(9) Coordinate with the State agency which administers the National School Lunch Program to ensure the receipt of a list of elementary schools in the State in which at least one-half of the children enrolled are certified eligible to receive free or reduced price meals. The State agency shall provide the list to sponsoring organizations by April 1, 1997, and by February 15 of each year thereafter, unless the State agency that administers the National School Lunch Program has elected to base data for the list on a month other than October, in which case the State agency shall provide the list to sponsoring organizations within 15 calendar days of its receipt from the State agency that administers the National School Lunch Program. The State agency also shall provide each sponsoring organization with census data, as provided to the State agency by FNS upon its availability on a decennial basis, showing areas in the State in which at least 50 percent of the children are from households meeting the income standards for free or reduced price meals. In addition, the State agency shall ensure that the most recent available data is used if the determination of a day care home's eligibility as a tier I day care home is made using school or census data. Determinations of a day care home's eligibility as a tier I day care home shall be valid for one year if based on a provider's household income, three years if based on school data, or until more current data are available if based on census data. However, a sponsoring organization, the State agency, or FNS may change the determination if information becomes available indicating that a home is no longer in a qualified area. The State agency shall not routinely require annual redeterminations of the tiering status of tier I day care homes based on updated elementary school data.

(10) Provide all sponsoring organizations of day care homes in the State with a listing of State-funded programs, participation in which by a parent or child will qualify a meal served to a child in a tier II home for the tier I rate of reimbursement.

(11) Require each sponsoring organization of day care homes to submit the total number of tier I and tier II day care homes that it sponsors; a breakdown showing the total number of children enrolled in tier I day care homes; the total number of children enrolled in tier II day care homes; and the number of children in tier II day care

homes that have been identified as eligible for free or reduced price meals.

(g) *Program expansion.* Each State agency shall take action to expand the availability of benefits under this Program. At a minimum, the State shall annually notify each nonparticipating child care center, outside-school-hours care center, and day care home within the State that is licensed, approved, registered, or receiving funds under title XX and each nonparticipating adult day care center that is licensed or approved, of the availability of the Program, the requirements for Program participation, and the application procedures to be followed in the Program. The State agency shall make the list of child care centers, adult day care centers, outside-school-hours care centers, and day care homes notified each year available to the public upon request.

(h) *Commodity distribution.* The State shall annually inquire as to the preference of each institution for commodities or cash-in-lieu of commodities. Each institution electing cash-in-lieu of commodities shall receive such payments. Each institution which elects to receive commodities shall have commodities provided to it unless the State agency, after consultation with the State commodity distribution agency, demonstrates to FNS that distribution of commodities to the number of such institutions would be impracticable. The State agency may then, with the concurrence of FNS, provide cash-in-lieu of commodities for all institutions. A State agency request for cash-in-lieu of all commodities shall be submitted to FNS not later than May 1 of the school year preceding the school year for which the request is made. The State agency shall, by June 1 of each year, submit a list of institutions which have elected to receive commodities to the State commodity distribution agency, unless FNS has approved a request for cash-in-lieu of commodities for all institutions. The list shall be accompanied by information on the average daily number of lunches and suppers to be served to participants by each such institution.

(i) *Standard contract.* Each State agency shall develop a standard contract in accordance with § 226.21 and provide for its use between institutions and food service management companies. The contract shall expressly and without exception stipulate:

(1) The institution shall provide the food service management company with a list of the State agency approved child care centers, day care homes, adult day care centers, and outside-school-hours care centers to be furnished meals by the food service management company, and the number of meals, by type, to be delivered to each location;

(2) The food service management company shall maintain such records (supported by invoices, receipts or other evidence) as the institution will need to meet its responsibilities under this part, and shall promptly submit invoices and delivery reports to the institution no less frequently than monthly;

(3) The food service management company shall have Federal, State or local health certification for the plant in which it proposes to prepare meals for use in the Program, and it shall ensure that health and sanitation requirements are met at all times. In addition, the State agency may require the food service management company to provide for meals which it prepares to be periodically inspected by the local health department or an independent agency to determine bacteria levels in the meals being prepared. These bacteria levels shall conform to the standards which are applied by the local health authority with respect to the level of bacteria which may be present in meals prepared or served by other establishments in the locality. Results of these inspections shall be submitted to the institution and to the State agency;

(4) The meals served under the contract shall conform to the cycle menus upon which the bid was based, and to menu changes agreed upon by the institution and food service management company;

(5) The books and records of the food service management company pertaining to the institution's food service operation shall be available for inspection and audit by representatives of the State agency, of the Department,

and of the U.S. General Accounting Office at any reasonable time and place, for a period of 3 years from the date of receipt of final payment under the contract, or in cases where an audit requested by the State agency or the Department remains unresolved, until such time as the audit is resolved;

(6) The food service management company shall operate in accordance with current Program regulations;

(7) The food service management company shall not be paid for meals which are delivered outside of the agreed upon delivery time, are spoiled or unwholesome at the time of delivery, or do not otherwise meet the meal requirements contained in the contract;

(8) Meals shall be delivered in accordance with a delivery schedule prescribed in the contract;

(9) Increases and decreases in the number of meal orders may be made by the institution, as needed, within a prior notice period mutually agreed upon in the contract;

(10) All meals served under the Program shall meet the requirements of § 226.20;

(11) All breakfasts, lunches, and suppers delivered for service in outside-school-hours care centers shall be unitized, with or without milk, unless the State agency determines that unitization would impair the effectiveness of food service operations. For meals delivered to child care centers and day care homes, the State agency may require unitization, with or without milk, of all breakfasts, lunches, and suppers only if the State agency has evidence which indicates that this requirement is necessary to ensure compliance with § 226.20.

(j) *Procurement provisions.* State agencies shall require institutions to adhere to the procurement provisions set forth in § 226.22.

(k) *Institution appeal procedures.* Except as provided in §226.8(g), each State agency shall establish an appeal procedure to be followed by an institution requesting a review of a denial of an institution's application for participation, a denial of an application submitted by a sponsoring organization on behalf of a facility, a termination of the participation of an institution or facility, a suspension of an institution's agreement, a denial of an institution's application for start-up or expansion payments, a denial of an advance payment, a denial of all or a part of the claim for reimbursement, (except for late submission under § 226.10(e)), a denial by the State agency to forward to FNS an exception request by the institution or sponsoring organization for payment of a late claim or a request for an upward adjustment to a claim, demand for the remittance of an overpayment, and any other action of the State agency affecting the participation of an institution in the Program or the institution's claim for reimbursement. State agencies may use their own State appeal procedures provided the same procedures are applied to all appellants in the State and the procedures meet the following requirements: Appellants are assured of a fair and impartial hearing before an independent official at which they may be represented by legal counsel; decisions are rendered in a timely manner not to exceed 120 days from the date of the receipt of the request for review; appellants are afforded the right to either a review of the record with the right to file written information, or a hearing which they may attend in person; and adequate notice is given of the place, date and procedures of the hearing. The appeal procedures adopted by the State agency shall be made available in writing each year to all institutions at the time of application for participation in the Program and upon request. If the State has not established its own appeal procedures or the procedures do not meet the above listed criteria, the State agency shall observe the following procedures at a minimum:

(1) The institution shall be advised in writing of the grounds on which the State agency based its action. The notice of action, which shall be sent by certified mail, return receipt requested, shall also include a statement indicating that the institution has the right to appeal the action;

(2) The written request for review shall be filed by the appellant not later than 15 calendar days from the date the appellant received the notice of action, and the State shall acknowledge the

receipt of the request for appeal within 10 calendar days;

(3) The appellant may refute the charges contained in the notice of action in person and by written documentation to the review official. In order to be considered, written documentation must be filed with the review official not later than 30 calendar days after the appellant received the notice of action. The appellant may retain legal counsel, or may be represented by another person. A hearing shall be held by the review official in addition to, or in lieu of, a review of written information submitted by the appellant only if the appellant so specifies in the letter of request for review. Failure of the appellant institution's representative to appear at a scheduled hearing shall constitute the appellant institution's waiver of the right to a personal appearance before the review official, unless the review official agrees to reschedule the hearing. A representative of the State agency shall be allowed to attend the hearing to respond to the appellant's testimony and to answer questions posed by the review official;

(4) If the appellant has requested a hearing, the appellant and the State agency shall be provided with at least 10 calendar days advance written notice, sent by certified mail, return receipt requested, of the time and place of the hearing;

(5) Any information on which the State agency's action was based shall be available to the appellant for inspection from the date of receipt of the request for review;

(6) The review official shall be an independent and impartial official other than, and not accountable to, any person authorized to make decisions that are subject to appeal under the provisions of this section;

(7) The review offficial shall make a determination based on information provided by the State agency and the appellant, and on Program regulations;

(8) Within 60 calendar days of the State agency's receipt of the request for review, the review official shall inform the State agency and the appellant of the determination of the review;

(9) The State agency's action shall remain in effect during the appeal process. However, participating institutions and facilities may continue to operate under the Program during an appeal of termination, unless the action is based on imminent dangers to the health or welfare of participants. If the institution or facility has been terminated for this reason, the State agency shall so specify in its notice of action. Institutions electing to continue operating while appealing terminations shall not be reimbursed for any meals served during the period of the appeal if the State agency's action is upheld; and

(10) The determination by the State review official is the final administrative determination to be afforded to the appellant.

(11) Appeals shall not be allowed on decisions made by FNS on requests for exceptions to the claims submission deadlines stated in § 226.10(e) or requests for upward adjustments to claims.

(12) In cases where an appeal results in the dismissal of a claim against an institution which was asserted by the State agency based upon Federal audit findings, FNS may assert a claim against the State agency in accordance with the procedures outlined in § 226.14(c).

(l) *Program assistance.* Each State agency shall provide technical and supervisory assistance to institutions and facilities to facilitate effective Program operations, monitor progress toward achieving Program goals, and ensure compliance with the Department's nondiscrimination regulations (part 15 of this title) issued under title VI of the Civil Rights Act of 1964. Documentation of supervisory assistance activities, including reviews conducted, corrective actions prescribed, and follow-up efforts, shall be maintained on file by the State agency. Program reviews shall assess institutional compliance with the provisions of this part and with any applicable instructions of FNS and the Department. Program reviews shall include State agency evaluation of the documentation used by sponsoring organizations to classify their day care homes as tier I day care homes. State agencies shall

annually review 33.3 percent of all institutions. State agencies shall also ensure that each institution is reviewed according to the following schedule.

(1) Independent centers, sponsoring organizations of centers, and sponsoring organizations of day care homes with 1 to 200 homes shall be reviewed at least once every four years. Reviews of sponsoring organizations shall include reviews of 15 percent of their child care, adult day care and outside-school-hours care centers and 10 percent of their day care homes.

(2) Sponsoring organizations with more than 200 homes shall be reviewed at least once every two years. Reviews of such sponsoring organizations shall include reviews of 5 percent of the first 1,000 homes and 2.5 percent of all homes in excess of 1,000.

(3) Reviews shall be conducted for newly participating sponsoring organizations with five or more child care facilities or adult day care facilities within the first 90 days of program operations.

(m) *Program irregularities.* Each State agency shall promptly investigate complaints received or irregularities noted in connection with the operation of the Program, and shall take appropriate action to correct any irregularities. State agencies shall maintain on file evidence of such investigations and actions. FNS and OIG may make investigations at the request of the State agency, or whenever FNS or OIG determines that investigations are appropriate.

(n) *Child care standards compliance.* The State agency shall, when conducting administrative reviews of child care centers, outside-school-hours care centers, and day care homes approved by the State agency under paragraph (d)(3) of this section, determine compliance with the child care standards used to establish eligibility, and the institution shall ensure that all violations are corrected and the State shall ensure that the institution has corrected all violations. If violations are not corrected within 60 calendar days of written notification to the institution, the State agency shall terminate the Program participation of the violating institution or facility. However, if the health or safety of the children is imminently threatened, the State agency may immediately terminate participation of the institution or facility. If, during an administrative review of a child care center, outside-school-hours care center, or day care home not approved by the State agency under paragraph (d)(3) of this section, the State agency observes violations of applicable health, safety, or staff-child ratio standards, or attendance in excess of licensed capacity, the State agency shall promptly refer such violations to the appropriate authority. The State agency may deny reimbursement for meals served to attending children in excess of authorized capacity.

(o) *Sponsoring organization agreement.* Each State agency shall develop and provide for the use of a standard form of agreement between each day care home sponsoring organization and all day care homes participating in the Program under such organization. However, the State agency may, at the request of the sponsor, approve an agreement developed by the sponsor. State agencies may develop a similar form for use between sponsoring organizations and other types of facilities.

(p) Following its reviews of institutions and facilities under §§ 226.6(l) and 226.23(h) conducted prior to July 1, 1988, the State agency shall report data on key elements of program operations on a form designated by FNS. These key elements include but are not limited to the program areas of meal requirements, determination of eligibility for free and reduced price meals, and the accuracy of reimbursement claims. These forms shall be submitted within 90 days of the completion of the data collection for the institutions except that, if the State has elected to conduct reviews of verification separate from its administrative reviews, the State shall retain data until all key elements have been reviewed and shall report all data for each institution on one form within 90 days of the completion of the data collection for all key elements for that institution. States shall ensure that all key element data for an institution is collected during a 12-month period.

[47 FR 36527, Aug. 20, 1982]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 226.6, see the List of CFR

Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 226.7 State agency responsibilities for financial management.

(a) This section prescribes standards of financial management systems in administering Program funds by the State agency and institutions.

(b) Each State agency shall maintain an acceptable financial management system, adhere to financial management standards and otherwise carry out financial management policies as delineated in the Uniform Federal Assistance Regulations, at 7 CFR part 3015. State agencies or FNSRO's, where applicable, shall also have a system in place for monitoring and reviewing the institutions' documentation of their nonprofit status to ensure that all Program reimbursement funds are used: (1) Solely for the conduct of the food service operation; or (2) to improve such food service operations, principally for the benefit of the participants.

(c) *Management evaluations and audits.* State agencies shall provide FNS with full opportunity to conduct management evaluations (including visits to institutions and facilities) of all operations of the State agency under the Program and shall provide OIG with full opportunity to conduct audits (including visits to institutions and facilities) of all operations of the State agency under the Program. Within 60 calendar days of receipt of each management evaluation report, the State agency shall submit to FNSRO a written plan for correcting serious deficiencies, including specific timeframes for accomplishing corrective actions and initiating follow-up efforts. If a State agency makes a showing of good cause, however, FNS may allow more than 60 days in which to submit a plan. Each State agency shall make available its records, including records of the receipt and expenditure of funds, upon request by FNS or OIG. OIG shall also have the right to make audits of the records and operation of any institution.

(d) *Reports.* Each State agency shall submit to FNS the final Report of the Child and Adult Care Food Program (FNS 44) for each month which shall be limited to claims submitted in accordance with § 226.10(e) and which shall be postmarked and/or submitted no later than 90 days following the last day of the month covered by the report. States shall not receive Program funds for any month for which the final report is not submitted within this time limit unless FNS grants an exception. Upward adjustments to a State agency's report shall not be made after 90 days from the month covered by the report unless authorized by FNS. Downward adjustments shall always be made, without FNS authorization, regardless of when it is determined that such adjustments are necessary. Adjustments shall be reported to FNS in accordance with procedures established by FNS. Each State agency shall also submit to FNS a quarterly Financial Status Report (SF–269) on the use of Program funds. Such reports shall be postmarked and/or submitted no later than 30 days after the end of each fiscal year quarter. Obligations shall be reported only for the fiscal year in which they occur. A final Financial Status Report for each fiscal year shall be postmarked and/or submitted to FNS within 120 days after the end of the fiscal year. FNS shall not be responsible for reimbursing unpaid Program obligations reported later than 120 days after the close of the fiscal year in which they were incurred.

(e) *Annual plan.* Each State shall submit to the Secretary for approval by August 15 of each year an annual plan for the use of State administrative expense funds, including a staff formula for State personnel.

(f) *Rate assignment.* Each State agency shall require institutions (other than sponsoring organizations for day care homes) to submit, not less frequently than annually, information necessary to assign rates of reimbursement as outlined in § 226.9.

(g) *Administrative budget approval.* The State agency shall approve institution administrative budgets, and shall limit allowable administrative costs claimed by each sponsoring organization for day care homes to administrative costs approved in its annual budget. The

State agency may establish such administrative costs limits for other institutions. Administrative budget levels may be adjusted to reflect changes in Program activities.

(h) *Start-up and expansion payments.* Each State agency shall establish procedures for evaluating requests for start-up and expansion payments, issuing these payments to eligible sponsoring organizations, and monitoring the use of these payments.

(i) *Advance payments.* Each State agency shall establish procedures for issuing advance payments by the first day of each month and comparing these payments with earned reimbursement on a monthly basis. The State agency shall maintain on file a statement of the State's law and policy governing the use of interest earned on advanced funds by sponsors, institutions, child care facilities and adult day care facilities.

(j) *Recovery of overpayments.* Each State agency shall establish procedures to recover outstanding start-up, expansion and advance payments from institutions which, in the opinion of the State agency, will not be able to earn these payments.

(k) *Claims processing.* Each State agency shall establish procedures for institutions to properly submit claims for reimbursement. All valid claims shall be paid within 45 calendar days of receipt. Within 15 calendar days of receipt of any incomplete or incorrect claim which must be revised for payment, the State agency shall notify the institution as to why and how such claim must be revised. If the State agency disallows partial or full payment for a claim for reimbursement, it shall notify the institution which submitted the claim of its right to appeal under § 226.6(k). State agencies may permit disallowances to be appealed separately from claims for reimbursement.

(l) *Participation controls.* The State agency may establish control procedures to ensure that payment is not made for meals served to participants attending in excess of the authorized capacity of each independent center, adult day care facility or child care facility.

(m) *Financial management system.* Each State agency shall establish a financial management system in accordance with the Uniform Federal Assistance Regulations, 7 CFR part 3015, and FNS guidance to identify allowable Program costs and establish standards for institutional recordkeeping and reporting. These standards shall (1) prohibit claiming reimbursement for meals provided by a participant's family, except as authorized by § 226.18(e) and (2) allow the cost of meals served to adults who perform necessary food service labor under the Program, except in day care homes. The State agency shall provide guidance on financial management requirements to each institution.

[47 FR 36527, Aug. 20, 1982, as amended at 48 FR 21530, May 13, 1983; Amdt. 5, 49 FR 18988, May 4, 1984; 50 FR 8580, Mar. 4, 1985; 50 FR 26975, July 1, 1985; 53 FR 52589, Dec. 28, 1988; Amdt. 22, 55 FR 1378, Jan. 14, 1990; 63 FR 9728, Feb. 26, 1998]

§ 226.8 Audits.

(a) Unless otherwise exempt, audits at the State and institution levels shall be conducted in accordance with the Office of Management and Budget's Circulars A–128 and A–110 and the Department's Uniform Federal Assistance Regulations (7 CFR part 3015). Title XIX and title XX proprietary institutions not subject to organization-wide audits shall be audited by the State agency at least once every two years.

(b) The funds provided to the State agency under § 226.4(h) may be made available to institutions to fund a portion of organization-wide audits, provided that the organization-wide audit includes tests of the CACFP in accordance with section 10.558 of the Compliance Supplement to OMB Circular A–128. The funds provided to an institution for an organization-wide audit shall not exceed the portion of the audit's cost equal to the CACFP's portion of the total Federal grant.

(c) Funds provided under § 226.4(h) may be used by the State agency to conduct program-specific audits of institutions not subject to organization-wide audits, or for which the State agency considers program specific audits to be needed. The State agency may use any funds remaining after all

required program-specific audits have been performed to conduct administrative reviews of institutions.

(d) Funds provided under § 226.4(h) may only be obligated during the fiscal year for which those funds are allocated. If funds provided under § 226.4(h) are not sufficient to meet the requirements of this section, the State agency may then use available State administrative expense funds to conduct audits, provided that the State agency is arranging for the audits and has not passed the responsibility down to the institution.

(e) In conducting management evaluations or audits for any fiscal year, FNS or OIG may disregard any overpayment which does not exceed $100. In conducting State agency sponsored audits in State administered programs, the State agency may disregard any overpayment which does not exceed the amount established by State law, regulations or procedures as a minimum for which claims will be made for State losses generally. No overpayment shall be disregarded, however, where there are unpaid claims of the same fiscal year from which the overpayment can be deducted, or where there is evidence of violation of criminal law or civil fraud statutes.

(f) While OIG shall rely to the fullest extent feasible upon State sponsored audits, OIG may, whenever it considers necessary:

(1) Make audits on a statewide basis;

(2) Perform on-site test audits;

(3) Review audit reports and related working papers of audits performed by or for State agencies.

(g) State agencies are not required to provide a hearing to an institution for State actions taken on the basis of a Federal audit determination. If a State agency does not provide a hearing in such situations, FNS will provide a hearing, upon request, in accordance with procedures set forth in § 226.6(j) of this part.

[47 FR 36527, Aug. 20, 1982, as amended at 50 FR 8580, Mar. 4, 1985; 51 FR 4295, Feb. 4, 1986; 52 FR 5526, Feb. 25, 1987; 53 FR 52590, Dec. 28, 1988; Amdt. 22, 55 FR 1378, Jan. 14, 1990]

Subpart D—Payment Provisions

§ 226.9 Assignment of rates of reimbursement for centers.

(a) The State agency shall assign rates of reimbursement, not less frequently than annually, on the basis of family-size and income information reported by each institution. Assigned rates of reimbursement may be changed more frequently than annually if warranted by changes in family-size and income information. Assigned rates of reimbursement shall be adjusted annually to reflect changes in the national average payment rates.

(b) The State agency shall either:

(1) Require that institutions submit each month's figures for meals served daily to participants from families meeting the eligibility standards for free meals, to participants from families meeting the eligibility standards for reduced-price meals, and to participants from families not meeting such guidelines; or

(2) Establish claiming percentages, not less frequently that annually, for each institution on the basis of the number of enrolled participants eligible for free, reduced-price, and paid meals; or

(3) Determine a blended per-meal rate of reimbursement, not less frequently than annually, by adding the products obtained by multiplying the applicable national average payment rate of reimbursement for each category (free, reduced-price, paid) by the claiming percentage for that category.

(c) States have two methods of reimbursing institutions. The method chosen by the State agency must be applied to all institutions participating in the Program in that State. These methods are:

(1) Meals times rates payment, which involves reimbursing an institution for meals served at the assigned rate for each meal. This method entails no comparison to the costs incurred by the institution for the meal service; and,

(2) Meals times rates or actual costs, whichever is the lesser, which involves reimbursing an institution for meals served at the assigned rate for each

meal or at the level of the costs actually incurred by the institution for the meal service. This method does entail a comparison of the costs incurred to the meal rates, with the costs being a limiting factor on the level of reimbursement an institution may receive.

(d) In those States where the State agency has chosen the option to implement a meals times rates payment system State-wide, the State agency may elect to pay an institution's final claim for reimbursement for the fiscal year at higher reassigned rates of reimbursement for lunches and suppers; however, the reassigned rates may not exceed the applicable maximum rates of reimbursement established under § 210.11(b) of the National School Lunch Program regulations. In those States which use the method of comparing meals times rates or actual costs, whichever is lesser, the total payments made to an institution shall not exceed the total net costs incurred for the fiscal year.

[47 FR 36527, Aug. 20, 1982, as amended at 48 FR 21530, May 13, 1983; 53 FR 52590, Dec. 28, 1988; Amdt. 22, 55 FR 1378, Jan. 14, 1990]

§ 226.10 Program payment procedures.

(a) By the first day of each month of operation, the State agency shall provide an advance payment to each institution electing to receive such payments, in accordance with § 226.6(b)(10). Advance payments shall equal the full level of claims estimated by the State agency to be submitted in accordance with paragraph (c) of this section, considering prior reimbursement claims and other information such as fluctuations in enrollment. The institution may decline to receive all or any part of the advance.

(b) For each fiscal year, the amount of payment made, including funds advanced to an institution, shall not exceed the amount of valid reimbursement claimed by that institution. To ensure that institutions do not receive excessive advance payments, the State agency shall observe the following procedures:

(1) After three advance payments have been made to an institution, the State agency shall ensure that no subsequent advance is made until the State agency has validated the institution's claim for reimbursement for the third month prior to the month for which the next advance is to be paid.

(2) If the State agency has audit or monitoring evidence of extensive program deficiencies or other reasons to believe that an institution will not be able to submit a valid claim for reimbursement, advance payments shall be withheld until the claim is received or the deficiencies are corrected.

(3) Each month the State agency shall compare incoming claims against advances to ensure that the level of funds authorized under paragraph (a) of this section does not exceed the claims for reimbursement received from the institution. Whenever this process indicates that excessive advances have been authorized, the State agency shall either demand full repayment or adjust subsequent payments, including advances.

(4) If, as a result of year end reconciliation as required by the Department's Uniform Federal Assistance Regulations (7 CFR part 3015), the State agency determines that reimbursement earned by an institution during a fiscal year is less than the amount paid, including funds advanced to that institution, the State agency shall demand repayment of the outstanding balance or adjust subsequent payments.

(c) Claims for Reimbursement shall report information in accordance with the financial management system established by the State agency, and in sufficient detail to justify the reimbursement claimed and to enable the State agency to provide the final Report of the Child and Adult Care Food Program (FNS 44) required under § 226.7(d). In submitting a Claim for Reimbursement, each institution shall certify that the claim is correct and that records are available to support that claim. Independent proprietary title XX child care centers shall submit the number and percentage of the enrolled participants, or the licensed capacity receiving title XX benefits for the month claimed for months in which not less than 25 percent of the enrolled children or 25 percent of licensed capacity, whichever is less, were title XX beneficiaries. Sponsoring organizations of such child care centers shall submit

the number and percentage of the enrolled children or licensed capacity, whichever is less, receiving title XX benefits for each center for the claim. Sponsoring organizations of such centers shall not submit claims for child care centers in which less than 25 percent of the enrolled children and licensed capacity were title XX beneficiaries for the month claimed. Independent proprietary title XIX or title XX adult day care centers shall submit the percentages of enrolled adult participants receiving title XIX or title XX benefits for the month claimed for months in which not less than 25 percent of enrolled adult participants were title XIX or title XX beneficiaries. Sponsoring organizations of such adult day care centers shall submit the percentage of enrolled adult participants receiving title XIX or title XX benefits for each center for the claim. Sponsoring organizations of such centers shall not submit claims for adult day care centers in which less than 25 percent of enrolled adult participants were title XIX or title XX beneficiaries for the month claimed.

(d) All records to support the claim shall be retained for a period of three years after the date of submission of the final claim for the fiscal year to which they pertain, except that if audit findings have not been resolved, the records shall be retained beyond the end of the three year period as long as may be required for the resolution of the issues raised by the audit. All accounts and records pertaining to the Program shall be made available, upon request, to representatives of the State agency, of the Department, and of the U.S. General Accounting Office for audit or review, at a reasonable time and place.

(e) Unless otherwise approved by FNS, the Claim for Reimbursement for any month shall cover only Program operations for that month except if the first or last month of Program operations in any fiscal year contains 10 operating days or less, such month may be added to the Claim for Reimbursement for the appropriate adjacent month; however, Claims for Reimbursement may not combine operations occurring in two fiscal years. A final Claim for Reimbursement shall be postmarked and/or submitted to the State agency not later than 60 days following the last day of the full month covered by the claim. State agencies may establish shorter deadlines at their discretion. Claims not postmarked and/or submitted within 60 days shall not be paid with Program funds unless FNS determines that an exception should be granted. The State agency shall promptly take corrective action with respect to any Claim for Reimbursement as determined necessary through its claim review process or otherwise. In taking such corrective action, State agencies may make upward adjustments in Program funds claimed on claims filed within the 60 day deadline if such adjustments are completed within 90 days of the last day of the claim month and are reflected in the final Report of the Child and Adult Care Food Programs (FNS–44) for the claim month which is required under 226.7(d). Upward adjustments in Program funds claimed which are not reflected in the final FNS–44 for the claim month shall not be made unless authorized by FNS. Downward adjustments in Program funds claimed shall always be made without FNS authorization regardless of when it is determined that such adjustments are necessary.

(f) If a State agency has reason to believe that an institution or food service management company has engaged in unlawful acts with respect to Program Operations, evidence found in audits, investigations or other reviews shall be a basis for non-payment of claims for reimbursement.

[47 FR 36527, Aug. 20, 1982, as amended by Amdt. 5, 49 FR 18988, May 4, 1984; 50 FR 26975, July 1, 1985; 53 FR 52590, Dec. 28, 1988; Amdt. 22, 55 FR 1378, Jan. 14, 1990; 62 FR 23618, May 1, 1997]

§ 226.11 Program payments for child care centers, adult day care centers and outside-school-hours care centers.

(a) Payments shall be made only to institutions operating under an agreement with the State agency for the meal types specified in the agreement served at approved child care centers, adult day care centers and outside-school-hours care centers. A State

agency may make payment for meals served in accordance with provisions of the Program in the calendar month preceding the calendar month in which the agreement is executed.

(b) Each child care institution shall report each month to the State agency the total number of meals, by type (breakfasts, lunches, suppers, and supplements), served to children, except that such reports shall be made for a proprietary title XX center only for calendar months during which not less than 25 percent of enrolled children, or 25 percent of licensed capacity, whichever is less, were title XX beneficiaries. Each adult day care institution shall report each month to the State agency the total number of meals, by type (breakfasts, lunches, suppers, and supplements), served to adult participants, except that such reports shall be made for a proprietary title XIX or title XX center only for calendar months during which no less than 25 percent of enrolled adult participants were title XIX or title XX beneficiaries.

(c) Each State agency shall base reimbursement to each child care institution on the number of meals, by type, served to children multiplied by the assigned rates of reimbursement, except that reimbursement shall be payable to proprietary title XX child care centers only for calendar months during which not less than 25 percent of enrolled children, or 25 percent of licensed capacity, whichever is less, were title XX beneficiaries. Each State agency shall base reimbursement to each adult day care institution on the number of meals, by type, served to adult participants multiplied by the assigned rates of reimbursement, except that reimbursement shall be payable to proprietary title XIX and title XX adult day care centers only for calendar months during which not less than 25 percent of enrolled adult participants were title XIX or Title XX beneficiaries. In computing reimbursement, the State agency shall either:

(1) Base reimbursement to institutions on actual daily counts of meals served, and multiply the number of meals, by type, served to participants eligible to receive free meals, served to participants eligible to receive reduced-price meals, and served to participants from families not meeting such standards by the applicable national average payment rate; or

(2) Apply the applicable claiming percentage or percentages to the total number of meals, by type, served to participants and multiply the product or products by the assigned rate of reimbursement for each meal type; or

(3) Multiply the assigned blended per meal rate of reimbursement by the total number of meals, by type, served to participants.

(d) If the State agency elects to reimburse its institutions according to the lesser of rates or actual costs, total Program payments to an institution during any fiscal year, including any cash payments in lieu of commodities, shall not exceed allowable Program operating and administrative costs, less income to the Program. The State agency may limit payments for administrative costs to the amount approved in the annual administrative budget of the institution. The State agency may prohibit an institution from using payments for operating costs to pay for administrative expenses.

(e) Each institution shall maintain records as prescribed by the State agency's financial management system.

[47 FR 36527, Aug. 20, 1982, as amended at 48 FR 21530, May 13, 1983; 52 FR 36907, Oct. 2, 1987; 53 FR 52590, Dec. 28, 1988; 62 FR 23618, May 1, 1997]

§ 226.12 Administrative payments to sponsoring organizations for day care homes.

(a) *General.* Sponsoring organizations for day care homes shall receive payments for administrative costs. During any fiscal year, administrative costs payments to a sponsoring organization may not exceed the lesser of (1) actual expenditures for the costs of administering the Program less income to the Program, or (2) the amount of administrative costs approved by the State agency in the sponsoring organization's budget, or (3) the sum of the products obtained by multiplying each month the sponsoring organization's:

(i) Initial 50 day care homes by 42 dollars;

(ii) Next 150 day care homes by 32 dollars;

(iii) Next 800 day care homes by 25 dollars; and

(iv) Additional day care homes by 22 dollars.

During any fiscal year, administrative payments to a sponsoring organization may not exceed 30 percent of the total amount of administrative payments and food service payments for day care home operations.

(b) *Start-up and expansion payments.* (1) Prospective sponsoring organizations of day care homes, participating sponsoring organizations of child care centers or outside-school-hours care centers, independent centers, and participating sponsoring organizations of less than 50 homes which meet the criteria in paragraph (b)(2) of this section shall be entitled to receive start-up payments to develop or expand successful Program operations in day care homes. Participating sponsoring organizations of day care homes which meet the criteria in paragraph (b)(2) of this section shall be entitled to receive expansion payments to initiate or expand Program operations in day care homes in low-income or rural areas. The State agency shall approve start-up payments only once for any eligible sponsoring organization, but may approve expansion payments for any eligible sponsoring organization more than once, provided that: the request must be for expansion into an area(s) other than that specified in their initial or prior request; and 12 months has elapsed since the sponsoring organization has satisfied all obligations under its initial or prior expansion agreement. Eligible sponsoring organizations which have received start-up payments shall be eligible to apply for expansion payments at a date no earlier than 12 months after it has satisfied all its obligations under its start-up agreement with the State agency.

(2) Sponsoring organizations which apply for start-up or expansion payments shall evidence:

(i) Public or tax-exempt status, or moving toward compliance with the requirements for IRS tax-exempt status, in accordance with § 226.15(a);

(ii) An organizational history of managing funds and ongoing activities (i.e., administering public or private programs);

(iii) An acceptable and realistic plan for recruiting day care homes to participate in the Program (such as the method of contacting providers), which may be based on estimates of the number of day care homes to be recruited and information supporting their existence, and in the case of sponsoring organizations applying for expansion payments, documentation that the day care homes to be recruited are located in low-income or rural areas; and

(iv) An acceptable preliminary sponsoring organization management plan including, but not limited to, plans for preoperational visits and training.

(3) The State agency shall deny start-up and expansion payments to applicant sponsoring organizations which fail to meet the criteria of paragraph (b)(2) of this section or which have not been financially responsible in the operation of other programs funded by Federal, State, or local governments. The State agency shall notify the sponsoring organization of the reasons for denial and allow the sponsoring organization full opportunity to submit evidence on appeal as provided for in § 226.6(k). Any sponsoring organization applying for start-up or expansion funds shall be notified of approval or disapproval by the State agency in writing within 30 calendar days of filing a complete and correct application. If a sponsoring organization submits an incomplete application, the State agency shall notify the sponsoring organization within 15 calendar days of receipt of the application and shall provide technical assistance, if necessary, to the sponsoring organization for the purpose of completing its application.

(4) Sponsoring organizations which apply for and meet the criteria for start-up or expansion payments shall enter into an agreement with the State agency. The agreement shall specify:

(i) Activities which the sponsoring organization will undertake to initiate or expand Program operations in day care homes;

(ii) The amount of start-up or expansion payments to be issued to the sponsoring organization, together with an administrative budget detailing the costs which the sponsoring organization shall incur, document, and claim;

(iii) The time allotted to the sponsoring organization for the initiation or expansion of Program operations in family day care homes;

(iv) The responsibility of the applicant sponsoring organization to repay, upon demand by the State agency, start-up or expansion payments not expended in accordance with the agreement.

(5) Upon execution of the agreement, the State agency shall issue a start-up or expansion payment to the sponsoring organization in an amount equal to not less than one, but not more than two month's anticipated administrative reimbursement to the sponsoring organization as determined by the State agency. However, no sponsoring organization may receive start-up or expansion payments for more than 50 day care homes. Eligible sponsoring organizations with fewer than 50 homes under their jurisdiction at the time of application for start-up payments may receive such payments for up to 50 homes, less the number of homes under their jurisdiction. Eligible sponsoring organizations applying for expansion funds may receive at a maximum such payments for up to 50 homes at the currently assigned administrative payment for the first 50 homes. In determining the amount of start-up or expansion payments to be made to a sponsoring organization, the State agency shall consider the anticipated level of start-up or expansion costs to be incurred by the sponsoring organization and alternate sources of funds available to the sponsoring organization.

(6) Upon expiration of the time allotted to the sponsoring organization for initiating or expanding Program operations in day care homes, the State agency shall obtain and review documentation of activities performed and costs incurred by the sponsoring organization under the terms of the start-up or expansion agreement. If the sponsoring organization has not made every reasonable effort to carry out the activities specified in the agreement, the State agency shall demand repayment of all or part of the payment. The sponsoring organization may retain start-up or expansion payments for all day care homes which initiate Program operations. However, no sponsoring organization may retain any start-up or expansion payments in excess of its actual costs for the expenditures specified in the agreement.

[47 FR 36527, Aug. 20, 1982; 47 FR 46072, Oct. 15, 1982, as amended at 53 FR 52590, Dec. 28, 1988; 63 FR 9728, Feb. 26, 1998]

§ 226.13 Food service payments to sponsoring organizations for day care homes.

(a) Payments shall be made only to sponsoring organizations operating under an agreement with the State agency for the meal types specified in the agreement served to enrolled nonresident children and eligible enrolled children of day care home providers, at approved day care homes.

(b) Each sponsoring organization shall report each month to the State agency the total number of meals, by type (breakfasts, lunches, suppers, and supplements) and by category (tier I and tier II), served to children enrolled in approved day care homes.

(c) Each sponsoring organization shall receive payment for meals served to children enrolled in approved day care homes at the tier I and tier II reimbursement rates, as applicable, and as established by law and adjusted in accordance with § 226.4. However, the rates for lunches and suppers shall be reduced by the value of commodities established under § 226.5(b) for all sponsoring organizations for day care homes which have elected to receive commodities. For tier I day care homes, the full amount of food service payments shall be disbursed to each day care home on the basis of the number of meals served, by type, to enrolled children. For tier II day care homes, the full amount of food service payments shall be disbursed to each day care home on the basis of the number of meals served to enrolled children by type, and by category (tier I and tier II) as determined in accordance with paragraphs (d)(2) and (d)(3) of this section. However, the sponsoring organization may withhold from Program payments to each home an amount equal to costs incurred for the provision of Program foodstuffs or meals by the sponsoring organization on behalf

of the home and with the home provider's written consent.

(d) As applicable, each sponsoring organization for day care homes shall:

(1) Require that tier I day care homes submit the number of meals served, by type, to enrolled children.

(2) Require that tier II day care homes in which the provider elects not to have the sponsoring organization identify enrolled children who are eligible for free or reduced price meals submit the number of meals served, by type, to enrolled children.

(3) Not more frequently than annually, select one of the methods described in paragraphs (d)(3) (i)–(iii) of this section for all tier II day care homes in which the provider elects to have the sponsoring organization identify enrolled children who are eligible for free or reduced price meals. In such homes, the sponsoring organization shall either:

(i) Require that such day care homes submit the number and types of meals served each day to each enrolled child by name. The sponsoring organization shall use the information submitted by the homes to produce an actual count, by type and by category (tier I and tier II), of meals served in the homes; or

(ii) Establish claiming percentages, not less frequently than semiannually, for each such day care home on the basis of one month's data concerning the number of enrolled children determined eligible for free or reduced-price meals. Sponsoring organizations shall obtain one month's data by collecting either enrollment lists (which show the name of each enrolled child in the day care home), or attendance lists (which show, by days or meals, the rate of participation of each enrolled child in the day care home). The State agency may require a sponsoring organization to recalculate the claiming percentage for any of its day care homes before the required semiannual calculation if the State agency has reason to believe that a home's percentage of income-eligible children has changed significantly or was incorrectly established in the previous calculation. Under this system, day care homes shall be required to submit the number of meals served, by type, to enrolled children; or

(iii) Determine a blended per-meal rate of reimbursement, not less frequently than semiannually, for each such day care home by adding the products obtained by multiplying the applicable rates of reimbursement for each category (tier I and tier II) by the claiming percentage for that category, as established in accordance with paragraph (d)(3)(ii) of this section. The State agency may require a sponsoring organization to recalculate the blended rate for any of its day care homes before the required semiannual calculation if the State agency has reason to believe that a home's percentage of income-eligible children has changed significantly or was incorrectly established in the previous calculation. Under this system, day care homes shall be required to submit the number of meals served, by type, to enrolled children.

[47 FR 36527, Aug. 20, 1982, as amended at 62 FR 903, Jan. 7, 1997; 62 FR 5519, Feb. 6, 1997; 63 FR 9105, Feb. 24, 1998]

§ 226.14 Claims against institutions.

(a) State agencies shall disallow any portion of a claim for reimbursement and recover any payment to an institution not properly payable under this part. State agencies may consider claims for reimbursement not properly payable if an institution does not comply with the recordkeeping requirements contained in this part. In addition, except with approval from the appropriate FNSRO, State agencies shall consider claims for reimbursement not payable when an institution fails to comply with the recordkeeping requirements that pertain to records directly supporting claims for reimbursement. Records that directly support claims for reimbursement include, but are not limited to, daily meal counts, menu records, and enrollment and attendance records, as required by § 226.15(e). State agencies shall assert overclaims against any sponsoring organization of day care homes which misclassifies a day care home as a tier I day care home unless the misclassification is determined to be inadvertent under guidance issued by FNS. However, the State agency shall notify the institution of the reasons for

any disallowance or demand for repayment, and allow the institution full opportunity to submit evidence on appeal as provided for in § 226.6(k). Miminum State agency collection procedures for unearned payments shall include:

(1) Written demand to the institution for the return of improper payments; (2) if, after 30 calendar days, the institution fails to remit full payment or agree to a satisfactory repayment schedule, a second written demand for the return of improper payments sent by certified mail return receipt requested; and (3) if, after 60 calendar days, the institution fails to remit full payment or agree to a satisfactory repayment schedule, the State agency shall refer the claim against the institution to appropriate State or Federal authorities for pursuit of legal remedies.

(b) In the event that the State agency finds that an institution which prepares its own meals is failing to meet the meal requirements of § 226.20, the State agency need not disallow payment or collect an overpayment arising out of such failure if the institution takes such other action as, in the opinion of the State agency, will have a corrective effect. However, the State agency shall not disregard any overpayments or waive collection action arising from the findings of Federal audits.

(c) If FNS does not concur with the State agency's action in paying an institution or in failing to collect an overpayment, FNS shall notify the State agency of its intention to assert a claim against the State agency. In all such cases, the State agency shall have full opportunity to submit evidence concerning the action taken. The State agency shall be liable to FNS for failure to collect an overpayment, unless FNS determines that the State agency has conformed with this part in issuing the payment and has exerted reasonable efforts to recover the improper payment.

[47 FR 36527, Aug. 20, 1982; 47 FR 46072, Oct. 15, 1982, as amended at 50 FR 8580, Mar. 4, 1985; 53 FR 52590, Dec. 28, 1988; 62 FR 903, Jan. 7, 1997; 64 FR 72260, Dec. 27, 1999]

Subpart E—Operational Provisions

§ 226.15 Institution provisions.

(a) *Tax-exempt status.* Except for proprietary title XIX and title XX centers, and sponsoring organizations of such centers, institutions shall be public, or have tax-exempt status under the Internal Revenue Code of 1986, or be moving toward compliance with the requirements for tax-exempt status, or be currently operating another Federal program requiring nonprofit status. An institution which has applied to IRS for tax-exempt status may participate in the program while its application is pending review by IRS. It shall, however, be the responsibility of the institution to document that it has complied with all requirements of IRS and has provided all information requested. If IRS denies the application for tax-exempt status, the institution shall immediately notify the State agency of such denial. The State agency shall then terminate the participation of the institution. If IRS certification of tax-exempt status has not been received within 12 months of filing the application with IRS, and IRS indicates that the institution has failed to provide all required information, the State agency shall terminate the participation of the institution until such time as IRS tax-exempt status is obtained.

(b) *Applications.* Each institution shall submit to the State agency all information required for its approval. As a minimum, such information shall include:

(1) Except for proprietary title XIX and title XX centers and sponsoring organizations or proprietary title XIX and title XX centers, evidence of nonprofit status, in accordance with § 226.15(a).

(2) An application for participation, or application renewal materials, accompanied by all necessary supporting documentation;

(3) An administrative budget;

(4) If an independent child care center or independent outside-school-hours care center, documentation that it meets the licensing/approval requirements of § 226.6(d)(1); or, if an independent adult day care center, the licensing/approval requirements of § 226.19a(b)(3).

(5) A nondiscrimination and free and reduced-price policy statement, and information regarding a public release, in accordance with § 226.23; and

(6) For each proprietary title XX child care center, documentation that it provides nonresidential day care services for which it receives compensation under title XX of the Social Security Act, and certification that not less than 25 percent of the enrolled children, or 25 percent of the licensed capacity, whichever is less, during the most recent calendar month were title XX beneficiaries. For each proprietary title XIX or title XX adult day care center, documentation that it provides nonresidential day care services for which it receives compensation under title XIX or title XX of the Social Security Act, and certification that not less than 25 percent of the adult participants enrolled during the most recent calendar month were title XIX or title XX beneficiaries. Sponsoring organizations shall provide documentation and certification for each proprietary title XIX or title XX center under its jurisdiction.

(c) *Responsibility*. Each institution shall accept final administrative and financial responsibility for Program operations. No institution may contract out for management of the Program.

(d) *Staffing*. Each institution shall provide adequate supervisory and operational personnel for management and monitoring of the Program.

(e) *Recordkeeping*. Each institution shall establish procedures to collect and maintain all program records required under this part, as well as any records required by the State agency. Failure to maintain such records shall be grounds for the denial of reimbursement for meals served during the period covered by the records in question and for the denial of reimbursement for costs associated with such records. At a minimum, the following records shall be collected and maintained:

(1) Copies of all applications and supporting documents submitted to the State agency;

(2) Documentation of the enrollment of each participant at child care centers, adult day care centers and outside-school-hours care centers including information used to determine eligibility for free or reduced price meals in accordance with § 226.23(e)(1).

(3) Documentation of: The enrollment of each child at day care homes; information used to determine the eligibility of enrolled providers' children for free or reduced price meals; information used to classify day care homes as tier I day care homes, including official source documentation obtained from school officials when the classification is based on elementary school data; and information used to determine the eligibility of enrolled children in tier II day care homes that have been identified as eligible for free or reduced price meals in accordance with § 226.23(e)(1).

(4) Daily records indicating the number of participants in attendance and the number of meals, by type (breakfast, lunch, supper, and supplements), served to participants.

(5) For child care centers and outside-school-hours care centers claiming reimbursement for two meals and two supplements or three meals and one supplement per child per day, either:

(i) Documentation of total time-in-attendance for each child at the center for each day for which the fourth meal service was claimed, including a time-in/time-out form which records time-in-attendance for each child at the center; or, at the discretion of the State agency,

(ii) Documentation which demonstrates that at least eight hours elapse between the end of the first meal service and the beginning of the fourth meal service on any day in which reimbursement is claimed for a fourth meal; service.

(6) Except at day care homes, daily records indicating the number of meals, by type, served to adults performing labor necessary to the food service;

(7) Copies of invoices, receipts, or other records required by the State agency financial management instruction to document:

(i) Administrative costs claimed by the institution;

(ii) Operating costs claimed by the institution except sponsoring organizations of day care homes; and

(iii) Income to the Program.

(8) Copies of all claims for reimbursement submitted to the State agency;

(9) Receipts for all Program payments received from the State agency;

(10) If applicable, information concerning the dates and amounts of disbursement to each child care facility or adult day care facility under its auspices;

(11) Copies of menus, and any other food service records required by the State agency;

(12) If applicable, information concerning the location and dates of each child care or adult day care facility review, any problems noted, and the corrective action prescribed and effected;

(13) Information on training session date(s) and location(s), as well as topics presented and names of participants; and

(14) Documentation of nonprofit food service to ensure that all Program reimbursement funds are used: (i) Solely for the conduct of the food service operation; or (ii) to improve such food service operations, principally for the benefit of the enrolled participants.

(f) *Day care home classifications*. Each sponsoring organization of day care homes shall determine which of the day care homes under its sponsorship are eligible as tier I day care homes. A sponsoring organization may use current school or census data provided by the State agency or free and reduced price applications collected from day care home providers in making a determination for each day care home. When using elementary school or census data for making tier I day care home determinations, a sponsoring organization shall first consult school data, except in cases in which busing or other bases of attendance, such as magnet or charter schools, result in school data not being representative of an attendance area's household income levels. In these cases, census data should generally be consulted instead of school data. A sponsoring organization may also use census data if, after reasonable efforts are made, as defined by the State agency, the sponsoring organization is unable to obtain local elementary school attendance area information. A sponsoring organization may also consult census data after having consulted school data which fails to support a tier I day care home determination for rural areas with geographically large elementary school attendance areas, for other areas in which an elementary school's free and reduced price enrollment is above 40 percent, or in other cases with State agency approval. However, if a sponsoring organization believes that a segment of an otherwise eligible elementary school attendance area is above the criteria for free or reduced price meals, then the sponsoring organization shall consult census data to determine whether the homes in that area qualify as tier I day care homes based on census data. If census data does not support a tier I classification, then the sponsoring organization shall reclassify homes in segments of such areas as tier II day care homes unless the individual providers can document tier I eligibility on the basis of their household income. When making tier I day care home determinations based on school data, a sponsoring organization shall use attendance area information that it has obtained, or verified with appropriate school officials to be current, within the last school year. Determinations of a day care home's eligibility as a tier I day care home shall be valid for one year if based on a provider's household income, three years if based on school data, or until more current data are available if based on census data. However, a sponsoring organization, State agency, or FNS may change the determination if information becomes available indicating that a home is no longer in a qualified area. The State agency shall not routinely require annual redeterminations of the tiering status of tier I day care homes based on updated elementary school data.

(g) *Claims submission*. Each institution shall submit claims for reimbursement to the State agency in accordance with § 226.10.

(h) *Program agreement*. Each institution shall enter into a Program agreement with the State agency in accordance with § 226.6(f)(1).

(i) *Commodities*. Each institution receiving commodities shall ensure proper commodity utilization.

(j) *Special Milk Program*. No institution may participate in both the Child

and Adult Care Food Program and the Special Milk Program at the same time.

(k) *Elderly feeding programs.* Institutions which are school food authorities (as defined in part 210 of this chapter) may use facilities, equipment and personnel supported by funds provided under this part to support a nonprofit nutrition program for the elderly, including a program funded under the Older Americans Act of 1965 (42 U.S.C. 3001 *et seq.*).

[47 FR 36527, Aug. 20, 1982, as amended at 48 FR 21530, May 13, 1983; 50 FR 8580, Mar. 4, 1985; 52 FR 15298, Apr. 28, 1987; 52 FR 36907, Oct. 2, 1987; 53 FR 52590, Dec. 28, 1988; 54 FR 26724, June 26, 1989; Amdt. 22, 55 FR 1378, Jan. 14, 1990; 56 FR 58174, Nov. 16, 1991; 61 FR 25554, May 22, 1996; 62 FR 903, Jan. 7, 1997; 62 FR 23619, May 1, 1997; 63 FR 9105, Feb. 24, 1998; 64 FR 72260, Dec. 27, 1999]

§ 226.16 Sponsoring organization provisions.

(a) Each sponsoring organization shall comply with all provisions of § 226.15.

(b) Each sponsoring organization shall submit to the State agency all information required for its approval and the approval of all child care and adult day care facilities under its jurisdiction, including:

(1) A sponsoring organization management plan, in accordance with § 226.6(f)(2);

(2) An application for participation, or renewal materials, for each child care and adult day care facility accompanied by all necessary supporting documentation; and

(3) Timely information concerning the eligibility status of child care and adult day care facilities (such as licensing/approval actions).

(c) Each sponsoring organization shall accept final administrative and financial responsibility for food service operations in all child care and adult day care facilities under its jurisdiction.

(d) Each sponsoring organization shall provide adequate supervisory and operational personnel for the effective management and monitoring of the program at all child care and adult day care facilities under its jursidiction. At a minimum, such Program assistance shall include:

(1) Pre-approval visits to each child care and adult day care facility for which application is made to discuss Program benefits and verify that the proposed food service does not exceed the capability of the child care facility;

(2) Staff training for all child care and adult day care facilities in Program duties and responsibilities prior to beginning Program operations;

(3) Additional training sessions, to be provided not less frequently than annually; and

(4) Reviews of food service operations to assess compliance with meal pattern, recordkeeping, and other Program requirements. Such reviews shall be made not less frequently than:

(i) Three times each year at each child care center and adult day care center, provided at least one review is made during each child care or adult day care center's first six weeks of Program operations and not more than six months elapse between reviews;

(ii) Three times each year at each day care home, provided at least one review is made during each day care home's first four weeks of Program operations and not more than six months elapse between reviews. However, based on case-by-case findings by the State agency that improved efficiency and more effective management will result and subject to FNSRO approval, State agencies may allow some or all of their sponsors to conduct reviews an average of three times each year per day care home, provided that each day care home is reviewed at least twice each year, at least one review is made during each day care home's first four weeks of Program operations, and no more than six months elapse between reviews; and

(iii) Six times each year for each outside-school-hours care center, provided at least one review is made during each outside-school-hours care center's first four weeks of Program operations and not more than three months elapse between reviews.

(e) Each sponsoring organization shall comply with the recordkeeping requirements established in §§ 226.10(d) and 226.15(e) and any recordkeeping requirements established by the State agency in order to justify the administrative payments made in accordance

with § 226.12(a). Failure to maintain such records shall be grounds for the denial of reimbursement.

(f) The State agency may require a sponsoring organization to enter into separate agreements for the administration of separate types of facilities (child care centers, day care homes, adult day care centers, and outside-school-hours care centers).

(g) Each sponsoring organization electing to receive advance payments of program funds for day care homes shall disburse the full amount of such payments within five working days of receipt from the State agency. If the sponsor requests the full operating advance to which it is entitled, the advances to day care homes shall be the full amount which the sponsor expects the home to earn based on the number of meals projected to be served to enrolled children during the period covered by the advance multiplied by the applicable payment rate as specified in § 226.13(c). If a sponsor elects to receive only a part of the operating advance to which it is entitled, or if the full operating advance is insufficient to provide a full advance to each home, the advance shall be disbursed to its homes in a manner and an amount the sponsor deems appropriate. Each sponsor shall disburse any reimbursement payments for food service due to each day care home within five working days of receipt from the State agency. Such payment shall be based on the number of meals served to enrolled children at each day care home, less any payments advanced to such home. However, the sponsoring organization may withhold from Program payments to each home an amount equal to food service operating costs incurred by the sponsoring organization in behalf of the home and with the home provider's written consent. If payments from the State agency are not sufficient to provide all day care homes under the sponsoring organization's jurisdiction with advance payments and reimbursement payments, available monies shall be used to provide all due reimbursement payments before advances are disbursed.

(h) Sponsoring organizations shall make payments of program funds to child care centers, adult day care centers or outside-school-hours care centers within five working days of receipt from the State agency, on the basis of the management plan approved by the State agency, and may not exceed the Program costs documented at each facility during any fiscal year; except in those States where the State agency has chosen the option to implement a meals times rates payment system. In those States which implement this optional method of reimbursement, such disbursements may not exceed the rates times the number of meals documented at each facility during any fiscal year.

(i) Disbursements of advance payments may be withheld from child and adult day care facilities which fail to submit reports required by § 226.15(e).

(j) A for-profit organization shall be eligible to serve as a sponsoring organization for proprietary title XIX or title XX centers which have the same legal identity as the organization, but shall not be eligible to sponsor proprietary title XIX or title XX centers which are legally distinct from the organization, day care homes, or public or private nonprofit centers.

(k) Before sponsoring organizations expend administrative funds to assist family day care homes in becoming licensed, they shall obtain the following information from each such home: a completed free and reduced price application which documents that the provider meets the Program's income standards; evidence of its application for licensing and official documentation of the defects that are impeding its licensing approval; and a completed CACFP application. These funding requests are limited to $300 per home and are only available to each home once.

[47 FR 36527, Aug. 20, 1982; 47 FR 46072, Oct. 15, 1982, as amended at 48 FR 21530, May 13, 1983; 50 FR 8580, Mar. 4, 1985; 50 FR 26975, July 1, 1985; 53 FR 52591, Dec. 28, 1988; 63 FR 9729, Feb. 26, 1998; 64 FR 72260, Dec. 27, 1999]

§ 226.17 Child care center provisions.

(a) Child care centers may participate in the Program either as independent centers or under the auspices of a sponsoring organization; provided, however, that public and private nonprofit centers shall not be eligible to participate in the Program under the

auspices of a for-profit sponsoring organization. Child care centers participating as independent centers shall comply with the provisions of § 226.15.

(b) All child care centers, independent or sponsored, shall meet the following requirements

(1) Child care centers shall have Federal, State, or local licensing or approval to provide day care services to children. Child care centers which are complying with applicable procedures to renew licensing or approval may participate in the Program during the renewal process, unless the State agency has information which indicates that renewal will be denied. If licensing or approval is not available, a center may participate if:

(i) It receives title XX funds for child care; or

(ii) It demonstrates compliance with the CACFP child care standards or any applicable State or local child care standards to the State agency.

(2) Except for proprietary title XX centers, child care centers shall be public, or have tax exempt status under the Internal Revenue Code of 1986, or be moving toward compliance with the requirements for tax-exempt status, or be currently operating another Federal program requiring nonprofit status. A child care center which has applied to the Internal Revenue Service (IRS) for tax-exempt status may participate in the Program while its application is pending review by IRS. If IRS denies the application for tax-exempt status, the child care center shall immediately notify the State agency of such denial and the State agency shall terminate the participation of the child care center. If IRS certification of nonprofit status has not been received within 12 months of filing the application with IRS, and IRS indicates that the child care center has failed to provide all required information, the State agency shall terminate the participation of the child care center until such time as IRS tax-exempt status is obtained.

(3) Each child care center participating in the Program shall serve one or more of the following meal types: (i) Breakfast, (ii) lunch, (iii) supper, and (iv) supplemental food. Reimbursement shall not be claimed for more than two meals and one supplement provided daily to each child, except that reimbursement may be claimed for two meals and two supplements or three meals and one supplement served to a child for each day in which that child is maintained in care for eight or more hours.

(4) Each child care center participating in the Program shall claim only the meal types specified in its approved application in accordance with the meal pattern requirements specified in § 226.20. Reimbursement may not be claimed for meals served to children who are not enrolled, or for meals served to children at any one time in excess of the child care center's authorized capacity, or for any meal served at a proprietary title XX center during a calendar month when less than 25 percent of enrolled children or 25 percent of licensed capacity, whichever is less, were title XX beneficiaries. Menus and any other nutritional records required by the State agency shall be maintained to document compliance with such requirements.

(5) A child care center with preschool children may also be approved to serve a breakfast, supplement, and supper to school-age children enrolled in an outside-school-hours care program meeting the criteria of § 226.19(b) which is distinct from its day care program for preschool-age children. The State agency may authorize the service of lunch to such enrolled children who attend a school which does not offer a lunch program provided the limit of not more than two meals and one supplement per child per day is not exceeded. If the majority of children served by the center are participating in an outside-school-hours care program, the center shall comply with reporting requirements of § 226.19 and, if it is a facility, shall be monitored by the sponsoring organization at the frequency specified in § 226.16(d)(4)(iii).

(6) A child care center may utilize existing school food service facilities or obtain meals from a school food service facility, and the pertinent requirements of this part shall be embodied in a written agreement between the child care center and school. The center shall maintain responsibility for all Program requirements set forth in this part.

(7) Child care centers shall collect and maintain documentation of the enrollment of each child, including information used to determine eligibility for free and reduced price meals in accordance with § 226.23(e)(1). In addition, Head Start participants need only have a Head Start statement of income eligibility, or a statement of Head Start enrollment from an authorized Head Start representative, to be eligible for free meal benefits under the CACFP.

(8) Each child care center shall maintain daily records of the number of meals by type (breakfast, lunch, supper, and supplements) served to enrolled children, and to adults performing labor necessary to the food service.

(c) Each child care center shall comply with the recordkeeping requirements established in § 226.10(d), in paragraph (b) of this section and, if applicable, in § 226.15(e). Failure to maintain such records shall be grounds for the denial of reimbursement.

[47 FR 36527, Aug. 20, 1982, as amended at 52 FR 36907, Oct. 2, 1987; 53 FR 52591, Dec. 28, 1988; 54 FR 26724, June 26, 1989; Amdt. 22, 55 FR 1378, Jan. 14, 1990; 61 FR 25554, May 22, 1996; 62 FR 23619, May 1, 1997; 63 FR 9729, Feb. 26, 1998; 64 FR 72261, Dec. 27, 1999]

§ 226.18 Day care home provisions.

(a) Day care homes shall have current Federal, State or local licensing or approval to provide day care services to children. Day care homes which cannot obtain their license because they lack the funding to comply with licensing standards may request a total limit per home of $300 in administrative funds from a sponsoring organization to assist them in obtaining their license. Day care homes that, at the option of their sponsoring organization, receive administrative funds for licensing-related expenses must complete documentation requested by their sponsor as described in § 226.16(k) prior to receiving any funds. Day care homes which are complying with applicable procedures to renew licensing or approval may participate in the Program during the renewal process, unless the State agency has information which indicates that renewal will be denied. If licensing or approval is not available, a day care home may participate in the Program if:

(1) It receives title XX funds for providing child care; or

(2) It demonstrates compliance with CACFP child care standards or applicable State or local child care standards to the State agency.

(b) Day care homes participating in the program shall operate under the auspices of a public or private nonprofit sponsoring organization. Sponsoring organizations shall enter into a written agreement with each sponsored day care home which specifies the rights and responsibilities of both parties. This agreement shall be developed by the State agency, unless the State agency elects, at the request of the sponsor, to approve an agreement developed by the sponsor. At a minimum, the agreement shall embody:

(1) The right of the sponsoring organization, the State agency, and the Department to visit the day care home and review its meal service and records during its hours of child care operations;

(2) The responsibility of the sponsoring organization to train the day care home's staff in program requirements;

(3) The responsibility of the day care home to prepare and serve meals which meet the meal patterns specified in § 226.20;

(4) The responsibility of the day care home to maintain records of menus, and of the number of meals, by type, served to enrolled children;

(5) The responsibility of the day care home to promptly inform the sponsoring organization about any change in the number of children enrolled for care or in its licensing or approval status;

(6) The meal types approved for reimbursement to the day care home by the State agency;

(7) The right of the day care home to receive in a timely manner the full food service rate for each meal served to enrolled children for which the sponsoring organization has received payment from the State agency. However, if, with the home provider's consent, the sponsoring organization will incur costs for the provision of program foodstuffs or meals in behalf of the home,

and subtract such costs from Program payments to the home, the particulars of this arrangement shall be specified in the agreement;

(8) The right of the sponsoring organization or the day care home to terminate the agreement for cause or, subject to stipulations by the State agency, convenience; and

(9) A prohibition of any sponsoring organization fee to the day care home for its Program administrative services.

(10) If the State agency has approved a time limit for submission of meal records by day care homes, that time limit shall be stated in the agreement.

(11) The responsibility of the sponsoring organization to inform tier II day care homes of all of their options for receiving reimbursement for meals served to enrolled children. These options include: electing to have the sponsoring organization attempt to identify all income-eligible children enrolled in the day care home, through collection of free and reduced price applications and/or possession by the sponsoring organization or day care home of other proof of a child or household's participation in a categorically eligible program, and receiving tier I rates of reimbursement for the meals served to identified income-eligible children; electing to have the sponsoring organization identify only those children for whom the sponsoring organization or day care home possess documentation of the child or household's participation in a categorically eligible program, under the expanded categorical eligibility provision contained in § 226.23(e)(1), and receiving tier I rates of reimbursement for the meals served to these children; or receiving tier II rates of reimbursement for all meals served to enrolled children.

(12) The responsibility of the sponsoring organization, upon the request of a tier II day care home, to collect applications and determine the eligibility of enrolled children for free or reduced price meals.

(c) Each day care home shall serve one or more of the following meal types:

(1) Breakfast,

(2) Lunch,

(3) Supper and

(4) Supplemental food.

Reimbursement shall not be claimed for more than two meals and one supplement provided daily to each child.

(d) Each day care home participating in the program shall serve the meal types specified in its approved application in accordance with the meal pattern requirements specified in § 226.20. Menu records shall be maintained to document compliance with these requirements. Meals shall be served at no separate charge to enrolled children;

(e) Each day care home shall maintain daily records of the number of children in attendance and the number of meals, by type, served to enrolled children. Each tier II day care home in which the provider elects to have the sponsoring organization identify enrolled children who are eligible for free or reduced price meals, and in which the sponsoring organization employs a meal counting and claiming system in accordance with § 226.13(d)(3)(i), shall maintain and submit each month to the sponsoring organization daily records of the number and types of meals served to each enrolled child by name. Payment may be made for meals served to the provider's own children only when (1) such children are enrolled and participating in the child care program during the time of the meal service, (2) enrolled nonresident children are present and participating in the child care program and (3) providers' children are eligible to receive free or reduced-price meals. Reimbursement may not be claimed for meals served to children who are not enrolled, or for meals served at any one time to children in excess of the home's authorized capacity or for meals served to providers' children who are not eligible for free or reduced-price meals.

(f) The State agency may not require a day care home or sponsoring organization to maintain documentation of home operating costs.

(g) Each day care home shall comply with the recordkeeping requirements established in § 226.10(d) and in this section. Failure to maintain such records

shall be grounds for the denial of reimbursement.

[47 FR 36527, Aug. 20, 1982, as amended by Amdt. 5, 49 FR 18989, May 4, 1984; 50 FR 8580, Mar. 4, 1985; 52 FR 36907, Oct. 2, 1987; Amdt. 22, 55 FR 1378, Jan. 14, 1990; 61 FR 25554, May 22, 1996; 62 FR 903, Jan. 7, 1997; 63 FR 9105, Feb. 24, 1998; 63 FR 9729, Feb. 26, 1998; 64 FR 72261, Dec. 27, 1999]

§ 226.19 Outside-school-hours care center provisions.

(a) Outside-school-hours care centers may participate in the Program either as independent centers or under the auspices of a sponsoring organization; *Provided, however*, That public and private nonprofit centers shall not be eligible to participate in the Program under the auspices of a for-profit sponsoring organization. Outside-school-hours care centers participating as independent centers shall comply with the provisions of § 226.15.

(b) All outside-school-hours care centers, independent or sponsored, shall meet the following requirements:

(1) Outside-school-hours care centers shall have current Federal, State or local licensing or approval to provide organized child care services to enrolled school-age children outside of school hours. The main purpose of the Program shall be the care and supervision of children. Outside-school-hours care centers which are complying with applicable procedures to renew licensing or approval may participate in the Program during the renewal process, unless the State agency has information which indicates the renewal will be denied. If licensing or approval is not available, an outside-school-hours care center may participate in the Program if:

(i) It receives title XX funds for providing child care; or

(ii) It demonstrates compliance with CACFP child care standards or any applicable State or local child care standards to the State agency.

(2) Except for proprietary title XX centers, outside-school-hours care centers shall be public, or have tax-exempt status under the Internal Revenue Code of 1986, or be moving toward compliance with the requirements for tax-exempt status, or be currently participating in another Federal program requiring nonprofit status. Centers which have applied to IRS for tax-exempt status may participate in the Program while their application is pending review by IRS. If IRS denies the application, the center shall immediately notify the State agency of such denial and the State agency shall terminate the participation of the center. If IRS certification of nonprofit status has not been received within 12 months of filing the application with IRS and IRS indicates that the center has failed to provide all required information, the State agency shall terminate the participation of the center in the Program until such time as IRS certification is obtained.

(3) Nonresidential public or private nonprofit schools which provide organized child care programs for school children may participate in the Program as outside-school-hours care centers if:

(i) Children are enrolled in a regularly scheduled child care program which meets the criteria of paragraph (b)(1) of this section. The program is organized for the purpose of providing child care services and is distinct from any extracurricular programs organized primarily for scholastic, cultural, and athletic purposes; and

(ii) Separate Program records are maintained.

(4) Outside-school-hours care centers shall be eligible to serve one or more of the following meal types: breakfasts, supplements and suppers. In addition, outside-school-hours care centers shall be eligible to serve lunches to enrolled children during periods of school vacation, including weekends and holidays, and to enrolled children attending schools which do not offer a lunch program. Notwithstanding the eligibility of outside-school-hours care centers to serve Program meals to children on school vacation, including holidays and weekends, such centers shall not operate under the Program on weekends only.

(5) Each outside-school-hours care center participating in the Program shall claim only the meal types specified in its approved application and served in compliance with the meal pattern requirements of § 226.20. Reimbursement shall not be claimed for

more than two meals and one supplement provided daily to each child, except that reimbursement may be claimed for two meals and two supplements or three meals and one supplement served to a child for each day in which that child is maintained in care for eight or more hours. In addition, reimbursement shall not be claimed for meals served to children who are not enrolled, for meals served to children at any one time in excess of authorized capacity, or for any meal served at a proprietary title XX center during a calendar month when less than 25 percent of enrolled children or 25 percent of licensed capacity, whichever is less, were title XX beneficiaries.

(6) Three hours shall elapse between the beginning of one meal service and the beginning of another, except that 4 hours shall elapse between the service of a lunch and supper when no supplement is served between lunch and supper. The service of a supper shall begin no later than 7 p.m. and end no later than 8 p.m. The duration of the meal service shall be limited to 2 hours for lunches and supper and 1 hour for other meals.

(7) Each outside-school-hours care center shall ensure that each meal service is supervised by an adequate number of operational personnel trained in Program requirements. Operational personnel shall ensure that:

(i) Meals are served only to children enrolled for care and adults who perform necessary food service labor; (ii) meals served to children meet the meal pattern requirements specified in § 226.20; (iii) each meal service is consistent with the meal time requirements of paragraph (b)(7) of this section; (iv) meals served are consumed on the premises of the centers; (v) accurate records are maintained; and (vi) the number of meals prepared or ordered is promptly adjusted on the basis of participation trends.

(8) Each outside-school-hours care center shall accurately maintain the following records:

(i) Documentation of enrollment for all children, including information used to determine eligibility for free or reduced price meals in accordance with § 226.23(e)(1);

(ii) Number of meals prepared or delivered for each meal service;

(iii) Daily menu records for each meal service;

(iv) Number of meals served to enrolled children at each meal service;

(v) Number of enrolled children in attendance during each meal service;

(vi) Number of meals served to adults performing necessary food service labor for each meal service; and

(vii) All other records required by the State agency financial management system.

(9) An outside-school-hours care center may utilize existing school food service facilities or obtain meals from a school food service facility, and the pertinent requirements of this part shall be embodied in a written agreement between the outside-school-hours care center and the school. The center shall maintain responsibility for all Program requirements set forth in this part.

(c) Each outside-school-hours care center shall comply with the recordkeeping requirements established in § 226.10(d), in paragraph (b) of this section and, if applicable, in § 226.15(e). Failure to maintain such records shall be grounds for the denial of reimbursement.

[47 FR 36527, Aug. 20, 1982, as amended at 52 FR 36907, Oct. 2, 1987; 54 FR 26724, June 26, 1989; Amdt. 22, 55 FR 1378, Jan. 14, 1990; 56 FR 58175, Nov. 16, 1991; 61 FR 25554, May 22, 1996; 62 FR 23619, May 1, 1997; 64 FR 72261, Dec. 27, 1999]

§ 226.19a Adult day care center provisions.

(a) Adult day care centers may participate in the Program either as independent centers or under the auspices of a sponsoring organization; provided, however, that public and private nonprofit centers shall not be eligible to participate in the Program under the auspices of a for-profit sponsoring organization. Adult day care centers participating as independent centers shall comply with the provisions of § 226.15.

(b) All adult day care centers, independent or sponsored, shall meet the following requirements:

(1) Adult day care centers shall provide a community-based group program

designed to meet the needs of functionally impaired adults through an individual plan of care. Such a program shall be a structured, comprehensive program that provides a variety of health, social and related support services to enrolled adult participants.

(2) Adult day care centers shall provide care and services directly or under arrangements made by the agency or organization whereby the agency or organization maintains professional management responsibility for all such services.

(3) Adult day care centers shall have Federal, State or local licensing or approval to provide day care services to functionally impaired adults (as defined in §226.2) or individuals 60 years of age or older in a group setting outside their home or a group living arrangement on a less than 24-hour basis. Adult day care centers which are complying with applicable procedures to renew licensing or approval may participate in the Program during the renewal process, unless the State agency has information which indicates that renewal will be denied.

(4) Except for proprietary title XIX or title XX centers, adult day care centers shall be public, or have tax-exempt status under the Internal Revenue Code of 1986, or be moving toward compliance with the requirements for tax-exempt status, or be currently operating another Federal program requiring nonprofit status. An adult day care center which has applied to the Internal Revenue Service (IRS) for tax-exempt status may participate in the Program while its application is pending review by IRS. If IRS denies the application for tax-exempt status, the adult day care center shall immediately notify the State agency of such denial and the State agency shall terminate the participation of the center. If IRS certification of nonprofit status has not been received within 12 months of filing the application with IRS, and IRS indicates that the adult day care center has failed to provide all required information, the State agency shall terminate the participation of the adult day care center until such time as IRS tax-exempt status is obtained.

(5) Each adult day care center participating in the Program shall serve one or more of the following meal types:

(i) Breakfast,

(ii) Lunch,

(iii) Supper, and

(iv) Supplemental food.

Reimbursement shall not be claimed for more than two meals and one supplement provided daily to each adult participant.

(6) Each adult day care center participating in the Program shall claim only the meal types specified in its approved application in accordance with the meal pattern requirements specified in §226.20. Participating centers may not claim CACFP reimbursement for meals claimed under part C of title III of the Older Americans Act of 1965. Reimbursement may not be claimed for meals served to persons who are not enrolled, or for meals served to participants at any one time in excess of the center's authorized capacity, or for any meal served at a proprietary title XIX or title XX center during a calendar month when less than 25 percent of enrolled participants were title XIX or title XX beneficiaries. Menus and any other nutritional records required by the State agency shall be maintained to document compliance with such requirements.

(7) An adult day care center may obtain meals from a school food service facility, and the pertinent requirements of this part shall be embodied in a written agreement between the center and school. The center shall maintain responsibility for all Program requirements set forth in this part.

(8) Adult day care centers shall collect and maintain documentation of the enrollment of each adult participant including information used to determine eligibility for free and reduced price meals in accordance with §226.23(e)(1).

(9) Each adult day care center shall maintain daily records of the number of meals by type (breakfast, lunch, supper, and supplements) served to enrolled participants, and to adults performing labor necessary to the food service.

(10) Each adult day care center shall maintain records on the age of each enrolled person. In addition, each adult day care center shall maintain records

which demonstrate that each enrolled person under the age of 60 meets the functional impairment eligibility requirements established under the definition of ''functionally impaired adult'' contained in this part. Finally, each adult day care center shall maintain records which document that qualified adult day care participants reside in their own homes (whether alone or with spouses, children or guardians) or in group living arrangements as defined in § 226.2.

(c) Each adult day care center shall comply with the recordkeeping requirements established in § 226.10(d), in paragraph (b) of this section and, if applicable, in § 226.15(e). Failure to maintain such records shall be grounds for the denial of reimbursement.

[53 FR 52591, Dec. 28, 1988, as amended by Amdt. 22, 55 FR 1378, Jan. 14, 1990; 61 FR 25554, May 22, 1996; 62 FR 23619, May 1, 1997; 64 FR 72261, Dec. 27, 1999]

§ 226.20 Requirements for meals.

(a) Except as otherwise provided in this section, each meal served in the Program shall contain, as a minimum, the indicated food components:

(1) A breakfast shall contain: (i) Fluid milk as a beverage or on cereal, or used in part for each purpose;

(ii) Vegetable(s) or fruit(s) or full-strength vegetable or fruit juice, or any combination of these foods;

(iii) Whole-grain or enriched bread; or cornbread, biscuits, rolls, muffins, etc., made with whole-grain or enriched meal or flour; or whole-grain or enriched or fortified cereal; or cooked whole-grain or enriched pasta or noodle products such as macaroni, or cereal grains such as rice, bulgur, or corn grits; or any combination of these foods.

(2) Lunch shall contain: (i) Fluid milk as a beverage;

(ii)(A) Lean meat, poultry or fish; alternate protein products; or cheese; or an egg; or cooked dry beans or peas; or peanut butter; or any combination of these foods. These foods must be served in a main dish, or in a main dish and one other menu item, to meet this requirement. Cooked dry beans or dry peas may be used as the meat alternate or as part of the vegetable/fruit component but not as both food components in the same meal;

(B) Nuts and seeds and their butters listed in program guidance are nutritionally comparable to meat or other meat alternates based on available nutritional data. Acorns, chestnuts, and coconuts shall *not* be used as meat alternates due to their low protein content. Nut or seed meals or flours may be used as an ingredient in a bread/bread alternate, but shall *not* be used as a meat alternate except as defined in this part under Appendix A: Alternate Foods for Meals, and in program guidance materials. As noted in paragraph (c)(2) of this section, nuts or seeds may be used to meet no more than one-half of the meat/meat alternate requirements. Therefore, nuts or seeds must be combined with another meat/meat alternate to fulfill the requirement;

(C) Yogurt may be used to meet all or part of the meat/meat alternate requirement. Yogurt served may be either plain or flavored, unsweetened or sweetened. Noncommercial and/or nonstandardized yogurt products, such as frozen yogurt, homemade yogurt, yogurt flavored products, yogurt bars, yogurt covered fruit and/or nuts or similar products shall not be credited. Four ounces (weight) or ½ cup (volume) of yogurt fulfills the equivalent of one ounce of the meat/meat alternate requirement in the meal pattern.

(iii) Two or more vegetables or fruits, or a combination of both. Full-strength vegetable or fruit juice may be counted to meet not more than one-half of this requirement;

(iv) Whole-grain or enriched bread; or cornbread, biscuits, rolls, muffins, etc., made with whole-grain or enriched meal or flour; or whole-grain or enriched pasta or noodle products such as macaroni, or cereal grains such as rice, bulgur, or corn grits; or any combination of these foods.

(3) Supper shall contain the food components and servings listed for lunch in § 226.20(a)(2), except that, for adult participants in adult day care centers, it does not require a serving of fluid milk.

(4) Supplemental food shall contain two of the following four components:

(i) Fluid milk as a beverage, or on cereal, or used in part for each purpose;

(ii) Meat or meat alternate. Nuts and seeds and their butters listed in program guidance are nutritionally comparable to meat or other meat alternates based on available nutritional data. Acorns, chestnuts, and coconuts are excluded and shall *not* be used as meat alternates due to their low protein content. Nut or seed meals or flours shall *not* be used as a meat alternate except as defined in this part under Appendix A: Alternate Foods for Meals;

(iii) Vegetable(s) or fruit(s) or full-strength vegetable or fruit juice, or any combination of these foods. For children, juice may not be served when milk is served as the only other component;

(iv) Whole-grain or enriched bread; or cornbread, biscuits, rolls, muffins, etc., made with whole-grain or enriched meal or flour; or cooked whole-grain or enriched pasta or noodle products such as macaroni, or cereal grains such as rice, bulgar, or corn grits; or any combination of these foods.

(b) *Infant meal pattern*. When infants from birth through 11 months of age participate in the Program, an infant meal shall be offered. Foods within the infant meal pattern shall be of texture and consistency appropriate for the particular age group being served, and shall be served during a span of time consistent with the infant's eating habits. For infants 4 through 7 months of age, solid foods are optional and should be introduced only if the infant is developmentally ready. Whenever possible the child care facility should consult with the infant's parent in making the decision to introduce solid foods. Solid foods should be introduced one at a time on a gradual basis with the intent of ensuring health and nutritional well-being. For infants 8 through 11 months of age, the total amount of food authorized in the meal patterns set forth below must be provided in order to qualify for reimbursement. Additional foods may be served to infants 4 months of age and older with the intent of improving their overall nutrition. Breast milk, provided by the infant's mother, may be served in place of infant formula from birth through 11 months of age. Either breast milk or iron-fortified infant formula shall be served for the entire first year. For some breastfed infants who regularly consume less than the minimum amount of breast milk per feeding, a serving of less than the minimum amount of breast milk may be offered. In these situations, additional breast milk must be offered if the infant is still hungry. Juice should not be offered to infants until they are ready to drink from a cup, in order to develop behaviors that may prevent baby bottle tooth decay. The infant meal pattern shall contain, as a minimum, each of the following components in the amounts indicated for the appropriate age group:

(1) Birth through 3 months. (i) Breakfast—4 to 6 fluid ounces of breast milk or iron-fortified infant formula;

(ii) Lunch or supper—4 to 6 fluid ounces of iron-fortified infant formula;

(iii) Supplemental food—4 to 6 fluid ounces of iron-fortified infant formula.

(2) 4 through 7 months. (i) Breakfast—4 to 8 fluid ounces of breast milk or iron-fortified infant formula; and 0 to 3 tablespoons of iron-fortified dry infant cereal (optional);

(ii) Lunch or supper—4 to 8 fluid ounces of iron-fortified infant formula; and 0 to 3 tablespoons of iron-fortified dry infant cereal (optional); and 0 to 3 tablespoons of fruit or vegetable of appropriate consistency or a combination of both (optional);

(iii) Supplemental food—4 to 6 fluid ounces of iron-fortified infant formula.

(3) 8 through 11 months. (i) Breakfast—6 to 8 fluid ounces of breast milk or iron-fortified infant formula; 2 to 4 tablespoons of iron-fortified dry infant cereal; and 1 to 4 tablespoons of fruit or vegetable of appropriate consistency or a combination of both;

(ii) Lunch or supper—6 to 8 fluid ounces of breast milk or iron-fortified infant formula; 2 to 4 tablespoons of iron-fortified dry infant cereal and/or 1 to 4 tablespoons of meat, fish, poultry, egg yolk, or cooked dry beans or peas, or ½ to 2 ounces (weight) of cheese or 1 to 4 ounces (weight or volume) of cottage cheese or cheese food or cheese spread of appropriate consistency; and 1 to 4 tablespoons of fruit or vegetable

of appropriate consistency or a combination of both;

(iii) Supplemental food—2 to 4 fluid ounces of iron-fortified infant formula, breast milk, or full strength fruit juice and 0 to ½ slice of crusty bread (optional) or 0 to 2 cracker type products (optional) made from whole-grain or enriched meal or flour and which are suitable for an infant for use as a finger food.

(4) The minimum amount of food components to be served as breakfast, lunch, supper or supplement as set forth in paragraphs (b), (1), (2), and (3) of this section are as follows:

CHILD CARE INFANT MEAL PATTERN

	Birth through 3 months	4 through 7 months	8 through 11 months
Breakfast	4–6 fl.oz. formula [1] or breast milk [2, 3].	4–8 fl.oz. formula [1] or breast milk [2, 3];. 0–3 Tbsp. Infant cereal [1, 4]	6–8 fl.oz. formula [1] or breast milk [2, 3]; and 2–4 Tbsp. Infant cereal [1]; and 1–4 Tbsp. Fruit and/or vegetable
Lunch or supper	4–6 fl.oz. formula [1] or breast milk [2, 3].	4–8 fl.oz. formula [1] or breast milk [2, 3];. 0–3 Tbsp. Infant cereal [1, 4]; 0–3 Tbsp. Fruit and/or vegetable [4].	6–8 fl.oz. formula [1] or breast milk [2, 3]; and 2–4 Tbsp. Infant cereal [1]; and/or 1–4 Tbsp. Meat, fish, poultry, egg yolk, cooked dry beans, or peas; or ½–2 oz. Cheese; or 1–4 ounces. Cottage cheese, cheese food, or cheese spread; and 1–4 Tbsp. Fruit and/or vegetable
Supplement (snack)	4–6 fl.oz. formula [1] or breast milk [2, 3].	4–6 fl.oz. formula [1] or breast milk [2, 3].	2–4 fl.oz. formula [1], breast milk [2, 3], or fruit juice [5]; 0–½ bread [4, 6] or 0–2 crackers [4, 6]

[1] Infant formula and dry infant cereal shall be iron-fortified.
[2] It is recommended that breast milk be served in place of formula from birth through 11 months.
[3] For some breastfed infants who regularly consume less than the minimum amount of breast milk per feeding, a serving of less than the minimum amount of breast milk may be offered, with additional breast milk offered if the infant is still hungry.
[4] A serving of this component shall be optional.
[5] Fruit juice shall be full-strength.
[6] Bread and bread alternates shall be made from whole-grain or enriched meal or flour.

(c) *Meal patterns for children age one through 12 and adult participants.* When individuals over age one participate in the Program, the total amount of food authorized in the meal patterns set forth below shall be provided in order to qualify for reimbursement.

(1) *Breakfast.* The minimum amount of food components to be served as breakfast as set forth in paragraph (a)(1) of this section are as follows:

Food components	Age 1 and 2	Age 3 through 5	Age 6 through 12 [1]	Adult participants
Milk, fluid	½ cup [2]	¾ cup	1 cup	1 cup.[2]
Vegetables and Fruits or	¼ cup	½ cup	½ cup	½ cup.
Full-strength vegetable or fruit juice or an equivalent quantity of any combination of vegetable(s), fruit(s), and juice.	¼ cup	½ cup	½ cup	½ cup.
Bread and Bread Alternates [3]				
Bread or	½ slice	½ slice	1 slice	2 slices (servings).
Cornbread, biscuits, rolls, muffins, etc.[4] or	½ serving	½ serving	1 serving	2 servings.
Cold dry cereal [5] or	¼ cup or ⅓ ounce	⅓ cup or ½ ounce	¾ cup or 1 ounce	1½ cup or 2 ounces.
Cooked cereal or	¼ cup	¼ cup	½ cup	1 cup.
Cooked pasta or noodle products or	¼ cup	¼ cup	½ cup	1 cup.
Cooked cereal grains or an equivalent quantity of any combination of bread/bread alternate.	¼ cup	¼ cup	½ cup	1 cup.

[1] Children age 12 and up may be served adult size portions based on the greater food needs of older boys and girls, but shall be served not less than the minimum quantities specified in this section for children age 6 up to 12.

[2] For purposes of the requirements outlined in this subsection, a cup means a standard measuring cup.

[3] Bread, pasta or noodle products, and cereal grains, shall be whole grain or enriched; cornbread, biscuits, rolls, muffins, etc., shall be made with whole grain or enriched meal or flour; cereal shall be whole grain or enriched or fortified.

[4] Serving sizes and equivalents to be published in guidance materials by FNS.

[5] Either volume (cup) or weight (ounces) whichever is less.

(2) *Lunch.* The minimum amount of food components to be served as lunch as set forth in paragraph (a)(2) of this section are as follows:

Food components	Age 1 and 2	Age 3 through 5	Age 6 through 12 [1]	Adult participants
Milk, fluid	½ cup [2]	¾ cup	1 cup	1 cup [2].
Vegetables and Fruits [3]				
Vegetables(s) and/or fruit(s)	¼ cup total	½ cup total	¾ cup total	1 cup total.
Bread and Bread Alternates [4]				
Bread or	½ slice	½ slice	1 slice	2 slices (servings).
Cornbread, biscuits, rolls, muffins, etc.[5] or	½ serving	½ serving	1 serving	2 servings.
Cooked pasta or noodle products or	¼ cup	¼ cup	½ cup	1 cup.
Cooked cereal grains or an equivalent quantity of any combination of bread/bread alternate.	¼ cup	¼ cup	½ cup	1 cup.
Meat and Meat Alternates				
Lean meat or poultry or fish [6] or	1 ounce	1½ ounces	2 ounces	2 ounces.
Alternate protein products [7] or	1 ounce	1½ ounces	2 ounces	2 ounces.
Cheese or	1 ounce	1½ ounces	2 ounces	2 ounces.
Egg (large) or	½	¾	1	1.
Cooked dry beans or peas or	¼ cup	⅜ cup	½ cup	½ cup.
Peanut butter or soynut butter or other nut or seed butters or	2 tablespoons	3 tablespoons	4 tablespoons	4 tablespoons.
Peanuts or soynuts or tree nuts or seeds [8] or	½ ounce [9]=50%	¾ ounce [9]=50%	1 ounce [9]=50%	1 ounce [9]=50%.
Yogurt, plain or flavored, unsweetened or sweetened or an equivalent quantity of any combination of the above meat/meat alternates.	4 ounces or ½ cup	6 ounces or ¾ cup	8 ounces or 1 cup	8 ounces or 1 cup.

[1] Children age 12 and up may be served adult size portions based on the greater food needs of older boys and girls, but shall be served not less than the minimum quantities specified in this section for children age 6 up to 12.
[2] For purposes of the requirements outlined in this subsection, a cup means a standard measuring cup.
[3] Serve 2 or more kinds of vegetable(s) and/or fruit(s). Full-strength vegetable or fruit juice may be counted to meet not more than one-half of this requirement.
[4] Bread, pasta or noodle products, and cereal grains, shall be whole grain or enriched; cornbread, biscuits, rolls, muffins, etc., shall be made with whole grain or enriched meal or flour.
[5] Serving sizes and equivalents to be published in guidance materials by FNS.
[6] Edible portion as served.
[7] Must meet the requirements in appendix A of this part.
[8] Tree nuts and seeds that may be used as meat alternates are listed in program guidance.
[9] No more than 50% of the requirement shall be met with nuts or seeds. Nuts or seeds shall be combined with another meat/meat alternate to fulfill the requirement. For purpose of determining combinations, 1 ounce of nuts or seeds is equal to 1 ounce of cooked lean meat, poultry, or fish.

(3) *Supper*. The minimum amount of food components to be served as supper as set forth in paragraph (a)(3) of this section are as follows:

Food components	Age 1 and 2	Age 3 through 5	Age 6 through 12 [1]	Adult participants
Milk, fluid	½ cup [2]	¾ cup [2]	1 cup	None.
Vegetables and Fruits [3]				
Vegetables(s) and/or fruit(s)	¼cup total	½ cup total	¾ cup total	1 cup total.
Bread and Bread Alternates [4]				
Bread or	½ slice	½ slice	1 slice	2 slices (servings).[5]
Cornbread, biscuits, rolls, muffins, etc.[5] or	½ serving	½ serving	1 serving	2 servings.
Cooked cereal grains or an equivalent quantity of any combination of bread/bread alternate.	¼ cup	¼ cup	½ cup	1 cup.
Meat and Meat Alternates				
Lean meat or poultry or fish [6] or	1 ounce	1½ ounces	2 ounces	2 ounces.
Alternate protein products [7] or	1 ounce	1½ ounces	2 ounces	2 ounces.
Cheese or	1 ounce	1½ ounces	2 ounces	2 ounces.
Egg (large) or	½	¾	1	1.
Cooked dry beans or peas or	¼ cup	⅜ cup	½ cup	½ cup.
Peanut butter or soynut butter or other nut or seed butters or	2 tablespoons	3 tablespoons	4 tablespoons	4 tablespoons.
Peanuts or soynuts or tree nuts or seeds [8] or	½ ounce [9]=50%	¾ ounce [9]=50%	1 ounce [9]=50%	1 ounce [9]=50%.
Yogurt, plain or flavored, unsweetened or sweetened or an equivalent quantity of any combination of the above meat/meat alternates.	4 ounces or ½ cup	6 ounces or ¾ cup	8 ounces or 1 cup	8 ounces or 1 cup.

[1] Children age 12 and up may be served adult size portions based on the greater food needs of older boys and girls, but shall be served not less than the minimum quantities specified in this section for children age 6 up to 12.
[2] For purposes of the requirements outlined in this subsection, a cup means a standard measuring cup.
[3] Serve 2 or more kinds of vegetable(s) and/or fruit(s). Full-strength vegetable or fruit juice may be counted to meet not more than one-half of this requirement.
[4] Bread, pasta or noodle products, and cereal grains, shall be whole grain or enriched; cornbread, biscuits, rolls, muffins, etc., shall be made with whole grain or enriched meal or flour.
[5] Serving sizes and equivalents to be published in guidance materials by FNS.
[6] Edible portion as served.
[7] Must meet the requirements in appendix A of this part.
[8] Tree nuts and seeds that may be used as meat alternates are listed in program guidance.
[9] No more than 50% of the requirement shall be met with nuts or seeds. Nuts or seeds shall be combined with another meat/meat alternate to fulfill the requirement. For purpose of determining combinations, 1 ounce of nuts or seeds is equal to 1 ounce of cooked lean meat, poultry, or fish.

(4) *Supplemental food*. The minimum amount of food components to be served as supplemental foods as set forth in paragraph (a)(4) of this section are as follows. Select two of the following four components. (For children, juice may not be served when milk is served as the only other component.)

Food Components [1]	Age 1 and 2	Age 3 through 5	Age 6 through 12 [2]	Adult participants
Milk, fluid	½ cup	½ cup	1 cup	1 cup.
Vegetables and Fruits				
Vegetables(s) and/or fruit(s) or	½ cup	½ cup	¾ cup	½ cup.
Full-strength vegetable or fruit juice or an equivalent quantity of any combination of vegetable(s), fruit(s) and juice.	½ cup	½ cup	¾ cup	½ cup.
Bread and Bread Alternates [3]				
Bread or	½ slice	½ slice	1 slice	1 slice (serving).
Cornbread, biscuits, rolls, muffins, etc [4] or	½ serving	½ serving	1 serving	1 serving.
Cold dry cereal or	¼ cup or ⅓ ounce	⅓ cup or ½ ounce	¾ cup or 1 ounce	¾ cup or 1 ounce.
Cooked cereal [5] or	¼ cup	¼ cup	½ cup	½ cup.
Cooked pasta or noodle products or	¼ cup	¼ cup	½ cup	½ cup.
Cooked cereal grains or an equivalent quantity of any combination of bread/bread alternate.	¼ cup	¼ cup	½ cup	½ cup.
Meat and Meat Alternates				
Lean meat or poultry or fish [6] or	½ ounce	½ ounce	1 ounce	1 ounce
Alternate protein products [7] or	½ ounce	½ ounce	1 ounce	1 ounce
Cheese or	½ ounce	½ ounce	1 ounce	1 ounce
Egg (large) or	½	½	½	½.
Cooked dry beans or peas or	⅛ cup	⅛ cup	¼ cup	¼ cup.
Peanut butter or soynut butter or other nut or seed butters or	1 tablespoon	1 tablespoon	2 tablespoons	2 tablespoons.
Peanuts or soynuts or tree nuts or seeds [8] or	½ ounce	½ ounce	1 ounce	1 ounce.
Yogurt, plain or flavored, unsweetened or sweetened or an equivalent quantity of any combination of the above meat/meat alternates.	2 ounces or ¼ cup	2 ounces or ¼ cup	4 ounces or ½ cup	4 ounces or ½ cup.

[1] For purposes of the requirements outlined in this subsection, a cup means a standard measuring cup.
[2] Children age 12 and up may be served adult size portions based on the greater food needs of older boys and girls, but shall be served not less than the minimum quantities specified in this section for children age 6 up to 12.
[3] Bread, pasta or noodle products, and cereal grains, shall be whole grain or enriched; cornbread, biscuits, rolls, muffins, etc., shall be made with whole grain or enriched meal or flour; cereal shall be whole grain or enriched or fortified.
[4] Serving sizes and equivalents to be published in guidance materials by FNS.
[5] Either volume (cup) or weight (ounces) whichever is less.
[6] Edible portion as served.
[7] Must meet the requirements in Appendix A of this Part.
[8] Tree nuts and seeds that may be used as meat alternates are listed in program guidance.

(d) *Additional food.* To improve the nutrition of participating children over 1 year of age additional foods may be served with each meal as follows:

(1) *Breakfast.* Include as often as practical one-half egg; or a 1-ounce serving (edible portion as served) of meat, poultry or fish; or 1-ounce of cheese; or 2 tablespoons of peanut butter; or 4 oz. of yogurt; or an equivalent quantity of any combination of these foods. Additional foods may be served as desired.

(2) *Lunch, supper or supplemental food.* Additional foods may be served as desired.

(e) *Temporary unavailability of milk.* If emergency conditions prevent an institution normally having a supply of milk from temporarily obtaining milk deliveries, the State agency may approve the service of breakfasts, lunches, or suppers without milk during the emergency period.

(f) *Continuing unavailability of milk.* The inability of an institution to obtain a supply of milk on a continuing basis shall not bar it from participation in the Program. In such cases, the State agency may approve service of meals without milk, provided that an equivalent amount of canned, whole dry or nonfat dry milk is used in the preparation of the components of the meal set forth in paragraphs (a)(1), (2) and (3) of this section.

(g) *Statewide substitutions.* In American Samoa, Puerto Rico, Guam, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Northern Mariana Islands the following variations from the meal requirements are authorized: A serving of a starchy vegetable, such as yams, plantains, or sweet potatoes may be substituted for the bread requirements.

(h) *Individual substitutions.* Substitutions may be made in food listed in paragraphs (b) and (c) of this section if individual participants are unable, because of medical or other special dietary needs, to consume such foods. Substitutions because of medical needs shall be made only when supported by a statement from a recognized medical authority which includes recommended alternate foods.

(i) *Special variations.* FNS may approve variations in the food components of the meals on an experimental or a continuing basis in any institution where there is evidence that such variations are nutritionally sound and are necessary to meet ethnic, religious, economic, or physical needs.

(j) *Meal planning.* Institutions shall plan for and order meals on the basis of current participation trends, with the objective of providing only one meal per participant at each meal service. Records of participation and of ordering or preparing meals shall be maintained to demonstrate positive action toward this objective. In recognition of the fluctuation in participation levels which makes it difficult to estimate precisely the number of meals needed and to reduce the resultant waste, any excess meals that are ordered may be served to participants and may be claimed for reimbursement, unless the State agency determines that the institution has failed to plan and prepare or order meals with the objective of providing only one meal per participant at each meal service.

(k) *Sanitation.* Institutions shall ensure that in storing, preparing, and serving food, proper sanitation and health standards are met which conform with all applicable State and local laws and regulations. Institutions shall ensure that adequate facilities are available to store food or hold meals.

(l) *Donated commodities.* Institutions shall efficiently use in the Program any foods donated by the Department and accepted by the institution.

(m) *Plentiful foods.* Institutions shall, insofar as practical, purchase and efficiently use in the Program foods designated as plentiful by the Department.

(n) *Additional provision.* The State agency may allow institutions which serve meals prepared in schools participating in the National School Lunch and School Breakfast Programs to substitute the meal pattern requirements of the regulations governing those Programs (7 CFR part 210 and 7 CFR part 220, respectively) for the meal pattern requirements contained in this section.

(o) *Family-style meal service.* Meals may be served in a family-style setting.

(p) *Offer versus serve*. (1) Each adult day care center shall *offer* its adult participants all of the required food servings as set forth in paragraph (c)(1), (c)(2) and (c)(3) of this section. However, at the discretion of the adult day care center, adult participants may be permitted to *decline:*

(i) *One of the four* food items (one serving of milk, one serving of vegetable and/or fruit, and two servings of bread or bread alternate) required at breakfast;

(ii) *Two of the six* food items (one serving of milk, two servings of vegetable and/or fruit, two servings of bread or bread alternate, and one serving of meat or meat alternate) required at lunch;

(iii) *Two of the five* food items (two servings of vegetables and/or fruit, two servings of bread or bread alternate, and one serving of meat or meat alternate) required at supper.

(2) The price of a reimbursable meal shall not be affected if an adult participant declines a food item.

[47 FR 36527, Aug. 20, 1982; 48 FR 40197, Sept. 16, 1983, as amended at 50 FR 8581, Mar. 4, 1985; 51 FR 16811, May 7, 1986; 51 FR 23515, June 30, 1986; 53 FR 25308, July 6, 1988; 53 48632, Dec. 2, 1988; 53 FR 52592, Dec. 28, 1988; 54 FR 27153, June 28, 1989; 58 FR 37850, July 14, 1993; 62 FR 10191, Mar. 6, 1997; 64 FR 61775, Nov. 15, 1999; 64 FR 72261, Dec. 27, 1999; 65 FR 12439, Mar. 9, 2000; 66 FR 65597, Dec. 20, 2001]

§ 226.21 Food service management companies.

(a) Any institution may contract with a food service management company. An institution which contracts with a food service management company shall remain responsible for ensuring that the food service operation conforms to its agreement with the State agency. All procurements of meals from food service management companies shall adhere to the procurement standards set forth in § 226.22. Public institutions shall follow applicable State or local laws governing bid procedures. In the absence of any applicable State or local laws, and in addition to the procurement provisions set forth in § 226.22, the State agency may mandate that each institution with Program meal contracts of an aggregate value in excess of $10,000 formally advertise such contracts and comply with the following procedures intended to prevent fraud, waste, and Program abuse:

(1) All proposed contracts shall be publicly announced at least once 14 calendar days prior to the opening of bids. The announcement shall include the time and place of the bid opening;

(2) The institution shall notify the State agency at least 14 calendar days prior to the opening of the bids of the time and place of the bid opening;

(3) The invitation to bid shall not provide for loans or any other monetary benefit or terms or conditions to be made to institutions by food service management companies;

(4) Nonfood items shall be excluded from the invitation to bid, except where such items are essential to the conduct of the food service;

(5) The invitation to bid shall not specify special meal requirements to meet ethnic or religious needs unless special requirements are necessary to meet the needs of the participants to be served;

(6) The bid shall be publicly opened;

(7) All bids totaling $50,000 or more shall be submitted to the State agency for approval before acceptance. All bids shall be submitted to the State agency for approval before accepting a bid which exceeds the lowest bid. State agencies shall respond to any request for approval within 10 working days of receipt;

(8) The institutions shall inform the State agency of the reason for selecting the food service management company chosen. State agencies may require institutions to submit copies of all bids submitted under this section.

(b) The institution and the food service management company shall enter into a standard contract as required by § 226.6(i). However, public institutions may, with the approval of the State agency, use their customary form of contract if it incorporates the provisions of § 226.6(i).

(c) A copy of the contract between each institution and food service management company shall be submitted to the State agency prior to the beginning of Program operations under the subject contract.

(d) Each proposed additional provision to the standard form of contract

shall be submitted to the State agency for approval.

(e) A food service management company may not subcontract for the total meal, with or without milk, or for the assembly of the meal.

[47 FR 36527, Aug. 20, 1982, as amended at 53 FR 52594, Dec. 28, 1988]

§ 226.22 Procurement standards.

(a) This section establishes standards and guidelines for the procurement of foods, supplies, equipment, and other goods and services. These standards are furnished to ensure that such materials and services are obtained efficiently and economically and in compliance with the provisions of applicable Federal law and Executive orders.

(b) These standards shall not relieve the institution of any contractual responsibilities under its contracts. The institution is responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements entered into in support of the Program. These include, but are not limited to: source evaluation, protests of award, disputes, and claims. Violations of the law shall be referred to the local, State, or Federal authority having proper jurisdiction.

(c) Institutions may use their own procurement procedures which reflect applicable State or local laws and regulations, provided that procurements made with Program payments conform to the standards set forth in this section and in Attachment O of Office of Management and Budget Circulars A–102 and A–110, as well as to procurement requirements which may be established by the State agency, with the approval of FNS to prevent fraud, waste, and Program abuse.

(d) Institutions shall maintain a written code of standards of conduct which shall govern the performance of their officers, employees or agents engaged in the award and administration of contracts supported by Program payments. No employee, officer or agent of the grantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

(1) The employee, officer or agent;

(2) Any member of his immediate family;

(3) His or her partner; or

(4) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award.

The institution's officers, employees or agents shall neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Institutions may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards of conduct shall provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the institution's officers, employees, or agents, or by contractors or their agents.

(e) The institution shall establish procurement procedures which provide that proposed procurement actions shall be reviewed by institution officials to avoid the purchase of unnecessary or duplicative items. Where appropriate, an analysis shall be made of lease versus purchase alternatives, and any other appropriate analysis to determine which approach would be the most economical.

(f) Affirmative steps shall be taken to assure that small and minority businesses are utilized when possible. Affirmative steps shall include the following:

(1) Including qualified small and minority businesses on solicitation lists;

(2) Assuring that small and minority businesses are solicited whenever they are potential sources;

(3) When economically feasible, dividing total requirements into smaller tasks or quantities so as to permit maximum small and minority business participation;

(4) Where the requirement permits, establishing delivery schedules which will encourage participation by small and minority businesses;

(5) Using the services and assistance of the Small Business Administration

and the Minority Business Enterprise of the Department of Commerce as required;

(6) If any subcontracts are to be let, requiring the prime contractor to take the affirmative steps in paragraphs (b)(1) through (5) of this section; and

(7) Taking similar appropriate affirmative action in support of women's business enterprises.

(g) All procurement transactions, regardless of whether by sealed bids or by negotiation and without regard to dollar value, shall be conducted in a manner that provides maximum open and free competition consistent with this section. Procurement procedures shall not restrict or eliminate competition. Examples of what is considered to be restrictive of competition include, but are not limited to (1) placing unreasonable requirements on firms in order for them to qualify to do business, (2) noncompetitive practices between firms, (3) organizational conflicts of interest, and (4) unnecessary experience and bonding requirements.

(h) The institution shall have written selection procedures which shall provide, as a minimum, the following procedural requirements:

(1) Solicitations of offers, whether by competitive sealed bids or competitive negotiation, shall:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a ''brand name or equal'' description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated; and

(ii) Clearly set forth all requirements which offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(2) Awards shall be made only to responsible contractors that possess the potential ability to perform successfully under the terms and conditions of a proposed procurement. Consideration shall be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(i) Program procurements shall be made by one of the following methods:

(1) Small purchase procedures are those relatively simple and informal procurement methods that are sound and appropriate for the procurement of services, supplies or other property, costing in the aggregate not more than $10,000. Institutions shall comply with State or local small purchase dollar limits under $10,000. If small purchase procedures are used for a procurement under the Program, price or rate quotation shall be obtained from an adequate number of qualified sources; or

(2) In competitive sealed bids (formal advertising), sealed bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is lowest in price.

(i) In order for formal advertising to be feasible, appropriate conditions must be present, including as a minimum, the following:

(A) A complete, adequate and realistic specification or purchase description is available.

(B) Two or more responsible suppliers are willing and able to compete effectively for the institution's business.

(C) The procurement lends itself to a firm-fixed price contract, and selection of the successful bidder can appropriately be made principally on the basis of price.

(ii) If formal advertising is used for a procurement under the Program, the following requirements shall apply:

(A) A sufficient time prior to the date set for opening of bids, bids shall be solicited from an adequate number

of known suppliers. In addition, the invitation shall be publicly advertised.

(B) The invitation for bids, including specifications and pertinent attachments, shall clearly define the items or services needed in order for the bidders to properly respond to the invitation.

(C) All bids shall be opened publicly at the time and place stated in the invitation for bids.

(D) A firm-fixed-price contract award shall be made by written notice to that responsible bidder whose bid, conforming to the invitation for bids, is lowest. Where specified in the bidding documents, factors such as discounts, transportation costs and life cycle costs shall be considered in determining which bid is lowest. Payment discounts may only be used to determine low bid when prior experience of the grantee indicates that such discounts are generally taken.

(E) Any or all bids may be rejected when there are sound documented business reasons in the best interest of the Program.

(3) In competitive negotiation, proposals are requested from a number of sources and the Request for Proposal is publicized. Negotiations are normally conducted with more than one of the sources submitting offers, and either a fixed-price or cost-reimbursable type contract is awarded, as appropriate. Competitive negotiation may be used if conditions are not appropriate for the use of formal advertising. If competitive negotiation is used for a procurement under a grant, the following requirements shall apply:

(i) Proposals shall be solicited from an adequate number of qualified sources to permit reasonable competition consistent with the nature and requirements of the procurement. The Request for Proposals shall be publicized and reasonable requests by other sources to compete shall be honored to the maximum extent practicable:

(ii) The Request for Proposal shall identify all significant evaluation factors, including price or cost where required and their relative importance;

(iii) The institution shall provide mechanisms for technical evaluation of the proposal received, determinations of responsible offerors for the purpose of written or oral discussions, and selection for contract award; and

(iv) Award may be made to the responsible offeror whose proposal will be most advantageous to the procuring party, price and other factors considered. Unsuccessful offerors should be notified promptly.

(4) Noncompetitive negotiation is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate. Noncompetitive negotiation may be used when the award of a contract is infeasible under small purchase, competitive bidding (formal advertising), or competitive negotiation procedures. Circumstances under which a contract may be awarded by noncompetitive negotiation are limited to the following:

(i) The item is available only from a single source;

(ii) Public exigency or emergency when the urgency for the requirement will not permit a delay incident to competitive solicitation;

(iii) FNS authorizes noncompetitive negotiation; or

(iv) After solicitation of a number of sources, competition is determined inadequate.

(j) The cost plus a percentage of cost method of contracting shall not be used. Instructions shall perform some form of cost or price analysis in connection with every procurement action including contract modifications. Costs or prices based on estimated costs for contracts under the Program shall be allowed only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles.

(k) Institutions shall maintain records sufficient to detail the significant history of a procurement. These records shall include, but are not necessarily limited to information pertinent to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the cost or price.

(l) In addition to provisions defining a sound and complete procurement contract, institutions shall include the following contract provisions or conditions in all procurement contracts and

subcontracts as required by the provision, Federal Law or FNS:

(1) Contracts other than small purchases shall contain provisions or conditions which will allow for administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate;

(2) All contracts in excess of $10,000 shall contain suitable provisions for termination by the institution including the manner by which it will be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor;

(3) All contracts awarded in excess of $10,000 by institutions and their contractors shall contain a provision requiring compliance with Executive Order 11246, entitled ''Equal Employment Opportunity,'' as amended by Executive Order 11375, and as supplemented in Department of Labor regulations (41 CFR part 60);

(4) Where applicable, all contracts awarded by institutions in excess of $2,500 which involve the employment of mechanics or laborers shall include a provision for compliance with section 103 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327 through 330) as supplemented by Department of Labor regulations (29 CFR part 5). Under section 103 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of a standard work day of 8 hours and a standard work week of 40 hours. Work in excess of the standard work day or week is permissible provided that the worker is compensated at a rate of not less than 1½ times the basic rate of pay for all hours worked in excess of 8 hours in any calendar day or 40 hours in the work week. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence;

(5) The contract shall include notice of USDA requirements and regulations pertaining to reporting and patent rights under any contract involving research, developmental, experimental or demonstration work with respect to any discovery or invention which arises or is developed in the course of or under such contract, and of USDA requirements and regulations pertaining to copyrights and rights in data. These requirements are in § 3015.175 of the USDA Uniform Federal Assistance Regulations 7 CFR part 3015. All negotiated contracts (except those awarded by small purchases procedures) awarded by institutions shall include a provision to the effect that the institution, FNS, the Comptroller General of the United States or any of their duly authorized representatives, shall have access to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract, for the purpose of making audit, examination, excerpts, and transcriptions. Institutions shall require contractors to maintain all required records for three years after institutions make final payment and all other pending matters are closed;

(6) Contracts and subcontracts of amounts in excess of $100,000 shall contain a provision which requires compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1837(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15), which prohibit the use under nonexempt Federal contracts, grants or loans of facilities included on the EPA List of Violating Facilities. The provision shall require reporting of violations to FNS and to the U.S. EPA Assistant Administrator for Enforcement (EN–329); and

(7) Contracts shall recognize mandatory standards and policies relating to energy efficiency which are contained in the State energy efficiency conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94–163).

(m) Institutions shall maintain a contract administration system insuring that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

§ 226.23 Free and reduced-price meals.

(a) The State agency shall require each institution to submit, at the time the institution applies for Program participation, a written policy statement concerning free and reduced-price meals to be used uniformly in all child care and adult day care facilities under its jurisdiction as required in this section. Institutions shall not be approved for participation nor agreements renewed unless the free and reduced-price policy statement has been approved. Pending approval of a revision of a policy statement, the existing policy shall remain in effect.

(b) Sponsoring organizations of day care homes (which may not serve meals at a separate charge to children) and other institutions which elect to serve meals at no separate charge, shall develop a policy statement consisting of an assurance to the State agency that all participants are served the same meals at no separate charge, regardless of race, color, national origin, sex, age, or handicap and that there is no discrimination in the course of the food service. This statement shall also contain an assurance that there will be no identification of children in day care homes in which meals are reimbursed at both the tier I and tier II reimbursement rates, and that the sponsoring organization will not make any free and reduced price eligibility information concerning individual households available to day care homes and will otherwise limit the use of such information to persons directly connected with the administration and enforcement of the Program.

(c) Independent centers and sponsoring organizations of centers which charge separately for meals shall develop a policy statement for determining eligibility for free and reduced-price meals which shall include the following:

(1) The specific criteria to be used in determining eligibility for free and reduced-price meals. The institution's standards of eligibility shall conform to the Secretary's income standards;

(2) A description of the method or methods to be used in accepting applications from families for free and reduced-price meals. Such methods will ensure that applications are accepted from households on behalf of children who are members of AFDC assistance units or food stamp or FDPIR households or, for adult participants, who are members of a food stamp or FDPIR household or SSI or Medicaid participants;

(3) A description of the method or methods to be used to collect payments from those participants paying the full or reduced price of the meal which will protect the anonymity of the participants receiving a free or reduced-price meal;

(4) An assurance which provides that the institution will establish a hearing procedure for use when benefits are denied or terminated as a result of verification:

(i) A simple, publicly announced method for a family to make an oral or written request for a hearing;

(ii) An opportunity for the family to be assisted or represented by an attorney or other person in presenting its appeal;

(iii) An opportunity to examine, prior to and during the hearing, the documents and records presented to support the decision under appeal;

(iv) That the hearing shall be held with reasonable promptness and convenience to the family and that adequate notice shall be given to the family as to the time and place of the hearing;

(v) An opportunity for the family to present oral or documentary evidence and arguments supporting its position;

(vi) An opportunity for the family to question or refute any testimony or other evidence and to confront and cross-examine any adverse witnesses;

(vii) That the hearing shall be conducted and the determination made by a hearing official who did not participate in making the initial decision;

(viii) The determination of the hearing official shall be based on the oral and documentary evidence presented at the hearing and made a part of that hearing record;

(ix) That the family and any designated representatives shall be notified in writing of the decision of the hearing official;

(x) That a written record shall be prepared with respect to each hearing, which shall include the decision under appeal, any documentary evidence and a summary of any oral testimony presented at the hearing, the decision of the hearing official, including the reasons therefor, and a copy of the notification to the family of the decision of the hearing official; and

(xi) That such written record of each hearing shall be preserved for a period of three years and shall be available for examination by the family or its representatives at any reasonable time and place during such period;

(5) An assurance that there will be no overt identification of free and reduced-price meal recipients and no discrimination against any participant on the basis of race, color, national origin, sex, age, or handicap;

(6) An assurance that the charges for a reduced-price lunch or supper will not exceed 40 cents, that the charge for a reduced-price breakfast will not exceed 30 cents, and that the charge for a reduced-price supplement will not exceed 15 cents.

(d) Each institution shall annually provide the information media serving the area from which the institution draws its attendance with a public release. All media releases issued by institutions other than sponsoring organizations of day care homes, shall include the Secretary's Income Eligibility Guidelines for Free and Reduced-Price Meals. The release issued by all sponsoring organizations of day care homes, and by other institutions which elect not to charge separately for meals, shall announce the availability of meals at no separate charge. The release issued by child care institutions which charge separately for meals shall announce the availability of free and reduced-price meals to children meeting the approved eligibility criteria. The release issued by child care institutions shall also announce that children who are members of AFDC assistance units, food stamp or FDPIR households, or are Head Start participants are automatically eligible to receive free meal benefits. The release issued by adult day care centers which charge separately for meals shall announce the availability of free and reduced-price meals to participants meeting the approved eligibility criteria. The release issued by adult day care centers shall also announce that adult participants who are members of food stamp or FDPIR households or who are SSI or Medicaid participants are automatically eligible to receive free meal benefits. All releases shall state that meals are available to all participants without regard to race, color, national origin, sex, age or handicap.

(e)(1) *Application for free and reduced-price meals.* (i) For the purpose of determining eligibility for free and reduced price meals, institutions shall distribute applications for free and reduced price meals to the families of participants enrolled in the institution. Sponsoring organizations of day care homes shall distribute applications for free and reduced price meals to day care home providers who wish to enroll their own eligible children in the Program. At the request of a provider in a tier II day care home, sponsoring organizations of day care homes shall distribute applications for free and reduced price meals to the households of all children enrolled in the home, except that applications need not be distributed to the households of enrolled children that the sponsoring organization determines eligible for free and reduced price meals under the circumstances described in paragraph (e)(1)(vi) of this section. These applications, and any other descriptive material distributed to such persons, shall contain only the family-size income levels for reduced price meal eligibility with an explanation that households with incomes less than or equal to these levels are eligible for free or reduced price meals. Such forms and descriptive materials may not contain the income standards for free meals. However, such forms and materials distributed by child care institutions other than sponsoring organizations of day care homes shall state that, if a child is a member of a food stamp or FDPIR household or AFDC assistance unit, the child is automatically eligible

to receive free Program meal benefits, subject to the completion of the application as described in paragraph (e)(1)(ii) of this section; such forms and materials distributed by sponsoring organizations of day care homes shall state that, if a child or a child's parent is participating in or subsidized under a Federally or State supported child care or other benefit program with an income eligibility limit that does not exceed the eligibility standard for free or reduced price meals, meals served to the child are automatically eligible for tier I reimbursement, subject to the completion of the application as described in paragraph (e)(1)(ii) of this section, and shall list any programs identified by the State agency as meeting this standard; such forms and materials distributed by adult day care centers shall state that, if an adult participant is a member of a food stamp or FDPIR household or is a SSI or Medicaid participant, the adult participant is automatically eligible to receive free Program meal benefits, subject to the completion of the application as described in paragraph (e)(1)(iii) of this section. Sponsoring organizations of day care homes shall not make free and reduced price eligibility information concerning individual households available to day care homes and shall otherwise limit the use of such information to persons directly connected with the administration and enforcement of the Program. However, sponsoring organizations may inform tier II day care homes of the number of identified income-eligible enrolled children. If a State agency distributes, or chooses to permit its sponsoring organizations to distribute, applications to the households of children enrolled in tier II day care homes which include household confidentiality waiver statements, such applications shall include a statement informing households that their participation in the program is not dependent upon signing the waivers. Furthermore, such forms and materials distributed by child care institutions shall state that if a child is a Head Start participant, the child is automatically eligible to receive free Program meal benefits, subject to submission by Head Start officials of a Head Start statement of income eligibility or income eligibility documentation.

(ii) Except as provided in paragraph (e)(1)(iv) of this section, the application for children shall contain a request for the following information:

(A) The names of all children for whom application is made;

(B) The names of all other household members;

(C) The social security number of the adult household member who signs the application, or an indication that he/she does not possess a social security number;

(D) The income received by each household member identified by source of income (such as earnings, wages, welfare, pensions, support payments, unemployment compensation, social security, and other cash income received or withdrawn from any other source, including savings, investments, trust accounts, and other resources);

(E) A statement to the effect that ''In certain cases, foster children are eligible for free and reduced-price meals regardless of household income. If such children are living with you and you wish to apply for such meals, please contact us.'';

(F) A statement that includes substantially the following information: ''Unless you include your child's case number for the Food Stamp Program, the Food Distribution Program on Indian Reservations (or other identifier for the Food Distribution Program on Indian Reservations) or the Temporary Assistance for Needy Families Program, you must include the social security number of the adult household member signing the application or indicate that the household member does not have a social security number. This is required by section 9 of the National School Lunch Act. The social security number is not mandatory, but the application cannot be approved if a social security number is not given or an indication is not made that the signer does not have a social security number. The social security number will be used in the administration and enforcement of the program.'' State agencies and institutions must ensure that the notice complies with section 7(b) of the Privacy Act of 1974 (5 U.S.C. 552a note); and

(G) The signature of an adult member of the household which appears immediately below a statement that the person signing the application certifies that all information furnished is true and correct; that the application is being made in connection with the receipt of Federal funds; that Program officials may verify the information on the application; and that the deliberate misrepresentation of any of the information on the application may subject the applicant to prosecution under applicable State and Federal criminal statutes.

(iii) Except as provided in paragraph (e)(1)(v) of this section, the application for adults shall contain a request for the following information:

(A) The names of all adults for whom application is made;

(B) The names of all other household members;

(C) The social security number of the adult household member who signs the application, or an indication that he/she does not possess a social security number;

(D) The income received by source of income (such as earnings, wages, welfare, pensions, support payments, unemployment compensation, social security, and other cash income received or withdrawn from any other source, including savings, investments, trust accounts and other resources);

(E) A statement which includes substantially the following information: ''Section 9 of the National School Lunch Act requires that, unless a food stamp, or FDPIR case number or SSI or Medicaid assistance identification number is provided for the adult for whom benefits are sought, you must include a social security number on the application. This must be the social security number of the adult household member signing the application. If the adult household member signing the application does not possess a social security number, he/she must indicate so on the application. Provision of a social security number is not mandatory, but if a social security number is not provided or an indication is not made that the adult household member signing the application does not have one, the application cannot be approved. This notice must be brought to the attention of the household member whose social security number is disclosed. The social security number may be used to identify the household member in carrying out efforts to verify the correctness of information stated on the application. These verification efforts may be carried out through program reviews, audits and investigations and may include contacting employers to determine income, contacting a food stamp, Indian tribal organization or welfare office to determine current certification for receipt of food stamps or FDPIR benefits, contacting the issuing office of SSI or Medicaid benefits to determine current certification for receipt of these benefits, contacting the State employment security office to determine the amount of benefits received, and checking the documentation produced by household members to provide the amount of income received. These efforts may result in loss or reduction of benefits, administrative claims or legal action if incorrect information is reported.'' State agencies and institutions shall ensure that the notice complies with section 7 of Pub. L. 93–579. If a State or local agency plans to use the social security numbers for CCFP verification purposes in a manner not described by this notice, the notice shall be altered to include a description of those uses; and

(F) The signature of an adult member of the household which appears immediately below a statement that the person signing the application certifies that all information furnished is true and correct; that the application is being made in connection with the receipt of Federal funds; that Program officials may verify the information on the application; and that the deliberate misrepresentation of any of the information on the application may subject the applicant to prosecution under applicable State and Federal criminal statutes.

(iv) If they so desire, households applying on behalf of children who are members of food stamp or FDPIR households or AFDC assistance units may apply under this paragraph rather than under the procedures described in paragraph (e)(1)(ii) of this section. In

addition, households of children enrolled in tier II day care homes who are participating in a Federally or State supported child care or other benefit program with an income eligibility limit that does not exceed the eligibility standard for free and reduced price meals may apply under this paragraph rather than under the procedures described in paragraph (e)(1)(ii) of this section. Households applying on behalf of children who are 0members of food stamp or FDPIR households; AFDC assistance units; or for children enrolled in tier II day care homes, other qualifying Federal or State program, shall be required to provide:

(A) For the child(ren) for whom automatic free meal eligibility is claimed, their names and food stamp, FDPIR, or AFDC case number; or for the households of children enrolled in tier II day care homes, their names and other program case numbers (if the program utilizes case numbers); and

(B) The signature of an adult member of the household as provided for in paragraph (e)(1)(ii)(G) of this section. In accordance with paragraph (e)(1)(ii)(F) of this section, if a case number is provided, it may be used to verify the current certification for the child(ren) for whom free meal benefits are claimed. Whenever households apply for children not receiving food stamp, FDPIR, or AFDC benefits; or for tier II homes, other qualifying Federal or State program benefits, they must apply in accordance with the requirements set forth in paragraph (e)(1)(ii) of this section.

(v) If they so desire, households applying on behalf of adults who are members of food stamp or FDPIR households or SSI or Medicaid participants may apply for free meal benefits under this paragraph rather than under the procedures described in paragraph (e)(1)(iii) of this section. Households applying on behalf of adults who are members of food stamp or FDPIR households or SSI or Medicaid participants shall be required to provide:

(A) The names and food stamp or FDPIR case numbers or SSI or Medicaid assistance identification numbers of the adults for whom automatic free meal eligibility is claimed; and

(B) The signature of an adult member of the household as provided in paragraph (e)(1)(iii)(F) of this section. In accordance with paragraph (e)(1)(iii)(G) of this section, if a food stamp or FDPIR case number or SSI or Medicaid assistance identification number is provided, it may be used to verify the current food stamp, FDPIR, SSI, or Medicaid certification for the adult(s) for whom free meal benefits are being claimed. Whenever households apply for benefits for adults not receiving food stamp, FDPIR, SSI, or Medicaid benefits, they must apply in accordance with the requirements set forth in paragraph (e)(1)(iii) of this section.

(vi) A sponsoring organization of day care homes may identify enrolled children eligible for free and reduced price meals (i.e., tier I rates), without distributing free and reduced price applications, by documenting the child's or household's participation in or receipt of benefits under a Federally or State supported child care or other benefit program with an income eligibility limit that does not exceed the eligibility standard for free and reduced price meals. Documentation shall consist of official evidence, available to the tier II day care home or sponsoring organization, and in the possession of the sponsoring organization, of the household's participation in the qualifying program.

(2) *Letter to households*. Institutions shall distribute a letter to households or guardians of enrolled participants in order to inform them of the procedures regarding eligibility for free and reduced-price meals. The letter shall accompany the application required under paragraph (e)(1) of this section and shall contain:

(i) The income standards for reduced-price meals, with an explanation that households with incomes less than or equal to the reduced-price standards would be eligible for free or reduced-price meals (the income standards for free meals shall *not* be included in letters or notices to such applicants);

(ii) How a participant's household may make application for free or reduced-price meals;

(iii) An explanation that an application for free or reduced price benefits cannot be approved unless it contains

complete ''documentation'' as defined in § 226.2.

(iv) The statement: ''In the operation of child feeding programs, no person will be discriminated against because of race, color, national origin, sex, age, or handicap'';

(v) A statement to the effect that participants having family members who become unemployed are eligible for free or reduced-price meals during the period of unemployment, provided that the loss of income causes the family income during the period of unemployment to be within the eligibility standards for those meals;

(vi) Except in the case of adult participants, a statement to the effect that in certain cases foster children are eligible for free or reduced-price meals regardless of the income of such household with whom they reside and that households wishing to apply for such benefits for foster children should contact the institution; and

(vii) An explanation that households receiving free and reduced-price meals must notify appropriate institution officials during the year of any decreases in household size or increases in income of over $50 per month or $600 per year or—

(A) In the case of households of enrolled children that provide a food stamp, FDPIR or AFDC case number to establish a child's eligibility for free meals, any termination in the child's certification to participate in the Food Stamp, FDPIR or AFDC Programs, or

(B) In the case of households of adult participants that provide a food stamp or FDPIR case number or an SSI or Medicaid assistance identification number to establish an adult's eligibility for free meals, any termination in the adult's certification to participate in the Food Stamp, FDPIR, SSI or Medicaid Programs.

(3) In addition to the information listed in paragraph (e)(2) of this section pricing institutions must include in their letter to household an explanation that indicates that: (i) The information in the application may be verified at any time during the year; and (ii) how a family may appeal a decision of the institution to deny, reduce, or terminate benefits as described under the hearing procedure set forth in paragraph (c)(4) of this section.

(4) *Determination of eligibility*. The institution shall take the income information provided by the household on the application and calculate the household's total current income. When a completed application furnished by a family indicates that the family meets the eligibility criteria for free or reduced-price meals, the participants from that family shall be determined eligible for free or reduced-price meals. Institutions that are pricing programs shall promptly provide written notice to each family informing them of the results of the eligibility determinations. When the information furnished by the family is not complete or does not meet the eligibility criteria for free or reduced-price meals, institution officials must consider the participants from that family as not eligible for free or reduced-price meals, and must consider the participants as eligible for ''paid'' meals. When information furnished by the family of participants enrolled in a pricing program does not meet the eligibility criteria for free or reduced-price meals, pricing program officials shall provide written notice to each family denied free or reduced-price benefits. At a minimum, this notice shall include:

(i) The reason for the denial of benefits, e.g., income in excess of allowable limits or incomplete application;

(ii) Notification of the right to appeal;

(iii) Instructions on how to appeal; and

(iv) A statement reminding the household that they may reapply for free or reduced-price benefits at any time during the year,

The reasons for ineligibility shall be properly documented and retained on file at the institution.

(5) *Appeals of denied benefits*. A family that wishes to appeal the denial of an application in a pricing program shall do so under the hearing procedures established under paragraph (c)(4) of this section. However, prior to initiating the hearing procedures, the household may request a conference to provide all affected parties the opportunity to discuss the situation, present information

and obtain an explanation of the data submitted on the application or the decision rendered. The request for a conference shall not in any way prejudice or diminish the right to a fair hearing. The institution shall promptly schedule a fair hearing, if requested.

(f) Free, reduced-price and paid meal eligibility figures must be reported by institutions to State agencies at least once each year and shall be based on current family-size and income information of enrolled participants. Such information shall be no more than 12 months old.

(g) Sponsoring organizations for family day care homes shall ensure that no separate charge for food service is imposed on families of children enrolled in participating family day care homes.

(h) *Verification of eligibility*. State agencies shall conduct verification of eligibility for free and reduced-price meals on an annual basis, in accordance with the verification procedures outlined in paragraphs (h) (1) and (2) of this section. Verification may be conducted in accordance with Program assistance requirements of § 226.6(l); however, the performance of verification for individual institutions shall occur no less frequently than once every four years. Any State may, with the written approval of FNSRO, use alternative approaches in the conduct of verification, provided that the results achieved meet the requirements of this part. If the verification process discloses deficiencies with the determination of eligibility and/or application procedures which exceed maximum levels established by FNS, State agencies shall conduct follow-up reviews for the purpose of determining that corrective action has been taken by the institution. These reviews shall be conducted within one year of the date the verification process was completed. The verification effort shall be applied without regard to race, color, national origin, sex, age, or handicap. State agencies shall maintain on file for review a description of the annual verification to be accomplished in order to demonstrate compliance with paragraphs (h) (1) and (2) of this section.

(1) *Verification procedures for nonpricing programs*. Except for sponsoring organizations of family day care homes, State agency verification procedures for nonpricing programs shall consist of a review of all approved free and reduced price applications on file. For sponsoring organizations of family day care homes, State agency verification procedures shall consist of a review only of the approved free and reduced price applications (or other documentation, if vouchers or other documentation are used in lieu of free and reduced price applications) on file for those day care homes that are required to be reviewed when the sponsoring organization is reviewed, in accordance with the review requirements set forth in section 226.6(l) of this Part. However, the State agency shall ensure that the day care homes selected for review are representative of the proportion of tier I, tier II, and tier II day care homes with a mix of income-eligible and non-income-eligible children in the sponsorship, and shall ensure that at least 10 percent of all free and reduced price applications (or other documentation, if applicable) on file for the sponsorship are verified. The review of applications shall ensure that:

(i) The application has been correctly and completely executed by the household;

(ii) The institution has correctly determined and classified the eligibility of enrolled participants for free or reduced price meals or, for family day care homes, for tier I or tier II reimbursement, based on the information included on the application submitted by the household;

(iii) The institution has accurately reported to the State agency the number of enrolled participants meeting the criteria for free or reduced price meal eligibility or, for day care homes, the number of participants meeting the criteria for tier I reimbursement, and the number of enrolled participants that do not meet the eligibility criteria for those meals; and

(iv) In addition, the State agency may conduct further verification of the information provided by the household on the approved application for program meal eligibility. If this effort is undertaken, the State agency shall

conduct this further verification for nonpricing programs in accordance with the procedures described in paragraph (h)(2) of this section.

(2) *Verification procedures for pricing programs.* (i) For pricing programs, in addition to the verification procedures described in paragraph (h)(1) of this section, State agencies shall also conduct verification of the income information provided on the approved application for free and reduced price meals and, at State agency discretion, verification may also include confirmation of other information required on the application. However,

(A) If a food stamp, FDPIR or AFDC case number is provided for a child, verification for such child shall include only confirmation that the child is included in a currently certified food stamp or FDPIR household or AFDC assistance unit; or

(B) If a food stamp or FDPIR case number or SSI or Medicaid assistance identification number is provided for an adult, verification for such adult shall include only confirmation that the adult is included in a currently certified food stamp or FDPIR household or is currently certified to receive SSI or Medicaid benefits.

(ii) State agencies shall perform verification on a random sample of no less than 3 percent of the approved free and reduced price applications in an institution which is a pricing program.

(iii) Households shall be informed in writing that they have been selected for verification and they are required to submit the requested verification information to confirm their eligibility for free or reduced-price benefits by such date as determined by the State agency. Those households shall be informed of the type or types of information and/or documents acceptable to the State agency and the name and phone number of an official who can answer questions and assist the household in the verification effort. This information must include a social security number for each adult household member or an indication that he/she does not have one. State agencies shall inform selected households that:

(A) Section 9 of the National School Lunch Act requires that, unless households provide the child's food stamp, FDPIR or AFDC case number, or the adult participant's food stamp or FDPIR case number or SSI or Medicaid assistance identification number, those selected for verification must provide the social security number of each adult household member;

(B) In lieu of providing a social security number, an adult household member may indicate that he/she does not possess one;

(C) Provision of a social security number is not mandatory, but if a social security number is not provided for each adult household member or an indication is not made that he/she does not possess one, benefits will be terminated;

(D) The social security number may be used to identify household members in carrying out efforts to verify the correctness of information stated on the application and continued eligibility for the program. These verification efforts may be carried out through program reviews, audits, and investigations and may include contacting employers to determine income, contacting Federal, State or local agencies to determine current certification for receipt of food stamps or FDPIR, AFDC, SSI or Medicaid benefits, contacting the State employment security office to determine the amount of benefits received, and checking the documentation produced by household members to prove the amount of income received. These efforts may result in loss or reduction of benefits, administrative claims or legal actions if incorrect information was reported; and

(E) This information must be provided to the attention of each adult household member disclosing his/her social security number. State agencies shall ensure that the notice complies with section 7 of Pub. L. 93–579 (Privacy Act of 1974). These households shall be provided with the name and phone number of an official who can assist in the verification effort.

(iv) Households of enrolled children selected for verification shall also be informed that if they are currently certified to participate in the Food Stamp, FDPIR, or AFDC Program they may submit proof of that certification in lieu of income information. In those

cases, such proof shall consist of a current ''Notice of Eligibility'' for Food Stamp, FDPIR, or AFDC Program benefits or equivalent official documentation issued by a food stamp, Indian Tribal Organization, or welfare office which shows that the children are members of households or assistance units currently certified to participate in the Food Stamp, FDPIR, or AFDC Programs. An identification card for any of these programs is not acceptable as verification unless it contains an expiration date. Households of enrolled adults selected for verification shall also be informed that if they are currently certified to participate in the Food Stamp Program or FDPIR or SSI or Medicaid Programs, they may submit proof of that certification in lieu of income information. In those cases, such proof shall consist of:

(A) A current ''Notice of Eligibility'' for Food Stamp or FDPIR benefits or equivalent official documentation issued by a food stamp, Indian Tribal Organization, or welfare office which shows that the adult participant is a member of a household currently certified to participate in the Food Stamp Program or FDPIR. An identification card is not acceptable as verification unless it contains an expiration date; or

(B) Official documentation issued by an appropriate SSI or Medicaid office which shows that the adult participant currently receives SSI or Medicaid assistance. An identification card is not acceptable as verification unless it contains an expiration date. All households selected for verification shall be advised that failure to cooperate with verification efforts will result in a termination of benefits.

(v) Sources of information for verification may include written evidence, collateral contacts, and/or systems of records.

(A) *Written evidence* shall be used as the primary source of information for verification. Written evidence includes written confirmation of a household's circumstances, such as wage stubs, award letters, letters from employers, and, for enrolled children, current certification to participate in the Food Stamp, FDPIR or AFDC Programs, or, for adult participants, current certification to participate in the Food Stamp, FDPIR, SSI or Medicaid Programs. Whenever written evidence is insufficient to confirm eligibility, the State agency may use collateral contacts.

(B) *Collateral contact* is a verbal confirmation of a household's circumstances by a person outside of the household. The collateral contact may be made in person or by phone and shall be authorized by the household. The verifying official may select a collateral contact if the household fails to designate one or designates one which is unacceptable to the verifying official. If the verifying official designates a collateral contact, the contact shall not be made without providing written or oral notice to the household. At the time of this notice, the household shall be informed that it may consent to the contact or provide acceptable verification in another form. The household shall be informed that its eligibility for free or reduced price meals shall be terminated if it refuses to choose one of these options. Termination shall be made in accordance with paragraph (h)(2)(vii) of this section. Collateral contacts could include employers, social service agencies, and migrant agencies.

(C) *Systems of records* to which the State agency may have routine access are not considered collateral contacts. Information concerning income, family size, or food stamp/FDPIR/AFDC certification for enrolled children, or food stamp/FDPIR/SSI/ Medicaidcertification for enrolled adults, which is maintained by other government agencies and to which a State agency can legally gain access may be used to confirm a household's eligibility for Program meal benefits. One possible source could be wage and benefit information maintained by the State unemployment agency, if that information is available. The use of any information derived from other agencies must be used with applicable safeguards concerning disclosure.

(vi) Verification by State agencies of receipt of food stamps, FDPIR, AFDC, SSI or Medicaid benefits shall be limited to a review to determine that the period of eligibility is current. If the benefit period is found to have expired,

or if the household's certification has been terminated, the household shall be required to document their income eligibility.

(vii) The State agency may work with the institution to verify the documentation submitted by the household on the application; however, the responsibility to complete the verification process may not be delegated to the institution.

(viii) If a household refuses to cooperate with efforts to verify, or the verification of income indicates that the household is ineligible to receive benefits or is eligible to receive reduced benefits, the State agency shall require the pricing program institution to terminate or adjust eligibility in accordance with the following procedures. Institution officials shall immediately notify families of the denial of benefits in accordance with paragraphs (e)(4) and (e)(5) of this section. Advance notification shall be provided to families which receive a reduction or termination of benefits 10 calendar days prior to the actual reduction or termination. The 10-day period shall begin the day the notice is transmitted to the family. The notice shall advise the household of: (A) The change; (B) the reasons for the change; (C) notification of the right to appeal the action and the date by which the appeal must be requested in order to avoid a reduction or termination of benefits; (D) instructions on how to appeal; and (E) the right to reapply at any time during the year. The reasons for ineligibility shall be properly documented and retained on file at the institution.

(ix) When a household disagrees with an adverse action which affects its benefits and requests a fair hearing, benefits shall be continued as follows while the household awaits the hearing:

(A) Households which have been approved for benefits and which are subject to a reduction or termination of benefits later in the same year shall receive continued benefits if they appeal the adverse action within the 10-day advance notice period; and

(B) Households which are denied benefits upon application shall not received benefits.

(3) State agencies shall inform institution officials of the results of the verification effort and the action which will be taken in response to the verification findings. This notification shall be made in accordance with the procedures outlined in § 226.14(a).

(4) If the verification results disclose that an institution has inaccurately classified or reported the number of participants eligible for free, reduced-price or paid meals, the State agency shall adjust institution rates of reimbursement retroactive to the month in which the incorrect eligibility figures were reported by the institution to the State agency.

(5) If the verification results disclose that a household has not reported accurate documentation on the application which would support continued eligibility for free or reduced-price meals, the State agency shall immediately adjust institution rates of reimbursement. However, this rate adjustment shall not become effective until the affected households have been notified in accordance with the procedures of paragraph (h)(2)(vi) of this section and any ensuing appeals have been heard as specified in paragraph (h)(2)(viii) of this section.

(6) *Verification procedures for sponsoring organizations of day care homes.* Prior to approving an application for a day care home that qualifies as tier I day care home on the basis of the provider's household income, sponsoring organizations of day care homes shall conduct verification of such income in accordance with the procedures contained in paragraph (h)(2)(i) of this section. Sponsoring organizations of day care homes may verify the information on applications submitted by households of children enrolled in day care homes in accordance with the procedures contained in paragraph (h)(2)(i) of this section.

(i) *Disclosure of program eligibility information to State Medicaid (Medicaid) and the State Children's Health Insurance Program (SCHIP)* Program eligibility information about children eligible for free and reduced price meals may be disclosed to Medicaid and SCHIP as described in this section.

(1) *Who decides whether to disclose program eligibility information to Medicaid and/or SCHIP?* The State agency may elect to allow institutions to disclose

children's free and reduced price meal eligibility information to Medicaid and SCHIP. Institutions may then elect to do so. Children's program eligibility information may only be disclosed to Medicaid or SCHIP when both the State agency and the institution so elect, the parent/guardian does not decline to have their eligibility information disclosed as described in paragraph (i)(5), and the requirements in this paragraph (i) are met.

(2) *What information may we disclose for use by Medicaid and SCHIP?* The State agency or institution, as appropriate, may disclose children's names, eligibility status (whether they are eligible for free or reduced price meals), and any other eligibility information obtained through the free and reduced price meal application to persons directly connected with the administration of Medicaid or SCHIP.

(3) *Who are persons ''directly connected'' with the administration of Medicaid and SCHIP?* State employees and persons authorized under Federal and State Medicaid and SCHIP requirements to carry out initial processing of Medicaid or SCHIP applications or to make eligibility determinations are persons directly connected with the administration of Medicaid and SCHIP for purposes of disclosure of children's free and reduced price meal eligibility information.

(4) *What are the restrictions on how Medicaid and SCHIP use children's free and reduced price meal eligibility information?* Medicaid and SCHIP agencies and health insurance program operators receiving children's free and reduced price meal eligibility information may only use the information to seek to enroll children in Medicaid or SCHIP. The Medicaid and SCHIP enrollment process may include targeting and identifying children from low-income households who are potentially eligible for Medicaid or SCHIP for the purpose of seeking to enroll them in Medicaid or SCHIP.

(5) *What are the requirements for notifying households of potential disclosure to Medicaid or SCHIP?* The State agency or institution, as appropriate, must notify parents/guardians that children's free or reduced price meal eligibility information will be disclosed to Medicaid and/or SCHIP unless the parent/guardian elects not to have their information disclosed. Additionally, the State agency or institution, as appropriate, must give parents/guardians an opportunity to elect not to have their information disclosed to Medicaid or SCHIP. Only the parent or guardian who is a member of the household or family for purposes of the free and reduced price meal or free milk application may decline the disclosure of eligibility information. The notification must inform parents/guardians that they are not required to consent to the disclosure, that the information, if disclosed, will be used to identify children eligible for and to seek to enroll children in a health insurance program, and that their decision will not affect their children's eligibility for free or reduced price meals. The notification may be included in the letter/notice to parents/guardians that accompanies the free and reduced price application, on the application itself or in a separate notice provided to parents/guardians. The notice must give parents/guardians adequate time to respond. For children determined eligible through direct certification, the notice of potential disclosure may be included in the document informing parents/guardians of their children's eligibility for free meals through direct certification.

(6) *May social security numbers be disclosed?* The State agency or institution, as appropriate, may disclose social security numbers to any programs or persons authorized to receive all program eligibility information under this paragraph (i), provided parents/guardians have not declined to have their information disclosed. However, State agencies and institutions that plan to disclose social security numbers must give notice of the planned use of the social security numbers. This notice must be in accordance with section 7(b) of the Privacy Act of 1974 (5 U.S.C. 552a note). The application must include substantially the following language for disclosures of social security numbers to Medicaid or SCHIP: ''The social security number may also be disclosed to Medicaid and the State Children's

Health Insurance Program for the purpose of identifying and seeking to enroll eligible children in one of these health insurance programs.'' This language is in addition to the notice required in paragraph (e)(1)(i)(F) of this section. State agencies and institutions are responsible for drafting the appropriate notice for disclosures of social security numbers.

(7) *Are agreements required before disclosing program eligibility information?* The State agency or institution, as appropriate, must have a written agreement with the State or local agency or agencies administering Medicaid or SCHIP prior to disclosing children's free and reduced price eligibility information. At a minimum, the agreement must:

(i) Identify the health insurance program or health agency receiving children's eligibility information;

(ii) Describe the information that will be disclosed;

(iii) Require that the Medicaid or SCHIP agency use the information obtained and specify that the information must only be used to seek to enroll children in Medicaid or SCHIP;

(iv) Describe how the information will be protected from unauthorized uses and disclosures;

(v) Describe the penalties for unauthorized disclosure; and

(vi) Be signed by both the Medicaid or SCHIP program or agency and the State agency or institution, as appropriate.

(8) *What are the penalties for unauthorized disclosure or misuse of information?* In accordance with section 9(b)(2)(C)(v) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1758(b)(2)(C)(v)), any individual who publishes, divulges, discloses or makes known in any manner, or to any extent not authorized by statute or this section, any information obtained under this paragraph (i) will be fined not more than $1,000 or imprisoned for up to 1 year, or both.

(9) *What are the State agency's responsibilities regarding disclosures?* State agencies that elect to allow disclosure of children's free and reduced price meal eligibility information to Medicaid or SCHIP, as provided in this paragraph (i), must ensure that any institution acting in accordance with that option:

(i) Has a written agreement with the State or local agency or agencies administering health insurance programs for children under titles XIX and XXI of the Social Security Act (42 U.S.C. 1396 *et seq.* and 1397aa *et seq.*) that requires the health agencies to use children's free and reduced price meal eligibility information to seek to enroll children in those health insurance programs; and

(ii) Notifies each household of the information that will be disclosed, that the information disclosed will be used only to seek to enroll children in Medicaid or SCHIP and provides each parent/guardian with an opportunity to elect not to have the information disclosed.

[47 FR 36527, Aug. 20, 1982, as amended at 49 FR 14078, Apr. 10, 1984; 50 FR 19310, May 8, 1985; 50 FR 20197, May 15, 1985; 52 FR 36907, Oct. 2, 1987; 53 FR 52594, Dec. 28, 1988; Amdt. 22, 55 FR 1378, Jan. 14, 1990; 61 FR 25555, May 22, 1996; 62 FR 904, Jan. 7, 1997; 62 FR 5519, Feb. 6, 1997; 62 FR 23619, May 1, 1997; 63 FR 9105, Feb. 24, 1998; 63 FR 9729, Feb. 26, 1998; 66 FR 2203, Jan. 11, 2001]

Subpart F—Food Service Equipment Provisions

§ 226.24 Property management requirements.

Institutions and administering agencies shall follow the policies and procedures governing title, use, and disposition of equipment obtained by purchase, whose cost was acquired in whole or part with food service equipment assistance funds in accordance with the Department's Uniform Federal Assistance Regulations (7 CFR part 3015).

[48 FR 41142, Sept. 14, 1983]

Subpart G—Other Provisions

§ 226.25 Other provisions.

(a) *Grant closeout procedures.* Grant closeout procedures for the Program shall be in accordance with the Uniform Federal Assistance Regulations.

(b) *State requirements.* Nothing contained in this part shall prevent a State agency from imposing additional requirements for participation in the

Program which are not inconsistent with the provisions of this part; however, any additional requirements shall be approved by FNSRO and may not deny the Program to an eligible institution.

(c) *Value of assistance.* The value of assistance to participants under the Program shall not be considered to be income or resources for any purposes under any Federal or State laws, including, but not limited to laws relating to taxation, welfare, and public assistance programs.

(d) *Maintenance of effort.* Expenditure of funds from State and local sources for the maintenance of food programs for children shall not be diminished as a result of funds received under the Act.

(e) *Fraud penalty.* Whoever embezzles, willfully misapplies, steals, or obtains by fraud any funds, assets, or property that are the subject of a grant or other form of assistance under this part, whether received directly or indirectly from the Department or whoever receives, conceals, or retains such funds, assets, or property to his use or gain, knowing such funds, assets, or property have been embezzled, willfully misapplied, stolen, or obtained by fraud shall, if such funds, assets, or property are of the value of $100 or more, be fined not more than $10,000 or imprisoned not more than five years, or both, or, if such funds, assets, or property are of value of less than $100, shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

(f) *Claims adjustment authority.* The Secretary shall have the authority to determine the amount of, to settle, and to adjust any claim arising under the Program, and to compromise or deny such claim or any part thereof. The Secretary shall also have the authority to waive such claims if the Secretary determines that to do so would serve the purposes of the program. This provision shall not diminish the authority of the Attorney General of the United States under section 516 of title 28, U.S. Code, to conduct litigation on behalf of the United States.

(g) *Special retroactivity provisions.* Notwithstanding any other provisions contained in this part, the following shall apply:

(1) State agencies shall provide reimbursement for meals served by any adult day care center between October 1, 1987 and the date of the initial Program agreement between the State agency and the center under the following conditions, provided that:

(i) The center can document that, for any meals claimed:

(A) Meals served met all requirements including items and quantities served;

(B) Free and reduced-price applications were on file if reimbursement for free or reduced-price meals is sought;

(C) Meal counts by category (free, reduced-price and paid) and type served (breakfast, lunch, supper and supplement) are available;

(D) Appropriate food service revenue and expenditure records are available;

(E) Reimbursement has not been received under title III of the Older Americans Act for the claimed meals and CCFP reimbursement does not duplicate other funding for the claimed meals; and

(ii) The application for Program participation is postmarked or submitted to the State agency no later than April 17, 1989, and the claims for reimbursement for the meals served between October 1, 1987 and the date of the initial agreement between the State agency and the center are postmarked or submitted to the State agency no later than April 17, 1989 or the date set by § 226.10(e), whichever is later.

(2) Alternative documentation for free meal eligibility for adult participants shall be based on the following:

(i) Beginning with October 1, 1987, documentation of membership in a food stamp household;

(ii) For the period October 1, 1987 through September 30, 1988, documentation of membership in an AFDC assistance unit; and

(iii) Beginning October 1, 1988, documentation of receipt of assistance under Medicaid or SSI.

(3) For the period October 1, 1987 through September 30, 1988, the family of an adult participant applying for free or reduced-price meals shall include a group of related or nonrelated individuals, who are not residents of an institution or boarding house, but who

are living as one economic unit. However, beginning October 1, 1988, the family of an adult participant applying for free or reduced-price meals shall include only the adult participant and any spouse or dependent(s) residing with the adult participant.

[47 FR 36527, Aug. 20, 1982, as amended at 53 FR 52597, Dec. 28, 1988; 54 FR 13049, Mar. 30, 1989]

§ 226.26 Program information.

Persons desiring information concerning the Program may write to the appropriate State agency or Regional Office of FNS as indicated below:

(a) In the States of Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont: Northeast Regional Office, FNS, U.S. Department of Agriculture, 10 Causeway Street, Room 501, Boston, MA 02222–1065.

(b) In the States of Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Puerto Rico, Virginia, Virgin Islands, and West Virginia: Mid-Atlantic Regional Office, FNS, U.S. Department of Agriculture, 300 Corporate Boulevard, Robbinsville, NJ 08691–1598.

(c) In the States of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee: Southeast Regional Office, FNS, U.S. Department of Agriculture, 61 Forsyth Street, SW., Room 8T36, Atlanta, GA 30303.

(d) In the States of Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin: Midwest Regional Office, FNS, U.S. Department of Agriculture, 77 Jackson Boulevard, 20th Floor, Chicago, IL 60604–3507.

(e) In the States of Colorado, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah and Wyoming: Mountain Plains Regional Office, FNS, U.S. Department of Agriculture, 1244 Speer Boulevard, Suite 903, Denver, CO 80204.

(f) In the States of Arkansas, Louisiana, New Mexico, Oklahoma and Texas: Southwest Regional Office, FNS, U.S. Department of Agriculture, 1100 Commerce Street, Room 5–C–30, Dallas, TX 75242.

(g) In the States of Alaska, American Samoa, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon, the Commonwealth of the Northern Mariana Islands, and Washington: Western Regional Office, FNS, U.S. Department of Agriculture, 550 Kearney Street, Room 400, San Francisco, CA 94108.

[47 FR 36527, Aug. 20, 1982; 47 FR 46072, Oct. 15, 1982, as amended at 48 FR 40197, Sept. 6, 1983; 53 FR 52598, Dec. 28, 1988; 65 FR 12442, Mar. 9, 2000]

§ 226.27 Information collection/recordkeeping—OMB assigned control numbers.

7 CFR section where requirements are described	Current OMB control number
226.3–226.4	0584–0055
226.6–226.10	0584–0055
226.14–226.16	0584–0055
226.23–226.24	0584–0055

[50 FR 53258, Dec. 31, 1985]

APPENDIX A TO PART 226—ALTERNATE FOODS FOR MEALS

ALTERNATE PROTEIN PRODUCTS

A. What are the criteria for alternate protein products used in the Child and Adult Care Food Program?

1. An alternate protein product used in meals planned under the provisions in § 226.20 must meet all of the criteria in this section.

2. An alternate protein product whether used alone or in combination with meat or meat alternate must meet the following criteria:

a. The alternate protein product must be processed so that some portion of the nonprotein constituents of the food is removed. These alternate protein products must be safe and suitable edible products produced from plant or animal sources.

b. The biological quality of the protein in the alternate protein product must be at least 80 percent that of casein, determined by performing a Protein Digestibility Corrected Amino Acid Score (PDCAAS).

c. The alternate protein product must contain at least 18 percent protein by weight when fully hydrated or formulated. (''When hydrated or formulated'' refers to a dry alternate protein product and the amount of water, fat, oil, colors, flavors or any other substances which have been added).

d. Manufacturers supplying an alternate protein product to participating schools or institutions must provide documentation that the product meets the criteria in paragraphs A.2. through c of this appendix.

e. Manufacturers should provide information on the percent protein contained in the

dry alternate protein product and on an as prepared basis.

f. For an alternate protein product mix, manufacturers should provide information on:

(1) The amount by weight of dry alternate protein product in the package;

(2) Hydration instructions; and

(3) Instructions on how to combine the mix with meat or other meat alternates.

B. How are alternate protein products used in the Child and Adult Care Food Program?

1. Schools, institutions, and service institutions may use alternate protein products to fulfill all or part of the meat/meat alternate component discussed in § 226.20.

2. The following terms and conditions apply:

a. The alternate protein product may be used alone or in combination with other food ingredients. Examples of combination items are beef patties, beef crumbles, pizza topping, meat loaf, meat sauce, taco filling, burritos, and tuna salad.

b. Alternate protein products may be used in the dry form (nonhydrated), partially hydrated or fully hydrated form. The moisture content of the fully hydrated alternate protein product (if prepared from a dry concentrated form) must be such that the mixture will have a minimum of 18 percent protein by weight or equivalent amount for the dry or partially hydrated form (based on the level that would be provided if the product were fully hydrated).

C. *How are commercially prepared products used in the Child and Adult Care Food Program?*

Schools, institutions, and service institutions may use a commercially prepared meat or meat alternate product combined with alternate protein products or use a commercially prepared product that contains only alternate protein products.

[65 FR 12442, Mar. 9, 2000]

APPENDIX B TO PART 226 [RESERVED]

APPENDIX C TO PART 226—CHILD NUTRITION (CN) LABELING PROGRAM

1. The Child Nutrition (CN) Labeling Program is a voluntary technical assistance program administered by the Food and Nutrition Service (FNS) in conjunction with the Food Safety and Inspection Service (FSIS), and Agricultural Marketing Service (AMS) of the U.S. Department of Agriculture (USDA), and National Marine Fisheries Service of the U.S. Department of Commerce (USDC) for the Child Nutrition Programs. This program essentially involves the review of a manufacturer's recipe or product formulation to determine the contribution a serving of a commercially prepared product makes toward meal pattern requirements and a review of the CN label statement to ensure its accuracy. CN labeled products must be produced in accordance with all requirements set forth in this rule.

2. Products eligible for CN labels are as follows:

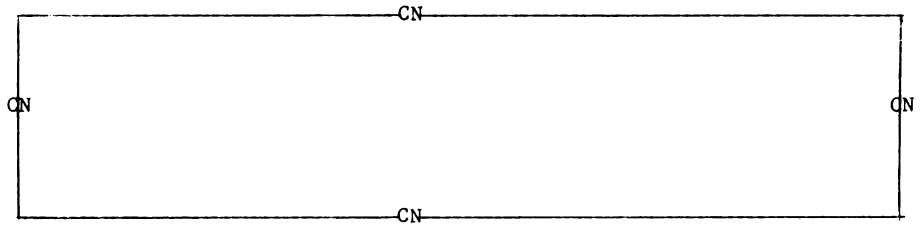
(a) Commercially prepared food products that contribute significantly to the meat/meat alternate component of meal pattern requirements of 7 CFR 210.10, 225.21, and 226.20 and are served in the main dish.

(b) Juice drinks and juice drink products that contain a minimum of 50 percent full-strength juice by volume.

3. For the purpose of this appendix the following definitions apply:

(a) *CN label* is a food product label that contains a CN label statement and CN logo as defined in paragraph 3 (b) and (c) below.

(b) The *CN logo* (as shown below) is a distinct border which is used around the edges of a ''CN label statement'' as defined in paragraph 3(c).



(c) The *CN label statement* includes the following:

(1) The product identification number (assigned by FNS),

(2) The statement of the product's contribution toward meal pattern requirements of 7 CFR 210.10, 220.8, 225.21, and 226.20. The statement shall identify the contribution of

a specific portion of a meat/meat alternate product toward the meat/meat alternate, bread/bread alternate, and/or vegetable/fruit component of the meal pattern requirements. For juice drinks and juice drink products the statement shall identify their contribution toward the vegetable/fruit component of the meal pattern requirements,

(3) Statement specifying that the use of the CN logo and CN statement was authorized by FNS, and

(4) The approval date.

For example:

```
                    CN                                  000000
     This 3.00 oz serving of raw beef pattie provides when cooked
CN   2.00 oz equivalent meat for Child Nutrition Meal Pattern      CN
     Requirements. (Use of  this logo and statement authorized
     by the Food and Nutrition Service, USDA 05-84.)
                    CN
```

(d) *Federal inspection* means inspection of food products by FSIS, AMS or USDC.

4. Food processors or manufacturers may use the CN label statement and CN logo as defined in paragraph 3 (b) and (c) under the following terms and conditions:

(a) The CN label must be reviewed and approved at the national level by the Food and Nutrition Service and appropriate USDA or USDC Federal agency responsible for the inspection of the product.

(b) The CN labeled product must be produced under Federal inspection by USDA or USDC. The Federal inspection must be performed in accordance with an approved partial or total quality control program or standards established by the appropriate Federal inspection service.

(c) The CN label statement must be printed as an integral part of the product label along with the product name, ingredient listing, the inspection shield or mark for the appropriate inspection program, the establishment number where appropriate, and the manufacturer's or distributor's name and address.

(1) The inspection marking for CN labeled non-meat, non-poultry, and non-seafood products with the exception of juice drinks and juice drink products is established as follows:

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INSPECTED BY THE
U.S. DEPT. OF AGRICULTURE
IN ACCORDANCE WITH
FNS REQUIREMENTS
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(d) Yields for determining the product's contribution toward meal pattern requirements must be calculated using the *Food Buying Guide for Child Nutrition Programs* (Program Aid Number 1331).

5. In the event a company uses the CN logo and CN label statement inappropriately, the company will be directed to discontinue the use of the logo and statement and the matter will be referred to the appropriate agency for action to be taken against the company.

6. Products that bear a CN label statement as set forth in paragraph 3(c) carry a warranty. This means that if a food service authority participating in the child nutrition programs purchases a CN labeled product and uses it in accordance with the manufacturer's directions, the school or institution will not have an audit claim filed against it for the CN labeled product for noncompliance with the meal pattern requirements of 7 CFR 210.10, 220.8, 225.21, and 226.20. If a State or Federal auditor finds that a product that is CN labeled does not actually meet the meal pattern requirements claimed on the label, the auditor will report this finding to FNS. FNS will prepare a report of the findings and send it to the appropriate divisions of FSIS and AMS of the USDA, National Marine Fisheries Services of the USDC, Food and Drug Administration, or the Department of Justice for action against the company.

Any or all of the following courses of action may be taken:

(a) The company's CN label may be revoked for a specific period of time;

(b) The appropriate agency may pursue a misbranding or mislabeling action against the company producing the product;

(c) The company's name will be circulated to regional FNS offices;

(d) FNS will require the food service program involved to notify the State agency of the labeling violation.

7. FNS is authorized to issue operational policies, procedures, and instructions for the CN Labeling Program.

To apply for a CN label and to obtain additional information on CN label application procedures write to: CN Labels, U.S. Department of Agriculture, Food and Nutrition Service, Nutrition and Technical Services

Division, 3101 Park Center Drive, Alexandria, Virginia 22302.

[49 FR 18457, May 1, 1984; 49 FR 45109, Nov. 15, 1984]

PART 227—NUTRITION EDUCATION AND TRAINING PROGRAM

Subpart A—General

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APPENDIX TO PART 227—APPORTIONMENT OF FUNDS FOR NUTRITION EDUCATION AND TRAINING

AUTHORITY: Sec. 15, Pub. L. 95–166, 91 Stat. 1340 (42 U.S.C. 1788), unless otherwise noted.

SOURCE: 44 FR 28282, May 15, 1979, unless otherwise noted.

Subpart A—General

§ 227.1 General purpose and scope.

The purpose of these regulations is to implement section 19 of the Child Nutrition Act (added by Pub. L. 95–166, effective November 10, 1977) which authorizes the Secretary to formulate and carry out a nutrition information and education program through a system of grants to State agencies to provide for (a) the nutritional training of educational and foodservice personnel, (b) the foodservice management training of school foodservice personnel, and (c) the conduct of nutrition education activities in schools and child care institutions. To the maximum extent possible, the Program shall fully utilize the child nutrition programs as a learning experience.

§ 227.2 Definitions.

(a) *Administrative costs* means costs allowable under Federal Management Circular 74–4, other than program costs, incurred by a State agency for overall administrative and supervisory purposes, including, but not limited to, costs of financial management, data processing, recordkeeping and reporting, personnel management, and supervising the State Coordinator.

(b) *Child Care Food Program* means the program authorized by section 17 of the National School Lunch Act, as amended.

(c) *Child Nutrition Programs* means any or all of the following: National School Lunch Program, School Breakfast Program, Child Care Food Program.

(d) *Commodity only school* means a school which has entered into an agreement under § 210.15a(b) of this subchapter to receive commodities donated under part 250 of this chapter for a nonprofit lunch program.

(e) *Department* means the U.S. Department of Agriculture.

(f) *Federal fiscal year* means a period of 12 calendar months beginning October 1 of any calendar year and ending September 30 of the following calendar year.

(g) *FNS* means the Food and Nutrition Service of the Department.

(h) *FNSRO* means the appropriate Regional Office of the Food and Nutrition Service of the Department.

(i) *Institution* means any licensed, nonschool, public or private nonprofit organization providing day care services where children are not maintained in permanent residence, including but not limited to day care centers, settlement houses, after school recreation centers, neighborhood centers, Head Start centers, and organizations providing day care services for handicapped children and includes a sponsoring organization under the Child Care Food Program regulations.

(j) *National School Lunch Program* means the lunch program authorized by the National School Lunch Act.

(k) *Needs assessment* means a systematic process for delineating the scope, extent (quantity), reach and success of any current nutrition education activities, including those relating to:

(1) Methods and materials available inside and outside the classroom; (2) training of teachers in the principles of nutrition and in nutrition education strategies, methods, and techniques; (3) training of school foodservice personnel in the principles and practices of foodservice management; and (4) compilation of existing data concerning factors impacting on nutrition education and training such as statistics on child health and competency levels achieved by foodservice personnel.

(l) *Program costs* means costs, other than administrative costs, incurred in connection with any or all of the following:

(1) The State Coordinator's salary, and related support personnel costs, including fringe benefits and travel expenses; (2) applying for assessment and planning funds; (3) the conduct of the needs assessment; (4) the development of the State Plan; and (5) the implementation of the approved State Plan, including related support services.

(m) *Program* means the Nutrition Education and Training Program authorized by section 19 of the Child Nutrition Act of 1966, as amended.

(n) *School* means: (1) An educational unit of high school grade or under operating under public or nonprofit private ownership in a single building or complex of buildings. The term ''high school grade or under'' includes classes of preprimary grade when they are conducted in a school having classes of primary or higher grade, or when they are recognized as a part of the educational system in the State, regardless of whether such preprimary grade classes are conducted in a school having classes of primary or higher grade.

(2) With the exception of residential summer camps which participate in the Summer Food Service Program for Children and private foster homes, any distinct part of a public or nonprofit private institution or any public or nonprofit private child care institution, which (i) maintains children in residence, (ii) operates principally for the care of children and (iii) if private, is licensed to provide residential child care services under the appropriate licensing code by the State or a subordinate level of government. The term ''child care institution'' includes, but is not limited to: Homes for the mentally retarded, the emotionally disturbed, the physically handicapped, and unmarried mothers and their infants; group homes; halfway houses; orphanages; temporary shelters for abused children and for runaway children; long term care facilities of chronically ill children; and juvenile detention centers.

(3) With respect to the Commonwealth of Puerto Rico, non-profit child care centers certified as such by the Governor of Puerto Rico.

(o) *School Breakfast Program* means the program authorized by section 4 of the Child Nutrition Act of 1966, as amended.

(p) *Foodservice personnel* means those individuals responsible for planning, preparing, serving and otherwise operating foodservice programs funded by USDA grants as provided for in the National School Lunch Act and the Child Nutrition Act of 1966.

(q) *State* means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Northern Mariana Islands.

(r) *State agency* means the State educational agency.

(s) *State educational agency* means, as the State legislature may determine:

(1) The Chief State School Officer (such as the State Superintendent of Public Instruction, Commissioner of Education, or similar officer), or (2) a board of education controlling the State Department of Education.

§ 227.3 Administration.

(a) Within the Department, FNS shall act on behalf of the Department in the administration of the Program.

(b) Within the States, responsibility for administration of the Program shall be in the State agency, except that FNSRO shall administer the Program with respect to nonprofit private schools or institutions in any State where the State agency is prohibited

by law from administering the Program in nonprofit private schools or institutions.

§ 227.4 Application and agreement.

After the initial fiscal year of participation each State agency desiring to take part in the Program shall enter into a written agreement with the Department for the administration of the Program in accordance with the provisions of this part. The State agency shall execute Form FNS–74, which shall constitute the written agreement.

(Approved by the Office of Management and Budget under control number 0584–0062)

(44 U.S.C. 3506)

[44 FR 28282, May 15, 1979, as amended at 47 FR 746, Jan. 2, 1982]

§ 227.5 Program funding.

(a) *Total grant.* The total grant to each State agency for each fiscal year for program costs and administrative costs shall consist of an amount equal to 50 cents per child enrolled in schools and institutions within the State during such year, but in no event shall such grant be less than $50,000: *Provided, however,* That a State's total grant shall be reduced proportionately if the State does not administer the program in nonprofit private schools and institutions. If funds appropriated for a fiscal year are insufficient to pay the amount to which each State is entitled, the amount of such grant shall be ratably reduced to the extent necessary so that the total of the amounts paid to each State does not exceed the amount of appropriated funds. Each State agency which receives funds based on all children enrolled in public and nonprofit private schools and institutions shall make the Program available to those schools and institutions. Enrollment figures shall be the latest available as certified by the Department of Education.

(b) *First fiscal year participation*—(1) *Assessment and planning grant.* A portion of the total grant shall be made available to each State agency during its first fiscal year of participation as an assessment and planning grant for:

(i) Employing a State Coordinator, as provided for in § 227.30, and related support personnel costs including fringe benefits and travel expenses, (ii) undertaking a needs assessment in the State, (iii) developing a State Plan for nutrition education and training within the State, and (iv) applying for the State assessment and planning grant.

(2) *Advances for the assessment and planning grant.* FNS shall make advances to any State desiring to participate in the Program, to enable the State to carry out the responsibilities set forth in paragraph (b)(1) of this section. Advances shall be made in two phases, in accordance with the following procedures:

(i) Initially, State agencies may receive an advance up to $35,000 for the purpose of hiring a State coordinator, as provided for in § 227.30. Application for such an advance shall be made on Form AD–623 when the State agency applies for participation in the Program. The information required for this advance shall be set out in Part III, Budget Information, Section B, Budget Categories. The State agency shall there indicate the funds required for the salary, travel, and fringe benefits of the State Coordinator, and related personnel costs necessary to carry out the duties and responsibilities of the State Coordinator.

(ii) After appointment of the State Coordinator, the State agency may receive an additional advance of up to 50 percent of the total grant to which the State agency is entitled for the first year of participation, after deduction of the advance made for the State Coordinator under § 227.5(b)(2), but not to exceed $100,000, for the purpose of undertaking a needs assessment in the State, developing a State Plan for nutrition education and training, and applying for the assessment and planning grant. Application for such advance shall be made by amending Part III, Budget Information, of Form AD–623.

(3) *Funds for implementing State plan.* (i) States receiving advances. Each State agency shall receive the remaining portion of its total grant in order to implement its State plan, which has been approved by FNS, if the State agency has carried out the responsibilities for which advances were received. With the submission of the State plan each State agency may apply for the funds remaining of its total grant.

(ii) States previously participating. Those States which previously participated may apply for their total grant upon submission of the State Plan.

(c) *Administrative costs*. Each State agency may use up to 15 percent of its total grant for up to 50 percent of its cash expenditures for administrative costs.

(d) *Payment to State agencies*. Approval of the State plan by FNS is a prerequisite to the payment of funds to the State agency. All funds made available for the Program shall be provided through a letter of credit or check, as determined by FNS.

(e) *Unobligated funds*. The State agency will release to FNS any Federal funds made available to it under the Program which are unobligated by September 30 of each fiscal year.

(f) *Funds for existing programs*. State agencies shall maintain their present level of funding for existing nutrition education and training programs. FNS funds for the Program shall augment current nutrition education and training programs and projects. Funds made available by FNS for this Program shall not replace such funds.

[44 FR 28282, May 15, 1979, as amended at 52 FR 8223, Mar. 17, 1987]

Subpart B—State Agency Provisions

§ 227.30 Responsibilities of State agencies.

(a) *General*. Except to the extent that it would be inconsistent with this part, the Program shall be administered in accordance with the applicable provisions of the Departmental regulations 7 CFR part 3015.

(b) *Application*. For the initial fiscal year of participation States shall make application for administration of the Program on Form and are responsible for amending Form AD–623 to request advance funding. In the initial application, in connection with the request for advance funding for the State Coordinator, part IV, Program Narrative, of Form AD–623 shall indicate the State agency's procedures for hiring a State Coordinator and contain a justification for the dollar value of salary requested. The narrative shall also indicate the time frame for hiring the State Coordinator. In amending Form AD–623 in connection with the request for advance funding for the remaining portion of the assessment and planning grant, part IV, Program Narrative, shall set forth the details for areas of the assessment and planning grant, other than employment of the State Coordinator.

(b–1) If any State does not apply for participation in the Program, by April 1 of a fiscal year by submitting Form AD 623 as required in § 227.30(b) and § 227.5(b)(2)(i), the State's share of the funds shall be provided to the remaining States, so long as this does not take the remaining States' grants above 50 cents per child enrolled in schools or institutions, except in those States which receive a minimum grant of $75,000 for a fiscal year.

(c) *State Coordinator*. After execution of the agreement the State agency shall appoint a nutrition education specialist to serve as a State Coordinator for the Program who may be employed on a full-time or part-time basis. The State Coordinator may be a State employee who reports directly or indirectly to the Chief State School Officer or an individual under contract with the State agency to serve as the State Coordinator. A State agency shall not contract with an organization to provide for the services of a State Coordinator. The State Coordinator, at a minimum, shall meet both of the following requirements:

(1) The State Coordinator shall have a Masters degree or equivalent experience. Equivalent experience is experience related to the position being filled or as defined by State civil service or personnel policies. If the Masters degree is not in foods and nutrition or dietetics, the Bachelors degree shall include academic preparations in foods and nutrition or dietetics.

(2) In addition, the State Coordinator shall have recognized and demonstrated skills in management and education through at least three years experience in one or more of these areas: Elementary or secondary education, but not limited to classroom teaching; foodservice management and training for adults; community nutrition or public health programs; foodservice operations for children; or

community action or assistance programs.

(d) *Needs assessment.* Each State agency shall conduct an ongoing needs assessment in accordance with § 227.36 The needs assessment shall be the data base utilized in formulating the State plan for each fiscal year. For the first year of participation a State agency may apply for funds in order to carry out the needs assessment in accordance with § 227.5.

(e) *Developing and submitting the State plan.* Each State agency shall submit to the Secretary a State plan for Nutrition Education and Training in accordance with § 227.37 prior to the beginning of each fiscal year. The date of submission for the State plan shall be designated by the Secretary. The Secretary shall act on the submitted State plan within 60 days after it is received. For the first year of participation the State agency shall submit to the Secretary, within nine months after the award of the planning and assessment grant, a State plan for nutrition education and training in accordance with § 227.37.

(f) *Records and reports.* (1) Each State agency shall maintain full and complete records concerning Program operations and shall retain such records in accordance with OMB Circular A–102 Attachment C.

(2) Each State agency shall submit to FNS a quarterly Financial Status Report, Form SF–269, as required by OMB Circular A–102, Attachment H.

(3) Each State agency shall submit an annual performance report (Form FNS–42) to FNS within 30 days after the close of the Fiscal Year.

(4) Each State agency shall maintain a financial management system in accordance with Federal Management Circular 74–4 and OMB Circular A–102, Attachment G.

(5) Each State agency shall comply with the requirements of OMB Circular A–102, Attachments N and O, and Federal Management Circular 74–4, for property management and the procurement of supplies, equipment and other services with these Program funds.

(6) Any income accruing to a State or local agency because of the Program shall be used in accordance with OMB Circular A–102, Attachment E.

(g) *Nondiscrimination.* Each State agency shall ensure that Program operations are in compliance with the Department's nondiscrimination regulations (part 15 of this title) issued under title VI of the Civil Rights Act of 1964.

(Approved by the Office of Management and Budget under control number 0584–0062)

(44 U.S.C. 3506; E.O. 12372, July 14, 1982, 47 FR 30959, sec. 401(b) of the Intergovernmental Cooperation Act of 1968 (31 U.S.C. 6506(c))

[44 FR 28282, May 15, 1979, as amended at 45 FR 14842, Mar. 7, 1980; 47 FR 746, Jan. 7, 1982; 47 FR 22072, May 21, 1982; 48 FR 29123, June 24, 1983; 48 FR 39213, Aug. 30, 1983]

§ 227.31 Audits, management reviews, and evaluations.

(a) *Audits.* (1) Examinations by the State agencies in the form of audits or internal audits shall be performed in accord with OMB Circular A–102, Attachment G.

(b) *Management reviews.* The State agency is responsible for meeting the following requirements:

(1) The State agency shall establish management evaluation and review procedures to monitor compliance with the State plan for local educational agencies and land grant colleges, other institutions of higher education and public or private nonprofit educational or research agencies, institutions, or organizations.

(2) The State agency shall require participating agencies to establish program review procedures to be used in reviewing the Agencies operations and those of subsidiaries or contractors.

(c) *Evaluations.* The State agency shall conduct formal evaluations of program activities at least annually. These evaluations shall be aimed at assessing the effectiveness of the various activities undertaken by the State and local agencies. State officials shall analyze why some activities have proved effective while others have not and shall initiate appropriate improvements. The results of the evaluations shall be used to make adjustments in ongoing activities and to plan activities and programs for the next year's State plan. The State agency shall submit a plan for evaluation of Program

activities as part of the State plan in accordance with § 227.37(b)(14).

(Approved by the Office of Management and Budget under control number 0584–0062)

(44 U.S.C. 3506; E.O. 12372 (July 14, 1982, 47 FR 30959); sec. 401(b) Intergovernmental Cooperation Act of 1968 (31 U.S.C. 6506(c))

[44 FR 28282, May 15, 1979, as amended at 47 FR 746, Jan. 7, 1982; 48 FR 29123, June 24, 1983]

Subpart C—State Coordinator Provisions

§ 227.35 Responsibilities of State coordinator.

At a minimum, the State Coordinator shall be responsible for: (a) Preparation of a budget, (b) the conduct of the needs assessment, (c) development of a State plan, (d) implementation of the approved State Plan, (e) evaluation of the progress and implementation of the State Plan, (f) coordination of the Program with the Child Nutrition Programs at the State and local levels, (g) coordination of the Program with other nutrition education and training programs conducted with Federal or State funds, (h) communication of needs and accomplishments of State nutrition education and training programs to parents and the communty at large, (i) use of Program funds in compliance with all regulations, instructions, or other guidance material provided by FNS, (j) coordinating the submission and preparation of the Program financial status report (SF–269), and (k) annual evaluation of the effectiveness of the State Plan.

§ 227.36 Requirements of needs assessment.

(a) The needs assessment is an ongoing process which identifies the discrepancies between ''what should be'' and ''what is'' and shall be applied to each category listed below to enable State agencies to determine their nutrition education and training needs for each year. The needs assessment shall identify the following as a minimum:

(1) Children, teachers, and food service personnel in need of nutrition education and training; (2) existing State or federally funded nutrition education and training programs including their: (i) Goals and objectives; (ii) source and level of funding; (iii) any available documentation of their relative success or failure; and (iv) factors contributing to their success or failure; (3) offices or agencies at the State and local level designated to be responsible for nutrition education and training of teachers and school food service personnel; (4) any relevant State nutrition education mandates; (5) funding levels at the State and local level for preservice and inservice nutrition education and training of food service personnel and teachers; (6) State and local individuals, and groups conducting nutrition education and training; (7) materials which are currently available for nutrition education and training programs, and determine for each: (i) Subject area and content covered; (ii) grade level; (iii) how utilized; (iv) acceptability by user; (v) currency of materials; (8) any major child nutrition related health problems in each State; (9) existing sources of primary and secondary data, including any data that has been collected for documenting the State's nutrition education and training needs; (10) available documentation of the competencies of teachers in the area of nutrition education; (11) available documentation of the competencies of food service personnel; (12) problems encountered by schools and institutions in procuring nutritious food economically and in preparing nutritious appetizing meals and areas where training can assist in alleviating these problems; (13) problems teachers encounter in conducting effective nutrition education activities and areas where inservice training or materials can assist in alleviating these problems; (14) problems in dietary habits of children and areas where nutrition education may assist in positive changes; (15) problems encountered in coordinating the nutrition education by teachers with the meal preparation and activities of the food service facility and areas where training might alleviate these problems.

(b) The needs assessment should be an ongoing process and provide not only data on current activities but also a description of the problems and needs in each category and whether training

or materials would help alleviate the identified problems.

§ 227.37 State plan for nutrition education and training.

(a) *General.* Each fiscal year the State agency shall submit a State plan for Nutrition Education and Training for approval to FNS. The State plan shall be based on the needs identified from the ongoing needs assessment and evaluation of the State plans from previous years. The State plan shall be submitted in accordance with § 227.30(e). Guidance for the preparation and submission of the State plan shall be provided by FNS.

(b) *Requirements for the State plan.* The State plan shall provide the following:

(1) Description of the ongoing needs assessment conducted within the State;

(2) The findings of the needs assessment within the State used to determine the goals and objectives of the State plan and results of the evaluation of the previous years' State plans for:

(i) Inservice training of food service personnel, (ii) nutrition education of children, (iii) inservice training in nutrition education for teachers;

(3) Goals and objectives of the State plan;

(4) Identification of the priority populations to be reached during the fiscal year;

(5) Provisions for coordinating the nutrition education and training programs carried out with funds made available under this part with any related publicly supported programs being carried out within the State to include:

(i) Identification of existing programs that may be utilized, (ii) description of how representatives of such groups are to be involved in the planning and implementation of the State program; (iii) criteria and procedure for selection of such representatives;

(6) Plans to solicit advice and recommendations of the National Advisory Council on Child Nutrition, State educational or other appropriate agencies; the U.S. Department of Education; the U.S. Department of Health and Human Services; and other interested groups and individuals concerned with improvement of child nutrition.

(7) Plans, including a timetable, for reaching all children in the State with instruction in the nutritional value of foods and the relationship among food, nutrition and health, for inservice training of food service personnel in the principles and skills of food service management and nutrition and for inservice instruction for teachers in sound principles of nutrition education;

(8) Any plans for using, on a priority basis, the resources of the land-grant colleges eligible to receive funds under the Act of July 2, 1862 (12 Stat. 503; 7 U.S.C. 301 through 305, 307, and 308) or the Act of August 30, 1890 (26 Stat. 417, as amended; 7 U.S.C. 312 through 326 and 328), including the Tuskegee Institute;

(9) A brief description of the program or activities to be contracted with land-grant colleges, described above, and other institutions of higher education, and other public or private nonprofit educational or research agencies, institutions or organizations for carrying out nutrition education and training activities;

(10) A brief description of pilot projects, including objectives, subject matter and expected outcomes, to be contracted with the land-grant colleges described above, other institutions of higher education, public and nonprofit educational or research agencies, institutions, or organizations for but not limited to projects for development, demonstration, testing and evaluation of curricula for use in early childhood, elementary, and secondary education programs;

(11) Identification of schools, school districts, and sponsoring agencies which may agree to participate in the nutrition education and training program;

(12) A brief description of (i) State agency sponsored pilot projects including objectives, subject matter and anticipated outcomes and (ii) nutrition education and training programs to be conducted by schools, school districts, and sponsoring agencies receiving funds under this provision including

objectives, subject matter and expected outcomes;

(13) Time frame and milestones for implementation of State plans;

(14) Plans to evaluate program activities including an evaluation component for each objective of the State plan;

(15) Description of staff available to perform State agency responsibilities of the State nutrition education and training program which includes:

(i) Definition of duties and responsibilities, (ii) minimum professional qualifications, (iii) number and classification of personnel;

(16) A description of the procedures used to comply with the requirements of Title VI of the Civil Rights Act of 1964, including racial and ethnic participation data collection, public notification procedures and the annual civil rights compliance review process;

(17) Plans for the conduct of audits in accordance with § 227.31;

(18) A budget detailing the use of program funds;

(19) Description of the financial management system in accordance with § 227.30(e);

(20) Description of the management evaluation and review procedures established in accordance with § 227.31(b); and

(21) Other components that the States determine necessary.

(c) States eligible to receive additional funds pursuant to § 227.30(b–1) shall submit an amendment to the State plan to the Food and Nutrition Service Regional Office for prior approval.

[44 FR 28282, May 15, 1979, as amended at 45 FR 14842, Mar. 7, 1980; 48 FR 39213, Aug. 30, 1983]

Subpart D—Miscellaneous

§ 227.40 Program information.

Persons desiring information concerning the program may write to the appropriate State agency or Regional Office of FNS as indicated below:

(a) In the States of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont: New England Regional Office, FNS, U.S. Department of Agriculture, 33 North Avenue, Burlington, Mass. 01803.

(b) In the States of Delaware, District of Columbia, Maryland, New Jersey, New York, Pennsylvania, Puerto Rico, Virginia, Virgin Islands, and West Virginia: Mid-Atlantic Regional Office, FNS, U.S. Department of Agriculture, One Vahlsing Center, Robbinsville, N.J. 08691.

(c) In the States of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee: Southeast Regional Office, FNS, U.S. Department of Agriculture, 1100 Spring Street NW., Atlanta, Ga. 30309.

(d) In the States of Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin: Midwest Regional Office, FNS, U.S. Department of Agriculture, 536 South Clark Street, Chicago, Ill. 60605.

(e) In the States of Colorado, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah, and Wyoming: Mountain Plains Regional Office, FNS, U.S. Department of Agriculture, 2420 West 26th Avenue, Room 430D, Denver, Colo. 80211.

(f) In the States of Arkansas, Louisiana, New Mexico, Oklahoma, and Texas: Southwest Regional Office, FNS, U.S. Department of Agriculture, 1100 Commerce Street, Room 5–C–30, Dallas, Tex. 75242.

(g) In the States of Alaska, American Samoa, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon, Trust Territory of the Pacific Islands, the Northern Mariana Islands, and Washington: Western Regional Office, FNS, U.S. Department of Agriculture, 550 Kearny Street, Room 400, San Francisco, Calif. 94108.

§ 227.41 Recovery of funds.

(a) FNS may recover funds from a State agency under any of the following conditions:

(1) If FNS determines, through a review of the State agency's reports, program, or financial analysis, monitoring, audit or otherwise, that the State agency's performance is inadequate or that the State agency has failed to comply with this part or FNS instructions and guidelines.

(2) If FNS determines that the State agency is not expending funds at a rate commensurate with the amount of

funds distributed or provided for expenditure under the program.

(3) If FNS determines that a State agency is not providing full and timely reports.

(b) FNS shall effect such recoveries of funds through adjustments in the amount of funds provided under the program.

§ 227.42 Grant closeout procedures.

The requirements of OMB Circular A–102, Attachment L, are applicable in the termination of any grant under this part.

§ 227.43 Participation of adults.

Nothing in this part shall prohibit a State or local educational agency from making available or distributing to adults education materials, resources, activities or programs authorized by this part.

§ 227.44 Management evaluations and reviews.

FNS shall establish evaluation procedures to determine whether State agencies carry out the purpose and provisions of this part, the State agency plan and FNS guidelines and instructions. To the maximum extent possible the State's performance shall be reviewed and evaluated by FNS on a regular basis including the use of public hearings.

APPENDIX TO PART 227—APPORTIONMENT OF FUNDS FOR NUTRITION EDUCATION AND TRAINING

Pursuant to sections 19(j) of the Child Nutrition Act of 1966, as amended (42 U.S.C. 1788), funds available for the fiscal year ending September 30, 1980, are apportioned among the States as follows:

[See footnotes at the end of Table.]

State	Public schools [1]	Private schools [2]	Residential child care institutions [3]	Nonresidential child care institutions [4]	Total [5]
Connecticut	231,069	38,488	1,260	2,866	273,683
Maine	93,406	6,538	387	808	101,139
Massachusetts	420,866	68,337	2,697	5,352	497,252
New Hampshire	67,087	7,978	331	1,160	76,556
Rhode Island	62,521	12,570	304	767	76,162
Vermont	39,419	3,814	247	579	75,000
	914,368	137,725	5,226	11,532	1,099,792
Delaware	43,210	7,277	107	1,339	75,000
District of Columbia	44,309	7,511	447	2,458	75,000
Maryland	315,196	51,992	1,292	5,234	373,714
New Jersey	520,438	117,060	3,930	8,588	650,016
New York	1,204,026	274,593	14,068	19,756	1,512,443
Pennsylvania	796,518	182,089	9,026	7,312	994,945
Puerto Rico	280,750	36,776	0	0	317,526
Virginia	410,660	34,947	6,239	6,068	457,914
Virgin Islands	9,783	2,452	11	0	75,000
West Virginia	154,000	4,942	770	854	160,566
	3,778,890	719,639	35,890	51,609	4,692,124
Alabama	296,412	21,949	892	10,607	329,860
Florida	589,122	57,440	2,116	19,074	667,752
Georgia [5]	424,042	27,708	2,783	14,806	469,339
Kentucky	269,690	27,786	3,685	3,652	304,813
Mississippi	192,134	25,802	541	12,175	230,652
North Carolina	452,523	22,104	3,052	19,722	497,401
South Carolina [5]	243,200	19,225	1,255	6,559	270,239
Tennessee	339,753	17,396	1,448	7,847	366,444
	2,806,876	219,410	15,772	94,442	3,136,500
Illinois	793,671	160,491	5,343	15,971	975,476
Indiana	433,267	39,967	2,814	5,279	481,327
Michigan	747,374	85,655	3,069	7,817	843,915
Minnesota	314,333	38,994	1,245	3,135	357,707
Ohio	818,192	110,561	5,836	10,767	945,356
Wisconsin	344,962	73,707	1,922	3,579	424,170
	3,451,799	509,375	20,229	46,548	4,027,951
Arkansas	177,730	8,095	385	4,453	190,663
Louisiana	317,817	64,562	1,551	6,307	390,237
New Mexico	108,673	5,448	235	2,619	116,975
Oklahoma	229,166	3,969	1,916	8,639	243,690
Texas	1,115,829	52,654	4,163	38,934	1,211,580

State	Public schools [1]	Private schools [2]	Residential child care institutions [3]	Nonresidential child care institutions [4]	Total [5]
	1,949,215	134,728	8,250	60,952	2,153,145
Colorado [5]	217,264	15,800	937	4,399	238,400
Iowa	221,255	25,957	3,204	2,631	253,047
Kansas	168,720	12,765	330	1,062	182,877
Missouri	350,248	54,950	1,271	6,629	413,098
Montana	63,950	3,425	75	677	75,000
Nebraska	115,891	17,629	376	1,694	135,590
North Dakota [5]	47,486	4,826	309	383	75,000
South Dakota	53,792	5,760	267	390	75,000
Utah	126,488	1,518	541	1,325	129,872
Wyoming	36,709	1,206	74	497	75,000
	1,401,803	143,836	7,384	19,687	1,652,884
Alaska	35,308	739	310	392	75,000
Samoa	3,616	778	0	0	75,000
Arizona	198,407	21,871	661	4,712	225,651
California	1,629,801	170,376	28,777	44,277	1,873,231
Guam	11,118	1,985	0	0	75,000
Hawaii	66,454	13,348	1,854	3,352	85,008
Idaho	79,009	1,868	119	860	81,856
Nevada	56,927	2,179	473	1,643	75,000
Oregon	183,441	9,379	859	3,703	197,382
Trust Territory	11,590	0	0	0	75,000
Washington	299,362	17,318	2,140	5,656	324,476
N Marianas	1,945	0	0	0	75,000
	2,576,978	239,841	35,193	64,595	3,237,604
	16,879,929	2,104,554	127,944	349,365	20,000,000

[1] Sources: (1) U.S. Department of Health, Education, and Welfare, Education Division, NCES, *Statistics of Public Schools, Fall 1977,* prepublication data, Table 5 for States and areas, except (2) Northern Marianas and Trust Territory, 1975–76 data from Department of Interior, adjust to include pre-school; Puerto Rico and Guam, Fall 1976 data.

[2] U.S. Department of Health, Education, and Welfare, Education Division, (NCES). Digest of Education Statistics, 1976, Table 46, p. 47, Northern Marianas and Trust Territory 1975–76 data from Department of Interior, adjust to include pre-school.

[3] U.S. Department of Agriculture, Food and Nutrition Service, Annual Report of Meal Service in Schools (Form FNS–47), October 1978.

[4] U.S. Department of Health, Education, and Welfare, *Day Care Centers In the U.S.; A National Profile 1976–77,* Volume 3 of the Final Report of the National Day Care Study, Table 63.

[5] A portion of these funds will be withheld from the States' allocations for use by FNS in administering the Program in nonprofit private schools or institutions.

[44 FR 70451, Dec. 7, 1979]

PART 235—STATE ADMINISTRATIVE EXPENSE FUNDS

Sec.
235.1 General purpose and scope.
235.2 Definitions.
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235.4 Allocation of funds to States.
235.5 Payments to States.
235.6 Use of funds.
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235.8 Management evaluations and audits.
235.9 Procurement and property management standards.
235.10 [Reserved]
235.11 Other provisions.
235.12 Information collection/recordkeeping—OMB assigned control numbers.

AUTHORITY: Secs. 7 and 10 of the Child Nutrition Act of 1966, 80 Stat. 888, 889, as amended (42 U.S.C. 1776, 1779).

SOURCE: 41 FR 32405, Aug. 3, 1976, unless otherwise noted.

§ 235.1 General purpose and scope.

This part announces the policies and prescribes the regulations necessary to carry out the provisions of section 7 of the Child Nutrition Act of 1966, as amended. It prescribes the methods for making payments of funds to State agencies for use for administrative expenses incurred in supervising and giving technical assistance in connection with activities undertaken by them under the National School Lunch Program (7 CFR part 210), the Special Milk Program (7 CFR part 215), the School Breakfast Program (7 CFR part 220), the Child and Adult Care Food Program (7 CFR part 226) and the Food Distribution Program (7 CFR part 250).

(Sec. 7, Pub. L. 95–627, 92 Stat. 3621 (42 U.S.C. 1776))

[44 FR 51185, Aug. 31, 1979, as amended by Amdt. 17, 55 FR 1378, Jan. 16, 1990; 60 FR 15461, Mar. 24, 1995]

§ 235.2 Definitions.

For the purpose of this part, the term:

(a) *Act* means the Child Nutrition Act of 1966, as amended.

(b) *CND* means the Child Nutrition Division of the Food and Nutrition Service of the U.S. Department of Agriculture.

(c) *Department* means the U.S. Department of Agriculture.

(d) *Distributing agency* means a State agency which enters into an agreement with the Department for the distribution of donated foods pursuant to part 250 of this title.

(e) [Reserved]

(f) *FNS* means the Food and Nutrition Service of the U.S. Department of Agriculture.

(g) *FNSRO* means the appropriate Food and Nutrition Service Regional Office of the Food and Nutrition Service of the U.S. Department of Agriculture.

(h) *Fiscal year* means a period of 12 calendar months beginning October 1, 1976, and October 1 of each calendar year thereafter and ending with September 30 of the following calendar year.

(i) *Institution* means a child or adult care center or a sponsoring organization as defined in part 226 of this chapter.

(j)–(k) [Reserved]

(l) *OIG* means the Office of the Inspector General of the Department.

(m) [Reserved]

(n) *SAE* means federally provided State administrative expense funds for State agencies under this part.

(o) *School* means the term as defined in sections 210.2, 215.2(v), 220.2(u), and 226.2 of this chapter, as applicable.

(p) *School Food Authority* means the governing body which is responsible for the administration of one or more schools and which has the legal authority to operate a breakfast or a lunch program therein. The term ''School Food Authority'' also includes a nonprofit agency or organization to which such governing body has delegated authority to operate the lunch or breakfast program in schools under its jurisdiction, provided the governing body retains the responsibility to comply with breakfast or lunch program regulations.

(q) *Secretary* means the Secretary of Agriculture.

(q–1) 7 *CFR part 3015* means the Uniform Federal Assistance Regulations published by the Department to implement OMB Circulars A–21, A–87, A–102, A–110, and A–122; and Executive Order 12372. (For availability of OMB Circulars referenced in this definition, see 5 CFR 1310.3.)

(q–2) *7 CFR part 3017* means the Department's regulation to implement Executive Order 12549, covering governmentwide rules on suspension and debarment as well as The Drug Free Workplace Act of 1988.

(q–3) *7 CFR part 3018* means the Department's Common Rule regarding Governmentwide New Restrictions on Lobbying. Part 3018 implements the requirements established by section 319 of the 1990 Appropriations Act for the Department of Interior and Related Agencies (Pub. L. 101–121).

(q–4) *7 CFR part 3052* means the Department's regulations implementing OMB Circular A–133, ''Audits of State, Local Governments, and Non-Profit Organizations.'' (For availability of OMB Circulars referenced in this definition, see 5 CFR 1310.3.)

(r) *State* means any of the 50 States, District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and, as applicable, American Samoa and the Commonwealth of the Northern Marianas.

(s) *State agency* means (1) the State educational agency or (2) such other agency of the State as has been designated by the Governor or other appropriate executive or legislative authority of the State and approved by the Department to administer programs under part 210, 215, 220, 226 or 250 of this title. Unless otherwise indicated, ''State agency'' shall also mean ''distributing agency'', as defined in § 235.2(d), when such agency is receiving funds directly from FNS under this part.

(t) *State educational agency* means, as the State legislature may determine: (1) The chief State school officer (such as the State Superintendent of Public Instruction, Commissioner of Education, or similar officer), or (2) a

board of education controlling the State department of education.

(Sec. 7, Pub. L. 95–627, 92 Stat. 3621 (42 U.S.C. 1776); sec. 205, Pub. L. 96–499, The Omnibus Reconciliation Act of 1980, 94 Stat. 2599; secs. 807 and 808, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1772, 1784, 1760); Pub. L. 79–396, 60 Stat. 231 (42 U.S.C. 1751); Pub. L. 89–642, 80 Stat. 885–890 (42 U.S.C. 1773); Pub. L. 91–248, 84 Stat. 207 (42 U.S.C. 1759)

[41 FR 32405, Aug. 3, 1976, as amended at 44 FR 48957, Aug. 21, 1979; 44 FR 51185, Aug. 31, 1979; Amdt. 9, 48 FR 19355, Apr. 29, 1983; Amdt. 14, 51 FR 27151, July 30, 1986; 54 FR 2991, Jan. 23, 1989; Amdt. 17, 55 FR 1378, Jan. 16, 1990; 60 FR 15461, Mar. 24, 1995; 64 FR 50743, Sept. 20, 1999]

§ 235.3 Administration.

(a) Within the Department, FNS shall act on behalf of the Department in the administration of the program for payment to States of State administrative expense funds covered by this part. Within FNS, CND shall be responsible for administration of the program.

(b) Each State agency desiring to receive payments under this part shall enter into a written agreement with the Department. Each agreement shall cover the operation of the Program during the period specified therein and may be extended at the option of the Department.

(Sec. 14, Pub. L. 95–166, 91 Stat. 1338 (42 U.S.C. 1776); sec. 7, Pub. L. 95–627, 92 Stat. 3621 (42 U.S.C. 1776))

[41 FR 32405, Aug. 3, 1976, as amended at 44 FR 48957, Aug. 21, 1979; Amdt. 14, 51 FR 27151, July 30, 1986]

§ 235.4 Allocation of funds to States.

(a) *Nondiscretionary SAE Funds*. For each fiscal year, FNS shall allocate the following:

(1) To each State which administers the National School Lunch, School Breakfast or Special Milk Programs an amount equal to one (1) percent of the funds expended by such State during the second preceding fiscal year under sections 4 and 11 of the National School Lunch Act, as amended, and sections 3, 4 and 17A of the Child Nutrition Act of 1966, as amended. However, the total amount allocated to any State under this paragraph shall not be less than $100,000 or the amount allocated to the State in the fiscal year ending September 30, 1981, whichever is greater.

(2) To each State which administers the Child and Adult Care Food Program an amount equal to the sum of: Twenty percent of the first $50,000; ten percent of the next $100,000; five percent of the next $250,000; and two and one-half percent of any remaining funds expended within the State under section 17 of the National School Lunch Act, as amended, during the second preceding fiscal year. FNS may adjust the amount of any such allocation in accordance with changes in the size of the Child and Adult Care Food Program in a State.

(b) *Discretionary SAE Funds*. For each fiscal year, FNS shall provide the following additional allocations:

(1) Allocate $30,000 to each State which administers the Child and Adult Care Food Program (7 CFR part 226).

(2) $30,000 to each State which administers the Food Distribution Program (part 250 of this chapter) in schools and/or institutions which participate in programs under parts 210, 220, 226 of this chapter.

(3) Amounts derived by application of the following four-part formula to each State agency which is allocated funds under paragraph (a) of this section:

(i) One equal share of forty (40) percent of the funds designated by FNS for the reviews conducted under § 210.18 of this title.

(ii) The ratio of the number of School Food Authorities participating in the National School Lunch or Commodity School Programs under the jurisdiction of the State agency to such School Food Authorities in all States times twenty (20) percent of the funds designated by FNS for reviews conducted under § 210.18 or of this title.

(iii) The ratio of the number of free and reduced price meals served in School Food Authorities under the jurisdiction of the State agency during the second preceding fiscal year to the number of free and reduced price meals served in all States in the second preceding fiscal year times twenty (20) percent of the funds designated by FNS for reviews conducted under § 210.18 of this title.

(iv) Equal shares of twenty (20) percent of the funds designated by FNS for

reviews conducted under § 210.18 of this title for each School Food Authority under the jurisdiction of the State agency participating in the National School Lunch or Commodity School Programs which has an enrollment of 40,000 or more; *Provided, however,* That for State agencies with fewer than two School Food Authorities with enrollments of 40,000 or more, an equal share shall be provided to the State agency, for either, or both, of the two largest School Food Authorities which have enrollments of more than 2,000; and *Provided, further,* That State agencies with only one School Food Authority, regardless of size, shall be provided with one equal share. For each fiscal year, the amount of State Administrative Expense Funds designated by FNS for reviews conducted under § 210.18 of this title and subject to allocation under this paragraph shall be equal to or greater than the amount designated by FNS for program management improvements for the fiscal year ending September 30, 1980.

(4) Funds which remain after the allocations required in paragraphs (a)(1), (a)(2), (b)(1), (b)(2) and (b)(3) of this section, and after any payments provided for under paragraph (c) of this section, as determined by the Secretary, to those States which administer the Food Distribution Program (part 250 of this chapter) in schools and/or institutions which participate in programs under parts 210, 220, or 226 of this chapter and to those States which administer part 226 of this chapter. The amount of funds to be allocated to each State for the Food Distribution Program for any fiscal year shall bear the same ratio to the total amount of funds made available for allocation to the State for the Food Distribution Program under this paragraph as the value of USDA donated foods delivered to the State for schools and institutions participating in programs under parts 210, 220 and 226 of this chapter during the second preceding fiscal year bears to the value of USDA donated foods delivered to all the States for such schools and institutions during the second preceding fiscal year. The amount of funds to be allocated to each State which administers the Child and Adult Care Food Program for any fiscal year shall bear the same ratio to the total amount of funds made available for allocation to all such States under this paragraph as the amount of funds allocated to each State under paragraph (a)(2) of this section bears to the amount allocated to all States under that paragraph.

(c) *SAE Funds for the Child and Adult Care Food Program.* If a State elects to have a separate State agency administer the adult care component of the Child and Adult Care Food Program, such separate State agency shall receive a pro rata share of the SAE funds allocated to the State under paragraphs (a)(2), (b)(1), and (b)(4) of this section which is equal to the ratio of funds expended by the State for the adult care component of the Child and Adult Care Food Program during the second preceding fiscal year to the funds expended by the State for the entire Child and Adult Care Food Program during the second preceding fiscal year. The remaining funds shall be allocated to the State agency administering the child care component of the Child and Adult Care Food Program.

(d) *SAE Start-up Cost Assistance for State Administration of Former ROAPs.* For any State agency which agrees to assume responsibility for the administration of food service programs in nonprofit private schools or child and adult care institutions that were previously administered by FNS, an appropriate adjustment in the administrative funds paid under this part to the State shall be made by FNS not later than the succeeding fiscal year. Such an adjustment shall consist of an amount of start-up cost assistance, negotiated with the State agency, of no less than $10,000 and not exceeding $100,000, per State.

(e) *SAE Funding Reduction Upon State Agency Termination of a Food Service Program.* For any State agency which terminates its administration of any food service program for which State administrative expense funds are provided under this part, a reduction in the amount of such funds, negotiated with the State agency, shall be made by FNS.

(f) *SAE Funds for ROAPs.* FNS shall have available to it the applicable

amounts provided for in paragraphs (a)(1), (a)(2), and (b)(1) of this section, and part 225 of this title, when it is responsible for the administration of a program or programs within a State.

(g) *Reallocation*. Funds allotted to State agencies under this section shall be subject to the reallocation provisions of § 235.5(d).

(h) *Withholding SAE funds*. The Secretary may withhold some or all of the funds allocated to the State agency under this section if the Secretary determines that the State agency is seriously deficient in the administration of any program for which State administrative expense funds are provided under this part or in the compliance of any regulation issued pursuant to those programs. On a subsequent determination by the Secretary that State agency administration of the programs or compliance with regulations is no longer seriously deficient and is operated in an acceptable manner, the Secretary may allocate some or all of the funds withheld.

(Sec. 14, Pub. L. 95–166, 91 Stat. 1338 (42 U.S.C. 1776); sec. 7, Pub. L. 95–627, 92 Stat. 3621 (42 U.S.C. 1776); sec. 7(a), Pub. L. 95–627, 92 Stat. 3622 (42 U.S.C. 1751); Pub. L. 96–499, secs. 201 and 204, 94 Stat. 2599; secs. 805, 812, 814 and 819, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1754, 1759a, 1774 and 1776); E.O. 12372 (July 14, 1982, 47 FR 30959); sec. 401(b) Intergovernmental Cooperation Act of 1968 (31 U.S.C. 6506(c))

[44 FR 48957, Aug. 21, 1979, as amended at 44 FR 51185, Aug. 31, 1979; 44 FR 53489, Sept. 14, 1979; 45 FR 3566, Jan. 18, 1980; Amdt. 11, 48 FR 27892, June 17, 1983; Amdt. 14, 51 FR 27151, July 30, 1986; Amdt. 15, 51 FR 33862, Sept. 24, 1986; Amdt. 17, 55 FR 1378, Jan. 16, 1990; 56 FR 32949, July 17, 1991; 58 FR 42489, Aug. 10, 1993; 60 FR 15462, Mar. 24, 1995; 64 FR 50743, Sept. 20, 1999]

§ 235.5 Payments to States.

(a) *Method of payment*. FNS will specify the terms and conditions of the State agency's annual grant of SAE funds in conjunction with the grant award document and will make funds available for payment by means of a Letter of Credit issued in favor of the State agency. The total amount of a State agency's grant shall be equal to the sum of the amounts allocated to such agency under § 235.4 plus or minus any adjustments resulting from the reallocation provisions under paragraph (d) of this section plus any transfers under § 235.6(a) and/or § 235.6(c) of this part. The amount of SAE funds made available for payment to a State agency in any fiscal year shall be determined by FNS upon approval of the State agency's administrative plan under paragraph (b) of this section and any amendments to such plan under paragraph (c) of this section. Funds shall not be made available before the State agency's plan or amendment to such plan, as applicable, has been approved by FNS. However, if the plan has not been approved by October 1 of the base year, FNS may advance SAE funds to the State agency, in amounts determined appropriate by FNS, pending approval of the plan.

(b) *Administrative plan*. (1) Each State agency shall submit, subject to FNS approval, an initial State Administrative Expense plan based upon guidance provided by FNS. This base year plan shall include:

(i) The staffing pattern for State level personnel;

(ii) A budget for the forthcoming fiscal year showing projected amounts (combined SAE and State funds) by cost category;

(iii) The total amount of budgeted funds to be provided from State sources;

(iv) The total amount of budgeted funds to be provided under this part;

(v) The State agency's estimate of the total amount of budgeted funds (combined SAE and State funds) attributable to administration of the School Nutrition Programs (National School Lunch, School Breakfast and Special Milk Programs), Child and Adult Care Food Program, and/or Food Distribution Program in schools and child and adult care institutions and to each of the major activity areas of the State agency; and

(vi) The State agency's estimate of the total Child and Adult Care Food Program audit funds to be used for the forthcoming fiscal year.

(2) These activity areas shall be defined and described by the State agency in accordance with guidance issued by FNS and may include such activities as program monitoring, technical assistance, Federal reporting/claims

processing, policy implementation, and allocation of foods to recipient agencies.

(3) Except in specific instances where determined necessary by FNS, State agencies shall not be required to maintain expenditure records by activity area or program. State agencies shall refer to Office of Management and Budget Circular A–87, Attachment B, to establish cost categories.

(4) FNS shall approve a State agency's plan, or any amendment to such plan under paragraph (c) of this section, if it determines that the plan or amendment is consistent with program administrative needs and SAE requirements under this part.

(5) To the extent practicable, State agencies shall implement their approved plans (as amended). FNS shall monitor State agency implementation of the plans through management evaluations, State agency reports submitted under this part, audits, and through other available means.

(6) FNS may expand plan requirements for individual State agencies in order to address specific administrative deficiencies which affect compliance with program requirements and which have been identified by FNS through its monitoring activities.

(c) *Amendments to the administrative plan.* A State agency may amend its plan at any time to reflect changes in funding or activities, except that, if such changes are substantive as defined in the June 5, 1997 guidance, and any amendments or updates to this guidance, the State agency shall amend its plan in accordance with guidance provided by FNS. Plan amendments shall provide information in a format consistent with that provided in the State agency's plan, but shall only require FNS approval if it results in a substantive change as defined by FNS.

(d) *Reallocation of funds.* Annually, between March 1 and May 1 on a date specified by FNS, of each year, each State agency shall submit to FNS a State Administrative Expense Funds Reallocation Report (FNS–525) on the use of SAE funds. At such time, a State agency may release to FNS any funds that have been allocated, reallocated or transferred to it under this part or may request additional funds in excess of its current grant level. Based on this information or on other available information, FNS shall reallocate, as it determines appropriate, any funds allocated to State agencies in the current fiscal year which will not be expended in the following fiscal year and any funds carried over from the prior fiscal year which will not be expended in the current fiscal year. Reallocated funds shall be made available for payment to a State agency upon approval by FNS of the State agency's amendment to the base year plan which covers the reallocated funds, if applicable. Notwithstanding any other provision of this part, a State agency may, at any time, release to FNS for reallocation any funds that have been allocated, reallocated or transferred to it under this part and are not needed to implement its approved plan under this section.

(e) *Return of funds.* (1) In Fiscal Year 1991, up to 25 per cent of the SAE funds allocated to each State agency under § 235.4 may remain available for obligation and expenditure in the second fiscal year of the grant. In subsequent fiscal years, up to 20 percent may remain available for obligation and expenditure in the second fiscal year. The maximum amount to remain available will be calculated at the time of the formula allocation by multiplying the appropriate percentage by each State agency's formula allocation as provided under § 235.4(a) through (c). At the end of the first fiscal year, the amount subject to the retention limit is determined by subtracting the amount reported by the State agency as Total Federal share of outlays and unliquidated obligations on the fourth quarter Standard Form (SF) 269, Financial Status Report, from the total amount of SAE funds made available for that fiscal year (i.e., the formula allocation adjusted for any transfers or reallocations). However, funds provided under § 235.4(d) are not subject to the retention limit. Any funds in excess of the amount that remains available to each State agency shall be returned to FNS.

(2) At the end of the fiscal year following the fiscal year for which funds were allocated, each State agency shall return any funds made available which are unexpended.

(3) Return of funds by the State agency shall be made as soon as practicable, but in any event, not later than 30 days following demand by FNS.

[Amdt. 14, 51 FR 27151, July 30, 1986, as amended by Amdt. 17, 55 FR 1378, Jan. 16, 1990; 60 FR 15462, Mar. 24, 1995]

[41 FR 32405, Aug. 3, 1976, as amended at 64 FR 50743, Sept. 20, 1999]

§ 235.6 Use of funds.

(a) Funds allocated under this part and 7 CFR part 225 shall be used for State agency administrative costs incurred in connection with the programs governed by 7 CFR parts 210, 215, 220, 225, 226, and 250 of this title. Except as provided under § 235.6(c), funds allocated under § 235.4, paragraphs (a) and (b) and 7 CFR part 225 shall be used for the program(s) for which allocated, except that the State agency may transfer funds allocated for any such program(s) to other such program(s). Subject to the provisions of this paragraph, a State agency may also transfer SAE funds that are not needed to implement its approved plan § 235.5(b) to another State agency within the State that is eligible to receive SAE funds under this part. Up to 25 per cent of funds allocated under § 235.4(a) through (c) for Fiscal Year 1991 and up to 20 per cent of funds allocated in subsequent fiscal years to a State agency may, subject to the provisions of § 235.5 of this part, remain available for obligation and expenditure by such State agency during the following fiscal year.

(a–1) State administrative expense funds paid to any State may be used by State agencies to pay salaries, including employee benefits and travel expenses for administrative and supervisory personnel, for support services, for office equipment, and for staff development, particularly for monitoring and training of food service personnel at the local level in areas such as food purchasing and merchandizing. Such funds shall be used to employ additional personnel, as approved in the applicable State plan to supervise, improve management, and give technical assistance to school food authorities and to institutions in their initiation, expansion, and conduct of any programs for which the funds are made available. State agencies may also use these funds for their general administrative expenses in connection with any such programs, including travel and related expenses. Additional personnel or part-time personnel hired are expected to meet professional qualifications and to be paid at salary scales of positions of comparable difficulty and responsibility under the State agency. Personnel may be used on a staff year equivalent basis, thus permitting new personnel and existing staff to be cross-utilized for most effective and economical operation under existing and new programs.

(a–2) State Administrative Expense Funds paid to any State agency under § 235.4(b)(3) shall be available for reviews conducted under § 210.18 activities associated with carrying out actions to ensure adherence to the program performance standards.

(b) State administrative expense funds shall be used consistent with the cost principles and constraints on allowable and unallowable costs and indirect cost rates as prescribed in Office of Management and Budget Circular A–87.

(c) In addition to State Administrative Expense funds made available specifically for food distribution purposes under § 235.4 (b)(2) and (b)(4), State Administrative Expense funds allocated under § 235.4 (a)(1), (a)(2), (b)(1), (b)(3), and (d), and under (b)(4) for the Child and Adult Care Food Program may be used to assist in the administration of the Food Distribution Program (7 CFR part 250) in schools and institutions which participate in programs governed by parts 210, 220, and 226 of this title when such Food Distribution Program is administered within the State agency and may also be used to pay administrative expenses of a distributing agency, when such agency is other than the State agency and is responsible for administering all or part of such Food Distribution Program.

(d) FNS shall allocate, for the purpose of providing grants on an annual basis to public entities and private nonprofit organizations participating in projects under section 18(c) of the National School Lunch Act, not more than $4,000,000 in each of Fiscal Years 1993 and 1994. Subject to the maximum allocation for such projects for each

fiscal year, at the beginning of each of Fiscal Years 1993 and 1994, FNS shall allocate, from funds available under § 235.5(d) that have not otherwise been allocated to States, an amount equal to the estimates by FNS of the funds to be returned under paragraph (a) of this section, but not less than $1,000,000 in each fiscal year. To the extent that amounts returned to FNS are less than estimated or are insufficient to meet the needs of the projects, FNS may allocate amounts to meet the needs of the projects from funds available under this section that have not been otherwise allocated to States. FNS shall reallocate any of the excess funds above the minimum level in accordance with § 235.5(d).

(e) Where State Administrative Expense Funds are used to acquire personal property or services the provisions of §§ 235.9 and 235.10 must be observed.

(f) Each State agency shall adequately safeguard all assets and assure that they are used solely for authorized purposes.

(g) Whoever embezzles, willfully misapplies, steals, or obtains by fraud any funds, assets, or property provided under this part, whether received directly or indirectly from the Department, shall:

(1) If such funds, assets, or property are of a value of $100 or more, be fined not more than $25,000 or imprisoned not more than five years or both; or

(2) If such funds, assets, or property are of a value of less than $100, be fined not more than $1,000 or imprisoned not more than one year or both.

(h) Whoever receives, conceals, or retains to his use or gain funds, assets, or property provided under this part, whether received directly or indirectly from the Department, knowing such funds, assets, or property have been embezzled, willfully misapplied, stolen, or obtained by fraud, shall be subject to the same penalties provided in paragraph (h) of this section.

(Sec. 14, Pub. L. 95–166, 91 Stat. 1338, 1339, 1340 (42 U.S.C. 1751, 1753, 1759a, 1761, 1766, 1772–1775, 1776, 1786); sec. 7(a), Pub. L. 95–627, 92 Stat. 3621, 3622 (42 U.S.C. 1751, 1776))

[41 FR 32405, Aug. 3, 1976, as amended at 43 FR 37172, Aug. 22, 1978; 44 FR 37901, June 29, 1979; 44 FR 48958, Aug. 21, 1979; 44 FR 51185, Aug. 31, 1979; 45 FR 3566, Jan. 18, 1980; Amdt. 11, 48 FR 27892, June 17, 1983; Amdt. 14, 51 FR 27152, July 30, 1986; 56 FR 32949, July 17, 1991; 60 FR 15462, Mar. 24, 1995; 60 FR 57148, Nov. 14, 1995; 64 FR 50744, Sept. 20, 1999]

§ 235.7 Records and reports.

(a) Each State agency shall keep records on the expenditure of State administrative expense funds provided under this part and part 225 of this title. Such records shall conform with the applicable State plan for use of State administrative expense funds. The State agency shall make such records available, upon a reasonable request, to FNS, OIG, or the U.S. Comptroller General and shall maintain current accounting records of State administrative expense funds which shall adequately identify fund authorizations, obligations, unobligated balances, assets, liabilities, outlays and income. The records may be kept in their original form or on microfilm, and shall be retained for a period of three years after the date of the submission of the final Financial Status Report, subject to the exceptions noted below:

(1) If audit findings have not been resolved, the records shall be retained beyond the three-year period as long as required for the resolution of the issues raised by the audit.

(2) Records for nonexpendable property acquired with State Administrative Expense Funds shall be retained for three years after its final disposition.

(b) Each State agency shall submit to FNS a quarterly Financial Status Report (SF–269) on the use of State administrative expense funds provided for

each fiscal year under this part. Reports shall be postmarked and/or submitted to FNS no later than 30 days after the end of each quarter of the fiscal year and, in case of funds carried over under § 235.6(a), each quarter of the following fiscal year until all such funds have been obligated and expended. Obligations shall be reported for the fiscal year in which they occur. Each State agency shall submit a final Financial Status Report for each fiscal year's State administrative expense funds. This report shall be postmarked and/or submitted to FNS no later than 30 days after the end of the fiscal year following the fiscal year for which the funds were initially made available. Based on guidance provided by FNS, each State agency shall also use the quarterly SF–269 to report on the use of State funds provided during the fiscal year. Each State agency shall also submit an annual report containing information on School Food Authorities under agreement with the State agency to participate in the National School Lunch or Commodity School programs.

(c) State agencies operating those programs governed by parts 210, 215, 220 and 226 and those State agencies which are distributing agencies eligible for SAE funds shall participate in surveys and studies of programs authorized under the National School Lunch Act, as amended, and the Child Nutrition Act of 1966, as amended, when such studies and surveys are authorized by the Secretary of Agriculture. The aforementioned State agencies shall encourage individual School Food Authorities, child and adult care institutions, and distributing agencies (as applicable) to participate in such studies and surveys. Distribution of State Administrative Expense funds to an individual State agency is contingent upon that State agency's cooperation in such studies and surveys.

(Sec. 14, Pub. L. 95–166, 91 Stat. 1338 (42 U.S.C. 1776); sec. 7, Pub. L. 95–627, 92 Stat. 3621 (42 U.S.C. 1776); 93 Stat. 837, Pub. L. 96–108 (42 U.S.C. 1776); secs. 804, 816, 817 and 819, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1753, 1756, 1759, 1771, 1773 and 1785); sec. 7(a), Pub. L. 95–627, 92 Stat. 3622, 42 U.S.C. 1751)

[41 FR 32405, Aug. 3, 1976, as amended at 43 FR 37173, Aug. 22, 1978; 44 FR 48958, Aug. 21, 1979; 45 FR 8563, Feb. 8, 1980; Amdt. 9, 48 FR 195, Jan. 4, 1983; Amdt. 11, 48 FR 27892, June 17, 1983; Amdt. 12, 49 FR 18989, May 4, 1984; Amdt. 14, 51 FR 27152, July 30, 1986; Amdt. 17, 55 FR 1378, Jan. 16, 1990; 60 FR 15463, Mar. 24, 1995]

§ 235.8 Management evaluations and audits.

(a) Each State agency shall provide for audits of State agency operations under this part to be made with reasonable frequency, but beginning in fiscal year 1978 once every two years. The audits shall determine the fiscal integrity of financial transactions and reports, and the compliance with applicable laws and regulations and with the administrative requirements set forth in 7 CFR part 3015. Audits may be made by State Auditors General, by State Controllers, or other comparable State audit groups, or by Certified Public Accountants or State licensed public accountants.

(b) Each State agency shall develop a plan for the conduct of such audits which shall (1) provide a description of the State agency in adequate detail to demonstrate the independence of the audit organization, and (2) provide a systematic method to assure timely and appropriate resolution of audit findings and recommendations.

(c) While OA shall rely to the fullest extent feasible upon State sponsored audits, it shall, whenever considered necessary, (1) perform on-site test audits, and (2) review audit reports and related working papers of audits performed by or for State agencies.

(d) Use of audit guides available from OA is encouraged. When these guides

are utilized, OA will coordinate its audits with State sponsored audits to form a network of intergovernmental audit systems.

(e) Each State agency shall provide FNS with full opportunity to conduct management evaluations of all operations of the State agency under this part and shall provide OA with full opportunity to conduct audits of all such operations. Each State agency shall make available its records, including records of the receipt and expenditure of funds, upon a reasonable request by FNS, OA, or the U.S. Comptroller General.

(Sec. 7, Pub. L. 95–627, 92 Stat. 3621 (42 U.S.C. 1776); secs. 804, 805, 812, 814, 816, 817 and 819, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1753, 1754, 1756, 1759, 1759a, 1771, 1773, 1774, 1776, and 1785))

[41 FR 32405, Aug. 3, 1976, as amended at 44 FR 51186, Aug. 31, 1979; Amdt. 7, 47 FR 18567, Apr. 30, 1982; Amdt. 9, 48 FR 195, Jan. 4, 1983; 54 FR 2991, Jan. 23, 1989]

§ 235.9 Procurement and property management standards.

(a) *Requirements*. State agencies shall comply with the requirements of the Office of Management and Budget (OMB) Circular A–102 and the Department's Uniform Federal Assistance Regulations, 7 CFR part 3015, subpart S (46 FR 55658) concerning the procurement of supplies, equipment and other services with State Administrative Expense Funds. These requirements are adopted by FNS to ensure that such materials and services are obtained for the Program efficiently and economically and in compliance with applicable laws and executive orders.

(b) *Contractual responsibilities*. The standards contained in OMB Circular A–102 and 7 CFR part 3015 do not relieve the State agency of any contractual responsibilities under its contract. The State agency is the responsible authority, without recourse to FNS, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in connection with the Program. This includes, but is not limited to source evaluation, protests, disputes, claims, or other matters of a contractual nature. Matters concerning violation of law are to be referred to the local, State or Federal authority that has proper jurisdiction.

(c) *Procurement procedure*. The State agency may use its own procurement procedures which reflect applicable State and local laws and regulations, provided that procurements made with Program funds adhere to the standards set forth in OMB Circular A–102 and 7 CFR part 3015.

(d) *Property acquired with State administrative expense funds*. State Agencies shall comply with the requirements of OMB Circular A–102 and 7 CFR part 3015, subpart R (46 FR 55654) in their utilization and disposition of property acquired in whole or in part with State Administrative Expense Funds.

(Pub. L. 79–396, 60 Stat. 231 (42 U.S.C. 1751); Pub. L. 89–642, 80 Stat. 885–890 (42 U.S.C. 1773); Pub. L. 91–248, 84 Stat. 207 (42 U.S.C. 1759))

[Amdt. 9, 48 FR 19355, Apr. 29, 1983]

§ 235.10 [Reserved]

§ 235.11 Other provisions.

(a) *State funds*. Expenditures of funds from State sources in any fiscal year for the administration of the National School Lunch Program, School Breakfast Program, Special Milk Program, Child and Adult Care Food Program shall not be less than that expended or obligated in fiscal year 1977. Failure of a State to maintain this level of funding will result in the total withdrawal of SAE funds. State agencies shall follow, as applicable, the provisions of Office of Management and Budget Circular A–102, Attachments F and G and 7 CFR part 3015, subparts G and H in identifying and documenting expenditures of funds from State revenues to meet the State funding requirement of this paragraph.

(b) *Sanctions imposed*. (1) FNS may recover, withhold or cancel payment of up to one hundred (100) percent of the funds payable to a State agency under this part, whenever it is determined by FNS that the State agency has failed to comply with the requirements contained in this part and in parts 210, 215, 220 and 226 of this title and in part 250 of this title as it applies to the operation of the Food Distribution Program in schools and child and adult care institutions.

(2) In addition to the general provisions found in paragraph (b)(1) of this section, FNS may, for any fiscal year, recover, withhold or cancel payment of up to thirty-three and one-third (33⅓) percent of the funds payable to, and to be used by, a State agency under § 235.4(a)(1) and § 235.4(b)(3) for administration of school nutrition programs in FNS determines that a State agency is deficient in one or more of the following:

(i) Implementing the requirements in § 210.18;

(ii) Conducting the number of reviews required in § 210.18 within the timeframes specified;

(iii) Covering the areas of review set forth in the § 210.18, carrying out corrective action, and assessing and recovering claims as prescribed in § 210.18 and § 210.19 of this title;

(iv) Conducting reviews with sufficient thoroughness to identify violations of the areas of review identified in § 210.18; and

(v) Meeting the reporting deadlines prescribed for the forms (FNS–10 and SF–269) required under § 210.5(d) of this title.

(3) Furthermore, FNS may for any fiscal year, recover, withhold or cancel payment of up to thirty-three and one-third (33⅓) percent of the funds payable to, and to be used by, a State agency under § 235.4(a)(2), § 235.4(b)(1) and § 235.4(b)(4) for administration of the Child and Adult Care Food Program if FNS determines that a State agency is deficient in meeting the reporting deadlines prescribed for the forms (FNS–44 and SF–269) required under § 226.7(d) of this title.

(4) In establishing the amounts of funds to be recovered, withheld or cancelled under paragraph (b)(2) and (b)(3) of this section, FNS shall determine the current or projected rate of funds usage by the State agency for all funds subject to sanction, and after considering the severity and longevity of the cumulative deficiencies, shall apply an appropriate sanction percentage to the amount so determined. During the fiscal year under sanction, a State agency may not use funds not included in the determination of funds usage to replace sanctioned funds. The maximum sanction percentage that may be imposed against a State agency for failure within one or more of the five deficiency areas specified in paragraph (b)(2) of this section for any fiscal year shall be thirty-three and one-third (33⅓) percent of the funds payable under § 235.4(a)(1) and § 235.4(b)(3) for administration of school nutrition programs for such fiscal year.

(5) Before carrying out any sanction against a State agency under this section, the following procedures shall be implemented:

(i) FNS shall notify the Chief State School Officer or equivalent of the deficiencies found and of its intention to impose sanctions unless an acceptable corrective action plan is submitted and approved by FNS within 60 calendar days.

(ii) The State agency shall develop a corrective action plan with specific timeframes to correct the deficiencies and/or prevent their future recurrence. The plan will include dates by which the State agency will accomplish such corrective action.

(iii) FNS shall review the corrective action plan. If it is acceptable, FNS shall issue a letter to the Chief State School Officer or equivalent approving the corrective action plan, and detailing the technical assistance that is available to the State agency to correct the deficiencies. The letter shall advise the Chief State School Officer or equivalent of the specific sanctions to be imposed if the corrective action plan is not implemented within timeframes set forth in the approved plan.

(iv) Upon advice from the State agency that corrective action has been taken, FNS shall assess such action and, if necessary, shall perform a follow-up review to determine if the noted deficiencies have been corrected. FNS shall then advise the State agency if the actions taken are in compliance with the corrective action plan or if additional corrective action is needed.

(v) If an acceptable corrective action plan is not submitted and approved within 60 calendar days, or if corrective action is not completed within the time limits established in the corrective action plan, FNS may impose a sanction by assessing a claim against the State agency or taking action in

accordance with 7 CFR part 3015, subpart L. FNS shall notify the Chief State School Officer or equivalent of any such action.

(vi) If, subsequent to the imposition of any sanction, FNS determines that the noted deficiencies have been resolved and that the programs for which SAE funds were made available are being operated in an acceptable manner, FNS may return to the State agency or restore to the State agency's Letter of Credit (LOC) part or all of any sanctioned SAE funds.

(6) In carrying out sanctions under this part for any fiscal year, FNS may reduce the amount of allocated SAE funds payable to a State agency in whole or in part during such fiscal year and during following fiscal years if necessary.

(7) Any State agency which has a sanction imposed against it in accordance with this paragraph shall not be eligible to participate in any reallocation of SAE funds under § 235.5(d) of this part during any fiscal year in which such sanction is being applied.

(c) *Termination for convenience.* FNS and the State agency may terminate the State agency's participation under this part in whole, or in part, when both parties agree that continuation would not produce beneficial results commensurate with the further expenditure of funds. The two parties shall agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated. The State agency shall not incur new obligations for the terminated portion after the effective date, and shall cancel as many outstanding obligations as possible. FNS shall allow full credit to the State agency for the Federal share of the noncancellable obligations, properly incurred by the State agency prior to termination.

(d) In taking any action under paragraphs (b) or (c) of this section, FNS and the State agency shall comply with the provisions of the Department's Uniform Federal Assistance Regulations, 7 CFR part 3015 subpart N concerning grant suspension, termination and closeout procedures.

(e) *State requirements.* Nothing contained in this part shall prevent a State agency from imposing additional operating requirements which are not inconsistent with the provisions of this part.

(f) *Administrative review process.* When FNS asserts a sanction against a State agency under the provisions of paragraph (b) of this section, the State agency may appeal the case and be afforded a review by an FNS Administrative Review Officer of the record including any additional written submissions prepared by the State agency.

(1) FNS shall provide a written notice and shall ensure the receipt of such notice when asserting a sanction against a State agency.

(2) A State agency aggrieved by a sanction asserted against it may file a written request with the Director, Administrative Review Staff, U.S. Department of Agriculture, Food and Nutrition Service, 3101 Park Center Drive, Alexandria, Va. 22302 for a review of the record. Such request must be postmarked within 30 calendar days of the date of delivery of the sanction notice and the envelope containing the request shall be prominently marked ''REQUEST FOR REVIEW.'' If the State agency does not request a review within 30 calendar days of the date of delivery of the sanction notice, the administrative decision on the sanction shall be final.

(3) Upon receipt of a request for review, FNS shall promptly provide the State agency with a written acknowledgment of the request. The acknowledgment shall include the name and address of the FNS Administrative Review Officer reviewing the sanction. The acknowledgment shall also notify the State agency that any additional information in support of its position must be submitted within 30 calendar days of the receipt of the acknowledgment.

(4) When a review is requested, the FNS Administrative Review Officer shall review all available information and shall make a final determination within 45 calendar days after receipt of the State agency's additional information. The final determination shall take effect upon delivery of the written notice of this final decision to the State agency.

(5) The final determination of the FNS Administrative Review Officer will be the Department's final decision in the case and will not be subject to reconsideration.

(Sec. 14, Pub. L. 95–166, 91 Stat. 1338 (42 U.S.C. 1776); sec. 7, Pub. L. 95–627, 92 Stat. 3621 (42 U.S.C. 1776); secs. 805 and 819, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1773); sec. 7(a), Pub. L. 95–627, 93 Stat. 3622, 42 U.S.C. 1751)

[41 FR 32405, Aug. 3, 1976, as amended at 44 FR 48958, Aug. 21, 1979; Amdt. 6, 47 FR 14135, Apr. 2, 1982; Amdt. 11, 48 FR 27892, June 17, 1983; Amdt. 12, 49 FR 18989, May 4, 1984; Amdt. 14, 51 FR 27152, July 30, 1986; Amdt. 15, 51 FR 33862, Sept. 24, 1986; Amdt. 17, 55 FR 1378, Jan. 16, 1990; 56 FR 32950, July 17, 1991; 60 FR 15463, Mar. 24, 1995; 64 FR 50744, Sept. 20, 1999]

§ 235.12 Information collection/recordkeeping—OMB assigned control numbers.

7 CFR section where requirements are described	Current OMB control number
235.3(b)	0584–0067
235.4(d), (e)	0584–0067
235.7(a)	0584–0067
235.7(b)	0584–0067
235.7(c)	0584–0067
235.8(a), (b)	0584–0067
235.9(c), (d)	0584–0067
235.11(b)(2)	0584–0067
235.11(b)(5)(ii)	0584–0067
235.11(f)	0584–0067

[64 FR 50744, Sept. 20, 1999]

PART 240—CASH IN LIEU OF DONATED FOODS

Sec.

240.1 General purpose and scope.
240.2 Definitions.
240.3 Cash in lieu of donated foods for program schools.
240.4 Cash in lieu of donated foods for nonresidential child and adult care institutions.
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AUTHORITY: 42 U.S.C. 612c note, 1751, 1755, 1762a, 1765, 1766, 1779.

SOURCE: 47 FR 15982, Apr. 13, 1982, unless otherwise noted.

§ 240.1 General purpose and scope.

(a) Each school year the Department programs agricultural commodities and other foods to States for delivery to program and commodity schools, nonresidential child care institutions, and service institutions pursuant to the regulations governing the donation of foods for use in the United States, its territories and possessions and areas under its jurisdiction (7 CFR part 250).

(b) Section 6(b) of the Act requires that not later than June 1 of each school year, the Secretary shall make an estimate of the value of the agricultural commodities and other foods that will be delivered during that school year for use in lunch programs by schools participating in the National School Lunch Program (7 CFR part 210). If this estimate is less than the total level of assistance authorized under section 6(e) of the Act the Secretary shall pay to the State administering agency not later than July 1 of that school year, an amount of funds equal to the difference between the value of donated foods as then programmed for that school year and the total level of assistance authorized under such section.

(c) Section 6(e)(1) of the Act requires:

(1) That for each school year, the total commodity assistance, or cash in lieu thereof, available to each State for the National School Lunch Program shall be the amount obtained by multiplying the national average value of donated foods, described in paragraph (c)(2) of this section, by the number of lunches served in that State in the preceding school year; and

(2) That the national average value of foods donated to schools participating in the National School Lunch Program, or cash payments made in lieu thereof, shall be 11 cents, adjusted on July 1, 1982, and each July 1 thereafter to reflect changes in the Price Index for Food Used in Schools and Institutions. Section 6(e)(1) further requires that not less than 75 percent of the assistance under that section shall be in the form

of donated foods for the National School Lunch Program. After the end of each school year, FNS shall reconcile the number of lunches served by schools in each State with the number served in the preceding school year and, based on such reconciliation, shall increase or reduce subsequent commodity assistance or cash in lieu thereof provided to each State.

(d) Section 12(g) of the Act provides that whoever embezzles, willfully misapplies, steals, or obtains by fraud any funds, assets, or property that are the subject of a grant or other form of assistance under this Act or the Child Nutrition Act of 1966, whether received directly or indirectly from the United States Department of Agriculture, or whoever receives, conceals, or retains such funds, assets, or property to his use or gain, knowing such funds, assets, or property have been embezzled, willfully misapplied, stolen, or obtained by fraud shall, if such funds, assets, or property are of the value of $100 or more, be fined not more than $10,000 or imprisoned not more than five years, or both, or, if such funds, assets, or property are of a value of less than $100, shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

(e) Section 14(f) of the Act provides that the value of foods donated to States for use in commodity schools for any school year shall be the sum of the national average value of donated foods established under section 6(e) of the Act and the national average payment established under section 4 of the Act. Section 14(f) also provides that such schools shall be eligible to receive up to five cents of such value in cash for processing and handling expenses related to the use of the donated foods.

(f) Sections 17(h)(1) (B) and (C) of the Act provide that the value of commodities, or cash in lieu thereof, donated to States for use in nonresidential child or adult care institutions participating in the Child and Adult Care Food Program (7 CFR part 226) for any school year shall be, at a minimum, the amount obtained by multiplying the number of lunches and suppers served during the preceding school year by the rate established for lunches for that school year under section 6(e) of the Act. At the end of each school year, FNS shall reconcile the number of lunches and suppers served in participating institutions in each State during such school year with the number of lunches and suppers served in the preceding school year and, based on such reconciliation, shall increase or reduce subsequent commodity assistance or cash in lieu of commodities provided to each State.

(g) Section 16 of the Act provides that a State which has phased out its food distribution facilities prior to June 30, 1974, may elect to receive cash payments in lieu of donated foods for the purposes of the applicable child nutrition programs—i.e., the National School Lunch Program, the Summer Food Service Program for Children (7 CFR part 225) and the Child Care Food Program.

(h) These regulations prescribe the methods for determination of the amount of payments, the manner of disbursement and the requirements for accountability for funds when these respective statutory authorities require the Department to make cash payments in lieu of donating agricultural commodities and other foods.

[47 FR 15982, Apr. 13, 1982, as amended at 52 FR 7267, Mar. 10, 1987; 58 FR 39120, July 22, 1993]

§ 240.2 Definitions.

For the purpose of this part the term:

Act means the National School Lunch Act, as amended.

Child Care Food Program means the Program authorized by section 17 of the Act.

Commodity school means a school that does not participate in the National School Lunch Program under part 210 of this chapter but which operates a nonprofit lunch program under agreement with the State educational agency or FNSRO and receives donated foods, or donated foods and cash or services of a value of up to 5 cents per lunch in lieu of donated foods under this part for processing and handling the foods.

Department means the U.S. Department of Agriculture.

Distributing agencies means State, Federal or private agencies which enter into agreements with the Department

for the distribution of donated foods to program schools, commodity schools, and nonresidential child care institutions.

Donated-food processing and handling expenses means any expenses incurred by or on behalf of a commodity school for processing or other aspects of the preparation, delivery, and storage of donated foods for use in its lunch program.

Donated foods means foods donated, or available for donation, by the Department under any of the legislation referred to in part 250 of this chapter.

Fiscal year means the period of 12 months beginning October 1 of any calendar year and ending September 30 of the following calendar year.

FNS means the Food and Nutrition Service of the Department.

FNSRO means the appropriate Food and Nutrition Service Regional Office.

National School Lunch Program means the Program authorized by sections 4 and 11 of the Act.

Nonprofit means exempt from income tax under section 501(c)(3) of the Internal Revenue Code of 1954, as amended; or in the Commonwealth of Puerto Rico, certified as nonprofit by its Governor.

Nonresidential child care institution means any child care center, day care home, or sponsoring organization (as those terms are defined in part 226 of this chapter) which participates in the Child Care Food Program.

Program school means a school which participates in the National School Lunch Program.

School means (1) an educational unit of high school grade or under except for a private school with an average yearly tuition exceeding $1,500 per child, operating under public or nonprofit private ownership in a single building or complex of buildings. The term ''high school grade or under'' includes classes of preprimary grade when they are conducted in a school having classes of primary or higher grade, or when they are recognized as a part of the educational system in the State, regardless of whether such preprimary grade classes are conducted in a school having classes of primary or higher grade; (2) with the exception of residential summer camps which participate in the Summer Food Service Program for Children, Job Corps centers funded by the Department of Labor and private foster homes, any public or nonprofit private child care institution, or distinct part of such institution, which (i) maintains children in residence, (ii) operates principally for the care of children, and (iii) if private, is licensed to provide residential child care services under the appropriate licensing code by the State or a subordinate level of government. The term ''child care institutions'' includes, but is not limited to: homes for the mentally retarded, the emotionally disturbed, the physically handicapped, and unmarried mothers and their infants; group homes; halfway houses; orphanages; temporary shelters for abused children and for runaway children; long-term care facilities for chronically ill children; and juvenile detention centers; and (3) with respect to the Commonwealth of Puerto Rico, nonprofit child care centers certified as such by the Governor of Puerto Rico.

School food authority means the governing body which is responsible for the administration of one or more schools and which has the legal authority to operate a nonprofit lunch program therein.

School year means the period of 12 months beginning July 1 of any calendar year and ending June 30 of the following calendar year.

Secretary means the Secretary of Agriculture.

Service institutions means camps or sponsors (as those terms are defined in part 225 of this chapter) which participate in the Summer Food Service Program for Children.

Special needs children means children who are emotionally, mentally or physically handicapped.

State means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American-Samoa, the Trust Territory of the Pacific Islands, or the Commonwealth of the Northern Mariana Islands.

State agency means the State educational agency or such other agency of the State as has been designated by the Governor or other appropriate executive or legislative authority of the

State and approved by the Department to administer, in the State, the National School Lunch Program, the Child Care Food Program, the Summer Food Service Program for Children, or nonprofit lunch programs in commodity schools.

State educational agency means, as the State legislature may determine, (1) the chief State school officer (such as the State Superintendent of Public Instruction, Commissioner of Education, or similar officer), or (2) a board of education controlling the State Department of Education.

Summer Food Service Program for Children means the Program authorized by section 13 of the Act.

Tuition means any educational expense required by the school as part of the students' educational program; not including transportation fees for commuting to and from school, and the cost of room and board. The following monies shall not be included when calculating a school's average yearly tuition per child:

(1) Academic scholarship aid from public or private organizations or entities given to students, or to schools for students, and (2) state, county or local funds provided to schools operating principally for the purpose of educating handicapped or other special needs children for whose education the State, county or local government is primarily or solely responsible. In a school which varies tuition, the average yearly tuition shall be calculated by dividing the total tuition receipts for the current school year by the total number of students enrolled for purposes of determining if the average yearly tuition exceeds $1,500 per child.

§ 240.3 Cash in lieu of donated foods for program schools.

(a) Not later than June 1 of each school year, FNS shall make an estimate of the value of agricultural commodities and other foods that will be delivered to States during the school year under the food distribution regulations (7 CFR part 250) for use in program schools. If the estimated value is less than the total value of assistance authorized under section 6(e) of the Act for the National School Lunch Program, FNS shall determine the difference between the value of the foods then programmed for each State for the school year and the required value and shall pay the difference to each State agency not later than July 1 of that school year.

(b) Notwithstanding any other provision of this section, in any State in which FNS administers the National School Lunch Program in any of the schools of the State, FNS shall withhold from the funds payable to that State under this section an amount equal to the ratio of the number of lunches served in schools in which the program is administered by FNS to the total number of lunches served in all program schools in the State.

[47 FR 15982, Apr. 13, 1982, as amended at 52 FR 7267, Mar. 10, 1987; 58 FR 39120, July 22, 1993]

§ 240.4 Cash in lieu of donated foods for nonresidential child and adult care institutions.

(a) For each school year any State agency may, upon application to FNS prior to the beginning of the school year, elect to receive cash in lieu of donated foods for use in nonresidential child care or adult care institutions participating in the Child and Adult Care Food Program. FNS shall pay each State agency making such election, at a minimum, an amount calculated by multiplying the number of lunches and suppers served in the State's nonresidential child and adult care institutions which meet the meal pattern requirements prescribed in the regulations for the Child and Adult Care Food Program under part 226 of this chapter by the national average value of donated food prescribed in section 6(e)(1) of the Act. However, if a State agency has elected to receive a combination of donated foods and cash, the required amount shall be reduced based upon the number of such lunches and suppers served for which the State receives donated foods.

(b) Notwithstanding any other provision of this section in any State in which FNS administers the Child Care Food Program in any nonresidential child care institution, FNS shall withhold from the funds payable to such State under this section an amount equal to the ratio of the number of

lunches and suppers served in such institutions in which the program is administered by the FNS and for which cash payments are provided to the total number of lunches and suppers served in that program and for which cash in lieu of payments are received, in all nonresidential child care institutions in the State.

[47 FR 15982, Apr. 13, 1982, as amended at 58 FR 39120, July 22, 1993]

§ 240.5 Cash in lieu of donated foods for commodity schools.

(a) The school food authority of a commodity school may elect (1) to receive cash payments in lieu of up to five cents per lunch of the value specified in § 250.4(b)(2)(ii) of this chapter to be used for donated-food processing and handling expenses, or (2) to have such payments retained for use on its behalf by the State agency. The school food authority shall consult with commodity schools before making the election.

(b) When a school food authority makes an election regarding receipt of cash payments and the amount of any payments to be received under this paragraph, such election shall be binding on the school food authority for the school year to which the election applies.

(c) The State agency shall (1) no later than May 14, 1982 for the school year ending June 30, 1982, and no later than August 15 of each subsequent school year, contact all school food authorities of commodity schools to learn their election regarding cash payments under this section and the amount of any such payments, and (2) forward this information to the distributing agency and FNSRO, in accordance with § 210.14(d)(2) of this chapter.

§ 240.6 Funds for States which have phased out facilities.

Notwithstanding any other provision of this part, any State which phased out its food distribution facilities prior to June 30, 1974, may, for purposes of the National School Lunch Program, the Summer Food Service Program for Children, and the Child Care Food Program, elect to receive cash payments in lieu of donated foods. Where such an election is made, FNS shall make cash payments to such State in an amount equivalent in value to the donated foods (or cash in lieu thereof) to which the State would otherwise have been entitled under section 6(e) of the Act, if it had retained its food distribution facilities, except that the amount may be based on the number of meals served in the current school year, rather than on the number of meals served in the preceding school year with a subsequent reconciliation.

[47 FR 15982, Apr. 13, 1982, as amended at 58 FR 39120, July 22, 1993]

§ 240.7 Payments to States.

(a) Funds to be paid to any State agency under § 240.3 of this part for disbursement to program schools shall be made available by means of United States Treasury Department checks. The State agency shall use the funds received without delay for the purpose for which issued.

(b) Funds to be paid to any State agency under § 240.4(a) for disbursement to nonresidential child care institutions and funds to be paid to any State agency under § 240.6 for disbursement to program schools, service institutions, or nonresidential child care institutions shall be made available by means of Letters of Credit issued by FNS in favor of the State agency. The State agency shall:

(1) Obtain funds needed to pay school food authorities, nonresidential child care institutions, and service institutions, as applicable through presentation by designated State Officials of a Payment Voucher on Letter of Credit (Treasury Form GFO 7578) in accordance with procedures prescribed by FNS and approved by the United States Treasury Department;

(2) Submit requests for funds on a monthly basis in such amounts as necessary to make payments with respect to meals served the previous month;

(3) Use the funds received without delay for the purpose for which drawn.

(c) FNS shall make any cash payments elected under § 240.5 of this part by increasing the amount of the Letter of Credit or, where applicable, of the Federal Treasury check, in accordance with the information provided under § 240.5(c) of this part.

(d) Funds received by State agencies pursuant to this part for disbursement to program schools and to commodity schools shall not be subject to the matching provisions of § 210.6 of part 210 of this chapter.

§ 240.8 Payments to program schools, service institutions, nonresidential child care institutions and commodity schools.

(a) Each State agency shall promptly and equitably disburse any cash received in lieu of donated foods under this part to eligible program schools, service institutions and nonresidential child care institutions, as applicable. Funds withheld from States under § 240.3 and § 240.4 shall be disbursed to eligible program schools, service institutions, and nonresidential child care institutions by FNSRO's in the same manner.

(b) Unless the school food authority of a commodity school elects to have cash payments for donated-food processing and handling expenses retained for use on its behalf by the State agency, the State agency shall make such payments to the school food authority of such a school on a monthly basis in an amount equal to the number of lunches served (as reported in accordance with § 210.13(a) of this chapter) times the value per lunch elected by the school food authority in accordance with § 240.5 of this part. For the period November 11, 1981, through the close of the month in which this part is published in the FEDERAL REGISTER, a retroactive payment shall be made, where applicable, to the school food authority of a commodity school based on the number of lunches served during that period which meet the nutritional requirements specified in § 210.10 of this chapter.

§ 240.9 Use of funds.

(a) Funds made available to school food authorities (for program schools), service institutions and nonresidential child care institutions under this part shall be used only to purchase United States agricultural commodities and other foods for use in their food service under the National School Lunch Program, Child Care Food Program, or Summer Food Service Program for Children, as applicable. Such foods shall be limited to those necessary to meet the requirements set forth in § 210.10 of part 210 of this chapter, § 225.10 of part 225 of this chapter and § 226.10 of part 226 of this chapter, respectively. On or before disbursing funds to school food authorities (for program schools), service institutions and nonresidential child care institutions, State agencies and FNSRO's shall notify them of the reason for special disbursement, the purpose for which these funds may be used, and, if possible, the amount of funds they will receive.

(b) Cash payments received under § 240.5 of this part shall be used only to pay donated-food processing and handling expenses of commodity schools.

(c) Funds provided under this part shall be subject to the Department's Uniform Federal Assistance Regulations (7 CFR part 3015).

§ 240.10 Unobligated funds.

State agencies shall release to FNS any funds paid to them under this part which are unobligated at the end of each fiscal year. Release of funds by any State agency shall be made as soon as practicable, but in any event, not later than 30 days following demand by FNS. Release of funds shall be reflected by a related adjustment in the State agency's Letter of Credit where appropriate or payment by State check where the funds have been paid by United States Treasury Department check.

§ 240.11 Records and reports.

(a) State agencies and distributing agencies shall maintain records and reports on the receipt and disbursement of funds made available under this part, and shall retain such records and reports for a period of three years after the end of the fiscal year to which they pertain, except that, if audit findings have not been resolved, the records shall be retained beyond the three-year period as long as required for the resolution of the issues raised by the audit.

(b) State agencies shall establish controls and procedures which will assure that the funds made available

under this part are not included in determining the State's matching requirements under § 210.6 of part 210 of this chapter.

PART 245—DETERMINING ELIGIBILITY FOR FREE AND REDUCED PRICE MEALS AND FREE MILK IN SCHOOLS

Sec.
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AUTHORITY: 42 U.S.C. 1752, 1758, 1759a, 1772, 1773, and 1779.

§ 245.1 General purpose and scope.

(a) This part established the responsibilities of State agencies, Food and Nutrition Service Regional Offices (where applicable), and School Food Authorities in providing free and reduced price meals and free milk in the National School Lunch Program (7 CFR part 210), the School Breakfast Program (7 CFR part 220), the Special Milk Program for Children (7 CFR part 215), and commodity schools. Section 9 of the National School Lunch Act, as amended, and sections 3 and 4 of the Child Nutrition Act of 1966, as amended, require schools participating in any of the programs and commodity schools to make available, as applicable, free and reduced price lunches, breakfasts, and at the option of the School Food Authority for schools participating only in the Special Milk Program free milk to eligible children.

(b) This part sets forth the responsibilities under these Acts of State agencies, the Food and Nutrition Service Regional Offices, and School Food Authorities with respect to the establishment of income guidelines, determination of eligibility of children for free and reduced price meals, and for free milk and assurance that there is no physical segregation of, or other discrimination against, or overt identification of children unable to pay the full price for meals or milk.

(Sec. 803, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1758))

[Amdt. 6, 39 FR 30337, Aug. 22, 1974, as amended by Amdt. 10, 41 FR 28783, July 13, 1976; 47 FR 31852, July 23, 1982]

§ 245.2 Definitions.

(a) *Adult* means any individual 21 years of age or older.

(a–1) *Commodity school* means a school which does not participate in the National School Lunch Program under part 210 of this chapter, but which enters into an agreement as provided in § 210.15a(b) to receive commodities donated under part 250 of this chapter for a nonprofit lunch program.

(a–2) *Current income* means income, as defined in § 245.6(a), received during the month prior to application. If such income does not accurately reflect the household's annual rate of income, income shall be based on the projected annual household income. If the prior year's income provides an accurate reflection of the household's current annual income, the prior year may be used as a base for the projected annual rate of income.

(a–3) *Disclosure* means individual children's program eligibility information obtained through the free and reduced price meal or free milk eligibility process that is revealed or used for a purpose other than for the purpose for which the information was obtained. The term refers to access, release, or transfer of personal data about children by means of print, tape, microfilm, microfiche, electronic communication or any other means.

(a–4) *Documentation means:*

(1) The completion of a free and reduced price school meal or free milk application which includes:

(i) For households applying on the basis of income and household size, names of all household members; income received by each household member, identified by source of the income (such as earnings, wages, welfare, pensions, support payments, unemployment compensation, and social security and other cash income); the signature of an adult household member; and the social security number of the adult household member who signs the application or an indication that he/she does not possess a social security number; or

(ii) For a child who is a member of a food stamp, FDPIR or TANF household: the child's name and appropriate food stamp or TANF case number or FDPIR case number or other identifier; and the name and signature of an adult household member; and

(2) In lieu of completion of the free and reduced price application, information obtained from the State or local agency responsible for the Food Stamp Program, FDPIR or TANF which includes the name of the child; a statement certifying that the child is a member of a currently certified food stamp, FDPIR or TANF household; information in sufficient detail to match the child attending school in the school food authority with the name of the child certified as a member of a food stamp, FDPIR or TANF household; the signature or a copy of the signature of the individual authorized to provide the certification on behalf of the Food Stamp, FDPIR or TANF office, as appropriate; and the date. When the signature is impracticable to obtain, such as in a computer match, other arrangements may be made to ensure that a responsible official can attest to the data.

(b) *Family* means a group of related or nonrelated individuals, who are not residents of an institution or boarding house, but who are living as one economic unit.

(b–1) *FDPIR* means the food distribution program for households on Indian reservations operated under part 253 of this title.

(b–2) *Food Stamp Household* means any individual or group of individuals which is currently certified to receive assistance as a household under the Food Stamp Program.

(c) *FNSRO where applicable* means the appropriate Food and Nutrition Service Regional Office when that agency administers the National School Lunch Program, School Breakfast Program or Special Milk Program with respect to nonprofit private schools.

(d) *Free meal* means a meal for which neither the child nor any member of his family pays or is required to work in the school or in the school's food service.

(d–1) *Free milk* means milk served under the regulations governing the Special Milk Program and for which neither the child nor any member of his family pays or is required to work in the school or in the school's food service.

(d–2) *Household* means ''family'' as defined in § 245.2(b).

(e) *Income eligibility guidelines* means the family-size income levels prescribed annually by the Secretary for use by States in establishing eligibility for free and reduced price meals and for free milk.

(f) *Meal* means a lunch or meal supplement or a breakfast which meets the applicable requirements prescribed in §§ 210.10, 210.15a, and 220.8 of this chapter.

(f–1) *Medicaid* means the State medical assistance program under title XIX of the Social Security Act (42 U.S.C. 1396 *et seq.*).

(f–2) *Milk* means pasteurized fluid types of unflavored or flavored whole milk, lowfat milk, skim milk, or cultured buttermilk which meet State and local standards for such milk except that, in the meal pattern for infants (0 to 1 year of age) milk means unflavored types of whole fluid milk or an equivalent quantity of reconstituted evaporated milk which meet such standards. In Alaska, Hawaii, American Samoa, Guam, Puerto Rico, the Trust Territory of the Pacific Islands, and the Virgin Islands, if a sufficient supply of such types of fluid milk cannot be obtained, ''milk'' shall include reconstituted or recombined milk. All milk should contain vitamins A and D at levels specified by the Food and Drug Administration and consistent with

State and local standards for such milk.

(f–3) *Operating day* means a day that reimbursable meals are offered to eligible students under the National School Lunch Program or School Breakfast Program.

(g) *Reduced price meal* means a meal which meets all of the following criteria: (1) The price shall be less than the full price of the meal; (2) the price shall not exceed 40 cents for a lunch and 30 cents for a breakfast; and (3) neither the child nor any member of his family shall be required to supply an equivalent value in work for the school or the school's food service.

(h) *Service institution* shall have the meaning ascribed to it in part 225 of this chapter.

(i) *School*, *school food authority*, and other terms and abbreviations used in this part shall have the meanings ascribed to them in part 210 of this chapter.

(j) *Special Assistance Certification and Reimbursement Alternatives* means the three optional alternatives for free and reduced price meal application and claiming procedures in the National School Lunch Program and School Breakfast Program which are available to those School Food Authorities with schools in which at least 80 percent of the enrolled children are eligible for free or reduced price meals, or schools which are currently, or who will be serving all children free meals.

(k) *State Children's Health Insurance Program (SCHIP)* means the State medical assistance program under title XXI of the Social Security Act (42 U.S.C. 1397aa *et seq.*).

(l) *TANF* means the State funded program under part A of title IV of the Social Security Act that the Secretary determines complies with standards established by the Secretary that ensure that the standards under the State program are comparable to or more restrictive than those in effect on June 1, 1995. This program is commonly referred to as Temporary Assistance for Needy Families, although States may refer to the program by another name.

(m) *Verification* means confirmation of eligibility for free or reduced price benefits under the National School Lunch Program or School Breakfast Program. Verification shall include confirmation of income eligibility and, at State or local discretion, may also include confirmation of any other information required in the application which is defined as documentation in § 245.2(a–4). Such verification may be accomplished by examining information provided by the household such as wage stubs, or by other means as specified in § 245.6a(b). However, if a food stamp or TANF case number or a FDPIR case number or other identifier is provided for a child, verification for such child shall only include confirmation that the child is included in a currently certified food stamp, TANF or FDPIR household.

(Secs. 801, 803, 812; Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1753, 1759(a), 1773, 1758))

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 245.2, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 245.3 Eligibility standards and criteria.

(a) Each State agency, or FNSRO where applicable, shall by July 1 of each year announce family-size income standards to be used by School Food Authorities of schools under the jurisdiction of such State agency, or FNSRO where applicable, in making eligibility determinations for free or reduced price meals and for free milk. Such family size income standards for free and reduced price meals and for free milk shall be in accordance with Income Eligibility Guidelines published by the Department by notice in the FEDERAL REGISTER.

(b) Each School Food Authority shall establish eligibility criteria for free and reduced price meals and for free milk in conformity with the family-size income standards prescribed by the State agency, or FNSRO where applicable, under paragraph (a) of this section. Such criteria shall:

(1) For all schools under the jurisdiction of the School Food Authority, specify the uniform family-size income criteria to be used for determining eligibility for free and reduced price meals in schools participating in the National School Lunch or School Breakfast Programs and in commodity-

only schools, and for determining eligibility for free milk when the School Food Authority has chosen to serve free milk in its schools participating in the Special Milk Program; and

(2) Provide that all children from a family meeting family-size income criteria and attending any school under the jurisdiction of the School Food Authority which participates under the National School Lunch Program, School Breakfast Program, Special Milk Program, or is a commodity only school shall be provided the same benefits. The School Food Authority's eligibility criteria shall be a part of the policy statement required under § 245.10 and shall be publicly announced in accordance with the provisions of § 245.5.

(c) Each School Food Authority shall serve free and reduced price meals or free milk in the respective programs to children eligible under its eligibility criteria. When a child is not a member of a family as defined in § 245.2(b), the child shall be considered a family of one. In any school which participates in more than one of the child nutrition programs, eligibility shall be applied uniformly so that eligible children receive the same benefits in each program. If a child transfers from one school to another school under the jurisdiction of the same School Food Authority, his eligibility for free or reduced price meals or for free milk, if previously established, shall be transferred to, and honored by, the receiving school if it participates in the National School Lunch Program, School Breakfast Program, Special Milk Program and the School Food Authority has elected to provide free milk, or is a commodity-only school.

(Sec. 8, Pub. L. 95–627, 92 Stat. 3623 (42 U.S.C. 1758); sec. 5, Pub. L. 95–627, 92 Stat. 3619 (42 U.S.C. 1772); 42 U.S.C. 1785, 1766, 1772, 1773(e), sec. 203, Pub. L. 96–499, 94 Stat. 2599; secs. 807 and 808, Pub. L. 97–35, 95 Stat. 521–535, 42 U.S.C. 1772, 1784, 1760; sec. 803, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1758))

[Amdt. 8, 40 FR 57207, Dec. 8, 1975; 40 FR 58281, Dec. 16, 1975, as amended by Amdt. 10, 41 FR 28783, July 13, 1976; Amdt. 13, 44 FR 33049, June 8, 1979; 47 FR 31852, July 23, 1982]

§ 245.4 Exceptions for Puerto Rico and the Virgin Islands.

Because the State agencies of Puerto Rico and the Virgin Islands provide free meals or milk to all children in schools under their jurisdiction, regardless of the economic need of the child's family, they are not required to make individual eligibility determinations or publicly announce eligibility criteria. Instead, such State agencies may use a statistical survey to determine the number of children eligible for free or reduced price meals and milk on which a percentage factor for the withdrawal of special cash assistance funds will be developed subject to the following conditions:

(a) State agencies shall conduct a statistical survey once every three years in accordance with the standards provided by FNS;

(b) State agencies shall submit the survey design to FNS for approval before proceeding with the survey;

(c) State agencies shall conduct the survey and develop the factor for withdrawal between July 1 and December 31 of the first school year of the three-year period;

(d) State agencies shall submit the results of the survey and the factor for fund withdrawal to FNS for approval before any reimbursement may be received under that factor;

(e) State agencies shall keep all material relating to the conduct of the survey and determination of the factor for fund withdrawal in accordance with the record retention requirements in § 210.8(e)(14) of this chapter;

(f) Until the results of the triennial statistical survey are available, the factor for fund withdrawal will be based on the most recently established percentages. The Department shall make retroactive adjustments to the States' Letter of Credit, if appropriate, for the year of the survey;

(g) If any school in these States wishes to charge a student for meals, the State agency, School Food Authority and school shall comply with all the

applicable provisions of this part and parts 210, 215 and 220 of this chapter.

(Sec. 9, Pub. L. 95–166, 91 Stat 1336 (42 U.S.C. 1759a); secs. 807 and 808, Pub. L. 97–35, 95 Stat. 521–535, 42 U.S.C. 1772, 1784, 1760; 44 U.S.C. 3506)

[Amdt. 18, 45 FR 52771, Aug. 8, 1980, as amended at 46 FR 51366, Oct. 20, 1981; 47 FR 746, Jan. 7, 1982]

§ 245.5 Public announcement of the eligibility criteria.

(a) After the State agency, or FNSRO where applicable, notifies the school food authority that its criteria for determining the eligibility of children for free and reduced price meals and for free milk have been approved, the school food authority shall publicly announce such criteria: *Provided however*, that no such public announcement shall be required for boarding schools, residential child care institutions (see § 210.2 of this chapter, definition of *Schools*), or a school which includes food service fees in its tuition, where all attending children are provided the same meals or milk. Such announcements shall be made at the beginning of each school year or, if notice of approval is given thereafter, within 10 days after the notice is received. The public announcement of such criteria, as a minimum, shall include the following:

(1) Except as provided in § 245.6(b), a letter or notice and application distributed on or about the beginning of each school year, to the parents of all children in attendance at school. The letter or notice shall contain the following information:

(i) In schools participating in a meal service program, the eligibility criteria for *reduced price* benefits with an explanation that households with incomes less than or equal to the reduced price criteria would be eligible for either free or reduced price meals, or in schools participating in the free milk option, the eligibility criteria for *free* milk benefits;

(ii) How a household may make application for free or reduced price meals or for free milk for its children;

(iii) An explanation that an application for free or reduced price benefits cannot be approved unless it contains complete ''documentation'' as defined in § 245.2(a–3);

(iv) An explanation that households with children who are members of currently certified food stamp, FDPIR or TANF households may submit applications for these children with the abbreviated information described in § 245.2(a–3);

(v) An explanation that the information on the application may be verified at any time during the school year;

(vi) An explanation that households receiving free or reduced price benefits must notify school officials during the school year of any decreases in household size and any increases in income of over $50 per month or $600 per year (or a lesser amount if established by the State) or, in the case of households that provided a food stamp or TANF case number or a FDPIR case number or other FDPIR identifier to establish eligibility for free meals or free milk for a child, of any termination of benefits for such children under the Food Stamp, FDPIR or TANF Programs.

(vii) How a household may apply for benefits at any time during the school year as circumstances change;

(viii) A statement to the effect that children having parents or guardians who become unemployed are eligible for free or reduced price meals or for free milk during the period of unemployment, *Provided*, that the loss of income causes the household income during the period of unemployment to be within the eligibility criteria;

(ix) A statement to the effect that in certain cases foster children are eligible for free or reduced price meals or free milk regardless of the income of the household with whom they reside and that households wishing to apply for such benefits for foster children should contact the School Food Authority;

(x) The statement: ''In the operation of child feeding programs, no child will be discriminated against because of race, sex, color, national origin, age or disability;'' and

(xi) How a household may appeal the decision of the School Food Authority with respect to the application under the hearing procedure set forth in

§ 245.7. The letter or notice shall be accompanied by a copy of the application form required under § 245.6.

(2) On or about the beginning of each school year, a public release, containing the same information supplied to parents, and including both free and reduced price eligibility criteria shall be provided to the informational media, the local unemployment office, and to any major employers contemplating large layoffs in the area from which the school draws its attendance.

(b) Copies of the public release shall be made available upon request to any interested persons. Any subsequent changes in a school's eligibility criteria during the school year shall be publicly announced in the same manner as the original criteria were announced.

(Sec. 803, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1758); Pub. L. 79–396, 60 Stat. 231 (42 U.S.C. 1751); Pub. L. 89–642, 80 Stat. 885–880 (42 U.S.C. 1773); Pub. L. 91–248, 84 Stat. 207 (42 U.S.C. 1759))

[Amdt. 8, 40 FR 57207, Dec. 8, 1975, as amended by Amdt. 10, 41 FR 28783, July 13, 1976; 47 FR 31852, 31853, July 23, 1982; Amdt. 24, 48 FR 19355, Apr. 29, 1983; 49 FR 26034, June 26, 1984; 52 FR 19275, May 22, 1987; 64 FR 50744, Sept. 20, 1999; 64 FR 72472, Dec. 28, 1999; 66 FR 48328, Sept. 20, 2001]

§ 245.6 Certification of children for free and reduced price meals and free milk.

(a) Each School Food Authority of a school participating in the National School Lunch Program, School Breakfast Program or Special Milk Program or of a commodity only school shall provide supplies of a form for use by families in making application for free or reduced price meals or free milk for their children. The application shall be clear and simple in design and the information requested thereon shall be limited to that required to demonstrate that the family does, or does not, meet the eligibility criteria for free or reduced price meals, respectively, or for free milk, issued by the School Food Authority. The information requested on the application with respect to the current income of the household shall be limited to the income received by each member identified by the household member who received the income, and the source of the income (such as earnings, wages, welfare, pensions, support payments, unemployment compensation, social security and other cash income). Other cash income includes cash amounts received or withdrawn from any source, including savings, investments, trust accounts, and other resources which are available for payment of the price of a child's meals or milk. Additionally, the application shall require applicants to provide the names of all household members and the social security number of the adult household member who signs the application. In lieu of a social security number, the household may indicate the adult household member who signs the application does not possess a social security number. However, if application is being made for a child who is a member of a food stamp, FDPIR or TANF household, the application shall enable the household to provide the appropriate food stamp or TANF case number or FDPIR case number or other FDPIR identifier in lieu of names of all household members, household income information and social security number. The application shall also contain substantially the following statements:

(1) ''Unless you include your child's case number for the Food Stamp Program, the Food Distribution Program on Indian Reservations (or other identifier for the Food Distribution Program on Indian Reservations) or the Temporary Assistance for Needy Families Program, you must include the social security number of the adult household member signing the application or indicate that the household member does not have a social security number. This is required by section 9 of the National School Lunch Act. The social security number is not mandatory, but the application cannot be approved if a social security number is not given or an indication is not made that the signer does not have a social security number. The social security number will be used in the administration and enforcement of the program.'' State agencies and school food authorities must ensure that the notice complies with section 7(b) of the Privacy Act of 1974 (5 U.S.C. 552a note); and

(2) ''In certain cases foster children are eligible for free or reduced price

meals or free milk regardless of your household income. If you have such children living with you and wish to apply for such meals or milk for them, please contact us.'' The application shall also include a statement, immediately above the space for signature, that the person signing the application certifies that all information furnished in the application is true and correct, that the application is being made in connection with the receipt of Federal funds, that school officials may verify the information on the application, and that deliberate misrepresentation of the information may subject the applicant to prosecution under applicable State and Federal criminal statutes. The application shall be signed by an adult member of the family. The application shall contain clear instructions with respect to the submission of the completed application to the official or officials designated by the School Food Authority to make eligibility determinations on its behalf. A family shall be permitted to file an application at any time during the school year.

(b) *Direct certification*. In lieu of determining eligibility based on information provided by the household on the free and reduced price meal or milk application specified in paragraph (a) of this section, school food authorities may determine children eligible for free meals or milk based on documentation obtained from the appropriate State or local agency responsible for the administration of the Food Stamp Program, FDPIR and/or the TANF Program, hereafter referred to as direct certification. The documentation for direct certification shall include the information specified in § 245.2(a–3)(2). The food stamp, FDPIR or TANF office may provide school officials with a list which includes all required documentation, or documentation may be obtained through a computerized match in which computerized lists of names of children from food stamp, FDPIR or TANF households and other identifying information are matched against a list of names and other identifying information of schoolchildren. When computer matches are used or the signature of the food stamp, FDPIR or TANF official is otherwise impracticable to obtain, the signature of the food stamp, FDPIR or TANF official is not required. However, other arrangements must be made to ensure that a responsible official can attest to the data. Additionally, the food stamp, FDPIR and/or TANF office may provide food stamp, FDPIR and/or TANF households with individual notices which contain all required documentation. The household may then transmit the notice to the school.

(1) Information about the child or the household obtained directly from the food stamp, FDPIR or TANF office must be kept confidential and shall be used solely for the purpose of determining the child's eligibility for school meal or milk benefits, or as otherwise permitted by section 9 of the National School Lunch Act.

(2) School food authorities are not required to provide the letter specified in § 245.5(a) to the parents of children who are eligible for free meals under paragraph (b) of this section when the school food authorities distribute the letters or notices with application forms and the notice to households concerning eligibility for benefits under direct certification, specified in paragraph (c)(1) of this section, through the mail, individualized student packets, or other method which prevents the overt identification of children eligible for direct certification.

(c) *Determination of eligibility*. Prior to the processing of applications or the completion of direct certification procedures for the current school year, children from households with approved applications or documentation of direct certification on file from the preceding year may be served reimbursable free and reduced price meals or free milk. However, applications and documentation of direct certification from the preceding year may be used to determine eligibility only during the 30 operating days following the first operating day at the beginning of the school year, or during a timeframe established by the State agency, provided that any State agency timeframe does not exceed the 30 operating day limit. The school food authority must take the income information provided by the household on the application and calculate the household's total current

income. When a household submits an application containing complete documentation, as specified in § 245.2(a–3)(1)(i), and the household's total current income is at or below the eligibility limits specified in the Income Eligibility Guidelines, the children in that household must be approved for free or reduced price benefits, as applicable. When a household submits an application containing the required food stamp, FDPIR or TANF documentation, as specified in § 245.2(a–3)(1)(ii), the children in that household must be approved for free benefits. Additionally, when the school food authority obtains documentation from the State or local agency responsible for the administration of the Food Stamp Program, FDPIR and/or TANF Program that children are members of currently certified food stamp, FDPIR or TANF households, as specified in § 245.2(a–3)(2), the school food authority must approve such children for free benefits without applications from the households.

(1) *Notice of approval.* The school food authority must promptly notify the household of their children's eligibility and provide them the benefits to which they are entitled. Households approved for benefits based on documentation provided by the appropriate State or local agency responsible for the administration of the Food Stamp Program, FDPIR or TANF Program must be notified, in writing, that their children are eligible for free meals or free milk, that households must contact the school when their children are no longer eligible for food stamp, FDPIR or TANF benefits, and that no application for free and reduced price school meals is required at this time. The notice of eligibility must also inform households that they must notify the school if they do not want their children to receive free benefits. When the household transmits the notice of eligibility containing the above information and the documentation provided by the food stamp, FDPIR or TANF office to the school, the school food authority is not required to provide a separate notice of eligibility. Children from households that notify the school that they do not want free benefits must have their benefits discontinued as soon as possible. Any notification from the household declining benefits must be documented and maintained on file, in accordance with paragraph (e) of this section. Additionally, a school food authority that is notified by the household that they are no longer eligible to receive food stamp, FDPIR or TANF benefits must follow the procedures specified in § 245.6a(e), and inform the household that it must submit an application with income information to establish continued eligibility.

(2) *Notice of denial.* When the application furnished by the family is not fully documented or does not meet the eligibility criteria for free or reduced price benefits, school officials shall promptly provide written notice to each family denied benefits. As a minimum, this notice shall include:

(i) The reason for the denial of benefits, e.g. income in excess of allowable limits or incomplete application; (ii) notification of the right to appeal; (iii) instructions on how to appeal; and (iv) a statement reminding parents that they may reapply for free and reduced price benefits at any time during the school year. The reasons for ineligibility shall be properly documented and retained on file at the School Food Authority.

(3) *Appeals of denied benefits.* A family who wishes to appeal a denied application by the School Food Authority may do so as specified in § 245.7. However, prior to initiating the hearing procedure, the parent may request a conference to provide the opportunity for the parent and school officials to discuss the situation, present information, and obtain an explanation of the data submitted in the application or the decision rendered. The request for a conference shall not in any way prejudice or diminish the right to a fair hearing. The School Food Authority shall promptly schedule a fair hearing, if requested.

(d) After the letter to parents and the applications have been disseminated, the School Food Authority may determine, based on information available to it, that a child for whom an application has not been submitted meets the School Food Authority's eligibility criteria for free and reduced price meals

or for free milk. In such a situation, the School Food Authority shall complete and file an application for such child setting forth the basis of determining the child's eligibility. When a School Food Authority has obtained a determination of individual family income and family-size data from other sources, it need not require the submission of an application for any child from a family whose income would qualify for free or reduced price meals or for free milk under the School Food Authority's established criteria. In such event, the School Food Authority shall notify the family that its children are eligible for free or reduced price meals or for free milk. Nothing in this paragraph shall be deemed to provide authority for the School Food Authority to make eligibility determinations or certifications by categories or groups of children.

(e) The school food authority must maintain documentation substantiating eligibility determinations on file for 3 years after the date of the fiscal year to which they pertain, except that if audit findings have not been resolved, the documentation must be maintained as long as required for resolution of the issues raised by the audit.

(f) *Disclosure of program eligibility information to State Medicaid (Medicaid) and the State Children's Health Insurance Program (SCHIP)* Program eligibility information about children eligible for free and reduced price meals may be disclosed to Medicaid and SCHIP as described in this section.

(1) *Who decides whether to disclose program eligibility information to Medicaid and/or SCHIP?* The State agency may elect to allow school food authorities to disclose children's free and reduced price meal eligibility information to Medicaid and SCHIP. School food authorities may then elect to do so. Children's program eligibility information may only be disclosed to Medicaid or SCHIP when both the State agency and the school food authority so elect, the parent/guardian does not decline to have their eligibility information disclosed as described in paragraph (f)(5), and the requirements in this paragraph (f) are met.

(2) *What information may we disclose for use by Medicaid and SCHIP?* The State agency or school food authority, as appropriate, may disclose children's names, eligibility status (whether they are eligible for free or reduced price meals or free milk), and any other eligibility information obtained through the free and reduced price meal/milk application or obtained through direct certification to persons directly connected with the administration of Medicaid or SCHIP.

(3) *Who are persons ''directly connected'' with the administration of Medicaid and SCHIP?* State employees and persons authorized under Federal and State Medicaid and SCHIP requirements to carry out initial processing of Medicaid or SCHIP applications or to make eligibility determinations are persons directly connected with the administration of Medicaid and SCHIP for purposes of disclosure of children's free and reduced price meal and free milk eligibility information.

(4) *What are the restrictions on how Medicaid and SCHIP use children's free and reduced price meal and free milk eligibility information?* Medicaid and SCHIP agencies and health insurance program operators receiving children's free and reduced price meal and free milk eligibility information may only use the information to seek to enroll children in Medicaid or SCHIP. The Medicaid and SCHIP enrollment process may include targeting and identifying children from low-income households who are potentially eligible for Medicaid or SCHIP for the purpose of seeking to enroll them in Medicaid or SCHIP.

(5) *Must we notify households of potential disclosure to Medicaid or SCHIP?* The State agency or school food authority, as appropriate, must notify parents/guardians that their children's free or reduced price meal or free milk eligibility information will be disclosed to Medicaid and/or SCHIP unless the parent/guardian elects not to have their information disclosed. Additionally, the State agency or school food authority, as appropriate, must give parents/guardians an opportunity to elect not to have their information disclosed to Medicaid or SCHIP. Only the parent or guardian who is a member of the

household or family for purposes of the free and reduced price meal or free milk application may decline the disclosure of eligibility information. The notification must inform parents/guardians that they are not required to consent to the disclosure, that the information, if disclosed, will be used to identify children eligible for and seek to enroll children in a health insurance program, and that their decision will not affect their children's eligibility for free or reduced price meals or free milk. The notification may be included in the letter/notice to parents/guardians that accompanies the free and reduced price meal or free milk application, on the application itself or in a separate notice provided to parents/guardians. The notice must give parents/guardians adequate time to respond. For children determined eligible through direct certification, the notice of potential disclosure may be included in the document informing parents/guardians of their children's eligibility for free meals or free milk through direct certification.

(6) *May social security numbers be disclosed?* The State agency or school food authority, as appropriate, may disclose social security numbers to any programs or persons authorized to receive all program eligibility information under this paragraph (f), provided parents/guardians have not declined to have their information disclosed. However, State agencies and school food authorities that plan to disclose social security numbers must give notice of the planned use of the social security numbers. This notice must be in accordance with section 7(b) of the Privacy Act of 1974 (5 U.S.C. 552a note). The application must include substantially the following language for disclosures of social security numbers to Medicaid or SCHIP: ''The social security number may also be disclosed to Medicaid and the State Children's Health Insurance Program for the purpose of identifying and seeking to enroll eligible children in one of these health insurance programs.'' This language is in addition to the notice required in paragraph (a)(1) of this section. State agencies and school food authorities are responsible for drafting the appropriate notice for disclosures of social security numbers.

(7) *Are agreements required before disclosing program eligibility information?* The State agency or school food authority, as appropriate, must have a written agreement with the State or local agency or agencies administering Medicaid or SCHIP prior to disclosing children's free and reduced price eligibility information. At a minimum, the agreement must:

(i) Identify the health insurance program or health agency receiving children's eligibility information;

(ii) Describe the information that will be disclosed;

(iii) Require that the Medicaid or SCHIP agency use the information obtained and specify that the information must only be used to seek to enroll children in Medicaid or SCHIP;

(iv) Describe how the information will be protected from unauthorized uses and disclosures;

(v) Describe the penalties for unauthorized disclosure; and

(vi) Be signed by both the Medicaid or SCHIP program or agency and the State agency or school food authority, as appropriate.

(8) *What are the penalties for unauthorized disclosure or misuse of information?* In accordance with section 9(b)(2)(C)(v) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1758(b)(2)(C)(v)), any individual who publishes, divulges, discloses or makes known in any manner, or to any extent not authorized by statute or this section, any information obtained under this paragraph (f) will be fined not more than $1,000 or imprisoned for up to 1 year, or both.

(9) *What are the State agency's responsibilities regarding disclosures?* State agencies that elect to allow disclosure of children's free and reduced price meal eligibility information to Medicaid or SCHIP, as provided in this paragraph (f), must ensure that any school food authority acting in accordance with that option:

(i) Has a written agreement with the State or local agency or agencies administering health insurance programs for children under titles XIX and XXI of the Social Security Act (42 U.S.C.

1396 *et seq.* and 1397aa *et seq.*) that requires the health agencies to use children's free and reduced price meal eligibility information to seek to enroll children in those health insurance programs; and

(ii) Notifies each household of the information that will be disclosed, that the information disclosed will be used only to seek to enroll children in Medicaid or SCHIP and provides each parent/guardian with an opportunity to elect not to have the information disclosed.

(Sec. 803, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1758))

[35 FR 14065, Sept. 4, 1970, as amended at 38 FR 14957, June 7, 1973; Amdt. 6, 39 FR 30338, Aug. 22, 1974; Amdt. 9, 41 FR 26192, June 25, 1976; Amdt. 19, 45 FR 67287, Oct. 10, 1980; 47 FR 31853, July 23, 1982; 49 FR 26034, June 26, 1984; 52 FR 19275, May 22, 1987; 55 FR 19240, May 9, 1990; 56 FR 32950, July 17, 1991; 56 FR 33860, July 24, 1991; 64 FR 72472, Dec. 28, 1999; 66 FR 2205, Jan. 11, 2001; 66 FR 48328, Sept. 20, 2001]

§ 245.6a Verification requirements.

(a) *Verification requirement.* School officials may seek verification of the information on the application. State agencies shall ensure that by December 15 of each School Year, School Food Authorities have selected and verified a sample of their approved free and reduced price applications in accordance with the conditions and procedures described in this section. Verification activity may begin at the start of the school year but the final required sample size shall be based on the number of approved applications on file as of October 31. Any extensions to these deadlines must be approved in writing by FNS. School Food Authorities are required to satisfy the verification requirement by using either random sampling or focused sampling as described below. *Random* sampling consists of verifying a minimum of the lesser of 3 percent or 3,000 applications which are selected by the School Food Authority. *Focused* sampling consists of selecting and verifying a minimum of: the lesser of 1 percent or 1,000 of total applications selected from non-food stamp households claiming monthly income within $100 or yearly income within $1200 of the income eligibility limit for free or reduced price meals; plus the lesser of one half of 1 percent (.5%) or 500 applications of food stamp, FDPIR or TANF households that provided a food stamp or TANF case number or FDPIR case number or other FDPIR identifier in lieu of income information. A State may require all School Food Authorities to perform either random or focused sampling. School Food Authorities may choose to verify up to 100 percent of all applications to improve program integrity. Any State may, with the written approval of FNS, assume responsibility for complying with the verification requirements of this part within any of its School Food Authorities. When assuming such responsibility, States may utilize alternate approaches to verification provided that such verification meets the requirements of this part.

(1) *Confirmation of income information.* Verification efforts shall not delay the approval of applications. An application must be approved if it contains the essential information specified in § 245.2(a–4) and, if applicable, the household meets the income eligibility criteria for free or reduced price benefits. When written evidence or collateral contacts are the primary sources of information, the School Food Authority shall require the submission of income information for the most recent full month that is available. However, when using a system of records, the School Food Authority may choose a recent month to verify and the entire sample may be verified for the same month. Households which dispute the validity of income information acquired through systems of records shall be given the opportunity to produce more recent income information.

(2) *Notification of selection.* Households selected to provide verification shall be provided written notice that their applications have been selected for verification and that they are required, by such date as determined by the school food authority, to submit the requested verification information to confirm eligibility for free or reduced price meals. These households shall be advised of the type or types of information and/or documents acceptable to the school. This information must include a social security number for each

adult household member or an indication that such member does not have one. School food authorities shall inform selected households that:

(i) Section 9 of the National School Lunch Act requires that unless the child's food stamp case number/ FDPIR case number or other FDPIR identifier or TANF case number is provided, households selected for verification must provide the social security number of each adult household member;

(ii) In lieu of providing a social security number, an adult household member may indicate that he/she does not possess one;

(iii) Provision of a social security number is not mandatory but if a social security number is not provided for each adult household member or an indication is not made that he/she does not possess one, benefits will be terminated;

(iv) The social security numbers may be used to identify household members in carrying out efforts to verify the correctness of information stated on the application and continued eligibility for the program. These verification efforts may be carried out through program reviews, audits, and investigations and may include contacting a food stamp, FDPIR or TANF office to determine current certification for receipt of these benefits, contacting the State employment security office to determine the amount of benefits received and checking documentation produced by household members to prove the amount of income received. These verification efforts may be carried out through program reviews, audits, and investigations and may include contacting employers to determine income, contacting a food stamp or welfare office to determine current certification for receipt of food stamps or AFDC benefits, contacting the State employment security office to determine the amount of benefits received and checking the documentation produced by household members to prove the amount of income received.

(v) This information must be provided to the attention of each adult household member disclosing his/her social security number. State agencies and school food authorities shall ensure that the notice complies with section 7 of Pub. L. 93–579 (Privacy Act of 1974). These households shall be provided with the name and phone number of a school official who can assist in the verification effort. Selected households must also be informed that, in lieu of any information that would otherwise be required, they can submit proof of current food stamp, FDPIR or TANF certification as described in paragraph (a)(3) of this section to verify the free meal eligibility of a child who is a member of a food stamp, FDPIR or TANF household. All households selected for verification shall be advised that failure to cooperate with verification efforts will result in the termination of benefits.

(3) *Food stamp, FDPIR or TANF recipients.* On applications where households have furnished food stamp or TANF case numbers or FDPIR case numbers or other FDPIR identifiers, verification shall be accomplished either by confirming with the local food stamp, FDPIR, or TANF office that each child, for whom application was made and a case number or other identifier was provided, is a member of a currently certified food stamp, FDPIR or TANF household; or by obtaining from the household a copy of a current ''Notice of Eligibility'' for the Food Stamp Program, FDPIR or TANF Program or equivalent official documentation issued by the food stamp, FDPIR or TANF office which confirms that the child is a member of a currently certified food stamp, FDPIR or TANF household. An identification card for either program is not acceptable as verification unless it contains an expiration date. If it is not established that the child is a member of a currently certified food stamp, TANF or FDPIR household, the procedures for adverse action specified in paragraph (e) of this section must be followed. The notification of forthcoming termination of benefits provided to such households shall include a request for household income information and for written evidence which confirms household income to assist those households in establishing continued eligibility for free meal benefits.

(4) *Household cooperation.* If a household refuses to cooperate with efforts

to verify, eligibility for free or reduced price benefits shall be terminated in accordance with § 245.6a(e). Households which refuse to complete the verification process and which are consequently determined ineligible for such benefits shall be counted toward meeting the School Food Authority's required sample of verified households.

(5) *Exceptions from verification.* Verification efforts are not required in residential child care institutions; schools in which FNS has approved special cash assistance claims based on economic statistics regarding per capita income; or schools in which all children are served with no separate charge for food service and no special cash assistance is claimed. School Food Authorities in which all schools participate in the Special Assistance Certification and Reimbursement Alternatives specified in § 245.9 shall meet the verification requirement only in those years in which applications are taken for all children in attendance. Verification of eligibility is not required of households when the determination of eligibility was based on documentation provided by the State or local agency responsible for the administration of the Food Stamp Program, FDPIR or TANF Program, as described in § 245.6(b).

(b) *Sources of information.* Sources of information for verification may include written evidence, collateral contacts, and systems of records.

(1) *Written evidence.* Written evidence shall be used as the primary source of information for verification. Written evidence includes written confirmation of a household's circumstances, such as wage stubs, award letters, and letters from employers. Whenever written evidence is insufficient to confirm income information on the application or current eligibility, the school may require collateral contacts.

(2) *Collateral contact.* Collateral contact is a verbal confirmation of a household's circumstances by a person outside of the household. The collateral contact may be made by person or by phone. The verifying official may select a collateral contact if the household fails to designate one or designates one which is unacceptable to the verifying official. If the verifying official designates a collateral contact, the contact shall not be made without providing written or oral notice to the household. At the time of this notice, the household shall be informed that it may consent to the contact or provide acceptable verification in another form. If the household refuses to choose one of these options, its eligibility shall be terminated in accordance with the normal procedures for failure to cooperate with verification efforts. Collateral contacts could include employers, social service agencies, and migrant agencies.

(3) *Agency records.* Agency records to which the State agency or School Food Authority may have access are not considered collateral contacts. Information concerning income, household size, or food stamp, FDPIR, or TANF eligibility maintained by other government agencies to which the State agency, school food authority or school can legally gain access may be used to confirm a household's income, size, or receipt of benefits. One possible source could be wage and benefit information maintained by the State employment agency, if that information is available. The use of any information derived from other agencies must be used with the applicable safeguards concerning disclosure.

(c) *Verification recordkeeping.* School Food Authorities verifying applications shall maintain on file for review a description of the verification to be accomplished beginning School Year 1983–84. The description shall include:

(1) A summary of the verification efforts including the techniques to be used;

(2) the total number of applications on file by October 31;

(3) the percentage or number of applications verified;

(4) all verified applications must be readily retrievable by school and include all documents submitted by the household in an effort to confirm eligibility, reproductions of those documents, or annotations made by the determining official which indicate which documents were submitted by the household and the date of submission;

(5) documentation of any changes in eligibility and the reasons for the changes; and

(6) all relevant correspondences between the household selected for verification and the school food authority/school.

(d) *Nondiscrimination.* The verification efforts shall be applied without regard to race, sex, color, national origin, age, or disability.

(e) *Adverse action.* If verification activities fail to confirm eligibility for free or reduced price benefits or should the household fail to cooperate with verification efforts, the school or School Food Authority shall reduce or terminate benefits, as applicable, as follows: Ten days advance notification shall be provided to households that are to receive a reduction or termination of benefits, prior to the actual reduction or termination. The first day of the 10 day advance notice period shall be the day the notice is sent. The notice shall advise the household of:

(1) The change; (2) the reasons for the change; (3) notification of the right to appeal and when the appeal must be filed to ensure continued benefits while awaiting a hearing and decision; (4) instructions on how to appeal; and (5) the right to reapply at any time during the school year. The reasons for ineligibility shall be properly documented and retained on file at the School Food Authority.

(Sec. 803, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1758))

[48 FR 12510, Mar. 25, 1983, as amended at 49 FR 26034, June 26, 1984; 52 FR 19275, May 22, 1987; 55 FR 19240, May 9, 1990; 56 FR 32950, July 17, 1991; 56 FR 33861, July 24, 1991; 64 FR 50744, Sept. 20, 1999; 64 FR 72474, Dec. 28, 1999; 66 FR 48328, Sept. 20, 2001]

§ 245.7 Hearing procedure for families and School Food Authorities.

(a) Each School Food Authority of a school participating in the National School Lunch Program, School Breakfast Program or the Special Milk Program or of a commodity only school shall establish a hearing procedure under which:

(1) A family can appeal from a decision made by the School Food Authority with respect to an application the family has made for free or reduced price meals or for free milk, and (2) the School Food Authority can challenge the continued eligibility of any child for a free or reduced price meal or for free milk. The hearing procedure shall provide for both the family and the School Food Authority:

(i) A simple, publicly announced method to make an oral or written request for a hearing;

(ii) An opportunity to be assisted or represented by an attorney or other person;

(iii) An opportunity to examine, prior to and during the hearing, any documents and records presented to support the decision under appeal;

(iv) That the hearing shall be held with reasonable promptness and convenience, and that adequate notice shall be given as to the time and place of the hearing;

(v) An opportunity to present oral or documentary evidence and arguments supporting a position without undue interference;

(vi) An opportunity to question or refute any testimony or other evidence and to confront and cross-examine any adverse witnesses;

(vii) That the hearing shall be conducted and the decision made by a hearing official who did not participate in making the decision under appeal or in any previously held conference;

(viii) That the decision of the hearing official shall be based on the oral and documentary evidence presented at the hearing and made a part of the hearing record;

(ix) That the parties concerned and any designated representative shall be notified in writing of the decision of the hearing official;

(x) That a written record shall be prepared with respect to each hearing, which shall include the challenge or the decision under appeal, any documentary evidence and a summary of any oral testimony presented at the hearing, the decision of the hearing official, including the reasons therefor, and a copy of the notification to the parties concerned of the decision of the hearing official; and

(xi) That the written record of each hearing shall be preserved for a period of 3 years and shall be available for examination by the parties concerned or their representatives at any reasonable time and place during that period.

(b) *Continuation of benefits.* When a household disagrees with an adverse action which affects its benefits and requests a fair hearing, benefits shall be continued as follows while the household awaits the hearing and decision:

(1) Households that have been approved for benefits and that are subject to a reduction or termination of benefits later in the same school year shall receive continued benefits if they appeal the adverse action within the 10 day advance notice period; and

(2) Households that are denied benefits upon application shall not receive benefits.

(44 U.S.C. 3506; sec. 803, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1758))

[Amdt. 6, 39 FR 30339, Aug. 22, 1974, as amended at 47 FR 746, Jan. 7, 1982; 48 FR 12511, Mar. 25, 1983]

§ 245.8 Nondiscrimination practices for children eligible to receive free and reduced price meals and free milk.

School Food Authorities of schools participating in the National School Lunch Program, School Breakfast Program or Special Milk Program or of commodity only schools shall take all actions that are necessary to insure compliance with the following nondiscrimination practices for children eligible to receive free and reduced price meals or free milk:

(a) The names of the children shall not be published, posted or announced in any manner;

(b) There shall be no overt identification of any of the children by the use of special tokens or tickets or by any other means;

(c) The children shall not be required to work for their meals or milk;

(d) The children shall not be required to use a separate dining area, go through a separate serving line, enter the dining area through a separate entrance or consume their meals or milk at a different time;

(e) When more than one lunch or breakfast or type of milk is offered which meets the requirements prescribed in § 210.10, § 210.15a, § 220.8 or § 215.2(1) of this chapter, the children shall have the same choice of meals or milk that is available to those children who pay the full price for their meal or milk.

[Amdt. 6, 39 FR 30339, Aug. 22, 1974]

§ 245.9 Special assistance certification and reimbursement alternatives.

(a) *Provision 1.* A School Food Authority of a school having at least 80 percent of its enrolled children determined eligible for free or reduced price meals may, at its option, authorize the school to reduce annual certification and public notification for those children eligible for *free meals* to once every two consecutive school years. This alternative shall be known as provision 1 and the following requirements shall apply:

(1) A School Food Authority of a school operating under provision 1 requirements shall publicly notify in accordance with § 245.5, parents of enrolled children who are receiving free meals once every two consecutive school years, and shall publicly notify in accordance with § 245.5, parents of all other enrolled children on an annual basis.

(2) The 80 percent enrollment eligibility for this alternative shall be based on the school's March enrollment data of the previous school year, or on other comparable data.

(3) A School Food Authority of a school operating under provision 1, shall count the number of free, reduced price and paid meals served to children in that school as the basis for monthly reimbursement claims.

(b) *Provision 2.* A school food authority may certify children for free and reduced price meals for up to 4 consecutive school years in the schools which serve meals at no charge to all enrolled children; provided that public notification and eligibility determinations are in accordance with § 245.5 and § 245.3, respectively, during the base year as defined in paragraph (b)(6) of this section. The Provision 2 base year is the first year, and is included in the 4-year cycle. The following requirements apply:

(1) *Meals at no charge.* Participating schools must serve reimbursable meals, as determined by a point of service observation, or as otherwise approved under part 210 of this chapter, to all participating children at no charge.

(2) *Cost differential.* The school food authority of a school participating in Provision 2 must pay, with funds from non-Federal sources, the difference between the cost of serving lunches and/or breakfasts at no charge to all participating children and Federal reimbursement.

(3) *Meal counts.* During the base year, even though meals are served to participating students at no charge, schools must take daily meal counts of reimbursable student meals by type (free, reduced price, and paid) at the point of service, or as otherwise approved under part 210 of this chapter. During the non-base years, participating Provision 2 schools must take total daily meal counts (not by type) of reimbursable student meals at the point of service, or as otherwise approved under part 210 of this chapter. For the purpose of calculating reimbursement claims in the non-base years, school food authorities must establish school specific monthly or annual claiming percentages, as follows:

(i) *Monthly percentages.* In any given Provision 2 school, the monthly meal counts of the actual number of meals served by type (free, reduced price, and paid) during the base year must be converted to monthly percentages for each meal type. For example, the free lunch percentage is derived by dividing the monthly total number of reimbursable free lunches served by the total number of reimbursable lunches served in the same month (free, reduced price and paid). The percentages for the reduced price and paid lunches are calculated using the same method as the above example for free lunches. These three percentages, calculated at the end of each month of the first school year, are multiplied by the corresponding monthly lunch count total of all reimbursable lunches served in the second, third and fourth consecutive school years, and applicable extensions, in order to calculate reimbursement claims for free, reduced price and paid lunches each month. The free, reduced price and paid percentages for breakfasts and, as applicable, snacks, are calculated using the same method; or

(ii) *Annual percentages.* In any given Provision 2 school, the actual number of all reimbursable meals served by type (free, reduced price, and paid) during the base year must be converted to an annual percentage for each meal type. For example, the free lunch percentage is derived by dividing the annual total number of reimbursable free lunches served by the annual total number of reimbursable lunches served for all meal types (free, reduced price and paid). The percentages for the reduced price and paid lunches are calculated using the same method as the above example for free lunches. These three percentages, calculated at the end of the base year, are multiplied by the total monthly lunch count of all reimbursable lunches served in each month of the second, third and fourth consecutive school years, and applicable extensions, in order to calculate reimbursement claims for free, reduced price and paid lunches each month. The free, reduced price and paid percentages for breakfasts and, as applicable, snacks, are calculated using the same method for each type of meal service.

(4) *School food authority claims review process.* During the Provision 2 base year (not including a streamlined base year under paragraph (c)(2)(iii) of this section), school food authorities are required to review the lunch count data for each school under its jurisdiction to ensure the accuracy of the monthly Claim for Reimbursement in accordance with § 210.8(a)(2) of this chapter. During non-base years and streamlined base years, school food authorities must compare each Provision 2 school's total daily meal counts to the school's total enrollment, adjusted by an attendance factor. The school food authority must promptly follow-up as specified in § 210.8(a)(4) of this chapter when the claims review suggests the likelihood of lunch count problems. When a school elects to operate Provision 2 only in the School Breakfast Program, school food authorities must continue to comply with the claims review requirements of § 210.8(a)(2) of this chapter for the National School Lunch Program.

(5) *Verification.* Except as otherwise specified in § 245.6a(a)(5), school food authorities are required to conduct verification in accordance with § 245.6a. When a school elects to participate

under Provision 2 or for all of the meal programs in which it participates (breakfast 7 CFR part 220 and/or lunch 7 CFR part 210), the applications from that school are excluded from the school food authority's required verification sample size and are exempt from verification during non-base years.

(6) *Base year*. For purposes of this paragraph (b), the term *base year* means the last school year for which eligibility determinations were made and meal counts by type were taken or the school year in which a school conducted a streamlined base year as authorized under paragraph (c)(2)(iii) of this section. Schools shall offer reimbursable meals to all students at no charge during the Provision 2 base year except as otherwise specified in paragraph (b)(6)(ii) of this section.

(i) *Duration of the base year*. The base year must begin at the start of the school year or as otherwise specified in paragraph (b)(6)(ii) of this section.

(ii) *Delayed implementation*. At State agency discretion, schools may delay implementation of Provision 2 for a period of time not to exceed the first claiming period of the school year in which the base year is established. Schools implementing this option may conduct standard meal counting and claiming procedures, including charging students eligible for reduced price and paid meals, during the first claiming period of the school year. Such schools must submit claims reflecting the actual number of meals served by type. In subsequent years, such schools shall convert the actual number of reimbursable meals served by type (free, reduced price and paid) during the remaining claiming periods of the base year, in which meals were served at no charge to all participating students, to an annual percentage for each type of meal. The annual claiming percentages must be applied to the total number of reimbursable meals served during the first claiming period in all non-base years of operation for that cycle and any extensions.

(c) *Extension of Provision 2*. At the end of the initial cycle, and each subsequent 4-year cycle, the State agency may allow a school to continue under Provision 2 for another 4 years using the claiming percentages calculated during the most recent base year if the school food authority can establish, through available and approved socioeconomic data, that the income level of the school's population, as adjusted for inflation, has remained stable, declined or has had only negligible improvement since the base year.

(1) *Extension criteria*. School food authorities must submit to the State agency available and approved socioeconomic data to establish whether the income level of a school's population, as adjusted for inflation, remained constant with the income level of the most recent base year.

(i) *Available and approved sources of socioeconomic data*. Pre-approved sources of socioeconomic data which may be used by school food authorities to establish the income level of the school's population are: local data collected by the city or county zoning and economic planning office; unemployment data; local Food Stamp Program certification data including direct certification; Food Distribution Program on Indian Reservations data; statistical sampling of the school's population using the application or equivalent income measurement process; and, Temporary Assistance for Needy Families data (provided that the eligibility standards were the same or more restrictive in the base year as the current year with allowance for inflation). To grant an extension using pre-approved socioeconomic data sources, State agencies must review and evaluate the socioeconomic data submitted by the school food authority to ensure that it is reflective of the school's population, provides equivalent data for both the base year and the last year of the current cycle, and demonstrates that the income level of the school's population, as adjusted for inflation, has remained stable, declined or had only negligible improvement. If the school food authority wants to establish the income level of the school's population using alternate sources of socioeconomic data, the use of such data must be approved by the Food and Nutrition Service. Data from alternate sources must be reflective of the school's population, be equivalent data for both the base year and the last year

of the current cycle, and effectively measure whether the income level of the school's population, as adjusted for inflation, has remained stable, declined or had only negligible improvement.

(ii) *Negligible improvement*. The change in the income level of the school's population shall be considered negligible if there is a 5 percent or less improvement, after adjusting for inflation, over the base year in the level of the socioeconomic indicator which is used to establish the income level of the school's population.

(2) *Extension not approved*. The State agency shall not approve an extension of Provision 2 procedures in those schools for which the available and approved socioeconomic data does not reflect the school's population, is not equivalent data for the base year and the last year of the current cycle, or shows over 5 percent improvement, after adjusting for inflation, in the income level of the school's population. Such schools shall:

(i) *Return to standard meal counting and claiming*. Return to standard meal counting and claiming procedures;

(ii) *Establish a new base year*. Establish a new Provision 2 base year by taking new free and reduced price applications, making new free and reduced price eligibility determinations, and taking point of service counts of free, reduced price and paid meals for the first year of the new cycle. For these schools, the new Provision 2 cycle will be 4 years. Schools electing to establish a Provision 2 base year shall follow procedures contained in paragraph (b) of this section;

(iii) *Establish a streamlined base year*. With prior approval by the State agency, establish a streamlined base year by providing reimbursable meals to all participating students at no charge and developing either enrollment based or participation based claiming percentages.

(A) *Enrollment based percentages*. In accordance with guidance established by the Food and Nutrition Service, establish a new Provision 2 base year by determining program eligibility on the basis of household size and income, and direct certification if applicable, for a statistically valid proportion of the school's enrollment as of October 31, or other date approved by the State agency. The statistically valid measurement of the school's enrollment must be obtained during the first year of the new cycle and meet the requirements of paragraph (k) of this section. Using the data obtained, enrollment based claiming percentages representing a proportion of the school's population eligible for free, reduced price and paid benefits shall be developed and applied to total daily meal counts of reimbursable meals at the point of service, or as otherwise approved under part 210 of this chapter. For schools electing to participate in Provision 2, these percentages shall be used for claiming reimbursement for each year of the new cycle and any extensions; or

(B) *Participation based percentages*. In accordance with guidance established by the Food and Nutrition Service, establish a new Provision 2 base year by determining program eligibility on the basis of household size and income, and direct certification if applicable, for a statistically valid proportion of participating students established over multiple operating days. The statistically valid measurement of the school's student participation must be obtained during the first year of the new cycle and meet the requirements of paragraph (k) of this section. Using the data obtained, participation based claiming percentages representing a proportion of the school's participating students which are eligible for free, reduced price and paid benefits shall be developed and applied to total daily meal counts of reimbursable meals at the point of service or as otherwise approved under part 210 of this chapter. These percentages shall be used for claiming reimbursement for each year of the new cycle and any extensions; or

(iv) *Establish a Provision 3 base year*. Schools may convert to Provision 3 using the procedures contained in paragraphs (e)(2)(ii) or (e)(2)(iii) of this section.

(d) *Provision 3*. A school food authority of a school which serves all enrolled children in that school reimbursable meals at no charge during any period for up to 4 consecutive school years may elect to receive Federal cash reimbursement and commodity assistance at the same level as the total Federal

cash and commodity assistance received by the school during the last year that eligibility determinations for free and reduced price meals were made and meals were counted by type (free, reduced price and paid) at the point of service, or as otherwise authorized under part 210 of this chapter. Such cash reimbursement and commodity assistance will be adjusted for each of the 4 consecutive school years pursuant to paragraph (d)(4) of this section. For purposes of this paragraph (d), the term base year means the last complete school year for which eligibility determinations were made and meal counts by type were taken or the school year in which a school conducted a streamlined base year as authorized under paragraph (e)(2)(iii) of this section. The base year must begin at the start of a school year. Reimbursable meals may be offered to all students at no charge or students eligible for reduced price and paid meal benefits may be charged for meals during a Provision 3 base, *except that* schools conducting a Provision 3 streamlined base year must provide reimbursable meals to all participating students at no charge in accordance with paragraph (e)(2)(iii) of this section. The Provision 3 base year immediately precedes, and is not included in, the 4-year cycle. This alternative shall be known as Provision 3, and the following requirements shall apply:

(1) *Meals at no charge.* Participating schools must serve reimbursable meals, as determined by a point of service observation, or as otherwise authorized under part 210 of this chapter, to all participating children at no charge during non-base years of operation or as specified in paragraph (e)(2)(iii) of this section, if applicable.

(2) *Cost differential.* The school food authority of a school participating in Provision 3 must pay, with funds from non-Federal sources, the difference between the cost of serving lunches and/or breakfasts at no charge to all participating children and Federal reimbursement.

(3) *Meal counts.* Participating schools must take total daily meal counts of reimbursable meals served to participating children at the point of service, or as otherwise authorized under part 210 of this chapter, during the non-base years. Such meal counts must be retained at the local level in accordance with paragraph (g) of this section. State agencies may require the submission of the meal counts on the school food authority's monthly Claim for Reimbursement or through other means. In addition, school food authorities must establish a system of oversight using the daily meal counts to ensure that participation has not declined significantly from the base year. If participation declines significantly, the school food authority must provide the school with technical assistance, adjust the level of financial assistance received through the State agency or return the school to standard eligibility determination and meal counting procedures, as appropriate. In residential child care institutions, the State agency may approve implementation of Provision 3 without the requirement to obtain daily meal counts of reimbursable meals at the point of service if:

(i) The State agency determines that enrollment, participation and meal counts do not vary; and

(ii) There is an approved mechanism in place to ensure that students will receive reimbursable meals.

(4) *Annual adjustments.* The State agency or school food authority shall make annual adjustments for enrollment and inflation to the total Federal cash and commodity assistance received by a Provision 3 school in the base year. The adjustments shall be made for increases and decreases in enrollment of children with access to the program(s). The annual adjustment for enrollment shall be based on the school's base year enrollment as of October 31 compared to the school's current year enrollment as of October 31. Another date within the base year may be used if it is approved by the State agency, and provides a more accurate reflection of the school's enrollment or accommodates the reporting system in effect in that State. If another date is used for the base year, the current year date must correspond to the base year date of comparison. State agencies may, at their discretion, make additional adjustments to a participating school's enrollment more frequently

than once per school year. If more frequent enrollment is calculated, it must be applied for both upward and downward adjustments. The annual adjustment for inflation shall be effected through the application of the current year rates of reimbursement. To the extent that the number of operating days in the current school year differs from the number of operating days in the base year, and the difference affects the number of meals, a prorata adjustment shall also be made to the base year level of assistance, as adjusted by enrollment and inflation. Upward and downward adjustments to the number of operating days shall be made. Such adjustment shall be effected by either:

(i) Multiplying the average daily meal count by type (free, reduced price and paid) by the difference in the number of operating days between the base year and the current year and adding/subtracting that number of meals from the Claim for Reimbursement, as appropriate. In developing the average daily meal count by type for the current school year, schools shall use the base year data adjusted by enrollment; or

(ii) Multiplying the dollar amount otherwise payable (i.e., the base year level of assistance, as adjusted by enrollment and inflation) by the ratio of the number of operating days in the current year to the number of operating days in the base year.

(5) *Reporting requirements.* The State agency shall submit to the Department on the monthly FNS–10, Report of School Programs Operations, the number of meals, by type (i.e., monthly meal counts by type for the base year, as adjusted); or the number of meals, by type, constructed to reflect the adjusted levels of cash assistance. State agencies may employ either method to effect payment of reimbursement for Provision 3 schools.

(6) *School food authority claims review process.* During the Provision 3 base year (not including a streamlined base year under paragraph (e)(2)(iii) of this section), school food authorities are required to review the lunch count data for each school under its jurisdiction to ensure the accuracy of the monthly Claim for Reimbursement in accordance with § 210.8(a)(2) of this chapter. During non-base years and streamlined base years, school food authorities must conduct their own system of oversight or compare each Provision 3 school's total daily meal counts to the school's total enrollment, adjusted by an attendance factor. The school food authority must promptly follow-up as specified in § 210.8(a)(4) of this chapter when the claims review suggests the likelihood of lunch count problems. When a school elects to operate Provision 3 only in the School Breakfast Program, school food authorities must continue to comply with the claims review requirements of § 210.8(a)(2) of this chapter for the National School Lunch Program.

(7) *Verification.* Except as otherwise specified in § 245.6a(a)(5), school food authorities are required to conduct verification in accordance with § 245.6a. When a school elects to participate under Provision 3 for all of the meal programs in which it participates (breakfast 7 CFR part 220 and/or lunch 7 CFR part 210), the applications from that school are excluded from the school food authority's required verification sample size and are exempt from verification during non-base years.

(e) *Extension of Provision 3.* At the end of the initial cycle, and each subsequent 4-year cycle, the State agency may allow a school to continue under Provision 3 for another 4 years without taking new free and reduced price applications and meal counts by type. State agencies may grant an extension of Provision 3 if the school food authority can establish, through available and approved socioeconomic data, that the income level of the school's population, as adjusted for inflation, has remained stable, declined, or has had only negligible improvement since the most recent base year.

(1) *Extension criteria.* School food authorities must submit to the State agency available and approved socioeconomic data to establish whether the income level of the school's population, as adjusted for inflation, remained constant with the income level of the most recent base year.

(i) *Available and approved sources of socioeconomic data.* Pre-approved

sources of socioeconomic data which may be used by school food authorities to establish the income level of the school's population are: local data collected by the city or county zoning and economic planning office; unemployment data; local Food Stamp Program certification data including direct certification; Food Distribution Program on Indian Reservations data; statistical sampling of the school's population using the application process; and Temporary Assistance for Needy Families data (provided that the eligibility standards were the same or more restrictive in the base year as the current year with allowance for inflation). To grant an extension using pre-approved socioeconomic data sources, State agencies must review and evaluate the socioeconomic data submitted by the school food authority to ensure that it is reflective of the school's population, provides equivalent data for both the base year and the last year of the current cycle, and demonstrates that the income level of the school's population, as adjusted for inflation, has remained stable, declined or had only negligible improvement. If the school food authority wants to establish the income level of the school's population using alternate sources of data, the use of such data must be approved by the Food and Nutrition Service. Data from alternate sources must be reflective of the school's population, be equivalent data for both the base year and the last year of the current cycle, and effectively measure whether the income level of the school's population, as adjusted for inflation, has remained stable, declined or had only negligible improvement.

(ii) *Negligible improvement*. The change in the income level of the school population shall be considered negligible if there is a 5 percent or less improvement, after adjusting for inflation, over the base year in the level of the socioeconomic indicator which is used to establish the income level of the school's population.

(2) *Extension not approved*. Schools for which the available and approved socioeconomic data does not reflect the school's population, is not equivalent data for the base year and the last year of the current cycle, or shows over 5 percent improvement after adjusting for inflation, shall not be approved for an extension. Such schools must elect one of the following options:

(i) *Return to standard meal counting and claiming*. Return to standard meal counting and claiming procedures;

(ii) *Establish a new base year*. Establish a new Provision 3 base year by taking new free and reduced price applications, making new free and reduced price eligibility determinations, and taking point of service counts of free, reduced price and paid meals for the first year of the new cycle. Schools electing to establish a Provision 3 base year shall follow procedures contained in paragraph (d) of this section;

(iii) *Establish a streamlined base year*. With prior approval by the State agency, establish a streamlined base year by providing reimbursable meals to all participating students at no charge and developing either enrollment based or participation based claiming percentages.

(A) *Enrollment based percentages*. In accordance with guidance established by the Food and Nutrition Service, establish a new Provision 3 base year by determining program eligibility on the basis of household size and income, and direct certification if applicable, for a statistically valid proportion of the school's enrollment as of October 31, or other date approved by the State agency. The statistically valid measurement of the school's enrollment must be obtained during the first year of the new cycle and meet the requirements of paragraph (k) of this section. Using the data obtained, enrollment based claiming percentages representing a proportion of the school's population eligible for free, reduced price and paid benefits shall be developed and applied to total daily meal counts of reimbursable meals at the point of service, or as otherwise approved under part 210 of this chapter. For schools electing to participate in Provision 3, the streamlined base year level of assistance will be adjusted for enrollment, inflation and, if applicable, operating days, for each subsequent year of the new cycle and any extensions; or

(B) *Participation based percentages*. In accordance with guidance established

by the Food and Nutrition Service, establish a new Provision 3 base year by determining program eligibility on the basis of household size and income, and direct certification if applicable, for a statistically valid proportion of participating students established over multiple operating days. The statistically valid measurement of the school's student participation must be obtained during the first year of the new cycle and meet the requirements of paragraph (k) of this section. Using the data obtained, participation based claiming percentages representing a proportion of the school's participating students which are eligible for free, reduced price and paid benefits shall be developed and applied to total daily meal counts of reimbursable meals at the point of service or as otherwise approved under part 210 of this chapter. For schools electing to participate in Provision 3, the streamlined base year level of assistance as described in this paragraph (e)(2)(iii)(B) will be adjusted for enrollment, inflation and, if applicable, operating days, for each subsequent year of the new cycle and any extensions; or

(iv) *Establish a Provision 2 base year.* Schools may convert to Provision 2 using the procedures contained in paragraphs (c)(2)(ii) or (c)(2)(iii) of this section.

(f) *Policy statement requirement.* A school food authority of a Provision 1, 2, or 3 school shall:

(1) Amend its Free and Reduced Price Policy Statement, specified in § 245.10, to include a list of all schools participating in Provision 1, 2, or 3, and for each school:

(i) The initial year of implementing the provision;

(ii) The years the cycle is expected to remain in effect;

(iii) The year the provision must be reconsidered; and

(iv) The available and approved socioeconomic data that will be used in the reconsideration, if applicable.

(2) Certify that the school(s) meet the criteria for participating in the special assistance provisions, as specified in paragraphs (a), (b), (c), (d) or (e) of this section, as appropriate.

(g) *Recordkeeping.* School food authorities of schools implementing Provision 1, 2 or 3 shall retain records related to the implementation of the provision. Failure to maintain sufficient records shall result in the State agency requiring the school to return to standard meal counting and claiming procedures and/or fiscal action. Recordkeeping requirements specific to Provision 2 and Provision 3 include:

(1) *Base year records.* A school food authority shall ensure that records as specified in § 210.15(b) and § 220.7(e) of this chapter which support subsequent year earnings are retained for the base year for schools under Provision 2 and Provision 3. In addition, records of enrollment data for the base year must be retained for schools under Provision 3. Such base year records must be retained during the period the provision is in effect, including all extensions, plus 3 fiscal years after the submission of the last Claim for Reimbursement which employed the base year data. School food authorities that conduct a streamlined base year must retain all records related to the statistical methodology and the determination of claiming percentages. Such records shall be retained during the period the provision is in effect, including all extensions, plus 3 fiscal years after the submission of the last Claim for Reimbursement which employed the streamlined base year data. In either case, if audit findings have not been resolved, base year records must be retained beyond the 3-year period as long as required for the resolution of the issues raised by the audit.

(2) *Non-base year records.* School food authorities that are granted an extension of a provision must retain records of the available and approved socioeconomic data which is used to determine the income level of the school's population for the base year and year(s) in which extension(s) are made. In addition, State agencies must also retain records of the available and approved socioeconomic data which is used to determine the income level of the school's population for the base year and year(s) in which extensions are made. Such records must be retained at both the school food authority level and at the State agency during the period the provision is in effect, including all extensions, plus 3 fiscal

years after the submission of the last monthly Claim for Reimbursement which employed base year data. If audit findings have not been resolved, records must be retained beyond the 3-year period as long as required for the resolution of the issues raised by the audit. In addition, for schools operating under Provision 2, a school food authority must retain non-base year records pertaining to total daily meal count information, edit checks and on-site review documentation. For schools operating under Provision 3, a school food authority must retain non-base year records pertaining to total daily meal count information, the system of oversight or edit checks, on-site review documentation, annual enrollment data and the number of operating days, which are used to adjust the level of assistance. Such records shall be retained for three years after submission of the final monthly Claim for Reimbursement for the fiscal year.

(h) *Availability of documentation*. Upon request, the school food authority shall make documentation including enrollment data, participation data, available and approved socioeconomic data that was used to grant the extension, if applicable, or other data available at any reasonable time for monitoring and audit purposes. In addition, upon request from the Food and Nutrition Service, school food authorities under Provision 2 or Provision 3, or State agencies shall submit to the Food and Nutrition Service all data and documentation used in granting extensions including documentation as specified in paragraphs (g) and (h) of this section.

(i) *Return to standard meal counting and claiming*. A school food authority may return a school to standard notification, certification and counting procedures at any time if standard procedures better suit the school's program needs. The school food authority will then notify the State agency.

(j) *Puerto Rico and Virgin Islands*. Puerto Rico and the Virgin Islands, where a statistical survey procedure is permitted in lieu of eligibility determinations for each child, may either maintain their standard procedures in accordance with §245.4 or may opt for Provision 2 or Provision 3 provided the eligibility requirements as set forth in paragraphs (a), (b), (c), (d) and (e) of this section are met, as applicable.

(k) *Statistical income measurements*. Statistical income measurements that are used under this section to establish enrollment or participation base claiming percentages must comply with the standards outlined as follows:

(1) For enrollment based claiming percentages, statistical income measurements must meet the following standards:

(i) The sample frame shall be limited to enrolled students who have access to the school meals program;

(ii) A sample of enrolled students shall be randomly selected from the sample frame;

(iii) The response rate to the survey shall be at least 80 percent;

(iv) The number of households that complete the survey shall be sufficiently large so that it can be asserted with 95 percent confidence that the true percentage of students who are enrolled in the school, have access to the school meals program, and are eligible for free meals is within plus or minus 2.5 percentage points of the point estimate determined from the sample; and

(v) To minimize statistical bias, data from all households that complete the survey must be used when calculating the enrollment based claiming percentages for paragraphs (c)(2)(iii)(A) and (e)(2)(iii)(A) of this section.

(2) For participation based claiming percentages, statistical income measurements must meet the following standards:

(i) The sample frame must be limited to students participating in the meal program for which the participation based claiming percentages are being developed;

(ii) The sample frame must represent multiple operating days, as established through guidance, in the meal program for which the participation based claiming percentages are being developed;

(iii) A sample of participating students shall be randomly selected from the sample frame;

(iv) The response rate to the survey shall be at least 80 percent;

(v) The number of households that complete the survey shall be sufficiently large so that it can be asserted with 95 percent confidence that the true percentage of participating students who are eligible for free meals is within plus or minus 2.5 percentage points of the point estimate determined from the sample; and,

(vi) To minimize statistical bias, data from all households that complete the survey must be used when calculating the participation based claiming percentages for paragraphs (c)(2)(iii)(B) and (e)(2)(iii)(B) of this section.

(Sec. 9, Pub. L. 95–166, 91 Stat. 1336 (42 U.S.C. 1759a); secs. 805, and 819, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1773))

[Amdt. 19, 45 FR 67287, Oct. 10, 1980, as amended by Amdt. 23, 47 FR 14135, Apr. 2, 1982; 66 FR 48328, Sept. 20, 2001]

§ 245.10 Action by School Food Authorities.

(a) Each School Food Authority of a school desiring to participate in the National School Lunch Program, School Breakfast Program, or to provide free milk under the Special Milk Program, or to become a commodity-only school shall submit for approval to the State agency a free and reduced price policy statement. Once approved, the policy statement shall be a permanent document which may be amended as necessary, except as specified in paragraph (c) of this section. Such policy statement, as a minimum, shall contain the following:

(1) The official or officials designated by the school food authority to make eligibility determinations on its behalf for free and reduced price meals or for free milk;

(2) An assurance that for children who are not categorically eligible for free and reduced price benefits the school food authority will determine eligibility for free and reduced price meals or free milk in accordance with the current Income Eligibility Guidelines.

(3) The specific procedures the school food authority will use in accepting applications from families for free and reduced price meals or for free milk. Additionally, if the school food authority has opted to determine eligibility for children from food stamp, FDPIR or TANF households based on documentation obtained from the State or local agency responsible for the Food Stamp, FDPIR or TANF Program, in lieu of an application, the school food authority shall include the specific procedures it will use to obtain the required documentation. Additionally, school food authorities that have implemented direct certification and that must provide households a notice of eligibility, as specified in § 245.6(b), must also include in their policy statement a copy of the notice to households regarding their children's eligibility under the direct certification provision.

(4) A description of the method or methods to be used to collect payments from those children paying the full price of the meal or milk, or a reduced price of a meal, which will prevent the overt identification of the children receiving a free meal or free milk or a reduced price meal, and

(5) An assurance that the school will abide by the hearing procedure set forth in § 245.7 and the nondiscrimination practices set forth in § 245.8.

(b) The policy statement submitted by each school food authority shall be accompanied by a copy of the application form to be used by the school and of the proposed letter or notice to parents.

(c) Each school food authority shall amend its permanent free and reduced price policy statement to reflect substantive changes. Any amendment to a policy shall be approved by the State agency prior to implementation, or as provided in paragraph (e) of this section. Each year, if a School Food Authority does not have its policy statement approved by the State agency, or FNSRO where applicable, by October 15, reimbursement shall be suspended for any meals or milk served until such time as the School Food Authority's free and reduced price policy statement has been approved by the State agency, or FNSRO where applicable. Furthermore, no commodities donated by the Department shall be used in any school after October 15, until such time as the School Food Authority's free and reduced price policy statement has been approved by the State agency, or FNSRO where applicable. Once the

School Food Authority's free and reduced price policy statement has been approved, reimbursement may be allowed, at the discretion of the State agency, or FNSRO where applicable, for eligible meals and milk served during the period of suspension.

(d) If any free and reduced price policy statement submitted for approval by any School Food Authority to the State agency, or FNSRO where applicable, is determined to be not in compliance with the provisions of this part, the School Food Authority shall submit a policy statement that does meet the provisions within 30 days after notification by the State agency, or FNSO where applicable.

(e) When revision of a School Food Authority's approved free and reduced price policy statement is necessitated because of a change in the family-size income standards of the State agency, or FNSRO where applicable, or because of other program changes, the School Food Authority shall have 60 days from the date the State agency announces the change in which to have its revised policy statement approved by the State agency, or FNSRO where applicable. In the event that a School Food Authority's proposed revised free and reduced price policy statement has not been submitted to, and approved by, the State agency, or FNSRO where applicable, within 60 days following the public announcement by the State agency, reimbursement shall be suspended for any meals or milk served after the end of the 60-day period. No commodities donated by the Department shall be used in any school after the end of the 60-day period, until such time as the School Food Authority's free and reduced price policy statement has been approved by the State agency, or FNSRO where applicable. Reimbursement may be allowed at the discretion of the State agency, or FNSRO where applicable, for eligible meals and milk served during the period of suspension once the School Food Authority's free and reduced price policy statement has been approved by the State agency, or FNSRO where applicable. Pending approval of a revision of a policy statement, the existing statement shall remain in effect.

(Sec. 8, Pub. L. 95–627, 92 Stat. 3623 (42 U.S.C. 1758); sec. 5, Pub. L. 95–627, 92 Stat. 3619 (42 U.S.C. 1772); 44 U.S.C. 3506; sec. 803, Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1758))

[35 FR 14065, Sept. 4, 1970, as amended at 38 FR 14958, June 7, 1973; Amdt. 6, 39 FR 30339, Aug. 22, 1974; Amdt. 8, 40 FR 57208, Dec. 8, 1975; Admt. 13, 44 FR 33049, June 8, 1979; 47 FR 746, Jan. 7, 1982; 48 FR 12511, Mar. 25, 1983; 64 FR 50744, Sept. 20, 1999;64 FR 72474, Dec. 28, 1999]

§ 245.11 Action by State agencies and FNSROs.

(a) Each State agency, or FNSRO where applicable, shall, for schools under its jurisdiction:

(1) As necessary, each State agency or FNSRO, as applicable, shall issue a prototype free and reduced price policy statement and any other instructions to ensure that each school food authority is fully informed of the provisions of this part. If the State elects to establish for all schools a maximum price for reduced price lunches that is less than 40 cents, the State shall establish such price in its prototype policy. Such State shall then receive the adjusted national average factor provided for in § 210.4(b); (2) prescribe and publicly announce by July 1 of each fiscal year, in accordance with § 245.3(a), family-size income standards. Any standards prescribed by FNSRO with respect to nonprofit private schools shall be developed by FNSRO after consultation with the State agency.

(a–1) When a revision of the family-size income standards of the State agency, or FNSRO where applicable, is necessitated because of a change in the Secretary's income poverty guidelines or because of other program changes, the State agency shall publicly announce its revised family-size income standards no later than 30 days after the Secretary has announced such change.

(b) State agencies, and FNSRO where applicable, shall review the policy statements submitted by school-food authorities for compliance with the provisions of this part and inform the school-food authorities of any necessary changes or amendments required in any policy statement to bring

such statement into compliance. They shall notify school-food authorities in writing of approval of their policy statements and shall direct them to distribute promptly the public announcements required under the provisions of § 245.5.

(c) Each State agency, or FNSRO where applicable, shall instruct School Food Authorities under their jurisdiction that they may not alter or amend the eligibility criteria set forth in an approved policy statement without advance approval of the State agency, or FNSRO where applicable.

(d) Not later than 10 days after the State agency, or FNSRO where applicable, announces its family-size income standards, it shall notify School Food Authorities in writing of any amendment to their free and reduced price policy statements necessary to bring the family-sized income criteria into conformance with the State agency's or FNSRO's family-size income standards.

(e) Except as provided in § 245.10, the State agency, or FNSRO where applicable, shall neither disburse any funds, nor authorize the distribution of commodities donated by the Department to any school unless the school food authority has an approved free and reduced price policy statement on file with the State Agency, or FNSRO where applicable.

(f) Each State agency, or FNSRO where applicable, shall, in the course of its supervisory assistance, review and evaluate the performance of School Food Authorities and of schools in fulfilling the requirements of this part, and shall advise School Food Authorities of any deficiencies found and any corrective action required to be taken.

(g) The State agency must notify FNS whether the TANF Program in their State is comparable to or more restrictive than the State's Aid to Families with Dependent Children Program that was in effect on June 1, 1995. Automatic eligibility and direct certification for TANF households is allowed only in States in which FNS has been assured that the TANF standards are comparable to or more restrictive than the program it replaced. State agencies must inform FNS when there is a change in the State's TANF Program that would no longer make households participating in TANF automatically eligible for free school meals.

(h) The State agency shall take action to ensure the proper implementation of Provisions 1, 2, and 3. Such action shall include:

(1) *Notification*. Notifying school food authorities of schools implementing Provision 2 and/or 3 that each Provision 2 or Provision 3 school must return to standard eligibility determination and meal counting procedures or apply for an extension under Provision 2 or 3. Such notification must be in writing, and be sent no later than February 15, or other date established by the State agency, of the fourth year of a school's current cycle;

(2) *Return to standard procedures*. Returning the school to standard eligibility determination and meal counting procedures and fiscal action as required under § 210.19(c) of this chapter if the State agency determines that records were not maintained; and

(3) *Technical assistance*. Providing technical assistance, adjustments to the level of financial assistance for the current school year, and returning the school to standard eligibility determination and meal counting procedures, as appropriate, if a State agency determines at any time that:

(i) The school or school food authority has not correctly implemented Provision 1, Provision 2 or Provision 3;

(ii) Meal quality has declined because of the implementation of the provision;

(iii) Participation in the program has declined over time;

(iv) Eligibility determinations or the verification procedures were incorrectly conducted; or

(v) Meal counts were incorrectly taken or incorrectly applied.

(4) *State agency recordkeeping*. State agencies shall retain the following information annually for the month of October and, upon request, submit to FNS:

(i) The number of schools using Provision 1, Provision 2 and Provision 3 for NSLP;

(ii) The number of schools using Provision 2 and Provision 3 for SBP only;

(iii) The number of extensions granted to schools using Provision 2 and

Provision 3 during the previous school year;

(iv) The number of extensions granted during the previous year on the basis of Food Stamp/FDPIR data;

(v) The number of extensions granted during the previous year on the basis of Temporary Assistance for Needy Families (TANF) data;

(vi) The number of extensions granted during the previous year on the basis of local data collected by a city or county zoning and/or economic planning office;

(vii) The number of extensions granted during the previous year on the basis of applications collected from enrolled students;

(viii) The number of extensions granted during the previous year on the basis of statistically valid surveys of enrolled students; and

(ix) The number of extensions granted during the previous year on the basis of alternate data as approved by the State agency's respective FNS Regional Office.

(5) *State agency approval.* Prior to approval for participation under Provision 2 or Provision 3, State agencies shall ensure school and/or school food authority program compliance as required under §§210.19(a)(4) and 220.13(k) of this chapter.

(Secs. 801, 803, 812; Pub. L. 97–35, 95 Stat. 521–535 (42 U.S.C. 1753, 1758, 1759(a), 1773, 1778))

[35 FR 14065, Sept. 4, 1970, as amended at 38 FR 14958, June 7, 1973; Amdt. 8, 40 FR 57208, Dec. 8, 1975; 44 FR 1364, Jan. 5, 1979; 46 FR 51368, Oct. 20, 1981; 48 FR 12511, Mar. 25, 1983; 52 FR 19276, May 22, 1987; 64 FR 50744, Sept. 20, 1999; 64 FR 72474, Dec. 28, 1999; 66 FR 48333, Sept. 20, 2001]

§245.12 Fraud penalties.

(a) Whoever embezzles, willfully misapplies, steals, or obtains by fraud any funds, assets, or property provided under this part, whether received directly or indirectly from the Department, shall—

(1) If such funds, assets, or property are of a value of $100 or more, be fined not more than $25,000 or imprisoned not more than five years of both; or

(2) If such funds, assets, or property are of a value of less than $100, be fined not more than $1,000 or imprisoned not more than one year or both.

(b) Whoever receives, conceals, or retains to his use or gain funds, assets, or property provided under this part, whether received directly or indirectly from the Department, knowing such funds, assets, or property have been embezzled, willfully misapplied, stolen, or obtained by fraud, shall be subject to the same penalties provided in paragraph (a) of this section.

(Sec. 10(a), Pub. L. 95–627, 92 Stat. 3623 (42 U.S.C. 1760); sec. 14, Pub. L. 95–627, 92 Stat. 3625–3626)

[Amdt. 14, 44 FR 37901, June 29, 1979, as amended at 64 FR 50744, Sept. 20, 1999]

§245.13 Information collection/recordkeeping—OMB assigned control numbers.

7 CFR section where requirements are described	Current OMB control number
245.3 (a), (b)	0584–0026
245.4	0584–0026
245.5 (a), (b)	0584–0026
245.6 (a), (b), (c), (e)	0584–0026
245.7(a)	0584–0026
245.9 (a), (b), (c)	0584–0026
245.10 (a), (d), (e)	0584–0026
245.11 (a), (a–1), (b), (c), (d), (f)	0584–0026
245.13(a)–(c)	0584–0026

[50 FR 53258, Dec. 31, 1985. Redesignated at 64 FR 50744, Sept. 20, 1999]

PART 246—SPECIAL SUPPLEMENTAL NUTRITION PROGRAM FOR WOMEN, INFANTS AND CHILDREN

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AUTHORITY: 42 U.S.C. 1786.

SOURCE: 50 FR 6121, Feb. 13, 1985, unless otherwise noted.

EDITORIAL NOTE: For nomenclature changes to part 246 see 59 FR 11498, Mar. 11, 1994.

Subpart A—General

§ 246.1 General purpose and scope.

This part announces regulations under which the Secretary of Agriculture shall carry out the Special Supplemental Nutrition Program for Women, Infants and Children (WIC Program). Section 17 of the Child Nutrition Act of 1966, as amended, states in part that the Congress finds that substantial numbers of pregnant, postpartum and breastfeeding women, infants and young children from families with inadequate income are at special risk with respect to their physical and mental health by reason of inadequate nutrition or health care, or both. The purpose of the Program is to provide supplemental foods and nutrition education through payment of cash grants to State agencies which administer the Program through local agencies at no cost to eligible persons. The Program shall serve as an adjunct to good health care during critical times of growth and development, in order to prevent the occurrence of health problems, including drug and other harmful substance abuse, and to improve the health status of these persons. The program shall be supplementary to the Food Stamp Program; any program under which foods are distributed to needy families in lieu of food stamps; and receipt of food or meals from soup kitchens, or shelters, or other forms of emergency food assistance.

[50 FR 6121, Feb. 13, 1985, as amended at 54 FR 51294, Dec. 14, 1989; 58 FR 11506, Feb. 26, 1993]

§ 246.2 Definitions.

For the purpose of this part and all contracts, guidelines, instructions, forms and other documents related hereto, the term:

Affirmative Action Plan means that portion of the State Plan which describes how the Program will be initiated and expanded within the State's jurisdiction in accordance with § 246.4(a).

A–130 means Office of Management and Budget Circular A–130, which provides guidance for the coordinated development and operation of information systems.

Applicants means pregnant women, breastfeeding women, postpartum women, infants, and children who are applying to receive WIC benefits, and the breastfed infants of applicant breastfeeding women. Applicants include individuals who are currently participating in the program but are re-applying because their certification period is about to expire.

Authorized supplemental foods means those supplemental foods authorized by the State or local agency for issuance to a particular participant.

Breastfeeding means the practice of feeding a mother's breastmilk to her infant(s) on the average of at least once a day.

Breastfeeding women means women up to one year postpartum who are breastfeeding their infants.

Categorical eligibility means persons who meet the definitions of pregnant women, breastfeeding women, postpartum women, or infants or children.

Certification means the implementation of criteria and procedures to assess and document each applicant's eligibility for the Program.

Children means persons who have had their first birthday but have not yet attained their fifth birthday.

Clinic means a facility where applicants are certified.

Competent professional authority means an individual on the staff of the local agency authorized to determine nutritional risk and prescribe supplemental foods. The following persons are the only persons the State agency may authorize to serve as a competent professional authority: Physicians, nutritionists (bachelor's or master's degree in Nutritional Sciences, Community Nutrition, Clinical Nutrition, Dietetics, Public Health Nutrition or Home Economics with emphasis in Nutrition), dieticians, registered nurses, physician's assistants (certified by the National Committee on Certification of Physician's Assistants or certified by the State medical certifying authority), or State or local medically trained health officials. This definition also applies to an individual who is not on the staff of the local agency but who is qualified to provide data upon which nutritional risk determinations are made by a competent professional authority on the staff of the local agency.

Competitive bidding means a procurement process under which FNS or the State agency selects a single source (such as a single infant formula manufacturer offering the lowest price), as determined by the submission of sealed bids, for a product for which bids are sought for use in the Program.

Compliance buy means a covert, onsite investigation in which a representative of the Program poses as a participant, parent or caretaker of an infant or child participant, or proxy, transacts one or more food instruments, and does not reveal during the visit that he or she is a program representative.

Contract brand infant formula means all infant formulas (except exempt infant formulas) produced by the manufacturer awarded the infant formula cost containment contract. If under a single solicitation the manufacturer subcontracts for soy-based infant formula, then all soy-based infant formulas covered by the subcontract are also considered contract brand infant formulas (see §246.16a(c)(1)(i)). If a State agency elects to solicit separate bids for milk-based and soy-based infant formulas, all infant formulas issued under each contract are considered the contract brand infant formula (see §246.16a(c)(1)(ii)). For example, all of the milk-based infant formulas issued by a State agency that are produced by the manufacturer that was awarded the milk-based contract are considered contract brand infant formulas. Similarly, all of the soy-based infant formulas issued by a State agency that are produced by the manufacturer that was awarded the soy-based contract are also considered to be contract brand infant formulas. Contract brand infant formulas also include all infant formulas (except exempt infant formulas) introduced after the contract is awarded.

Cost containment measure means a competitive bidding, rebate, direct distribution, or home delivery system implemented by a State agency as described in its approved State Plan of operation and administration.

CSFP means the Commodity Supplemental Food Program administered by the Department, authorized by section 5 of the Agriculture and Consumer Protection Act of 1973, as amended, and governed by part 247 of this title.

Days means calendar days.

Department means the U.S. Department of Agriculture.

Discount means, with respect to a State agency that provides Program foods to participants without the use of retail grocery stores (such as a State agency that provides for the home delivery or direct distribution of supplemental food), the amount of the price reduction or other price concession provided to any State agency by the manufacturer or supplier of the particular food product as the result of the purchase of Program food by each such State agency, or its representative, from the manufacturer or supplier.

Disqualification means the act of ending the Program participation of a participant, authorized food vendor, or authorized State or local agency, whether as a punitive sanction or for administrative reasons.

Documentation means the presentation of written documents which substantiate statements made by an applicant or participant or a person applying on behalf of an applicant.

Drug means:

(a) A beverage containing alcohol;

(b) A controlled substance (having the meaning given it in section 102(6) of the Controlled Substance Act (21 U.S.C. 802(6)); or

(c) A controlled substance analogue (having the meaning given it in section 102(32) of the Controlled Substance Act (21 U.S.C. 802(32)).

Dual participation means simultaneous participation in the Program in one or more than one WIC clinic, or participation in the Program and in the CSFP during the same period of time.

Exempt infant formula means an infant formula that meets the requirements for an exempt infant formula under section 412(h) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 350a(h)) and the regulations at 21 CFR parts 106 and 107.

Family means a group of related or nonrelated individuals who are living together as one economic unit, except that residents of a homeless facility or an institution shall not all be considered as members of a single family.

Fiscal year means the period of 12 calendar months beginning October 1 of any calendar year and ending September 30 of the following calendar year.

FNS means the Food and Nutrition Service of the U.S. Department of Agriculture.

Food costs means the costs of supplemental foods, determined in accordance with § 246.14(b).

Food delivery system means the method used by State and local agencies to provide supplemental foods to participants.

Food instrument means a voucher, check, electronic benefits transfer card (EBT), coupon or other document which is used by a participant to obtain supplemental foods.

Health services means ongoing, routine pediatric and obstetric care (such as infant and child care and prenatal and postpartum examinations) or referral for treatment.

High-risk vendor means a vendor identified as having a high probability of committing a vendor violation through application of the criteria established in § 246.12(j)(3) and any additional criteria established by the State agency.

Home food delivery contractor means a sole proprietorship, partnership, cooperative association, corporation, or other business entity that contracts with a State agency to deliver authorized supplemental foods to the residences of participants under a home food delivery system.

Homeless facility means the following types of facilities which provide meal service. A supervised publicly or privately operated shelter (including a welfare hotel or congregate shelter) designed to provide temporary living accommodations; a facility that provides a temporary residence for individuals intended to be institutionalized; or a public or private place not designed for, or normally used as, a regular sleeping accommodation for human beings.

Homeless individual means a woman, infant or child:

(a) Who lacks a fixed and regular nighttime residence; or

(b) Whose primary nighttime residence is:

(1) A supervised publicly or privately operated shelter (including a welfare hotel, a congregate shelter, or a shelter for victims of domestic violence) designated to provide temporary living accommodation;

(2) An institution that provides a temporary residence for individuals intended to be institutionalized;

(3) A temporary accommodation of not more than 365 days in the residence of another individual; or

(4) A public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

IHS means the Indian Health Service of the U.S. Department of Health and Human Services.

Individual with disabilities means a handicapped person as defined in 7 CFR 15b.3.

Infant formula means a food that meets the definition of an infant formula in section 201(z) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(z)) and that meets the requirements for an infant formula under section 412 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 350a) and the regulations at 21 CFR parts 106 and 107.

Institution means any residential accommodation which provides meal service, except private residences and homeless facilities.

Infants means persons under one year of age.

Inventory audit means the examination of food invoices or other proofs of purchase to determine whether a vendor has purchased sufficient quantities of supplemental foods to provide participants the quantities specified on food instruments redeemed by the vendor during a given period of time.

Local agency means: (a) A public or private, nonprofit health or human service agency which provides health services, either directly or through contract, in accordance with § 246.5; (b) an IHS service unit; (c) an Indian tribe, band or group recognized by the Department of the Interior which operates a health clinic or is provided health services by an IHS service unit; or (d) an intertribal council or group that is an authorized representative of Indian tribes, bands or groups recognized by the Department of the Interior, which operates a health clinic or is provided health services by an IHS service unit.

Members of populations means persons with a common special need who do not necessarily reside in a specific geographic area, such as off-reservation Indians or migrant farmworkers and their families.

Migrant farmworker means an individual whose principal employment is in agriculture on a seasonal basis, who has been so employed within the last 24 months, and who establishes, for the purposes of such employment, a temporary abode.

Net price means the difference between an infant formula manufacturer's lowest national wholesale price per unit for a full truckload of infant formula and the rebate level or the discount offered or provided by the manufacturer under an infant formula cost containment contract.

Non-contract brand infant formula means all infant formula, including exempt infant formula, that is not covered by an infant formula cost containment contract awarded by that State agency.

Nonprofit agency means a private agency which is exempt from income tax under the Internal Revenue Code of 1954, as amended.

Nutrition education means individual or group education sessions and the provision of information and educational materials designed to improve health status, achieve positive change in dietary habits, and emphasize relationships between nutrition and health, all in keeping with the individual's personal, cultural, and socioeconomic preferences.

Nutrition Services and Administration (NSA) Costs means those direct and indirect costs, exclusive of food costs, as defined in § 246.14(c), which State and local agencies determine to be necessary to support Program operations. Costs include, but are not limited to, the costs of Program administration, start-up, monitoring, auditing, the development of and accountability for food delivery systems, nutrition education and breastfeeding promotion and support, outreach, certification, and developing and printing food instruments.

Nutritional risk means: (a) Detrimental or abnormal nutritional conditions detectable by biochemical or anthropometric measurements; (b) Other documented nutritionally related medical conditions; (c) Dietary deficiencies that impair or endanger health; (d) Conditions that directly affect the nutritional health of a person, including alcoholism or drug abuse; or (e) Conditions that predispose persons to inadequate nutritional patterns or nutritionally related medical conditions, including, but not limited to, homelessness and migrancy.

OIG means the Department's Office of the Inspector General.

Other harmful substances means other substances such as tobacco, prescription drugs and over-the-counter medications that can be harmful to the health of the WIC population, especially the pregnant woman and her fetus.

Participants means pregnant women, breastfeeding women, postpartum women, infants and children who are receiving supplemental foods or food instruments under the Program, and the breastfed infants of participant breastfeeding women.

Participant violation means any intentional action of a participant, parent or caretaker of an infant or child participant, or proxy that violates Federal or State statutes, regulations, policies, or procedures governing the Program. Participant violations include intentionally making false or misleading statements or intentionally misrepresenting, concealing, or withholding facts to obtain benefits; exchanging food instruments or supplemental foods for cash, credit, non-food items, or unauthorized food items, including supplemental foods in excess of those listed on the participant's food instrument; threatening to harm or physically harming clinic or vendor staff; and dual participation.

Participation means the sum of the number of persons who have received supplemental foods or food instruments during the reporting period and the number of infants breastfed by participant breastfeeding women (and receiving no supplemental foods or food instruments) during the reporting period.

Postpartum women means women up to six months after termination of pregnancy.

Poverty income guidelines means the poverty income guidelines prescribed by the Department of Health and Human Services. These guidelines are adjusted annually by the Department of Health and Human Services, with each annual adjustment effective July 1 of each year. The poverty income guidelines prescribed by the Department of Health and Human Services shall be used for all States, as defined in this section, except for Alaska and Hawaii. Separate poverty income guidelines are prescribed for Alaska and Hawaii.

Pregnant women means women determined to have one or more embryos or fetuses in utero.

Price adjustment means an adjustment made by the State agency, in accordance with the vendor agreement, to the purchase price on a food instrument after it has been submitted by a vendor for redemption to ensure that the payment to the vendor for the food instrument complies with the State agency's price limitations.

Program means the Special Supplemental Nutrition Program for Women, Infants and Children (WIC) authorized by section 17 of the Child Nutrition Act of 1966, as amended.

Proxy means any person designated by a woman participant, or by a parent or caretaker of an infant or child participant, to obtain and transact food instruments or to obtain supplemental foods on behalf of a participant. The proxy must be designated consistent with the State agency's procedures established pursuant to § 246.12(r)(1). Parents or caretakers applying on behalf of child and infant participants are not proxies.

Rebate means the amount of money refunded under cost containment procedures to any State agency from the manufacturer of the particular food product as the result of the purchase of the supplemental food with a voucher or other purchase instrument by a participant in each State agency's program. Such rebates shall be payments made subsequent to the exchange of a food instrument for food.

Remote Indian or Native village means an Indian or Native village that is located in a rural area, has a population of less than 5,000 inhabitants, and is not accessible year-round by means of a public road (as defined in 23 U.S.C. 101).

Routine monitoring means overt, onsite monitoring during which program representatives identify themselves to vendor personnel.

Secretary means the Secretary of Agriculture.

SFPD means the Supplemental Food Programs Division of the Food and Nutrition Service of the U.S. Department of Agriculture.

7 CFR part 3016 means the Department's Uniform Federal Assistance

Regulations. Part 3016 implements the policies established by the Office of Management and Budget (OMB) in Circulars A–21, A–87, A–102, A–110, and A–122, as well as OMB Guidance on Implementation of the Federal Grant and Cooperative Agreement Act of 1977.

7 CFR part 3017 means the Department's Common Rule regarding Governmentwide Debarment and Suspension (Non-procurement) and Governmentwide Requirements for Drug-Free Workplace. Part 3017 implements the requirements established by Executive Order 12549 (February 18, 1986) and sections 5151–5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100–690).

7 CFR part 3018 means the Department's Common Rule regarding Governmentwide New Restrictions on Lobbying. Part 3018 implements the requirements established by section 319 of the 1990 Appropriations Act for the Department of Interior and Related Agencies (Pub. L. 101–121).

State means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Marianas Islands, and the Trust Territory of the Pacific Islands.

State agency means the health department or comparable agency of each State; an Indian tribe, band or group recognized by the Department of the Interior; an intertribal council or group which is an authorized representative of Indian tribes, bands or groups recognized by the Department of the Interior and which has an ongoing relationship with such tribes, bands or groups for other purposes and has contracted with them to administer the Program; or the appropriate area office of the IHS.

State Plan means a plan of Program operation and administration that describes the manner in which the State agency intends to implement and operate all aspects of Program administration within its jurisdiction in accordance with § 246.4.

Supplemental foods means those foods containing nutrients determined to be beneficial for pregnant, breastfeeding, and postpartum women, infants and children, as prescribed by the Secretary in § 246.10.

Vendor means a sole proprietorship, partnership, cooperative association, corporation, or other business entity operating one or more stores authorized by the State agency to provide authorized supplemental foods to participants under a retail food delivery system. Each store operated by a business entity constitutes a separate vendor and must be authorized separately from other stores operated by the business entity. Each store must have a single, fixed location, except when the authorization of mobile stores is necessary to meet the special needs described in the State agency's State Plan in accordance with § 246.4(a)(14)(xiv).

Vendor authorization means the process by which the State agency assesses, selects, and enters into agreements with stores that apply or subsequently reapply to be authorized as vendors.

Vendor limiting criteria means criteria established by the State agency to determine the maximum number and distribution of vendors it authorizes pursuant to § 246.12(g)(2).

Vendor overcharge means intentionally or unintentionally charging the State agency more for authorized supplemental foods than is permitted under the vendor agreement. It is not a vendor overcharge when a vendor submits a food instrument for redemption and the State agency makes a price adjustment to the food instrument.

Vendor selection criteria means the criteria established by the State agency to select individual vendors for authorization consistent with the requirements in § 246.12(g)(3).

Vendor violation means any intentional or unintentional action of a vendor's current owners, officers, managers, agents, or employees (with or without the knowledge of management) that violates the vendor agreement or Federal or State statutes, regulations, policies, or procedures governing the Program.

WIC means the Special Supplemental Nutrition Program for Women, Infants and Children authorized by section 17 of the Child Nutrition Act of 1966, 42 U.S.C. 1786.

WIC-eligible medical foods means certain enteral products that are specifically formulated to provide nutritional

support for individuals with a diagnosed medical condition, when the use of conventional foods is precluded, restricted, or inadequate. Such WIC-eligible medical foods may be nutritionally complete or incomplete, but they must serve the purpose of a food, provide a source of calories and one or more nutrients, and be designed for enteral digestion via an oral or tube feeding. WIC-eligible medical foods include many, but not all, products that meet the definition of medical food in Section 5(b)(3) of the Orphan Drug Act (21 U.S.C. 360ee(b)(3)).

[50 FR 6121, Feb. 13, 1985; 50 FR 8098, Feb. 28, 1985, as amended at 52 FR 25189, July 2, 1987; 54 FR 51294, Dec. 14, 1989; 55 FR 9717, Mar. 15, 1990; 58 FR 11506, Feb. 26, 1993; 58 FR 47022, Sept. 7, 1993; 59 FR 11498, Mar. 11, 1994; 63 FR 63973, Nov. 18, 1998; 64 FR 13322, Mar. 18, 1999; 64 FR 56674, Oct. 21, 1999; 65 FR 3378, Jan. 21, 2000; 65 FR 53527, Sept. 5, 2000; 65 FR 51222, Aug. 23, 2000; 65 FR 77249, Dec. 11, 2000; 65 FR 83277, Dec. 29, 2000]

§ 246.3 Administration.

(a) *Delegation to FNS.* Within the Department, FNS shall act on behalf of the Department in the administration of the Program. Within FNS, SFPD and the Regional Offices are responsible for Program administration. FNS shall provide assistance to State and local agencies and evaluate all levels of Program operations to ensure that the goals of the Program are achieved in the most effective and efficient manner possible.

(b) *Delegation to State agency.* The State agency is responsible for the effective and efficient administration of the Program in accordance with the requirements of this part; the Department's regulations governing nondiscrimination (7 CFR parts 15, 15a and 15b); governing administration of grants (7 CFR part 3016); governing nonprocurement debarment/suspension and drug-free workplace (7 CFR part 3017); and governing restrictions on lobbying (7 CFR part 3018); FNS guidelines; and, instructions issued under the FNS Directives Management System. The State agency shall provide guidance to local agencies on all aspects of Program operations.

(c) *Agreement and State Plan.* (1) Each State agency desiring to administer the Program shall annually submit a State Plan and enter into a written agreement with the Department for administration of the Program in the jurisdiction of the State agency in accordance with the provisions of this part.

(2) The written agreement shall include a certification/assurance regarding drug-free workplace as required by 7 CFR part 3017, and, if applicable, a certification regarding lobbying and a disclosure of lobbying activities as required by 7 CFR part 3018.

(d) *State agency eligibility.* A State agency shall be ineligible to participate in the WIC Program if State or local sales tax is collected on WIC food purchases in the area in which it administers the program, except that, if sales tax is collected on WIC food purchases by sovereign Indian entities which are not State agencies, the State agency shall remain eligible if any vendors collecting such tax are disqualified.

(e) *State staffing standards.* Each State agency shall ensure that sufficient staff is available to administer an efficient and effective Program including, but not limited to, the functions of nutrition education, certification, food delivery, fiscal reporting, monitoring, and training. Based on the June participation of the previous fiscal year, each State agency, as a minimum, shall employ the following staff:

(1) A full-time or equivalent administrator when the monthly participation level exceeds 1,500, or a half-time or equivalent administrator when the monthly participation exceeds 500.

(2) At least one full-time or equivalent Program specialist for each 10,000 participants above 1,500, but the State agency need not employ more than eight Program specialists unless the State agency considers it necessary. Program specialists should be utilized for providing fiscal management and technical assistance, monitoring vendors, reviewing local agencies, training, and nutritional services, or other Program duties as assigned by the State agency.

(3) For nutrition-related services, one full-time or equivalent nutritionist when the monthly participation is above 1,500, or a half-time or equivalent nutritionist when the monthly

participation exceeds 500. The nutritionist shall be named State WIC Nutrition Coordinator and shall meet State personnel standards and qualifications in paragraphs (e)(3) (i), (ii), (iii), (iv), or (v) of this section and have the qualifications in paragraph (e)(3)(vi) of this section. Upon request, an exception to these qualifications may be granted by FNS. The State WIC Nutrition Coordinator shall—

(i) Hold a Master's degree with emphasis in food and nutrition, community nutrition, public health nutrition, nutrition education, human nutrition, nutrition science or equivalent and have at least two years responsible experience as a nutritionist in education, social service, maternal and child health, public health, nutrition, or dietetics; or

(ii) Be registered or eligible for registration with the American Dietetic Association and have at least two years experience; or

(iii) Have at least a Bachelor of Science or Bachelor of Arts degree, from an accredited four-year institution, with emphasis in food and nutrition, community nutrition, public health nutrition, nutrition education, human nutrition, nutrition science or equivalent and have at least three years of responsible experience as a nutritionist in education, social service, maternal and child health, public health nutrition, or dietetics; or

(iv) Be qualified as a Senior Public Health Nutritionist under the Department of Health and Human Services guidelines; or

(v) Meet the IHS standards for a Public Health Nutritionist; and

(vi) Have at least one of the following: Program development skills, education background and experience in the development of educational and training resource materials, community action experience, counseling skills or experience in participant advocacy.

(4) A designated breastfeeding promotion coordinator, to coordinate breastfeeding promotion efforts identified in the State plan in accordance with the requirement of § 246.4(a)(9) of this part. The person to whom the State agency assigns this responsibility may perform other duties as well.

(5) A staff person designated for food delivery system management. The person to whom the State agency assigns this responsibility may perform other duties as well.

(6) The State agency shall enforce hiring practices which comply with the nondiscrimination criteria set forth in § 246.8. The hiring of minority staff is encouraged.

(f) *Delegation to local agency*. The local agency shall provide Program benefits to participants in the most effective and efficient manner, and shall comply with this part, the Department's regulations governing nondiscrimination (7 CFR parts 15, 15a, 15b), the Department's regulations governing the administration of grants (7 CFR part 3016), Office of Management and Budget Circular A–130, and State agency and FNS guidelines and instructions.

[50 FR 6121, Feb. 13, 1985; 50 FR 8098, Feb. 28, 1985, as amended at 52 FR 21236, June 4, 1987; 59 FR 11499, Mar. 11, 1994; 65 FR 83277, Dec. 29, 2000]

Subpart B—State and Local Agency Eligibility

§ 246.4 State plan.

(a) *Requirements*. By August 15 of each year, each State agency shall submit to FNS for approval a State Plan for the following fiscal year as a prerequisite to receiving funds under this section. The State agency may submit the State Plan in the format provided by FNS guidance. Alternatively, the State agency may submit the Plan in combination with other federally required planning documents or develop its own format, provided that the information required below is included. FNS requests advance notification that a State agency intends to use an alternative format. The State Plan shall be signed by the State designated official responsible for ensuring that the Program is operated in accordance with the State Plan. FNS will provide written approval or denial of a completed State Plan or amendment within 30 days of receipt. Within 15 days after FNS receives an incomplete Plan, FNS

will notify the State agency that additional information is needed to complete the Plan. Any disapproval will be accompanied by a statement of the reasons for the disapproval. After receiving approval of the State Plan, each State agency shall only submit to FNS for approval substantive changes in the State Plan. A complete and approved Plan shall include:

(1) An outline of the State agency's goals and objectives for improving Program operations.

(2) A budget for nutrition services and administration funds, and an estimate of food expenditures.

(3) An estimate of Statewide participation for the coming fiscal year by category of women, infants and children.

(4) The State agency staffing pattern.

(5) An Affirmative Action Plan which includes—

(i) A list of all areas and special populations, in priority order based on relative need, within the jurisdiction of the State agency, the State agency's plans to initiate or expand operations under the Program in areas most in need of supplemental foods, including plans to inform nonparticipating local agencies of the availability and benefits of the Program and the availability of technical assistance in implementing the Program, and a description of how the State agency will take all reasonable actions to identify potential local agencies and encourage agencies to implement or expand operations under the Program within the following year in the neediest one-third of all areas unserved or partially served;

(ii) An estimate of the number of potentially eligible persons in each area and a list of the areas in the Affirmative Action Plan which are currently operating the Program and their current participation, which participant priority levels as specified in § 246.7 are being reached in each of these areas, and which areas in the Affirmative Action Plan are currently operating CSFP and their current participation; and

(iii) A list of the names and addresses of all local agencies.

(6) Plans to provide program benefits to eligible migrant farmworkers and their families, to Indians, and to homeless individuals.

(7) The State agency's plans, to be conducted in cooperation with local agencies, for informing eligible persons of the availability of Program benefits, including the eligibility criteria for participation, the location of local agencies operating the Program, and the institutional conditions of § 246.7(n)(1)(i) of this part, with emphasis on reaching and enrolling eligible women in the early months of pregnancy and migrants. Such information shall be publicly announced by the State agency and by local agencies at least annually. Such information shall also be distributed to offices and organizations that deal with significant numbers of potentially eligible persons, including health and medical organizations, hospitals and clinics, welfare and unemployment offices, social service agencies, farmworker organizations, Indian tribal organizations, organizations and agencies serving homeless individuals, and religious and community organizations in low-income areas.

(8) A description of how the State agency plans to coordinate program operations with other services or programs that may benefit participants in, or applicants for, the program.

(9) The State agency's nutrition education goals and action plans, including a description of the methods that will be used to provide drug and other harmful substance abuse information, promote breastfeeding, and to meet the special nutrition education needs of migrant farmworkers and their families, Indians, and homeless persons.

(10) For Indian State or local agencies that wish to apply for the alternate income determination procedure in accordance with § 246.7(d)(2)(vii), documentation that the majority of Indian household members have incomes below eligibility criteria.

(11) A copy of the procedure manual developed by the State agency for guidance to local agencies in operating the Program. The manual shall include—

(i) Certification procedures, including a list of the specific nutritional risk criteria by priority level which cites conditions and indices to be used to determine a person's nutritional

risk, hematological data requirements including timeframes for the collection of such data, the State agency's income guidelines for Program eligibility, and any adjustments to the participant priority system made pursuant to § 246.7(e)(4) to accommodate high-risk postpartum women or the addition of Priority VII;

(ii) Methods for providing nutrition education, including drug and other harmful substance abuse information, to participants, including homeless individuals;

(iii) Instructions concerning all food delivery operations performed at the local level;

(iv) Instructions for providing all records and reports which the State agency requires local agencies to maintain and submit; and

(v) Instructions on coordinating operations under the program with drug and other harmful substance abuse counseling and treatment services.

(12) A description of the State agency's financial management system.

(13) A description of how the State agency will distribute nutrition services and administration funds, including start-up funds, to local agencies operating under the Program.

(14) A description of the food delivery system as it operates at the State agency level, including—

(i) *Type of system.* All food delivery systems in use within the State agency's jurisdiction;

(ii) *Vendor limiting and selection criteria.* Vendor limiting criteria, if used by the State agency, and the vendor selection criteria established by the State agency consistent with the requirements in § 246.12(g)(3);

(iii) *Vendor agreement.* A sample vendor agreement, including the sanction schedule, which may be incorporated as an attachment or, if the sanction schedule is in the State agency's regulations, through citation to the regulations. State agencies that intend to delegate signing of vendor agreements to local agencies must describe the State agency supervision and instruction that will be provided to ensure the uniformity and quality of local agency activities;

(iv) *Vendor monitoring.* The system for monitoring vendors to ensure compliance and prevent fraud, waste, and program noncompliance, and the State agency's plans for improvement in the coming year in accordance with § 246.12(j). The State agency must also include the criteria it will use to determine which vendors will receive routine monitoring visits. State agencies that intend to delegate any aspect of vendor monitoring responsibilities to a local agency or contractor must describe the State agency supervision and instruction that will be provided to ensure the uniformity and quality of vendor monitoring;

(v) *Options regarding trafficking convictions.* The option exercised by the State agency to sanction vendors pursuant to § 246.12(k)(1)(i).

(vi) *Food instruments.* A facsimile of the food instrument, if used, and a description of the system the State agency will use to account for the disposition of food instruments in accordance with § 246.12(q);

(vii) *Names of contractors.* The names of companies, excluding authorized vendors, with whom the State agency has contracted to participate in the operation of the food delivery system;

(viii) *Nutrition services and administration funds conversion* For State agencies applying for authority to convert food funds to nutrition services and administration funds under § 246.16(g), a full description of their proposed cost-cutting system or system modification;

(ix) *Homeless participants.* If the State agency plans to adapt its food delivery system to accommodate the needs of homeless individuals, a description of such adaptations;

(x) *Cost containment systems.* A description of any cost containment system. A State agency must submit a State Plan or Plan amendment if it is attempting to structure and justify a system that is not a single-supplier competitive bidding system for infant formula in accordance with § 246.16a(d); is requesting a waiver for an infant formula cost containment system under § 246.16a(e); or, is planning to change or modify its current system or implement a system for the first time. The amendment must be submitted at least 90 days before the proposed effective date of the system change. The plan

amendment must include documentation for requests for waivers based on interference with efficient or effective program operations; a cost comparison analysis conducted under § 246.16a(d)(2); and a description of the proposed cost containment system. If FNS disputes supporting plan amendment documentation, it will deem the Plan amendment incomplete under this paragraph (a), and will provide the State agency with a statement outlining disputed issues within 15 days of receipt of the Plan amendment. The State agency may not enter into any infant formula cost containment contract until the disputed issues are resolved and FNS has given its consent. If necessary, FNS may grant a postponement of implementation of an infant formula cost containment system under § 246.16a(f). If at the end of the postponement period issues remain unresolved the State agency must proceed with a cost containment system judged by FNS to comply with the provisions of this part. If the State agency does not comply, it will be subject to the penalties set forth in § 246.16a(i);

(xi) *Vendor training*. The procedures the State agency will use to train vendors in accordance with § 246.12(i). State agencies that intend to delegate any aspect of training to a local agency, contractor, or vendor representative must describe the State agency supervision and instruction that will be provided to ensure the uniformity and quality of vendor training;

(xii) *Food instrument security*. A description of the State agency's system for ensuring food instrument security in accordance with § 246.12(p);

(xiii) *Participant access determination criteria*. A description of the State agency's participant access determination criteria consistent with § 246.12(l); and

(xiv) *Mobile stores*. The special needs necessitating the authorization of mobile stores, if the State agency chooses to authorize such stores.

(15) The State agency's plans to prevent and identify dual participation in accordance with § 246.7(l)(1)(i) and (l)(1)(ii). In States where the Program and the CSFP operate in the same area, or where an Indian State agency operates a Program in the same area as a geographic State agency, a copy of the written agreement between the State agencies for the detection and prevention of dual participation shall be submitted.

(16) A description of the procedures the State will use to comply with the civil rights requirements described in § 246.8, including the processing of discrimination complaints.

(17) A copy of the State agency's fair hearing procedures for participants and the administrative appeal procedures for local agencies and food vendors.

(18) The State agency's plan to reach and enroll migrants, and eligible women in the early months of pregnancy.

(19) The State agency's plan to establish, to the extent practicable, that homeless facilities, and institutions if it chooses to make the Program available to them, meet the conditions established in § 246.7(n)(1)(i) of this part, if residents of such accommodations are to be eligible to receive WIC Program benefits.

(20) A plan to provide program benefits to unserved infants and children under the care of foster parents, protective services, or child welfare authorities, including infants exposed to drugs perinatally.

(21) A plan to improve access to the Program for participants and prospective applicants who are employed or who reside in rural areas, by addressing their special needs through the adoption or revision of procedures and practices to minimize the time participants and applicants must spend away from work and the distances participants and applicants must travel. The State agency shall also describe any plans for issuance of food instruments to employed or rural participants, or to any other segment of the participant population, through means other than direct participant pick-up, pursuant to § 246.12(r)(4). Such description shall also include measures to ensure the integrity of Program services and fiscal accountability.

(22) Assurance that each local agency and any subgrantees of the State agency and/or local agencies are in compliance with the requirements of 7 CFR part 3017 regarding nonprocurement debarment/suspension.

(23) A description of the State agency's plans to provide and maintain a drug-free workplace.

(b) *Public comment*. The State agency shall establish a procedure under which members of the general public are provided an opportunity to comment on the development of the State agency plan.

(c) *Amendments*. At any time after approval, the State agency may amend the State Plan to reflect changes. The State agency shall submit the amendments to FNS for approval. The amendments shall be signed by the State designated official responsible for ensuring that the Program is operated in accordance with the State Plan.

(d) *Retention of copy*. A copy of the approved State Plan or the WIC portion of the State's composite plan of operations shall be kept on file at the State agency for public inspection.

[50 FR 6121, Feb. 13, 1985, as amended at 52 FR 21236, June 4, 1987; 53 FR 25314, July 6, 1988; 54 FR 51294, Dec. 14, 1989; 55 FR 9717, Mar. 15, 1990; 57 FR 34506, Aug. 5, 1992; 58 FR 11506, Feb. 26, 1993; 59 FR 11499, Mar. 11, 1994; 63 FR 63973, Nov. 18, 1998; 64 FR 13322, Mar. 18, 1999; 64 FR 70177, Dec. 16, 1999; 65 FR 51223, Aug. 23, 2000; 65 FR 53527, Sept. 5, 2000; 65 FR 83278, Dec. 29, 2000]

§ 246.5 Selection of local agencies.

(a) *General*. This section sets forth the procedures the State agency shall perform in the selection of local agencies and the expansion, reduction, and disqualification of local agencies already in operation. In making decisions to intitiate, continue, and discontinue the participation of local agencies, the State agency shall give consideration to the need for Program benefits as delineated in the Affirmative Action Plan.

(b) *Application of local agencies*. The State agency shall require each agency, including subdivisions of the State agency, which desires approval as a local agency, to submit a written local agency application. After the receipt of an incomplete application, the State agency shall provide written notification to the applicant agency of the additional information needed. After the receipt of a complete application, the State agency shall notify the applicant agency in writing of the approval or disapproval of its application. When an application is disapproved, the State agency shall advise the applicant agency of the reasons for disapproval and of the right to appeal as set forth in § 246.18. When an agency submits an application and there are no funds to serve the area, the applicant agency shall be notified that there are currently no funds available for Program initiation or expansion. The applicant agency shall be notified by the State agency when funds become available.

(c) *Program initiation and expansion*. The State agency shall meet the following requirements concerning Program initiation and expansion:

(1) The State agency shall fund local agencies serving those areas or special populations most in need first, in accordance with their order of priority as listed in the Affirmative Action Plan described in § 246.4(a)(5). The selection criteria cited in paragraph (d)(1) of this section shall be applied to each area or special population before eliminating that area from consideration and serving the next area of special population. The State agency shall consider the number of participants in each priority level being served by existing local agencies in determining when it is appropriate to move into additional areas in the Affirmative Action Plan or to expand existing operations in an area. Additionally, the State agency shall consider the total number of people potentially eligible in each area compared to the number being served. Expansion of existing operations shall be in accordance with the Affirmative Action Plan and may be based on the percentage of need being met in each participant priority level.

(2) The State agency shall provide a written justification to FNS for not funding an agency to serve the highest priority area or special population. Such justification may include its inability to administer the Program, lack of interest expressed for operating the Program, or for those areas or special populations which are under consideration for expansion of an existing operation, a determination by the State agency that there is a greater need for funding an agency serving an area or special population not operating the Program. The State agency

shall use the participant priority system in § 246.7 as a measurement of greater need in such determination.

(3) The State agency may fund more than one local agency to serve the same area or special population as long as more than one local agency is necessary to serve the full extent of need in that area or special population.

(d) *Local agency priority system.* The State agency shall establish standards for the selection of new local agencies. Such standards shall include the following considerations:

(1) The State agency shall consider the following priority system, which is based on the relative availability of health and administrative services, in the selection of local agencies:

(i) First consideration shall be given to a public or a private nonprofit health agency that will provide ongoing, routine pediatric and obstetric care and administrative services.

(ii) Second consideration shall be given to a public or a private nonprofit health or human service agency that will enter into a written agreement with another agency for either ongoing, routine pediatric and obstetric care or administrative services.

(iii) Third consideration shall be given to a public or private nonprofit health agency that will enter into a written agreement with private physicians, licensed by the State, in order to provide ongoing, routine pediatric and obstetric care to a specific category of participants (women, infants or children).

(iv) Fourth consideration shall be given to a public or private nonprofit human service agency that will enter into a written agreement with private physicians, licensed by the State, to provide ongoing, routine pediatric and obstetric care.

(v) Fifth consideration shall be given to a public or private nonprofit health or human service agency that will provide ongoing, routine pediatric and obstetric care through referral to a health provider.

(2) When seeking new local agencies, the State agency shall publish a notice in the media of the area next in line according to the Affirmative Action Plan, unless the State agency has received an application from a public or nonprofit private health agency in that area which can provide adequate health and administrative services. The notice shall include a brief explanation of the Program, a description of the local agency priority system cited in this paragraph and a request that potential local agencies notify the State agency of their interest. In addition, the State agency shall contact all potential local agencies in the area to ensure that they are aware of the opportunity to apply for participation under the Program. If no agency submits an application within 30 days, the State agency may then proceed with the selection of a local agency in the area next in line according to the Affirmative Action Plan. If sufficient funds are available, a State agency shall give notice and consider applications in more than one area at the same time but shall fund new local agencies in conformance with the sequential ranking of the Affirmative Action Plan.

(e) *Disqualification of local agencies.* (1) The State agency may disqualify a local agency—

(i) When the State agency determines noncompliance with Program regulations;

(ii) When the State's Program funds are insufficient to support the continued operation of all its existing local agencies at their current participation level; or

(iii) When the State agency determines, following a review of local agency credentials in accordance with paragraph (f) of this section, that another local agency can operate the Program more effectively and efficiently.

(2) The State agency may establish its own criteria for disqualification of local agencies. The State agency shall notify the local agency of any State-established criteria. In addition to any State established criteria, the State agency shall consider, at a minimum—

(i) The availability of other community resources to participants and the cost efficiency and cost effectiveness of the local agency in terms of both food and nutrition services and administration costs;

(ii) The percentages of participants in each priority level being served by the local agency and the percentage of

need being met in each participant category;

(iii) The relative position of the area or special population served by the local agency in the Affirmative Action Plan;

(iv) The local agency's place in the priority system in paragraph (d)(1) of this section; and

(v) The capability of another local agency or agencies to accept the local agency's participants.

(3) When disqualifying a local agency under the Program, the State agency shall—

(i) Make every effort to transfer affected participants to another local agency without disruption of benefits;

(ii) Provide the affected local agency with written notice not less than 60 days in advance of the pending action which includes an explanation of the reasons for disqualification, the date of disqualification, and, except in cases of the expiration of a local agency's agreement, the local agency's right to appeal as set forth in § 246.18; and

(iii) Ensure that the action is not in conflict with any existing written agreements between the State and the local agency.

(f) *Periodic review of local agency qualifications.* The State agency may conduct periodic reviews of the qualifications of authorized local agencies under its jurisdiction. Based upon the results of such reviews the State agency may make appropriate adjustments among the participating local agencies, including the disqualification of a local agency when the State agency determines that another local agency can operate the Program more effectively and efficiently. In conducting such reviews, the State agency shall consider the factors listed in paragraph (e)(2) of this section in addition to whatever criteria it may develop. The State agency shall implement the procedures established in paragraph (e)(3) of this section when disqualifying a local agency.

[50 FR 6121, Feb. 13, 1985; 50 FR 8098, Feb. 28, 1985; 65 FR 53527, Sept. 5, 2000]

§ 246.6 Agreements with local agencies.

(a) *Signed written agreements.* The State agency shall enter into a signed written agreement with each local agency, including subdivisions of the State agency, which sets forth the local agency's responsibilities for Program operations as prescribed in this part. Copies of the agreement shall be kept on file at both the State and local agencies for purposes of review and audit in accordance with §§ 246.19 and 246.20. Neither the State agency nor the local agency has an obligation to renew the agreement. The expiration of an agreement is not subject to appeal. The State agency shall provide local agencies with advance written notice of the expiration of an agreement as required under §§ 246.5(e)(3)(ii) and 246.18(b)(1).

(b) *Provisions of agreement.* The agreement between the State agency and each local agency shall ensure that the local agency—

(1) Complies with all the fiscal and operational requirements prescribed by the State agency pursuant to this part, 7 CFR part 3016, the debarment and suspension requirements of 7 CFR part 3017, if applicable, the lobbying restrictions of 7 CFR part 3018, and FNS guidelines and instructions, and provides on a timely basis to the State agency all required information regarding fiscal and Program information;

(2) Has a competent professional authority on the staff of the local agency and the capabilities necessary to perform the certification procedures;

(3) Makes available appropriate health services to participants and informs applicants of the health services which are available;

(4) Prohibits smoking in the space used to carry out the WIC Program during the time any aspect of WIC services are performed;

(5) Has a plan for continued efforts to make health services available to participants at the clinic or through written agreements with health care providers when health services are provided through referral;

(6) Provides nutrition education services to participants, in compliance with § 246.11 and FNS guidelines and instructions;

(7) Implements a food delivery system prescribed by the State agency pursuant to § 246.12 and approved by FNS;

(8) Maintains complete, accurate, documented and current accounting of all Program funds received and expended;

(9) Maintains on file and has available for review, audit, and evaluation all criteria used for certification, including information on the area served, income standards used, and specific criteria used to determine nutritional risk; and

(10) Does not discriminate against persons on the grounds of race, color, national origin, age, sex or handicap; and compiles data, maintains records and submits reports as required to permit effective enforcement of the nondiscrimination laws.

(c) *Indian agencies.* Each Indian State agency shall ensure that all local agencies under its jurisdiction serve primarily Indian populations.

(d) *Health and human service agencies.* When a health agency and a human service agency comprise the local agency, both agencies shall together meet all the requirements of this part and shall enter into a written agreement which outlines all Program responsibilities of each agency. The agreement shall be approved by the State agency during the application process and shall be on file at both the State and local agency. No Program funds shall be used to reimburse the health agency for the health services provided. However, costs of certification borne by the health agency may be reimbursed.

(e) *Health or human service agencies and private physicians.* When a health or human service agency and private physician(s) comprise the local agency, all parties shall together meet all of the requirements of this part and shall enter into a written agreement which outlines the inter-related Program responsibilities between the physician(s) and the local agency. The agreement shall be approved by the State agency during the application process and shall be on file at both agencies. The local agency shall advise the State agency on its application of the name(s) and address(es) of the private physician(s) participating and obtain State agency approval of the written agreement. A competent professional authority on the staff of the health or human service agency shall be responsible for the certification of participants. No Program funds shall be used to reimburse the private physician(s) for the health services provided. However, costs of certification data provided by the physician(s) may be reimbursed.

(f) *Outreach/Certification In Hospitals.* The State agency shall ensure that each local agency operating the program within a hospital and/or that has a cooperative arrangement with a hospital:

(1) Advises potentially eligible individuals that receive inpatient or outpatient prenatal, maternity, or postpartum services, or that accompany a child under the age of 5 who receives well-child services, of the availability of program services; and

(2) To the extent feasible, provides an opportunity for individuals who may be eligible to be certified within the hospital for participation in the WIC Program.

[50 FR 6121, Feb. 13, 1985, as amended at 59 FR 11500, Mar. 11, 1994; 63 FR 63974, Nov. 18, 1998]

Subpart C—Participant Eligibility

§ 246.7 Certification of participants.

(a) *Integration with health services.* To lend administrative efficiency and participant convenience to the certification process, whenever possible, Program intake procedures shall be combined with intake procedures for other health programs or services administered by the State and local agencies. Such merging may include verification procedures, certification interviews, and income computations. Local agencies shall maintain and make available for distribution to all pregnant, postpartum, and breastfeeding women and to parents or caretakers of infants and children applying for and participating in the Program a list of local resources for drug and other harmful substance abuse counseling and treatment.

(b) *Program referral and access.* State and local agencies shall provide WIC Program applicants and participants or their designated proxies with information on other health-related and public assistance programs, and when appropriate, shall refer applicants and participants to such programs.

(1) The State agency shall provide each local WIC agency with materials showing the maximum income limits, according to family size, applicable to pregnant women, infants, and children up to age 5 under the medical assistance program established under Title XIX of the Social Security Act (in this section, referred to as the ''Medicaid Program''). The local agency shall, in turn, provide to adult individuals applying or reapplying for the WIC Program for themselves or on behalf of others, written information about the Medicaid Program. If such individuals are not currently participating in Medicaid but appear to have family income below the applicable maximum income limits for the program, the local agency shall also refer these individuals to Medicaid, including the referral of infants and children to the appropriate entity in the area authorized to determine eligibility for early and periodic screening, diagnostic, and treatment (EPSDT) services, and, the referral of pregnant women to the appropriate entity in the area authorized to determine presumptive eligibility for the Medicaid Program, if such determinations are being offered by the State.

(2) State agencies shall provide WIC services at community and migrant health centers, Indian Health Services facilities, and other federally health care supported facilities established in medically underserved areas to the extent feasible.

(3) Local agencies may provide information about other potential sources of food assistance in the local area to adult individuals applying or reapplying in person for the WIC Program for themselves or on behalf of others, when such applicants cannot be served because the Program is operating at capacity in the local area.

(4) Each local agency that does not routinely schedule appointments shall schedule appointments for employed adult individuals seeking to apply or reapply for participation in the WIC Program for themselves or on behalf of others so as to minimize the time such individuals are absent from the workplace due to such application.

(5) Each local agency shall attempt to contact each pregnant woman who misses her first appointment to apply for participation in the Program in order to reschedule the appointment. At the time of initial contact, the local agency shall request an address and telephone number where the pregnant woman can be reached.

(c) *Eligibility criteria.* (1) To be certified as eligible for the Program, infants, children, and pregnant, postpartum, and breastfeeding women shall:

(i) In all State agencies except for Indian State agencies, meet the requirement that the applicant reside within the jurisdiction of the State. Indian State agencies may establish the requirement that applicants reside within their jurisdiction. All State agencies may determine a service area for any local agency, and may require that an applicant reside within the service area. However, the State agency may not use length of residency as an eligibility requirement.

(ii) Meet the income criteria specified in paragraph (d) of this section.

(iii) Meet the nutritional risk criteria specified in paragraph (e) of this section.

(2) A State, a State agency, and an Indian Tribal Organization (including, an Indian tribe, band, or group recognized by the Department of the Interior; or an intertribal council or group which is an authorized representative of Indian tribes, bands or groups recognized by the Department of the Interior and which has an ongoing relationship with such tribes, bands or groups for other purposes and has contracted with them to administer the Program) serving as a State agency, may limit WIC participation to United States citizens, nationals, and qualified aliens as these terms are defined in the Immigration and Nationality Laws (8 U.S.C. 1101 *et seq.*). State agencies that implement this option shall inform FNS of their intentions and provide copies of the procedures they will establish regarding the limitation of WIC services to United States citizens, nationals, and qualified aliens.

(d) *Income criteria and income eligibility determinations.* The State agency

shall establish, and provide local agencies with, income guidelines, definitions, and procedures to be used in determining an applicant's income eligibility for the Program.

(1) *Income eligibility guidelines.* The State agency may prescribe income guidelines either equaling the income guidelines established under section 9 of the National School Lunch Act for reduced-price school meals or identical to State or local guidelines for free or reduced-price health care. However, in conforming Program income guidelines to health care guidelines, the State agency shall not establish Program guidelines which exceed the guidelines for reduced-price school meals or are less than 100 percent of the revised poverty income guidelines issued annually by the Department of Health and Human Services. Program applicants who meet the requirements established by paragraph (d)(2)(vi)(A) of this section shall not be subject to the income limits established by State agencies under this paragraph.

(i) *Local agency income eligibility guidelines.* Different guidelines may be prescribed for different local agencies within the State provided that the guidelines are the ones used by the local agencies for determining eligibility for free or reduced-price health care.

(ii) *Annual adjustments in the income guidelines.* On or before June 1 each year, FNS will announce adjustments in the income guidelines for reduced-price meals under section 9 of the National School Lunch Act, based on annual adjustments in the revised poverty income guidelines issued by the Department of Health and Human Services.

(iii) *Implementation of the income guidelines.* On or before July 1 each year, each State agency shall announce and transmit to each local agency the State agency's family size income guidelines, unless changes in the poverty income guidelines issued by the Department of Health and Human Services do not necessitate changes in the State or local agency's income guidelines. The State agency may implement revised guidelines concurrently with the implementation of income guidelines under the Medicaid program established under Title XIX of the Social Security Act (42 U.S.C. 1396 of *et seq.*). The State agency shall ensure that conforming adjustments are made, if necessary, in local agency income guidelines. The local agency shall implement (revised) guidelines not later than July 1 of each year for which such guidelines are issued by the State.

(2) *Income eligibility determinations.* The State agency shall ensure that local agencies determine income through the use of a clear and simple application form provided or approved by the State agency.

(i) *Timeframes for determining income.* In determining the income eligibility of an applicant, the State agency may instruct local agencies to consider the income of the family during the past 12 months and the family's current rate of income to determine which indicator more accurately reflects the family's status. However, persons from families with adult members who are unemployed shall be eligible based on income during the period of unemployment if the loss of income causes the current rate of income to be less than the State or local agency's income guidelines for Program eligibility.

(ii) *Definition of ''Income''.* If the State agency uses the National School Lunch reduced-priced meal income guidelines, as specified in paragraph (d)(1) of this section, it shall use the following definition of income: Income for the purposes of this part means gross cash income before deductions for income taxes, employees' social security taxes, insurance premiums, bonds, etc. Income includes the following—

(A) Monetary compensation for services, including wages, salary, commissions, or fees;

(B) Net income from farm and nonfarm self-employment;

(C) Social Security benefits;

(D) Dividends or interest on savings or bonds, income from estates or trusts, or net rental income;

(E) Public assistance or welfare payments;

(F) Unemployment compensation;

(G) Government civilian employee or military retirement or pensions or veterans' payments;

(H) Private pensions or annuities;

(I) Alimony or child support payments;

(J) Regular contributions from persons not living in the household;

(K) Net royalties; and

(L) Other cash income. Other cash income includes, but is not limited to, cash amounts received or withdrawn from any source including savings, investments, trust accounts and other resources which are readily available to the family.

(iii) *Use of a State or local health care definition of ''Income''.* If the State agency uses State or local free or reduced-price health care income guidelines, as it is authorized to do in paragraph (d)(1) of this section, it may use the State or local definition or definitions of income used for the health care eligibility determinations. The State agency shall ensure, however, that the State or local agency's definition of income does not count the value of in-kind housing and other in-kind benefits and payments or benefits listed in paragraph (d)(2)(iv) of this section as income for Program purposes, and that families with gross income, as defined in paragraph (d)(2)(ii) of this section, in excess of 185 percent of the Federal guidelines specified under paragraph (d)(1) of this section are not rendered eligible for Program benefits, except that persons who meet the requirements of paragraph (d)(2)(vi) of this section shall not be subject to limitations established under this paragraph.

(iv) *Income exclusions.* (A) In determining income eligibility, the State agency may exclude from consideration as income any:

(*1*) Basic allowance for housing received by military services personnel residing off military installations; and

(*2*) Cost-of-living allowance provided under 37 U.S.C. 405, to a member of a uniformed service who is on duty outside the contiguous states of the United States.

(B) The value of inkind housing and other inkind benefits, shall be excluded from consideration as income in determining an applicant's eligibility for the program.

(C) Payments or benefits provided under certain Federal programs or acts are excluded from consideration as income by legislative prohibition. The payments or benefits which must be excluded from consideration as income include, but are not limited to:

(*1*) Reimbursements from the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Pub. L. 91–646, sec. 216, 42 U.S.C. 4636);

(*2*) Any payment to volunteers under Title I (VISTA and others) and Title II (RSVP, foster grandparents, and others) of the Domestic Volunteer Service Act of 1973 (Pub. L. 93–113, sec. 404(g), 42 U.S.C. 5044(g)) to the extent excluded by that Act;

(*3*) Payment to volunteers under section 8(b)(1)(B) of the Small Business Act (SCORE and ACE) (Pub. L. 95–510, sec. 101, 15 U.S.C. 637(b)(1)(D));

(*4*) Income derived from certain submarginal land of the United States which is held in trust for certain Indian tribes (Pub. L. 94–114, sec. 6, 25 U.S.C. 459e);

(*5*) Payments received under the Job Training Partnership Act (Pub. L. 97–300, sec. 142(b), 29 U.S.C. 1552(b));

(*6*) Income derived from the disposition of funds to the Grand River Band of Ottawa Indians (Pub. L. 94–540, sec. 6);

(*7*) Payments received under the Alaska Native Claims Settlement Act (Pub. L. 100–241, sec. 15, 43 U.S.C. sec. 1626(c));

(*8*) The value of assistance to children or their families under the National School Lunch Act, as amended (Pub. L. 94–105, sec. 9(d), 42 U.S.C. sec. 1760(e)), the Child Nutrition Act of 1966 (Pub. L. 89–642, sec. 11(b), 42 U.S.C. sec. 1780(b)), and the Food Stamp Act of 1977 (Pub. L. 95–113, sec. 1301, 7 U.S.C. sec. 2017(b));

(*9*) Payments by the Indian Claims Commission to the Confederated Tribes and Bands of the Yakima Indian Nation or the Apache Tribe of the Mescalero Reservation (Pub. L. 95–433, sec. 2, 25 U.S.C. 609c–1);

(*10*) Payments to the Passamaquoddy Tribe and the Penobscot Nation or any of their members received pursuant to the Maine Indian Claims Settlement Act of 1980 (Pub. L. 96–420, sec. 6, 9(c), 25 U.S.C. 1725(i), 1728(c));

(*11*) Payments under the Low-income Home Energy Assistance Act, as

amended (Pub. L. 99–125, sec. 504(c), 42 U.S.C. sec. 8624(f));

(*12*) Student financial assistance received from any program funded in whole or part under Title IV of the Higher Education Act of 1965, including the Pell Grant, Supplemental Educational Opportunity Grant, State Student Incentive Grants, National Direct Student Loan, PLUS, College Work Study, and Byrd Honor Scholarship programs, which is used for costs described in section 472 (1) and (2) of that Act (Pub. L. 99–498, section 479B, 20 U.S.C. 1087uu). The specified costs set forth in section 472 (1) and (2) of the Higher Education Act are tuition and fees normally assessed a student carrying the same academic workload as determined by the institution, and including the costs for rental or purchase of any equipment, materials, or supplies required of all students in the same course of study; and an allowance for books, supplies, transportation, and miscellaneous personal expenses for a student attending the institution on at least a half-time basis, as determined by the institution. The specified costs set forth in section 472 (1) and (2) of the Act are those costs which are related to the costs of attendance at the educational institution and do not include room and board and dependent care expenses;

(*13*) Payments under the Disaster Relief Act of 1974, as amended by the Disaster Relief and Emergency Assistance Amendments of 1989 (Pub. L. 100–707, sec. 105(i), 42 U.S.C. sec. 5155(d));

(*14*) Effective July 1, 1991, payments received under the Carl D. Perkins Vocational Education Act, as amended by the Carl D. Perkins Vocational and Applied Technology Education Act Amendments of 1990 (Pub. L. 101–392, sec. 501, 20 U.S.C. sec. 2466d);

(*15*) Payments pursuant to the Agent Orange Compensation Exclusion Act (Pub. L. 101–201, sec. 1);

(*16*) Payments received for Wartime Relocation of Civilians under the Civil Liberties Act of 1988 (Pub. L. 100–383, sec. 105(f)(2), 50 App. U.S.C. sec. 1989b–4(f)(2));

(*17*) Value of any child care payments made under section 402(g)(1)(E) of the Social Security Act, as amended by the Family Support Act (Pub. L. 100–485, sec. 301, 42 U.S.C. sec. 602 (g)(1)(E));

(*18*) Value of any ''at-risk'' block grant child care payments made under section 5081 of Pub. L. 101–508, which amended section 402(i) of the Social Security Act;

(*19*) Value of any child care provided or paid for under the Child Care and Development Block Grant Act, as amended (Pub. L. 102–586, Sec. 8(b)), 42 U.S.C. 9858q);

(*20*) Mandatory salary reduction amount for military service personnel which is used to fund the Veteran's Educational Assistance Act of 1984 (GI Bill), as amended (Pub. L. 99–576, sec. 303(a)(1), 38 U.S.C. sec. 1411 (b));

(*21*) Payments received under the Old Age Assistance Claims Settlement Act, except for per capita shares in excess of $2,000 (Pub. L. 98–500, sec. 8, 25 U.S.C. sec. 2307);

(*22*) Payments received under the Cranston-Gonzales National Affordable Housing Act, unless the income of the family equals or exceeds 80 percent of the median income of the area (Pub. L. 101–625, sec. 522(i)(4), 42 U.S.C. sec. 1437f nt);

(*23*) Payments received under the Housing and Community Development Act of 1987, unless the income of the family increases at any time to not less than 50 percent of the median income of the area (Pub. L. 100–242, sec. 126(c)(5)(A), 25 U.S.C. sec. 2307);

(*24*) Payments received under the Sac and Fox Indian claims agreement (Pub. L. 94–189, sec. 6);

(*25*) Payments received under the Judgment Award Authorization Act, as amended (Pub. L. 97–458, sec. 4, 25 U.S.C. sec. 1407 and Pub. L. 98–64, sec. 2(b), 25 U.S.C. sec. 117b(b));

(*26*) Payments for the relocation assistance of members of Navajo and Hopi Tribes (Pub. L. 93–531, sec. 22, 22 U.S.C. sec. 640d-21);

(*27*) Payments to the Turtle Mountain Band of Chippewas, Arizona (Pub. L. 97–403, sec. 9);

(*28*) Payments to the Blackfeet, Grosventre, and Assiniboine tribes (Montana) and the Papago (Arizona) (Pub. L. 97–408, sec. 8(d));

(*29*) Payments to the Assiniboine Tribe of the Fort Belknap Indian community and the Assiniboine Tribe of

the Fort Peck Indian Reservation (Montana) (Pub. L. 98–124, sec. 5);

(*30*) Payments to the Red Lake Band of Chippewas (Pub. L. 98–123, sec. 3);

(*31*) Payments received under the Saginaw Chippewa Indian Tribe of Michigan Distribution of Judgment Funds Act (Pub. L. 99–346, sec. 6(b)(2)); and

(*32*) Payments to the Chippewas of Mississippi (Pub. L. 99–377, sec. 4(b)).

(v) *Are applicants required to document income eligibility?* (A) *Adjuctively/automatically income eligible applicants.* The State or local agency must require applicants determined to be adjunctively or automatically income eligible to document their eligibility for the program that makes them income eligible as set forth in paragraph (d)(2)(vi) of this section.

(B) *Other applicants.* The State or local agency must require all other applicants to provide documentation of family income at certification.

(C) *Exceptions.* The income documentation requirement does not apply to an individual for whom the necessary documentation is not available or an individual such as a homeless woman or child for whom the agency determines the income documentation requirement would present an unreasonable barrier to participation. Examples of individuals for whom the necessary documentation is not available include those with no income or no proof of income (such as an applicant or applicant's parent who is a migrant farmworker or other individual who works for cash). These are the only exceptions that may be used. When using these exceptions, the State or local agency must require the applicant to sign a statement specifying why he/she cannot provide documentation of income. Such a statement is not required when there is no income.

(D) *Verification.* The State or local agency may require verification of information it determines necessary to confirm income eligibility for Program benefits.

(vi) *Adjunct or automatic income eligibility.* (A) The State agency shall accept as income-eligible for the Program any applicant who documents that he/she is:

(*1*) Certified as fully eligible to receive food stamps under the Food Stamp Act of 1977, or certified as fully eligible, or presumptively eligible pending completion of the eligibility determination process, to receive Temporary Assistance for Needy Families (TANF) under Part A of Title IV of the Social Security Act or Medical Assistance (i.e., Medicaid) under Title XIX of the Social Security Act; or

(*2*) A member of a family that is certified eligible to receive assistance under TANF, or a member of a family in which a pregnant woman or an infant is certified eligible to receive assistance under Medicaid.

(B) The State agency may accept, as evidence of income within Program guidelines, documentation of the applicant's participation in State-administered programs not specified in this paragraph that routinely require documentation of income, provided that those programs have income eligibility guidelines at or below the State agency's Program income guidelines.

(C) Persons who are adjunctively income eligible, as set forth in paragraphs (d)(2)(vi)(A) of this section, shall not be subject to the income limits established under paragraph (d)(1) of this section.

(vii) *Income eligibility of pregnant women.* A pregnant woman who is ineligible for participation in the program because she does not meet income guidelines shall be considered to have satisfied the income guidelines if the guidelines would be met by increasing the number of individuals in her family by the number of embryos or fetuses in utero. The same increased family size may also be used for any of the pregnant woman's categorically eligible family members. The State agency shall allow applicants to waive this increase in family size.

(viii) *Income eligibility of Indian applicants.* If an Indian State agency (or a non-Indian State agency which acts on behalf of a local agency operated by an Indian organization or the Indian Health Service) submits census data or other reliable documentation demonstrating to FNS that the majority of the Indian households in a local agency's service area have incomes at or

below the State agency's income eligibility guidelines, FNS may authorize the State agency to approve the use of an income certification system under which the local Indian agency shall inform each Indian applicant household of the maximum family income allowed for that applicant's family size. The local agency shall ensure that the applicant, or the applicant's parent or caretaker, signs a statement that the applicant's family income does not exceed the maximum. The local agency may verify the income eligibility of any Indian applicant.

(ix) *Are instream migrant farmworkers and their family members required to document income eligibility?* Certain instream migrant farmworkers and their family members with expired Verification of Certification cards shall be declared to satisfy the State agency's income standard and income documentation requirements. Such cases include when income of that instream migrant farmworker is determined at least once every 12 months. Such families shall satisfy the income criteria in any State for any subsequent certification while the migrant is instream during the 12-month period following the determination. The determination can occur either in the migrant's home base area before the migrant has entered the stream for a particular agricultural season, or in an instream area during the agricultural season.

(e) *Nutritional risk.* To be certified as eligible for the Program, applicants who meet the Program's eligibility standards specified in paragraph (c) of this section must be determined to be at nutritional risk. A competent professional authority on the staff of the local agency shall determine if a person is at nutritional risk through a medical and/or nutritional assessment. This determination may be based on referral data submitted by a competent professional authority not on the staff of the local agency. Nutritional risk data shall be documented in the participant's file and shall be used to assess an applicant's nutritional status and risk, tailor the food package to address nutritional needs, design appropriate nutrition education, and make referrals to health and social services for follow-up, as necessary and appropriate.

Except as stated in paragraph (e)(1)(v) of this section, at least one determination of nutritional risk must be documented at the time of certification in order for an income eligible applicant to receive WIC benefits.

(1) *Determination of nutritional risk.* (i) *Required nutritional risk data.* (A) At a minimum, height or length and weight measurements shall be performed and/or documented in the applicant's file at the time of certification. In addition, a hematological test for anemia such as a hemoglobin, hematocrit, or free erythrocyte protoporphyrin test shall be performed and/or documented at certification for applicants with no other nutritional risk factor present. For applicants with a qualifying nutritional risk factor present at certification, such test shall be performed and/or documented within 90 days of the date of certification. However, for breastfeeding women 6–12 months postpartum, such hematological tests are not required if a test was performed after the termination of their pregnancy. In addition, such hematological tests are not required, but are permitted, for infants under nine months of age. All infants nine months of age and older (who have not already had a hematological test performed or obtained, between the ages of six and nine months), shall have a hematological test performed between nine and twelve months of age or obtained from referral sources. This hematological test does not have to occur within 90 days of the date of certification. Only one test is required for children between 12 and 24 months of age, and this test should be done 6 months after the infant test, if possible. At the State or local agency's discretion, the hematological test is not required for children ages two and older who were determined to be within the normal range at their last certification. However, the hematological test shall be performed on such children at least once every 12 months. Hematological test data submitted by a competent professional authority not on the staff of the local agency may be

used to establish nutritional risk. However, such referral hematological data must:

(*1*) Be reflective of a woman applicant's category, meaning the test must have been taken for pregnant women during pregnancy and for postpartum or breastfeeding women following termination of pregnancy;

(*2*) Conform to the anemia screening schedule for infants and children as outlined in paragraph (e)(1)(ii)(B) of this section; and

(*3*) Conform to recordkeeping requirements as outlined in paragraph (i)(4) of this section.

(B) Height or length and weight measurements and, with the exceptions specified in paragraph (e)(1)(v) of this section, hematological tests, shall be obtained for all participants, including those who are determined at nutritional risk based solely on the established nutritional risk status of another person, as provided in paragraphs (e)(1)(iv) and (e)(1)(v) of this section.

(ii) *Timing of nutritional risk data.* (A) *Weight and height or length.* Weight and height or length shall be measured not more than 60 days prior to certification for program participation.

(B) *Hematological test for anemia.* (*1*) For pregnant, breastfeeding, and postpartum women, and child applicants, the hematological test for anemia shall be performed or obtained from referral sources at the time of certification or within 90 days of the date of certification. The hematological test for anemia may be deferred for up to 90 days from the time of certification for applicants who have at least one qualifying nutritional risk factor present at the time of certification. If no qualifying risk factor is identified, a hematological test for anemia must be performed or obtained from referral sources (with the exception of presumptively eligible pregnant women).

(*2*) Infants nine months of age and older (who have not already had a hematological test performed, between six and nine months of age, by a competent professional authority or obtained from referral sources), shall between nine and twelve months of age have a hematological test performed or obtained from referral sources. Such a test may be performed more than 90 days after the date of certification.

(*3*) For pregnant women, the hematological test for anemia shall be performed during their pregnancy. For persons certified as postpartum or breastfeeding women, the hematological test for anemia shall be performed after the termination of their pregnancy. For breastfeeding women who are 6–12 months postpartum, no additional blood test is necessary if a test was performed after the termination of their pregnancy. The participant or parent/guardian shall be informed of the test results when there is a finding of anemia, and notations reflecting the outcome of the tests shall be made in the participant's file. Nutrition education, food package tailoring, and referral services shall be provided to the participant or parent/guardian, as necessary and appropriate.

(iii) *Breastfeeding dyads.* A breastfeeding woman may be determined to be a nutritional risk if her breastfed infant has been determined to be a nutritional risk. A breastfed infant can be certified based on the mother's medical and/or nutritional assessment. A breastfeeding mother and her infant shall be placed in the highest priority level for which either is qualified.

(iv) *Infants born to WIC mothers or women who were eligible to participate in WIC.* An infant under six months of age may be determined to be at nutritional risk if the infant's mother was a Program participant during pregnancy or of medical records document that the woman was at nutritional risk during pregnancy because of detrimental or abnormal nutritional conditions detectable by biochemical or anthropometric measurements or other documented nutritionally related medical conditions.

(v) *Presumptive eligibility for pregnant women.* A pregnant woman who meets the income eligibility standards may be considered presumptively eligible to participate in the program, and may be certified immediately without an evaluation of nutritional risk for a period up to 60 days. A nutritional risk evaluation of such woman shall be completed not later than 60 days after the woman is certified for participation. A

hematological test for anemia is not required to be performed within the 60-day period, but rather within 90 days, unless the nutritional risk evaluation performed does not identify a qualifying risk factor. If no qualifying risk factor is identified, a hematological test for anemia must be performed or obtained from referral sources before the 60-day period elapses. Under the subsequent determination process, if the woman does not meet any qualifying nutritional risk criteria, including anemia criteria, the woman shall be determined ineligible and may not participate in the program for the reference pregnancy after the date of the determination. Said applicant may subsequently reapply for program benefits and if found to be both income eligible and at qualifying nutritional risk may participate in the program. Persons found ineligible to participate in the program under this paragraph shall be advised in writing of the ineligibility, of the reasons for the ineligibility, and of the right to a fair hearing. The reasons for the ineligibility shall be properly documented and shall be retained on file at the local agency. In addition, if the nutritional risk evaluation is not completed within the 60-day timeframe, the woman shall be determined ineligible.

(vi) *Regression*. A participant who has previously been certified eligible for the Program may be considered to be at nutritional risk in the next certification period if the competent professional authority determines there is a possibility of regression in nutritional status without the supplemental foods. The State agency may limit the number of times and circumstances under which a participant may be certified due to the possibility of regression.

(2) *Nutritional risk criteria*. The following are examples of nutritional risk conditions which may be used as a basis for certification. These examples include—

(i) Detrimental or abnormal nutritional conditions detectable by biochemical or anthropometric measurements, such as anemia, underweight, overweight, abnormal patterns of weight gain in a pregnant woman, low birth weight in an infant, or stunting in an infant or child;

(ii) Other documented nutritionally related medical conditions, such as clinical signs of nutritional deficiencies, metabolic disorders, pre-eclampsia in pregnant women, failure to thrive in an infant, chronic infections in any person, alcohol or drug abuse or mental retardation in women, lead poisoning, history of high risk pregnancies or factors associated with high risk pregnancies (such as smoking; conception before 16 months postpartum; history of low birth weight, premature births, or neonatal loss; adolescent pregnancy; or current multiple pregnancy) in pregnant women, or congenital malformations in infants or children, or infants born of women with alcohol or drug abuse histories or mental retardation.

(iii) Dietary deficiencies that impair or endanger health, such as inadequate dietary patterns assessed by a 24-hour dietary recall, dietary history, or food frequency checklist; and

(iv) Conditions that predispose persons to inadequate nutritional patterns or nutritionally related medical conditions, such as homelessness or migrancy.

(3) *Nutritional risk priorities*. In determining nutritional risk, the State agency shall develop and include in its State Plan, specific risk conditions by priority level with indices for identifying these conditions. The criteria shall be used statewide and in accordance with the priority system as set forth in paragraph (e)(4) of this section.

(4) *Nutritional risk priority system*. The competent professional authority shall fill vacancies which occur after a local agency has reached its maximum participation level by applying the following participant priority system to persons on the local agency's waiting list. Priorities I through VI shall be utilized in all States. The State agency may, at its discretion, expand the priority system to include Priority VII. The State agency may set income or other sub-priority levels within any of these seven priority levels. The State agency may expand Priority III, IV, or V to include high-risk postpartum women. The State agency may place pregnant or breastfeeding women and infants who are at nutritional risk

solely because of homelessness or migrancy in Priority IV; children who are at nutritional risk solely because of homelessness or migrancy in Priority V; and postpartum women who are at nutritional risk solely because of homelessness or migrancy in Priority VI, *OR*, the State agency may place pregnant, breastfeeding or postpartum women, infants, and children who are at nutritional risk solely because of homelessness or migrancy in Priority VII.

(i) *Priority I*. Pregnant women, breastfeeding women and infants at nutritional risk as demonstrated by hematological or anthropometric measurements, or other documented nutritionally related medical conditions which demonstrate the need for supplemental foods.

(ii) *Priority II*. Except those infants who qualify for Priority I, infant up to six months of age of Program participants who participated during pregnancy, and infants up to six months of age born of women who were not Program participants during pregnancy but whose medical records document that they were at nutritional risk during pregnancy due to nutritional conditions detectable by biochemical or anthropometric measurements or other documented nutritionally related medical conditions which demonstrated the person's need for supplemental foods.

(iii) *Priority III*. Children at nutritional risk as demonstrated by hematological or anthropometric measurements or other documented medical conditions which demonstrate the child's need for supplemental foods.

(iv) *Priority IV*. Pregnant women, breastfeeding women, and infants at nutritional risk because of an inadequate dietary pattern.

(v) *Priority V*. Children at nutritional risk because of an inadequate dietary pattern.

(vi) *Priority VI*. Postpartum women at nutritional risk.

(vii) *Priority VII*. Individuals certified for WIC solely due to homelessness or migrancy and, at State agency option, and in accordance with the provisions of paragraph (e)(1)(iii) of this section, previously certified participants who might regress in nutritional status without continued provision of supplemental foods.

(f) *Processing standards*. The local agencies shall process applicants within the following timeframes:

(1) *Waiting lists*. When the local agency is serving its maximum caseload, the local agency shall maintain a waiting list of individuals who visit the local agency to express interest in receiving Program benefits and who are likely to be served. However, in no case shall an applicant who requests placement on the waiting list be denied inclusion. State agencies may establish a policy which permits or requires local agencies to accept telephone requests for placement on the waiting list. The waiting list shall include the person's name, address or phone number, status (e.g., pregnant, breastfeeding, age of applicant), and the date he or she was placed on the waiting list. Individuals shall be notified of their placement on a waiting list within 20 days after they visit the local agency during clinic office hours to request Program benefits. For those State agencies establishing procedures to accept telephone requests for placement on a waiting list, individuals shall be notified of their placement on a waiting list within 20 days after contacting the local agency by phone. The competent professional authority shall apply the participant priority system as specified in paragraph (e)(4) of this section to the waiting list to ensure that the highest priority persons become Program participants first when caseload slots become available.

(2) *Timeframes for processing applicants*. (i) When the local agency is not serving its maximum caseload, the local agency shall accept applications, make eligibility determinations, notify the applicants of the decisions made and, if the applicants are to be enrolled, issue food or food instruments. All of these actions shall be accomplished within the timeframes set forth below.

(ii) The processing timeframes shall begin when the individual visits the local agency during clinic office hours to make an oral or written request for Program benefits. To ensure that accurate records are kept of the date of such requests, the local agency shall,

at the time of each request, record the applicant's name, address and the date. The remainder of the information necessary to determine eligibility shall be obtained by the time of certification. Medical data taken prior to certification may be used as provided in paragraph (g)(4) of this section.

(iii) The local agency shall act on applications within the following timeframes:

(A) Special nutritional risk applicants shall be notified of their eligibility or ineligibility within 10 days of the date of the first request for Program benefits; except that State agencies may provide an extension of the notification period to a maximum of 15 days for those local agencies which make written request, including a justification of the need for an extension. The State agency shall establish criteria for identifying categories of persons at special nutritional risk who require expedited services. At a minimum, however, these categories shall include pregnant women eligible as Priority I participants, and migrant farmworkers and their family members who soon plan to leave the jurisdiction of the local agency.

(B) All other applicants shall be notified of their eligibility or ineligibility within 20 days of the date of the first request for Program benefits.

(iv) Each local agency using a retail purchase system shall issue a food instrument(s) to the participant at the same time as notification of certification. Such food instrument(s) shall provide benefits for the current month or the remaining portion thereof and shall be redeemable immediately upon receipt by the participant. Local agencies may mail the initial food instrument(s) with the notification of certification to those participants who meet the criteria for the receipt of food instruments through the mail, as provided in § 246.12(r)(4).

(v) Each local agency with a direct distribution or home delivery system shall issue the supplemental foods to the participant within 10 days of issuing the notification of certification.

(g) *Certification periods.* (1) Program benefits shall be based upon certifications established in accordance with the following timeframes:

(i) Pregnant women shall be certified for the duration of their pregnancy and for up to six weeks postpartum.

(ii) Postpartum women shall be certified for up to six months postpartum.

(iii) Breastfeeding women shall be certified at intervals of approximately six months and ending with the breastfed infant's first birthday.

(iv) Infants shall be certified at intervals of approximately six months, except that the State agency may permit local agencies under its jurisdiction to certify infants under six months of age for a period extending up to the first birthday provided the quality and accessibility of health care services are not diminished.

(v) Children shall be certified at intervals of approximately six months and ending with the end of the month in which a child reaches the fifth birthday.

(2) The State agency may authorize local agencies under its jurisdiction to establish shorter certification periods than outlined in paragraph (g)(1) of this section on a case-by-case basis. If the State agency exercises this option, it shall issue guidance for use by local agencies in establishing the shorter periods.

(3) In cases where there is difficulty in appointment scheduling for persons referenced in paragraphs (g)(1) (iii), (iv) and (v) of this section, the certification period may be shortened or extended by a period not to exceed 30 days.

(h) *Actions affecting participation in mid-certification.* (1) The State agency shall ensure that local agencies disqualify an individual during a certification period if, on the basis of a reassessment of Program eligibility status, the individual is determined ineligible; provided, however, that an individual determined adjunctively income eligible under paragraph (d)(2)(vi)(A) (*1*) or (*2*) of this section or income eligible under paragraph (d)(2)(vi)(B) of this section is not disqualified solely on the basis of a determination they no longer participate in TANF, Medicaid, Food Stamps, or another qualified State-administered program or are no longer a member of a family which contains an TANF recipient or a pregnant woman

or an infant receiving Medicaid. The State agency shall ensure that local agencies disqualify such an individual during a certification period, if on the basis of a reassessment of Program eligibility, the individual is no longer deemed income eligible under paragraph (d)(2)(vi) (A) or (B) of this section and does not meet the income eligibility requirements of paragraph (d)(1) of this section. The State agency may authorize local agencies to disqualify an individual during the certification period for the following reasons:

(i) Participant abuse, including, but not limited to the infractions listed in the definition of *Participant violation* in § 246.2; or

(ii) Failure to obtain food instruments or supplemental foods for a number of consecutive months, as specified by the State agency, evidenced by indicators such as failure to pick up supplemental foods or food instruments, nonreceipt of food instruments as evidenced by return of mailed instruments, or failure to have an electronic benefit transfer card revalidated to authorize the purchase of supplemental foods.

(2) If a State agency experiences funding shortages, it may be necessary to discontinue Program benefits to a number of certified participants. Such action may be taken only after the State agency has explored alternative actions. If taken, the action should affect the least possible number of participants and should affect participants whose nutritional and health status would be least impaired by withdrawal of Program benefits. The State may discontinue benefits by—

(i) Disqualifying a group of participants; and/or

(ii) Withholding benefits of a group with the expectation of providing benefits again when funds are available.

(3) When a State agency elects to discontinue benefits to a number of certified participants due to insufficient funds for a period of time, it shall not enroll new participants during that period.

(i) *Certification forms.* All certification data for each person certified shall be recorded on a form (or forms) which are provided by the State agency. The information on the forms shall include—

(1) Name and address;

(2) Date of initial visit to apply for participation;

(3) An indication of whether the applicant was physically present at certification and, if not, the reason why an exception was granted or a copy of the document(s) in the file which explains the reason for the exception;

(4) A description of the document(s) used to determine residency and identity or a copy of the document(s) used or the applicant's written statement when no documentation exists;

(5) Information regarding income eligibility for the Program as specified in paragraph (d) of this section as follows:

(i) A description of the document(s) used to determine income eligibility or a copy of the document(s) in the file;

(ii) An indication that no documentation is available and the reason(s) why or a copy of the applicant's written statement explaining such circumstances; or

(iii) An indication that the applicant has no income.

(6) The date of certification and the date nutritional risk data were taken if different from the date of certification;

(7) Height or length, weight, and hematological test results;

(8) The specific nutritional risk conditions which established eligibility for the supplemental foods. Documentation should include health history when appropriate to the nutritional risk condition, with the applicant's or applicant's parent's or caretaker's consent;

(9) The signature and title of the competent professional authority making the nutritional risk determination, and, if different, the signature and title of the administrative person responsible for determining income eligibility under the Program; and

(10) The following statement with a space for the signature of the applicant, parent, or caretake to sign after reading or being read the following statement:

I have been advised of my rights and obligations under the Program. I certify that the information I have provided for my eligibility determination is correct, to the best of my knowledge. This certification form is

being submitted in connection with the receipt of Federal assistance. Program officials may verify information on this form. I understand that intentionally making a false or misleading statement or intentionally misrepresenting, concealing, or withholding facts may result in paying the State agency, in cash, the value of the food benefits improperly issued to me and may subject me to civil or criminal prosecution under State and Federal law.

(11) In States exercising the authority to disclose information pursuant to § 246.26(d)(2), a statement, to be added to the statement required under paragraph (i)(8) of this section, acknowledging that the chief State health officer (or in the case of Indian State agencies, the governing authority) may authorize disclosure of information provided by the applicant or participant to representatives of public organizations, designated by such chief State officer or governing authority, which administer health or welfare programs that serve persons categorically eligible for the WIC Program. This statement shall also indicate that such information can be used by the recipient organizations only to determine the eligibility of WIC applicants and participants for programs administered by such organizations, and to conduct outreach for such programs.

(j) *Notification of participant rights and responsibilities.* In order to inform applicants and participants or their parents or caretakers of Program rights and responsibilities, the following information shall be provided. Where a significant number or proportion of the population eligible to be served needs the information in a language other than English, reasonable steps shall be taken to provide the information in appropriate languages to such persons, considering the scope of the Program and the size and concentration of such population.

(1) During the certification procedure, every Program applicant, parent or caretaker shall be informed of the illegality of dual participation.

(2) At the time of certification, each Program participant, parent or caretaker shall read, or have read to him or her, the statement provided in paragraph (i)(8) of this section and the following sentences:

(i) ''Standards for eligibility and participation in the WIC Program are the same for everyone, regardless of race, color, national origin, age, handicap, or sex.''

(ii) ''You may appeal any decision made by the local agency regarding your eligibility for the Program.''

(iii) ''The local agency will make health services and nutrition education available to you, and you are encouraged to participate in these services.''

(3) If the State agency implements the policy of disqualifying a participant for not picking up supplemental foods or food instruments in accordance with paragraph (h)(1)(ii) of this section, it shall provide notice of this policy and of the importance of regularly picking up food instruments or supplemental foods to each participant, parent or caretaker at the time of each certification.

(4) At least during the initial certification visit, each participant, parent or caretaker shall receive an explanation of how the local food delivery system operates and shall be advised of the types of health services available, where they are located, how they may be obtained and why they may be useful.

(5) Persons found ineligible for the Program during a certification visit shall be advised in writing of the ineligibility, of the reasons for the ineligibility, and of the right to a fair hearing. The reasons for ineligibility shall be properly documented and shall be retained on file at the local agency.

(6) A person who is about to be suspended or disqualified from program participation at any time during the certification period shall be advised in writing not less than 15 days before the suspension or disqualification. Such notification shall include the reasons for this action, and the participant's right to a fair hearing. Further, such notification need not be provided to persons who will be disqualified for not picking up supplemental foods or food instruments in accordance with paragraph (h)(1)(ii) of this section.

(7) When a State or local agency pursues collection of a claim pursuant to § 246.23(c) against an individual who has been improperly issued benefits, the person shall be advised in writing of

the reason(s) for the claim, the value of the improperly issued benefits which must be repaid, and of the right to a fair hearing.

(8) Each participant, parent or caretaker shall be notified not less than 15 days before the expiration of each certification period that certification for the Program is about to expire.

(9) If a State agency must suspend or terminate benefits to any participant during the participant's certification period due to a shortage of funds for the Program, it shall issue a notice to such participant in advance, as stipulated in paragraph (j)(6) of this section.

(k) *Transfer of certification.* (1) Each State agency shall ensure issuance of a Verification of Certification card to every participant who is a member of a family in which there is a migrant farmworker or any other participant who is likely to be relocating during the certification period. Certifying local agencies shall ensure that Verification of Certification cards are fully completed.

(2) The State agency shall require the receiving local agency to accept Verification of Certification cards from participants, including participants who are migrant farmworkers or members of their families, who have been participating in the Program in another local agency within or outside of the jurisdiction of the State agency. A person with a valid Verification of Certification card shall not be denied participation in the receiving State because the person does not meet that State's particular eligibility criteria.

(3) The Verification of Certification card is valid until the certification period expires, and shall be accepted as proof of eligibility for Program benefits. If the receiving local agency has waiting lists for participation, the transferring participant shall be placed on the list ahead of all waiting applicants.

(4) The Verification of Certification card shall include the name of the participant, the date the certification was performed, the date income eligibility was last determined, the nutritional risk condition of the participant, the date the certification period expires, the signature and printed or typed name of the certifying local agency official, the name and address of the certifying local agency and an identification number or some other means of accountability. The Verification of Certification card shall be uniform throughout the jurisdiction of the State agency.

(l) *Dual participation.* (1) The State agency is responsible for the following:

(i) In conjunction with WIC local agencies, the prevention and identification of dual participation within each local agency and between local agencies under the State agency's jurisdiction, including actions to identify suspected instances of dual participation at least semiannually. The State or local agency must take follow-up action within 120 days of detecting instances of suspected dual participation;

(ii) In areas where a local agency serves the same population as an Indian State agency or a CSFP agency, and in areas where geographical or other factors make it likely that participants travel regularly between contiguous local service areas located across State agency borders, entering into an agreement with the other agency for the detection and prevention of dual participation. The agreement must be made in writing and included in the State Plan;

(iii) Immediate termination from participation in one of the programs or clinics for participants found in violation due to dual participation; and

(iv) In cases of dual participation resulting from intentional misrepresentation, the collection of improperly issued benefits in accordance with § 246.23(c)(1) and disqualification from both programs in accordance with § 246.12(u)(2).

(2) At certification, the State or local agency must require each applicant to present proof of residency (*i.e.*, location or address where the applicant routinely lives or spends the night) and proof of identity. The State or local agency must also check the identity of participants, or in the case of infants or children, the identity of the parent or guardian, or proxies when issuing food or food instruments. The State agency may authorize the certification of applicants when no proof of residency or identity exists (such as when an applicant or an applicant's parent is

a victim of theft, loss, or disaster, a homeless individual, or a migrant farmworker). In these cases, the State or local agency must require the applicant to confirm in writing his/her residency or identity. Further, an individual residing in a remote Indian or Native village or an individual served by an Indian tribal organization and residing on a reservation or pueblo may establish proof of residency by providing the State agency their mailing address and the name of the remote Indian or Native village.

(m) *Certification without charge.* The certification procedure shall be performed at no cost to the applicant.

(n) *Certification of persons in homeless facilities and institutions.* (1) Pregnant, breastfeeding, and postpartum women, infants or children who meet the requirements of paragraph (c) of this section, and who reside in a homeless facility, shall be considered eligible for the Program and shall be treated equally with all other eligible applicants at the local agency where they apply for WIC benefits, Provided that: the State or local agency has taken reasonable steps to:

(i) Establish, to the extent practicable, that the homeless facility meets the following conditions with respect to resident WIC participants:

(A) The homeless facility does not accrue financial or in-kind benefit from a person's participation in the Program, e.g., by reducing its expenditures for food service because its residents are receiving WIC foods;

(B) Foods provided by the WIC Program are not subsumed into a communal food service, but are available exclusively to the WIC participant for whom they were issued;

(C) The homeless facility places no constraints on the ability of the participant to partake of the supplemental foods and nutrition education available under the Program;

(ii) Contact the homeless facility periodically to ensure continued compliance with these conditions; and

(iii) Request the homeless facility to notify the State or local agency if it ceases to meet any of these conditions.

(2) The State agency may authorize or require local agencies to make the Program available to applicants who meet the requirements of paragraph (c) of this section, but who reside in institutions which meet the conditions of paragraphs (n)(1)(i)(A)–(C) of this section with respect to resident WIC participants.

(3) The State or local agency shall attempt to establish to the best of its ability,whether a homeless facility or institution complies with the conditions of paragraphs (n)(1)(i) (A)–(C) of this section with respect to WIC participants. If caseload slots are available, full certification periods shall be provided to the following:

(i) Participants who are residents of a homeless facility or institution which has been found to be in compliance with the conditions of paragraph (n)(1)(i)(A)–(C) of this section;

(ii) Participants who are residents of a homeless facility or institution whose compliance with the conditions of paragraphs (n)(1)(i)(A)–(C) of this section has not yet been established; and

(iii) Participants for whom no other shelter alternative is available in the local agency's service delivery area.

(4) If a homeless facility or institution has been determined to be noncompliant during the course of a participant's initial certification period, participants applying for continued benefits may be certified again, but the State agency shall discontinue issuance of WIC foods, except infant formula, to the participant in such accommodation until the accommodation's compliance is achieved or alternative shelter arrangements are made. If certified, such participants shall continue to be eligible to receive all other WIC benefits, such as nutrition education and health care referral services.

(5) The State agency shall continue to the end of their certification periods the participation of residents of a homeless facility or institution which ceases to comply with the conditions of paragraphs (n)(1)(i)(A)–(C) of this section.

(6) As soon as the State or local agency determines that a homeless facility/institution does not meet the conditions of paragraphs (n)(1)(i) (A)–(C) of this section, it shall refer all participants using such accommodation to

any other accommodations in the area which meet these conditions.

(o) *Drug and other harmful substance abuse screening*. When a State agency determines that screening is necessary to fulfill the referral requirements in this part, the State agency must require screening for the use of drugs and other harmful substances. When such screening is required, it shall:

(1) Be limited to the extent the State agency deems necessary to fulfill the referral requirement of § 246.4(a)(8) of this part and the drug and other harmful substance abuse information requirement of § 246.11(a)(3) of this part; and

(2) Be integrated into certification process as part of the medical or nutritional assessment.

(p) *Are applicants required to be physically present at certification?* (1) *In general*. The State or local agency must require all applicants to be physically present at each WIC certification.

(2) *Exceptions*.—(i) *Disabilities*. The State or local agency must grant an exception to applicants who are qualified individuals with disabilities and are unable to be physically present at the WIC clinic because of their disabilities or applicants whose parents or caretakers are individuals with disabilities that meet this standard. Examples of such situations include:

(A) A medical condition that necessitates the use of medical equipment that is not easily transportable;

(B) A medical condition that requires confinement to bed rest; and

(C) A serious illness that may be exacerbated by coming in to the WIC clinic.

(ii) *Receiving ongoing health care*. The State agency may exempt from the physical presence requirement, if being physically present would pose an unreasonable barrier, an infant or child who was present at his/her initial WIC certification *and* has documented ongoing health care from a health care provider other than the WIC local agency.

(iii) *Working parents or caretakers*. The State agency may exempt from the physical presence requirement an infant or child who was present at his/her initial WIC certification *and* was present at a WIC certification or recertification determination within the 1-year period ending on the date of the most recent certification or recertification determination *and* is under the care of one or more working parents or one or more primary working caretakers whose working status presents a barrier to bringing the infant or child in to the WIC clinic.

(q) *Certification of qualified aliens*. In those cases where a person sponsors a qualified alien, (as the term is defined in the Immigration and Nationality Laws (8 U.S.C.1101 *et seq.*)), *i.e.*, signs an affidavit of support, the sponsor's income, including the income of the sponsor's spouse, shall not be counted in determining the income eligibility of the qualified alien except when the alien is a member of the sponsor's family or economic unit. Sponsors of qualified aliens are not required to reimburse the State or local agency or the Federal government for WIC Program benefits provided to sponsored aliens. Further, qualified aliens are eligible for the WIC Program without regard to the length of time in the qualifying status.

[50 FR 6121, Feb. 13, 1985, as amended at 52 FR 21236, June 4, 1987; 53 FR 35301, Sep. 13, 1988; 54 FR 51295, Dec. 14, 1989; 55 FR 3387, Feb. 1, 1990; 57 FR 34506, Aug. 5, 1992; 58 FR 11506, Feb. 26, 1993; 59 FR 11500, Mar. 11, 1994; 60 FR 19490, Apr. 19, 1995; 63 FR 63974, Nov. 18, 1998; 64 FR 70177, Dec. 16, 1999; 65 FR 3378, Jan. 21, 2000; 65 FR 53527, Sept. 5, 2000; 65 FR 77249, Dec. 11, 2000; 65 FR 83278, Dec. 29, 2000]

§ 246.8 Nondiscrimination.

(a) *Civil rights requirements*. The State agency shall comply with the requirements of title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, Department of Agriculture regulations on nondiscrimination (7 CFR parts 15, 15a and 15b), and FNS instructions to ensure that no person shall, on the grounds of race, color, national origin, age, sex or handicap, be excluded from participation in, be denied benefits of, or be otherwise subjected to discrimination under the Program. Compliance with title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and regulations and

instructions issued thereunder shall include, but not be limited to:

(1) Notification to the public of the nondiscrimination policy and complaint rights of participants and potentially eligible persons;

(2) Review and monitoring activity to ensure Program compliance with the nondiscrimination laws and regulations;

(3) Collection and reporting of racial and ethnic participation data as required by title VI of the Civil Rights Act of 1964, which prohibits discrimination in federally assisted programs on the basis of race, color, or national origin; and

(4) Establishment of grievance procedures for handling complaints based on sex and handicap.

(b) *Complaints.* Persons seeking to file discrimination complaints may file them either with the Secretary of Agriculture, or the Director, Office of Equal Opportunity, USDA, Washington, DC 20250 or with the Office established by the State agency to handle discrimination grievances or complaints. All complaints received by State or local agencies which allege discrimination based on race, color, national origin, or age shall be referred to the Secretary of Agriculture or Director, Office of Equal Opportunity. A State or local agency may process complaints which allege discrimination based on sex or handicap if grievance procedures are in place.

(c) *Non-English materials.* Where a significant number or proportion of the population eligible to be served needs service or information in a language other than English in order effectively to be informed of or to participate in the Program, the State agency shall take reasonable steps considering the size and concentration of such population, to provide information in appropriate languages to such persons. This requirement applies with regard to required Program information except certification forms which are used only by local agency staff. The State agency shall also ensure that all rights and responsibilities listed on the certification form are read to these applicants in the appropriate language.

§ 246.9 Fair hearing procedures for participants.

(a) *Availability of hearings.* The State agency shall provide a hearing procedure through which any individual may appeal a State or local agency action which results in a claim against the individual for repayment of the cash value of improperly issued benefits or results in the individual's denial of participation or disqualification from the Program.

(b) *Hearing system.* The State agency shall provide for either a hearing at the State level or a hearing at the local level which permits the individual to appeal a local agency decision to the State agency. The State agency may adopt local level hearings in some areas, such as those with large caseloads, and maintain only State level hearings in other areas.

(c) *Notification of appeal rights.* At the time of a claim against an individual for improperly issued benefits or at the time of participation denial or of disqualification from the Program, the State or local agency shall inform each individual in writing of the right to a fair hearing, of the method by which a hearing may be requested, and that any positions or arguments on behalf of the individual may be presented personally or by a representative such as a relative, friend, legal counsel or other spokesperson. Such notification is not required at the expiration of a certification period.

(d) *Request for hearing.* A request for a hearing is defined as any clear expression by the individual, the individual's parent, caretaker, or other representative, that he or she desires an opportunity to present his or her case to a higher authority. The State or local agency shall not limit or interfere with the individual's freedom to request a hearing.

(e) *Time limit for request.* The State or local agency shall provide individuals a reasonable period of time to request fair hearings; provided that, such time limit is not less than 60 days from the date the agency mails or gives the applicant or participant the notice of adverse action.

(f) *Denial or dismissal of request.* The State and local agencies shall not deny

or dismiss a request for a hearing unless—

(1) The request is not received within the time limit set by the State agency in accordance with paragraph (e) of this section;

(2) The request is withdrawn in writing by the appellant or a representative of the appellant;

(3) The appellant or representative fails, without good cause, to appear at the scheduled hearing; or

(4) The appellant has been denied participation by a previous hearing and cannot provide evidence that circumstances relevant to Program eligibility have changed in such a way as to justify a hearing.

(g) *Continuation of benefits.* Except for participants whose certification period has expired, participants who appeal the termination of benefits within the 15 days advance adverse notice period provided by § 246.7(j)(6) shall continue to receive Program benefits until the hearing official reaches a decision or the certification period expires, whichever occurs first. Applicants who are denied benefits at initial certification or because of the expiration of their certification may appeal the denial, but shall not receive benefits while awaiting the hearing.

(h) *Rules of procedure.* State and local agencies shall process each request for a hearing under uniform rules of procedure and shall makes these rules of procedure available for public inspection and copying. At a minimum, such rules shall include: The time limits for requesting and conducting a hearing; all advance notice requirements; the rules of conduct at the hearing; and the rights and responsibilities of the appellant. The procedures shall not be unduly complex or legalistic.

(i) *Hearing official.* Hearings shall be conducted by an impartial official who does not have any personal stake or involvement in the decision and who was not directly involved in the initial determination of the action being contested. The hearing official shall—

(1) Administer oaths or affirmations if required by the State;

(2) Ensure that all relevant issues are considered;

(3) Request, receive and make part of the hearing record all evidence determined necessary to decide the issues being raised;

(4) Regulate the conduct and course of the hearing consistent with due process to ensure an orderly hearing;

(5) Order, where relevant and necessary, an independent medical assessment or professional evaluation from a source mutually satisfactory to the appellant and the State agency; and

(6) Render a hearing decision which will resolve the dispute.

(j) *Conduct of the hearing.* The State or lcoal agency shall ensure that the hearing is accessible to the appellant and is held within three weeks from the date the State or local agency received the request for a hearing. The State or local agency shall provide the appellant with a minimum of 10 days advance written notice of the time and place of the hearing and shall enclose an explanation of the hearing procedure with the notice. The State or local agency shall also provide the appellant or representative an opportunity to—

(1) Examine, prior to and during the hearing, the documents and records presented to support the decision under appeal;

(2) Be assisted or represented by an attorney or other persons;

(3) Bring witnesses;

(4) Advance arguments without undue interference;

(5) Question or refute any testimony or evidence, including an opportunity to confront and cross-examine adverse witnesses; and

(6) Submit evidence to establish all pertinent facts and circumstances in the case.

(k) *Fair hearing decisions.* (1) Decisions of the hearing official shall be based upon the application of appropriate Federal law, regulations and policy as related to the facts of the case as established in the hearing record. The verbatim transcript or recording of testimony and exhibits, or an official report containing the substance of what transpired at the hearing, together with all papers and requests filed in the proceeding, constitute the exclusive record for a final decision by hearing official. The State or local agency shall retain the hearing record in accordance with § 246.25 and make these records

available, for copying and inspection, to the appellant or representative at any reasonable time.

(2) The decision by the hearing official shall summarize the facts of the case, specify the reasons for the decision, and identify the supporting evidence and the pertinent regulations or policy. The decision shall become a part of the record.

(3) Within 45 days of the receipt of the request for the hearing, the State or local agency shall notify the appellant or representative in writing of the decision and the reasons for the decision in accordance with paragraph (k)(2) of this section. If the decision is in favor of the appellant and benefits were denied or discontinued, benefits shall begin immediately. If the decision concerns disqualification and is in favor of the agency, as soon as administratively feasible, the local agency shall terminate any continued benefits, as decided by the hearing official. If the decision regarding repayment of benefits by the appellant is in favor of the agency, the State or local agency shall resume its efforts to collect the claim, even during pendency of an appeal of a local-level fair hearing decision to the State agency. The appellant may appeal a local hearing decision to the State agency, provided that the request for appeal is made within 15 days of the mailing date of the hearing decision notice. If the decision being appealed concerns disqualification from the Program, the appellant shall not continue to receive benefits while an appeal to the State agency of a decision rendered on appeal at the local level is pending. The decision of a hearing official at the local level is binding on the local agency and the State agency unless it is appealed to the State level and overturned by the State hearing official.

(4) The State and local agency shall make all hearing records and decisions available for public inspection and copying; however, the names and addresses of participants and other members of the public shall be kept confidential.

(l) *Judicial review*. If a State level decision upholds the agency action and the appellant expresses an interest in pursuing a higher review of the decision, the State agency shall explain any further State level review of the decision and any State level rehearing process. If these are either unavailable or have been exhausted, the State agency shall explain the right to pursue judicial review of the decision.

[50 FR 6121, Feb. 13, 1985, as amended at 52 FR 21236, June 4, 1987; 59 FR 11503, Mar. 11, 1994]

Subpart D—Participant Benefits

§ 246.10 Supplemental foods.

(a) *General*. This section prescribes the requirements for providing supplemental foods to participants.

(b) *State agency responsibilities*. State agencies shall—

(1) Identify foods which are acceptable for use under the Program in accordance with the requirements of this section and provide to local agencies a list of acceptable foods and their maximum monthly quantities as specified in paragraph (c) of this section; and

(2) Ensure that local agencies—

(i) Make available at least one food from each group in each food package listed in paragraph (c) of this section. However, this does not mean that the local agency must provide each participant with a food from each food group;

(ii) Make available to participants the supplemental foods, as authorized in paragraph (c) of this section; and

(iii) Designate a competent professional authority to prescribe types of supplemental foods in quantities appropriate for each participant, taking into consideration the participant's age and dietary needs. The amounts of supplemental foods shall not exceed the maximum quantities specified in this section.

(c) *Food packages*. There are seven food packages available under the Program which may be provided to participants. The authorized supplemental foods shall be prescribed from food packages according to the category and nutritional need of the participant. The food packages are as follows:

NOTE: The metric units given are mathematical conversions. If packaging practices change, the authorized food quantities will be revised accordingly.

(1) *Food Package I—Infants 0 Through 3 Months.* (i) *Iron-fortified infant formula—requirements and routine issuance.* Except as specified in paragraphs (c)(1)(iii) through (c)(1)(v) of this section, local agencies must issue a contract brand infant formula that meets the requirements of paragraph (c)(1)(i) of this section. The supplemental food for this food package is an iron-fortified infant formula that is not an exempt infant formula. The iron-fortified infant formula must be nutritionally complete, not requiring the addition of any ingredients other than water prior to being served in a liquid state. It also must contain at least 10 milligrams of iron per liter at standard dilution and supply 67 kilocalories per 100 milliliters (i.e., approximately 20 kilocalories per fluid ounce of infant formula) at standard dilution. Medical documentation is not required for any contract brand infant formula authorized for issuance by the State agency, including the soy-based contract brand of infant formula. However, the State agency may require medical documentation for any contract brand infant formula even though it meets these requirements and may decide that some contract brand infant formulas may not be issued under any circumstances.

(ii) *Physical forms.* Local agencies must issue all WIC formulas (WIC formula means all infant formulas, including exempt infant formulas, and WIC-eligible medical foods) in concentrated liquid or powdered physical forms. Ready-to-feed WIC formulas may be authorized when the competent professional authority determines and documents that the participant's household has an unsanitary or restricted water supply or poor refrigeration, the participant or person caring for the participant may have difficulty in correctly diluting concentrated forms or reconstituting powdered forms, or the WIC formula is only available in ready-to-feed form.

(iii) *WIC formulas requiring medical documentation.* Local agencies may issue the following WIC formulas, but only with medical documentation:

(A) Any contract brand infant formula that does not meet the requirements of paragraph (c)(1)(i) of this section (e.g., low-iron, low-calorie, or high-calorie infant formulas);

(B) Any non-contract brand infant formula (even if it meets the requirements for an iron-fortified infant formula in paragraph (c)(1)(i) of this section);

(C) Any exempt infant formula; and

(D) Any WIC-eligible medical food.

(iv) *Religious eating patterns exception.* Local agencies may issue a non-contract brand infant formula that meets the requirements of paragraph (c)(1)(i) of this section without medical documentation in order to meet religious eating patterns. However, if the non-contract brand infant formula does not meet the requirements of paragraph (c)(1)(i) of this section, medical documentation must be provided. Documentation of the basis of the substitution must be kept on file at the local clinic.

(v) *Medical documentation.* (A) *Determination.* For purposes of this food package, medical documentation means a determination by a licensed health care professional authorized to write medical prescriptions under State law. A licensed health care professional must make a medical determination that an infant has a medical condition that dictates the use of the following: a contract brand infant formula that does not meet the requirements of paragraph (c)(1)(i) of this section; a non-contract brand infant formula; an exempt infant formula; or a WIC-eligible medical food. These conditions include, but are not limited to: those that contraindicate the use of iron-fortified infant formula, metabolic disorders, inborn errors of amino acid metabolism, gastrointestinal disorders, malabsorption syndromes, and food allergies. Low-calorie WIC formulas may not be issued solely for the purpose of managing body weight.

(B) *Technical requirements.* Medical documentation must include the brand name of the WIC formula prescribed; medical diagnosis warranting the issuance of WIC formula; length of time the prescribed WIC formula is medically required by the participant; and signature or name (if the initial medical documentation was received by telephone) of the requesting health

care professional. Medical documentation may be provided as an original written document, electronically, or by facsimile. Medical documentation also may be provided by telephone to a competent professional authority who must promptly document the information which must be kept on file at the local clinic. However, this method may only be used until written confirmation is received and only when absolutely necessary on an individual participant basis to prevent undue hardship to a participant or to prevent a delay in the provision of infant formula that would place the participant at increased nutritional risk. The local clinic must obtain written confirmation of the medical documentation within a reasonable amount of time (i.e., one or two weeks' time) after accepting the initial medical documentation by telephone. The written documentation must be kept on file with the initial telephone documentation.

(vi) *Quantities and types of supplemental foods*. The quantities and types of supplemental foods prescribed shall be appropriate for the participant taking into consideration the participant's age and dietary needs. The maximum quantity of supplemental foods authorized per month is as follows:

Food	Quantity
Formula:	
Concentrated liquid formula.	403 fluid oz. (11.9 L).
or	
Powdered formula ..	May be substituted at the rate of 8 lbs. (3.6 kg) per 403 fluid oz. (11.9 L) of concentrated liquid formula.
or	
Ready-to-feed formula.	May be substituted at the rate of 26 fluid oz. (.8 L) per 13 fluid oz. (.4 L) of concentrated liquid formula.

(2) *Food Package II—Infants 4 through 12 Months*. (i) Infant formula as specified in paragraphs (c)(1)(i) through (c)(1)(v) of this section.

(ii) Infant cereal which contains a minimum of 45 milligrams of iron per 100 grams of dry cereal.

(iii) Single strength fruit juice which contains a minimum of 30 milligrams of vitamin C per 100 milliliters; or frozen concentrated fruit juice which contains a minimum of 30 milligrams of vitamin C per 100 milliliters of reconstituted juice; or infant juice which contains a minimum of 30 milligrams of vitamin C per 100 milliliters. Issuance prior to the time when the infant can drink from a cup is discouraged. The competent professional authority shall instruct the participant's parent or guardian to feed the juice to the participant from a cup to prevent ''bottle caries.''

(iv) The quantities and types of supplemental foods prescribed shall be appropriate for the participant taking into consideration the participant's age and dietary needs. The maximum quantity of supplemental foods authorized per month is as follows:

Food	Quantity
Formula:	
Concentrated liquid formula.	403 fluid oz. (11.9 L).
or	
Powdered formula ..	May be substituted at the rate of 8 lb. (3.6 kg) per 403 fluid oz. (11.9 L) of concentrated liquid formula.
or	
Ready-to-feed formula.	May be substituted at the rate of 26 fluid oz. (.8 L) per 13 fluid oz. (.4 L) of concentrated liquid formula.
Infant cereal	24 oz. dry (.7 kg).
Juice: [1]	
Single strength adult juice.	92 fluid oz. (2.7 L).
or	
Frozen concentrated juice.	96 fluid oz. reconstituted (2.8 L).
or	
Infant juice	May be substituted at the rate of 63 fluid oz. (1.9 L) of infant juice per 92 fluid oz. (2.7 L) of single strength adult juice.

[1] Combinations of single strength or frozen concentrated juice may be issued as long as the total volume of juice does not exceed the amount specified for single strength juice.

(3) *Food Package III—Children/Women with Special Dietary Needs*. Local agencies may issue this food package to women and children only with medical documentation. The supplemental foods in Food Package III are set forth in paragraphs (c)(3)(i) through (c)(3)(iv) of this section. For purposes of this food package, medical documentation means a determination by a licensed health care professional authorized to write medical prescriptions under State law that the child or woman has a medical condition that dictates the use of a WIC formula (WIC formula means all infant formulas, including exempt infant formulas, and WIC-eligible medical foods) because the use of

conventional foods is precluded or restricted. These medical conditions include, but are not limited to, metabolic disorders, inborn errors of amino acid metabolism, gastrointestinal disorders, malabsorption syndromes and food allergies. This food package may not be issued solely for the purpose of enhancing nutrient intake or managing body weight. Medical documentation for WIC formulas must meet the technical requirements described in paragraph (c)(1)(v)(B) of this section.

(i) WIC formulas (i.e., an infant formula, exempt infant formula, or WIC-eligible medical food).

(ii) Cereal (hot or cold) which contains a minimum of 28 milligrams of iron per 100 grams of dry cereal and not more than 21.2 grams of sucrose and other sugars per 100 grams of dry cereal (6 grams per ounce).

(iii) Single strength fruit juice or vegetable juice, or both, which contains a minimum of 30 milligrams of vitamin C per 100 milliliters; or frozen concentrated fruit or vegetable juice, or both, which contains a minimum of 30 milligrams of vitiamin C per 100 milliliters of reconstituted juice.

(iv) The quantities and types of supplemental foods prescribed shall be appropriate for the participant taking into consideration the participant's age and special dietary needs. The maximum quantity of supplemental foods authorized per month is as follows:

Food	Quantity
Formula:	
Concentrated liquid formula.	403 fluid oz. (11.9 L).
Addition [1]	52 fluid oz. (1.5 L).
or	
Powdered formula ..	May be substituted at a rate of 8 lb. (3.6 kg) per 403 fluid oz. (11.9 L) of concentrated liquid formula.
Addition [1]	1 lb. (.4 kg).
or	
Ready-to-feed formula.	May be substituted at the rate of 26 fluid oz. (.8 L) per 13 fluid oz. (.4 L) of concentrated liquid formula.
Addition [1]	104 fluid oz. (3.1 L).
Cereal (hot or cold)	36 oz. dry (1 kg).
Juice: [2]	
Single strength juice	138 fluid oz. (4.1 L).
or	
Frozen concentrated juice.	144 fluid oz. reconstituted (4.3 L).

[1] Additional formula may be issued on an individual basis provided the need is demonstrated and documented in the individual's certification file by the competent professional authority.

[2] Combinations of single strength and frozen concentrated juice may be issued as long as the total volume does not exceed the amount specified for single strength juice.

(4) *Food Package IV—Children 1 to 5 Years.* (i) Pasteurized fluid whole milk which is flavored or unflavored and which contains 400 International Units of vitamin D per quart (.9 liter); or pasteurized fluid skim or lowfat milk which is flavored or unflavored and which contains 400 International Units of vitamin D and 2000 International Units of vitamin A per fluid quart (.9 liter); or pasteurized cultured buttermilk which contains 400 International units of vitamin D and 2000 International Units of vitamin A per fluid quart (.9 liter); or evaporated whole milk which contains 400 International Units of vitamin D per reconstituted quart (.9 liter); or evaporated skimmed milk which contains 400 International Units of vitamin D and 2000 International Units of vitamin A per reconstituted quart (.9 liter); or dry whole milk which contains 400 International Units of vitamin D per reconstituted quart (.9 liter); or nonfat or lowfat dry milk which contains 400 International Units of vitamin D and 2000 International Units of vitamin A per reconstituted quart (.9 liter); or domestic cheese (pasteurized process American, Monterey Jack, Colby, natural Cheddar, Swiss, Brick, Muenster, Provolone, Mozzarella Part-Skim or Whole).

(ii) Adult cereal (hot or cold) which contains a minimum of 28 milligrams of iron per 100 grams of dry cereal and not more than 21.2 grams of sucrose and other sugars per 100 grams of dry cereal (6 grams per ounce).

(iii) Single strength fruit juice or vegetable juice, or both, which contains a minimum of 30 milligrams of vitamin C per 100 milliliters; or frozen concentrated fruit or vegetable juice, or both, which contains a minimum of 30 milligrams of vitamin C per 100 milliliters of reconstituted juice.

(iv) Eggs or dried egg mix.

(v) Peanut butter or mature dry beans or peas, including but not limited to, lentils, black, navy, kidney, garbanzo, soy, pinto, and mung beans, crowder, cow, split and black-eyed peas.

(vi) The quantities and types of supplemental foods prescribed shall be appropriate for the participant taking

into consideration the participant's age and dietary needs. The maximum quantity of supplemental foods authorized per month is as follows:

Food	Quantity
Milk:	
Fluid whole milk	24 qt. (22.7 L).
or	
Fluid skim or low fat milk.	May be substituted for fluid whole milk on a quart-for-quart (.9 L) basis.
or	
Cultured buttermilk	May be substituted for fluid whole milk on a quart-for-quart (.9 L) basis.
or	
Evaporated whole milk.	May be substituted for fluid whole milk at the rate of 13 fluid oz. (.4 L) per qt. (.9 L) of fluid whole milk.
or	
Evaporated skimmed milk.	May be substituted for fluid whole milk at the rate of 13 fluid oz. (.4 L) per qt. (.9 L) of fluid whole milk.
or	
Dry whole milk	May be substituted for fluid whole milk at the rate of 1 lb. (.4 kg) per 3 qt. (2.8 L) of fluid whole milk.
or	
Nonfat or lowfat dry milk.	May be substituted for fluid whole milk at the rate of 1 lb. (.4 kg) per 5 qt. (4.7 L) of fluid whole milk.
or	
Cheese	May be substituted for fluid whole milk at the rate of 1 lb. (.4 kg) per 3 qt. (2.8 L) of fluid whole milk. 4 lbs. (1.8 kg) is the maximum amount which may be substituted.[1]
Eggs:	
Eggs	2 doz. or 2½ doz.
or	
Dried egg mix	May be substituted at the rate of 1.5 lb. (.7 kg) egg mix per 2 doz. fresh eggs or 2 lb. (.9 kg) egg mix per 2½ doz. fresh eggs.
Cereals (hot or cold) ..	36 oz. dry (1 kg).
Juice:[2]	
Single strength juice	276 fluid oz. (8.2 L).
or	
Frozen concentrated juice.	288 fluid oz. reconstituted (8.5 L).
Legumes:	
Dry beans or peas	1 lb. (.4 kg).
or	
Peanut butter	18 oz. (.5 kg).

[1] Additional cheese may be issued on an individual basis in cases of lactose intolerance, provided the need is documented in the participant's file by the competent professional authority.

[2] Combinations of single strength and frozen concentrated juice may be issued as long as the total volume does not exceed the amount specified for single strength juice.

(5) *Food Package V—Pregnant and Breastfeeding Women (Basic).* (i) Pasteurized fluid whole milk which is flavored or unflavored and which contains 400 International Units of Vitamin D per quart (.9 liter) or pasteurized fluid skim or lowfat milk which is flavored or unflavored and which contains 400 International Units of vitamin D and 2000 International Units of vitamin A per fluid quart (.9 liter); or pasteurized cultured buttermilk which contains 400 International Units of vitamin D and 2000 International Units of vitamin A per fluid quart (.9 liter); or evaporated whole milk which contains 400 International Units of vitamin D per reconstituted quart (.9 liter); or evaporated skimmed milk which contains 400 International Units of vitamin D and 2000 International Units of vitamin A per reconstituted quart (.9 liter); or dry whole milk which contains 400 International Units of vitamin D per reconstituted quart (.9 liter); or nonfat or lowfat dry milk which contains 400 International Units of vitamin D and 2000 International Units of vitamin A per reconstituted quart (.9 liter); or domestic cheese (pasteurized process American, Monterey Jack, Colby, natural Cheddar, Swiss, Brick, Muenster, Provolone, Mozzarella Part-Skim or Whole).

(ii) Adult cereal (hot or cold) which contains a minimum of 28 milligrams of iron per 100 grams of dry cereal and not more than 21.2 grams of sucrose and other sugars per 100 grams of dry cereal (6 grams per ounce).

(iii) Single strength fruit juice or vegetable juice, or both, which contains a minimum of 30 milligrams of vitamin C per 100 milliliters; or frozen concentrated fruit or vegetable juice, or both, which contains a minimum of 30 milligrams of vitamin C per 100 milliliters of reconstituted juice.

(iv) Eggs or dried egg mix.

(v) Peanut butter or mature dry beans or peas, including but not limited to lentils, black, navy, kidney, garbanzo, soy, pinto and mung beans, crowder, cow, split and black-eyed peas.

(vi) The quantities and types of supplemental foods prescribed shall be appropriate for the participant taking into consideration the participant's age and dietary needs. The maximum quantity of supplemental foods authorized per month is as follows:

Food	Quantity
Milk:	
Fluid whole milk	28 qt. (26.5 L).

Food	Quantity
or	
Fluid skim or lowfat milk.	May be substituted for fluid whole milk on a quart-for-quart (.9 L) basis.
or	
Cultured buttermilk	May be substituted for fluid whole milk on a quart-for-quart (.9 L) basis.
or	
Evaporated whole milk.	May be substituted for fluid whole milk at the rate of 13 fluid oz. (.4 L) per qt. (.9 L) of fluid whole milk.
or	
Evaporated skimmed milk.	May be substituted for fluid whole milk at the rate of 13 fluid oz. (.4 L) per qt. (.9 L) of fluid whole milk.
or	
Dry whole milk	May be substituted for fluid whole milk at the rate of 1 lb. (.4 kg) per 3 qt. (2.8 L) of fluid whole milk.
or	
Nonfat or lowfat dry milk.	May be substituted for fluid whole milk at the rate of 1 lb. (.4 kg) per 5 qt. (4.7 L) of fluid whole milk.
or	
Cheese	May be substituted for fluid whole milk at the rate of 1 lb. (.4 kg) per 3 qt. (2.8 L) of fluid whole milk. 4 lbs. (1.8 kg) is the maximum amount which may be substituted.[1]
Eggs:	
Eggs	2 doz. or 2½ doz.
or	
Dried egg mix	May be substituted at the rate of 1.5 lb. (.7 kg) egg mix per 2 doz. fresh eggs, or 2 lb. (.9 kg) egg mix per 2½ doz. fresh eggs.
Cereals (hot or cold) ..	36 oz. dry (1 kg).
Juice:[2]	
Single strength juice	276 fluid oz. (8.2 L).
or	
Frozen, concentrated juice.	288 fluid oz. reconstituted (8.5 L).
Legumes:	
Dry beans or peas	1 lb. (.4 kg).
or	
Peanut butter	18 oz. (.5 kg).

[1] Additional cheese may be issued on an individual basis in cases of lactose intolerance, provided the need is documented in the participant's file by the competent professional authority.

[2] Combinations of single strength or frozen concentrated juice may be issued as long as the total volume does not exceed the amount specified for single strength juice.

(6) *Food Package VI—Nonbreastfeeding Postpartum Women.* (i) Pasteurized fluid whole milk which is flavored or unflavored and which contains 400 International Units of vitamin D per quart (.9 liter); or pasteurized fluid skim or lowfat milk which is flavored or unflavored and which contains 400 International Units of vitamin D and 2000 International Units of vitamin A per fluid quart (.9 liter); or pasteurized cultured buttermilk which contains 400 International Units of vitamin D and 2000 International Units of vitamin A per fluid quart (.9 liter); or evaporated whole milk which contains 400 International Units of vitamin D per reconstituted quart (.9 liter); or evaporated skimmed milk which contains 400 International Units of vitamin D and 2000 International Units of vitamin A per reconstituted quart (.9 liter); or dry whole milk which contains 400 International Units of vitamin D per reconstituted quart (.9 liter); or nonfat or lowfat dry milk which contains 400 International Units of Vitamin D and 2000 International Units of vitamin A per reconstituted quart (.9 liter); or domestic cheese (pasteurized process American, Monterey Jack, Colby, natural Cheddar, Swiss, Brick, Muenster, Provolone, Mozzarella Part-Skim or Whole).

(ii) Cereal (hot or cold) which contains a minimum of 28 milligrams of iron per 100 grams of dry cereal and not more than 21.1 grams of sucrose and other sugars per 100 grams of dry cereal (6 grams per 1 ounce).

(iii) Single strength fruit juice or vegetable juice, or both, which contains a minimum of 30 milligrams of vitamin C per 100 milliliters; or concentrated fruit or vegetable juice, or both, which contains a minimum of 30 milligrams of vitamin C per 100 milliliters of reconstituted juice.

(iv) Eggs or dried egg mix.

(v) The quantities and types of supplemental foods prescribed shall be appropriate for the participant taking into consideration the participant's age and dietary needs. The maximum quantity of supplemental foods authorized per month is as follows:

Food	Quantity
Milk:	
Fluid whole milk	24 qt. (22.7 L).
or	
Fluid skim or lowfat milk.	May be substituted for fluid whole milk on a quart-for-quart (.9 L) basis.
or	
Cultured buttermilk	May be substituted for fluid whole milk on a quart-for-quart (.9 L) basis.
or	
Evaporated whole milk.	May be substituted for fluid whole milk at the rate of 13 fluid oz. (.4 L) per qt. (.9 L) of fluid whole milk.
or	
Evaporated skimmed milk.	May be substituted for fluid whole milk at the rate of 13 fluid oz. (.4 L) per qt. (.9 L) of fluid whole milk.

Food	Quantity
or	
Dry whole milk	May be substituted for fluid whole milk at the rate of 1 lb. (.4 kg) per 3 qt. (2.8 L) of fluid whole milk.
or	
Nonfat or lowfat dry milk.	May be substituted for fluid whole milk at the rate of 1 lb. (.4 kg) per 5 qt. (4.7 L) of fluid whole milk.
or	
Cheese	May be substituted for fluid whole milk at the rate of 1 lb. (.4 kg) per 3 qt. (2.8 L) of fluid whole milk. 4 lbs. (1.8 kg) is the maximum amount which may be substituted.[1]
Eggs:	
Eggs	2 doz. or 2½ doz.
or	
Dried egg mix	May be substituted at the rate of 1.5 lb. (.7 kg) egg mix per 2 doz. fresh eggs of 2 lb. (.9 kg) egg mix per 2½ doz. fresh eggs.
Cereal (hot or cold)	36 oz. dry (1 kg).
Juice.[2]	
Single strength juice	184 fluid oz. (5.4 L).
or	
Frozen concentrated juice.	192 fluid oz. reconstituted (5.7 L).

[1] Additional cheese may be issued on an individual basis in cases of lactose intolerance, provided the need is documented in the participant's file by the competent professional authority.

[2] Combinations of single strength or frozen concentrated juice may be issued as long as the total volume does not exceed the amount specified for single strength juice.

(7) *Food Package VII—Breastfeeding Women (Enhanced).* (i) Pasteurized fluid whole milk which is flavored or unflavored and which contains 400 International Units of Vitamin D per quart (.9 liter) or pasteurized fluid skim or lowfat milk which is flavored or unflavored and which contains 400 International Units of vitamin D and 2000 International Units of vitamin A per fluid quart (.9 liter); or pasteurized cultured buttermilk which contains 400 International Units of vitamin D and 2000 International Units of vitamin A per fluid quart (.9 liter); or evaporated whole milk which contains 400 International Units of vitamin D per reconstituted quart (.9 liter); or evaporated skim milk which contains 400 International Units of vitamin D and 2000 International Units of vitamin A per reconstituted quart (.9 liter); or dry whole milk which contains 400 International Units of vitamin D per reconstituted quart (.9 liter); or nonfat or lowfat dry milk which contains 400 International Units of vitamin D and 2000 International Units of vitamin A per reconstituted quart (.9 liter); or domestic cheese (pasteurized process American, Monterey Jack, Colby, natural Cheddar, Swiss, Brick, Muenster, Provolone, Mozzarella Part-Skim or Whole).

(ii) Domestic cheese (pasteurized process American, Monterey Jack, Colby, natural Cheddar, Swiss, Brick, Muenster, Provolone, Mozzarella Part-Skim or Whole).

(iii) Adult cereal (hot or cold) which contains a minimum of 28 milligrams of iron per 100 grams of dry cereal and not more than 21.2 grams of sucrose and other sugars per 100 grams of dry cereal (6 grams per ounce).

(iv) Single strength fruit juice or vegetable juice, or both, which contains a minimum of 30 milligrams of vitamin C per 100 milliliters; or frozen concentrated fruit or vegetable juice, or both, which contains a minimum of 30 milligrams of vitamin C per 100 milliliters of reconstituted juice.

(v) Eggs or dried egg mix.

(vi) Peanut butter.

(vii) Mature dry beans or peas, including but not limited to lentils, black, navy, kidney, garbanzo, soy, pinto and mung beans, crowder, cow, split and black-eyed peas.

(viii) Tuna: Canned white, light, dark or blended tuna packed in water or oil, including solid and solid pack; chunk, chunks and chunk style; flake and flakes; and grated.

(ix) Carrots: Raw, canned or frozen. Mature raw; canned and frozen carrots containing only the mature root of the carrot plant packed in water.

(x) The quantities and types of supplemental foods prescribed shall be appropriate for the participant taking into consideration the participant's age and dietary needs. The maximum quantity of supplemental foods authorized per month is as follows:

Food	Quantity
Milk:	
Fluid whole milk or	28 qt. (26.5 L).

Food	Quantity
Cheese or	May be substituted for fluid whole milk at the rate of 1 lb. (.4 kg) per 3 qt. (2.8 L) of fluid whole milk. 4 lbs. (1.8 kg) is the maximum amount which may be substituted. Additional cheese may be issued on an individual basis in cases of lactose intolerance, provided the need is documented in the participant's file by the competent professional authority.
Fluid skim or lowfat milk or	May be substituted for fluid whole milk on a quart-for-quart (.9 L) basis.
Cultured buttermilk or	May be substituted for fluid whole milk on a quart-for-quart (.9 L) basis.
Evaporated whole milk or	May be substituted for fluid whole milk at the rate of 13 fluid oz. (.4 L) per qt. (.9 L) of fluid whole milk.
Evaporated skimmed milk or	May be substituted for fluid whole milk at the rate of 13 fluid oz. (.4 L) per qt. (.9 L) of fluid whole milk.
Dry whole milk or	May be substituted for fluid whole milk at the rate of 1 lb. (.4 kg) per 3 qt. (2.8 L) of fluid whole milk.
Nonfat or lowfat dry milk	May be substituted for fluid whole milk at the rate of 1 lb. (.4 kg) per 5 qt. (4.7 L) of fluid whole milk.
Cheese:	
Cheese	1 lb. (.4 kg).
Eggs:	
Eggs or	2 doz. or 2½ doz.
Dried egg mix	May be substituted at the rate of 1.5 lb. (.7 kg) egg mix per 2 doz. fresh eggs, or 2 lb. (.9 kg) egg mix per 2½ doz. fresh eggs.
Cereals:	
Cereals (hot or cold)	36 oz. dry (1 kg).
Juice:	
Single strength juice or	322 fluid oz. (9.6 L).
Frozen concentrated juice	336 fluid oz. reconstituted (10.0 L). Combinations of single strength or frozen concentrated juice may be issued as long as the total volume does not exceed the amount specified for single strength juice.
Legumes:	
Dry beans or peas and	1 lb. (.4 kg). May be substituted for peanut butter at the rate of 1 lb. of dry beans or peas per 18 oz. of peanut butter.
Peanut butter	18 oz. (.5 kg). Peanut butter may not be substituted for mature dry beans or peas at any rate.
Fish:	
Tuna	26 oz. (.8 kg).
Vegetable:	
Raw carrots or	2 lb. (.9 kg).
Frozen carrots or	May be substituted for fresh at the rate of 1 lb. frozen per 1 lb. fresh.
Canned carrots	May be substituted for fresh at the rate of 1 16–20 ounce can of carrots per 1 lb. fresh.

(d) *Use of commodity foods.* (1) At the request of a State agency, the Department will purchase commodity foods for the State agency using funds allocated to the State agency. The commodity foods purchased and made available to the State agency shall be equivalent to the foods specified in paragraph (c) of this section.

(2) The State agency shall—

(i) Distribute the commodity foods to the local agency or participant;

(ii) Ensure satisfactory storage conditions for the commodity foods, including documentation of proper insurance; and

(iii) Ensure that there are proper storage facilities for commodity foods.

(e) *Plans for substitutions or eliminations.* (1) The State agency may submit to FNS a plan for substitution of food(s) acceptable for use in the Program to allow for different cultural eating patterns and substitution or elimination of a category of foods to accommodate the special needs of homeless persons, and/or residents of institutions if the State agency chooses to serve such persons under § 246.7(m)(2) of this part. The plan shall provide the State agency's justification, including a specific explanation of the cultural eating pattern or the homeless situation which requires the proposed alteration and other information necessary for FNS to evaluate the plan as specified in paragraph (e)(2) of this section for cultural substitutions and in paragraph (e)(3) of this section for homeless substitutions or eliminations.

(2) FNS will evaluate a State agency's plan for substitution of foods for

different cultural eating patterns based on the following criteria:

(i) Any proposed substitute food must be nutritionally equivalent or superior to the food it is intended to replace.

(ii) The proposed substitute must be widely available to participants in the areas where the substitute is intended to be used.

(iii) The cost of the substitute must be equivalent to or less than the cost of the food it is intended to replace.

(3) FNS will evaluate a State agency's plan for substitution or elimination of a food category to accommodate the special needs of a specific group of homeless persons based on the justification presented by the State agency documenting the need. Documentation shall illustrate that all alternatives from within existing food packages have been explored and shall include a specific description of the circumstances of the homeless persons to be served that necessitate the proposed food package alteration.

(4) FNS will make a determination on the proposed plan based on the evaluation criteria specified in paragraph (e)(2) or (e)(3) of this section, as appropriate. The State agency shall substitute or eliminate foods only after receiving the written approval of FNS.

(f) *Infant formula manufacturer registration.* Infant formula manufacturers supplying formula to the WIC Program shall register with the Secretary of Health and Human Services under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321 *et seq.*). Such manufacturers wishing to bid for a State contract to supply infant formula to the program shall first certify with the State health department that their formulas comply with the Federal Food, Drug, and Cosmetic Act and regulations issued pursuant to the Act.

[50 FR 6121, Feb. 13, 1985; 50 FR 8098, Feb. 28, 1985, as amended at 51 FR 13208, Apr. 18, 1986; 51 FR 16155, May 1, 1986; 53 FR 25314, July 6, 1988; 54 FR 51295, Dec. 14, 1989; 57 FR 34506, Aug. 5, 1992; 57 FR 56240, Nov. 27, 1992; 65 FR 51223, Aug. 23, 2000]

§ 246.11 Nutrition education.

(a) *General.* (1) Nutrition education shall be considered a benefit of the Program, and shall be made available at no cost to the participant. Nutrition education shall be designed to be easily understood by participants, and it shall bear a practical relationship to participant nutritional needs, household situations, and cultural preferences including information on how to select food for themselves and their families. Nutrition education shall be thoroughly integrated into participant health care plans, the delivery of supplemental foods, and other Program operations.

(2) The State agency shall ensure that nutrition education is made available to all participants. Nutrition education may be provided through the local agencies directly, or through arrangements made with other agencies. At the time of certification, the local agency shall stress the positive, long-term benefits of nutrition education and encourage the participant to attend and participate in nutrition education activities. However, individual participants shall not be denied supplemental foods for failure to attend or participate in nutrition education activities.

(3) As an integral part of nutrition education, the State agency shall ensure that local agencies provide drug and other harmful substance abuse information to all pregnant, postpartum, and breastfeeding women and to parents or caretakers of infants and children participating in the program. Drug and other harmful substance abuse information may also be provided to pregnant, postpartum, and breastfeeding women and to parents or caretakers of infants and children participating in local agency services other than the Program.

(b) *Goals.* Nutrition education shall be designed to achieve the following two broad goals:

(1) Stress the relationship between proper nutrition and good health with special emphasis on the nutritional needs of pregnant, postpartum, and breastfeeding women, infants and children under five years of age, and raise awareness about the dangers of using drugs and other harmful substances during pregnancy and while breastfeeding.

(2) Assist the individual who is at nutritional risk in achieving a positive change in food habits, resulting in improved nutritional status and in the

prevention of nutrition-related problems through optimal use of the supplemental foods and other nutritious foods. This is to be taught in the context of the ethnic, cultural and geographic preferences of the participants and with consideration for educational and environmental limitations experienced by the participants.

(c) *State agency responsibilities.* The State agency shall perform the following activities in carrying out nutrition education responsibilities:

(1) Develop and coordinate the nutrition education component of Program operations with consideration of local agency plans, needs and available nutrition education resources.

(2) Provide in-service training and technical assistance for professional and para-professional personnel involved in providing nutrition education to participants at local agencies. The State agency shall also provide training on the promotion and management of breastfeeding to staff at local agencies who will provide information and assistance on this subject to participants.

(3) Identify or develop resources and educational materials for use in local agencies, including breastfeeding promotion and instruction materials, taking reasonable steps to include materials in languages other than English in areas where a significant number or proportion of the population needs the information in a language other than English, considering the size and concentration of such population and, where possible, the reading level of participants.

(4) Develop and implement procedures to ensure that nutrition education is offered to all adult participants and to parents and guardians of infant or child participants, as well as child participants, whenever possible.

(5) Monitor local agency activities to ensure compliance with provisions set forth in paragraphs (c)(8), (d), and (e) of this section.

(6) Establish standards for participant contacts that ensure adequate nutrition education in accordance with paragraph (e) of this section.

(7) Establish standards for breastfeeding promotion and support which include, at a minimum, the following:

(i) A policy that creates a positive clinic environment which endorses breastfeeding as the preferred method of infant feeding;

(ii) A requirement that each local agency designate a staff person to coordinate breastfeeding promotion and support activities;

(iii) A requirement that each local agency incorporate task-appropriate breastfeeding promotion and support training into orientation programs for new staff involved in direct contact with WIC clients; and

(iv) A plan to ensure that women have access to breastfeeding promotion and support activities during the prenatal and postpartum periods.

(d) *Local agency responsibilities.* Local agencies shall perform the following activities in carrying out their nutrition education responsibilities:

(1) Make nutrition education available or enter into an agreement with another agency to make nutrition education available to all adult participants, and to parents or caretakers of infant and child participants, and whenever possible, to child participants. Nutrition education may be provided through the use of individual or group sessions. Educational materials designed for Program participants may be utilized to provide education to pregnant, postpartum, and breastfeeding women and to parents or caretakers of infants and children participating in local agency services other than the program.

(2) Develop an annual local agency nutrition education plan consistent with the State's nutrition education component of Program operations and in accordance with this part and FNS guidelines. The local agency shall submit its nutrition education plan to the State agency by a date specified by the State agency.

(e) *Participant contacts.* (1) The nutrition education contacts shall be made available through individual or group sessions which are appropriate to the individual participant's nutritional needs. All pregnant participants shall be encouraged to breastfeed unless contraindicated for health reasons.

(2) During each six-month certification period, at least two nutrition contacts shall be made available to all adult participants and the parents or caretakers of infant and child participants, and wherever possible, the child participants themselves.

(3) Nutrition education contacts shall be made available at a quarterly rate, but not necessarily taking place within each quarter, to parents or caretakers of infant participants certified for a period in excess of six months.

(4) The local agency shall document in each participant's certification file that nutrition education has been given to the participant in accordance with State agency standards, except that the second or any subsequent nutrition education contact during a certification period that is provided to a participant in a group setting may be documented in a masterfile. Should a participant miss a nutrition education appointment, the local agency shall, for purposes of monitoring and further education efforts, document this fact in the participant's file, or, at the local agency's discretion, in the case of a second or subsequent missed contact where the nutrition education was offered in a group setting, document this fact in a master file.

(5) An individual care plan shall be provided for a participant based on the need for such plan as determined by the competent professional authority, except that any participant, parent, or caretaker shall receive such plan upon request.

(6) Contacts shall be designed to meet different cultural and language needs of Program participants.

[50 FR 6121, Feb. 13, 1985; 50 FR 8098, Feb. 28, 1985, as amended at 58 FR 11507, Feb. 26, 1993; 59 FR 11503, Mar. 11, 1994; 65 FR 53528, Sept. 5, 2000]

Subpart E—State Agency Provisions

§ 246.12 Food delivery systems.

(a) *General.* This section sets forth design and operational requirements for food delivery systems. In recognition of emergent electronic benefits transfer (EBT) technology, FNS may, on a case-by-case basis, modify regulatory provisions to the extent FNS determines the particular EBT system provides adequate safeguards that serve the purpose of the provisions being modified.

(1) *Management.* The State agency is responsible for the fiscal management of, and accountability for, food delivery systems under its jurisdiction. The State agency may permit only authorized vendors, home food delivery contractors, and direct distribution sites to accept food instruments.

(2) *Design.* The State agency must design all food delivery systems to be used by its local agencies.

(3) *FNS oversight.* FNS may, for a stated cause and by written notice, require revision of a proposed or operating food delivery system and will allow a reasonable time for the State agency to effect such a revision.

(4) *Part 3016.* All contracts or agreements entered into by the State or local agency for the management or operation of food delivery systems must conform to the requirements of Part 3016 of this title.

(b) *Uniform food delivery systems.* The State agency may operate up to three types of food delivery systems under its jurisdiction—retail, home delivery, or direct distribution. Each system must be procedurally uniform throughout the jurisdiction of the State agency and must ensure adequate participant access to supplemental foods. When used, food instruments must be uniform within each type of system.

(c) *No charge for authorized supplemental foods.* The State agency must ensure that participants receive their authorized supplemental foods free of charge.

(d) *Compatibility of food delivery system.* The State agency must ensure that the food delivery system(s) selected is compatible with the delivery of health and nutrition education services to participants.

(e) *Retail food delivery systems: General.* Retail food delivery systems are systems in which participants, parents or caretakers of infant and child participants, and proxies obtain authorized supplemental foods by submitting a food instrument to an authorized vendor.

(f) *Retail food delivery systems: Food instrument requirements.* (1) *General.*

State agencies using retail food delivery systems must use food instruments that comply with the requirements of paragraph (f)(2) of this section.

(2) *Printed food instruments.* Each printed food instrument must clearly bear on its face the following information:

(i) *Authorized supplemental foods.* The supplemental foods authorized to be obtained with the food instrument;

(ii) *First date of use.* The first date on which the food instrument may be used to obtain supplemental foods;

(iii) *Last date of use.* The last date on which the food instrument may be used to obtain authorized supplemental foods. This date must be a minimum of 30 days from the first date on which it may be used, except for the participant's first month of issuance, when it may be the end of the month or cycle for which the food instrument is valid. Rather than entering a specific last date of use on each instrument, all instruments may be printed with a notice that the participant must transact them within a specified number of days after the first date on which the food instrument may be used;

(iv) *Redemption period.* The date by which the vendor must submit the food instrument for redemption. This date must be no more than 90 days from the first date on which the food instrument may be used. If the date is fewer than 90 days, then the State agency must ensure that the allotted time provides the vendor sufficient time to submit the food instrument for redemption without undue burden;

(v) *Serial number.* A unique and sequential serial number;

(vi) *Purchase price.* A space for the purchase price to be entered. At the discretion of the State agency, a maximum price may be printed on the food instrument that is higher than the expected purchase price of the authorized supplemental foods for which it will be used, but that is low enough to protect against potential loss of funds. When a maximum price is printed on the food instrument, the space for the purchase price must be clearly distinguishable from the maximum price. For example, the words ''purchase price'' or ''actual amount of sale'' could be printed larger and in a different area of the food instrument than the maximum price; and

(vii) *Signature space.* A space where participants, parents or caretakers of infant or child participants, or proxies must sign.

(3) *Vendor identification.* The State agency must implement procedures to ensure each food instrument submitted for redemption can be identified by the vendor that submitted the food instrument. Each vendor operated by a single business entity must be identified separately. The State agency may identify vendors by requiring that all authorized vendors stamp their names and/or enter a vendor identification number on all food instruments prior to submitting them for redemption.

(g) *Retail food delivery systems: Vendor authorization.* (1) *General.* The State agency must authorize an appropriate number and distribution of vendors in order to ensure adequate participant access to supplemental foods and to ensure effective State agency management, oversight, and review of its authorized vendors.

(2) *Vendor limiting criteria.* The State agency may establish criteria to limit the number of stores it authorizes. The State agency must apply its limiting criteria consistently throughout its jurisdiction. Any vendor limiting criteria used by the State agency must be included in the State Plan in accordance with § 246.4(a)(14)(ii).

(3) *Vendor selection criteria.* The State agency must develop and implement criteria to select stores for authorization. The State agency must apply its selection criteria consistently throughout its jurisdiction. The State agency may reassess any authorized vendor at any time during the vendor's agreement period using the vendor selection criteria in effect at the time of the reassessment and must terminate the agreements with those vendors that fail to meet them. The vendor selection criteria must include the following categories and requirements and must be included in the State Plan in accordance with § 246.4(a)(14)(ii).

(i) *Competitive price and price limitations.* The State agency must consider the prices a vendor applicant charges for supplemental foods as compared to

the prices charged by other vendor applicants and authorized vendors. The State agency may evaluate a vendor applicant based on its shelf prices or on the prices it bids for supplemental foods, which may not exceed its shelf prices. The State agency must also establish price limitations on the amount that it will pay vendors. The price limitations must be designed to ensure that the State agency does not pay a vendor at a level that would otherwise make the vendor ineligible for authorization. The State agency may establish different competitive price requirements and price limitations for different vendor peer groups, may include a factor to reflect fluctuations in wholesale prices in its price limitations, and may except pharmacy vendors that supply only exempt infant formula and/or WIC-eligible medical foods from both the competitive price selection criterion and the price limitations.

(ii) *Minimum variety and quantity of supplemental foods*. The State agency must establish minimum requirements for the variety and quantity of supplemental foods that a vendor applicant must stock to be authorized. The State agency may not authorize a vendor applicant unless it determines that the vendor applicant meets these minimums. The State agency may establish different minimums for different vendor peer groups.

(iii) *Business integrity*. The State agency must consider the business integrity of a vendor applicant. In determining the business integrity of a vendor applicant, the State agency may rely solely on facts already known to it and representations made by the vendor applicant on its vendor application. The State agency is not required to establish a formal system of background checks for vendor applicants. Unless denying authorization of a vendor applicant would result in inadequate participant access, the State agency may not authorize a vendor applicant if during the last six years the vendor applicant or any of the vendor applicant's current owners, officers, or managers have been convicted of or had a civil judgment entered against them for any activity indicating a lack of business integrity. Activities indicating a lack of business integrity include fraud, antitrust violations, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, and obstruction of justice. The State agency may add other types of convictions or civil judgments to this list.

(iv) *Current Food Stamp Program disqualification or civil money penalty for hardship*. Unless denying authorization of a vendor applicant would result in inadequate participant access, the State agency may not authorize a vendor applicant that is currently disqualified from the Food Stamp Program or that has been assessed a Food Stamp Program civil money penalty for hardship and the disqualification period that would otherwise have been imposed has not expired.

(4) *On-site preauthorization visit*. The State agency must conduct an on-site visit prior to or at the time of a vendor's initial authorization.

(5) *Sale of store to circumvent WIC sanction*. The State agency may not authorize a vendor applicant if the State agency determines the store has been sold by its previous owner in an attempt to circumvent a WIC sanction. The State agency may consider such factors as whether the store was sold to a relative by blood or marriage of the previous owner(s) or sold to any individual or organization for less than its fair market value.

(6) *Impact on small businesses*. The State agency is encouraged to consider the impact of authorization decisions on small businesses.

(7) *Application periods*. The State agency may limit the periods during which applications for vendor authorization will be accepted and processed, except that applications must be accepted and processed at least once every three years. The State agency must develop procedures for processing vendor applications outside of its timeframes when it determines there will be inadequate participant access unless additional vendors are authorized.

(8) *Data collection at authorization*. At the time of application, the State agency must collect the vendor applicant's Food Stamp Program authorization number if the vendor applicant is

authorized in that program. In addition, the State agency must collect the vendor applicant's current shelf prices for supplemental foods.

(h) *Retail food delivery systems: Vendor agreements.* (1) *General.* (i) *Entering into agreements.* The State agency must enter into written agreements with all authorized vendors. The agreements must be for a period not to exceed three years. The agreement must be signed by a representative who has legal authority to obligate the vendor and a representative of the State agency. When the vendor representative is obligating more than one vendor, the agreement must specify all vendors covered by the agreement. When more than one vendor is specified in the agreement, the State agency may add or delete an individual vendor without affecting the remaining vendors. The State agency must require vendors to reapply at the expiration of their agreements and must provide vendors with not less than 15 days advance written notice of the expiration of their agreements.

(ii) *Delegation to local agencies.* The State agency may delegate to its local agencies the authority to sign vendor agreements if the State agency indicates its intention to do so in its State Plan in accordance with § 246.4(a)(14)(iii). In such cases, the State agency must provide supervision and instruction to ensure the uniformity and quality of local agency activities.

(2) *Standard vendor agreement.* The State agency must use a standard vendor agreement throughout its jurisdiction, although the State agency may make exceptions to meet unique circumstances provided that it documents the reasons for such exceptions.

(3) *Vendor agreement provisions.* The vendor agreement must contain the following specifications, although the State agency may determine the exact wording to be used:

(i) *Acceptance of food instruments.* The vendor may accept food instruments only from participants, parents or caretakers of infant and child participants, or proxies.

(ii) *No substitutions, cash, credit, refunds, or exchanges.* The vendor may provide only the authorized supplemental foods listed on the food instrument. The vendor may not provide unauthorized food items, non-food items, cash, or credit (including rainchecks) in exchange for food instruments. The vendor may not provide refunds or permit exchanges for authorized supplemental foods obtained with food instruments, except for exchanges of an identical authorized supplemental food item when the original authorized supplemental food item is defective, spoiled, or has exceeded its ''sell by,'' ''best if used by,'' or other date limiting the sale or use of the food item. An identical authorized supplemental food item means the exact brand and size as the original authorized supplemental food item obtained and returned by the participant.

(iii) *Treatment of participants, parents/caretakers, and proxies.* The vendor must offer program participants, parents or caretakers of infant of child participants, and proxies the same courtesies offered to other customers.

(iv) *Time periods for transacting food instruments.* The vendor may accept a food instrument only within the specified time period.

(v) *Purchase price on food instruments.* The vendor must ensure that the purchase price is entered on food instruments in accordance with the procedures described in the vendor agreement. The State agency has the discretion to determine whether the vendor or the participant enters the purchase price. The purchase price must include only the authorized supplemental food items actually provided and must be entered on the food instrument before it is signed.

(vi) *Signature on food instruments.* For printed food instruments, the vendor must ensure the participant, parent or caretaker of an infant or child participant, or proxy signs the food instrument in the presence of the cashier. In EBT systems, a Personal Identification Number (PIN) may be used in lieu of a signature.

(vii) *Sales tax prohibition.* The vendor may not collect sales tax on authorized supplemental foods obtained with food instruments.

(viii) *Food instrument redemption.* The vendor must submit food instruments for redemption in accordance with the

redemption procedures described in the vendor agreement. The vendor may redeem a food instrument only within the specified time period. As part of the redemption procedures, the State agency may make price adjustments to the purchase price on food instruments submitted by the vendor for redemption to ensure compliance with the price limitations applicable to the vendor.

(ix) *Vendor claims*. When the State agency determines the vendor has committed a vendor violation that affects the payment to the vendor, the State agency will delay payment or establish a claim. The State agency may delay payment or establish a claim in the amount of the full purchase price of each food instrument that contained the vendor overcharge or other error. The State agency will provide the vendor with an opportunity to justify or correct a vendor overcharge or other error. The vendor must pay any claim assessed by the State agency. In collecting a claim, the State agency may offset the claim against current and subsequent amounts to be paid to the vendor. In addition to denying payment or assessing a claim, the State agency may sanction the vendor for vendor overcharges or other errors in accordance with the State agency's sanction schedule.

(x) *No charge for authorized supplemental foods or restitution from participants*. The vendor may not charge participants, parents or caretakers of infant and child participants, or proxies for authorized supplemental foods obtained with food instruments. In addition, the vendor may not seek restitution from these individuals for food instruments not paid or partially paid by the State agency.

(xi) *Training*. At least one representative of the vendor must participate in training annually. Annual vendor training may be provided by the State agency in a variety of formats, including newsletters, videos, and interactive training. The State agency will have sole discretion to designate the date, time, and location of all interactive training, except that the State agency will provide the vendor with at least one alternative date on which to attend such training.

(xii) *Vendor training of staff*. The vendor must inform and train cashiers and other staff on program requirements.

(xiii) *Accountability for owners, officers, managers, and employees*. The vendor is accountable for its owners, officers, managers, agents, and employees who commit vendor violations.

(xiv) *Monitoring*. The vendor may be monitored for compliance with program requirements.

(xv) *Recordkeeping*. The vendor must maintain inventory records used for Federal tax reporting purposes and other records the State agency may require for the period of time specified by the State agency in the vendor agreement. Upon request, the vendor must make available to representatives of the State agency, the Department, and the Comptroller General of the United States, at any reasonable time and place for inspection and audit, all food instruments in the vendor's possession and all program-related records.

(xvi) *Termination*. The State agency will immediately terminate the agreement if it determines that the vendor has provided false information in connection with its application for authorization. Either the State agency or the vendor may terminate the agreement for cause after providing advance written notice of a period of not less than 15 days to be specified by the State agency.

(xvii) *Change in ownership or location or cessation of operations*. The vendor must provide the State agency advance written notification of any change in vendor ownership, store location, or cessation of operations. In such instances, the State agency will terminate the vendor agreement, except that the State agency may permit vendors to move short distances without terminating the agreement. The State agency has the discretion to determine the length of advance notice required for vendors reporting changes under this provision, whether a change in location qualifies as a short distance, and whether a change in business structure constitutes a change in ownership.

(xviii) *Sanctions*. In addition to claims collection, the vendor may be sanctioned for vendor violations in accordance with the State agency's sanction schedule. Sanctions may include

administrative fines, disqualification, and civil money penalties in lieu of disqualification. The State agency does not have to provide the vendor with prior warning that violations were occurring before imposing such sanctions.

(xix) *Conflict of interest.* The State agency will terminate the agreement if the State agency identifies a conflict of interest, as defined by applicable State laws, regulations, and policies, between the vendor and the State agency or its local agencies.

(xx) *Criminal penalties.* A vendor who commits fraud or abuse in the Program is liable to prosecution under applicable Federal, State or local laws. Those who have willfully misapplied, stolen or fraudulently obtained program funds will be subject to a fine of not more than $10,000 or imprisonment for not more than five years or both, if the value of the funds is $100 or more. If the value is less than $100, the penalties are a fine of not more than $1,000 or imprisonment for not more than one year or both.

(xxi) *Not a license/property interest.* The vendor agreement does not constitute a license or a property interest. If the vendor wishes to continue to be authorized beyond the period of its current agreement, the vendor must reapply for authorization. If a vendor is disqualified, the State agency will terminate the vendor's agreement, and the vendor will have to reapply in order to be authorized after the disqualification period is over. In all cases, the vendor's new application will be subject to the State agency's vendor selection criteria and any vendor limiting criteria in effect at the time of the reapplication.

(xxii) *Compliance with vendor agreement, statutes, regulations, policies, and procedures.* The vendor must comply with the vendor agreement and Federal and State statutes, regulations, policies, and procedures governing the Program, including any changes made during the agreement period.

(xxiii) *Nondiscrimination regulations.* The vendor must comply with the nondiscrimination provisions of Departmental regulations (Parts 15, 15a and 15b of this title).

(xxiv) *Compliance with vendor selection criteria.* The vendor must comply with the vendor selection criteria throughout the agreement period, including any changes to the criteria. Using the current vendor selection criteria, the State agency may reassess the vendor at any time during the agreement period. The State agency will terminate the vendor agreement if the vendor fails to meet the current vendor selection criteria.

(xxv) *Reciprocal Food Stamp Program disqualification for WIC Program disqualifications.* Disqualification from the WIC Program may result in disqualification as a retailer in the Food Stamp Program. Such disqualification may not be subject to administrative or judicial review under the Food Stamp Program.

(4) *Purchase price and redemption procedures.* The State agency must describe in the vendor agreement its purchase price and redemption procedures. The redemption procedures must ensure that the State agency does not pay a vendor more than the price limitations applicable to the vendor.

(5) *Sanction schedule.* The State agency must include its sanction schedule in the vendor agreement or as an attachment to it. The sanction schedule must include all mandatory and State agency vendor sanctions and must be consistent with paragraph (l) of this section. If the sanction schedule is in State law or regulations or in a document provided to the vendor at the time of authorization, the State agency instead may include an appropriate cross-reference in the vendor agreement.

(6) *Actions subject to administrative review and review procedures.* The State agency must include the adverse actions a vendor may appeal and those adverse actions that are not subject to administrative review. The State agency also must include a copy of the State agency's administrative review procedures in the vendor agreement or as an attachment to it or must include a statement that the review procedures are available upon request and the applicable review procedures will be provided along with an adverse action subject to administrative review. These items must be consistent with § 246.18.

If these items are in State law or regulations or in a document provided to the vendor at the time of authorization, the State agency instead may include an appropriate cross-reference in the vendor agreement.

(7) *Notification of program changes.* The State agency must notify vendors of changes to Federal or State statutes, regulations, policies, or procedures governing the Program before the changes are implemented. The State agency should give as much advance notice as possible.

(i) *Retail food delivery systems: Vendor training.* (1) *General requirements.* The State agency must provide training annually to at least one representative of each vendor. Prior to or at the time of a vendor's initial authorization, and at least once every three years thereafter, the training must be in an interactive format that includes a contemporaneous opportunity for questions and answers. The State agency must designate the date, time, and location of the interactive training and the audience (e.g., managers, cashiers, etc.) to which the training is directed. The State agency must provide vendors with at least one alternative date on which to attend interactive training. Examples of acceptable vendor training include on-site cashier training, off-site classroom-style train-the-trainer or manager training, a training video, and a training newsletter. All vendor training must be designed to prevent program errors and noncompliance and improve program service.

(2) *Content.* The annual training must include instruction on the purpose of the Program, the supplemental foods authorized by the State agency, the minimum varieties and quantities of authorized supplemental foods that must be stocked by vendors, the procedures for transacting and redeeming food instruments, the vendor sanction system, the vendor complaint process, the claims procedures, and any changes to program requirements since the last training.

(3) *Delegation.* The State agency may delegate vendor training to a local agency, a contractor, or a vendor representative if the State agency indicates its intention to do so in its State Plan in accordance with § 246.4(a)(14)(xi). In such cases, the State agency must provide supervision and instruction to ensure the uniformity and quality of vendor training.

(4) *Documentation.* The State agency must document the content of and vendor participation in vendor training.

(j) *Retail food delivery systems: Monitoring vendors and identifying high-risk vendors.* (1) *General requirements.* The State agency must design and implement a system for monitoring its vendors for compliance with program requirements. The State agency may delegate vendor monitoring to a local agency or contractor if the State agency indicates its intention to do so in its State Plan in accordance with § 246.4(a)(14)(iv). In such cases, the State agency must provide supervision and instruction to ensure the uniformity and quality of vendor monitoring.

(2) *Routine monitoring.* The State agency must conduct routine monitoring visits on a minimum of five percent of the number of vendors authorized by the State agency as of October 1 of each fiscal year in order to survey the types and levels of abuse and errors among authorized vendors and to take corrective actions, as appropriate. The State agency must develop criteria to determine which vendors will receive routine monitoring visits and must include such criteria in its State Plan in accordance with § 246.4(a)(14)(iv).

(3) *Identifying high-risk vendors.* The State agency must identify high-risk vendors at least once a year using criteria developed by FNS and/or other statistically-based criteria developed by the State agency. FNS will not change its criteria more frequently than once every two years and will provide adequate advance notification of changes prior to implementation. The State agency may develop and implement additional criteria. All State agency-developed criteria must be approved by FNS.

(4) *Compliance investigations.* (i) *High-risk vendors.* The State agency must conduct compliance investigations of a minimum of five percent of the number of vendors authorized by the State agency as of October 1 of each fiscal year. The State agency must conduct compliance investigations on all high-

risk vendors up to the five percent minimum. The State agency may count toward this requirement a compliance investigation of a high-risk vendor conducted by a Federal, State, or local law enforcement agency. The State agency also may count toward this requirement a compliance investigation conducted by another WIC State agency provided that the State agency implements the option to establish State agency sanctions based on mandatory sanctions imposed by the other WIC State agency, as specified in paragraph (l)(2)(iii) of this section. A compliance investigation of a high-risk vendor may be considered complete when the State agency determines that a sufficient number of compliance buys have been conducted to provide evidence of program noncompliance, when two compliance buys have been conducted in which no program violations are found, or when an inventory audit has been completed.

(ii) *Randomly selected vendors*. If fewer than five percent of the State agency's authorized vendors are identified as high-risk, the State agency must randomly select additional vendors on which to conduct compliance investigations sufficient to meet the five-percent requirement. A compliance investigation of a randomly selected vendor may be considered complete when the State agency determines that a sufficient number of compliance buys have been conducted to provide evidence of program noncompliance, when two compliance buys are conducted in which no program violations are found, or when an inventory audit has been completed.

(iii) *Prioritization*. If more than five percent of the State agency's vendors are identified as high-risk, the State agency must prioritize such vendors so as to perform compliance investigations of those determined to have the greatest potential for program noncompliance and/or loss of funds.

(5) *Monitoring report*. For each fiscal year, the State agency must send FNS a summary of the results of its vendor monitoring containing information stipulated by FNS. The report must be sent by February 1 of the following fiscal year. Plans for improvement in the coming year must be included in the State Plan in accordance with § 246.4(a)(14)(iv).

(6) *Documentation*.

(i) *Monitoring visits*. The State agency must document the following information for all monitoring visits, including routine monitoring visits, inventory audits, and compliance buys:

(A) the date of the monitoring visit, inventory audit, or compliance buy;

(B) the name(s) and signature(s) of the reviewer(s); and

(C) the nature of any problem(s) detected.

(ii) *Compliance buys*. For compliance buys, the State agency must also document:

(A) the date of the buy;

(B) a description of the cashier involved in each transaction;

(C) the types and quantities of items purchased, current shelf prices or prices charged other customers, and price charged for each item purchased, if available. Price information may be obtained prior to, during, or subsequent to the compliance buy; and

(D) the final disposition of all items as destroyed, donated, provided to other authorities, or kept as evidence.

(k) *Retail food delivery systems: Vendor claims*. (1) *System to review food instruments*. The State agency must design and implement a system to review food instruments submitted by vendors for redemption to ensure compliance with the applicable price limitations and to detect questionable food instruments, suspected vendor overcharges, and other errors. This review must examine either all or a representative sample of the food instruments and may be done either before or after the State agency makes payments on the food instruments. The review must include a price comparison or other edit designed to ensure compliance with the applicable price limitations and to assist in detecting vendor overcharges. For printed food instruments, the system also must detect the following errors: purchase price missing; participant, parent/caretaker, or proxy signature missing; vendor identification missing; food instruments transacted or redeemed after the specified time periods; and, as appropriate, altered purchase price. The State agency must take follow-up action within 120 days of detecting any

questionable food instruments, suspected vendor overcharges, and other errors and must implement procedures to reduce the number of errors when possible.

(2) *Delaying payment and establishing a claim.* When the State agency determines the vendor has committed a vendor violation that affects the payment to the vendor, the State agency must delay payment or establish a claim. Such vendor violations may be detected through compliance investigations, food instrument reviews, or other reviews or investigations of a vendor's operations. The State agency may delay payment or establish a claim in the amount of the full purchase price of each food instrument that contained the vendor overcharge or other error.

(3) *Opportunity to justify or correct.* When payment for a food instrument is delayed or a claim is established, the State agency must provide the vendor with an opportunity to justify or correct the vendor overcharge or other error. If satisfied with the justification or correction, the State agency must provide payment or adjust the proposed claim accordingly.

(4) *Timeframe and offset.* The State agency must deny payment or initiate claims collection action within 90 days of either the date of detection of the vendor violation or the completion of the review or investigation giving rise to the claim, whichever is later. Claims collection action may include offset against current and subsequent amounts owed to the vendor.

(5) *Food instruments redeemed after the specified period.* With justification and documentation, the State agency may pay vendors for food instruments submitted for redemption after the specified period for redemption. If the total value of such food instruments submitted at one time exceeds $500.00, the State agency must obtain the approval of the FNS Regional Office before payment.

(l) *Retail food delivery systems: Vendor sanctions*—(1) *Mandatory vendor sanctions*—(i) *Permanent disqualification.* The State agency must permanently disqualify a vendor convicted of trafficking in food instruments or selling firearms, ammunition, explosives, or controlled substances (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) in exchange for food instruments. A vendor is not entitled to receive any compensation for revenues lost as a result of such violation. If reflected in its State Plan, the State agency may impose a civil money penalty in lieu of a disqualification for this violation when it determines, in its sole discretion, and documents that:

(A) Disqualification of the vendor would result in inadequate participant access; or

(B) The vendor had, at the time of the violation, an effective policy and program in effect to prevent trafficking; and the ownership of the vendor was not aware of, did not approve of, and was not involved in the conduct of the violation.

(ii) *Six-year disqualification.* The State agency must disqualify a vendor for six years for:

(A) One incidence of buying or selling food instruments for cash (trafficking); or

(B) One incidence of selling firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802, in exchange for food instruments.

(iii) *Three-year disqualification.* The State agency must disqualify a vendor for three years for:

(A) One incidence of the sale of alcohol or alcoholic beverages or tobacco products in exchange for food instruments;

(B) A pattern of claiming reimbursement for the sale of an amount of a specific supplemental food item which exceeds the store's documented inventory of that supplemental food item for a specific period of time;

(C) A pattern of vendor overcharges;

(D) A pattern of receiving, transacting and/or redeeming food instruments outside of authorized channels, including the use of an unauthorized vendor and/or an unauthorized person;

(E) A pattern of charging for supplemental food not received by the participant; or

(F) A pattern of providing credit or non-food items, other than alcohol, alcoholic beverages, tobacco products,

cash, firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802, in exchange for food instruments.

(iv) *One-year disqualification*. The State agency must disqualify a vendor for one year for a pattern of providing unauthorized food items in exchange for food instruments, including charging for supplemental foods provided in excess of those listed on the food instrument.

(v) *Second mandatory sanction*. When a vendor, who previously has been assessed a sanction for any of the violations in paragraphs (l)(1)(ii) through (l)(1)(iv) of this section, receives another sanction for any of these violations, the State agency must double the second sanction. Civil money penalties may only be doubled up to the limits allowed under paragraph (l)(1)(x)(C) of this section.

(vi) *Third or subsequent mandatory sanction*. When a vendor, who previously has been assessed two or more sanctions for any of the violations listed in paragraphs (l)(1)(ii) through (l)(1)(iv) of this section, receives another sanction for any of these violations, the State agency must double the third sanction and all subsequent sanctions. The State agency may not impose civil money penalties in lieu of disqualification for third or subsequent sanctions for violations listed in paragraphs (l)(1)(ii) through (l)(1)(iv) of this section.

(vii) *Disqualification based on a Food Stamp Program disqualification*. The State agency must disqualify a vendor who has been disqualified from the Food Stamp Program. The disqualification must be for the same length of time as the Food Stamp Program disqualification, may begin at a later date than the Food Stamp Program disqualification, and is not subject to administrative or judicial review under the WIC Program.

(viii) *Voluntary withdrawal or nonrenewal of agreement*. The State agency may not accept voluntary withdrawal of the vendor from the Program as an alternative to disqualification for the violations listed in paragraphs (l)(1)(i) through (l)(1)(iv) of this section, but must enter the disqualification on the record. In addition, the State agency may not use nonrenewal of the vendor agreement as an alternative to disqualification.

(ix) *Participant access determinations*. Prior to disqualifying a vendor for a Food Stamp Program disqualification pursuant to paragraph (l)(1)(vii) of this section or for any of the violations listed in paragraphs (l)(1)(ii) through (l)(1)(iv) of this section, the State agency must determine if disqualification of the vendor would result in inadequate participant access. The State agency must make the participant access determination in accordance with paragraph (l)(8) of this section. If the State agency determines that disqualification of the vendor would result in inadequate participant access, the State agency must impose a civil money penalty in lieu of disqualification. However, as provided in paragraph (l)(1)(vi) of this section, the State agency may not impose a civil money penalty in lieu of disqualification for third or subsequent sanctions for violations in paragraphs (l)(1)(ii) through (l)(1)(iv) of this section. The State agency must include documentation of its participant access determination and any supporting documentation in the file of each vendor who is disqualified or receives a civil money penalty in lieu of disqualification.

(x) *Civil money penalty formula*. For each violation subject to a mandatory sanction, the State agency must use the following formula to calculate a civil money penalty imposed in lieu of disqualification:

(A) Determine the vendor's average monthly redemptions for at least the 6-month period ending with the month immediately preceding the month during which the notice of adverse action is dated;

(B) Multiply the average monthly redemptions figure by 10 percent (.10);

(C) Multiply the product from paragraph (l)(1)(x)(B) of this section by the number of months for which the store would have been disqualified. This is the amount of the civil money penalty, provided that the civil money penalty shall not exceed $10,000 for each violation. For a violation that warrants permanent disqualification, the amount of the civil money penalty shall be

$10,000. When during the course of a single investigation the State agency determines a vendor has committed multiple violations, the State agency must impose a CMP for each violation. The total amount of civil money penalties imposed for violations investigated as part of a single investigation may not exceed $40,000.

(xi) *Notification to FNS.* The State agency must provide the appropriate FNS office with a copy of the notice of adverse action and information on vendors it has either disqualified or imposed a civil money penalty in lieu of disqualification for any of the violations listed in paragraphs (l)(1)(i) through (l)(1)(iv) of this section. This information must include the name of the vendor, address, identification number, the type of violation(s), and the length of disqualification or the length of the disqualification corresponding to the violation for which the civil money penalty was assessed, and must be provided within 15 days after the vendor's opportunity to file for a WIC administrative review has expired or all of the vendor's WIC administrative reviews have been completed.

(xii) *Multiple violations during a single investigation.* When during the course of a single investigation the State agency determines a vendor has committed multiple violations (which may include violations subject to State agency sanctions), the State agency must disqualify the vendor for the period corresponding to the most serious mandatory violation. However, the State agency must include all violations in the notice of administration action. If a mandatory sanction is not upheld on appeal, then the State agency may impose a State agency-established sanction.

(2) *State agency vendor sanctions.* (i) *General requirements.* The State agency may impose sanctions for vendor violations that are not specified in paragraphs (l)(1)(i) through (l)(1)(iv) of this section as long as such vendor violations and sanctions are included in the State agency's sanction schedule. State agency sanctions may include disqualifications, civil money penalties assessed in lieu of disqualification, and administrative fines. The total period of disqualification imposed for State agency violations investigated as part of a single investigation may not exceed one year. A civil money penalty or fine may not exceed $10,000 for each violation. The total amount of civil money penalties and administrative fines imposed for violations investigated as part of a single investigation may not exceed $40,000.

(ii) *Food Stamp Program civil money penalty for hardship.* The State agency may disqualify a vendor that has been assessed a civil money penalty for hardship in the Food Stamp Program, as provided under § 278.6 of this chapter. The length of such disqualification must correspond to the period for which the vendor would otherwise have been disqualified in the Food Stamp Program. If a State agency decides to exercise this option, the State agency must:

(A) Include notification that it will take such disqualification action in its sanction schedule; and

(B) Determine if disqualification of the vendor would result in inadequate participant access in accordance with paragraph (l)(8) of this section. If the State agency determines that disqualification of the vendor would result in inadequate participant access, the State agency may not disqualify the vendor or impose a civil money penalty in lieu of disqualification. The State agency must include documentation of its participant access determination and any supporting documentation in each vendor's file.

(iii) *A mandatory sanction by another WIC State agency.* The State agency may disqualify a vendor that has been disqualified or assessed a civil money penalty in lieu of disqualification by another WIC State agency for a mandatory vendor sanction. The length of the disqualification must be for the same length of time as the disqualification by the other WIC State agency or, in the case of a civil money penalty in lieu of disqualification assessed by the other WIC State agency, for the same length of time for which the vendor would otherwise have been disqualified. The disqualification may begin at a later date than the sanction imposed by the other WIC State agency. If a State agency decides to exercise this option, the State agency must:

(A) Include notification that it will take such action in its sanction schedule; and

(B) Determine if disqualification of the vendor would result in inadequate participant access in accordance with paragraph (l)(8) of this section. If the State agency determines that disqualification of the vendor would result in inadequate participant access, the State agency must impose a civil money penalty in lieu of disqualification, except that the State agency may not impose a civil money penalty in situations in which the vendor has been assessed a civil money penalty in lieu of disqualification by the other WIC State agency. Any civil money penalty in lieu of disqualification must be calculated in accordance with paragraph (l)(2)(x) of this section. The State agency must include documentation of its participant access determination and any supporting documentation in each vendor's file.

(3) *Prior warning*. The State agency does not have to provide the vendor with prior warning that violations were occurring before imposing any of the sanctions in paragraph (l) of this section.

(4) *Administrative reviews*. The State agency must provide administrative reviews of sanctions to the extent required by § 246.18.

(5) *Installment plans*. The State agency may use installment plans for the collection of civil money penalties and administrative fines.

(6) *Failure to pay a civil money penalty*. If a vendor does not pay, only partially pays, or fails to timely pay a civil money penalty assessed in lieu of disqualification, the State agency must disqualify the vendor for the length of the disqualification corresponding to the violation for which the civil money penalty was assessed (for a period corresponding to the most serious violation in cases where a mandatory sanction included the imposition of multiple civil money penalties as a result of a single investigation).

(7) *Actions in addition to sanctions*. Vendors may be subject to actions in addition to the sanctions in this section, such as claims pursuant to paragraph (k) of this section and the penalties set forth in § 246.23(c) in the case of deliberate fraud.

(8) *Participant access determination criteria*. The State agency must develop participant access criteria. When making participant access determinations, the State agency must consider the availability of other authorized vendors in the same area as the violative vendor and any geographic barriers to using such vendors.

(9) *Termination of agreement*. When the State agency disqualifies a vendor, the State agency must also terminate the vendor agreement.

(m) *Home food delivery systems*. Home food delivery systems are systems in which authorized supplemental foods are delivered to the participant's home. Home food delivery systems must provide for:

(1) *Procurement*. Procurement of supplemental foods in accordance with § 246.24, which may entail measures such as the purchase of food in bulk lots by the State agency and the use of discounts that are available to States.

(2) *Accountability*. The accountable delivery of authorized supplemental foods to participants. The State agency must ensure that:

(i) Home food delivery contractors are paid only after the delivery of authorized supplemental foods to participants;

(ii) A routine procedure exists to verify the correct delivery of authorized supplemental foods to participants, and, at a minimum, such verification occurs at least once a month after delivery; and

(iii) Records of delivery of supplemental foods and bills sent or payments received for such supplemental foods are retained for at least three years. Federal, State, and local authorities must have access to such records.

(n) *Direct distribution food delivery systems*. Direct distribution food delivery systems are systems in which participants, parents or caretakers of infant or child participants, or proxies pick up authorized supplemental foods from storage facilities operated by the State agency or its local agencies. Direct distribution food delivery systems must provide for:

(1) *Storage and insurance.* Adequate storage and insurance coverage that minimizes the danger of loss due to theft, infestation, fire, spoilage, or other causes;

(2) *Inventory.* Adequate inventory control of supplemental foods received, in stock, and issued;

(3) *Procurement.* Procurement of supplemental foods in accordance with § 246.24, which may entail measures such as purchase of food in bulk lots by the State agency and the use of discounts that are available to States;

(4) *Availability.* The availability of program benefits to participants and potential participants who live at great distance from storage facilities; and

(5) *Accountability.* The accountable delivery of authorized supplemental foods to participants.

(o) *Participant, parent/caretaker, proxy, vendor, and home food delivery contractor complaints.* The State agency must have procedures to document the handling of complaints by participants, parents or caretakers of infant or child participants, proxies, vendors, home food delivery contractors, and direct distribution contractors. Complaints of civil rights discrimination must be handled in accordance with § 246.8(b).

(p) *Food instrument security.* The State agency must develop standards for ensuring the security of food instruments from the time the food instruments are created to the time they are issued to participants, parents/caretakers, or proxies. For pre-printed food instruments, these standards must include maintenance of perpetual inventory records of food instruments throughout the State agency's jurisdiction; monthly physical inventory of food instruments on hand throughout the State agency's jurisdiction; reconciliation of perpetual and physical inventories of food instruments; and maintenance of all food instruments under lock and key, except for supplies needed for immediate use. For EBT and print-on-demand food instruments, the standards must provide for the accountability and security of the means to manufacture and issue such food instruments.

(q) *Food instrument disposition.* The State agency must account for the disposition of all food instruments as either issued or voided, and as either redeemed or unredeemed. Redeemed food instruments must be identified as validly issued, lost, stolen, expired, duplicate, or not matching valid enrollment and issuance records. In an EBT system, evidence of matching redeemed food instruments to valid enrollment and issuance records may be satisfied through the linking of the Primary Account Number (PAN) associated with the electronic transaction to valid enrollment and issuance records. This process must be performed within 150 days of the first valid date for participant use of the food instruments and must be conducted in accordance with the financial management requirements of § 246.13. The State agency will be subject to claims as outlined in § 246.23(a)(4) for redeemed food instruments that do not meet the conditions established in paragraph (q) of this section.

(r) *Issuance of food instruments and authorized supplemental foods.* The State agency must:

(1) *Parents/caretakers and proxies.* Establish uniform procedures that allow parents and caretakers of infant and child participants and proxies to obtain and transact food instruments or obtain authorized supplemental foods on behalf of a participant. In determining whether a particular participant or parent/caretaker should be allowed to designate a proxy or proxies, the State agency must require the local agency or clinic to consider whether adequate measures can be implemented to provide nutrition education and health care referrals to that participant or, in the case of an infant or child participant, to the participant's parent or caretaker;

(2) *Signature requirement.* Ensure that the participant, parent or caretaker of an infant or child participant, or proxy signs for receipt of food instruments or authorized supplemental foods, except as provided in paragraph (r)(4) of this section;

(3) *Instructions.* Ensure that participants, parents or caretakers of infant and child participants, and proxies receive instructions on the proper use of food instruments, or on the procedures for obtaining authorized supplemental foods when food instruments are not

used. The State agency must also ensure that participants, parents or caretakers of infant and child participants, and proxies are notified that they have the right to complain about improper vendor and home food delivery contractor practices with regard to program responsibilities;

(4) *Food instrument pick up.* Require participants, parents and caretakers of infant and child participants, and proxies to pick up food instruments in person when scheduled for nutrition education or for an appointment to determine whether participants are eligible for a second or subsequent certification period. However, in all other circumstances the State agency may provide for issuance through an alternative means such as EBT or mailing, unless FNS determines that such actions would jeopardize the integrity of program services or program accountability. If a State agency opts to mail food instruments, it must provide justification, as part of its alternative issuance system in its State Plan, as required in § 246.4(a)(21), for mailing food instruments to areas where food stamps are not mailed. State agencies that opt to mail food instruments must establish and implement a system that ensures the return of food instruments to the State or local agency if a participant no longer resides or receives mail at the address to which the food instruments were mailed; and

(5) *Maximum issuance of food instruments.* Ensure that no more than a three-month supply of food instruments or a one-month supply of authorized supplemental foods is issued at any one time to any participant, parent or caretaker of an infant or child participant, or proxy.

(s) *Payment to vendors and home food delivery contractors.* The State agency must ensure that vendors and home food delivery contractors are paid promptly. Payment must be made within 60 days after valid food instruments are submitted for redemption. Actual payment to vendors and home food delivery contractors may be made by local agencies.

(t) *Conflict of interest.* The State agency must ensure that no conflict of interest exists, as defined by applicable State laws, regulations, and policies, between the State agency and any vendor or home food delivery contractor, or between any local agency and any vendor or home food delivery contractor under its jurisdiction.

(u) *Participant violations and sanctions.* (1) *General requirements.* The State agency must establish procedures designed to control participant violations. The State agency also must establish sanctions for participant violations. Participant sanctions may include disqualification from the Program for a period of up to one year.

(2) *Mandatory disqualification.* (i) *General.* Except as provided in paragraphs (u)(2)(ii) and (u)(2)(iii) of this section, whenever the State agency assesses a claim of $100 or more, assesses a claim for dual participation, or assess a second or subsequent claim of any amount, the State agency must disqualify the participant for one year.

(ii) *Exceptions to mandatory disqualification.* The State agency may decide not to impose a mandatory disqualification if, within 30 days of receipt of the letter demanding repayment, full restitution is made or a repayment schedule is agreed on, or, in the case of a participant who is an infant, child, or under age 18, the State or local agency approves the designation of a proxy.

(iii) *Terminating a mandatory disqualification.* The State agency may permit a participant to reapply for the Program before the end of a mandatory disqualification period if full restitution is made or a repayment schedule is agreed upon or, in the case of a participant who is an infant, child, or under age 18, the State or local agency approves the designation of a proxy.

(3) *Warnings before sanctions.* The State agency may provide warnings before imposing participant sanctions.

(4) *Fair hearings.* At the time the State agency notifies a participant of a disqualification, the State agency must advise the participant of the procedures to follow to obtain a fair hearing pursuant to § 246.9.

(5) *Referral to law enforcement authorities.* When appropriate, the State agency must refer vendors, home food delivery contractors, and participants who

violate program requirements to Federal, State, or local authorities for prosecution under applicable statutes.

[65 FR 83278, Dec. 29, 2000]

§ 246.13 Financial management system.

(a) *Disclosure of expenditures.* The State agency shall maintain a financial management system which provides accurate, current and complete disclosure of the financial status of the Program. This shall include an accounting for all property and other assets and all Program funds received and expended each fiscal year.

(b) *Internal control.* The State agency shall maintain effective control over and accountability for all Program grants and funds. The State agency must have effective internal controls to ensure that expenditures financed with Program funds are authorized and properly chargeable to the Program.

(c) *Record of expenditures.* The State agency shall maintain records which adequately identify the source and use of funds expended for Program activities. These records shall contain, but are not limited to, information pertaining to authorization, receipt of funds, obligations, unobligated balances, assets, liabilities, outlays, and income.

(d) *Payment of costs.* The State shall implement procedures which ensure prompt and accurate payment of allowable costs, and ensure the allowability and allocability of costs in accordance with the cost principles and standard provisions of this part, 7 CFR part 3016, and FNS guidelines and instructions.

(e) *Identification of obligated funds.* The State agency shall implement procedures which accurately identify obligated Program funds at the time the obligations are made.

(f) *Resolution of audit findings.* The State agency shall implement procedures which ensure timely and appropriate resolution of claims and other matters resulting from audit findings and recommendations.

(g) *Use of minority- and women-owned banks.* Consistent with the national goals of expanding opportunities for minority business enterprises, State and local agencies are encouraged to use minority- and women-owned banks.

(h) *Adjustment of expenditures.* The State agency must adjust projected expenditures to account for redeemed food instruments and for other changes as appropriate.

(i) *Transfer of cash.* The State agency shall have controls to minimize the time elapsing between receipt of Federal funds from the U.S. Department of Treasury and the disbursements of these funds for Program costs. In the Letter of Credit system, the State agency shall make drawdowns from the U.S. Department of Treasury's Regional Disbursing Office as close as possible to the actual date that disbursement of funds is made. Advances made by the State agency to local agencies shall also conform to these same standards.

(j) *Local agency financial management.* The State agency shall ensure that all local agencies develop and implement a financial management system consistent with requirements prescribed by FNS and the State agency pursuant to the requirements of this section.

[50 FR 6121, Feb. 13, 1985; 50 FR 8098, Feb. 28, 1985, as amended at 65 FR 83286, Dec. 29, 2000]

§ 246.14 Program costs.

(a) *General.* (1) The two kinds of allowable costs under the Program are ''food costs'' and ''nutrition services and administration costs.'' In general, costs necessary to the fulfillment of Program objectives are to be considered allowable costs. The two types of nutrition services and administration costs are:

(i) Direct costs. Those direct costs that are allowable under 7 CFR part 3016.

(ii) Indirect costs. Those indirect costs that are allowable under 7 CFR part 3016. When computing indirect costs, food costs may not be used in the base to which the indirect cost rate is applied. In accordance with the provisions of 7 CFR part 3016, a claim for indirect costs shall be supported by an approved allocation plan for the determination of allowable indirect costs.

(2) Except as provided in paragraph (e) of this section and §§ 246.16(g) and 246.16(h) of this part, funds allocated by FNS for food purchases may not be used to pay nutrition services and administration costs. However, nutrition

services and administration funds may be used to pay for food costs.

(b) *What costs may I charge to the food grant?*

(1) The State agency may use food funds for costs of:

(i) Acquiring supplemental foods provided to State or local agencies or participants, whichever receives the supplemental food first;

(ii) Warehousing supplemental foods; and

(iii) Purchasing and renting breast pumps.

(2) For costs to be allowable, the State agency must ensure that food costs do not exceed the customary sales price charged by the vendor, home food delivery contractor, or supplier in a direct distribution food delivery system. In addition, food costs may not exceed the price limitations applicable to the vendor.

(c) *Specified allowable nutrition services and administration costs.* Allowable nutrition services and administration (NSA) costs include the following:

(1) The cost of nutrition education and breastfeeding promotion and support which meets the requirements of § 246.11. During each fiscal year, each State agency shall expend, for nutrition education activities and breastfeeding promotion and support activities, an aggregate amount that is not less than the sum of one-sixth of the amount expended by the State agency for costs of NSA and an amount equal to its proportionate share of the national minimum expenditure for breastfeeding promotion and support activities. The amount to be spent on nutrition education shall be computed by taking one-sixth of the total fiscal year NSA expenditures. The amount to be spent by a State agency on breastfeeding promotion and support activities shall be an amount that is equal to at least its proportionate share of the national minimum breastfeeding promotion expenditure as specified in paragraph (c)(1) of this section. The national minimum expenditure for breastfeeding promotion and support activities shall be equal to $21 multiplied by the number of pregnant and breastfeeding women in the Program, based on the average of the last three months for which the Department has final data. On October 1, 1996 and each October 1 thereafter, the $21 will be adjusted annually using the same inflation percentage used to determine the national administrative grant per person. If the State agency's total reported nutrition education and breastfeeding promotion and support expenditures are less than the required amount of expenditures, FNS will issue a claim for the difference. The State agency may request prior written permission from FNS to spend less than the required portions of its NSA grant for either nutrition education or for breastfeeding promotion and support activities. FNS will grant such permission if the State agency has sufficiently documented that other resources, including in-kind resources, will be used to conduct these activities at a level commensurate with the requirements of this paragraph (c)(1). However, food costs used to purchase or rent breast pumps may not be used for this purpose. Nutrition education costs are limited to activities which are distinct and separate efforts to help participants understand the importance of nutrition to health. The cost of dietary assessments for the purpose of certification, the cost of prescribing and issuing supplemental foods, the cost of screening for drug and other harmful substance use and making referrals to drug and other harmful substance abuse services, and the cost of other health-related screening shall not be applied to the expenditure requirement for nutrition education and breastfeeding promotion and support activities. The Department shall advise State agencies regarding methods for minimizing documentation of the nutrition education and breastfeeding promotion and support expenditure requirement. Costs to be applied to the one-sixth minimum amount required to be spent on nutrition education and the target share of funds required to be spent on breastfeeding promotion and support include, but need not be limited to—

(i) Salary and other costs for time spent on nutrition education and breastfeeding promotion and support consultations whether with an individual or group;

(ii) The cost of procuring and producing nutrition education and breastfeeding promotion and support materials including handouts, flip charts, filmstrips, projectors, food models or other teaching aids, and the cost of mailing nutrition education or breastfeeding promotion and support materials to participants;

(iii) The cost of training nutrition or breastfeeding promotion and support educators, including costs related to conducting training sessions and purchasing and producing training materials;

(iv) The cost of conducting evaluations of nutrition education or breastfeeding promotion and support activities, including evaluations conducted by contractors;

(v) Salary and other costs incurred in developing the nutrition education and breastfeeding promotion and support portion of the State Plan and local agency nutrition education and breastfeeding promotion and support plans; and

(vi) The cost of monitoring nutrition education and breastfeeding promotion and support activities.

(2) The cost of Program certification, nutrition assessment and procedures and equipment used to determine nutritional risk, including the following:

(i) Laboratory fees incurred for up to two hematological tests for anemia per individual per certification period. The first test shall be to determine anemia status. The second test may be performed only in follow up to a finding of anemia when deemed necessary for health monitoring as determined by the WIC State agency;

(ii) Expendable medical supplies;

(iii) Medical equipment used for taking anthropometric measurements, such as scales, measuring boards, and skin fold calipers; and for blood analysis to detect anemia, such as spectrophotometers, hematofluorometers and centrifuges; and

(iv) Salary and other costs for time spent on nutrition assessment and certification.

(3) The cost of outreach services.

(4) The cost of administering the food delivery system, including the cost of transporting food.

(5) The cost of translators for materials and interpreters.

(6) The cost of fair hearings, including the cost of an independent medical assessment of the appellant, if necessary.

(7) The cost of transporting rural participants to clinics when prior approval for using Program funds to provide transportation has been granted by the State agency and documentation that such service is considered essential to assure Program access has been filed at the State agency. Direct reimbursement to participants for transportation cost is not an allowable cost.

(8) The cost of monitoring and reviewing Program operations.

(9) The cost, exclusive of laboratory tests, of screening for drug and other harmful substance use and making referrals for counseling and treatment services.

(10) The cost of breastfeeding aids which directly support the initiation and continuation of breastfeeding.

(d) *Costs allowable with approval.* The following costs are allowable only with the prior approval of FNS:

(1) Automated information systems which are required by a State or local agency except for those used in general management and payroll, including acquisition of automatic data processing hardware or software whether by outright purchase, rental-purchase agreement or other method of acquisition. Approval shall be granted by FNS if the proposed system meets the requirements of this part, A–130, and 7 CFR part 3016. At the time the State agency decides to seek computerization, except for use in general management or payroll, it shall inform FNS and seek approval, if required.

(2) Capital expenditures over $2,500.00, such as the cost of facilities, equipment, including medical equipment, other capital assets and any repairs that materially increase the value of useful life of capital assets.

(3) Management studies performed by agencies or departments other than the State or local agency or those performed by outside consultants under contract with the State or local agency.

(e) *How and when may I use my funds recovered from vendors and participants?*

(1) The State agency may keep funds collected through the recovery of claims assessed against food vendors or participants. Recovered funds include those withheld from a vendor as a result of reviews of food instruments prior to payment. Recovered funds may be used for either food or NSA costs.

(2) These recovered funds may be used in the fiscal year:

(i) In which the initial obligation was made;

(ii) In which the claim arose;

(iii) In which the funds are collected; or

(iv) after the funds are collected.

(3) The State agency may not credit any recoveries until:

(i) In the case of a vendor claim, the vendor has had the opportunity to correct or justify the error or apparent overcharge in accordance with § 246.12(k)(3); or

(ii) In the case of a participant, any administrative hearing requested in accordance with § 246.9 has been completed.

(4) The State agency must report vendor and participant recoveries to FNS through the normal reporting process;

(5) The State agency must keep documentation supporting the amount and use of these vendor and participant recoveries.

[50 FR 6121, Feb. 13, 1987, as amended at 52 FR 21237, June 4, 1987; 53 FR 25314, July 6, 1988; 54 FR 18091, Apr. 27, 1989; 58 FR 11507, Feb. 26, 1993; 59 FR 11503, Mar. 11, 1994; 63 FR 63974, Nov. 18, 1998; 64 FR 67999, Dec. 6, 1999; 64 FR 70178, Dec. 16, 1999; 65 FR 83286, Dec. 29, 2000]

§ 246.15 Program income other than grants.

(a) *Interest earned on advances.* Interest earned on advances of Program funds at the State and local levels shall be treated in accordance with the provisions of 31 CFR Part 205, which implement the requirements of the Cash Management Improvement Act of 1990. However, State agencies will not incur an interest liability to the Federal government on rebate funds for infant formula or other foods, *provided* that all interest earned on such funds is used for program purposes.

(b) *Other Program income.* The State agency may use current Program income for costs incurred in the current fiscal year and, with the approval of FNS, for costs incurred in previous or subsequent fiscal years. With the approval of FNS, Program income may be used for costs which are in addition to the allowable costs of the Program but which nevertheless further the objectives of the law authorizing the Program. Provided that the costs supported by the income further the broad objectives of the Program, they need not be a kind that would be permissible as charges to Federal funds. Money received by the State agency as a result of civil money penalties or fines assessed against a vendor and any interest charged in the collection of these penalties and fines shall be considered as program income.

[50 FR 6121, Feb. 13, 1985, as amended at 63 FR 63974, Nov. 18, 1998; 64 FR 13324, Mar. 18, 1999]

§ 246.16 Distribution of funds.

(a) *General.* This paragraph describes the timeframes for distribution of appropriated funds by the Department to participating State agencies and the authority for the Secretary to use appropriated funds for evaluation studies and demonstration projects.

(1) Authorized appropriations to carry out the provisions of this section may be made not more than 1 year in advance of the beginning of the fiscal year in which the funds shall become available for disbursement to the State agencies. The funds shall remain available for the purposes for which appropriated until expended.

(2) In the case of appropriations legislation providing funds through the end of a fiscal year, the Secretary shall issue to State agencies an initial allocation of funds provided under such legislation not later than the expiration of the 15-day period beginning on the date of the enactment and subsequent allocation of funds shall be issued not later than the beginning of each of the second, third and fourth quarters of the fiscal year.

(3) Allocations of funds pursuant to paragraph (a)(2) of this section shall be made as follows: The initial allocation of funds to State agencies shall include not less than ⅓ of the appropriated

amounts for the fiscal year. The allocation of funds to be made not later than the beginning of the second and third quarters shall each include not less than ¼ of the appropriated amounts for the fiscal year.

(4) In the case of legislation providing funds for a period that ends prior to the end of a fiscal year, the Secretary shall issue to State agencies an initial allocation of funds not later than the expiration of the 10-day period beginning on the date of enactment. In the case of legislation providing appropriations for a period of not more than 4 months, all funds must be allocated to State agencies except those reserved by the Secretary to carry out paragraph (a)(6) of this section.

(5) In any fiscal year unused amounts from a prior fiscal year that are identified by the end of the first quarter of the fiscal year shall be recovered and reallocated not later than the beginning of the second quarter of the fiscal year. Unused amounts from a prior fiscal year that are identified after the end of the first quarter of the fiscal year shall be recovered and reallocated on a timely basis.

(6) Up to one-half of one percent of the sums appropriated for each fiscal year, not to exceed $5,000,000, shall be available to the Secretary for the purpose of evaluating Program performance, evaluating health benefits, providing technical assistance to improve State agency administrative systems, preparing reports on program participant characteristics, and administering pilot projects, including projects designed to meet the special needs of migrants, Indians, rural populations, and to carry out technical assistance and research evaluation projects for the WIC Farmers' Market Nutrition Program.

(b) *Distribution and application of grant funds to State agencies.* Notwithstanding any other provision of law, funds made available to the State agencies for the Program in any fiscal year will be managed and distributed as follows:

(1) The State agency shall ensure that all Program funds are used only for Program purposes. As a prerequisite to the receipt of funds, the State agency shall have executed an agreement with the Department and shall have received approval of its State Plan.

(2) Notwithstanding any other provision of law, all funds not made available to the Secretary in accordance with paragraph (a)(6) of this section shall be distributed to State agencies on the basis of funding formulas which allocate funds to all State agencies for food costs and NSA costs incurred during the fiscal year for which the funds had been made available to the Department. Final State agency grant levels as determined by the funding formula and State agency breastfeeding promotion and support expenditure targets will be issued in a timely manner.

(3) *When may I transfer funds from one fiscal year to another?*

(i) *Back spend authority.* The State agency may back spend into the prior fiscal year up to an amount equal to one percent of its current year food grant and one percent of its current year NSA grant. Food funds spent back may be used only for food costs incurred during the prior fiscal year. NSA funds spent back may be used for either food or NSA costs incurred during the prior fiscal year. With prior FNS approval, the State agency may also back spend food funds up to an amount equal to three percent of its current year food grant in a fiscal year for food costs incurred in the prior fiscal year. FNS will approve such a request only if FNS determines there has been a significant reduction in infant formula cost containment savings that affected the State agency's ability to maintain its participation level.

(ii) *Spend forward authority.* (A) The State agency may spend forward NSA funds up to an amount equal to one percent of their total grant (NSA plus food grants) in any fiscal year. These NSA funds spent forward may be used only for NSA costs incurred in the next fiscal year. Any food funds that the State agency converts to NSA funds pursuant to paragraph (f) of this section (based on projected or actual participation increases during a fiscal year) may not be spent forward into the next fiscal year. With prior FNS approval, the State agency may spend forward additional NSA funds up to an

amount equal to one-half of one percent of its total grant. These funds are to be used in the next fiscal year for the development of a management information system, including an electronic benefit transfer system.

(B) Funds spent forward will not affect the amount of funds allocated to the State agency for any fiscal year. Funds spent forward must be the first funds expended by the State agency for costs incurred in the next fiscal year.

(iii) *Reporting requirements.* In addition to obtaining prior FNS approval for certain spend forward/back spending options, the State agency must report to FNS the amount of all funds it already has or intends to back spend and spend forward. The spending options must be reported at closeout.

(c) *Allocation formula.* State agencies shall receive grant allocations according to the formulas described in this paragraph. To accomplish the distribution of funds under the allocation formulas, State agencies shall furnish the Department with any necessary financial and Program data.

(1) *Use of participation data in the formula.* Wherever the formula set forth in paragraphs (c)(2) and (c)(3) of this section require the use of participation data, the Department shall use participation data reported by State agencies according to § 246.25(b).

(2) *How is the amount of NSA funds determined?* The funds available for allocation to State agencies for NSA for each fiscal year must be sufficient to guarantee a national average per participant NSA grant, adjusted for inflation. The amount of the national average per participant grant for NSA for any fiscal year will be an amount equal to the national average per participant grant for NSA issued for the preceding fiscal year, adjusted for inflation. The inflation adjustment will be equal to the percentage change between two values. The first is the value of the index for State and local government purchases, as published by the Bureau of Economic Analysis of the Department of Commerce, for the 12-month period ending June 30 of the second preceding fiscal year. The second is the best estimate that is available at the start of the fiscal year of the value of such index for the 12-month period ending June 30 of the previous fiscal year. Funds for NSA costs will be allocated according to the following procedure:

(i) *Fair share target funding level determination.* For each State agency, FNS will establish, using all available NSA funds, an NSA fair share target funding level which is based on each State agency's average monthly participation level for the fiscal year for which grants are being calculated, as projected by FNS. Each State agency receives an adjustment to account for the higher per participant costs associated with small participation levels and differential salary levels relative to a national average salary level. The formula shall be adjusted to account for these cost factors in the following manner: 90 percent of available funds shall provide compensation based on rates which are proportionately higher for the first 15,000 or fewer participants, as projected by FNS, and 10 percent of available funds shall provide compensation based on differential salary levels, as determined by FNS.

(ii) *Base funding level.* To the extent funds are available and subject to the provisions of paragraph (c)(2)(iv) of this section, each State agency shall receive an amount equal to 100 percent of the final formula-calculated NSA grant of the preceding fiscal year, prior to any operational adjustment funding allocations made under paragraph (c)(2)(iv) of this section. If funds are not available to provide all State agencies with their base funding level, all State agencies shall have their base funding level reduced by a pro-rata share as required by the shortfall of available funds.

(iii) *Fair share allocation.* Any funds remaining available for allocation for NSA after the base funding level required by paragraph (c)(2)(ii) of this section has been completed and subject to the provisions of paragraph (c)(2)(iv) of this section shall be allocated to bring each State agency closer to its NSA fair share target funding level. FNS shall make fair share allocation funds available to each State agency based on the difference between the NSA fair share target funding level and the base funding level, which are determined in accordance with paragraphs

(c)(2)(i) and (c)(2)(ii) of this section, respectively. Each State agency's difference shall be divided by the sum of the differences for all State agencies, to determine the percent share of the available fair share allocation funds each State agency shall receive.

(iv) *Operational adjustment funds.* Each State agency's final NSA grant shall be reduced by up to 10 percent, and these funds shall be aggregated for all State agencies within each FNS region to form an operational adjustment fund. The Regions shall allocate these funds to State agencies according to national guidelines and shall consider the varying needs of State agencies within the region.

(v) *Operational level.* The sum of each State agency's stability, residual and operational adjustment funds shall constitute the State agency's operational level. This operational level shall remain unchanged for such year even if the number of Federally-supported participants in the program at such State agency is lower than the Federally-projected participation level. However, if the provisions of paragraph (e)(2)(ii) of this section are applicable, a State agency will have its operational level for NSA reduced in the immediately succeeding fiscal year.

(3) *Allocation of food benefit funds.* In any fiscal year, any amounts remaining from amounts appropriated for such fiscal year and amounts appropriated from the preceding fiscal year after making allocations under paragraph (a)(6) of this section and allocations for nutrition services and administration (NSA) as required by paragraph (c)(2) of this section shall be made available for food costs. Allocations to State agencies for food costs will be determined according to the following procedure:

(i) *Fair share target funding level determination.* (A) For each State agency, FNS will establish a fair share target funding level which shall be an amount of funds proportionate to the State agency's share of the national aggregate population of persons who are income eligible to participate in the Program based on the 185 percent of poverty criterion. The Department will determine each State agency's population of persons categorically eligible for WIC which are at or below 185% of poverty, through the best available, nationally uniform, indicators as determined by the Department. If the Commodity Supplemental Food Program (CSFP) also operates in the area served by the WIC State agency, the number of participants in such area participating in the CSFP but otherwise eligible to participate in the WIC Program, as determined by FNS, shall be deducted from the WIC State agency's population of income eligible persons. If the State agency chooses to exercise the option in § 246.7(c)(2) to limit program participation to U.S. citizens, nationals, and qualified aliens, FNS will reduce the State agency's population of income eligible persons to reflect the number of aliens the State agency declares no longer eligible.

(B) The Department may adjust the respective amounts of food funds that would be allocated to a State agency which is outside the 48 contiguous states and the District of Columbia when the State agency can document that economic conditions result in higher food costs for the State agency. Prior to any such adjustment, the State agency must demonstrate that it has successfully implemented voluntary cost containment measures, such as improved vendor management practices, participation in multi-state agency infant formula rebate contracts or other cost containment efforts. The Department may use the Thrifty Food Plan amounts used in the Food Stamp Program, or other available data, to formulate adjustment factors for such State agencies.

(ii) *Prior year grant level allocation.* To the extent funds are available, each State agency shall receive a prior year grant allocation equal to its final authorized grant level as of September 30 of the prior fiscal year. If funds are not available to provide all State agencies with their full prior year grant level allocation, all State agencies shall have their full prior year grant level allocation reduced by a pro-rata share as required by the shortfall of available funds.

(iii) *Inflation/fair share allocation.* (A) If funds remain available after the allocation of funds under paragraph (c)(3)(ii) of this section, the funds shall

be allocated as provided in this paragraph (c)(3)(iii). First, FNS will calculate a target inflation allowance by applying the anticipated rate of food cost inflation, as determined by the Department, to the prior year grant funding level. Second, FNS will allocate 80 percent of the available funds to all State agencies in proportionate shares to meet the target inflation allowance. Third, FNS will allocate 20 percent of the available funds to each State agency which has a prior year grant level allocation, as determined in paragraph (c)(3)(ii) of this section and adjusted for inflation as determined in this paragraph (c)(3)(iii), which is still less than its fair share target funding level. The amount of funds allocated to each State agency shall be based on the difference between its prior year grant level allocation plus target inflation funds and the fair share funding target level. Each State agency's difference shall be divided by the sum of the differences for all such State agencies, to determine the percentage share of the 20 percent of available funds each State agency shall receive. In the event a State agency declines any of its allocation under either this paragraph (c)(3)(iii) or paragraph (c)(3)(ii) of this section, the declined funds shall be reallocated in the percentages and manner described in this paragraph (c)(3)(iii). Once all State agencies receive allocations equal to their full target inflation allowance, any remaining funds shall be allocated or reallocated, in the manner described in this paragraph (c)(3)(iii), to those State agencies still under their fair share target funding level.

(B) In the event funds still remain after completing the distribution in paragraph (c)(3)(iii)(A) of this section, these funds shall be allocated to all State agencies including those with a stability allocation at, or greater than, their fair share allocation. Each State agency which can document the need for additional funds shall receive additional funds based on the difference between its prior year grant level and its fair share allocation. State agencies closest to their fair share allocation shall receive first consideration.

(iv) *Migrant services.* At least 9/10 of one percent of appropriated funds for each fiscal year shall be available first to assure service to eligible members of migrant populations. For those State agencies serving migrants, a portion of the grant shall be designated to each State agency for service to members of migrant populations based on that State agency's prior year reported migrant participation. The national aggregate amount made available first for this purpose shall equal 9/10 of one percent of all funds appropriated each year for the Program.

(v) *Special provisions for Indian State agencies.* The Department may choose to adjust the allocations and/or eligibles data among Indian State agencies, or among Indian State agencies and the geographic State agencies in which they are located when eligibles data for the State agencies' population is determined to not fairly represent the population to be served. Such allocations may be redistributed from one State agency to another, based on negotiated agreements among the affected State agencies approved by FNS.

(4) *Adjustment for new State agencies.* Whenever a State agency that had not previously administered the program enters into an agreement with the Department to do so during a fiscal year, the Department shall make any adjustments to the requirements of this section that are deemed necessary to establish an appropriate initial funding level for such State agency.

(d) *Distribution of funds to local agencies.* The State agency shall provide to local agencies all funds made available by the Department, except those funds necessary for allowable State agency NSA costs and food costs paid directly by the State agency. The State agency shall distribute the funds based on claims submitted at least quarterly by the local agency. Where the State agency advances funds to local agencies, the State agency shall ensure that each local agency has funds to cover immediate disbursement needs, and the State agency shall offset the advances made against incoming claims as they are submitted to ensure that funding levels reflect the actual expenditures reported by the local agency. Upon receipt of Program funds from the Department, the State agency shall take the following actions:

(1) Distribute funds to cover expected food cost expenditures and/or distribute caseload targets to each local agency which are used to project food cost expenditures.

(2) Allocate funds to cover expected local agency NSA costs in a manner which takes into consideration each local agency's needs. For the allocation of NSA funds, the State agency shall develop an NSA funding procedure, in cooperation with representative local agencies, which takes into account the varying needs of the local agencies. The State agency shall consider the views of local agencies, but the final decision as to the funding procedure remains with the State agency. The State agency shall take into account factors it deems appropriate to further proper, efficient and effective administration of the program, such as local agency staffing needs, density of population, number of persons served, and availability of administrative support from other sources.

(3) The State agency may provide in advance to any local agency any amount of funds for NSA deemed necessary for the successful commencement or significant expansion of program operations during a reasonable period following approval of a new local agency, a new cost containment measure, or a significant change in an existing cost containment measure.

(e) *Recovery and reallocation of funds.* (1) Funds may be recovered from a State agency at any time the Department determines, based on State agency reports of expenditures and operations, that the State agency is not expending funds at a rate commensurate with the amount of funds distributed or provided for expenditures under the Program. Recovery of funds may be either voluntary or involuntary in nature. Such funds shall be reallocated by the Department through application of appropriate formulas set forth in paragraph (c) of this section.

(2) *Performance standards.* The following standards shall govern expenditure performance.

(i) The amount allocated to any State agency for food benefits in the current fiscal year shall be reduced if such State agency's food expenditures for the preceding fiscal year do not equal or exceed 97 percent of the amount allocated to the State agency for such costs. Such reduction shall equal the difference between the State agency's preceding year food expenditures and the performance expenditure standard amount. For purposes of determining the amount of such reduction, the amount allocated to the State agency for food benefits for the preceding fiscal year shall not include food funds expended for food costs incurred under the spendback provision in paragraph (b)(3)(i) of this section or conversion authority in paragraph (g) of this section. Temporary waivers of the performance standard may be granted at the discretion of the Department.

(ii) *Reduction of NSA grant.* FNS will reduce the State agency's NSA grant for the next fiscal year if the State agency's current fiscal year per participant NSA expenditure is more than 10 percent higher than its per participant NSA grant. To avoid a reduction to its NSA grant level, the State agency may submit a ''good cause'' justification explaining why it exceeded the applicable limit on excess NSA expenditures. This justification must be submitted at the same time as the close-out report for the applicable fiscal year. Good cause may include dramatic and unforeseen increases in food costs, which would prevent a State agency from meeting its projected participation level.

(iii) *Spend forward funds.* If any State agency notifies the Department of its intent to spend forward a specific amount of funds for expenditure in the subsequent fiscal year, in accordance with paragraph (b)(3)(ii) of this section, such funds shall not be subject to recovery by the Department.

(f) *How do I qualify to convert food funds to NSA funds based on increased participation?* (1) *Requirements.* The State agency qualifies to convert food funds to NSA funds based on increased participation in any fiscal year in two ways:

(i) *Approved plan.* A State agency may submit a plan to FNS to reduce average food costs per participant and to increase participation above the FNS-projected level for the State agency. If approved, the State agency may

use funds allocated for food costs to pay NSA costs.

(ii) *Participation increases achieved.* The State agency may also convert food funds to NSA funds in any fiscal year if it achieves, through acceptable measures, increases in participation in excess of the FNS-projected level for the State agency. Acceptable measures include use of cost containment measures, curtailment of vendor abuse, and breastfeeding promotional activities. FNS will disallow the State agency's conversion of food funds to NSA funds in accordance with paragraph (h) of this section if:

(A) The State agency increases its participation level through measures that are not in the nutritional interests of participants; or

(B) It is not otherwise allowable under program regulations.

(2) *Limitation.* The State agency may convert food funds only to the extent that the conversion is necessary—

(i) To cover NSA expenditures in the current fiscal year that exceed the State agency's NSA grant for the current fiscal year and any NSA funds which the State agency has spent forward into the current fiscal year; and

(ii) To ensure that the State agency maintains the level established for the per participant NSA grant for the current fiscal year.

(3) *Maximum amount.* The maximum amount the State agency may convert equals the State agency's conversion rate times the projected or actual participation increase, as applicable. The conversion rate is the same as the per participant NSA grant and is determined by dividing the State agency's NSA grant by the FNS-projected participation level. The NSA grant used in the calculation equals the initial allocation of current year funds plus the operational adjustment funding allocated to the State agency for that fiscal year.

(g) *How do I qualify to convert food funds to NSA funds for service to remote Indian or Native villages?* (1) *Eligible State agencies.* Only State agencies located in noncontiguous States containing a significant number of remote Indian or Native villages qualify to convert food funds to NSA funds under this paragraph (g) in any fiscal year.

(2) *Limitation.* In the current fiscal year, food funds may be converted only to the extent necessary to cover expenditures incurred:

(i) In providing services (including the full cost of air transportation and other transportation) to remote Indian or Native villages; and

(ii) To provide breastfeeding support in those areas that exceed the State agency's NSA grant for the current fiscal year and any NSA funds which the State agency has spent forward into the current fiscal year.

(h) *What happens at the end of the fiscal year in which food funds are converted?* At the end of the fiscal year, the Department will determine the amount of food funds which the State agency was entitled to convert to NSA funds under paragraphs (f) and (g) of this section. In the event that the State agency has converted more than the permitted amount of funds, the Department will disallow the amount of excess conversion.

(i) *How do converted funds affect the calculation of my prior year food grant and base NSA grant?* For purposes of establishing a State agency's prior year food grant and base NSA grant under paragraphs (c)(2)(i) and (c)(3)(i) of this section, respectively, amounts converted from food funds to NSA funds under paragraphs (f) and (g) of this section and §246.14(e) during the preceding fiscal year will be treated as though no conversion had taken place.

[50 FR 6121, Feb. 13, 1985, as amended at 52 FR 21237, June 4, 1987; 52 FR 25190, July 2, 1987; 53 FR 2221, Jan. 27, 1988; 53 FR 25315, July 6, 1988; 54 FR 18091, Apr. 27, 1989, 54 FR 19486, May 5, 1989; 58 FR 51568, Oct. 4, 1993; 59 FR 11504, Mar. 11, 1994; 59 FR 50823, Oct. 6, 1994; 63 FR 63974, Nov. 18, 1998; 64 FR 56674, Oct. 21, 1999; 64 FR 61016, Nov. 9, 1999; 64 FR 68000, Dec. 6, 1999; 65 FR 51224, Aug. 23, 2000; 65 FR 53528, Sept. 5, 2000; 65 FR 77771, Dec. 13, 2000; 65 FR 80281, Dec. 21, 2000]

§246.16a Infant formula cost containment.

(a) *Who must use cost containment procedures for infant formula?* All State agencies must continuously operate a cost containment system for infant formula that is implemented in accordance with this section except:

(1) State agencies with home delivery or direct distribution food delivery systems;

(2) Indian State agencies with 1,000 or fewer participants in April of any fiscal year, which are exempt for the following fiscal year;

(3) State agencies granted a waiver under paragraph (e) of this section; and

(4) State agencies granted a postponement under paragraph (f) of this section.

(b) *What cost containment procedures must be used?* State agencies must use either a single-supplier competitive system as outlined in paragraph (c) of this section, or an alternative cost containment system as outlined in paragraph (d) of this section.

(c) *What is the single-supplier competitive system?* Under the single-supplier competitive system, a State agency solicits sealed bids from infant formula manufacturers to supply and provide a rebate for infant formulas. The State agency must conduct the procurement in a manner that maximizes full and open competition consistent with the requirements of this section.

(1) *How must a State agency structure the bid solicitation?* (i) *Single solicitation.* Under the single solicitation system, the State agency's bid solicitation must require the winning bidder to supply and provide a rebate on all infant formulas it produces that the State agency chooses to issue, except exempt infant formulas. Rebates must also be paid on any new infant formulas that are introduced after the contract is awarded. The solicitation must require bidders that do not produce a soy-based infant formula to subcontract with another manufacturer to supply a soy-based infant formula under the contract. In this case, the bid solicitation must require that the winning bidder pay the State agency a rebate on the soy-based infant formula supplied by the subcontractor that is issued by the State agency. The bid solicitation must require all rebates (including those for soy-based infant formula supplied by a subcontractor) to be calculated in accordance with paragraph (c)(5) of this section. All of these infant formulas are called contract brand infant formulas.

(ii) *Separate solicitations.* Under the separate solicitation system, a State agency issues two bid solicitations. The first solicitation must require the winning bidder to supply and provide a rebate on all milk-based infant formulas it produces that the State agency chooses to issue, except exempt infant formulas. Rebates must also be paid on any new milk-based infant formulas that are introduced by the manufacturer after the contract is awarded. These infant formulas are considered to be contract brand infant formulas. The second bid solicitation must require the winning bidder to supply and provide a rebate on all soy-based infant formulas it produces that the State agency chooses to issue. Rebates must also be paid on any new soy-based infant formulas that are introduced by the manufacturer after the contract is awarded. These infant formulas are also considered to be contract brand infant formulas.

(2) *On what types and physical forms of infant formula must bids be solicited?* The bid solicitation must require bidders to specify a rebate for each of the types and physical forms of infant formulas specified in the following chart. These rebates apply proportionally to other infant formulas produced by the winning bidder(s) (see paragraph (c)(5) of this section). For purposes of this section the infant formula on which bids are solicited is the primary contract brand infant formula.

Type of infant formula	Physical forms of infant formula	Infant formula requirements
(i) For a single solicitation, the solicitation must require bidders to specify a rebate amount for the following:		
A single milk-based infant formula (primary contract brand infant formula); bidders must specify the brand name of the milk-based infant formula for which the rebate is being specified.	Concentrated liquid, powdered, and ready-to-feed.	Meets requirements under § 246.10(c)(1)(i) and suitable for routine issuance to the majority of generally healthy, full-term infants.

Type of infant formula	Physical forms of infant formula	Infant formula requirements
(ii) For separate solicitations, the solicitation must require bidders to specify a rebate amount for the following:		
(A) A single milk-based infant formula (primary milk-based contract brand infant formula); bidders must specify the brand name of the milk-based infant formula for which the rebate is being specified.	Concentrated liquid, powdered, and ready-to-feed.	Meets requirements under §246.10(c)(1)(i) and suitable for routine issuance to the majority of generally healthy, full-term infants.
(B) A single soy-based infant formula (primary soy-based contract brand infant formula); bidders must specify the brand name of the soy-based infant formula for which the rebate is being specified.	Concentrated liquid, powdered, and ready-to-feed.	Meets requirements under §246.10(c)(1)(i).

(3) *How are contracts awarded?* A State agency must award the contract(s) to the responsive and responsible bidder(s) offering the lowest total monthly net price for infant formula or the highest monthly rebate (subject to paragraph (c)(3)(ii) of this section) for a standardized number of units of infant formula. The State agency must calculate the lowest net price using the lowest national wholesale cost per unit for a full truckload of the infant formula on the date of the bid opening.

(i) *Calculating the standardized number of units of infant formula.* The State agency must specify a standardized number of units (*e.g.*, cans) of infant formula by physical form (*e.g.*, concentrated liquid, powdered, and ready-to-feed) to be bid upon. The standardized number of units must contain the equivalent of the total number of ounces by physical form needed to give the maximum allowance to the average monthly number of infants using each form. The number of infants does not include infant participants who are exclusively breastfed and those who are issued exempt infant formula. The average monthly number of infant using each physical form must be based on at least 6 months of the most recent participation and issuance data. In order to calculate the standardized number of units of infant formula by form to be bid upon, the average monthly number of infants using each physical form is multiplied by the maximum monthly allowable number of ounces for each form (as allowed under §246.10(c)(1)(vi)), and divided by the corresponding unit size (*i.e.*, number of ounces per unit being bid). In order to compare bids, total cost is calculated by multiplying this standardized number of units by the net price for each physical form. Alternative calculations that arrive at a mathematically equivalent result are acceptable.

(ii) *Determining the lowest total monthly net price or highest rebate.* To determine the lowest total monthly net price a State agency must multiply the net price per unit by the established standardized amount of infant formula to be bid upon as calculated in paragraph (c)(3)(i) of this section. If the bid evaluation is based on highest rebate offered, the State agency must multiply the rebate offered by the established amount of infant formula to be bid upon as calculated in paragraph (c)(3)(i) of this section.

(iii) *Highest rebate limitation.* Before issuing the bid solicitation, a State agency that elects to evaluate bids by highest rebate must demonstrate to FNS' satisfaction that the weighted average retail prices for different brands of infant formula in the State vary by 5 percent or less. The weighted average retail price must take into account the prices charged for each type and physical form of infant formula by authorized vendors or, if a State agency elects, it may include stores that do not participate in the WIC program in the State. The State agency must also base calculations on the proportion of each type and physical form of infant formula the State agency issues based on the data provided to bidders pursuant to paragraph (c)(4) of this section.

(4) *What data must be provided to bidders?* The State agency must provide as part of the bid solicitation the participation and infant formula usage data and the standardized number of ounces

by physical form of infant formula to be used in evaluating bids as described in paragraph (c)(3) of this section. The State agency must notify bidders that the participation and infant formula usage data does not necessarily reflect the actual issuance and redemption that will occur under the contract.

(5) *How is the rebate to be calculated on all other contract brand infant formulas?* All bids must specify the rebates offered by each bidder for the primary contract brand infant formula(s). After the contract is awarded, the State agency must calculate the percentage discount for all other contract brand infant formulas (*i.e.*, all other infant formulas produced by the bidder other than exempt infant formulas) approved for issuance by the State agency. The State agency must use the following method in calculating the rebates:

(i) *Calculation of percentage discounts.* Rebates for contract brand infant formulas, other than the primary contract brand infant formula(s) for which bids were received, must be calculated by first determining the percentage discount for each physical form (*e.g.*, concentrated liquid, powdered, and ready-to-feed) of the primary contract brand infant formula(s). The percentage discount must be calculated by dividing the rebate for the primary contract brand infant formula by the manufacturer's lowest national wholesale price per unit, as of the date of the bid opening, for a full truckload of the primary contract infant formula. The percentage discounts must be used to determine the rebate for all other contract brand infant formulas approved for issuance by the State agency.

(ii) *Calculation of rebate amount.* The rebate for each type and form of all other contract brand infant formulas must be calculated by multiplying the percentage discount by the manufacturer's lowest national wholesale price per unit, as of the date of the bid opening, for a full truckload of the other contract brand infant formula. The percentage discount used for each of the other contract brand infant formulas depends on the physical form of the infant formula. For example, if the percentage discount provided for the primary contract brand powdered infant formula is 80 percent of its wholesale price, the same percentage discount must be applied to all other contract brand powdered infant formulas. The rebate for any types or forms of contract brand infant formulas that are introduced during the contract period must be calculated using the wholesale prices of these new contract brand infant formulas at the time the infant formulas are approved for issuance by the State agency.

(iii) *Calculation of rebates during contract term.* The rebates resulting from the application of the percentage discount must remain the same throughout the contract period except for the inflation adjustments required in paragraph (c)(5)(iv) of this section.

(iv) *Inflation provisions.* Bid solicitations must require the manufacturer to adjust for price changes subsequent to the bid opening. The inflation provision may require either a cent-for-cent increase in the rebate amounts whenever there is any change in the lowest national wholesale price for a full truckload of the particular infant formula, or may require another equally effective cost adjustment mechanism for inflation as established by the State agency in the bid solicitation.

(6) *Does a State agency have to approve the issuance of all contract brand infant formulas?* No, the State agency may choose to approve for issuance, in addition to the primary contract brand infant formula(s), none, some, or all of the winning bidder's other infant formula(s). In addition, the State agency may require medical documentation before issuing any contract brand infant formula (see § 246.10(c)(1)(i)) and must require medical documentation before issuing any WIC formula covered by § 246.10(c)(1)(iii).

(d) *What is an alternative cost containment system?* Under an alternative cost containment system, a State agency elects to implement an infant formula cost containment system of its choice. The State agency may only implement an alternative system if such a system provides a savings equal to or greater than a single-supplier competitive system. A State agency must conduct a cost comparison demonstrating such savings as described in paragraphs (d)(1) and (d)(2) of this section.

(1) *How must the State agency structure the bid solicitation?* The State agency must solicit bids simultaneously using the single-supplier competitive system described in paragraph (c) of this section and the alternative cost containment system(s) the State agency has selected. The State agency may prescribe standards of its choice for the alternative cost containment system(s), provided that conditions established for each system addressed in the bid solicitation include identical bid specifications for the contract period length and the types and forms of infant formula(s) to be included in the systems. In addition, the alternative cost containment system must cover the types and forms of infant formulas routinely issued to the majority of generally healthy, full-term infants. The State agency must use the procedure outlined in paragraph (d)(2) of this section in conducting a cost comparison to determine which system offers the greatest savings over the entire contract period specified in the bid solicitation.

(2) *How does the State agency conduct the cost comparison?* (i) *Establishing infant formula cost containment savings.* (A) *Savings under the single-supplier competitive system.* The State agency must project food cost savings in the single-supplier competitive system based on the lowest monthly net price or highest monthly rebate, as described in paragraph (c)(3) of this section.

(B) *Savings under an alternative cost containment system.* The State agency must project food cost savings under alternative cost containment systems based on the lowest monthly net cost or highest monthly rebate, as described in paragraph (c)(3) of this section. Food cost savings must be based on the standardized amount of infant formula expected to be issued as calculated for a single-supplier competitive system, prorated by the percentage of anticipated total infant formula purchases attributable to each manufacturer. The State agency must use the aggregate market share of the manufacturers submitting bids in calculating its cost savings estimate.

(C) *General.* In establishing the potential food cost savings under each system, the State agency must take into consideration in its estimate of savings any inflation factors which would affect the amount of savings over the life of the contract. Further, the State agency must not subtract any loss of payments which would occur under the terms of a current contract as a result of any State agency action to be effective after expiration of the contract.

(ii) *Nutrition services and administration cost adjustment.* The State agency must deduct from the food cost savings projected for each system under this paragraph (d) the nutrition services and administration costs associated with developing and implementing—but not operating—each cost containment system. This includes any anticipated costs for modifying its automated data processing system or components of its food delivery system(s), and of training participants, local agencies, vendors, and licensed health care professionals on the purpose and procedures of the new system. For contracts of two years or less, such costs must be proportionately distributed over at least a two year period. The State agency must not deduct any costs associated with procurement. The State agency must itemize and justify all nutrition services and administration cost adjustments as necessary and reasonable for the development and implementation of each system.

(iii) *Final cost comparison.* The State agency must calculate the food costs savings and deduct the appropriate nutrition services and administration costs for each system for which bids were received. The State agency must implement the single-supplier competitive system, unless its comparative cost analysis shows that, over the length of the contract stipulated in the bid solicitation, an alternative cost containment system offers savings at least equal to, or greater than, those under the competitive single-supplier system. If the comparative cost analysis permits selection of the alternative cost containment system and the State agency wishes to implement that system, it must first submit a State Plan amendment with the calculations and supporting documentation for this cost analysis to FNS for approval. Only after the calculations are approved by FNS may the State agency award the contract or contracts

under the alternative cost containment system.

(e) *How does a State agency request a waiver of the requirement for a single-supplier competitive system?* A State agency which, after completing the cost comparison in paragraphs (d)(2)(i) through (d)(2)(iii) of this section, is required to implement the single-supplier competitive cost containment system for infant formula procurement, may request a waiver from FNS to permit it to implement an alternative system. State agencies must support all waiver requests with documentation in the form of a State Plan amendment as required under § 246.4(a)(14)(xi) and may submit such requests only in either of the following circumstances:

(1) The difference between the single-supplier competitive system and the alternative cost containment system is less than 3 percent of the savings anticipated under the latter system and not more than $100,000 per annum.

(2) The single-supplier competitive system would be inconsistent with the efficient or effective operation of the program. Examples of justifications FNS will not accept for a waiver, include, but are not limited to: preservation of participant preference for otherwise nutritionally equivalent infant formulas; maintenance of health care professionals' prerogatives to prescribe otherwise nutritionally equivalent infant formulas for non-medical reasons; potential loss of free or otherwise discounted materials to WIC clinics and other health care facilities; potential inability of a manufacturer selected in accordance with applicable State procurement procedures to supply contractually-specified amounts of infant formula; and the possibility of interrupted infant formula supplies to retail outlets as a consequence of entering into a contract with a single manufacturer.

(f) *How does a State agency request a postponement of the requirement for a continuously operated cost containment system for infant formula?* A State agency may request a postponement of the requirement to continuously operate a cost containment system for infant formula that has been implemented in accordance with this section. However, a State agency may only request a postponement when it has taken timely and responsible action to implement a cost containment system before its current system expires but has been unable to do so due to procurement delays, disputes with FNS concerning cost containment issues during the State Plan approval process or other circumstances beyond its control. The written postponement request must be submitted to FNS before the expiration of the current system. The postponement period may be no longer than 120 days. If a postponement is granted, the State agency may extend, renew or otherwise continue an existing system during the period of the postponement.

(g) *May a State agency implement cost containment systems for other supplemental foods?* Yes, when a State agency finds that it is practicable and feasible to implement a cost containment system for any WIC food other than infant formula, the State agency must fully implement that system in accordance with the time frames established by the State agency and notification must be given to FNS by means of the State agency's State Plan.

(h) *What are the implementation time frames for Indian State agencies that lose their exemption from the infant formula cost containment requirement?* If an Indian State agency operating a retail food delivery system expands its program participation above 1000 and thereby loses its exemption from the requirements of paragraph (a) of this section regarding the method of cost containment for infant formula, then the Indian State agency must begin compliance with paragraph (a) of this section in accordance with time frames established by FNS.

(i) *What are the penalties for failure to comply with the cost containment requirements?* Any State agency that FNS determines to be out of compliance with the cost containment requirements of this part must not draw down on or obligate any Program grant funds, nor will FNS make any further Program funds available to such State agency, until it is in compliance with these requirements.

(j) *What provisions are prohibited to be included in cost containment contracts?* A

State agency may not issue bid solicitations or enter into contracts which:

(1) Prescribe conditions that would void, reduce the savings under or otherwise limit the original contract if the State agency solicited or secured bids for, or entered into, a subsequent cost containment contract to take effect after the expiration of the original contract;

(2) Does not include the registration and certification requirements in §246.10(f); or

(3) Require infant formula manufacturers to submit bids on more than one of the systems specified in the invitation for bids.

(k) *What are the requirements for the national cost containment bid solicitation and selection for infant formula?* FNS will solicit and select bids for infant formula rebates on behalf of State agencies with retail food delivery systems based on the following guidelines:

(1) FNS will solicit bids and select the winning bidder(s) for infant formula cost containment contracts only if two or more State agencies with retail food delivery systems request FNS to conduct bid solicitation and selection on their behalf. FNS will conduct the bid solicitation and selection process only and will not award or enter into any infant formula cost containment contract on behalf of the individual State agencies. Each State agency will individually award and enter into infant formula cost containment contract(s) with the winning bidder(s). State agencies must obtain the rebates directly from the infant formula manufacturer(s). FNS will conduct the bid solicitation in accordance with this paragraph (k) and the competitive bidding procurement procedures of the State agency with the highest infant participation in the bid group on whose behalf bids are being solicited. Any bid protests and contractual disputes are the responsibility of the individual State agencies to resolve.

(2) FNS will make a written offer to all State agencies to conduct bid solicitation and selection on their behalf at least once every 12 months. FNS will send State agencies a copy of the draft Request for Rebates when making the offer to State agencies. Only State agencies that provide the information required by this paragraph (k)(2) in writing, signed by a responsible State agency official, by certified mail, return receipt requested or by hand delivery with evidence of receipt within 15 days of receipt of the offer will be included in the national bid solicitation and selection process. Each interested State agency must provide:

(i) A statement that the State agency requests FNS to conduct bid solicitation and selection on its behalf;

(ii) A statement of the State agency's minimum procurement procedures applicable to competitive bidding (as defined in §246.2) for infant formula cost containment contracts and supporting documentation;

(iii) A statement of any limitation on the duration of infant formula cost containment contracts and supporting documentation;

(iv) A statement of any contractual provisions required to be included in infant formula cost containment contracts by the State agency;

(v) The most recent available average monthly number of infant participants less those infant participants who are exclusively breastfed and those who are issued exempt infant formula. The average monthly participation level must be based on at least 6 months of participation data.

(vi) Infant formula usage rates by type (e.g., milk-based or soy-based), form (e.g., concentrated, powdered, ready-to-feed), container size, and supporting documentation;

(vii) A statement of the termination date of the State agency's current infant formula cost containment contract; and

(viii) Any other related information that FNS may request.

(3) If FNS determines that the number of State agencies making the request provided for in paragraph (k)(2) of this section so warrants, FNS may, in consultation with such State agencies, divide such State agencies into more than one group and solicit bids for each group. These groups of State agencies are referred to as ''bid groups''. In determining the size and composition of the bid groups, FNS will, to the extent practicable, take into account the need to maximize the

number of potential bidders so as to increase competition among infant formula manufacturers and the similarities in the State agencies' procurement and contract requirements (as provided by the State agencies in accordance with paragraphs (k)(2)(ii), (k)(2)(iii) and (k)(2)(iv) of this section). FNS reserves the right to exclude a State agency from the national bid solicitation and selection process if FNS determines that the State agency's procurement requirements or contractual requirements are so dissimilar from those of the other State agencies in any bid group that the State agency's inclusion in the bid group could adversely affect the bids.

(4) For each bid group formed pursuant to paragraphs (k)(2) and (k)(3) of this section, FNS will use for soliciting bids the competitive bidding procurement procedures of the State agency in the group with the highest infant participation. To the extent not inconsistent with the requirements of this paragraph (k), FNS will use that set of procedures in soliciting the bids for that bid group of State agencies. FNS will notify each State agency in the bid group of the choice and provide them each a copy of the procurement procedures of the chosen State agency. Each State agency must provide FNS a written statement, signed by a responsible State agency official, by certified mail, return receipt requested or by hand delivery with evidence of receipt stating whether that State agency is legally authorized to award an infant formula cost containment contract pursuant to that set of procedures within 10 days of the receipt of the notification. If the State agency determines it is not legally authorized to award an infant formula cost containment contract pursuant to those procedures, that State agency may not continue in that round of the national bid solicitation and selection.

(5) At a minimum, in soliciting bids FNS will address the following:

(i) Unless FNS determines that doing so would not be in the best interest of the Program, bids will be solicited for either:

(A) A single contract for each State agency under which the winning bidder will be required to supply and provide rebates on all infant formulas produced by that manufacturer (except exempt infant formulas) that are issued by the State agency. If that manufacturer does not produce a soy-based infant formula, the winning bidder will be required to subcontract with another manufacturer for a soy-based infant formula and the winning bidder will be required to pay a rebate on the soy-based infant formula; or

(B) Two separate contracts for each State agency. Under the first contract, the winning bidder will supply and provide a rebate on all the milk-based infant formulas the winning bidder produces (except exempt infant formulas) that are issued by the State agency and under the second contract the winning bidder will supply and provide a rebate on all the soy-based infant formulas the winning bidder produces (except exempt infant formulas) that are issued by the State agency.

(ii) The infant formula cost containment contract(s) to be entered into by the State agencies and infant formula manufacturers must provide for a constant net price for infant formula for the full term of the infant formula cost containment contract(s).

(iii) The duration of the infant formula cost containment contracts for each bid group will be determined by FNS in consultation with the State agencies. The term will be for a period of not less than 2 years, unless the law applicable to a State agency regarding the duration of infant formula cost containment contracts is more restrictive than this paragraph (k)(5)(iii). In such cases, the term of the contract for only that State agency will be for one year, with the option provided to the State agency to extend the contract for a specified number of additional years (to be determined by FNS in consultation with the State agency). The date on which the individual State agencies' current infant formula cost containment contracts terminate may vary, so the infant formula cost containment contracts awarded by the State agencies within a bid group may begin on different dates.

(iv) FNS will not prescribe conditions that are prohibited under paragraph (j) of this section.

(v) FNS will solicit bids for rebates only from infant formula manufacturers. FNS may limit advertising to contacting in writing each infant formula manufacturer which has registered with the Secretary of Health and Human Services under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321 *et seq.*).

(6) FNS will select the winning bidder(s). The winning bidder(s) will be the responsive and responsible bidder(s) meeting the specifications and all bid terms and conditions which offers the lowest net price weighted to take into account infant formula usage rates and infant participation. In all instances the winning bidder(s) will be those which singly or in combination yield the greatest aggregate savings based on the net price weighted to take into account the infant formula usage rates. To break a tie between 2 equally low bids, FNS will select the bidder to be awarded the infant formula cost containment contract by a drawing by lot limited to the bidders which submitted those bids.

(7) Once FNS has conducted bid selection, a State agency may decline to award the infant formula cost containment contract(s) only if the State agency determines that awarding the contract(s) would not be in the best interests of its Program, taking into account whether the national bid solicitation and selection would achieve a lower aggregate savings.

(8) As soon as practicable after selecting the winning bid(s), FNS will notify the affected State agencies in writing of the bid results, including the name(s) of the winning bidder(s). If a State agency chooses to request approval to decline to award the infant formula cost containment contract(s) in accordance with paragraph (k)(7) of this section, it must notify FNS in writing, signed by a responsible State agency official, together with supporting documentation, by certified mail, return receipt requested or by hand delivery with evidence of receipt within 10 days of the State agency's receipt of this notification of bid results.

(9) If FNS approves any State agency's request to decline to award the infant formula cost containment contract(s) in accordance with paragraphs (k)(7) and (k)(8) of this section, FNS will notify the bidders of the decision. If two or more State agencies remain in the group, FNS will require the bidders to indicate in writing whether they wish to withdraw or modify their bids within 5 days of receipt of this notification. FNS will again permit State agencies to decline to award the infant formula cost containment contract(s) in accordance with paragraphs (k)(7) and (k)(8) of this section. If FNS approves these additional State agency requests to decline contract awards, FNS may conduct a resolicitation of bids in accordance with this paragraph (k).

[65 FR 51224, Aug. 23, 2000]

§ 246.17 Closeout procedures.

(a) *General.* State agencies shall submit preliminary and final closeout reports for each fiscal year. All obligations shall be liquidated before closure of a fiscal year grant. Obligations shall be reported for the fiscal year in which they occur.

(b) *Fiscal year closeout reports.* State agencies—

(1) Shall submit to FNS, within 30 days after the end of the fiscal year, preliminary financial reports which show cumulative actual expenditures and obligations for the fiscal year, or part thereof, for which Program funds were made available;

(2) Shall submit to FNS, within 150 days after the end of the fiscal year, final fiscal year closeout reports;

(3) May submit revised closeout reports. FNS will reimburse State agencies for additional costs claimed in a revised closeout report up to the State's original grant level, if costs are properly justified and if funds are available for the fiscal year pertaining to the request. FNS will not be responsible for reimbursing State agencies for unreported expenditures later than one year after the end of the fiscal year in which they were incurred.

(c) *Grant closeout procedures.* When grants to State agencies are terminated, the following procedures shall be performed in accordance with 7 CFR part 3016.

(1) FNS may disqualify a State agency's participation under the Program,

in whole or in part, or take such remedies as may be legal and appropriate, whenever FNS determines that the State agency failed to comply with the conditions prescribed in this part, in its Federal-State Agreement, or in FNS guidelines and instructions. FNS will promptly notify the State agency in writing of the disqualification together with the effective date. A State agency shall disqualify a local agency by written notice whenever it is determined by FNS or the State agency that the local agency has failed to comply with the requirements of the Program.

(2) FNS or the State agency may disqualify the State agency or restrict its participation in the Program when both parties agree that continuation under the Program would not produce beneficial results commensurate with the further expenditure of funds. The State agency or the local agency may disqualify the local agency or restrict its participation in the Program under the same conditions. The two parties shall agree upon the conditions of disqualification, including the effective date thereof, and, in the case of partial disqualification, the portion to be disqualified.

(3) Upon termination of a grant, the affected agency shall not incur new obligations for the disqualified portion after the effective date, and shall cancel as many outstanding obligations as possible. FNS will allow full credit to the State agency for the Federal share of the noncancellable obligations properly incurred by the State agency prior to disqualification, and the State agency shall do the same for the local agency.

(4) A grant closeout shall not affect the retention period for, or Federal rights of access to, grant records as specified in § 246.25. The closeout of a grant does not affect the State or local agency's responsibilities regarding property or with respect to any Program income for which the State or local agency is still accountable.

(5) A final audit is not a required part of the grant closeout and should not be needed unless there are problems with the grant that require attention. If FNS considers a final audit to be necessary, it shall so inform OIG. OIG will be resonsible for ensuring that necessary final audits are performed and for any necessary coordination with other Federal cognizant audit agencies or the State or local auditors. Audits performed in accordance with § 246.20 may serve as final audits providing such audits meet the needs of requesting agencies. If the grant is closed out without the audit, FNS reserves the right to disallow and recover an appropriate amount after fully considering any recommended disallowances resulting from an audit which may be conducted later.

§ 246.18 Administrative review of State agency actions.

(a) *Adverse actions subject to administrative reviews.* (1) *Vendor appeals.* (i) *Adverse actions subject to full administrative reviews.* Except as provided elsewhere in paragraph (a)(1) of this section, the State agency must provide full administrative reviews to vendors that appeal the following adverse actions:

(A) denial of authorization based on the vendor selection criteria for competitive price or for minimum variety and quantity of authorized supplemental foods (§ 246.12(g)(3)(i) and (g)(3)(ii)) or on a determination that the vendor is attempting to circumvent a sanction (§ 246.12(g)(4));

(B) termination of an agreement for cause;

(C) disqualification; and

(D) imposition of a fine or a civil money penalty in lieu of disqualification.

(ii) *Adverse actions subject to abbreviated administrative reviews.* The State agency must provide abbreviated administrative reviews to vendors that appeal the following adverse actions, unless the State agency decides to provide full administrative reviews for any of these types of adverse actions:

(A) denial of authorization based on the vendor selection criteria for business integrity or for a current Food Stamp Program disqualification or civil money penalty for hardship (§ 246.12(g)(3)(iii) and (g)(3)(iv));

(B) denial of authorization based on a State agency-established vendor selection criterion if the basis of the denial is a WIC vendor sanction or a Food

Stamp Program withdrawal of authorization or disqualification;

(C) denial of authorization based on the State agency's vendor limiting criteria (§ 246.12(g)(2));

(D) denial of authorization because a vendor submitted its application outside the timeframes during which applications are being accepted and processed as established by the State agency under § 246.12(g)(7);

(E) termination of an agreement because of a change in ownership or location or cessation of operations (§ 246.12(h)(3)(xvii));

(F) disqualification based on a trafficking conviction (§ 246.12(l)(1)(i));

(G) disqualification based on the imposition of a Food Stamp Program civil money penalty for hardship (§ 246.12(l)(2)(ii)); and

(H) disqualification or a civil money penalty imposed in lieu of disqualification based on a mandatory sanction imposed by another WIC State agency (§ 246.12(l)(2)(iii)).

(iii) *Actions not subject to administrative reviews.* The State agency may not provide administrative reviews pursuant to this section to vendors that appeal the following actions:

(A) the validity or appropriateness of the State agency's vendor limiting or selection criteria (§ 246.12(g)(2) and (g)(3));

(B) the validity or appropriateness of the State agency's participant access criteria and the State agency's participant access determinations;

(C) the State agency's determination whether a vendor had an effective policy and program in effect to prevent trafficking and that the ownership of the vendor was not aware of, did not approve of, and was not involved in the conduct of the violation (§ 246.12(l)(1)(i)(B));

(D) denial of authorization if the State agency's vendor authorization is subject to the procurement procedures applicable to the State agency;

(E) the expiration of a vendor's agreement;

(F) disputes regarding food instrument payments and vendor claims (other than the opportunity to justify or correct a vendor overcharge or other error, as permitted by § 246.12(k)(3); and

(G) disqualification of a vendor as a result of disqualification from the Food Stamp Program (§ 246.12(l)(1)(vii)).

(2) *Effective date of adverse actions against vendors.* The State agency must make denials of authorization and disqualifications imposed under § 246.12(l)(1)(i) effective on the date of receipt of the notice of adverse action. The State agency must make all other adverse actions effective no earlier than 15 days after the date of the notice of the adverse action and no later than 90 days after the date of the notice of adverse action or, in the case of an adverse action that is subject to administrative review, no later than the date the vendor receives the review decision.

(3) *Local agency appeals.* (i) *Adverse actions subject to full administrative reviews.* Except as provided in paragraph (a)(3)(ii) of this section, the State agency must provide full administrative reviews to local agencies that appeal the following adverse actions:

(A) denial of a local agency's application;

(B) disqualification of a local agency; and

(C) any other adverse action that affects a local agency's participation.

(ii) *Actions not subject to administrative reviews.* The State agency may not provide administrative reviews pursuant to this section to local agencies that appeal the following actions:

(A) expiration of the local agency's agreement; and

(B) denial of a local agency's application if the State agency's local agency selection is subject to the procurement procedures applicable to the State agency;

(iii) *Effective date of adverse actions against local agencies.* The State agency must make denials of local agency applications effective immediately. The State agency must make all other adverse actions effective no earlier than 60 days after the date of the notice of the adverse action and no later than 90 days after the date of the notice of adverse action or, in the case of an adverse action that is subject to administrative review, no later than the date the local agency receives the review decision.

(b) *Full administrative review procedures*. The State agency must develop procedures for a full administrative review of the adverse actions listed in paragraphs (a)(1)(i) and (a)(3) of this section. At a minimum, these procedures must provide the vendor or local agency with the following:

(1) Written notification of the adverse action, the procedures to follow to obtain a full administrative review and the cause(s) for and the effective date of the action. When a vendor is disqualified due in whole or in part to violations in § 246.12(l)(1), such notification must include the following statement: ''This disqualification from WIC may result in disqualification as a retailer in the Food Stamp Program. Such disqualification is not subject to administrative or judicial review under the Food Stamp Program.''

(2) The opportunity to appeal the adverse action within a time period specified by the State agency in its notification of adverse action.

(3) Adequate advance notice of the time and place of the administrative review to provide all parties involved sufficient time to prepare for the review.

(4) The opportunity to present its case and at least one opportunity to reschedule the administrative review date upon specific request. The State agency may set standards on how many review dates can be scheduled, provided that a minimum of two review dates is allowed.

(5) The opportunity to cross-examine adverse witnesses. When necessary to protect the identity of WIC Program investigators, such examination may be conducted behind a protective screen or other device (also referred to as an ''in camera'' examination).

(6) The opportunity to be represented by counsel.

(7) The opportunity to examine prior to the review the evidence upon which the State agency's action is based.

(8) An impartial decision-maker, whose determination is based solely on whether the State agency has correctly applied Federal and State statutes, regulations, policies, and procedures governing the Program, according to the evidence presented at the review. The State agency may appoint a reviewing official, such as a chief hearing officer or judicial officer, to review appeal decisions to ensure that they conform to approved policies and procedures.

(9) Written notification of the review decision, including the basis for the decision, within 90 days from the date of receipt of a vendor's request for an administrative review, and within 60 days from the date of receipt of a local agency's request for an administrative review. These timeframes are only administrative requirements for the State agency and do not provide a basis for overturning the State agency's adverse action if a decision is not made within the specified timeframe.

(c) *Abbreviated administrative review procedures*. Except when the State agency decides to provide full administrative reviews for the adverse actions listed in paragraph (a)(1)(ii) of this section, the State agency must develop procedures for an abbreviated administrative review of the adverse actions listed in paragraph (a)(1)(ii) of this section. At a minimum, these procedures must provide the vendor with the following:

(1) Written notification of the adverse action, the procedures to follow to obtain an abbreviated administrative review, the cause(s) for and the effective date of the action, and an opportunity to provide a written response; and

(2) A decision-maker who is someone other than the person who rendered the initial decision on the action and whose determination is based solely on whether the State agency has correctly applied Federal and State statutes, regulations, policies, and procedures governing the Program, according to the information provided to the vendor concerning the cause(s) for the adverse action and the vendor's response; and

(3) Written notification of the review decision, including the basis for the decision, within 90 days of the date of receipt of the request for an administrative review. This timeframe is only an administrative requirement for the State agency and does not provide a basis for overturning the State agency's adverse action if a decision is not made within the specified timeframe.

(d) *Continuing responsibilities.* Appealing an action does not relieve a local agency or a vendor that is permitted to continue program operations while its appeal is in process from the responsibility of continued compliance with the terms of any written agreement with the State agency.

(e) *Finality and effective date of decisions.* The State agency procedures must provide that review decisions rendered under both the full and abbreviated review procedures are the final State agency action. If the adverse action under review has not already taken effect, the State agency must make the action effective on the date of receipt of the review decision by the vendor or the local agency.

(f) *Judicial review.* If the review decision upholds the adverse action against the vendor or local agency, the State agency must inform the vendor or local agency that it may be able to pursue judicial review of the decision.

[65 FR 83266, Dec. 29, 2000]

Subpart F—Monitoring and Review

§ 246.19 Management evaluation and monitoring reviews.

(a) *Management evaluations and reviews.* (1) FNS and each State agency shall establish a management evaluation system in order to assess the accomplishment of Program objectives as provided under this part, FNS guidelines, instructions, and the Federal-State agreement with the Department. FNS will provide assistance to States in discharging this responsibility, establish standards and procedures to determine how well the objectives of this part are being accomplished, and implement sanction procedures as warranted by State Program performance.

(2) The State agency must submit a corrective action plan, including implementation timeframes, within 60 days of receipt of an FNS management evaluation report containing a finding that the State agency did not comply with program requirements. If FNS determines through a management evaluation or other means that during a fiscal year the State agency has failed, without good cause, to demonstrate efficient and effective administration of its program, or has failed to comply with its corrective action plan, or any other requirements contained in this part or the State Plan, FNS may withhold an amount up to 100 percent of the State agency's nutrition services and administration funds for that year.

(3) Sanctions imposed upon a State agency by FNS in accordance with this section (but not claims for repayment assessed against a State agency) may be appealed in accordance with the procedures established in § 246.22. Before carrying out any sanction against a State agency, the following procedures will be followed:

(i) FNS will notify the Chief State Health Officer or equivalent in writing of the deficiencies found and of FNS' intention to withhold nutrition services and administration funds unless an acceptable corrective action plan is submitted by the State agency to FNS within 60 days after mailing of notification.

(ii) The State agency shall develop a corrective action plan with a schedule according to which the State agency shall accomplish various actions to correct the deficiencies and prevent their future recurrence.

(iii) If the corrective action plan is acceptable, FNS will notify the Chief State Health Officer or equivalent in writing within 30 days of receipt of the plan. The letter approving the corrective action plan will describe the technical assistance that is available to the State agency to correct the deficiencies. The letter will also advise the Chief State Health Officer or equivalent of the sanctions to be imposed if the corrective action plan is not implemented according to the schedule set forth in the approved plan.

(iv) Upon notification from the State agency that corrective action as been taken, FNS will assess such action, and, if necessary, will perform a follow-up review to determine if the noted deficiencies have been corrected. FNS will then advise the State agency of whether the actions taken are in compliance with the corrective action plan, and whether the deficiency is resolved or further corrective action is needed.

(v) If an acceptable corrective action plan is not submitted within 60 days, or if corrective action is not completed according to the schedule established

in the corrective action plan, FNS may withhold nutrition services and administration funds through a reduction of the State agency Letter of Credit or by assessing a claim against the State agency. FNS will notify the Chief State Health Officer or equivalent of this action.

(vi) If compliance is achieved before the end of the fiscal year in which the nutrition services and administration funds are withheld, the funds withheld shall be restored to the State agency's Letter of Credit. FNS is not required to restore funds withheld if compliance is not achieved until the subsequent fiscal year. If the 60-day warning period ends in the fourth quarter of a fiscal year, FNS may elect not to withhold funds until the next fiscal year.

(b) *State agency responsibilities*. (1) The State agency shall establish an ongoing management evaluation system which includes at least the monitoring of local agency operations, the review of local agency financial and participation reports, the development of corrective action plans to resolve Program deficiencies, the monitoring of the implementation of corrective action plans, and on-site visits. The results of such actions shall be documented.

(2) Monitoring of local agencies must encompass evaluation of management, certification, nutrition education, participant services, civil rights compliance, accountability, financial management systems, and food delivery systems. If the State agency delegates the signing of vendor agreements, vendor training, or vendor monitoring to a local agency, it must evaluate the local agency's effectiveness in carrying out these responsibilities.

(3) The State agency shall conduct monitoring reviews of each local agency at least once every two years. Such reviews shall include on-site reviews of a minimum of 20 percent of the clinics in each local agency or one clinic, whichever is greater. The State agency may conduct such additional on-site reviews as the State agency determines to be necessary in the interest of the efficiency and effectiveness of the program.

(4) The State agency must promptly notify a local agency of any finding in a monitoring review that the local agency did not comply with program requirements. The State agency must require the local agency to submit a corrective action plan, including implementation timeframes, within 60 days of receipt of a State agency report of a monitoring review containing a finding of program noncompliance. The State agency must monitor local agency implementation of corrective action plans.

(5) As part of the regular monitoring reviews, FNS may require the State agency to conduct in-depth reviews of specified areas of local agency operations, to implement a standard form or protocol for such reviews, and to report the results to FNS. No more than two such areas will be stipulated by FNS for any fiscal year and the areas will not be added or changed more often than once every two fiscal years. These areas will be announced by FNS at least six months before the beginning of the fiscal year.

(6) The State agency shall require local agencies to establish management evaluation systems to review their operations and those of associated clinics or contractors.

[50 FR 6121, Feb. 13, 1985, as amended at 59 FR 11508, Mar. 11, 1994]

§ 246.20 Audits.

(a) *Federal audit responsibilities*. (1) OIG reserves the right to perform audits of State and local agencies and other organizations involved in the Program as determined by OIG to be necessary. In performing such audits, OIG will rely to the extent feasible on audit work performed by other Federal and non-Federal auditors.

(2) The State agency may take exception to particular audit findings and recommendations. The State agency shall submit a response or statement to FNS as to the action taken or a proposed corrective action plan regarding the findings. A proposed corrective action plan developed and submitted by the State agency shall include specific timeframes for its implementation and for completion of correction of deficiencies and their causes.

(3) FNS will determine whether Program deficiencies have been adequately corrected. If additional corrective action is necessary, FNS shall schedule a

follow-up review, allowing a reasonable time for such corrective action to be taken.

(b) *State audit responsibilities.* (1) State agencies shall comply with the provisions of 7 CFR part 3016 regarding independent organization-wide audits of financial operations. In conformance with 7 CFR part 3016, State agencies shall arrange for independent audits of financial operations, including compliance with appropriate provisions of Federal laws and regulations, and shall ensure that audits are made on an organization-wide basis rather than on a program basis. When organization-wide audits are done the State agency shall cause procedures to be established which ensure that FNS programs are included in the universe of Federal awards from which a sample is drawn.

(2) Such organization-wide audits shall be used to determine whether—

(i) Financial operations are conducted properly;

(ii) Financial statements are presented fairly;

(iii) State and local agencies are complying with the laws, regulations and administrative requirements that affect the expenditure of Federal funds;

(iv) State and local agencies have established internal procedures to meet the financial management objectives of federally assisted programs; and

(v) State and local agencies are providing accurate and reliable information to the Federal government. If such agencies fail to arrange for the required audits at the appropriate frequency or fail to ensure that an acceptable audit is performed at the appropriate frequency, the respective cognizant audit agencies may arrange for the performance of the required audits. If the cognizant audit agencies arrange for the required audits because of these circumstances, the State agencies shall reimburse the respective cognizant audit agencies for the pro rata cost of their organization-wide audits.

(3) Each State agency shall make all State or local agency sponsored audit reports of Program operations under its jurisdiction available for the Department's review upon request. The cost of these audits shall be considered a part of nutrition services and administration costs and may be funded from the State or local agency nutrition services and administration funds, as appropriate. For purposes of determining the Program's pro rata share of indirect costs associated with organization-wide audits, the cost of food shall not be considered in the total dollar amount of the Program.

§ 246.21 Investigations.

(a) *Authority.* The Department may make an investigation of any allegation of noncompliance with this part and FNS guidelines and instructions. The investigation may include, where appropriate, a review of pertinent practices and policies of any State or local agency, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the State or local agency has failed to comply with the requirements of this part.

(b) *Confidentiality.* No State or local agency, participant, or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege under this part because that person has made a complaint or formal allegation, or has testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The identity of every complainant shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conducting of any investigation, hearing, or judicial proceeding.

Subpart G—Miscellaneous Provisions

§ 246.22 Administrative appeal of FNS decisions.

(a) *Right to appeal.* When FNS asserts a sanction against a State agency under the provisions of § 246.19, the State agency may appeal and must be afforded a hearing or review by an FNS Administrative Review Officer. The right of appeal shall not apply to claims for repayment assessed by FNS against the State agency under § 246.23(a). A State agency shall have the option of requesting a hearing to

present its position or a review of pertinent documents and records including any additional written submission prepared by the State agency.

(1) FNS will send a written notice by Certified Mail-Return Receipt Requested to the state agency or otherwise ensure receipt of such notice by the agency when asserting a sanction against a State agency as specified in § 246.19(a).

(2) A State agency aggrieved by a sanction asserted against it may file a written request with the Director, Administrative Review Division, U.S. Department of Agriculture, Food and Nutrition Service, 3101 Park Center Drive, Alexandria, Va. 22302, for a hearing or a review of the record. Such request shall be sent by Certified Mail-Return Receipt Requested and postmarked within 30 days of the date of receipt of the sanction notice. The envelope containing the request shall be prominently marked ''REQUEST FOR REVIEW OR HEARING.'' The request shall clearly identify the specific FNS sanction(s) being appealed and shall include a photocopy of the FNS notice of sanction. If the State agency does not request a review of hearing within 30 days of receipt of the notice, the administrative decision on the sanctions will be considered final.

(b) *Acknowledgment of request.* Within 15 days of receipt by the Director of the Administrative Review Division of a request for review or hearing, the Director will provide the State agency with a written acknowledgment of the request.

(1) The acknowledgment will include the name and address of the FNS Administrative Review Officer to review the sanction;

(2) The acknowledgment will also notify the State agency that within 30 days of the receipt of the acknowledgment, the State agency shall submit three sets of the following information to the Administrative Review Officer—

(i) A clear, concise identification of the issue(s) in dispute;

(ii) The State agency's position with respect to the issue(s) in dispute;

(iii) The pertinent facts and reasons in support of the State agency's position with respect to the issue(s) in dispute and a copy of the specific sanction notice provided by FNS;

(iv) All pertinent documents, correspondence and records which the State agency believes are relevant and helpful toward a more thorough understanding of the issue(s) in dispute;

(v) The relief sought by the State agency;

(vi) The identity of the person(s) presenting the State agency's position when a hearing is involved; and

(vii) A list of prospective State agency witnesses when a hearing is involved.

(c) *FNS action.* (1) When a hearing is requested pursuant to this section, the Administrative Review Officer will, within 60 days after receipt of the State agency's information, schedule and conduct the hearing. The State agency will be advised of the time, date and location of the hearing at least 10 days in advance.

(2) When a hearing is requested, the FNS Administrative Review Officer will make a final determination within 30 days after the hearing, and the final determination will take effect upon delivery of the written notice of this final decision to the State agency.

(3) When a review is requested, the FNS Administrative Review Officer will review information presented by a State agency and will make a final determination within 30 days after receipt of that information. The final determination will take effect upon delivery of the written notice of this final decision to the State agency.

§ 246.23 Claims and penalties.

(a) *Claims against State agencies.* (1) If FNS determines through a review of the State agency's reports, program or financial analysis, monitoring, audit, or otherwise, that any Program funds provided to a State agency for supplemental foods or nutrition services and administration purposes were, through State or local agency negligence or fraud, misused or otherwise diverted from Program purposes, a formal claim will be assessed by FNS against the State agency. The State agency shall pay promptly to FNS a sum equal to the amount of the nutrition services and administration funds or the value

of supplemental foods or food instruments so misused or diverted.

(2) If FNS determines that any part of the Program funds received by a State agency; or supplemental foods, either purchased or donated commodities; or food instruments, were lost as a result of thefts, embezzlements, or unexplained causes, the State agency shall, on demand by FNS, pay to FNS a sum equal to the amount of the money or the value of the supplemental foods or food instruments so lost.

(3) The State agency shall have full opportunity to submit evidence, explanation or information concerning alleged instances of noncompliance or diversion before a final determination is made in such cases.

(4) FNS will establish a claim against any State agency that has not accounted for the disposition of all redeemed food instruments and taken appropriate follow-up action on all redeemed food instruments that cannot be matched against valid enrollment and issuance records, including cases that may involve fraud, unless the State agency has demonstrated to the satisfaction of FNS that it has:

(i) Made every reasonable effort to comply with this requirement;

(ii) Identified the reasons for its inability to account for the disposition of each redeemed food instrument; and

(iii) Provided assurances that, to the extent considered necessary by FNS, it will take appropriate actions to improve its procedures.

(b) *Interest charge on claims against State agencies.* If an agreement cannot be reached with the State agency for payment of its debts or for offset of debts on its current Letter of Credit within 30 days from the date of the first demand letter from FNS, FNS will assess an interest (late) charge against the State agency. Interest accrual shall begin on the 31st day after the date of the first demand letter, bill or claim, and shall be computed monthly on any unpaid balance as long as the debt exists. From a source other than the Program, the State agency shall provide the funds necessary to maintain Program operations at the grant level authorized by FNS.

(c) *Claims.* (1) *Claims against participants.* (i) *Procedures.* If the State agency determines that program benefits have been obtained or disposed of improperly as the result of a participant violation, the State agency must establish a claim against the participant for the full value of such benefits. For all claims, the State agency must issue a letter demanding repayment. If full restitution is not made or a repayment schedule is not agreed on within 30 days of receipt of the letter, the State agency must take additional collection actions until restitution is made or a repayment schedule is agreed on, unless the State agency determines that further collection actions would not be cost-effective. The State agency must establish standards, based on a cost benefit analysis, for determining when collection actions are no longer cost-effective. At the time the State agency issues the demand letter, the State agency must advise the participant of the procedures to follow to obtain a fair hearing pursuant to § 246.9 and that failure to pay the claim may result in disqualification. In addition to establishing a claim, the State agency must determine whether disqualification is required by § 246.12(u)(2).

(ii) *Types of restitution.* In lieu of financial restitution, the State agency may allow participants or parents or caretakers of infant or child participants for whom financial restitution would cause undue hardship to provide restitution by performing in-kind services determined by the State agency. Restitution may not include offsetting the claim against future program benefits, even if agreed to by the participant or the parent or caretaker of an infant or child participant.

(iii) *Disposition of claims.* The State agency must document the disposition of all participant claims.

(2) *Claims against the State agency.* FNS will assert a claim against the State agency for losses resulting from program funds improperly spent as a result of dual participation, if FNS determines that the State agency has not complied with the requirements in § 246.7(l)(1).

(3) *Delegation of claims responsibility.* The State agency may delegate to its

local agencies the responsibility for collecting participant claims.

(d) *Penalties.* In accordance with section 12(g) of the National School Lunch Act, whoever embezzles, willfully misapplies, steals or obtains by fraud any funds, assets or property provided under section 17 of the Child Nutrition Act of 1966, as amended, whether received directly or indirectly from USDA, or whoever receives, conceals or retains such funds, assets or property for his or her own interest, knowing such funds, assets or property have been embezzled, willfully misapplied, stolen, or obtained by fraud shall, if such funds, assets or property are of the value of $100 or more, be fined not more than $10,000 or imprisoned not more than five years, or both, or if such funds, assets or property are of a value of less than $100, shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

[50 FR 6121, Feb. 13, 1985, as amended at 52 FR 21238, June 4, 1987; 65 FR 83288, Dec. 29, 2000]

§ 246.24 Procurement and property management.

(a) *Requirements.* State and local agencies shall ensure that subgrantees comply with the requirements of 7 CFR part 3016, the nonprocurement debarment/suspension requirements of 7 CFR part 3017, and if applicable, the lobbying restrictions as required in 7 CFR part 3018 concerning the procurement and allowability of food in bulk lots, supplies, equipment and other services with Program funds. These requirements are adopted to ensure that such materials and services are obtained for the Program in an effective manner and in compliance with the provisions of applicable law and executive orders.

(b) *Contractual responsibilities.* The standards contained in A–130 and 7 CFR part 3016 do not relieve the State or local agency of the responsibilities arising under its contracts. The State agency is the responsible authority, without recourse to FNS, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in connection with the Program. This includes, but is not limited to, disputes, claims, protests of award, source evaluation, or other matters of a contractual nature. Matters concerning violation of law are to be referred to such local, State or Federal authority as may have proper jurisdiction.

(c) *State regulations.* The State or local agency may use its own procurement regulations which reflect applicable State and local regulations, provided that procurements made with Program funds adhere to the standards set forth in A–130 and 7 CFR part 3016.

(d) *Property acquired with Program funds.* State and local agencies shall observe the standards prescribed in 7 CFR part 3016 in their utilization and disposition of real property and equipment, including automated data processing equipment, acquired in whole or in part with Program funds.

[50 FR 6121, Feb. 13, 1985, as amended at 59 FR 11508, Mar. 11, 1994]

§ 246.25 Records and reports.

(a) *Recordkeeping requirements.* Each State and local agency shall maintain full and complete records concerning Program operations. Such records shall comply with 7 CFR part 3016 and the following requirements:

(1) Records shall include, but not be limited to, information pertaining to financial operations, food delivery systems, food instrument issuance and redemption, equipment purchases and inventory, certification, nutrition education, civil rights and fair hearing procedures.

(2) All records shall be retained for a minimum of three years following the date of submission of the final expenditure report for the period to which the report pertains. If any litigation, claim, negotiation, audit or other action involving the records has been started before the end of the three-year period, the records shall be kept until all issues are resolved, or until the end of the regular three-year period, whichever is later. If FNS deems any of the Program records to be of historical interest, it may require the State or local agency to forward such records to FNS whenever either agency is disposing of them.

(3) Records for nonexpendable property acquired in whole or in part with Program funds shall be retained for three years after its final disposition.

(4) All records, except medical case records of individual participants (unless they are the only source of certification data), shall be available during normal business hours for representatives of the Department of the Comptroller General of the United States to inspect, audit, and copy. Any reports resulting from such examinations shall not divulge names of individuals.

(b) *Financial and participation reports*—(1) *Monthly reports.* State agencies shall submit financial and program performance data on a monthly basis as specified by FNS. Such information may include, but shall not be limited to, actual and projected participation, the number of persons on waiting lists, and itemized nutrition services and administration funds expenditures. State agencies shall require local agencies to report such financial and participation information as is necessary for the efficient management of food and nutrition services and administration funds. When considered necessary and feasible by FNS, State agencies may be required to:

(i) Show in the ''Remarks'' section of the Financial and Participation Report the amount of cash allowances exceeding three days need being held by their local agencies or contractors; and

(ii) Provide short narrative explanations of actions taken by the State agency to reduce such excess balances.

(2) *Quarterly reports.* Quarterly, on dates specified by FNS, State agencies shall report the number of persons participating in the Program by category (i.e., pregnant, breastfeeding, and postpartum women, infants and children) within each priority level as established in § 246.7(e)(4).

(3) *Program Participant Characteristic reports.* State and local agencies shall provide such information as may be required by FNS to prepare reports on participant characteristics which includes, at a minimum, information on breastfeeding incidence and duration, income and nutritional risk characteristics of participants, and participation in the Program by members of families of migrant farmworkers.

(c) *Civil rights.* The State agency shall ensure that each local agency participating under the Program submits a report of racial and ethnic participation data to the State agency, at a frequency prescribed by FNS.

(d) *Source documentation.* To be acceptable for audit purposes, all financial and Program performance reports shall be traceable to source documentation.

(e) *Certification of reports.* Financial and Program reports shall be certified as to their completeness and accuracy by the person given that responsibility by the State agency.

(f) *Use of reports.* FNS will use State agency reports to measure progress in achieving objectives set forth in the State Plan, and this part, or other State agency performance plans. If it is determined, through review of State agency reports, Program or financial analysis, or an audit, that a State agency is not meeting the objectives set forth in its State Plan, FNS may request additional information including, but not limited to, reasons for failure to achieve its objectives.

(g) *Extension of reporting deadline.* FNS may extend the due date for any Financial and Participation Report upon receiving a justified request from the State agency. The State agency should not wait until the due date if an extension is to be requested, but should submit the request as soon as the need is known. Failure by a State agency to submit a report by its due date may result in appropriate enforcement actions by FNS in accordance with § 246.19(a)(2), including withholding of further grant payments, suspension or termination of the grant.

[50 FR 6121, Feb. 13, 1985, as amended at 52 FR 21238, June 4, 1987; 53 FR 15653, May 3, 1988; 59 FR 11508, Mar. 11, 1994; 65 FR 53528, Sept. 5, 2000]

§ 246.26 Other provisions.

(a) *No aid reduction.* The value of benefits or assistance available under the Program shall not be considered as income or resources of participants or their families for any purpose under Federal, State, or local laws, including, but not limited to, laws relating to taxation, welfare and public assistance programs.

(b) *Statistical information.* FNS reserves the right to use information obtained under the Program in a summary, statistical or other form which

does not identify particular individuals.

(c) *Medical information.* FNS may require the State or local agencies to supply medical data and other information collected under the Program in a form that does not identify particular individuals, to enable the Secretary or the State agencies to evaluate the effect of food intervention upon low-income individuals determined to be at nutritional risk.

(d) *Confidentiality of applicant and participant information.* The State agency shall restrict the use or disclosure of information obtained from program applicants and participants to:

(1) Persons directly connected with the administration or enforcement of the program, including persons investigating or prosecuting violations in the WIC Program under Federal, State or local authority;

(2) Representatives of public organizations designated by the chief State health officer (or, in the case of Indian State agencies, the governing authority) which administer health or welfare programs that serve persons categorically eligible for the WIC Program. The State agency shall execute a written agreement with each such designated organization:

(i) Specifying that the receiving organization may employ WIC Program information only for the purpose of establishing the eligibility of WIC applicants and participants for health or welfare programs which it administers and conducting outreach to WIC applicants and participants for such programs, and

(ii) Containing the receiving organization's assurance that it will not, in turn, disclose the information to a third party; and

(3) The Comptroller General of the United States for audit and examination authorized by law.

(e) *Confidentiality of vendor information.* Confidential vendor information is any information about a vendor (whether it is obtained from the vendor or another source) that individually identifies the vendor, except for vendor's name, address and authorization status. Except as otherwise permitted by this section, the State agency must restrict the use or disclosure of confidential vendor information to:

(1) Persons directly connected with the administration or enforcement of the WIC Program or the Food Stamp Program who the State agency determines have a need to know the information for purposes of these programs. These persons may include personnel from its local agencies and other WIC State and local agencies and persons investigating or prosecuting WIC or Food Stamp Program violations under Federal, State, or local law;

(2) Persons directly connected with the administration or enforcement of any Federal or State law. Prior to releasing the information to one of these parties (other than a Federal agency), the State agency must enter into a written agreement with the requesting party specifying that such information may not be used or redisclosed except for purposes directly connected to the administration or enforcement of a Federal, or State law; and

(3) A vendor that is subject to an adverse action, including a claim, to the extent that the confidential information concerns the vendor subject to the adverse action and is related to the adverse action.

(f) *Confidentiality of Food Stamp Program retailer information.* Except as otherwise provided in this section, the State agency must restrict the use or disclosure of information about Food Stamp Program retailers obtained from the Food Stamp Program, including information provided pursuant to Section 9(c) of the Food Stamp Act of 1977 (7 U.S.C. 2018(c)) and § 278.1(q) of this chapter, to persons directly connected with the administration or enforcement of the WIC Program.

(g) *USDA and the Comptroller General.* The State agency must provide the Department and the Comptroller General of the United States access to all WIC Program records, including confidential vendor information, pursuant to § 246.25(a)(4).

[50 FR 6121, Feb. 13, 1985, as amended at 53 FR 35301, Sept. 13, 1988; 65 FR 83288, Dec. 29, 2000]

§ 246.27 Program information.

Any person who wishes information, assistance, records or other public material shall request such information from the State agency, or from the FNS Regional Office serving the appropriate State as listed below:

(a) Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, Vermont: U.S. Department of Agriculture, FNS, Northeast Region, 10 Causeway Street, room 501, Boston, Massachusetts 02222–1066.

(b) Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Puerto Rico, Virginia, Virgin Islands, West Virginia: U.S. Department of Agriculture, FNS, Mid-Atlantic Region, Mercer Corporate Park, 300 Corporate Boulevard, Robbinsville, New Jersey 08691–1598.

(c) Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee: U.S. Department of Agriculture, FNS, Southeast Region, 77 Forsyth Street, SW., suite 112, Atlanta, Georgia 30303.

(d) Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin: U.S. Department of Agriculture, FNS, Midwest Region, 77 West Jackson Boulevard—20th Floor, Chicago, Illinois 60604–3507.

(e) Arkansas, Louisiana, New Mexico, Oklahoma, Texas: U.S. Department of Agriculture, FNS, Southwest Region, 1100 Commerce Street, room 5–C–30, Dallas, Texas 75242.

(f) Colorado, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah, Wyoming: U.S. Department of Agriculture, FNS, Mountain Plains Region, 1244 Speer Boulevard, suite 903, Denver, Colorado 80204.

(g) Alaska, American Samoa, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon, Trust Territory of the Pacific Islands, the Northern Mariana Islands, Washington: U.S. Department of Agriculture, FNS, Western Region, 550 Kearny Street, room 400, San Francisco, California 94108.

[50 FR 6121, Feb. 13, 1985; 50 FR 8098, Feb. 28, 1985, as amended at 59 FR 11508, Mar. 11, 1994]

§ 246.28 OMB control numbers.

The following control numbers have been assigned to the information collection requirements in 7 CFR part 246 by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96–511.

7 CFR part 246 section where requirements are described	Currrent OMB control no.
.4(a) (8), (9), (11)	0584–0386
.5	0584–0043
.6	0584–0043
.7(a)	0584–0386
.7(e), (h), (j)	0584–0043
.7(n)	0584–0386
.7(i)	0584–A536
.10	0584–A536
.11(a)(3)	0584–0386
.11(d)	0584–0043
.12(f), (i), (i)(3), (j)	0584–0043
.14(d)(1)	0584–0043
.16(c)	0584–0043
.17(c)(1)	0584–0043
.19	0584–0043
.20(a)	0584–0043
.25(a), (b)	0584–0043, 0584–0347

[50 FR 6121, Feb. 13, 1985, as amended at 53 FR 15653, May 3, 1988; 54 FR 51295, Dec. 14, 1989; 58 FR 11507, Feb. 26, 1993]

PART 247—COMMODITY SUPPLEMENTAL FOOD PROGRAM

Sec.
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247.10 Caseload assignment and administrative funding.
247.11 Administrative costs.
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247.13 Records and reports.
247.14 Procurement and property management standards.
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247.18 Closeout procedures.
247.19 Nondiscrimination.
247.20 Fair hearing procedures.
247.21 Management evaluation and reviews.
247.22 Administrative appeal of State agency decisions.
247.23 Miscellaneous provisions.

AUTHORITY: Sec. 5, Pub.L. 93–86, 87 Stat. 249, as added by sec. 1304(b)(2), Pub.L. 95–113, 91 Stat. 980 (7 U.S.C. 612c note); sec. 1335, Pub.L. 97–98, 95 Stat. 1293 (7 U.S.C. 612c note);

sec. 209, Pub.L. 98–8, 97 Stat. 35 (7 U.S.C. 612c note); sec. 2(8), Pub.L. 98–92, 97 Stat. 611 (7 U.S.C. 612c note); sec. 1562, Pub.L. 99–198, 99 Stat. 1590 (7 U.S.C. 612c note); sec. 101(k), Pub.L. 100–202; sec. 1771(a), Pub.L 101–624, 101 Stat. 3806 (7 U.S.C. 612c note); sec. 402(a), Pub.L. 104–127, 110 Stat. 1028 (7 U.S.C. 612c note).

SOURCE: 46 FR 6341, Jan. 21, 1981, unless otherwise noted.

§ 247.1 General purpose and scope.

This part specifies the policies and prescribes the regulations for the Commodity Supplemental Food Program (CSFP) under which women, infants and children in low-income groups, vulnerable to malnutrition, may obtain supplemental nutritious foods donated by the U.S. Department of Agriculture. The purpose of the Program is to provide supplemental foods and nutrition education to eligible persons through State or local agencies.

§ 247.2 Definitions.

For the purpose of this part and of all contracts, guidelines, instructions, forms, and other related documents, the term:

Administrative costs means those direct and indirect costs, identified under FMC 74–4, which State and local agencies determine to be necessary to support Program operations. Such costs are further addressed in § 247.11.

A–90 means Office of Management and Budget Circular A–90 which provides guidance for the coordinated development and operation of information systems.

A–102 means Office of Management and Budget Circular A–102 which sets forth uniform administrative requirements for grants-in-aid to State and local governments and federally recognized Indian tribal governments.

A–110 means Office of Management and Budget Circular A–110 which sets forth uniform administrative requirements for grants to, and other agreements with, institutions of higher education, hospitals, and other quasi-public and private non-profit organizations.

Breastfeeding women means women up to one year postpartum who are breastfeeding their infants.

Caseload means the monthly average number of persons a State agency is authorized by FNS to serve over a specified period of time.

Caseload cycle means the period beginning with the later of (1) each December 1 or (2) a date not to exceed 30 days after enactment of appropriations legislation for the full fiscal year, and ending each November 30.

Categorical ineligibility means persons who do not meet the definition of pregnant women, breastfeeding women, postpartum women, infants, children, or elderly persons.

Certification means the use of criteria and procedures to assess and document each applicant's eligibility for the Program.

Children means persons who are at least one year of age but have not reached their sixth birthday.

Department means the U.S. Department of Agriculture.

Distributing agency means an agency which has entered into an agreement with a State agency and with the Department for the distribution of commodities under 7 CFR part 250, subchapter B—Food Distribution Regulations.

Dual participation means simultaneous participation by an individual in the CSFP in more than one local agency or clinic, or simultaneous participation in the CSFP and in the Special Supplemental Nutrition Program for Women, Infants and Children (WIC) 7 CFR part 246.

Elderly persons means persons 60 years of age or older.

Fiscal year means the Federal fiscal year covering the period of 12 calendar months beginning October 1 of any calendar year and ending September 30 of the following year.

FMC 74–4 means Federal Management Circular 74–4, which sets forth principles for determining costs applicable to grants and contracts with State and local governments.

FNS means the Food and Nutrition Service of the U.S. Department of Agriculture.

Homebound elderly persons means persons who are, in the judgment of the local agency, unable to obtain monthly food packages without assistance provided by or through the local agency.

Infants means persons under one year of age.

Local agency means a public or private nonprofit agency which enters into an agreement with the State agency to administer the Program at the local level. A local agency determines the eligibility of applicants, distributes supplemental foods and provides nutrition education to low-income persons, either directly or through another agency with which it has entered into a written agreement in accordance with § 247.6. In addition, existing local agencies are required to maintain the health-ties at the same level that were effective prior to March 3, 1978. All other local agencies are encouraged to develop health services linkages and, at a minimum, are required to advise participants of the importance of health care and where low-income persons can obtain such services. The term local agency includes an IHS service unit, an Indian tribe, band or group recognized by the Department of the Interior, or an intertribal council or group that is an authorized representative of Indian tribes, bands or groups recognized by the Department of the Interior.

Nonprofit agency means a private agency which is exempt from income tax under the Internal Revenue Code of 1954, as amended.

Participants means pregnant women, breastfeeding women, postpartum women, infants, children and elderly persons who are receiving supplemental foods under the Program.

Participation means the number of persons who have received supplemental foods through the Program in the reporting period.

Postpartum women means women up to 12 months after termination of pregnancy.

Pregnant women means women determined to have one or more embryos or fetuses in utero.

Program means the Commodity Supplemental Food Program (CSFP) of the Food and Nutrition Service of the U.S. Department of Agriculture.

Secretary means the Secretary of the U.S. Department of Agriculture.

SFPD means the Supplemental Food Programs Division of the Food and Nutrition Service of the U.S. Department of Agriculture.

State means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands and the Northern Mariana Islands.

State agency means the agency of a State designated by the State to administer the Program; or an Indian tribe, band or group recognized by the Department of the Interior; or an Intertribal council or group recognized by the Department of the Interior and which has an ongoing relationship with Indian tribes, bands or groups for other purposes and has contracted with them to administer the Program; or the appropriate area office of the Indian Health Service of the Department of Health and Human Services.

State Agency Plan of Program Operation and Administration (State Plan) means the document which, as required by § 247.5 describes the manner in which the State agency intends to implement and operate all aspects of Program administration within its jurisdiction.

Supplemental foods means foods donated by the Department for use by eligible persons in low-income groups who are vulnerable to malnutrition.

WIC Program means the Special Supplemental Nutrition Program for Women, Infants and Children (7 CFR part 246).

[46 FR 6341, Jan. 21, 1981, as amended at 48 FR 29124, June 24, 1983; 51 FR 32900, Sept. 17, 1986; 53 FR 4838, Feb. 18, 1988]

§ 247.3 Administration.

(a) *Delegation of Authority to FNS.* Within the Department, FNS shall act on behalf of the Department in the administration of the Program. Within FNS, SFPD and the Regional Offices are responsible for Program administration. FNS will provide assistance to State and local agencies and evaluate all levels of Program operations to assure that the goals of the Program are achieved in the most effective and efficient manner possible.

(b) *Delegation of authority to State agency.* The State agency is responsible for all operations under the Program within its jurisdiction and shall administer the Program in accordance with the requirements of this part, FMC 74–4, A–90, A–95, A–102, A–110, and 7 CFR

part 250 subchapter B where applicable. The State agency shall provide guidance to local agencies on all aspects of Program operations. If distribution of supplemental foods or other Program operations at the State level are performed by an agency of the State other than the State agency, the State agency shall enter into a written agreement with the other agency. The agreement shall outline the responsibilities of each agency under the Program and shall be included in the State Plan. In addition, when a State agency enters into an agreement with a distributing agency, the distributing agency still must enter into a separate agreement with the Department as required by 7 CFR part 250 subchapter B, Food Distribution.

(c) *Agreement and State plan*. Each State agency desiring to administer the Program shall annually submit a State Plan and enter into a written agreement with the Department for the administration of the Program in the jurisdiction of the State agency in accordance with the provisions of this part.

(d) *Delegation of authority to local agency*. The local agency shall provide Program benefits to participants in the most effective and efficient manner, and shall comply with this part and the State Plan.

(Approved by the Office of Management and Budget under control number 0584–0063)

[46 FR 6341, Jan. 21, 1981, as amended at 47 FR 746, Jan. 7, 1982]

§ 247.4 Donation of supplemental foods.

The Department shall donate supplemental foods for use in the Program in accordance with the terms and conditions of this part and with the terms and conditions applicable to distributing agencies under 7 CFR part 250 subchapter B, Food Distribution Regulations, as long as these provisions are not inconsistent with this part. The State agency is strictly liable to FNS for losses of supplemental foods donated by the Department and shall safeguard items from theft, spoilage, other damage or destruction or other loss. If supplemental foods donated by the Department are lost through any cause, prior to issuance to the participant, the State agency shall provide replacement in kind or submit payment to FNS in accordance with § 250.6(m) under 7 CFR part 250 subchapter B, Food Distribution regulations.

§ 247.5 State agency plan of program operation and administration.

(a) *Requirements*. State applications to continue or initiate program operations and requests for additional caseload to expand service to women, infants, children, and elderly persons shall be made through State Plan submissions. By August 15 of each year, the State agency shall submit to FNS for approval a State Plan for the following fiscal year. State agencies whose Plans are approved by the beginning of the fiscal year shall be eligible to commence program operations or receive caseload increases at the beginning of the first caseload cycle to commence after that date. Plans or Plan amendments to initiate or expand operations which are approved after this date may be considered for caseload assignment if additional resources become available during that caseload cycle. The State agency may submit the State Plan in the format provided by FNS guidance. Alternatively, the State agency may submit the Plan in combination with other federally required planning documents or develop its own format, provided that the information required below is included. FNS requests advance notification that a State agency intends to use an alternative format. The State Plan and all amendments shall be signed by the State-designated official responsible for ensuring that the program is operated in accordance with the State Plan. FNS shall provide written approval or denial of a completed State Plan or amendment within 30 days of receipt. Within 15 days after FNS receives an incomplete submission, FNS shall notify the State agency that additional information is needed to complete the Plan. Any disapproval shall be accompanied by a statement of the reasons for the disapproval. Approval of the Plan by FNS is a prerequisite to the assignment of caseload and payment of funds for administration to the State agency. In approving the State Plan or Plan amendment to initiate or

expand program operations, FNS shall specify the number of caseload slots it believes the State agency can use, and which the State agency has the administrative capacity to manage. This determination shall be based on the content of the Plan or amendment, demographic data, past performance of the State agency, and other information which FNS considers relevant. Portions of the State Plan which do not change from year to year need not be resubmitted. However, the State agency shall provide the title of each section that remains unchanged, as well as the year of the last Plan in which the section was submitted. The State Plan shall provide the following:

(1) The names and addresses of each local agency (i) which have an agreement with the State agency for Program administration; and (ii) the name and address of each certification, food distribution and storage site under the jurisdiction of the local agency.

(2) The specific income criteria and nutritional risk criteria (if used) to be used in certifying persons as being in need of supplemental foods and the period of time covered by certifications in each local agency.

(3) A description of any plans for requesting program expansion or major redistribution of caseloads within the State during the fiscal year.

(4) A description of any plans for conducting outreach to ensure that all women, infants, and children, and elderly persons are aware of program benefits.

(5) The plan for nutrition education services for the fiscal year. The nutrition education portion of the State Plan shall include an evaluation component which includes a systematic procedure for participants' input.

(6) A detailed description of the manner in which foods are distributed to each local agency and to participants by the local agency.

(7) A description of the manner in which the State agency plans to monitor each local agency.

(8) A description of plans to involve local agencies, participants and other interested parties in the development of the State Plan for the next fiscal year.

(9) A description of how the financial management system will provide an accurate, current and complete disclosure of the financial status of the State's Program including an accurate accounting of all administrative funds received and expended.

(10) A plan for the detection of dual participation within the jurisdiction of the State agency. In States where the CSFP and either an Indian State agency for CSFP or a WIC Program State agency operate in the same area, a copy of the written agreement between the State agencies for the detection and prevention of dual participation must be submitted.

(11) Procedures developed in accordance with §250.6(u) and provided to local agencies for reporting, processing and resolving complaints about supplemental foods.

(12) A description of the audit procedures, including: (i) A description of the scope and frequency of audits of the State agency and local agencies and a delineation of the procedures used that assure audit examinations of the CSF Program at reasonable frequency. Audit agency guidelines for selecting a sample of grant programs for audits should be addressed; (ii) a description of the audit organization in sufficient detail to demonstrate the independence of the audit organization; and (iii) the number of local agencies in which the CSF Program was included in the audit in the last four full quarters, and the number of local agency audits planned for the coming fiscal year which include examinations of the CSF Program.

(13) A description of the procedures used to comply with the nondiscrimination requirements of title VI of the Civil Rights Act of 1964, the FNS Civil Rights Instruction 113–2 and with 7 CFR part 15, including racial and ethnic participation data collection, public notification procedures and the annual civil rights compliance review process.

(14) A description of the fair hearing procedures for participants.

(15) If a State agency wishes to initiate service to the elderly, or request expansion caseload to serve the elderly, a description of plans for providing program benefits to elderly persons within

the State during the caseload cycle. Such description shall include—

(i) An identification of the elderly population to be served, including documentation of the extent of need in the proposed service area; and

(ii) A description of the means by which the State agency will meet the needs of the homebound elderly.

(b) *Submission of local agency information*. Local agencies under the State agency's jurisdiction may be required to submit information, similar to the preceding requirements, to the State agency for its use in assuring compliance with this section.

(c) *Amendments*. Except as provided in paragraph (a) of this section, the State agency may amend the State Plan at any time. The State agency shall submit the amendments to FNS for approval.

(d) *Retention of copy*. A copy of the approved State Plan shall be kept on file at the State agency for public inspection.

(Approved by the Office of Management and Budget under control number 0584–0063)

(44 U.S.C. 3506; E.O. 12372 (July 14, 1982, 47 FR 30959); secs. 401(b), Intergovernmental Cooperation Act of 1968 (42 U.S.C. 4231(b)))

[46 FR 6341, Jan. 21, 1981, as amended at 47 FR 746, Jan. 7, 1982; 48 FR 29123, June 24, 1983; 51 FR 32900, Sept. 17, 1986; 53 FR 4838, Feb. 18, 1988; 62 FR 55145, Oct. 23, 1997]

§ 247.6 Selection of local agencies.

(a) *Application of local agencies*. The State agency shall require each agency which desires approval as a local agency to submit a written application which contains sufficient information to enable the State agency to make a determination as to the eligibility of that agency. If the State agency and the local agency are the same, this requirement does not apply. The State agency shall notify the agency of the approval or disapproval of its application within 30 days of receipt of the agency's application. If the application is denied the State agency shall advise the agency of the reasons for the denial in writing and the right to appeal as set forth in § 247.22 of this part. When an agency submits an application and there are no funds to serve the area, the applicant agency shall be notified within 30 days of receipt of the application that there are currently no funds available for Program initiation or expansion. The State agency shall return the application and maintain a record of the name and address of the applicant agency. The potential agency whose application was returned shall be notified by the State agency when funds become available. The State agency may approve the application of a local agency in an area already served by the Program or a WIC program only if a new local agency is necessary to serve the full extent of need in that area or population. If the State agency approves the operation of a new local agency in an area already served by an existing Program or a WIC Program, documentation which indicates the need for both local agencies in that area shall be maintained on file at the State agency for FNS review and evaluation.

(b) *Agreements between State and local agencies*. (1) State agencies shall enter into agreements with local agencies which are approved to participate in the Program. If the State agency and the local agency are the same, this requirement does not apply. Copies of the agreement shall be kept on file at both the State and local agency for purposes of review and audit. Such agreements shall be in writing and shall contain the following:

(i) An assurance that local agencies will comply with all the fiscal and operational requirements prescribed by the State agency as required by this part; (ii) an assurance that local agencies will provide nutrition education as required by this part; (iii) for those local agencies in existence prior to March 3, 1978, an assurance that they will continue arrangements with health service providers for the provision of services to Program participants at least at the level that existed on March 2, 1978, and for other local agencies, an assurance that they will advise participants of the importance of health care and where low-income persons can obtain such care; (iv) an assurance that issuance of supplemental food is in accordance with this part and FNS food package instructions; (v) a statement that local agencies are responsible to the State agency for any loss resulting from improper

or negligent issuance by them of prescriptions for supplemental foods; (vi) a statement that local agencies are responsible to the State agency for any Program losses caused by other agencies which have entered into agreements with the local agency; (vii) the names and address of each certification, food distribution and storage site under the jurisdiction of the local agency; and (viii) an assurance that the local agencies will maintain accurate and complete records with respect to their activities under the Program and retain such records for a period of 3 years following the date of submission of the final expenditure report for the period to which the report pertains.

(c) *Agreements between local agencies and other agencies.* A local agency which cannot fulfill one or more of these requirements shall enter into written agreement with another agency(s) in order to comply with these requirements. The written agreement shall state the Program responsibilities of the other agency, shall be approved by the State agency, and shall be on file at both the State agency and local agency. State agency approval of agreements with applicant agencies shall be accomplished during the application process.

(Approved by the Office of Management and Budget under control number 0584–0063)

[46 FR 6341, Jan. 21, 1981, as amended at 47 FR 746, Jan. 7, 1982]

§ 247.7 Certification.

(a) *Eligibility requirements.* To be certified as eligible to receive supplemental foods under the Program, each applicant shall meet the following requirements:

(1) Categorical eligibility as an infant, child, pregnant, postpartum or breastfeeding woman, or elderly person;

(2) For women, infants and children, income eligibility for local benefits under existing Federal, State or local food, health or welfare programs for low-income persons;

(3) For elderly persons certified on or after September 17, 1986, household income at or below 130 percent of the Federal Poverty Income Guidelines published annually by the Department of Health and Human Services. Elderly persons certified before September 17, 1986, shall be subject to the terms and conditions in effect on the date of their certification.

(4) At the State agency's discretion, be determined by a physician, a staff member of the local agency or his or her designee to be at nutritional risk; and

(5) Meet a residency requirement if one is established by the State agency. The State agency may determine a service area for any local agency, and may require that an applicant be residing within the service area at the time of application to be eligible for the Program. However, the State agency may not impose any durational or fixed residency requirements. For example, migrant and seasonal farmworkers entering a CSFP service area shall be considered as meeting the residency requirement.

(b) *Processing standards.* (1) When there are no funds available to provide program benefits, the local agency shall maintain waiting lists of individuals who visit the local agency to apply for the Program. To enable the local agency to contact the individuals when caseload space becomes available, these waiting lists shall include the name of the applicant, the date placed on the waiting list, an address or phone number of the applicant and the applicant's status, i.e., pregnant, breastfeeding, child's age. Individuals shall be notified of their placement on a waiting list within 20 days after they visit the local agency during clinic office hours to request Program benefits.

(2) The following priorities based on categorical eligibility shall be applied when vacancies occur after the local agency has filled all caseload, except that these priorities shall not apply to the minimum protected caseload assigned under § 247.10(a) (2)(i).

(i) *Priority I.* Pregnant women, breastfeeding women, and infants.

(ii) *Priority II.* Children ages 1 through 3.

(iii) *Priority III.* Children ages 4 through 5.

(iv) *Priority IV.* Postpartum women.

(v) *Priority V.* Elderly persons.

(c) *Issuance of supplemental foods.* Participants shall be issued prescriptions for supplemental foods by personnel of

the local agency or by such other personnel as the local agency may designate. The local agency may choose to issue either a one month supply of supplemental foods each month or a two month supply of supplemental foods every other month. However, local agencies which choose to issue a two month supply every other month shall inform participants that they may still receive one month's supply if they so request.

(d) *Certification forms*. All certification data for each applicant shall be recorded on a certification form. At a minimum the information on the form shall include the following:

(1) The person's name and address.

(2) The date of initial visit to apply for participation and the date of the certification or denial.

(3) The criteria used to determine the person's eligibility or ineligibility and the signature and title of the persons making the eligibility determination.

(4) The following statement shall be located directly above the applicant's signature line and shall be read by or to the applicant, or the applicant's parent or caretaker, before the application is signed:

This certification form is being completed in connection with the receipt of Federal assistance. Program officials may verify information on this form. I am aware that deliberate misrepresentation may subject me to prosecution under applicable State and Federal statutes. I have been advised of my rights and obligations under the Program. I certify that the information I have provided for my eligibility determination is correct to the best of my knowledge.

(e) *Applicant's rights*. The following sentences shall be read by, or read to, the applicant or the applicant's parent or caretaker at the time of certification. When a significant proportion of the population served by a local agency is composed of non-English or limited English speaking persons who speak the same language, the sentences shall be stated to such persons in a language they understand:

(1) Standards for participation in the Program are the same for everyone regardless of race, color, or national origin.

(2) You may appeal any decision made by the local agency regarding your denial or termination from the Program.

(3) If your application is approved, the local agency will make nutrition education available to you and you are encouraged to participate.

(f) *Notification requirements*. The following responsibilities shall be performed by the State or local agency;

(1) Each applicant shall be informed during the certification procedure of the right to a fair hearing and of the illegality of participation in the Commodity Supplemental Food Program in more than one local agency, or simultaneous participation in the Commodity Supplemental Food Program and in the WIC Program.

(2) A person found ineligible for the Program during a certification visit shall be advised in writing of the ineligibility and of the right to a fair hearing in accordance with the provisions in § 247.20. The reasons for ineligibility shall be properly documented and shall be retained on file at the local agency.

(3) A person found ineligible for the Program at any time during the certification period shall be advised in writing 15 days before termination of eligibility of the reasons for ineligibility and of the right to a fair hearing.

(4) Each participant shall be notified at least 15 days before the expiration of each certification period that eligibility for the Program is about to expire.

(5) Each participant shall receive an explanation of how the food delivery system in the local agency operates.

(6) Each participant shall be advised of the importance of participating in ongoing routine health care, the types of health services available, where they are located and how they may be obtained.

(g) *Certification periods*. (1) Program benefits shall be based upon certifications established in accordance with the following time frames.

(i) Pregnant women shall be certified for the duration of their pregnancy and for up to 6 weeks postpartum;

(ii) Postpartum and breastfeeding women, infants and children shall be certified at intervals prescribed by the State agency, provided such intervals do not exceed 6 months in length; and

(iii) Elderly persons, except those certified before September 17, 1986, shall be certified at intervals prescribed by the State agency, provided such intervals do not exceed 6 months in length. The Initial and any subsequent odd-numbered certifications of elderly persons first certified on or after September 17, 1986 shall be based on an assessment of newly submitted information for all applicable eligibility requirements, except that age need be established only at the first certification. The State agency may authorize local agencies to certify such elderly participants for an additional 6 months without reviewing the case record or collecting new eligibility data at the second and any subsequent even-numbered certifications if there are no women, infants or children waiting to be served. State agencies shall, however, require local agencies to establish contact with such participants prior to such even-numbered certifications in order to confirm each participant's address and continued interest in program participation.

(iv) Elderly persons certified before September 17, 1986 shall be subject to the terms and conditions in effect on the date of their certification.

(2) Program benefits may be continued until the end of the month in which categorical ineligibility begins, for example, until the end of the month in which a child reaches its sixth birthday.

(h) *Restrictions*. The following restrictions shall be observed by State agencies:

(1) Participants shall not be required to make any payments in money, materials or services for, or in connection with, the receipt of supplemental foods. Also, they shall not be solicited in connection with the receipt of supplemental foods for voluntary cash contributions for any purpose.

(2) Distribution of supplemental foods shall not be used as a means for furthering the political interest of any person or party.

(i) *Transfer of certification*. Each State agency shall ensure issuance of a verification of certification form to every participant who intends to relocate during the certification period. The State agency shall require the local agencies under its jurisdiction to accept verification of certification forms from participants who have been participating in the Program or the WIC Program in another local agency within or outside of the jurisdiction of the State agency. The verification of certification is valid until the certification period expires, and shall be accepted as proof of eligibility for Program benefits. However, if the receiving local agency has waiting lists for participation, the transferring participant shall be placed on the list ahead of all waiting applicants. The verification of certification shall include the name of the participant, the date the certification was performed, the date the certification period expires, the signature and printed or typed name of the local agency official in the originating jurisdiction, the name and address of the certifying local agency and an identification number or some other means of accountability. The verification of certification form shall be uniform throughout the jurisdiction of the State agency.

(j) *Dual participation*. The State agency shall be responsible for the following:

(1) In conjunction with the local agency, the detection and prevention of dual participation within each local agency and between local agencies. As part of the certification process, applicants shall be informed of the illegality of simultaneous participation in the WIC Program and this Program or of simultaneous participation in more than one CSFP.

(2) In areas where a local agency serves the same area as an Indian State agency or WIC Program, the CSFP State agency for the Program or the WIC State agency shall agree to a plan for the detection and prevention of dual participation. The agreement must be in writing and must be made prior to operation within the same area.

(3) Participants found committing dual participation shall be terminated from one of the Programs immediately and shall be notified of termination from the other program as specified in § 247.7.

(4) At certification the local agency shall check the identification of each participant. For a child participant, an immunization record, birth certificate, or other records that local agency personnel consider adequate identification shall be acceptable. Also, when issuing supplemental foods, the local agency shall check the identification of each participant or the identity of the adult responsible for picking up the food for a child participant.

(k) *Disqualification.* (1) The State agency may disqualify applicants and participants from Program participation for a period not to exceed 3 months if it is established by the State or local agency that the applicant, participant, parent, or caretaker fraudulently applied for and/or obtained Program benefits. However, if the person who determined the participant's eligibility determines that a serious health risk will result from disqualification from the Program and the participant is currently eligible, the disqualification shall be waived. In addition, participants may request a fair hearing, as specified in § 247.20, to contest a disqualification.

(2) For Program purposes, fraud includes, but is not limited to, the following actions if they are taken knowingly, willfully and deceitfully:

(i) Making false statements orally or in writing in order to obtain benefits to which the individual would not otherwise be eligible; (ii) concealing information in order to obtain benefits to which the individual is not eligible; (iii) altering Program documents for the purpose of receiving increased benefits to which the individual is not eligible or for the purpose of transferring benefits to an unauthorized individual; (iv) using supplemental foods in an unauthorized manner, such as trading or selling the foods; or (v) committing dual participation.

[46 FR 6341, Jan. 21, 1981, as amended at 51 FR 32901, Sept. 17, 1986; 53 FR 4839, Feb. 18, 1988]

§ 247.8 Nutrition education.

(a) *General.* Nutrition education shall be thoroughly integrated into Program operations. Nutrition education shall be designed to be easily understood by individual participants and shall bear a practical relationship to their nutritional needs and household situations.

(b) *Goals.* Nutrition education shall be based on the following two broad goals: (1) To emphasize the relationship of proper nutrition to the total concept of good health, with special emphasis on the nutritional needs of pregnant, postpartum, and breastfeeding women, infants and children under 6 years of age; and

(2) To assist participants in obtaining a positive change in food habits, resulting in improved nutritional status and in the prevention of nutrition related problems through maximum use of the supplemental and other nutritious foods. This use is to be within the context of ethnic, cultural and geographic preferences. Consideration should also be given to tailoring nutrition education to meet any limitations experienced by groups of participants, such as lack of running water, lack of electricity, and limited cooking or refrigeration facilities.

(c) *State agency responsibilities.* The State agency shall ensure that the local agency fully performs its responsibilities as set forth in paragraph (d) of this section. The State agency shall also ensure that an evaluation procedure is maintained to determine the effectiveness of the nutrition education. Such evaluation procedure shall include a systematic procedure for participant input and may be conducted directly by State and local agencies or by contract for such services, so long as the evaluation is directed by a nutritionist or other professional determined by the State agency to be qualified to perform the evaluation procedure.

(d) *Local agency responsibilities.* (1) The local agency shall make nutrition education available to all adult participants and to parents or guardians of infant and child participants. Where appropriate, nutrition education for child participants is encouraged.

(2) The local agency shall direct Program funds for nutrition education to the benefit of participants and local agency staff members involved in nutrition education, in accordance with this part.

(3) The local agency shall conduct or arrange for nutrition education in a

manner consistent with the nutrition education portion of the State Plan.

(4) The local agency shall include the following subject matter in the instruction given to participants:

(i) An explanation of the importance of the consumption of the supplemental foods by the participant for whom they are prescribed rather than by other family members; (ii) reference to any special nutritional needs of participants and ways to provide adequate diets; (iii) an explanation of the Program as a supplemental rather than a total food program; (iv) information on the use of the supplemental foods and on the nutritional value of these foods; (v) information on the benefits of breastfeeding; and (vi) an explanation of the importance of health care.

(e) *Food demonstrations.* Any food demonstrations using supplemental foods shall be conducted by the State or local agency solely in conjunction with nutrition education and primarily for participants under the Program. Supplemental foods may not be used for outreach, refreshments for participants, or any other such purpose. Supplemental foods may not be provided to any other community agency or facility for any purpose whatsoever, unless such agency has entered into a signed written agreement with the State or local agency to provide nutrition education services under the Program.

(Approved by the Office of Management and Budget under control number 0584–0063)

[46 FR 6341, Jan. 21, 1981, as amended at 47 FR 746, Jan. 7, 1982]

§ 247.9 Financial management systems.

(a) *Disclosure of expenditures.* The State agency shall maintain a financial management system which provides accurate, current and complete disclosure of the financial status of the Program. This shall include an accounting for all property and other assets and all Program funds received and expended each fiscal year.

(b) *Reports.* The State agency shall maintain its financial and donated food accounts in a manner sufficient to permit the preparation of the reports required in § 247.13.

(c) *Record of expenditures.* The State agency shall maintain records which adequately identify the source and use of funds expended for Program activities. These records shall contain, but are not limited to, information pertaining to authorization, receipt of funds, obligations, unobligated balances, assets, liabilities, outlays and income.

(d) *Payment of costs.* The State agency shall implement procedures which ensure prompt and accurate payment of allowable costs, and ensure the allowability and allocation of costs in accordance with the cost principles and standard provisions of this part, and FMC 74–4.

(e) *Identification of obligated funds.* The State agency shall implement procedures which accurately identify obligated Program funds at the time obligations are made.

(f) *Resolutions of audit findings.* The State agency shall implement procedures which ensure timely and appropriate resolution of claims and other matters resulting from audit findings and recommendations.

(g) *Letters of Credit.* All administrative funds made available under this section shall be provided to participating State agencies by means of issuance of Letters of Credit unless other funding arrangements are made with FNS. If at the end of the fiscal year, funds authorized by a Letter of Credit issued to any State agency exceed obligations, FNS shall reduce the amount of the Letter of Credit by the unobligated portion.

(h) *Payments.* Letters of Credit shall be issued to the appropriate Regional Disbursing Office in favor of the State agency. The State agency shall obtain funds needed through presentation by designated officials of a payment voucher on the Letter of Credit in accordance with procedures prescribed by FNS and consistent with the U.S. Treasury Department Circular 1075.

(i) *Transfer of cash.* The State agency shall have controls to minimize the time elapsing between receipt of Federal funds from the U.S. Department of Treasury and the disbursement of these funds for Program costs. In the Letter of Credit system, the State agency shall make drawdowns from the U.S. Department of Treasury's Regional Disbursing Office as close as possible to the time of the actual disbursement of

funds. Advances made by the State agency to local agencies shall also conform to these same standards.

(j) *Local agency financial management.* The State agency shall ensure that all local agencies develop and implement a financial management system consistent with the requirements prescribed by the State agency pursuant to the requirements of this section.

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[46 FR 6341, Jan. 21, 1981, as amended at 47 FR 746, Jan. 7, 1982]

§ 247.10 Caseload assignment and administrative funding.

(a) *State agency caseload assignment.* (1) FNS shall assign caseload to State agencies on December 1 of each year or within 30 days after enactment of appropriations legislation covering the full fiscal year, whichever comes later. In the event appropriations legislation for the year is not enacted by December 1, caseload assignments for the previous caseload cycle shall remain in effect, subject to the availability of sufficient funding, until assignments are made for the current caseload cycle. Any caseload assigned for a period beyond the end of the current fiscal year shall be available only to the extent that program funds are appropriated for the next fiscal year.

(2) To the extent that funds are available, FNS shall assign caseload to State agencies in the following order.

(i) State agencies for the three elderly feeding projects in Detroit, New Orleans, and Des Moines shall be assigned caseload equal to the level of participation for each project in December 1985.

(ii) Currently participating State agencies, except those entering their second cycle of program service, shall receive caseload in amounts equal to the greatest of their total participation of women, infants, and children, and elderly persons (except for caseload equal to the December 1985 level of participation at the three elderly feeding projects) during September, or monthly average participation for the period July through September, or for the prior fiscal year; provided, however, that a State agency shall not receive caseload under this paragraph in excess of caseload assigned for the preceding caseload cycle. State agencies entering their second caseload cycle of program service shall receive caseload equal to the caseload level assigned for their first cycle of program service.

(iii) Requests from currently participating State agencies to expand service to women, infants, and children, and the elderly, shall be addressed in the following manner. Expansion requests to increase service to women, infants, and children shall receive priority over expansion requests to increase service to the elderly.

(A) State agencies shall be eligible to receive expansion caseload only if, during the preceding September, the period July through September, or the prior fiscal year, their monthly average participation equaled at least 90 percent of their assigned caseload level for the preceding caseload cycle.

(B) State agencies requesting expansion caseload to increase service to women, infants, and children shall be assigned the lesser of an equal share of available caseload or the amount of expansion caseload FNS has determined that the State agency needs and can effectively manage. If any State agencies' shares exceed their approved requests, the excess caseload shall be divided equally among State agencies whose approved requests exceed their shares.

(C) State agencies requesting expansion caseload to increase service to the elderly shall be assigned the lesser of an equal share of available caseload or the amount of expansion caseload FNS has determined that the State agency needs and can effectively manage. If any State agencies' shares exceed their approved requests, the excess caseload shall be divided equally among State agencies whose approved requests exceed their shares.

(iv) Requests from State agencies to initiate program service for women, infants, and children, and the elderly shall be addressed in the following manner. Requests to initiate service to women, infants, and children shall receive priority over requests to initiate service to the elderly.

(A) State agencies with approved State plans incorporating requests for program initiation to provide service to women, infants, and children shall

be assigned caseload in the same manner described in paragraph (a)(2)(iii)(B) of this section.

(B) State agencies with approved State plans incorporating requests for program initiation to provide service to the elderly shall be assigned caseload in the same manner described in paragraph (a)(2)(iii)(C) of this section.

(b) *Administrative funding*. This subsection provides the policies and procedures for payment by FNS of funds for administrative costs to participating State agencies and disbursement by State agencies to local agencies. Funds shall be paid to State agencies as specified in § 247.9, Financial Management Systems. As a prerequisite to the receipt of such funds each fiscal year, the State agency shall have executed a written agreement with the Department and shall have received FNS approval of its State Plan.

(1) Funds for total State administrative costs for each fiscal year shall be allocated by FNS based on 15 percent of the sum of the annual appropriation for the program and the value of commodities provided without charge or credit by the Department to States and distributed by local agencies as part of, and in addition to, the food package.

(2) From the portion of program funds equal to 15 percent of the annual appropriation, each State shall receive an administrative grant proportionate to its share of the total caseload assigned. Each State agency shall receive its share of this funding on a quarterly basis.

(3) In addition to the funding provided under paragraph (b)(2) of this section, States shall receive administrative funding to support distribution of commodities provided without charge or credit by the Department to States and distributed as part of, and in addition to, the program food package. Prior to the beginning of each fiscal year, FNS shall estimate the value of such commodities expected to be distributed to participants by local agencies in each State during the fiscal year. Fifteen percent of this estimated amount shall be provided to each State agency. Funds provided under this paragraph shall be identified and accounted for by FNS separately from funds provided under paragraph (b)(2) of this section. After the end of the fiscal year, FNS shall compute the actual value of such commodities reported as distributed to participants by local agencies in each State. Unit values of such commodities shall be provided by the Agricultural Stabilization and Conservation Service. FNS shall make whatever adjustments are necessary to ensure that each State agency has received administrative funding equal to 15 percent of the value of such commodities reported as distributed to participants by its local agencies during the fiscal year.

(4) To ensure that State agencies can properly budget for program operations, FNS guarantees that 75 percent of the administrative funding provided to each State under paragraph (b)(2) of this section will be protected from recoveries during the current fiscal year.

(5) The State agency may retain a percentage of administrative funding for State level use, based on the following formula: 15 percent of the first $50,000; plus 10 percent of the next $100,000; plus 5 percent of the next $250,000. The State may retain a maximum amount of $30,000 annually for its administrative expenditures. However, if the State agency provides warehousing services, FNS approval may be requested at the beginning of the applicable fiscal year for funds greater than those allowed under the formula, provided that the State agency can document the need and ensure that the increase will not impose undue hardship on local agencies. The remaining funds and any unused funds at the State level shall be distributed to the local agencies.

(6) The State agency, in providing administrative funds to local agencies, shall apportion such funds among the local agencies on the basis of their respective needs so as to ensure that those local agencies evidencing higher administrative costs, while demonstrating prudent management and fiscal controls, receive a greater portion of the administrative funds.

(c) *Reallocation*. FNS reserves the right to periodically recover and redistribute unused caseload slots and unspent administrative funds (subject to the limitation in paragraph (b)(4) of

this section). In the event that caseload slots are recovered, they shall be allocated in accordance with the order of funding established in § 247.10(a)(2).

[51 FR 32901, Sept. 17, 1986, as amended at 53 FR 4840, Feb. 18, 1988; 62 FR 55145, Oct. 23, 1997]

§ 247.11 Administrative costs.

(a) *General*. Funds provided to State and local agencies may be used to cover administrative costs identified under FMC 74–4 which State agencies determine to be necessary to carry out the Program within their jurisdiction.

(b) *Allowable costs*. The following costs are specifically identified as illustrative of costs allowable under the Program:

(1) The cost of certification procedures including: (i) Laboratory fees incurred for tests conducted to determine the eligibility of persons to participate in the Program; (ii) expendable medical supplies necessary to determine the eligibility of persons to participate in the Program; and (iii) centrifuges, measuring boards, skin fold calipers, spectrophotometers, hematofluorometers, hemoglobinometers, and scales used for determining the eligibility of persons, provided that expenditure limits will be set by FNS for each piece of equipment and expenditures which exceed the limits shall receive prior approval by the FNS Regional Office.

(2) The cost of nutrition education services provided to participants and parents and guardians of participants, and used for training local agency staff members;

(3) The cost of transporting food and of administering the food distribution system;

(4) The cost of interpreters and translators for Program materials;

(5) The cost of outreach services;

(6) The cost of audits and fair hearings;

(7) General administration of the State and local agencies including, but not limited to, personnel, warehousing, and insurance;

(8) The cost of monitoring and reviewing Program operations; and

(9) The cost of transportation for participants to and from the local agency when the local agency has determined and documented the need for such assistance.

(c) *Restrictions on allowable costs*. The following costs are allowable only with the prior approval of FNS.

(1) Automatic Data Processing equipment and system purchases whether by outright purchase, rental-purchase agreement or other method of purchase;

(2) Capital expenditures over $2,500.00 such as the cost of facilities, equipment, other capital assets and any repairs that materially increase the value or useful life of capital assets, provided that any subsequent sale of real or personal properties, purchased in whole or in part with Program funds, shall be used to reimburse FNS in an amount computed by applying to the sale proceeds the percentage of FNS participation in the original acquisition costs;

(3) Occupancy of space under rental-purchase or a lease with option to purchase agreements;

(4) Equipment rental costs where the agreement provides for rental-purchase or a lease with option to purchase; and

(5) Management studies performed by agencies or departments other than the State or local agency or those performed by outside consultants under contract with the State or local agency.

(d) *Unallowable costs*. Expenditures by a State agency or local agencies which result in costs that may not be applicable to the Program objectives are ''unallowable costs.'' A State agency's system for financial management shall identify such unallowable costs. In addition to unallowable costs identified in FMC 74–4 the following are specifically unallowable costs for reimbursement by FNS:

(1) Costs incurred for rearrangement and alteration of facilities not required specifically for the program;

(2) Actual losses which could have been covered by permissible insurance (through an approved self-insurance program or otherwise).

§ 247.12 Program income.

Program income means gross income the State agency or local agencies earn from grant supported activities, with the exception of income from the sale

of property as specified in § 247.11(c)(2). Program income earned during the agreement period shall be retained by the State agency in accordance with the provisions of A–102, Attachment E and used to further Program objectives; except that interest earned on Program funds at the State or local levels shall be used in accordance with the provisions of A–102, Attachment E. A State agency's financial management system shall provide guidelines to assure that: income earned is recorded as individual transactions within the accounting records in conformance with generally accepted accounting principles for recording expenditures and revenues; and specifically earmarked Program income is used for the purpose(s) intended.

§ 247.13 Records and reports.

(a) *Recordkeeping requirements.* Each State agency shall, in accordance with § 250.6(r), maintain accurate and complete records with respect to the receipt, disposal, and inventory of supplemental foods, including the determination made as to liability for any improper distribution or use of, or loss of, or damage to, such foods and the result obtained from the pursuit of claims arising in favor of the State agency. Accurate and complete records shall also be maintained with respect to the receipt and disbursement of administrative funds. State agencies shall require all local agencies to maintain accurate and complete records with respect to the receipt, disposal and inventory of supplemental foods and with respect to receipt and disbursement of administrative funds. All records required by this section shall be retained for a period of 3 years following the date of submission of the annual expenditure report for the period to which the reports pertain. All records, except medical case records of participants (unless they are the only source of certification data), shall be available during normal business hours for representatives of the Department and the General Accounting Office of the United States to inspect, audit, and copy. Any reports resulting from such examinations shall not divulge names of individuals.

(b) *Financial reports.* All financial data shall be submitted quarterly on the S.F. 269(WIC/CSFP) and/or the S.F. 272 for State agencies on the check payment system.

(c) *Participation and food distribution reports.* Participation and Food Distribution reports FNS–153 and FNS–155 shall be submitted as required by FNS, at a frequency prescribed by FNS. Annually, a physical inventory of all foods at each storage and distribution site is required to be submitted to FNS at a date specified by FNS.

(d) *Civil rights.* Each local agency participating under the Program shall submit a report of racial and ethnic participation data FNS–191, at a frequency prescribed by FNS.

(e) *Audit acceptability of reports.* To be acceptable for audit purposes, all financial and Program performance reports shall be traceable to source documentation.

(f) *Certification of reports.* Financial and Program reports shall be certified as to their completeness and accuracy by the person given that responsibility by the State agency.

(g) *Use of reports.* FNS shall use State agency reports to measure progress in achieving objectives set forth in the State Plan. If it is determined, through review of State agency reports, Program or financial analysis, or an audit, that a State agency is not operating according to its State Plan, FNS may request additional information and take other appropriate actions.

(Approved by the Office of Management and Budget under control number 0584–0063)

(44 U.S.C. 3506)

[46 FR 6341, Jan. 21, 1981, as amended at 47 FR 746, Jan. 7, 1982]

§ 247.14 Procurement and property management standards.

(a) *Requirements.* State and local agencies shall comply with the requirements of Circular A–102, Attachment 0 for procurement of equipment and other services with Program funds. These requirements are adopted by FNS to ensure that such materials and services are obtained for the Program in an effective manner and in compliance with the provisions of applicable law and executive orders.

(b) *Contractual responsibilities.* The standards contained in Circulars A–90, A–102 and A–110, where applicable, do not relieve the State or local agency of the responsibilities arising under its contracts. The State agency is the responsible authority, without recourse to FNS, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in connection with the Program. This includes, but is not limited to: Disputes, claims, protests of awards, source evaluation, or other matters of a contractual nature. Matters concerning violation of law are to be referred to such local, State or Federal authority as may have proper jurisdiction.

(c) *State regulations.* The State or local agency may use its own procurement regulations which reflect applicable State and local regulations, provided that procurements made with Program funds adhere to the standards set forth in Circulars A–90, A–102 and Circular A–110, where applicable.

(d) *Property acquired with Program funds.* State and local agencies shall observe the standards prescribed in A–102, Attachment N, and A–110, Attachment N, where applicable, in their utilization and disposition of property acquired in whole or in part with Program funds.

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(44 U.S.C. 3506)

[46 FR 6341, Jan. 21, 1981, as amended at 47 FR 746, Jan. 7, 1982]

§ 247.15 Audits.

(a) *Federal access to information.* The Secretary, the Comptroller General of the United States, or any of their duly authorized representatives, or State auditors shall have access to any books, documents, papers, and records of the State and local agencies and their contractors, for the purpose of making surveys, audits, examinations, excerpts, and transcripts.

(b) *State agency response.* The State agency may take exception to particular audit findings and recommendations. The State agency shall submit a response or statement to FNS as to the action taken or planned regarding the findings. A proposed corrective action plan developed and submitted by the State agency shall include specific time frames for its implementation and for completion of the correction of deficiencies and problems leading to the deficiencies.

(c) *Corrective action.* FNS shall determine whether Program deficiencies have been adequately corrected. If additional corrective action is necessary, FNS shall schedule a followup review, allowing a reasonable time for such corrective action to be taken.

(d) *State sponsored audits.* (1) Each State agency shall provide for an independent audit of the financial operations of the State agency and local agencies. Audits may be conducted by State and local government audit staffs, State licensed public accountants who were licensed on or before December 31, 1970, or by Certified Public Accountants and audit firms under contract to the State or local agencies. Audits shall conform to: ''The Standards of Audit of Governmental Organizations, Program Activities and Functions,'' issued by the Comptroller General of the United States (Reprint 1974, for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402); the ''Guidelines for Financial and Compliance Audits of Federally Assisted Programs,'' issued by the U.S. General Accounting Office, October 1978 (for sale by the U.S. General Accounting Office, Distribution Section, Room 1518, 441 G Street, NW., Washington, DC 20013); any compliance supplements approved by OMB; and generally accepted auditing standards established by the American Institute of Certified Public Accountants. An audit shall be used to determine whether:

(i) Financial operations are properly conducted; (ii) the financial reports are fairly presented; (iii) the State or local agency has complied with applicable laws, regulations, and administrative requirements pertaining to financial management; and (iv) proper inventory controls (physical and paper) are being maintained.

(2) The State agency shall conduct audits in accordance with the provisions of A–102, Attachment P. Audits of the State agency and the local agencies

under the State agency's jurisdiction shall be performed in a representative sample of grant program audit examinations during each audit cycle which occurs, not less frequency than once every two years. In some audit cycles, a grant program or programs other than this Program may be audited. However, audits of the Program shall be performed at intervals frequent enough to ensure consistency with good Program management. Also, at any time, the Department, FNS or the State agency may at its discretion audit a Program if an audit appears to be warranted. If FNS in the course of Program reviews of State agency operations finds that the efficiency and effectiveness of the State agency's financial management system is in question, FNS may request the State agency to include the Program in the sample for the next audit examination.

(3) Each State agency shall make all State or local agency sponsored audit reports of Program operations under its jurisdiction available for the Department's review upon request. The cost of these audits shall be considered a part of administrative costs and funded from either State or local agency administrative funds.

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(44 U.S.C. 3506)

[46 FR 6341, Jan. 21, 1981, as amended at 47 FR 746, Jan. 7, 1982]

§ 247.16 Investigations.

(a) *Authority*. The Department may make an investigation of any allegation of noncompliance with this part. The investigation may include, where appropriate, a review of pertinent practices and policies of any State or local agency, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the State or local agency has failed to comply with the requirements of this part.

(b) *Confidentiality*. No State or local agency, participant, or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege under this part because the individual has made a complaint or formal allegation, or testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The identity of every complainant shall be kept confidential except to the extent necessary to carry out the purpose of this part, including the conduct of any investigation, hearing, or judicial proceeding.

§ 247.17 Claims.

If FNS determines through a review of the State agency's reports, program or financial analysis, monitoring, audit, or otherwise, that any Program funds provided to a State agency for administrative purposes were, through State agency or local agency negligence or fraud, misused or otherwise diverted from Program purposes, a claim shall be made by FNS against the State agency, and the State agency shall pay promptly to FNS a sum equal to the amount of the administrative funds so misused or diverted. Further, if FNS determines that any part of the money received by a State agency was lost as a result of thefts, embezzlements, or unexplained causes, the State agency shall, on demand by FNS, pay to FNS a sum equal to the amount of the money so lost. Claims for losses or misuse of supplemental foods shall be handled in accordance with § 250.6(m), 7 CFR part 250—Subchapter B—Food Distribution. The State agency shall have full opportunity to submit evidence, explanations or information concerning alleged instances of noncompliance or diversion before a final determination is made in such cases.

§ 247.18 Closeout procedures.

(a) *Fiscal year closeout reports*. State agencies shall submit preliminary and final closeout reports for each fiscal year or part thereof. All obligations shall be liquidated before final closure of a fiscal year grant. Obligations shall be reported for the fiscal year in which they occur State agencies shall:

(1) Submit to FNS, within 30 days after the end of the fiscal year, preliminary financial reports which show cumulative actual expenditures and obligations for the fiscal year, or part

thereof, for which Program funds were made available; and

(2) Submit to FNS, within 90 days after the end of the fiscal year, final fiscal year closeout reports.

(b) *Revised closeout reports.* Revised closeout reports may be submitted at any time. However, FNS shall not be responsible for reimbursing unpaid obligations later than one year after the close of the fiscal year in which they were incurred.

(c) *Grant closeout procedures.* When grants to State agencies are terminated, the following closeout procedures for the Program shall be performed in accordance with OMB Circular A–102.

(1) *Termination for cause.* FNS may terminate a State agency's participation under the Program, in whole or in part, whenever FNS determines that the State agency has failed to comply with the conditions prescribed in this part. FNS shall promptly notify the State agency in writing of the termination and the reasons for the termination, including the effective date. A State agency shall terminate a local agency's participation under the Program by written notice whenever it is determined by FNS or the State agency that the local agency has failed to comply with the requirements of the Program. When a State agency's participation under the Program is terminated for cause, any payments made to the State agency, or any recoveries by FNS from the State agency, shall be in conformance with the legal rights and liabilities of the parties.

(2) *Termination for convenience.* FNS or the State agency may terminate the State agency's participation under the Program, in whole or in part, when both parties agree that continuation under the Program would not produce beneficial results commensurate with the further expenditure of funds. The State agency or the local agency may terminate the local agency's participation, in whole or in part, under the same conditions. The two parties shall agree upon the termination conditions, including the effective date thereof and, in the case of partial termination, the portion to be terminated. The State agency shall not incur new obligations for the terminated portion after the effective date, and shall cancel as many outstanding obligations as possible. FNS shall allow full credit to the State agency for the Federal share of the noncancellable obligations, properly incurred by the State agency prior to termination.

§ 247.19 Nondiscrimination.

(a) *Requirement.* The State agency shall comply with the requirements of title VI of the Civil Rights Act of 1964, the FNS Civil Rights Instruction 113–2 and the Department's regulations concerning nondiscrimination (7 CFR part 15), including requirements of racial and ethnic participation data collection, public notification of the nondiscrimination policy, and annual reviews of each local agency to assure compliance with such policy, to the end that no person shall, on the grounds of race, color or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under the Program.

(b) *Non-English materials and staff.* Where a significant proportion of the population of the area served by a local agency is composed of non-English or limited English speaking persons who speak the same language, the State agency shall take action to ensure that Program information, except certification forms, is provided to such persons in the appropriate language orally and in writing. The State agency shall ensure that there are bilingual staff members or interpreters available to serve these persons.

(c) *Complaints.* Complaints of discrimination filed by applicants or participants shall be referred to the Director, Supplemental Food Programs Division, Food and Nutrition Service, U.S.D.A., Washington, DC 20250.

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(44 U.S.C. 3506)

[46 FR 6341, Jan. 21, 1981, as amended at 47 FR 746, Jan. 7, 1982]

§ 247.20 Fair hearing procedures.

(a) *Availability of hearings.* The State agency shall provide a hearing procedure through which any individual may appeal a State or local agency action

which results in the denial or termination of benefits to the individual. The State agency shall conform to Program hearing procedures as outlined in this section at all times unless the State has an alternate hearing procedure whereby participants can appeal State or local agency actions. This alternate procedure may be used with FNS approval.

(b) *Notification of appeal rights.* At the time of application each applicant shall be informed of the right to a fair hearing.

At the time of denial or termination of benefits, each individual shall be informed in writing of the right to a fair hearing, of the method by which a hearing may be requested, and that any positions or arguments on behalf of the individual may be presented personally or by a representative such as a relative, friend, legal counsel or other spokesperson. Such notification is not required at the expiration of a certification period.

(c) *Request for hearing.* A request for a hearing is defined as any clear expression by the individual or the individual's parent, guardian or other representative, that an opportunity to present its case to a higher authority is desired. The State or local agency shall not limit or interfere with the individual's freedom to request a hearing.

(d) *Time limit for request.* The State or local agency shall provide individuals a reasonable period of time to request fair hearings. Such time limit shall not be less than 60 days from the date the agency mails or gives the applicant or participant the notice of adverse action to deny or terminate benefits, as required in § 247.7(f)(2).

(e) *Denial or dismissal of request.* A request for a hearing shall not be denied or dismissed unless:

(1) The request is not received within the time limit set by the State agency in accordance with paragraph (d) of this section.

(2) The request is withdrawn in writing by the applicant or a writing by the applicant or a representative.

(3) The applicant or representative fails, without good cause, to appear at the scheduled hearing.

(f) *Continuation of benefits.* Participants who appeal the termination of benefits within the 15 day advance adverse notice period provided by § 247.7(f)(2) shall continue to receive Program benefits until the hearing official reaches a decision. Applicants who are denied benefits at initial certification or at subsequent certifications may appeal the denial but shall not receive benefits while awaiting the hearing.

(g) *Rules of procedure.* The State and local agency shall process each request for a hearing under uniform rules of procedure. The uniform rules of procedure shall be available for public inspection and copying. At a minimum, the uniform rules of procedure shall include: The time limits for requesting and conducting a hearing; all advance notice requirements; the rules of conduct at the hearing; and the rights and responsibilities of the applicant. The procedures shall not be unduly complex or legalistic and the applicant's background shall be taken into consideration.

(h) *Hearing official.* Hearings shall be conducted by an impartial official who does not have any personal stake or involvement in the decision and who was not directly involved in the initial determination of the action being contested. The hearing official shall:

(1) Administer oaths or affirmations if required by the State;

(2) Ensure that all relevant issues are considered;

(3) Request, receive and make part of the hearing record all evidence determined necessary to decide the issues being raised;

(4) Regulate the conduct and course of the hearing consistent with due process to ensure an orderly hearing;

(5) Render a hearing decision which will resolve the dispute.

(i) *Conduct of the hearing.* The hearing shall be accessible to the applicant. The State or local agency shall provide the applicant with a minimum of 10 days advance written notice of time and place of the hearing and shall enclose the rules of procedure. The State and local agency shall also provide the applicant or representative an opportunity to:

(1) Examine, prior to and during hearing, the documents and records presented to support the decision under appeal; (2) be assisted or represented by an attorney or other persons; (3) bring witnesses; (4) advance arguments without undue interference; (5) question or refute any testimony or evidence, including an opportunity to confront and cross-examine adverse witnesses; and (6) submit evidence to establish all pertinent facts and circumstances in the case.

(j) *Hearing decisions.* (1) Decisions of the hearing official shall comply with Federal law or regulations and shall be based on facts in the hearing record. The verbatim transcript or recording of testimony and exhibits, or an official report containing the substance of what transpired at the hearing, together with all papers and requests filed in the proceeding shall constitute the exclusive record for a final decision by the hearing official. This record shall be retained in accordance with § 247.13. This record shall also be available, for copying and inspection, to the appellant or representative at any reasonable time.

(2) A decision by the hearing official shall be binding on the local agency and shall summarize the facts of the case, specify the reasons for the decision, and identify the supporting evidence and the pertinent regulations. The decision shall become a part of the record.

(3) Within 45 days of the request for the hearing, the applicant or representative shall be notified in writing of the decision and the reasons for the decision in accordance with paragraph (j)(2) of this section. Also, if the decision is in the favor of the applicant and benefits were denied, benefits shall begin within this 45-day time period. If the decision is in favor of the agency, as soon as administratively feasible any continued benefits shall be terminated as decided by the hearing official.

(4) All State and local agency hearing records and decisions shall be available for public inspection and copying, subject to the disclosure safeguards provided in § 247.22(d), and provided the names and addresses of participants and other members of the public are kept confidential.

(k) *Judicial review.* If a State level decision upholds the agency action, the State agency shall explain any available State review of the decision and any State rehearing process. If neither are available or have been exhausted, the State agency shall explain the right to pursue judicial review of the decision.

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[46 FR 6341, Jan. 21, 1981, as amended at 47 FR 746, Jan. 7, 1982]

§ 247.21 Management evaluation and reviews.

(a) *General.* FNS and each State agency shall establish a management evaluation system in order to assess the accomplishment of Program objectives as provided under these regulations, the State Plan, and the written agreement with the Department. FNS will provide assistance to States in discharging this responsibility, and will establish standards and procedures to determine how well the objectives of this part are being accomplished.

(b) *Responsibilities of FNS.* FNS shall establish evaluation procedures to determine whether State agencies carry out the purposes and provisions of this part, the State Plan, and the written agreement with the Department. As a part of the evaluation procedure, FNS shall review audits performed by the State agency to ensure that the Program at both the State and local levels has been included in audit examinations at a reasonable frequency. These evaluations shall include a review of each State agency, including on-site reviews of selected local agencies. These evaluations will measure the State agency's progress toward meeting the objective outlined in its State Plan and compliance with these regulations.

(c) *Responsibilities of State agencies.* The State agency is responsible for meeting the following requirements:

(1) The State agency shall establish evaluation and review procedures and document the results of such procedures. The procedures shall include, but not be limited to:

(i) Annual monitoring of the operation of all local agencies to evaluate certification procedures, management, nutrition education, civil rights compliance, food storage, inventory accountability, and financial management systems. However, more frequent reviews may be performed as the State agency deems necessary. The State agency shall provide a continuing evaluation of each local agency through on-site reviews of the local agency, reviews of local agency reports including inventory reports, reviews of storage facilities and safeguards for supplemental foods.

(ii) Instituting the necessary followup procedures to correct identified problem areas.

(2) On its own initiative or when required by FNS, the State agency shall provide special reports on Program activities, and take positive action to correct deficiencies in Program operations.

(3) The State agency shall require that local agencies establish Program review procedures to be used in reviewing their own operations and those of subsidiaries or contractors.

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[46 FR 6341, Jan. 21, 1981, as amended at 47 FR 746, Jan. 7, 1982]

§ 247.22 Administrative appeal of State agency decisions.

(a) *Requirements*. The State agency shall provide a hearing procedure whereby a local agency adversely affected by a State action may appeal the action. The right to appeal shall be granted when the local agency's application to participate is denied, when participation is terminated, when a contract is not renewed by the State agency or when any other adverse action which affects participation is taken. The adverse action shall be postponed until a hearing decision is reached.

(b) *Procedure*. The State agency hearing procedure shall at a minimum provide the local agency:

(1) Adequate advance notice of the time and place of the hearing to provide all parties involved sufficient time to prepare for the hearing;

(2) The opportunity to present its case;

(3) The opportunity to confront and cross-examine adverse witnesses;

(4) The opportunity to be represented by counsel, if desired;

(5) The opportunity to review the case record prior to the hearing;

(6) An impartial decision maker, whose decision as to the validity of the State or local agency's action shall rest solely on the evidence presented at the hearing and the statutory and regulatory provisions governing the Program. The basis for the decision shall be stated in writing, although it need not amount to a full opinion or contain formal finding of fact and conclusions of law; and

(7) Written notification of the decision concerning the appeal, within 60 days from the date of the request for a hearing.

§ 247.23 Miscellaneous provisions.

(a) *No aid reduction*. The value of benefits or assistance available under the Program shall not be considered as income to or resources of participants or their families for any purpose under Federal, State or local laws, including, but not limited to, laws relating to taxation, welfare and public assistance programs.

(b) *Statistical information*. FNS reserves the right to use information obtained under the Program in a summary, statistical or other form which does not identify particular individuals. FNS may require the State or local agencies to supply data and other information collected under the Program in a form that does not identify particular individuals, to enable the Secretary or the State agencies to evaluate the effect of food intervention upon low-income individuals determined to be eligible for Program benefits.

(c) *Confidentiality*. Each State agency shall restrict the use or disclosure of information obtained from Program applicants or participants to persons directly connected with the administration or enforcement of the Program.

(d) *Public information*. Any person who wishes information, assistance,

records or other public material shall request such information from the State agency, or from the FNS Regional Office serving the appropriate State as listed below:

(1) Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont:

U.S. Department of Agriculture, FNS, New England Region, 33 North Avenue, Burlington, Massachusetts 01803.

(2) Delaware, District of Columbia, Maryland, New Jersey, New York, Pennsylvania, Puerto Rico, Virginia, Virgin Islands, West Virginia:

U.S. Department of Agriculture, FNS, Mid-Atlantic Region, One Vahlsing Center, Robbinsville, New Jersey 08691.

(3) Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee:

U.S. Department of Agriculture, FNS, Southeast Region, 1100 Spring Street, NW, Atlanta, Georgia 30309.

(4) Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin:

U.S. Department of Agriculture, FNS, Midwest Region, 536 South Clark Street, Chicago, Illinois 60605.

(5) Arkansas, Louisiana, New Mexico, Oklahoma, Texas:

U.S. Department of Agriculture, FNS, Southwest Region, 1100 Commerce Street, Room 5–C–30, Dallas, Texas 75242.

(6) Colorado, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah, Wyoming:

U.S. Department of Agriculture, FNS, Mountain Plains Region, 2420 West 26th Avenue, Room 430–D, Denver, Colorado 80211.

(7) Alaska, American Samoa, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon, Trust Territory of the Pacific Islands, Washington:

U.S. Department of Agriculture, FNS, Western Region, 550 Kearney Street, Room 400, San Francisco, California 94108.

PART 248—WIC FARMERS' MARKET NUTRITION PROGRAM (FMNP)

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AUTHORITY: 42 U.S.C. 1786.

SOURCE: 59 FR 11517, Mar. 11, 1994, unless otherwise noted.

Subpart A—General

§ 248.1 General purpose and scope.

This part announces regulations under which the Secretary of Agriculture shall carry out the WIC Farmers' Market Nutrition Program. The dual purposes of the FMNP are:

(a) To provide resources in the form of fresh, nutritious, unprepared foods (fruits and vegetables) from farmers' markets to women, infants, and children who are nutritionally at risk and

who are participating in the Special Supplemental Nutrition Program for Women, Infants and Children (WIC) or are on the waiting list for the WIC Program; and

(b) To expand the awareness, use of and sales at farmers' markets.

This will be accomplished through payment of cash grants to approved State agencies which administer the FMNP and deliver benefits at no cost to eligible persons. The FMNP shall be supplementary to the food stamp program carried out under the Food Stamp Act of 1977 (7 U.S.C. 2011 *et seq.*) and to any other Federal or State program under which foods are distributed to needy families in lieu of food stamps.

§ 248.2 Definitions.

For the purpose of this part and all contracts, guidelines, instructions, forms and other documents related hereto, the term:

Administrative costs means those direct and indirect costs, exclusive of food costs, as defined in § 248.12(b), which State agencies determine to be necessary to support FMNP operations. Administrative costs include, but are not limited to, the costs of administration, start-up, training, monitoring, auditing, the development of and accountability for coupon and market management, nutrition education, outreach, eligibility determination, and developing, printing, and distributing coupons.

Compliance buy means a covert, on-site investigation in which a FMNP representative poses as a FMNP participant and transacts one or more FMNP food coupons.

Coupon means a coupon, voucher, or other negotiable financial instrument by which benefits under the FMNP are transferred to recipients.

Days means calendar days.

Demonstration project means the Farmers' Market Coupon Demonstration Project authorized by section 17(m) of the Child Nutrition Act of 1966 (CNA), (42 U.S.C. 1786(m)), as amended by section 501 of the Hunger Prevention Act of 1988 (Pub. L. 100–435), enacted September 19, 1988. Public Law 102–314 authorized the Secretary to competitively award, subject to the availability of funds, a 3-year grant (which was subsequently extended for an additional year by Public Law 102–142) to up to 10 States that submitted applications that were approved for the establishment of demonstration projects designed to provide WIC participants with coupons that could be exchanged for fresh, nutritious, unprepared foods at farmers' markets. Those States are: Connecticut, Iowa, Maryland, Massachusetts, Michigan, New York, Pennsylvania, Texas, Vermont, and Washington.

Department means the U.S. Department of Agriculture.

Eligible foods means fresh, nutritious, unprepared, locally grown fruits, vegetables and herbs for human consumption. Eligible foods may not be processed or prepared beyond their natural state except for usual harvesting and cleaning processes. Honey, maple syrup, cider, nuts, seeds, eggs, meat, cheese and seafood are examples of foods not eligible for purposes of the FMNP. State agencies shall consider locally grown to mean produce grown only within State borders but may also define it to include areas in neighboring States adjacent to its borders. Under no circumstances can produce grown outside of the United States and its territories be considered eligible foods.

Farmer means an individual authorized to sell produce at participating farmers' markets. Individuals who exclusively sell produce grown by someone else, such as wholesale distributors, cannot be authorized to participate in the FMNP. For purposes of this part, the term ''farmer'' shall mean ''producer'' as that term is used in section 17(m)(6)(D) of the CNA (42 U.S.C. 1786(m)(6)(D)). A participating State agency has the option to authorize individual farmers or farmers' markets.

Farmers' market means an association of local farmers who assemble at a defined location for the purpose of selling their produce directly to consumers. In cases where recipient access to farmers' markets is an issue, with prior FNS approval this definition may be expanded at the State agency's option to include farmstands at which authorized farmers sell their produce.

Farmstand means a location at which a single, individual farmer sells his/her produce directly to consumers. This is in contrast to a group or association of farmers selling their produce at a farmers' market. With prior FNS approval, through the State Plan process, a State agency may authorize a farmstand or a nonprofit organization operating a farmstand to participate in the FMNP where necessary to ensure adequate recipient access to farmers' markets.

Fiscal year means the period of 12 calendar months beginning October 1 of any calendar year and ending September 30 of the following calendar year.

FMNP funds means Federal grant funds provided for the FMNP, plus the required matching funds.

FNS means the Food and Nutrition Service of the U.S. Department of Agriculture.

Food costs means the cost of eligible supplemental foods.

Household has the same definition as that of ''family'' defined in § 246.2 of this chapter. Each such family shall constitute a separate household for FMNP benefit issuance purposes.

In-kind contributions means property or services which benefit the FMNP and which are contributed by non-Federal parties without charge to the FMNP.

Local agency means any nonprofit entity or local government agency which issues FMNP coupons, and provides nutrition education and/or information on operational aspects of the FMNP to FMNP recipients.

Matching requirement means State, local or private funds, or program income equal to not less than 30 percent of the total FMNP costs for the fiscal year. The Secretary may negotiate with an Indian State agency a lower percentage of matching funds, but not less than 10 percent of the total cost of the program, if the Indian State agency demonstrates to the Secretary financial hardship for the affected Indian tribe, band, group, or council. The match may be satisfied through expenditures for similar farmers' market programs which operate during the same period as the FMNP. Similar programs include other farmers' market programs which serve low-income women, infants and children (who may or may not be WIC participants or on the waiting list for WIC services), as well as other categories of low-income recipients, such as, but not limited to, low-income elderly persons.

Nonprofit agency means a private agency which is exempt from income tax under the Internal Revenue Code of 1986, as amended, (26 U.S.C. 1 *et. seq.*).

Nutrition education means individual or group education sessions and the provision of information and educational materials designed to improve health status, achieve positive change in dietary habits, and emphasize relationships between nutrition and health, all in keeping with the individual's personal, cultural, and socioeconomic preferences.

OIG means the Department's Office of the Inspector General.

Program or FMNP means the WIC Farmers' Market Nutritiona Program authorized by section 17(m) of the CNA (42 U.S.C. 1786(m)), as amended by Public Law 102–214, the WIC Farmers' Market Nutrition Act of 1992, enacted on July 2, 1992. The Special Supplemental Nutrition Program for Women, Infants and Children (WIC) is authorized by section 17 of the Child Nutrition Act of 1966, as amended. Within section 17, section 17(m) authorizes the FMNP.

Recipient means a person chosen by the State agency to receive FMNP benefits. Such person must be a woman, infant over 4 months of age, or child, who receives benefits under the WIC Program or is on the waiting list to receive benefits under the WIC Program.

SFPD means the Supplemental Food Programs Division of the Food and Nutrition Service of the U.S. Department of Agriculture.

Similar programs means other farmers' market projects or programs which serve low-income women, infants and children, or other categories of recipients, such as, but not limited to, elderly persons.

State means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Marianas Islands.

State agency means the agriculture department, the health department or

any other agency approved by the chief executive officer of the State; an Indian tribe, band or group recognized by the Department of the Interior; an intertribal council or group which is an authorized representative of Indian tribes, bands or groups recognized by the Department of the Interior and which has an ongoing relationship with such tribes, bands or groups for other purposes and has contracted with them to administer the Program; or the appropriate area office of the Indian Health Service (IHS), an agency of the Department of Health and Human Services.

State Plan means a plan of FMNP operation and administration that describes the manner in which the State agency intends to implement, operate and administer all aspects of the FMNP within its jurisdiction in accordance with § 248.4.

Total FMNP costs means the sum of all allowable costs incurred for FMNP purposes, whether funded from the Federal or the State matching share of total FMNP funds.

Total FMNP funds means the sum of the Federal funds provided to the State agency and non-Federal contributions provided by the State agency for FMNP purposes.

WIC means the Special Supplemental Nutrition Program for Women, Infants and Children authorized by section 17 of the Child Nutrition Act of 1966, as amended (42 U.S.C. 1771 *et. seq.*).

[59 FR 11517, Mar. 11, 1994, as amended at 60 FR 49745, Sept. 27, 1995; 64 FR 48076, Sept. 2, 1999]

§ 248.3 Administration.

(a) *Delegation to FNS*. Within the Department, FNS shall act on behalf of the Department in the administration of the FMNP. Within FNS, SFPD and the FNS Regional Offices are responsible for FMNP administration. FNS shall provide assistance to State agencies and evaluate all levels of FMNP operations to ensure that the goals of the FMNP are achieved in the most effective and efficient manner possible.

(b) *Delegation to State agency*. The State agency is responsible for the effective and efficient administration of the FMNP in accordance with the requirements of this part; the requirements of the Department's regulations governing nondiscrimination (7 CFR parts 15, 15a and 15b), administration of grants (7 CFR part 3016), nonprocurement debarment/suspension (7 CFR part 3017), drug-free workplace (7 CFR part 3017), and lobbying (7 CFR part 3018); and, Office of Management and Budget Circular A–130, FNS guidelines, and Instructions issued under the FNS Directives Management System. The State agency shall provide guidance to cooperating WIC State and local agencies on all aspects of FMNP operations. Pursuant to section 17(m)(2) of the CNA, State agencies may operate the FMNP locally through nonprofit organizations or local government entities and must ensure coordination among the appropriate agencies and organizations.

(c) *Agreement and State Plan*. Each State agency desiring to administer the FMNP shall annually submit a State Plan and enter into a written agreement with the Department for administration of the Program in the jurisdiction of the State agency in accordance with the provisions of this part.

(d) *State agency ineligibility*. A State agency shall be ineligible to participate in the FMNP if State or local sales tax is collected on Program food purchases in the area in which it administers the Program, except that, if sales tax is collected on Program food purchases by sovereign Indian entities which are not State agencies, the State agency shall remain eligible so long as any farmers' markets collecting such tax are disqualified.

(e) *Coordination with WIC agency*. The Chief Executive Officer of the State shall ensure coordination between the designated administering State agency and the WIC State agency, if different, by ensuring that the two agencies enter into a written agreement. Such coordination between agencies is necessary for the successful operation of the FMNP, because WIC participants or persons on the waiting list for WIC services are the only persons eligible to receive Federal benefits under the FMNP. The written agreement shall delineate the responsibilities of each agency, describe any compensation for

services, and shall be signed by the designated representative of each agency. This agreement shall be submitted each year along with the State Plan.

(f) *State staffing standards*. Each State agency shall ensure that sufficient staff is available to efficiently and effectively administer the FMNP. This shall include, but not be limited to, sufficient staff to provide nutrition education in coordination with the WIC Program, coupon and market management, fiscal reporting, monitoring, and training. The State agency shall provide an outline of administrative staff and job descriptions for staff whose salaries will be paid from program funds in their State Plans.

Subpart B—State Agency Eligibility

§ 248.4 State Plan.

(a) *Requirements*. By November 15 of each year, each applying or participating State agency shall submit to FNS for approval a State Plan for the following year as a prerequisite to receiving funds under this section. The State Plan shall be signed by the State designated official responsible for ensuring that the Program is operated in accordance with the State Plan. FNS will provide written approval or denial of a completed State Plan or amendment within 30 days. Portions of the State Plan which do not change annually need not be resubmitted. However, the State agency shall provide the title of the sections that remain unchanged, as well as the year of the last Plan in which the sections were submitted. At a minimum, the Plan must address the following areas in sufficient detail to demonstrate the State agency's ability to meet the requirements of the FMNP:

(1) A copy of the agreement between the designated administering State agency and the WIC State agency, if different, for services such as nutrition education, and documentation of coordinated efforts as required in § 248.3(e), as well as copies of agreements with agencies other than the WIC State agency.

(2) Estimated number of recipients for the fiscal year, and proposed months of operation.

(3) Estimated cost of the FMNP, including a minimum amount necessary to operate the FMNP.

(4) Description of how the Program will achieve its dual purposes of providing a nutritional benefit to WIC (or waiting list) participants and expanding the awareness and use of farmers' markets.

(5) Outline of administrative staff and job descriptions.

(6) Detailed description of the recordkeeping system including, but not limited to, the system for maintaining records pertaining to financial operations, coupon issuance and redemption, and FMNP participation.

(7) Detailed description of the financial management system, including, but not limited to documentation of how the State will meet the matching requirement and procedures for obligating funds.

(8) Detailed description of the service area including:

(i) The number and addresses of participating markets, farmstands and area WIC clinics including a map outlining the service area and proximity of markets/farmstands to clinics; and

(ii) Estimated number of WIC participants and persons on the WIC waiting list that will receive FMNP coupons.

(9) Description of the coupon issuance system including:

(i) How the State agency will target areas with highest concentrations of eligible persons and greatest access to farmers' markets within the broadest possible geographic area;

(ii) Annual benefit amount per recipient;

(iii) Method for instructing recipients on the proper use of FMNP coupons and the purpose of the FMNP; and

(iv) Method for ensuring that FMNP coupons are only issued to eligible recipients.

(10) Detailed description of the coupon and farmers' market management system including:

(i) criteria for authorizing farmers' markets;

(ii) For those State agencies desiring to authorize farmstands, justification for doing so.

(iii) Procedures for training farmers and market managers, at authorization, and annually thereafter;

(iv) Procedures for monitoring farmers' markets;

(v) Description of system for identifying high risk farmers and farmers' markets and procedures for sanctioning farmers and farmers' markets;

(vi) Facsimile of the FMNP coupon;

(vii) Identification of the fresh, nutritious, unprepared fruits, vegetables, and herbs which are eligible for purchase under the Program;

(viii) Description of FMNP coupon replacement policy;

(ix) Procedures for handling recipient and farmer/farmers' market complaints.

(11) Detailed description of the FMNP coupon redemption process including:

(i) Procedures for ensuring the secure transportation and storage of FMNP coupons;

(ii) System for identifying and reconciling FMNP coupons;

(iii) Timeframes for FMNP coupon redemption by recipients; submission for payment by markets, and payment by the State agency;

(12) System for ensuring that FMNP coupons are redeemed only by authorized farmers/farmers' markets and only for eligible foods.

(13) System for identifying FMNP coupons which are redeemed or submitted for payment outside valid dates or by unauthorized farmers/farmers' markets.

(14) A copy of the written agreement to be used between the State agency and authorized farmers/farmers' markets. In those States which authorize farmers' markets, but not individual farmers, this agreement shall specify in detail the role of and procedures to be used by farmers' markets for monitoring and sanctioning farmers, and the appropriate procedures to be used by a farmer to appeal a sanction or disqualification imposed by a farmers' market.

(15) If available, information on the change in consumption of fresh fruits and vegetables by recipients. This information shall be submitted as an addendum to the State Plan and shall be submitted at such a date specified by the Secretary.

(16) If available, information on the effects of the program on farmers' markets. This information shall be submitted as an addendum to the State Plan and shall be submitted at such a date specified by the Secretary.

(17) A description of the procedures the State agency will use to comply with the civil rights requirements described in §248.7(a), including the processing of discrimination complaints.

(18) State agencies which have not previously participated in the FMNP, shall provide the following additional information:

(i) A statement assuring that if the State agency receives Federal funds, as specified under §248.14 to operate the FMNP, and applies those funds to similar programs operated in the previous fiscal year with State or local funds, the amount of State and local funds that were available to similar programs in the fiscal year preceding the first year of operation shall not be reduced. The State agency shall include data in the State Plan showing that it did not reduce the amount of State and local funds available to the similar program in the preceding fiscal year.

(ii) A capability statement which includes a summary description of any prior experience with farmers' market projects or programs, including information and data describing the attributes of such projects or programs.

(19) For States making expansion requests, documentation which demonstrates:

(i) The need for an increase in funding;

(ii) That the use of the increased funding will be consistent with serving WIC participants, or persons on a waiting list for WIC benefits, by expanding benefits to more persons, by enhancing current benefits, or a combination of both, and expanding the awareness and use of farmers' markets;

(iii) The ability to satisfactorily operate the existing FMNP;

(iv) The management capabilities of the State agency to expand; and

(v) Whether, in the case of a State agency that intends to use the funding to increase the value of the Federal share of the benefits received by a recipient, the funding provided will increase the rate of coupon redemption.

(20) For those State agencies requesting the extra 2 percent administrative

rate for market development or technical assistance to promote such development in disadvantaged areas or remote rural areas, an explanation of their justification and plans for the use of such funds.

(b) *Amendments*. At any time after approval, the State agency may amend the State Plan to reflect changes. The State agency shall submit the amendments to FNS for approval. The amendments shall be signed by the State designated official responsible for ensuring that the FMNP is operated in accordance with the State Plan.

(c) *Retention of copy*. A copy of the approved State Plan shall be kept on file at the State agency for public inspection.

[59 FR 11517, Mar. 11, 1994, as amended at 60 FR 49746, Sept. 27, 1995; 64 FR 48076, Sept. 2, 1999]

§ 248.5 Selection of new State agencies.

In selecting new State agencies, the Department will use objective criteria to rank and approve State plans submitted in accordance with § 248.4. In making this ranking, the Department will consider the amount of funds necessary to successfully operate the FMNP in the State compared with other States and with the total amount of funds available to the FMNP. Approval of a State Plan does not equate to an obligation on the part of the Department to fund the FMNP within that State agency.

[64 FR 48076, Sept. 2, 1999]

Subpart C—Recipient Eligibility

§ 248.6 Recipient eligibility.

(a) *Eligibility for certification*. Individuals who are eligible to receive Federal benefits under the FMNP are those, excluding infants 4 months of age or younger, who are currently receiving benefits under WIC or who are on the waiting list to receive benefits from WIC.

(b) *Limitations on certification*. If necessary to limit the number of recipients, State agencies may impose additional eligibility requirements, such as limiting participant certification to certain geographic areas, or to high priority WIC participants such as pregnant and breastfeeding women. States may also preclude groups of low priority persons, such as persons on the waiting list for WIC. Each State agency must specifically identify these limitations on certification in its State Plan.

(c) *Recipient or household benefit allocation*. On a Statewide basis, State agencies shall elect to allocate and issue benefits either to recipients or households. A State agency allocating benefits on a household basis shall not issue more benefits to a household than it otherwise would if benefits were allocated to individual recipients within the household. For those State agencies issuing FMNP benefits on a household basis, each family as defined in § 246.2 of this chapter shall constitute a separate household. Foods provided, regardless of method of issuance, are intended for the sole benefit of FMNP recipients and are not intended to be shared with other non-participating household members. If a State agency issues benefits on a household basis, data concerning number and type of recipients must still be provided as required by § 248.23(b). Recipients shall receive FMNP benefits free of charge.

§ 248.7 Nondiscrimination.

(a) *Civil rights requirements*. The State agency shall comply with the requirements of title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, Department of Agriculture regulations on nondiscrimination (7 CFR parts 15, 15a and 15b), and applicable FNS Instructions to ensure that no person shall, on the grounds of race, color, national origin, age, sex or handicap, be excluded from participation, be denied benefits, or be otherwise subjected to discrimination, under the FMNP. Because racial and ethnic participation data (as required by title VI of the Civil Rights Act of 1964) are collected at the time women, infants, and children are certified for participation in the WIC Program, the Department has determined that the WIC data collection effort is sufficient to fulfill the racial/ethnic data collection requirement for the FMNP. Therefore, no additional data collection is

required. Compliance with title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and regulations and instructions issued thereunder shall include, but not be limited to:

(1) Notification to the public of the nondiscrimination policy and complaint rights of recipients and potentially eligible persons, which may be satisfied through the Department's required nondiscrimination statement on brochures and publications;

(2) Review and monitoring activity to ensure FMNP compliance with the nondiscrimination laws and regulations;

(3) Establishment of grievance procedures for handling recipient complaints based on sex and handicap.

(b) *Complaints*. Persons seeking to file discrimination complaints may file them either with the Secretary of Agriculture, or the Director, Office of Equal Opportunity, USDA, Washington, DC 20250 or with the office established by the State agency to handle discrimination grievances or complaints. All complaints received by State agencies which allege discrimination based on race, color, national origin, or age shall be referred to the Secretary of Agriculture or the Director of the Office of Equal Opportunity, USDA. A State agency may process complaints which allege discrimination based on sex or handicap if grievance procedures are in place.

Subpart D—Recipient Benefits

§ 248.8 Level of benefits and eligible foods.

(a) *General*. State agencies shall identify in the State Plan the fresh, nutritious, unprepared, locally grown fruits, vegetables and herbs which are eligible for purchase under the FMNP. Ineligible foods for the purpose of the FMNP include, but are not limited to: honey, maple syrup, cider, nuts and seeds, eggs, cheese, meat and seafood. Locally grown shall mean produce grown only within a State's borders but may be defined to include border areas in adjacent States. Under no circumstances can produce grown outside of the United States and its territories be considered eligible foods.

(b) *The value of the Federal benefits received*. The value of the Federal share of the FMNP benefits received by each recipient, or by each family within a household in those States which elect to issue benefits on a household basis under § 248.6(c) may not be less than $10 per year or more than $20 per year.

[59 FR 11517, Mar. 11, 1994, as amended at 60 FR 49746, Sept. 27, 1995]

§ 248.9 Nutrition education.

(a) *Goals*. Nutrition education shall emphasize the relationship of proper nutrition to the total concept of good health, including the importance of consuming fresh fruits and vegetables.

(b) *Requirement*. The State agency shall integrate nutrition education into FMNP operations and may satisfy nutrition education requirements through coordination with other agencies within the State. Such other agencies may include the WIC Program which routinely offers nutrition education to participants and which may wish to use the opportunity of the FMNP to reinforce nutrition messages. State agencies wishing to coordinate nutrition education with WIC shall enter into a written cooperative agreement with WIC agencies to offer nutrition education relevant to the use and nutritional value of foods available to FMNP recipients. In cases where relevant WIC nutrition education sessions are used to meet this requirement, reimbursement to the WIC local agency shall not be permitted. In cases where FMNP recipients are not receiving relevant nutrition education from the WIC Program, the State agency shall arrange alternative methods for the provision of such nutrition education which is an allowable cost under the FMNP.

Subpart E—State Agency Provisions

§ 248.10 Coupon and market management.

(a) *General*. This section sets forth State agency responsibilities regarding the authorization of farmers/farmers'

markets. The State agency is responsible for the fiscal management of, and accountability for FMNP-related activities for farmers/farmers' markets. Each State agency may decide whether to authorize farmers individually, farmers' markets, or both farmers and farmers' markets. All contracts or agreements entered into by the State agency for the management or operation of farmers/farmers' markets shall conform with the requirements of 7 CFR part 3016, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.

(1) Only farmers' markets authorized by the State agency may redeem FMNP coupons. Only farmers authorized by the State agency or that have a valid agreement with an authorized farmers' market, may redeem coupons.

(2) The State agency shall establish criteria for the authorization of individual farmers and/or farmers' markets. Any authorized farmer/farmers' market must agree to sell recipients only those foods identified as eligible by the State agency, in exchange for FMNP coupons. Individuals who exclusively sell produce grown by someone else, such as wholesale distributors, cannot be authorized to participate in the FMNP, except individuals employed by a farmer otherwise qualified under these regulations, or individuals hired by a nonprofit organization to sell produce at urban farmstands on behalf of local farmers.

(3) The State agency shall ensure that an appropriate number of farmers/farmers' markets are authorized for adequate recipient convenience and access in the area(s) proposed to be served and for effective management of the farmers/farmers' markets by the State agency. The State agency may establish criteria to limit the number of authorized farmers/farmers' markets.

(4) The State agency shall ensure that face-to-face training is conducted prior to start up of the first year of FMNP participation of a farmers' market and individual farmer. The face-to-face training shall include at a minimum those items listed in paragraph (d) of this section.

(5) Authorized farmers shall display a sign stating that they are authorized to redeem FMNP coupons.

(6) Authorized farmers/farmers' markets shall comply with the requirements of Title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, Department of Agriculture regulations on nondiscrimination (7 CFR parts 15, 15a and 15b), and FNS Instructions as outlined in § 248.7.

(7) The State agency shall ensure that there is no conflict of interest between the State or local agency and any participating farmer/farmers' market.

(b) *Farmers' market agreements.* The State agency shall ensure that all participating farmers' markets enter into written agreements with the State agency. State agencies which authorize individual farmers shall also enter into written agreements with the individual farmers. The agreement shall be signed by a representative who has legal authority to obligate the farmers/farmers' market. Agreements shall include a description of sanctions for noncompliance with FMNP requirements and shall contain at a minimum, the following specifications, although the State agency may determine the exact wording to be used:

(1) The farmer/farmers' market shall:

(i) Provide such information as the State agency may require for its periodic reports to FNS;

(ii) Assure that FMNP coupons are redeemed only for eligible foods;

(iii) Provide eligible foods at the current price or less than the current price charged to other customers;

(iv) Accept FMNP coupons within the dates of their validity and submit such coupons for payment within the allowable time period established by the State agency;

(v) In accordance with a procedure established by the State agency, mark each transacted coupon with a farmer identifier. In those cases where the agreement is between the State agency and the farmer, each transacted FMNP coupon shall contain a farmer identifier and shall be batched for reimbursement under that identifier. In those

cases where the agreement is between the State agency and the farmers' market, each transacted FMNP coupon shall contain a farmer identifier and be batched for reimbursement under a farmers' market identifier.

(vi) Accept training on FMNP procedures and provide training to farmers and any employees with FMNP responsibilities on such procedures;

(vii) Agree to be monitored for compliance with FMNP requirements, including both overt and covert monitoring;

(viii) Be accountable for actions of farmers or employees in the provision of foods and related activities;

(ix) Pay the State agency for any coupons transacted in violation of this agreement;

(x) Offer FMNP recipients the same courtesies as other customers;

(xi) Comply with the nondiscrimination provisions of USDA regulations as provided in § 248.7; and

(xii) Notify the State agency if any farmer or farmers' market ceases operation prior to the end of the authorization period.

(2) The farmers' market/farmer shall not:

(i) Collect sales tax on FMNP coupon purchases;

(ii) Seek restitution from FMNP recipients for coupons not paid by the State agency;

(iii) Issue cash change for purchases that are in an amount less than the value of the FMNP coupon(s).

(3) Neither the State agency nor the farmer/farmers' market has an obligation to renew the agreement. Either the State agency or the farmer/farmers' market may terminate the agreement for cause after providing advance written notification.

(4) The State agency may deny payment to the farmer/farmers' market for improperly redeemed FMNP coupons and may demand refunds for payments already made on improperly redeemed coupons.

(5) The State agency may disqualify a farmer/farmers' market for FMNP abuse. The farmer/farmers' market has the right to appeal a denial of an application to participate, a disqualification, or a FMNP sanction by the State agency. Expiration of a contract or agreement with a farmer/farmers' market, and claims actions under § 248.20, are not appealable.

(6) A farmer or farmers' market which commits fraud or engages in other illegal activity is liable to prosecution under applicable Federal, State or local laws.

(7) Agreements may not exceed 3 years.

(c) *Farmer agreements for State agencies which do not authorize farmers.* Those State agencies which authorize farmers' markets but not individual farmers shall require authorized farmers' markets to enter into a written agreement with each farmer within the market that is participating in FMNP. The State agency shall set forth the required terms for the agreement and provide a sample agreement which may be used.

(d) *Annual training for farmers/farmers' market managers.* State agencies shall conduct annual training for farmers/farmers' market managers participating in the FMNP. The State agency shall conduct a face-to-face training for all farmers and farmers' market managers who have never previously participated in the program prior to their commencing participation in the FMNP. After a farmer/farmers' market manager's first year of FMNP operation, State agencies have discretion in determining the method used for annual training purposes. At a minimum, annual training shall include instruction emphasizing:

(1) Eligible food choices;

(2) Proper FMNP coupon redemption procedures, including deadlines for submission of coupons for payment;

(3) Equitable treatment of FMNP recipients, including the availability of produce to FMNP recipients that is of the same quality and cost as that sold to other customers;

(4) Civil rights compliance and guidelines;

(5) Guidelines for storing FMNP coupons safely; and

(6) Guidelines for cancelling FMNP coupons, such as punching holes or rubber stamping.

(e) *Monitoring and review of farmers/farmers' markets and local agencies.* The State agency shall be responsible for the monitoring of farmers/farmers'

markets, and local agencies within its jurisdiction. This shall include developing a system for identifying high risk farmers/farmers' markets and ensuring on-site monitoring, conducting further investigation, and sanctioning of such farmers/farmers' markets as appropriate.

(1) Where coupon reimbursement responsibilities are delegated to farmers' market managers, farmers' market associations, or nonprofit organizations, the State agency may establish bonding requirements for these entities. Costs of such bonding are not reimbursable administrative expenses.

(2) Each State agency shall rank participating farmers and farmers' markets by risk factors, and shall conduct annual, on-site monitoring of at least 10 percent of farmers and 10 percent of farmers' markets which shall include those farmers and markets identified as being the highest-risk. Mandatory high-risk indicators are a proportionately high volume of FMNP coupons redeemed by a farmer as compared to other farmers within the farmers' market and within the State, recipient complaints, and farmers and farmers' markets in their first year of FMNP operation. States are encouraged to formally establish other high risk indicators for identifying potential problems. If additional high risk indicators are established, they shall be set forth in the farmers/farmers' market agreement and in the State Plan. If application of the high-risk indicators results in fewer than 10 percent of farmers and farmers' markets as high-risk, the State agency shall randomly select additional farmers and farmers' markets to be monitored in order to meet the 10 percent minimum. The high-risk indicators listed above generally apply to a State agency already participating in the FMNP. A State agency participating in the FMNP for the first time shall, in lieu of applying the high-risk indicators, randomly select 10 percent of its participating farmers and 10 percent of its participating farmers' markets for monitoring visits.

(3) The following shall be documented for all on-site farmers and farmers' markets monitoring visits, at a minimum: Names of both farmer/farmers' market and reviewer; date of review; nature of problem(s) detected or the observation that the farmer/farmers' market appears to be in compliance with FMNP requirements; record of interviews with recipients, market managers and/or farmers; and signature of the reviewer. Reviewers are not required to notify the farmer/farmers' market of the monitoring visit during, or immediately after the visit. The State agency shall do so after a reasonable delay when necessary to protect the identity of the reviewer(s) or the integrity of the investigation. After the farmer/farmers' market has been informed of any deficiencies detected by the monitoring visit, and instances where the farmer/farmers' market will be permitted to continue participation, the farmer/farmers' market shall provide plans as to how the deficiencies will be corrected.

(4) At least every 2 years, the State agency shall review all local agencies within its jurisdiction. WIC State agency reviews of WIC local agencies, which include reviews of FMNP practices, may contribute to meeting the requirement that all local agencies be reviewed once every 2 years.

(f) *Control of FMNP coupons.* (1) The State agency shall control and provide accountability for the receipt and issuance of FMNP coupons.

(2) The State agency shall ensure that there is secure transportation and storage of unissued FMNP coupons.

(3) The State agency shall design and implement a system of review of FMNP coupons to detect errors. At a minimum, the errors the system must detect are a missing recipient signature, a missing farmer and/or market identification, and redemption by a farmer outside of the valid date. The State agency shall implement procedures to reduce the number of errors in transactions, where possible.

(g) *Payment to farmers/farmers' markets.* The State agency shall ensure that farmers/ farmers' markets are promptly paid for food costs.

(h) *Reconciliation of FMNP coupons.* The State agency shall identify the disposition of all FMNP coupons as validly redeemed, lost or stolen, expired, or not matching issuance records. Validly redeemed FMNP coupons are those

that are issued to a valid recipient and redeemed by an authorized farmers/farmers' market within valid dates. FMNP coupons that were redeemed but cannot be traced to a valid recipient or authorized farmer/farmers' market shall be subject to claims action in accordance with § 248.20. (1) If the State agency elects to replace lost, stolen or damaged FMNP coupons, it must describe its system for doing so in the State Plan.

(2) The State agency shall use uniform FMNP coupons within its jurisdiction.

(3) FMNP coupons must include, at a minimum, the following information:

(i) The last date by which the recipient may use the coupon. This date shall be no later than November 30 of each year.

(ii) A date by which the farmer or farmers' market must submit the coupon for payment. When establishing this date, State agencies shall take into consideration the date financial statements are due to the FNS, and allow time for the corresponding coupon reconciliation that must be done by the State agency prior to submission of financial statements. Currently, financial statements are due to FNS by January 30.

(iii) A unique and sequential serial number.

(iv) A denomination (dollar amount).

(v) A farmer identifier for the redeeming farmer when agreements are between the State agency and the farmer.

(vi) In those instances where State agencies have agreements with farmers' markets, there must be a farmer identifier on each coupon and a market identifier on the cover of coupons which are batched by the market manager for reimbursement.

(i) *Instructions to recipients.* Each recipient shall receive instructions on the proper use and redemption of the FMNP coupons, including, but not limited to: (1) A list of names and addresses of authorized farmers/farmers' markets at which FMNP coupons may be redeemed.

(2) A description of eligible foods and the prohibition against cash change.

(3) An explanation of their right to complain about improper farmer/farmers' market practices with regard to FMNP responsibilities and the process for doing so.

(j) *Recipients and farmer/farmers' market complaints.* The State agency shall have procedures which document the handling of complaints by recipients and farmers/farmers' markets. Complaints of civil rights discrimination shall be handled in accordance with § 248.7(b).

(k) *Recipients and farmer/farmers' market sanctions.* The State agency shall establish policies which determine the type and level of sanctions to be applied against recipients and farmers/farmers' markets, based upon the severity and nature of the FMNP violations observed, and such other factors as the State agency determines appropriate, such as whether repeated offenses have occurred over a period of time. Farmers/farmers' markets may be sanctioned, disqualified, or both, when appropriate. Sanctions may include fines for improper FMNP coupon redemption procedures and the penalties outlined in § 248.20, in case of deliberate fraud. In those instances where compliance purchases are conducted, the results of covert compliance purchases can be a basis for farmer/farmers' market sanctions. A farmer/farmers' market committing fraud or other unlawful activities is liable to prosecution under applicable Federal, State or local laws. State agency policies shall ensure that a farmer that is disqualified from the FMNP at one market shall not participate in the FMNP at any other farmers' market in the State's jurisdiction during the disqualification period.

[59 FR 11517, Mar. 11, 1994, as amended at 60 FR 49746, Sept. 27, 1995]

§ 248.11 Financial management system.

(a) *Disclosure of expenditures.* The State agency shall maintain a financial management system which provides accurate, current and complete disclosure of the financial status of the FMNP. This shall include an accounting for all property and other assets and all FMNP funds received and expended each fiscal year.

(b) *Internal controls.* The State agency shall maintain effective controls over and accountability for all FMNP funds.

The State agency must have effective internal controls to ensure that expenditures financed with FMNP funds are authorized and properly chargeable to the FMNP.

(c) *Record of expenditures.* The State agency shall maintain records which adequately identify the source and use of funds expended for FMNP activities. These records shall contain, but are not limited to, information pertaining to authorization, receipt of funds, obligations, unobligated balances, assets, liabilities, outlays, and income.

(d) *Payment of costs.* The State agency shall implement procedures which ensure prompt and accurate payment of allowable costs, and ensure the allowability and allocability of costs in accordance with the cost principles and standard provisions of this part, 7 CFR part 3016, and FNS guidelines and Instructions.

(e) *Identification of obligated funds.* The State agency shall implement procedures which accurately identify obligated FMNP funds at the time the obligations are made.

(f) *Resolution of audit findings.* The State agency shall implement procedures which ensure timely and appropriate resolution of claims and other matters resulting from audit findings and recommendations.

(g) *Reconciliation of food instruments.* The State agency shall reconcile FMNP coupons in accordance with § 248.10(h).

(h) *Transfer of cash.* The State agency shall establish the timing and amounts of its cash draws against its Letter of Credit in accordance with 31 CFR part 205.

[59 FR 11517, Mar. 11, 1994, as amended at 60 FR 49747, Sept. 27, 1995]

§ 248.12 FMNP costs.

(a) *General.*—(1) *Composition of allowable costs.* In general, a cost item will be deemed allowable if it is reasonable and necessary for FMNP purposes and otherwise satisfies allowability criteria set forth in 7 CFR 3016.22 and this part. FMNP purposes include the administration and operation of the FMNP. Program costs supported by State matching contributions must meet the same criteria for allowability as costs supported by Federal funds. Allowable FMNP costs may be classified as follows:

(i) *Food costs and administrative costs.* Food costs are the costs of food benefits provided to FMNP recipients. Administrative costs are the costs associated with providing FMNP benefits and services to recipients and generally administering the FMNP. Specific examples of allowable administrative costs are listed in paragraph (b) of this section. Except as provided in § 248.14(g) of this part, a State agency's administrative costs under the FMNP may not exceed 17 percent of its total FMNP costs. Any costs incurred for food and/or administration above the Federal grant level will be the State agency's responsibility.

(ii) *Market development or technical assistance costs.* Market development or technical assistance costs are those costs under § 248.14(h) incurred to promote the development of farmers' markets in socially or economically disadvantaged areas, or remote rural areas, where individuals eligible for participation in the program have limited access to locally grown fruits and vegetables. Subject to a determination by the Secretary under § 248.14(h), a State agency may, during any fiscal year, use not more than 2 percent of total program funds for such market development or technical assistance.

(iii) *Direct and indirect costs.* Direct costs are food and administrative costs incurred specifically for the FMNP. Indirect costs are administrative costs that benefit multiple programs or activities, and cannot be identified to any one without effort disproportionate to the results achieved. In accordance with the provisions of 7 CFR part 3016, a claim for reimbursement of indirect costs shall be supported by an approved allocation plan for the determination of such costs. An indirect cost rate developed through such an allocation plan may not be applied to a base that includes food costs.

(2) *Costs allowable with prior approval.* A State or local agency must obtain prior approval in accordance with 7 CFR 3016.22 before charging to the FMNP any capital expenditures and other cost items designated by 7 CFR 3016.22 as requiring such approval.

(3) *Unallowable costs.* Costs that are not reasonable and necessary for FMNP purposes, or that do not otherwise satisfy the cost principles of 7 CFR 3016.22, are unallowable. Notwithstanding any other provision of part 3016 or this part, the cost of constructing or operating a farmers' market is unallowable. Unallowable costs may never be claimed for Federal reimbursement or counted toward the State matching requirement.

(b) *Specified allowable administrative costs.* Allowable administrative costs include the following:

(1) The costs associated with the provision of nutrition education which meets the requirements of § 248.9 of this part.

(2) The costs of FMNP coupon issuance, or recipient education covering proper coupon redemption procedures.

(3) The cost of outreach services.

(4) The costs associated with the food delivery process, such as printing FMNP coupons, processing redeemed coupons, and training market managers on the food delivery system.

(5) The cost of monitoring and reviewing Program operations.

(6) The cost of FMNP training.

(7) The cost of required reporting and recordkeeping.

(8) The cost of determining which local WIC sites will be utilized.

(9) The cost of recruiting and authorizing farmers/farmers' markets to participate in the FMNP.

(10) The cost of preparing contracts for farmers/farmers' markets and local WIC providers.

(11) The cost of developing a data processing system for redemption and reconciliation of FMNP coupons.

(12) The cost of designing program training and informational materials.

(13) The cost of coordinating FMNP implementation responsibilities between designated administering agencies.

[59 FR 11517, Mar. 11, 1994, as amended at 60 FR 49747, Sept. 27, 1995]

§ 248.13 FMNP income.

Program income means gross income the State agency earns from grant supported activities. It includes fees for services performed and receipts from the use or rental of real or personal property acquired with Federal grant funds, but does not include proceeds from the disposition of such property. The State agency shall retain Program income earned during the agreement period and use it for Program purposes in accordance with the addition method described in 7 CFR 3016.25(g)(2). Fines, penalties or assessments paid by local agencies or farmers/farmers' markets are also deemed to be FMNP income. The State agency shall ensure that the sources and applications of Program income are fully documented.

§ 248.14 Distribution of funds.

(a) *Conditions for receipt of Federal funds.*—(1) *Matching of funds*—(i) *Match amount.* As a prerequisite to the receipt of Federal funds, a State agency must agree to contribute State, local or private funds, or program income, equal to not less than 30 percent of its total FMNP cost. The Secretary may negotiate a lower percentage of matching funds, but not lower than 10 percent of the total cost of the program, in the case of an Indian State agency that demonstrates to the Secretary financial hardship for the affected Indian tribe, band, group, or council. The State agency may contribute more than this minimum amount. State, local or private funds for similar programs as defined in (248.2 may satisfy the State matching requirement.

(ii) *Sources of matching contributions.* A State agency may count any form of contribution authorized by 7 CFR 3016.24 toward the State matching requirement including in-kind contributions.

(iii) *Failure to match.* A State agency's failure to meet the State matching requirement will result in the establishment of a claim for the amount of Federal grant funds not matched. The matching requirement will be considered satisfied if State or other non-Federal matching contributions reported on the final closeout report required by § 248.15(a) of this part amount to at least 30 percent of the total FMNP costs. This match amount may be lower for those Indian State agencies that have demonstrated to the Secretary financial hardship as set

forth in paragraph (a)(1)(i) of this section.

(2) *State Plan and agreement.* A State agency shall have its State Plan approved and shall execute an agreement with the Department in accordance with § 248.3(c) of this part.

(b) *Distribution of FMNP funds to previously participating State agencies.* Provided that sufficient FMNP funds are available, each State agency that participated in the FMNP in any prior fiscal year, shall receive not less than the amount of funds the State agency received in the most recent fiscal year in which it received funding, if it otherwise complies with the requirements established in this part.

(c) *Ratable reduction.* If amounts appropriated for any fiscal year for grants under the FMNP are not sufficient to pay to each previously participating State agency at least an amount as identified in paragraph (b) of this section, each State agency's grant shall be ratably reduced, except that, to the extent permitted by available funds, each State agency shall receive at least $75,000 or the amount that the State agency received for the most recent prior fiscal year in which the State participated, if that amount is less than $75,000.

(d) *Expansion of participating State agencies and establishment of new State agencies.* Any FMNP funds remaining for allocation after meeting the requirements of paragraph (b) of this section shall be allocated in the following manner:

(1) Of the remaining funds, 75 percent shall be made available to State agencies already participating in the FMNP that wish to serve additional recipients. If this amount is greater than that necessary to satisfy all State plans approved for additional recipients, the unallocated amount shall be applied toward satisfying any unmet need in paragraph (d)(2) of this section.

(2) Of the remaining funds, 25 percent shall be made available to State agencies that have not participated in the FMNP in any prior fiscal year. If this amount is greater than that necessary to satisfy the approved State Plans for new States, the unallocated amount shall be applied toward satisfying any unmet need in paragraph (d)(1) of this section. The Department reserves the right not to fund every State agency with an approved State Plan.

(3) In any fiscal year, any FMNP funds that remain unallocated after satisfying the requirements of paragraphs (d)(1) and (d)(2) of this section, shall be reallocated in accordance with paragraph (k) of this section.

(e) *Expansion for current State agencies.* In providing funds to State agencies that participated in the FMNP in the previous fiscal year, the Department shall consider on a case-by-case basis, the following:

(1) Whether the State agency utilized at least 80 percent of its prior year food grant. States that did not spend at least 80 percent of their prior year food grant may still be eligible for expansion funding if, in the judgment of the Department, good cause existed which was beyond the management control of the State, such as severe weather conditions, or unanticipated decreases in participant caseload in the WIC Program.

(2) Documentation supporting the funds expansion request as outlined in § 248.4(a)(19).

(f) *Funding of new State agencies.* Funds will be awarded to new State agencies in accordance with § 248.5.

(g) *Administrative funding.* A State agency shall have available for administrative costs an amount not greater than 17 percent of total FMNP funds. The 17 percent administrative cost limitation shall not apply to any funds that a State agency may contribute in excess of its minimum matching requirement. A State agency may use any non-Federal contributions in excess of the 30 percent (or the negotiated percentage for those Indian State agencies that received a lower amount) matching requirement for food and/or administrative costs.

(h) *Market development.* A State agency shall be permitted to use not more than 2 percent of total program funds for market development or technical assistance to farmers' markets if the Secretary determines that the State intends to promote the development of farmers' markets in socially or economically disadvantaged areas, or remote rural areas, where individuals eligible for participation in the program

have limited access to locally grown fruits and vegetables.

(i) *Transfer of funds.* A State agency may use not more than 5 percent of the Federal FMNP funds made available for the fiscal year to reimburse expenses incurred by the FMNP during a preceding fiscal year. The State agency shall provide such justification for its request to spend back funds under this paragraph as FNS may require.

(j) *Recovery of unused funds.* State agencies shall return to FNS any unexpended funds made available for a fiscal year by February 1 of the following fiscal year.

(k) *Reallocation of funds.* Any funds recovered under paragraphs (d)(3) and (j) of this section will be reallocated in accordance with the appropriate method determined by FNS.

[59 FR 11517, Mar. 11, 1994, as amended at 60 FR 49747, Sept. 27, 1995; 60 FR 57148, Nov. 14, 1995; 64 FR 48076, Sept. 2, 1999]

§ 248.15 Closeout procedures.

(a) *General.* State agencies shall submit to FNS a final closeout report for the fiscal year on a form prescribed by FNS on a date specified by FNS.

(b) *Grant closeout procedures.* When grants to State agencies are terminated, the following procedures shall be performed in accordance with 7 CFR part 3016.

(1) FNS may disqualify a State agency's participation under the FMNP, in whole or in part, or take such remedies as may be appropriate, whenever FNS determines that the State agency failed to comply with the conditions prescribed in this part, in its Federal-State Agreement, or in FNS guidelines and instructions. FNS will promptly notify the State agency in writing of the disqualification together with the effective date.

(2) FNS may disqualify the State agency or restrict its participation in the FMNP when both parties agree that continuation under the FMNP would not produce beneficial results commensurate with the further expenditure of funds.

(3) Upon termination of a grant, the affected agency shall not incur new obligations after the effective date of the disqualification, and shall cancel as many outstanding obligations as possible. FNS will allow full credit to the State agency for the Federal share of the noncancellable obligations properly incurred by the State agency prior to disqualification, and the State agency shall do the same for farmers/farmers' markets.

(4) A grant closeout shall not affect the retention period for, or Federal rights of access to, FMNP records as specified in § 248.24(b) and (c). The closeout of a grant does not affect the responsibilities of the State agency regarding property or with respect to any FMNP income for which the State agency is still accountable.

(5) A final audit is not a required part of the grant closeout and should not be needed unless there are problems with the grant that require attention. If FNS considers a final audit to be necessary, it shall so inform OIG. OIG will be responsible for ensuring that necessary final audits are performed and for any necessary coordination with other Federal cognizant audit agencies or State or local auditors. Audits performed in accordance with § 248.18 may serve as final audits providing such audits meet the needs of requesting agencies. If the grant is closed out without an audit, FNS reserves the right to disallow and recover an appropriate amount after fully considering any recommended disallowances resulting from an audit which may be conducted later.

§ 248.16 Administrative appeal of State agency decisions.

(a) *Requirements.* The State agency shall provide a hearing procedure whereby recipients, local agencies and farmers/farmers' markets adversely affected by certain actions of the State agency may appeal those actions. A recipient may appeal disqualification/suspension of FMNP benefits. A local agency may appeal an action of the State agency disqualifying it from participating in the FMNP. A farmer/farmers' market may appeal an action of the State agency denying its application to participate, imposing a sanction, or disqualifying it from participating in the FMNP. Expiration of a contract or agreement shall not be subject to appeal.

(b) *Postponement pending decision.* An adverse action may, at the State agency's option, be postponed until a decision in the appeal is rendered.

(1) In a case where an adverse action affects a local agency or farmer/farmers' market, a postponement is appropriate where the State agency finds that recipients would be unduly inconvenienced by the adverse action. In addition, the State agency may determine other relevant criteria to be considered in deciding whether or not to postpone an adverse action.

(2) In a case where a recipient appeals the termination of benefits, that recipient shall continue to receive FMNP benefits until the hearing official reaches a decision or the expiration of the current FMNP season, whichever occurs first. Applicants who are denied benefits may appeal the denial, but shall not receive benefits while awaiting the decision.

(c) *Procedure.* The State agency hearing procedure shall at a minimum provide the recipient, local agency or farmer/farmers' market with the following:

(1) Written notification of the adverse action, the cause(s) for the action, and the effective date of the action, including the State agency's determination of whether the action shall be postponed under paragraph (b) of this section if it is appealed, and the opportunity for a hearing. Such notification shall be provided within a reasonable timeframe established by the State agency and in advance of the effective date of the action.

(2) The opportunity to appeal the action within the time specified by the State agency in its notification of adverse action.

(3) Adequate advance notice of the time and place of the hearing to provide all parties involved sufficient time to prepare for the hearing.

(4) The opportunity to present its case and at least one opportunity to reschedule the hearing date upon specific request. The State agency may set standards on how many hearing dates can be scheduled, provided that a minimum of two hearing dates is allowed.

(5) The opportunity to confront and cross-examine adverse witnesses.

(6) The opportunity to be represented by counsel, or in the case of a recipient appeal, by a representative designated by the recipient, if desired.

(7) The opportunity to review the case record prior to the hearing.

(8) An impartial decision maker, whose decision as to the validity of the State agency's action shall rest solely on the evidence presented at the hearing and the statutory and regulatory provisions governing the FMNP. The basis for the decision shall be stated in writing, although it need not amount to a full opinion or contain formal findings of fact and conclusions of law.

(9) Written notification of the decision in the appeal, within 60 days from the date of receipt of the request for a hearing by the State agency.

(d) *Continuing responsibilities.* Appealing an adverse action does not relieve a farmer/farmers' market or local agency permitted to continue in the FMNP while its appeal is pending, from responsibility for continued compliance with the terms of the written agreement or contract with the State agency.

(e) *Judicial review.* If a State level decision is rendered against the recipient, local agency or farmer/farmers' market and the appellant expresses an interest in pursuing a further review of the decision, the State agency shall explain any further State level review of the decision and any available State level rehearing process. If neither is available or both have been exhausted, the State agency shall explain the right to pursue judicial review of the decision.

(f) *Additional appeals procedures for State agencies which authorize farmers' markets and not individual farmers.* A State agency which authorizes farmers' markets and not individual farmers shall ensure that procedures are in place to be used when a farmer seeks to appeal an action of a farmers' market or association denying the farmer's application to participate, or sanctioning or disqualifying the farmer. The procedures shall be set forth in the State Plan and in the agreements entered by

the State agency and the farmers' market and the farmer.

[59 FR 11517, Mar. 11, 1994, as amended at 60 FR 49748, Sept. 27, 1995; 60 FR 57148, Nov. 14, 1995]

Subpart F—Monitoring and Review of State Agencies

§ 248.17 Management evaluations and reviews.

(a) *General.* FNS and each State agency shall establish a management evaluation system in order to assess the accomplishment of FMNP objectives as provided under these regulations, the State Plan, and the written agreement with the Department. FNS will provide assistance to State agencies in discharging this responsibility, and will establish standards and procedures to determine how well the objectives of this part are being accomplished, and implement sanction procedures as warranted by State FMNP performance.

(b) *Responsibilities of FNS.* FNS shall establish evaluation procedures to determine whether State agencies carry out the purposes and provisions of this part, the State Plan, and the written agreement with the Department. As a part of the evaluation procedure, FNS shall review audits to ensure that the FMNP has been included in audit examinations at a reasonable frequency. These evaluations shall also include reviews of selected local agencies, and on-site reviews of selected farmers/farmers' markets. These evaluations will measure the State agency's progress toward meeting the objectives outlined in its State Plan and the State agency's compliance with these regulations.

(1) If FNS determines that the State agency has failed, without good cause, to demonstrate efficient and effective administration of its FMNP or has failed to comply with the requirements contained in this section or the State Plan, FNS may withhold an amount up to 100 percent of the State agency's administrative grant.

(2) Sanctions imposed upon a State agency by FNS in accordance with this section (but not claims for repayment assessed against a State agency) may be appealed in accordance with the procedures established in § 248.20. Before carrying out any sanction against a State agency, the following procedures will be followed:

(i) FNS will notify the chief departmental officer of the administering agency in writing of the deficiencies found and of FNS' intention to withhold administrative funds unless an acceptable corrective action plan is submitted by the State agency to FNS within 45 days after mailing of notification.

(ii) The State agency shall develop a corrective action plan, including timeframes for implementation to address the deficiencies and prevent their future recurrence.

(iii) If the corrective action plan is acceptable, FNS will notify the chief departmental officer of the administering agency in writing within 30 days of receipt of the plan. The letter will advise the State agency of the sanctions to be imposed if the corrective action plan is not implemented according to the schedule set forth in the approved plan.

(iv) Upon notification from the State agency that corrective action has been taken, FNS will assess such action, and, if necessary, perform a follow-up review to determine if the noted deficiencies have been corrected. FNS will then advise the State agency of whether the actions taken are in compliance with the corrective action plan, and whether the deficiency is resolved or further corrective action is needed. Compliance buys can be required if during FNS management evaluations by regional offices, a State agency is found to be out of compliance with its responsibility to monitor and review farmers/farmers' markets.

(v) If an acceptable corrective action plan is not submitted within 45 days, or if corrective action is not completed according to the schedule established in the corrective action plan, FNS may withhold the award of FMNP administrative funds. If the 45-day warning period ends in the fourth quarter of a fiscal year, FNS may elect not to withhold funds until the next fiscal year. FNS will notify the chief departmental officer of the administering State agency.

(vi) If compliance is achieved before the end of the fiscal year in which the FMNP administrative funds are withheld, the funds withheld may be restored to the State agency. FNS is not required to restore funds withheld beyond the end of the fiscal year for which the funds were initially awarded.

(c) *Responsibilities of State agencies.* The State agency is responsible for meeting the following requirements:

(1) The State agency shall establish evaluation and review procedures and document the results of such procedures. The procedures shall include, but are not limited to:

(i) Annual monitoring reviews of participating farmers' farmers' markets, including on-site reviews of a minimum of 10 percent of farmers and 10 percent of farmers' markets, which includes those farmers and markets identified as being the highest risk. First year of operation in the FMNP shall be considered a high-risk indicator. More frequent reviews may be performed as the State agency deems necessary.

(ii) Conducting monitoring reviews of all local agencies within the State agency's jurisdiction at least once every 2 years. Monitoring of local agencies shall encompass, but not be limited to, evaluation of management, accountability, certification, nutrition education, financial management systems, and coupon management systems. WIC State agency reviews of local agencies conducted for the WIC Program may contribute to meeting the FMNP requirement that all local agencies be reviewed once every two years if the reviews include reviews of FMNP practices. When the WIC State agency conducts a review of the local agency outside of the FMNP season, a review of documents and procedural plans of the FMNP, rather than actual FMNP activities, is acceptable.

(iii) Instituting the necessary follow-up procedures to correct identified problem areas.

(2) On its own initiative or when required by FNS, the State agency shall provide special reports on FMNP activities, and take positive action to correct deficiencies in FMNP operations.

[59 FR 11517, Mar. 11, 1994, as amended at 60 FR 49748, Sept. 27, 1995]

§ 248.18 Audits.

(a) *Federal access to information.* The Secretary, the Comptroller General of the United States, or any of their duly authorized representatives, or duly authorized State auditors shall have access to any books, documents, papers, and records of the State agency and their contractors, for the purpose of making surveys, audits, examinations, excerpts, and transcripts.

(b) *State agency response.* The State agency may take exception to particular audit findings and recommendations. The State agency shall submit a response or statement to FNS as to the action taken or planned regarding the findings. A proposed corrective action plan developed and submitted by the State agency shall include specific time frames for its implementation and for completion of the correction of deficiencies and problems leading to the deficiencies.

(c) *Corrective action.* FNS shall determine whether FMNP deficiencies identified in an audit have been adequately corrected. If additional corrective action is necessary, FNS shall schedule a follow-up review, allowing a reasonable time for such corrective action to be taken.

(d) *State sponsored audits.* State and local agencies shall conduct independent audits in accordance with 7 CFR part 3015, § 3016.26 or part 3051, as applicable. A State or local agency may elect to obtain either an organization-wide audit or an audit of the Program if it qualifies to make such an election under applicable regulations.

§ 248.19 Investigations.

(a) *Authority.* The Department may make an investigation of any allegation of noncompliance with this part and FNS guidelines and instructions. The investigation may include, where appropriate, a review of pertinent practices and policies of any State and local agency, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the State and local agency has failed to comply with the requirements of this part.

(b) *Confidentiality.* No State or local agency, recipient, or other person shall

intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege under this part because that person has made a complaint or formal allegation, or has testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The identity of every complainant shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conducting of any investigation, hearing, or judicial proceeding.

Subpart G—Miscellaneous Provisions

§ 248.20 Claims and penalties.

(a) *Claims against State agencies.* (1) If FNS determines through a review of the State agency's reports, program or financial analysis, monitoring, audit, or otherwise, that any FMNP funds provided to a State agency for food or administrative purposes were, through State agency negligence or fraud, misused or otherwise diverted from FMNP purposes, a formal claim will be assessed by FNS against the State agency. The State agency shall pay promptly to FNS a sum equal to the amount of the administrative funds or the value of coupons so misused or diverted.

(2) If FNS determines that any part of the FMNP funds received by a State agency; or coupons, were lost as a result of theft, embezzlement, or unexplained causes, the State agency shall, on demand by FNS, pay to FNS a sum equal to the amount of the money or the value of the FMNP coupons so lost.

(3) The State agency shall have full opportunity to submit evidence, explanation or information concerning alleged instances of noncompliance or diversion before a final determination is made in such cases.

(4) FNS is authorized to establish claims against a State agency for unreconciled FMNP coupons. When a State agency can demonstrate that all reasonable management efforts have been devoted to reconciliation and 99 percent or more of the FMNP coupons issued have been accounted for by the reconciliation process, FNS may determine that the reconciliation process has been completed to satisfaction.

(b) *Interest charge on claims against State agencies.* If an agreement cannot be reached with the State agency for payment of its debts or for offset of debts on its current Letter of Credit within 30 days from the date of the first demand letter from FNS, FNS will assess an interest (late) charge against the State agency. Interest accrual shall begin on the 31st day after the date of the first demand letter, bill or claim, and shall be computed monthly on any unpaid balance as long as the debt exists. From a source other than the FMNP, the State agency shall provide the funds necessary to maintain FMNP operations at the grant level authorized by FNS.

(c) *Penalties.* In accordance with section 12(g) of the National School Lunch Act, whoever embezzles, willfully misapplies, steals or obtains by fraud any funds, assets or property provided under section 17 of the Child Nutrition Act of 1966, as amended, whether received directly or indirectly from USDA, or whoever receives, conceals or retains such funds, assets or property for his or her own interest, knowing such funds, assets or property have been embezzled, willfully misapplied, stolen, or obtained by fraud shall, if such funds, assets or property are of the value of $100 or more, be fined not more than $10,000 or imprisoned not more than five years, or both, or if such funds, assets or property are of a value of less than $100, shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

§ 248.21 Procurement and property management.

(a) *Requirements.* State agencies shall comply with the requirements of 7 CFR part 3016 for procurement of supplies, equipment and other services with FMNP funds. These requirements are adopted by FNS to ensure that such materials and services are obtained for the FMNP in an effective manner and in compliance with the provisions of applicable law and executive orders.

(b) *Contractual responsibilities.* The standards contained in 7 CFR part 3016 do not relieve the State agency of the

responsibilities arising under its contracts. The State agency is the responsible authority, without recourse to FNS, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in connection with the FMNP. This includes, but is not limited to, disputes, claims, protests of award, source evaluation, or other matters of a contractual nature. Matters concerning violation of law are to be referred to such local, State or Federal authority as may have proper jurisdiction.

(c) *State regulations*. The State agency may use its own procurement regulations which reflect applicable State and local regulations, provided that procurements made with FMNP funds adhere to the standards set forth in 7 CFR part 3016.

(d) *Property acquired with program funds*. State and local agencies shall observe the standards prescribed in 7 CFR part 3016 in their utilization and disposition of real property and equipment acquired in whole or in part with FMNP funds.

§ 248.22 Nonprocurement debarment/suspension, drug-free workplace, and lobbying restrictions.

The State agency shall ensure compliance with the requirements of the Department's regulations governing nonprocurement debarment/suspension (7 CFR part 3017), drug-free workplace (7 CFR part 3017), and the Department's regulations governing restrictions on lobbying (7 CFR part 3018), where applicable.

§ 248.23 Records and reports.

(a) *Recordkeeping requirements*. Each State agency shall maintain full and complete records concerning FMNP operations. Such records shall comply with 7 CFR part 3016 and the following requirements:

(1) Records shall include, but not be limited to, information pertaining to financial operations, FMNP coupon issuance and redemption, equipment purchases and inventory, nutrition education, and civil rights procedures.

(2) All records shall be retained for a minimum of 3 years following the date of submission of the final expenditure report for the period to which the report pertains. If any litigation, claim, negotiation, audit or other action involving the records has been started before the end of the 3-year period, the records shall be kept until all issues are resolved, or until the end of the regular 3-year period, whichever is later. If FNS deems any of the FMNP records to be of historical interest, it may require the State agency to forward such records to FNS whenever the State agency is disposing of them.

(3) Records for nonexpendable property acquired in whole or in part with FMNP funds shall be retained for three years after its final disposition.

(4) All records shall be available during normal business hours for representatives of the Department of the Comptroller General of the United States to inspect, audit, and copy. Any reports resulting from such examinations shall not divulge names of individuals.

(b) *Financial and recipient reports*. State agencies shall submit financial and FMNP performance data on a yearly basis as specified by FNS and required by section 17(m)(8) of the CNA. Such information shall include, but shall not be limited to:

(1) Number and type of recipients (Federal and non-Federal).

(2) Value of coupons issued.

(3) Value of coupons redeemed.

(c) *Source documentation*. To be acceptable for audit purposes, all financial and FMNP performance reports shall be traceable to source documentation.

(d) *Certification of reports*. Financial and FMNP reports shall be certified as to their completeness and accuracy by the person given that responsibility by the State agency.

(e) *Use of reports*. FNS will use State agency reports to measure progress in achieving objectives set forth in the State Plan, and this part, or other State agency performance plans. If it is determined, through review of State agency reports, FMNP or financial analysis, or an audit, that a State agency is not meeting the objectives set forth in its State Plan, FNS may request additional information including, but not limited to, reasons for failure to achieve these objectives.

§ 248.24 Other provisions.

(a) *No aid reduction*. The value of benefits or assistance available under the FMNP shall not be considered as income or resources of recipients or their families for any purpose under Federal, State, or local laws, including, but not limited to, laws relating to taxation, welfare and public assistance programs. Section 17(m)(7)(B) of the CNA provides that any programs for which a grant is received under this subsection shall be supplementary to the food stamp program carried out under the Food Stamp Act of 1977 as amended (7 U.S.C. 2011 *et seq.*) and to any other Federal or State program under which foods are distributed to needy families in lieu of food stamps.

(b) *Statistical information*. FNS reserves the right to use information obtained under the FMNP in a summary, statistical or other form which does not identify particular individuals.

(c) *Confidentiality*. The State agency shall restrict the use or disclosure of information obtained from FMNP applicants and recipients to persons directly connected with the administration or enforcement of the WIC Program or the FMNP, including persons investigating or prosecuting violations in the WIC Program or FMNP under Federal, State or local authority.

§ 248.25 FMNP information.

Any person who wishes information, assistance, records or other public material shall request such information from the State agency, or from the FNS Regional Office serving the appropriate State as listed below:

(a) Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, Vermont: U.S. Department of Agriculture, FNS, Northeast Region, 10 Causeway Street, Room 501, Boston, Massachusetts 02222–1066.

(b) Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Puerto Rico, Virginia, Virgin Islands, West Virginia: U.S. Department of Agriculture, FNS, Mid-Atlantic Region, Mercer Corporate Park, 300 Corporate Boulevard, Robbinsville, New Jersey, 08691–1598.

(c) Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee: U.S. Department of Agriculture, FNS, Southeast Region, 77 Forsyth Street, SW., suite 112, Atlanta, Georgia 30303.

(d) Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin: U.S. Department of Agriculture, FNS, Midwest Region, 77 West Jackson Boulevard—20th floor, Chicago, Illinois 60604–3507.

(e) Arkansas, Louisiana, New Mexico, Oklahoma, Texas: U.S. Department of Agriculture, FNS, Southwest Region, 1100 Commerce Street, room 5–C–30, Dallas, Texas 75242.

(f) Colorado, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah, Wyoming: U.S. Department of Agriculture, FNS, Mountain Plains Region, 1244 Speer Boulevard, suite 903, Denver, Colorado 80204.

(g) Alaska, American Samoa, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon, Trust Territory of the Pacific Islands, the Northern Mariana Islands, Washington: U.S. Department of Agriculture, FNS, Western Region, 550 Kearny Street, room 400, San Francisco, California 94108.

[59 FR 11517, Mar. 11, 1994, as amended at 60 FR 49748, Sept. 27, 1995; 60 FR 57148, Nov. 14, 1995]

§ 248.26 OMB control number.

The collecting of information requirements for part 248 have been approved by the Office of Management and Budget and assigned OMB control number 0584–0477.

[60 FR 49748, Sept. 27, 1995]

SUBCHAPTER B—GENERAL REGULATIONS AND POLICIES—FOOD DISTRIBUTION

PART 250—DONATION OF FOODS FOR USE IN THE UNITED STATES, ITS TERRITORIES AND POSSESSIONS AND AREAS UNDER ITS JURISDICTION

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Subpart E—Where To Obtain Information

250.60 Program information.

AUTHORITY: 5 U.S.C. 301; 7 U.S.C. 612c, 612c note, 1431, 1431b, 1431e, 1431 note, 1446a-1, 1859, 2014, 2025; 15 U.S.C. 713c; 22 U.S.C. 1922; 42 U.S.C. 1751, 1755, 1758, 1760, 1761, 1762a, 1766, 3030a, 5179, 5180.

SOURCE: 53 FR 20426, June 3, 1988, unless otherwise noted.

Subpart A—General

§ 250.1 General purpose and scope.

This part prescribes the terms and conditions under which donated foods may be obtained from the Department by Federal, State and private agencies for use in any State in child nutrition programs, nonprofit summer camps for children, charitable institutions, nutrition programs for the elderly, the Commodity Supplemental Food Program, the Special Supplemental Nutrition Program for Women, Infants, and Children, the Food Distribution Programs on Indian Reservations and the assistance of needy persons.

§ 250.2 Administration.

(a) *Delegation to FNS.* Within the Department, FNS shall act on behalf of the Department in the administration of the program. FNS will provide assistance to distributing agencies and evaluate all levels of program operations to assure that the goals of the program are achieved in the most effective and efficient manner possible.

(b) *Delegation to distributing agency.* The distributing agency is responsible for effective and efficient administration of program operations within its jurisdiction and shall administer the program in accordance with the requirements of this part and FNS guidelines and instructions. Distributing agencies may impose additional requirements for participation that are not inconsistent with the provisions of this part, except that this provision

shall not apply to distribution to households on all or part of an Indian reservation which is participating in the Food Distribution Program under part 253 and part 254 of this chapter. The distributing agency shall provide guidance to subdistributing agencies and recipient agencies on all aspects of program operations.

(c) *Personnel.* Each distributing agency shall provide adequate personnel, to administer the program in accordance with this part.

§ 250.3 Definitions.

Charitable institutions means:

(a) A nonpenal, noneducational public (Federal, State or local) institution,

(b) A nonprofit, tax exempt, private hospital, or

(c) Any other nonprofit, noneducational, tax exempt private institution, including hospitals and facilities caring for needy infants and children, organized to provide charitable or public welfare services in the same place without marked changes and, at the Department's option, approved by a public welfare agency as meeting a definite need in the community by administering to needy persons, and provides a meal service on a regular basis. Charitable institutions include any institution defined as ''service institution''; ''nonresidential child care institution''; or ''school'' which is not a commodity school or does not participate in a child nutrition program. For purposes of this paragraph, tax exempt shall mean exempt from income tax under the Internal Revenue Code, as amended, and a charitable institution shall be considered ''noneducational'' even though educational courses are given, where such courses are incidental to the primary purpose of the charitable institution.

Child nutrition program means the National School Lunch Program, the School Breakfast Program, the Summer Food Service Program for Children, or the Child Care Food Program (parts 210, 220, 225, and 226, respectively of this chapter).

Commodities means foods donated, or available for donation, by the Department under any of the legislation referred to in this part (see ''Donated Foods'').

Commodity school means a school that does not participate in the National School Lunch Program under part 210 of this chapter but which operates a nonprofit school food service under agreement with the State educational agency or FNSRO as provided for under part 210 of this chapter and receives donated foods, or donated foods and cash or services of a value of up to 5 cents per lunch in lieu of donated foods under part 240 of this chapter for processing and handling of the donated foods.

Contract value of the donated foods means the price assigned by the Department to a donated food which shall reflect the Department's current acquisition price, transportation and, if applicable, processing costs related to the food.

Contracting agency means the distributing agency, subdistributing agency, or recipient agency which enters into a processing contract.

Department means the United States Department of Agriculture or the Commodity Credit Corporation, whichever is the donor under the pertinent legislation.

Disaster means (a) Any natural catastrophe (including any hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*) (Stafford Act) to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby; or

(b) Any other occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.

Disaster organizations means organizations authorized by appropriate Federal or State officials to assist disaster victims.

Disaster victims means persons who, because of acts of God or manmade disasters, are in need of food assistance, whether or not they are victims of a major disaster or an emergency as defined in this section.

Discount system means a system whereby a recipient agency purchases end products directly from a processor at an established wholesale price minus the contract value of the donated foods contained in the end products.

Distributing agency means a State, Federal or private agency, or Indian Tribal Organization (ITO) which enters into an agreement with the Department for the distribution of donated foods to eligible recipient agencies and recipients and the Food and Nutrition Service of the Department when it accepts title to commodities from the Commodity Credit Corporation (CCC) for distribution to eligible recipient agencies pursuant to the National Commodity Processing System. A distributing agency may also be a recipient agency.

Distributor means a commercial food purveyor or handler who is independent of a processor and both sells and bills for the end products delivered to recipient agencies.

Donated foods means foods donated, or available for donation, by the Department under any of the legislation referred to in this part (see ''Commodities'').

End product means a product containing any amount of donated foods which have been processed.

Federal acceptance service means the acceptance service provided by:

(a) The applicable grading branches of the Department's Agricultural Marketing Service (AMS),

(b) The Department's Federal Grain Inspection Service, and

(c) The National Marine Fisheries Service of the U.S. Department of Commerce.

Fee-for-service means the price by pound or by case representing a processor's cost of ingredients (other than donated foods), labor, packaging, overhead, and other costs incurred in the conversion of the donated food into the specified end product.

Fiscal year means the period of 12 months beginning October 1 of any calendar year and ending September 30 of the following year.

FNS means the Food and Nutrition Service of the Department of Agriculture.

FNSRO means the appropriate Food and Nutrition Service Regional Office of the Food and Nutrition Service of the Department of Agriculture.

Food service management company means a commercial enterprise or a nonprofit organization which is or may be contracted with by a recipient agency to manage any aspect of its food service in accordance with § 250.12(d) of this part or in accordance with part 210, 220, 225, or 226 of this chapter.

Household means a group of related or non-related individuals, exclusive of boarders, who are not residents of an institution, but who are living as one economic unit and for whom food is customarily purchased and prepared in common. It also means a single individual living alone.

In-kind replacement means replacement of lost donated foods with a quantity of the same foods of U.S. origin that are of equal or better quality than the lost foods and that are of at least equal monetary value to the Department's cost of replacing the lost foods.

Multi-State processor means:

(a) A processor which has entered into a processing contract with contracting agencies in more than one State, or

(b) A processor which has entered into a processing contract with one or more contracting agencies located in a State other than the one in which either the processor's plant or business office is located.

Needy persons means:

(a) Persons provided service by charitable institutions, who, because of their economic status, are in need of food assistance,

(b) All the members of a household who are certified as in need of food assistance, and

(c) Disaster victims.

Nonprofit school food service means all food service operations conducted by the school food authority principally

for the benefit of school children, all of the revenue from which is used solely for the operation or improvement of such food services.

Nonprofit summer camps for children means nonprofit camps which do not participate in the Summer Food Service Program for Children authorized under section 13 of the National School Lunch Act, as amended (42 U.S.C. 1761), and in which, during the months of May through September, meal services are conducted for children of high school grade and under.

Nonresidential child or adult care institution means any child or adult care institution (as defined in part 226 of this chapter) which participates in the Child and Adult Care Food Program authorized under section 17 of the National School Lunch Act, as amended (42 U.S.C. 1766).

Nutrition program for the elderly means a project conducted by a recipient of a grant or contract under title III or title VI of the Older Americans Act of 1965, as amended (42 U.S.C. 3030a).

Offer-and-acceptance system means a procedure whereby a school food authority is given the opportunity to order only the amounts and varieties of donated foods it desires for its school lunch program on the basis of advance notification by the distributing agency.

Performance supply and surety bond means a written instrument issued by a surety company which guarantees performance and supply of end products by a processor under the terms of a processing contract.

Processing means:

(a) The conversion of a donated food or donated foods into a different end product or

(b) The repackaging of a donated food or donated foods.

Processor means any commercial facility which processes or repackages donated foods. However, commercial enterprises which handle, prepare and/or serve products or meals containing donated foods on-site solely for the individual recipient agency under contract are exempt under this definition. Notwithstanding this definition, a recipient agency which prepares products or meals containing donated foods for more than one recipient agency under more than one contract in the same facility or prepares products or meals for any one recipient agency off-site shall not be a processor if the recipient agency preparing products or meals provides: (1) accountability for any donated foods received from another recipient agency consistent with § 250.16 of this part and (2) any funds received as payment for preparing products or meals shall be deposited in the nonprofit meal account of the recipient agency preparing products or meals.

Program means the Food Distribution Program.

Recipient agencies means nonprofit summer camps for children, charitable institutions, nutrition programs for the elderly, disaster organizations, school food authorities, schools, nonresidential child care institutions, service institutions, and welfare agencies receiving foods for their own use or for distribution to eligible recipients.

Recipients means the needy persons receiving commodities for household consumption.

Refund means (a) a credit or check issued to a distributor in an amount equal to the contract value of donated foods contained in an end product sold by the distributor to a recipient agency at a discounted price and (b) a check issued to a recipient agency in an amount equal to the contract value of donated foods contained in an end product sold to the recipient agency under a refund system.

Refund application means an application by a recipient agency in any form acceptable to the processor which certifies purchase of end products and requests a refund of the contract value of the donated foods contained in the end products purchased.

Refund system means a system whereby a recipient agency purchases a processor's end products and receives from the processor a payment equivalent to the contract value of the donated foods contained in the end products.

School means (a) An educational unit of high school grade or under, recognized as part of the educational system in the State and operating under public or nonprofit private ownership in a single building or complex of buildings. The term ''high school grade or under''

includes classes of preprimary grade when recognized as part of the education system of the States;

(b) Any public or nonprofit private classes of preprimary grade when they are conducted in those schools defined in paragraph (a) of this definition having classes of primary or of higher grade;

(c) Any public or nonprofit private residential child care institution, or distinct part of such institution, which operates principally for the care of children, and if private, is licensed to provide residential child care services under the appropriate licensing code by the State or a subordinate level of government, *except for* residential summer camps which participate in the Summer Food Service Program for Children, Job Corps centers funded by the Department of Labor and private foster homes. The term ''residential child care institutions'' includes, but is not limited to: homes for the mentally, emotionally or physically impaired, and unmarried mothers and their infants; group homes; halfway houses; orphanages; temporary shelters for abused children and for runaway children; long-term care facilities for chronically ill children; and juvenile detention centers. A long-term care facility is a hospital, skilled nursing facility, intermediate care facility, or distinct part thereof, which is intended for the care of children confined for 30 days or more; or

(d) With respect to the Commonwealth of Puerto Rico, nonprofit child care centers certified as such by the Governor of Puerto Rico.

School food authority means the governing body which is responsible for the administration of one or more schools and which has the legal authority to operate a nonprofit school food service therein or otherwise approved by FNS to operate the NSLP.

School year means the period of 12 months beginning July 1 of any calendar year and ending June 30 of the following calendar year.

Secretary means the Secretary of Agriculture.

Section 4(a) means section 4(a) of the Agriculture and Consumer Protection Act of 1973, as amended (7 U.S.C. 612c note). Section 4(a) authorizes the purchase of foods for distribution to maintain the traditional level of assistance for food assistance programs as are authorized by law, including institutions, supplemental feeding programs, disaster areas, summer camps for children, the Trust Territory of the Pacific Islands, and Indians whenever a tribal organization requests distribution of federally-donated foods under section 4(b) of the Food Stamp Act of 1977 (7 U.S.C. 2013(b)).

Section 6 means section 6 of the National School Lunch Act, as amended (42 U.S.C. 1755). Section 6 authorizes the purchase of foods for distribution to schools and institutions participating in child nutrition programs under the National School Lunch Act and specifies the level of assistance which is to be provided.

Section 14 means section 14 of the National School Lunch Act, as amended (42 U.S.C. 1762a). Section 14 authorizes the purchase of foods for distribution to maintain the annually programmed level of assistance for programs carried on under the National School Lunch Act, the Child Nutrition Act of 1966, and title III of the Older Americans Act of 1965.

Section 32 means section 32 of Pub. L. 74–320, as amended (7 U.S.C. 612c). Section 32 authorizes the Department to purchase nonbasic perishable foods available under surplus-removal operations, for the purpose of encouraging the domestic consumption of such foods by diverting them from the normal channels of trade or commerce.

Section 311 means section 311 of the Older Americans Act of 1965, as amended (42 U.S.C. 3030a). Section 311 authorizes the purchase of commodities for nutrition programs for the elderly.

Section 416 means section 416 of the Agricultural Act of 1949, as amended (7 U.S.C. 1431). Section 416 authorizes the Department to donate basic nonperishable foods acquired through Federal price-support operations for use by needy persons, for use in nonprofit school lunch programs and nonprofit summer camps for children, and for use in charitable institutions to the extent that needy persons are served.

Section 709 means section 709 of the Food and Agricultural Act of 1965, as amended (7 U.S.C. 1446a–1). Section 709

authorizes the purchase of adequate supplies of dairy products to meet the requirements of schools, domestic relief distribution, and other programs authorized by law when the stocks of the Commodity Credit Corporation are insufficient to meet those requirements.

Service institutions means camps or sponsors (as those terms are defined in part 225 of this chapter) which participate in the Summer Food Service program authorized under section 13 of the National School Lunch Act, as amended (42 U.S.C. 1761).

Similar replacement means replacement of lost donated foods with a quantity of similiar foods of U.S. origin of the same types as those normally donated by the Department and of at least equal monetary value to the Department's cost of replacing the lost foods. Such replacement shall be subject to the approval of the FNSRO.

Situation of distress means (a) A hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, drought, fire, explosion, or other natural catastrophe not declared by the President to be a disaster, but which, in the judgment of the distributing agency, warrants the use of USDA commodities for congregate feeding; and

(b) Any other situation not declared by the President to be a disaster, but which, in the judgment of FNS, warrants the use of USDA commodities for congregate feeding or household distribution.

State and *United States* means any one of the 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands.

State Agency on Aging means:

(a) The State agency that has been designated by the Governor and approved by the United States Department of Health and Human Services (DHHS) to administer nutrition programs for the elderly under title III of the Older Americans Act of 1965, as amended or

(b) The Indian tribal organization which has been approved by DHHS to administer nutrition programs for the elderly under title VI of such act.

Storage facility means an operation that provides warehousing services, or provides both warehousing and delivery services.

Students in home economics means students in regular classes wherein they are taught general home economics including food preparation, cooking, serving, nutrition, food purchasing, child care and health.

Subdistributing agency means an agency performing one or more distribution functions for a distributing agency other than, or in addition to, functions normally performed by common carriers or warehousemen. A subdistributing agency may also be a recipient agency.

Substituted food means domestically produced food that is purchased or manufactured by a processor and is substituted for donated food.

Substitution means:

(a) The replacement of donated foods with like quantities of domestically produced commercial foods of the same generic identity and of equal or better quality (i.e. cheddar cheese for cheddar cheese, nonfat dry milk for nonfat dry milk, etc.); or

(b) In the case of donated nonfat dry milk, substitution as defined under (a) of this definition or replacement with an equivalent amount, based on milk solids content, of domestically produced concentrated skim milk.

Welfare agency means a public (Federal, State or local) or private agency offering assistance on a charitable or welfare basis to needy persons, who are not residents of an institution, and to Tribal councils designated by the Bureau of Indian Affairs.

[53 FR 20426, June 3, 1988, as amended at 53 FR 20598, June 6, 1988; 53 FR 27475, July 21, 1988; 58 FR 39120, July 22, 1993; 59 FR 16972, Apr. 11, 1994; 59 FR 62983, Dec. 7, 1994; 62 FR 8365, Feb. 25, 1997; 62 FR 53729, Oct. 16, 1997; 64 FR 72902, Dec. 29, 1999]

Subpart B—General Operating Provisions

§ 250.10 Eligible distributing and subdistributing agencies.

(a) *State and Federal agencies*. Federal agencies and such State agencies as are

designated by the Governor of the State, or by the State legislature, and approved by the Secretary are eligible to become distributing agencies.

(b) *Private agencies.* Where distributing agencies are not permitted by law to make distribution to private recipient agencies, or to any class of private recipient agency, private agencies which agree to make distribution of donated food on a State-wide basis and which apply directly to FNS, and are approved by the Secretary are eligible to become distributing agencies.

(c) *Subdistributing agencies.* If distributing agencies use subdistributing agencies to distribute donated foods, the distributing agencies' responsibilities to the Department for overall management and control of the distribution program shall not be delegated to such subdistributing agencies.

§ 250.11 Eligibility determination for recipient agencies and recipients.

(a) *Verification of recipient agency eligibility.* Distributing agencies at the request of FNS shall:

(1) Verify that recipient agencies registered to participate in the National Commodity Processing (NCP) Program have a current agreement with the distributing agency to receive donated food in accordance with § 252.1(c) and

(2) Report the results of such verification to FNS within timeframes determined by FNS.

(b) *Eligibility of recipient agencies and recipients.* Distributing agencies shall determine the eligibility of any agency which submits an application for participation in the program. Distributing agencies shall consider the past performance of recipient agencies when approving applications for participation. Once a recipient agency has been determined to be eligible for participation in the program, the distributing agency shall enter into an agreement with the agency in accordance with § 250.12(b) and make donated food available. Distributing agencies shall impose upon welfare agencies the responsibility for determining that recipients to whom welfare agencies distribute donated foods are eligible: *Provided, however:* That the State agency or FNSRO administering the applicable program shall determine the eligibility under this part of school food authorities participating under part 210 or part 220, or sponsors participating in the Summer Food Service Program for Children under part 225, of this chapter, and of nonresidential child care institutions participating in the Child Care Food Program under part 226 of this chapter.

§ 250.12 Agreements and contracts.

(a) *Agreements with Department.* Prior to the beginning of a distribution program, distributing agencies shall enter into written agreements with the Department which shall incorporate the terms and conditions set forth in this part. When requested by the Department an eligible agency shall present evidence of its authority to enter into such agreements. The agreements shall be considered permanent, with amendments initiated by distributing agencies, or submitted by them at the Department's request, all of which shall be subject to approval by the Department. In addition, agreements between the Department and State Agencies on Aging that elect to receive cash in lieu of commodities shall also be considered permanent, with amendments initiated by these agencies, or submitted by them at the Department's request, all of which amendments shall be subject to approval by the Department.

(b) *Distributing agency agreements.* Distributing agencies shall enter into written agreements with all subdistributing agencies, recipient agencies, warehouses, carriers, or other entities to which distributing agencies deliver donated foods under their distribution program. Distributing agencies shall be responsible for ensuring that program integrity is maintained by all entities with whom agreements are entered into. All agreements shall contain such terms and conditions as the distributing agency deems necessary to ensure that:

(1) The distribution and use of donated foods is in accordance with this part,

(2) Subdistributing agencies, recipient agencies, warehouses, carriers, or other persons to whom donated foods are delivered by the distributing agency are responsible to the distributing agency for any improper distribution

or use of donated foods or for any loss of, or damage to, donated foods caused by their fault or negligence,

(3) Subdistributing agencies and recipient agencies have and preserve a right to assert claims against other persons to whom donated foods are delivered for care, handling or distribution, and

(4) Subdistributing agencies and recipient agencies will take action to obtain restitution in connection with claims for improper distribution, use or loss of, or damage to, donated foods.

(c) *Duration of distributing agency agreements.*—(1) Recipient agencies. Distributing agency agreements with recipient agencies shall be considered permanent, with amendments to be made as necessary. Distributing agencies shall ensure that recipient agencies provide, on a timely basis, by amendment to the agreement, any changed information, including, but not limited to, any changes resulting from amendments to Federal regulatory requirements and policy and changes in site locations, and number of meals or needy persons to be served.

(2) *Subdistributing agencies, carriers, and other entities.* Distributing agency agreements with subdistributing agencies (as defined in § 250.3) that are not recipient agencies, carriers, and other entities shall be in effect for not longer than one year, and shall provide that they may be extended at the option of both parties for two additional one-year periods. The party contracting with the distributing agency shall update all pertinent information and demonstrate that all donated food received during the period of the previous agreement has been accounted for, before an agreement is extended.

(3) *Termination of agreements.* Agreements may be terminated for cause by either party upon 30 days notice.

(d) *Food service management company contracts.* Food service management companies may be employed to conduct the food service operations of nonprofit summer camps for children, charitable institutions, nutrition programs for the elderly, schools, nonresidential child care institutions, and service institutions. When a food service management company is employed to provide such services, the recipient agency shall enter into a written contract with the food service management company. The contract shall expressly provide that any donated foods received by the recipient agency and made available to the food service management company shall be utilized solely for the purpose of providing benefits for the employing agency's food service operation, and it shall be the responsibility of the recipient agency to demonstrate that the full value of all donated foods is used solely for the benefit of the recipient agency. All food service management companies shall be subject to review by the distributing agency for compliance with contractual requirements, in accordance with § 250.19(b)(1). In the case of nonprofit summer camps for children, charitable institutions, and nutrition programs for the elderly, the contract shall be in effect for no longer than one year, and may provide that it be extended at the option of both parties for not more than four additional one-year periods. Contracts shall provide that they may be terminated for cause by either party upon 30 days notice. Prior to extension of the contract, the nonprofit summer camp for children, charitable institution, or nutrition program for the elderly shall update all pertinent information and demonstrate that all donated food received during the previous contract period has been accounted for.

(e) *Storage facility contracts.* When contracting for storage facilities, distributing agencies and subdistributing agencies shall enter into a written contract, in accordance with § 250.14(d).

(f) *Processing contracts.* When contracting for the processing of donated foods, contracting agencies shall enter into agreements with processors in accordance with § 250.30(c).

[53 FR 20426, June 3, 1988, as amended at 62 FR 53729, Oct. 16, 1997]

§ 250.13 Distribution and control of donated foods.

(a) *Availability and use of donated foods*—(1) *General.* (i) Donated foods shall be available only for distribution and use in accordance with the provisions of this part and, with respect to distribution to households on all or

part of an Indian reservation, of parts 253 and 254 of this chapter.

(ii) Donated foods shall not be sold, exchanged or otherwise disposed of without the approval of the Department.

(iii) Donated foods which are provided as part of an approved food package or authorized level of assistance may be transferred between like recipient agencies only with prior authorization of the distributing agency. Donated foods which are provided in addition to the State's authorized level of assistance may be transferred between recipient agencies which are eligible to receive such foods with the prior authorization of the distributing agency. However, the transfer of donated foods between unlike recipient agencies (e.g., from schools to charitable institutions), which have been provided as part of an approved food package or authorized level of assistance, must be approved by the appropriate FNSRO.

(iv) Food donated under section 32 of Public Law 74–320 (7 U.S.C. 612c) may also be transferred by recipient agencies to eligible recipient agencies which are distributing donated foods under part 251 of this chapter. A transfer between recipient agencies and eligible recipient agencies may be made only with the prior approval of the distributing agency and the State agency responsible for administering TEFAP.

(v) All transfers of donated foods shall be documented. Such documentation shall be maintained in accordance with the recordkeeping requirements in §§ 250.16 and 251.10(a) of this chapter.

(2) *Quantities.* (i) The quantity of donated foods to be made available for donation under this part shall be determined in accordance with the pertinent legislation and the program obligations of the Department, and shall be such as can be effectively distributed to further the objectives of the pertinent legislation.

(ii) Donated foods shall be requested and distributed only in quantities which can be consumed without waste in providing food assistance for persons eligible under this part. Distributing agencies shall impose similar restrictions on recipient agencies.

(3) *Minimum donations.* Foods shall be donated only in such quantities as will protect the lower truck load freight rate, except as the Department determines to be in the best interest of the program.

(4) *Allocations.* As foods become available for donation, FNS shall notify distributing agencies regarding the donated foods, the class or classes of recipient agencies or recipients eligible to receive them, and any special terms and conditions of donation and distribution which attach to a particular donated food, in addition to the general terms and conditions set forth herein.

When a commodity is available in limited quantities, the Department shall allocate such commodities among the States using allocation percentages which are based on appropriate participation data for the program designated to receive the commodity.

(5) *Commodity value.* Distributing agencies shall establish a value for each commodity for school food authorities and nonresidential child and adult care institutions for purposes of offering and crediting each recipient agency with the correct amount of commodities to fulfill planned commodity assistance levels (i.e., volume of commodities expected to be needed in order to meet the anticipated assistance at the local level, as determined by the distributing agency). Each commodity value shall be used consistently throughout the State to value commodities. The distributing agencies shall document and maintain on file for FNS review the method used to determine commodity values. Distributing agencies shall notify recipient agencies of the cost-per-pound used to value commodities at the time a commodity is offered to recipient agencies. If the cost used to credit a commodity differs from the cost used to offer a commodity, distributing agencies shall also advise recipient agencies of the cost used to credit a commodity. To value a commodity offered to a recipient agency and to credit a commodity towards a recipient agency's planned commodity assistance level, distributing agencies shall use one of the following: The actual cost-per-pound data used to charge a State's commodity entitlement; the estimated cost-per-pound data provided by the Department; or the USDA commodity file

cost as of a specified date. Actual cost data shall be defined as the cost-per-pound for an individual commodity charged to a State's entitlement on the Entitlement Food Order Report, which is based on the USDA purchase cost. Estimated cost data shall be defined as the cost provided by USDA on commodity survey memoranda. The USDA commodity file cost shall be defined as the cost that is listed for a commodity as of a date specified by the distributing agency.

(6) *Announcement and delivery of commodities.* The Department shall make every reasonable effort to arrange commodity deliveries based on information obtained from distributing agencies. However, the Department shall not be held fiscally responsible for any delay in delivering or for nondelivery of donated foods due to any cause. Distributing agencies shall maintain monthly distribution schedules which provide for equitable and reliable deliveries to recipient agencies, recognize local hours of operation, holidays and vacations and, whenever possible, other special needs of recipient agencies. Upon request by the recipient agency, the distributing agency may make deliveries less frequent than monthly when the distributing agency determines that monthly service is not cost effective, due to distance or the size of a food order, or other necessary reasons, such as seasonal school closures. Distributing agencies shall notify recipient agencies of:

(i) General USDA purchase information at least quarterly;

(ii) Anticipated State delivery schedules at least quarterly, including the types and quantities of commodities available; and

(iii) Changes in delivery schedules when such changes affect the recipient agency.

(7) *Demonstrations and tests.* Notwithstanding any other provision of this part, a quantity of any food donated for use by any recipient agency or recipient may be transferred by the distributing agency or by the recipient agency to bona fide experimental or testing agencies, or for use in workshops, or for demonstrations or tests relating to the utilization of such donated food by the recipient agency or recipient. No such transfer by any recipient agency shall be made without the approval of the appropriate distributing agency.

(b) *Processing and other costs.* The Department shall pay such processing, reprocessing, transporting, handling and other charges accruing up to the time of transfer of title to distributing agencies as is deemed in the best interest of the Department.

(c) *Transfer of title.* Title to donated foods shall pass to distributing agencies upon their acceptance of donated foods at time and place of delivery, limited, however, by the obligation of the distributing agency to use such donated foods for the purposes and upon the terms and conditions set forth in this part.

(d) *Distribution of donated foods to recipient agencies or recipients*—(1) *Distribution.* Donated foods shall be distributed only to recipient agencies and recipients eligible to receive them under this part (see subpart D). Distributing agencies shall require that welfare agencies and disaster organizations distribute donated foods only to recipients eligible to receive them under this part. It shall not be deemed a failure to comply with the provisions of this part if recipient agencies serve meals containing donated foods to persons other than those who are eligible under this part, when such persons share common preparation, serving or dining facilities with eligible persons (needy persons, children, participants in nutrition programs for the elderly) and at least one of the following is true:

(i) Such other persons are common beneficiaries with the eligible persons of the program of the recipient agency, or

(ii) Such other persons are few in number compared to the eligible persons and receive their meals as an incident of their service to the eligible persons.

Such other persons include, but are not limited to teachers, disaster relief workers, and staff members. Nothing in this paragraph shall be construed as authorizing allocation or issuance of donated foods to recipient agencies in greater quantity than that authorized

for the assistance of persons eligible under this part.

(2) *Normal food expenditures.* Section 416 donated foods shall not be distributed to any recipient agencies or recipients whose normal food expenditures are reduced because of the receipt of donated foods.

(e) *Improper distribution, loss of or damage to donated foods.* (1) If a distributing agency improperly distributes or uses any donated foods or causes loss of or damage to a donated food through its failure to provide proper storage, care or handling, the provisions set forth in § 250.15(c) shall apply.

(2) In instances when it is determined by a distributing agency that a claim exists against a subdistributing agency, recipient agency, warehouse, carrier, processor or other person, the distributing agency shall pursue claims in accordance with § 250.15(c).

(f) *Disposition of damaged or out-of-condition foods.* Donated foods which are found to be damaged or out-of-condition and are declared unfit for human consumption by Federal, State or local health officials, or by other inspection services or persons deemed competent by the Department, shall be disposed of in accordance with instructions of the Department. Such instructions may direct that unfit donated food be:

(1) Sold in a manner prescribed by the Department with the net proceeds thereof remitted to the Department;

(2) Sold in a manner prescribed by the Department with the proceeds thereof retained for use in accordance with the provisions of § 250.15(f);

(3) Used in such manner as will serve a useful purpose as determined by the Department; or

(4) Destroyed in accordance with applicable sanitation laws and regulations.

Upon a finding by the Department that donated food are unfit for human consumption at the time of delivery to the distributing agency and when the Department or appropriate health officials require that such donated foods be destroyed, the Department may pay to the distributing agency any expenses incurred in connection with such donated foods as determined by the Department. The Department may, in any event, repossess damaged or out-of-condition donated foods.

(g) *Replacement of damaged commodities.* (1) The Department shall replace donated foods received by distributing or recipient agencies when:

(i) The distributing agency documents that the donated foods were stale, spoiled, out of condition or not in compliance with USDA specifications at the time they were delivered by the Department;

(ii) The donated foods have been provided as part of the State's authorized level of assistance (entitlement) as established by law; or, when the donated foods have been provided in addition to the State's entitlement, but the total amount of the specific donated food which the distributing agency can order is limited by the Department;

(iii) The loss is reported to the FNSRO within three months of the date the donated foods were received in the State, except that for canned commodities the reporting deadline shall be six months after receipt;

(iv) A signed consignee receipt or acceptable written documentation of delivery is submitted to the FNSRO; and

(v) At the request of the Department, the product has been reinspected and has been determined to be stale, spoiled, out of condition or not in compliance with USDA specifications.

(2) In instances in which a recipient agency seeks replacement of donated foods, the recipient agency shall submit the information listed above to its distributing agency. The distributing agency shall promptly submit the information to the FNSRO.

(3) Replacement by the vendor shall be made with either the same or similar food agreed to by the Department. Physical replacement shall be on a per-pound or per-case basis. In rare instances, and only with the approval of the Department, distributing agency and recipient agency, vendor replacement will be made with a cash payment to the recipient or distributing agency. Any such cash payments shall be used to purchase replacement commodities which are the same or similar to the original commodities. Cash payments shall be made on the basis of the dollar value established by the Department of the donated food at the time

the product was delivered or the cost to the Department for replacement, whichever is higher.

(4) Replacement by the Department shall be with either the same or similar food or by crediting the State's entitlement or cap. Physical replacement shall be on a per-pound or per-case basis. Entitlement or cap crediting shall be equal to the dollar value or the number of pounds which was deducted from the State's entitlement or cap for that shipment. The Department shall arrange for delivery of the replacement donated foods when the quantities to be delivered are sufficient to make it cost effective. Once the Department has replaced the donated foods, the distributing agency shall make arrangements for providing replacement donated foods to the recipient agency which incurred the loss.

(5) In instances in which it is determined that the donated foods were in good condition at the time they were delivered by the Department, the cost of the reinspection shall be borne by the distributing agency and the distributing agency shall follow the claims procedures contained in § 250.15(c) of this part and FNS Instruction 410–1, Non-Audit Claims—FNS Distribution Program.

(h) *Redonations.* Whenever a distributing agency has any donated food on hand which it cannot efficiently utilize, it shall immediately make a request to the appropriate FNSRO, in writing, for instructions as to the disposition of such donated food. Distributing agencies requesting authority from the Department to make redonation of any donated foods shall, upon the Department's request, have such donated foods federally inspected. Expenditures incurred by the distributing agency as a result of redonation shall be handled in accordance with § 250.15(e).

(i) *Embezzlement, misuse, theft, or obtainment by fraud of donated foods and donated food-related funds, assets, or property.* Notwithstanding paragraph (c) of this section concerning transfer of title to donated foods, whoever embezzles, willfully misapplies, steals, or obtains by fraud, donated foods or any funds, assets, or property deriving from donated foods or whoever receives, conceals, or retains such donated foods, funds, assets, or property for his/her own use or gain, knowing such donated foods, funds, assets, or property have been embezzled, willfully misapplied, stolen, or obtained by fraud shall be subject to Federal criminal prosecution under section 12(g) of the National School Lunch Act, as amended (42 U.S.C. 1760(g)) or section 4(c) of the Agriculture and Consumer Protection Act of 1973, as amended (7 U.S.C. 612c note). For the purpose of this paragraph ''funds, assets, or property'' include, but are not limited to funds accruing from the sources identified in § 250.15(f)(1) and (2), donated foods which have been processed into different end products as provided for under subpart C of this part, and the containers in which donated foods have been received from the Department. Distributing agencies shall immediately notify FNSRO of any suspected violation of section 12(g) or section 4(c) to allow the Department, in conjunction with the U.S. Department of Justice, to determine whether Federal criminal prosecution under section 12(g) or section 4(c) is warranted. Prosecution of violations by the Federal Government shall not relieve any distributing agency of its obligation to obtain recovery for improperly distributed or lost donated foods, as required by § 250.15(c).

(j) *Commodity specifications.* Distributing agencies shall make summaries of commodity specifications available to recipient agencies upon request.

(k) *Commodity acceptability reports.* To ensure that the Department is kept apprised of the commodities and packaging that are preferred by recipients and participating agencies, information shall be collected as follows:

(1) *Information collection.* Distributing agencies shall obtain information from recipient agencies which reflects:

(i) The types and forms of donated foods that are most useful to recipients;

(ii) Commodity specification recommendations; and

(iii) Requests for options regarding package sizes and forms of commodities.

(2) *Samples and representation.* The distributing agency shall collect information from recipient agencies from

each of the following program categories: The National School Lunch Program, the Child and Adult Care Food Program, the Nutrition Program for the Elderly, the Commodity Supplemental Food Program, and the Food Distribution Program on Indian Reservations. At a minimum, distributing agencies shall obtain this information from a sample of at least 10 percent or 100 recipient agencies in each program category, whichever is less. To ensure that the sample is representative of all recipient agencies, distributing agencies shall consider the size and geographic location of all recipient agencies within the State and alternate among them so that over time each recipient agency is provided an opportunity to express its views. Distributing agencies are encouraged to extract information regarding commodity acceptability from all available sources.

(3) *Timeframes for submission.* Distributing agencies shall submit commodity acceptability reports to the appropriate FNSRO by April 30th of each year on form FNS–663.

[53 FR 20426, June 3, 1988, as amended at 53 FR 22469, June 16, 1988; 53 FR 27475, July 21, 1988; 58 FR 39120, July 22, 1993; 62 FR 53730, Oct. 16, 1997; 64 FR 72902, Dec. 29, 1999]

§ 250.14 Warehousing, distribution and storage of donated foods.

(a) *Standards for Warehousing and Distribution Systems*—(1) *Use of cost efficient and effective facilities.* Distributing agencies shall use the most cost effective and efficient system for providing warehousing and distribution services to recipient agencies. For the purpose of this part, commercial facilities are defined as enterprises that provide commercial warehousing services or commercial delivery services, or those commercial enterprises that provide both warehousing and delivery services.

(2) *Timeframes for evaluation.* All distributing agencies shall evaluate their current warehousing and distribution systems. Initial evaluations shall be submitted to the FNSRO by June 30, 1990. Subsequent evaluations of noncommercial systems shall, at a minimum, be submitted to FNS every three years by March 31.

(3) *Evaluation of current systems.* The evaluation of the system in place shall, at a minimum, include the following information:

(i) A description of the principal warehousing/delivery techniques used by the distributing agency. The description should include:

(A) The frequency of delivery available;

(B) The timeframes for making deliveries;

(C) The type of delivery service offered (to the loading dock or placement in the storeroom); and

(D) The system for recipient agencies to order specific amounts of food from available inventory; and

(ii) An estimate of all costs that will be incurred in administering the Food Distribution Program for the upcoming school year. These costs include transportation, storage and handling of donated foods (if the current distributing agency system does not include delivery to recipient agencies, identification of costs incurred by recipient agencies to pick up commodities at a warehouse and to deliver the food to a centralized storage facility or the individual preparation sites), salaries of persons directly connected with the administration of the program and other program related expenses. These expenses shall include fringe benefits, travel expenses, rent, utilities, accounting/auditing services to recipient agencies such as the costs for administering and monitoring the State's processing program, and technical assistance workshops.

(4) *Comparison of existing system with commercial systems.* All distributing agencies which do not use commercial facilities for a basic level of warehousing and distribution services shall compare the cost of warehousing and distributing commodities under their current system with the cost of comparable services under a commercial system for the upcoming school year.

(i) The cost comparison shall be made between the cost of providing a basic level of service under its current system and the cost of obtaining an equivalent level of service from commercial facilities. This basic level of

service shall consist of the transportation, storage and handling of donated food from the time of delivery by the Department to a distributing agency until delivery to a recipient agency's centralized storage facility or individual preparation sites and shall include monthly deliveries of donated food to all recipient agencies except those that have agreed to less frequent deliveries.

(ii) A distributing agency may base its cost comparison on a level of service in excess of the basic level and/or on services not currently provided. In all cases, the comparison must be made on the costs of providing a comparable level of service under the existing system (as identified in § 250.14(a)(2)) versus a commercial system.

(iii) If a distributing agency is unable to locate any commercial facilities expressing interest in providing the basic level of warehousing and distribution services, the distributing agency shall indicate this in its cost comparison submission, together with documentation of its efforts to obtain cost estimates from commercial facilities.

(iv) All initial data regarding the cost of the current warehousing and distribution system and the cost for comparable commercial facilities shall be submitted to the FNSRO by June 30, 1990. Subsequent cost comparisons shall, at a minimum, be submitted to FNS once every three years by March 31.

(5) *Approval to use other systems.* Distributing agencies that do not implement a commercial warehousing and distribution system shall apply to the FNSRO for approval to use other facilities and must demonstrate that other facilities are more cost effective and efficient. All requests for a waiver shall be accompanied with a full evaluation of the existing system complete with cost comparison data. Each request will be considered on a case by case basis. Initial requests for approval of alternative systems shall be submitted to the FNSRO by June 30, 1990. Subsequent requests shall, at a minimum, be submitted to the FNSRO once every three years by March 31.

(6) *System implementation.* (i) Distributing agencies shall implement the most cost effective and efficient system for warehousing and distribution services to recipient agencies by July 1, 1991. Unless otherwise approved by the FNSRO, subsequent to July 1, 1991, a distributing agency shall convert to a commercial system within six months of:

(A) The date of submission of evaluation and cost comparison data indicating that a commercial system is more cost effective and efficient (if no request for approval of an alternate system is made); or

(B) The date of the denial of a request to use an alternative system.

(ii) If at any time FNS determines that the warehousing and distribution system in place is not cost effective or efficient, the distributing agency will be required to reevaluate its system (including a cost comparison and request for continued approval to use an alternative system) in accordance with this subsection within 90 days of notification by the FNSRO.

(7) *Revisions in system.* All distributing agencies (using either commercial or noncommercial systems) shall request approval from the FNSRO at least 90 days in advance of any planned reduction in the level of service provided or any increase in distribution charges beyond normal inflation. If FNS determines the proposed changes are inappropriate, FNS may require the distributing agency to submit additional justification, deny the request, or request a reevaluation of the system in accordance with paragraph (a)(6)(ii) of this section.

(b) *Standards for storage facilities.* Distributing agencies, subdistributing agencies and recipient agencies shall provide facilities for the handling, storage and distribution of donated foods which:

(1) Are sanitary and free from rodent, bird, insect and other animal infestation;

(2) Safeguard against theft, spoilage and other loss;

(3) Maintain foods at proper storage temperatures;

(4) Stock and space foods in a manner so that USDA-donated foods are readily identified;

(5) Store donated food off the floor in a manner to allow for adequate ventilation; and

(6) Take other protective measures as may be necessary.

Distributing agencies, subdistributing agencies and recipient agencies shall ensure that storage facilities have obtained all required Federal, State and/or local health inspections and/or approvals and that such inspection/approvals are current.

(c) *Reviews.* All distributing agency-level storage facilities shall be reviewed annually. Distributing agencies shall ensure that subdistributing and recipient agencies. Conduct annual reviews of their respective storage facilities. Documentation shall be maintained on file at the distributing agency or local level as appropriate to reflect compliance with this section, including documentation of corrective action in cases of noncompliance. Corrective action must be taken immediately on all deficiencies identified in the review and the result of the corrective action must be forwarded to the distributing agency. Where applicable, the distributing agency shall determine and pursue claims in accordance with § 250.15(c).

(d) *Contracts.* When contracting for storage facilities, distributing agencies and subdistributing agencies shall enter into written contracts to be effective for no longer than five years, including option years extending a contract. Before the exercise of option years, the storage facility shall update all pertinent information and demonstrate that all donated foods received during the previous contract period have been accounted for. The contract shall, at a minimum, contain the following:

(1) Assurance that the storage facilities will be maintained in accordance with the standards specified in paragraph (b) of this section;

(2) Evidence that donated food shall be clearly identified;

(3) Assurance that an inventory system shall be maintained and an annual physical inventory will be conducted; and reconciled with the inventory records;

(4) Beginning and ending dates of the contract;

(5) A provision for immediate termination of the contract due to noncompliance on the part of the warehouse management;

(6) A provision allowing for termination of the contract for cause by either party upon 30 days written notification;

(7) The amount of any insurance coverage, which has been purchased to protect the value of food items which are being stored; and

(8) Express written consent for inspection and inventory by the distributing agency, subdistributing agency, recipient agency, the Comptroller General, the Department or any of their duly authorized representatives.

(e) *Physical inventory.* During the annual review required by paragraph (c) of this section, distributing agencies, subdistributing agencies and recipient agencies shall take a physical inventory of all storage facilities. Such inventory shall be reconciled annually with the storage facility's inventory records and maintained on file by the agency which contracted with or maintained the storage facility. Food items which have been lost, stolen or found to be out-of-condition shall be identified during the physical inventory and reported by the subdistributing or recipient agency to the distributing agency. Potential excessive inventory, as described in paragraph (f) of this section, shall be reported by the subdistributing or recipient agency to the distributing agency. Corrective action shall be taken immediately on all deficiencies and inventory discrepancies and the results of the corrective action forwarded to the distributing agency. Where applicable, the distributing agency shall determine and pursue claims in accordance with § 250.15(c).

(f) *Excessive inventories.* (1) The distributing agency shall determine if a subdistributing or recipient agency's inventories are excessive based on:

(i) The rate of distribution;

(ii) Anticipated distribution; and

(iii) Other concerns such as logistical and economic considerations.

(2) In no case may the inventory level of each donated food in storage exceed a six-month supply unless sufficient justification for additional inventory has been submitted and approved. Subdistributing agencies and recipient agencies shall submit justification to

the distributing agency in instances where more than a six-month inventory is needed. Justification shall be submitted by the distributing agency to the FNSRO for approval in instances where more than a six-month inventory is needed at the distributing agency level.

(3) The distributing agency shall take corrective action to ensure that excess inventories at all levels are eliminated and shall document actions taken to reduce excessive inventories.

[53 FR 20426, June 3, 1988, as amended at 54 FR 42475, Oct. 17, 1989; 62 FR 53730, Oct. 16, 1997]

§ 250.15 Financial management.

(a) *Distribution charges.* (1) Recipient agencies may be required to pay part or all of the direct costs for intrastate storage and distribution of donated food through distribution charges assessed by the distributing or subdistributing agency, except as provided in paragraph (a)(2) of this section.

(i) Distributing and subdistributing agencies assessing distribution charges shall submit a description of their system with all data used in calculating the rate to be used for the upcoming school year to the FNSRO for approval. The initial description and data shall be submitted by June 30, 1990. Updates to this information shall, at a minimum, be submitted to the FNSRO for approval every three years by March 31.

(ii) At least 90 days before increasing distribution charges beyond normal inflation, the distributing/subdistributing agency shall submit to the FNSRO a description of the change together with all data used to calculate the change. FNS will take action on the proposed increase in accordance with paragraph (a)(1)(v) of this section.

(iii) Allowable costs include but are not limited to those program costs referenced in paragraph (f)(2) of this section, i.e. transportation, storage and handling of donated foods, salaries of persons directly connected with the administration of the program and other program related expenses. Examples of other program related expenses are administrative costs such as fringe benefits, travel expenses, rent, utilities, accounting/auditing services, computer services, and the costs of providing program services to recipient agencies such as the cost for administering and monitoring the State's processing program, and technical assistance workshops.

(iv) Distribution charges shall not be assessed for costs which would be unallowable under the Cost Principles in the Department's Uniform Federal Assistance Regulations, 7 CFR part 3015, subpart T. In no case may distribution charges be assessed for costs which are paid for by State Administrative Expense (SAE) funds, State or local appropriated funds or any other funds available to the distributing or subdistributing agency to administer the program. Distribution charges shall not be based on a percentage of the value of the commodities distributed.

(v) FNS shall review the information and inform the distributing agency of the appropriateness of its distribution charges. If it is determined that a distributing agency's proposed distribution charges are excessive or incorporate inappropriate costs, the distributing/subdistributing agency will be required to adjust the distribution charges to reflect an appropriate level or submit further justification sufficient to satisfy the FNSRO that the proposed distribution charges are essential to cover allowable costs and services. This further justification shall include information from recipient agencies regarding their satisfaction with services provided.

(vi) Distribution charges, including any excess distribution charges which may accrue (as defined in paragraph (f)(4) of this section) shall be used in accordance with provisions of paragraph (f) of this section.

(2) Whenever a commodity is donated to a State without charge or credit against entitlement, recipient agencies may not be assessed for any part of the intrastate costs of storage and transportation of such commodity that is in excess of the distributing or subdistributing agency's direct costs for such storage and transportation minus any amount that the Department provides to the State to pay such costs under part 251 of this chapter.

(3) Under no circumstances shall recipients be required to make any payments in money, materials, or services for or in connection with the receipt of donated foods, nor shall voluntary contributions be solicited (except for the nutrition programs for the elderly) in connection with the receipt of donated foods for any purpose.

(b) *Sale of containers.* When containers or packing materials in which donated foods are received are disposed of by sale, the proceeds of such sale shall be used solely in accordance with the provisions of paragraph (f)(2) of this section.

(c) *Claims.* If a distributing agency improperly distributes or uses any donated foods, or causes loss of or damage to a donated food through its failure to provide proper storage, care, or handling, the distributing agency shall, at the Department's option:

(1) Replace the donated food in its distribution program in kind, or, in the case of section 6 donated foods, where replacement in kind may not be practicable, with other similar foods, or

(2) Pay to the Department the value of the donated food as determined by the Department.

Upon the happening of any event creating a claim in favor of a distributing agency against a subdistributing agency, recipient agency, warehouseman, carrier or other person, for the improper distribution, use, or loss of, or damage to, a donated food, the distributing agency shall take action to obtain recovery. All amounts collected by such action shall, at the Department's option, be used in accordance with the provisions of paragraph (c)(1) of this section, or, except for amounts collected on claims involving section 6 donated foods, shall be expended for program purposes in accordance with the provisions of paragraph (f) of this section. Determinations by a distributing agency that a claim has or has not arisen in favor of the distributing agency against a subdistributing agency, recipient agency, warehouseman, carrier or other person, shall, at the option of the Department, be approved by the Department prior to the distributing agency taking action thereon. Where prior approval has not been given by the Department, a distributing agency's claim determinations shall be subject to review by the Department. In the case of an inventory shortage, when the loss of any one commodity does not exceed one percent of the total quantity of the donated food distributed or utilized from any single storage facility during the fiscal year in which the loss occurred, or during the period for which an audit was conducted by representatives of the Department, or, if approved by FNS, during the period for which an audit was conducted by the distributing agency, if the distributing agency finds that: (i) The cause of the shortage cannot be established, (ii) the lost donated foods were held in noncommercial storage or other facilities owned or operated by the distributing agency, a subdistributing agency or a recipient agency, and (iii) there is no indication that the loss was the result of negligence or continued inefficiency in operations, the distributing agency need not take any further claims action, but the factual basis for not taking further claims action shall be subject to review by the Department. Furthermore, distributing agencies shall not be required to file or pursue a claim for a loss which does not exceed an amount established by State law, regulations, or procedure as a minimum amount for which a claim will be made for State losses generally, but no such claim shall be disregarded where there is evidence of violation of Federal or State statutes. Distributing agencies which fail to pursue claims arising in their favor, or fail to provide for the right to assert such claims, or fail to require their subdistributing agencies and recipient agencies to provide for such rights in accordance with § 250.12(b), shall be responsible to the Department for replacing the donated foods or paying the value thereof in accordance with the provisions of paragraph (c)(1) or (2) of this section. Distributing agencies which pursue claims arising in their favor, but fail to obtain full restitution shall not be liable to the Department for any deficiency unless the Department determines that the distributing agency fraudulently or negligently failed to take reasonable action to obtain restitution. The Department may, at its option, require

assignment to it of any claim arising from the distribution of donated foods.

(d) *Demurrage.* Demurrage or other charges which accrue after a car or truck has been placed for unloading by the delivering carrier, or which accrue because placement of a car or truck is prevented, shall be borne by the distributing agency, except that demurrage or other charges may be borne by the Department where such charges accrue because of actions by the Department and without the fault or negligence of the distributing agency.

(e) *Redonation expenditures.* In accordance with § 250.13(g), whenever a distributing agency requests authority to make redonation of any donated foods and the Department requests that the donated foods be federally inspected, these inspections will be made at the expense of the distributing agency. Any donated foods which the Department determines are acceptable for redonation shall be moved at the distributing agency's expense to the closest point within the FNS region in which the State is located where it can be utilized, or to a closer point outside the region, if such a transfer is mutually agreed to by the Department and the distributing agency. In those instances in which the distributing agency satisfactorily demonstrates to the Department that the need for any redonation resulted from no fault or negligence on its part, the Department shall assume such transportation costs as it determines to be proper. Whenever a redonation is made at the request of the Department, the Department shall pay all transportation and handling costs in connection with such redonation and shall pay to the distributing agency all storage and handling costs accrued on the donated foods at the time of redonation, as determined by the Department, except when the request is made as a result of negligence on the part of the distributing agency.

(f) *Use of funds accruing in operation of the program.* (1) *Funds accruing from claims.* Funds accruing from recoveries from loss or damage claims (which are authorized under paragraph (c) of this section to be expended for program purposes) shall be used only for the payment of expenses of the food distributing program, including transportation, storage and handling or donated foods, salaries of persons directly connected with the program, and other administrative expenses. In accordance with paragraph (f)(4) of this section, the receipt and expenditure of funds so accrued shall be reviewed by the distributing agency to determine that fund balances are not in excess of program needs.

(2) *Other funds.* Funds accruing from the sale of containers, packing materials, salvage of donated foods, distribution charges, or insurance shall be returned to the Department or used only for the payment of expenses of the program which will improve program operations including, but not limited to, transportation, storage and handling of donated foods, salaries of persons directly connected with the program and other program-related expenses. Funds accruing from the collection of distribution charges which are determined to be in excess of program needs pursuant to paragraph (f)(4) of this section shall be used in accordance with that paragraph. Funds accruing from the operation of the program shall not be used for those costs which are unallowable under the cost Principles in the Department's Uniform Federal Assistance Regulations, 7 CFR part 3015, subpart T. These unallowable costs include, but are not limited to:

(i) Bad debts;

(ii) Contingencies;

(iii) Contributions and donations;

(iv) Entertainment;

(v) Fines and penalties;

(vi) Governor's expenses;

(vii) Interest and other financial costs;

(viii) Legislative expenses; and

(ix) Losses on other grants.

(3) *Segregation of funds.* Distributing agencies and subdistributing agencies shall maintain two separate accounts for funds accruing from program operations. Funds accruing from the collection of distribution charges shall be maintained in an operating account. Funds accruing from the sale of containers, salvage of foods, insurance and recoveries of claims for the loss or damage of donated foods shall be maintained in a salvage account.

(4) *Excess funds.* The distributing agency shall review the receipt and expenditures of funds annually to ensure that fund balances are not in excess of program needs. At a maximum, the operating account fund shall not exceed the sum of the previous year's highest three-month expenditures. Funds exceeding this maximum shall be considered in excess of program needs unless the distributing agency provides sufficient justification as to the need for such funds and receives approval from the FNSRO. FNSRO may determine that funds equal to or less than the expenditures for the previous year's highest three months are in excess of what is needed. In such instances, the distributing agency shall reduce the excess funds in the operating account by reducing distributing charges or returning the funds to the contributor. The salvage account will have no set limit. FNSRO must, however, give prior approval to each deposit to or expenditure from the salvage fund which is in excess of $2,500. The distributing agency shall impose upon subdistributing agencies and recipient agencies similar provisions for the use of such funds accruing from the operation of their programs.

[53 FR 20426, June 3, 1988, as amended at 54 FR 42476, Oct. 17, 1989]

§ 250.16 Maintenance of records.

(a) *General requirements.* (1) Accurate and complete records shall be maintained with respect to the receipt, distribution/use and inventory of donated foods including:

(i) End products processed from donated foods and

(ii) The determination made as to liability for any improper distribution, use of, loss of, or damage to, such foods and the results obtained from the pursuit of claims by the distributing agency.

Such records shall also be maintained with respect to the receipt and disbursement of funds arising from the operation of the distribution program, including the determination as to the amount of payments to be made by any processor, upon termination of processing contracts.

(2) Distributing agencies shall require all subdistributing and recipient agencies to maintain accurate and complete records with respect to the receipt, distribution/disposal and inventory of donated foods, including end products processed from donated foods, and with respect to any funds which arise from the operation of the distribution program, including refunds made to recipient agencies by processors in accordance with § 250.30(k).

(3) Unless a distributing agency maintains an offer-and-acceptance system in accordance with § 250.48(e), the distributing agency shall maintain accurate and complete records with respect to amounts and value of commodities refused by school food authorities. School food authorities shall also be required to maintain such records of refusals.

(4) Each processor, food service management company, warehouse, or other entity which contracts with a distributing agency, subdistributing agency or recipient agency shall be required to keep accurate and complete records with respect to the receipt, distribution/disposal, storage and inventory of such foods similar to those required of distributing agencies under this paragraph. Where donated foods have been commingled with commercial foods, the processor shall maintain records which permit an accurate determination of the donated-food inventory. The processor shall also be required to keep formula, recipes, daily or batch production records, loadout sheets, bills of lading, and other processing and shipping records to substantiate the use made of such foods and their subsequent redelivery, in whatever form, to any distributing agency, subdistributing agency or recipient agency. Processors must maintain records which will permit a determination regarding compliance with the contracting provisions required by § 250.30(f) (3) and (4) as well as maintain records used as the basis for compiling the processor performance reports required by § 250.30(m).

(5) All recipient agencies shall be required to keep accurate and complete records showing the data and method used to determine the number of eligible persons served by that agency.

(6) Failure by a distributing agency, subdistributing agency, recipient agency, processor, food service management company, warehouse or other entity to maintain records required by this Section shall be considered prima facie evidence of improper distribution or loss of donated foods and the agency, processor or entity shall be subject to the provisions of § 250.13(e).

(b) *Length of maintenance.* All records required by this Section shall be retained for a period of three years from the close of the fiscal year to which they pertain. However, in instances when claims action and/or audit findings have not been resolved, the records shall be retained as long as required for the resolution of such action or findings.

§ 250.17 Reports.

(a) *Inventory reports and receipt of donated foods.* Distributing agencies shall complete and submit to the FNSRO semiannual reports regarding excessive inventories (as defined in § 250.14(f)) of donated foods, utilizing form FNS–155, the Inventory Management Register, except that distributing agencies shall submit monthly inventory information on form FNS–152, for the Food Distribution Program on Indian Reservations, and on form FNS–153, for the Commodity Supplemental Food Program. FNS may require the use of other reporting formats. FNS may also require that form FNS–155 be submitted more frequently than semiannually if necessary to maintain program accountability, and that any inventory report be submitted less frequently if sufficient to meet program needs. Reports shall be submitted not later than 30 calendar days after the last month in the reporting period as established by FNS.

(b) *Processing inventory reports.* Distributing agencies shall complete and submit a quarterly processing inventory report in accordance with § 250.30(o).

(c) *Performance reports.* Monthly reports of performance shall be submitted by processors to distributing agencies in accordance with § 250.30(m).

(d) *Commodity acceptability reports.* Distributing agencies shall submit to the FNSRO reports relative to the types and forms of donated foods which are most useful to recipient agencies in accordance with § 250.13(k) of this part.

(e) *Other reports.* Distributing agencies shall complete and submit other reports relative to distribution operations in such form as may be required from time to time by the Department.

(f) *Report transmission.* Where a report is to be postmarked by a specific date and such report is transmitted by means of a facsimile machine, the date printed by the facsimile machine on the facsimile copy may serve as the postmark.

(Reporting requirements contained in paragraph (a) approved by the Office of Management and Budget under control number 0584–0001. Reporting requirements contained in paragraph (e) approved by the Office of Management and Budget under control numbers 0584–0028, 0584–0109, 0584–0288 and 0584–0293)

[53 FR 20426, June 3, 1988, as amended at 53 FR 27476, July 21, 1988; 59 FR 62983, Dec. 7, 1994; 62 FR 53730, Oct. 16, 1997]

§ 250.18 Audits.

(a) *Right of inspection and audit.* The Secretary, the Comptroller General of the United States, or any of their duly authorized representatives, may inspect and inventory donated foods in storage or the facilities used in the handling or storage of such donated foods, and may inspect and audit all records, including financial records, and reports pertaining to the distribution of donated foods and may review or audit the procedures and methods used in carrying out the requirements of this part at any reasonable time. Subdistributing agencies, recipient agencies, processors, food service management companies and warehouses shall be required to permit similar inspection and audit by such entities or their representatives. Fiscal matters shall continue to be reviewed in audits under the Single Audit Act (31 U.S.C. 7501–07) and the Department's Uniform Federal Assistance Regulations (7 CFR part 3015).

(b) *Independent CPA audits of multi-State processors.* (1) For any year in which a multi-State processor receives more than $250,000 in donated foods, the processor shall obtain an independent CPA (certified public accountant) audit for that year. Multi-State

processors which receive $75,000 to $250,000 in donated food each year shall obtain an independent CPA audit every two years and those which receive less than $75,000 in donated foods each year shall obtain an independent CPA audit every three years. Those multi-State processors which are in the two or three-year audit cycle shall move into the next audit cycle at the point in time in which the value of donated foods received reaches $75,000 or $250,000 in any year. The total value of donated food received shall be computed by adding the value of food received under State and National Commodity Processing contracts. In instances in which the Department determines that the audit is not acceptable or that the audit has disclosed serious deficiencies, the processor shall be subject to additional audits at the request of FNS.

(2) Audits shall be conducted in accordance with the auditing provisions set forth under the Uniform Federal Assistance Regulations (7 CFR part 3015, subpart I) and the FNS Audit Guide for Multi-State Processors. At the discretion of FNS, auditors will be required to attend training sessions conducted by the Department.

(3) The costs of the audits, including those costs associated with training, shall be borne by the processors.

(4) Audit findings relative to those elements associated with the processing of donated food shall be submitted to the processor and to FNS concurrently.

(5) Noncompliance with the audit requirements in paragraph (b)(1) of this section will render the processor ineligible to enter into another processing contract with any contracting agency until the required audit has been conducted and deficiencies corrected.

(6) *Processor response.* Multi-State processors shall develop a written response to FNS addressing deficiencies which have been identified in the audit. Such responses shall include:

(i) Corrective action which has already been taken to eliminate the deficiency;

(ii) Corrective action which the processor proposes to take to eliminate the deficiency;

(iii) The timeframes for the implementation and completion of the corrective action;

(iv) A determination of what caused the deficiency; and

(v) Deficiencies which have been identified that the processor takes exception to and an explanation for the exception.

Multi-State processors shall submit a written response to FNS in accordance with timeframes established by FNS.

[53 FR 20426, June 3, 1988, as amended at 54 FR 7525, Feb. 22, 1989]

§ 250.19 Reviews.

(a) *General.* Each distributing agency shall establish a review system in order to assess the effectiveness of its food distribution program in meeting the requirements of these regulations.

(b) *Responsibilities of distributing agencies.* (1) Each distributing agency shall establish review procedures encompassing eligibility, food ordering procedures, storage practices, inventory controls, reporting and recordkeeping requirements and compliance with nondiscrimination provisions. The procedures shall include:

(i) An on-site review of all nutrition programs for the elderly under agreement in accordance with § 250.12(b), at least once every four years, with not fewer than 25 percent of these programs being reviewed each year. These reviews shall also include on-site reviews of the storage facilities of sites receiving donated foods to ensure compliance with § 250.14(b);

(ii) An on-site review of all charitable institutions and nonprofit summer camps for children under agreement in accordance with § 250.12(b), and the food service management companies under contract with these recipient agencies in accordance with § 250.12(d), at a minimum, whenever the distributing agency identifies actual or probable deficiencies in program administration, including compliance with civil rights provisions, through audits, investigations of complaints, reports submitted by recipient agencies, or any other information available to the State agency which, at the discretion of the State agency, warrants an on-site review, or at the request of FNS;

(iii) An on-site review at least once every 2 years of all processors except those that are multi-State processors as defined in § 250.3, with no fewer than 50 percent being reviewed each year;

(iv) An annual on-site review of each storage facility utilized by the distributing agency. On-site reviews conducted by FNS may be considered as contributing to the fulfillment of the minimum coverage required by this paragraph; and

(v) A biennial review of all food service management companies under contract with recipient agencies in accordance with § 250.12(d), except that:

(A) Food service management companies under contract with charitable institutions and nonprofit summer camps for children shall be reviewed in accordance with paragraph (b)(1)(ii) of this section; and,

(B) Food service management companies under contract with schools participating in the National School Lunch Program or commodity schools under part 210 of this chapter, or with schools participating in the School Breakfast Program under part 220 of this chapter, shall be reviewed in accordance with the provisions set forth in parts 210 and 220.

(2) Each distributing agency shall design and implement a system to verify sales of end products to all recipient agencies under that distributing agency's authority in instances when a processor transfers end products to a distributor and the distributor sells the end product to the recipient agencies at a discount and the distributor receives a refund from the processor. At a minimum, such a system must:

(i) At a minimum, provide for a semi-annual review of a statistically valid sample of sales for the previous six-month period for all processors which contract with the distributing agency or contracting agencies under the authority of the distributing agency, including multi-State processors. The sample size must ensure a 95 percent confidence level;

(ii) Support the projection of a claim against the processor when, in the review of the sample, it is determined that the value of donated foods has not been passed on to recipient agencies or when end products have been improperly distributed; and

(iii) Provide for the assessment of claims against the processor in accordance with FNS Instruction 410–1, Non-Audit Claims, Food Distribution Program, in instances when deficiences have been identified.

(iv) Provide for the adjustment of performance reports and processing inventory reports to refect any invalid sales;

(v) Provide for the development and submission by processors to the distributing agency of a corrective action plan designed to correct problems identified during the sales verification; and

(vi) In instances in which the distributing agency has delegated the responsibility of sales verification to processors, the distributing agency must:

(A) Establish guidelines which ensure that the criteria contained in paragraphs (b)(2)(i)-(v) are met;

(B) Ensure that processors report their findings to the distributing agency on a semi-annaul basis in accordance with § 250.30(m);

(C) Review the processor's findings and select a random sub-sample of at least 10 percent of all sales verified by the processor and reverify the sale by contacting the recipient agency by telephone or through written correspondence; and

(D) Submit a copy of the processor's review report and findings and the results of the reverification efforts to the appropriate FNSRO. In instances of poor processor performance, the distributing agency shall require the processor to discontinue the abused value pass-through-system, initiate an audit or review to determine the extent to which sales are to be disallowed, establish a claim, and/or terminate the contract.

(3) The distributing agency shall submit a report of review findings to each entity reviewed. The report shall include:

(i) Each deficiency found;

(ii) The factors contributing to each deficiency;

(iii) Recommendations for needed corrective action, including timetables for completion and/or claims action to be pursued, if any; and

(iv) Provisions for evaluating effectiveness of corrective actions.

A copy of each processor review report shall be provided to the appropriate FNSRO.

(4) Distributing agencies shall monitor progress toward completion and the effectiveness of corrective actions taken in eliminating program deficiences.

(5) In addition to the review requirements of paragraph (b)(1) of this section, each distributing agency shall make a continuing evaluation of all recipient agencies, and processors by monitoring performance reports, food requests, participation data, and data regarding refunds and discounts to recipient agencies and distributors for the receipt of end products.

(6) Distributing agencies shall, where applicable, require that subdistributing agencies monitor and review their operations in accordance with this paragraph.

(c) *Corrective action plans.* Corrective action plans shall be submitted whenever a distributing agency is found by the FNSRO to be substantially out of compliance with a performance standard or any other provision of this part. The corrective action plan shall identify the corrective actions and the timeframes needed to correct the deficiencies found by the FNSRO. The plan shall be written, signed by the proper official in the State, and submitted to the FNSRO within 60 days after the distributing agency receives notification from the FNSRO of a deficiency. Extensions beyond 60 days may be made, for cause, with written justification to and approved by the FNSRO.

(d) *Responsibilities of State Agencies on Aging.* State Agencies on Aging which receive cash payments in lieu of donated foods in accordance with the provisions of § 250.42(c) shall monitor use of such cash after disbursement to nutrition programs for the elderly to ensure that the amounts so received are expended solely for the purchase of U.S. agricultural commodities and other foods of U.S. origin for such programs.

[53 FR 20426, June 3, 1988, as amended at 54 FR 7525, Feb. 22, 1989, 54 FR 25564, June 16, 1989; 54 FR 42477, Oct. 17, 1989; 62 FR 53731, Oct. 16, 1997]

§ 250.20 Sanctions.

Any distributing agency which has failed to comply with the provisions of this part or any instructions or procedures issued in connection with it or any agreements entered into pursuant to it, may, at the discretion of the Department, be disqualified from further participation in any distribution program. Reinstatement may be made at the option of the Department. Disqualification shall not prevent the Department from taking other action through other available means when considered necessary, including prosecution under applicable Federal statutes.

§ 250.21 Civil rights.

Distributing agencies, subdistributing agencies and recipient agencies shall comply with the Department's nondiscrimination regulations (7 CFR parts 15, 15a, and 15b) and the FNS civil rights instructions to ensure that in the operation of the program no person is discriminated against because of race, color, national origin, age, sex or handicap.

§ 250.22 Complaints.

Distributing agencies shall investigate promptly complaints received in connection with the distribution or use of donated foods. Irregularities which are disclosed shall be corrected immediately. Serious irregularities shall be promptly reported to the Department. Distributing agencies shall maintain or file evidence of such investigations and actions. The Department also reserves the right to make investigations and shall have the final determination as to when a complaint has been properly handled. Complaints alleged on the basis of race, color, national origin, age, sex or handicap shall be handled in accordance with § 250.21.

§ 250.23 Buy American.

(a) *Purchase requirements.* When purchasing food products with Federal funds, whenever possible, recipient agencies shall purchase only food products that are produced in the United States (U.S.). Food products produced in the U.S. means:

(1) An unmanufactured food product produced in the U.S.; or

(2) A food product that is manufactured in the U.S.

(b) *Exceptions*. The purchase requirements described in paragraph (a) of this section shall not apply in instances when the recipient agency determines: (1) Recipients have unusual or ethnic food preferences which can only be met through purchases of products not produced in the U.S.; (2) the product is not produced or manufactured in the U.S. in sufficient and reasonably available quantities of a satisfactory quality; (3) the cost of U.S. produced food products is significantly higher than foreign products, or (4) the recipient agency is located in Alaska, Hawaii, Guam, American Samoa, Puerto Rico, the Virgin Islands, or the Commonwealth of the Northern Mariana Islands.

[53 FR 27476, July 21, 1988, as amended at 58 FR 39122, July 22, 1993]

§ 250.24 Distributing agency performance standards.

This section establishes basic performance standards which must be followed by distributing agencies responsible for intrastate distribution of donated commodities and products. The seven standards address the level of service that shall be provided to recipient agencies. The basic standards include the following:

(a) *Program management and evaluation*. Distributing agencies shall conduct reviews in accordance with § 250.19. Distributing agencies shall also assess the adequacy of the service provided to recipient agencies.

(b) *Information dissemination*. Distributing agencies shall provide recipient agencies with all information needed for informed participation in the program. Distributing agencies shall provide program information relative to:

(1) Current program regulations,

(2) Summaries of commodity specifications upon request (§ 250.13(j)) and commodity fact sheets,

(3) Results of any test evaluations and surveys,

(4) Recipes, and

(5) Written procedures for ordering commodities, handling commodities which are stale, spoiled, out-of-condition or not in compliance with specifications (including procedures for replacement by the Department under § 250.13(g)), submitting complaints and other written policy which affects program operations.

(c) *Fiscal responsibility*. Distributing agencies shall maintain a financial management system which ensures fiscal integrity and accountability for all funds and includes a recordkeeping system which conforms to generally accepted accounting practices. Distributing agencies shall submit information relative to distribution charges to FNS in accordance with § 250.15(a).

(d) *Ordering and allocation*. Distributing agencies shall ensure that donated food is provided on an equitable basis and, to the extent practicable, in the types and forms most usable by recipient agencies. Distributing agencies shall be responsible for:

(1) Obtaining and utilizing commodity acceptability information in accordance with § 250.13(k);

(2) Providing recipient agencies with information regarding commodity availability;

(3) Providing recipient agencies with information regarding commodity assistance levels;

(4) Ordering and allocating donated food based on participation data for those programs which serve meals;

(5) Ensuring the availability of commodities, to the extent possible, in quantities requested and at times specified by recipient agencies;

(6) Permitting recipient agencies to refuse all or a portion of a commodity prior to delivery to the distributing agency if time permits;

(7) Permitting recipient agencies to change orders for Group B (grain, dairy, peanut and oil products) and unlimited bonus commodities prior to submission of an order to the Department;

(8) Providing recipient agencies with ordering options and commodity values (§ 250.13(a)(5));

(9) Offering schools participating in the National School Lunch Program the per meal value of donated food in accordance with § 250.48(c); and

(10) Consider the preparation and storage capabilities of recipient agencies when ordering donated food, including capabilities of such agencies to handle commodity product forms, quantity, packaging and quantities.

(e) *Warehousing and distribution.* Distributing agencies shall use a warehousing and distribution system that is efficient, cost effective and responsive to needs of recipient agencies in accordance with § 250.14(a). In addition, distributing agencies shall:

(1) Work with recipient agencies capable of receiving direct shipments to order donated food directly into their warehouses;

(2) Solicit information and recommendations regarding the individual delivery needs of recipient agencies;

(3) Maintain distribution schedules which are equitable and reliable, recognize hours of operation, holidays and vacations and other special needs of recipient agencies;

(4) And make donated food available at least monthly to all recipient agencies except those that have agreed to less frequent deliveries (§ 250.13(a)(6)); however, the distributing agency shall not be held liable for delays in deliveries of donated food when such delays are due to late deliveries of donated food to the distributing agency by the Department.

(f) *Disposition of damaged or out-of-condition commodities.* Distributing agencies shall establish a system for handling recipient agency complaints, notifying the Department of any commodity losses in accordance with § 250.13(f) and arranging for the replacement of lost commodities in accordance with § 250.13(g).

(g) *Processing.* Distributing agencies shall administer an acceptable processing program in accordance with § 250.30. In addition, distributing agencies shall inform recipient agencies annually of processing options available to them in facilitating participation in State or National processing contracts. Prior to entering into a processing contract, distributing agencies shall test end products. The end product testing may be delegated to the purchasing recipient agency provided that test results are reviewed by the distributing agency. Distributing agencies shall monitor the acceptability of processed end products as required in § 250.30(b)(1).

[54 FR 42477, Oct. 17, 1989, as amended at 62 FR 53731, Oct. 16, 1997; 64 FR 72902, Dec. 29, 1999]

Subpart C—Processing and Labeling of Donated Foods

§ 250.30 State processing of donated foods.

(a) *General.* This section sets forth the terms and conditions under which distributing agencies, subdistributing agencies, or recipient agencies may enter into contracts for the processing of donated foods and prescribes the minimum requirements to be included in such contracts.

(b) *Permissible contractual arrangements.* (1) A distributing agency, subdistributing agency, or recipient agency may contract for processing, pay the processing fee, and deliver the end products to eligible recipient agencies through its own distribution system. Distributing agencies shall assure that the acceptability of processed end products is tested with recipient agencies eligible to receive them prior to entering into a processing contract and shall develop a system for monitoring product acceptability. Distributing agencies may exempt end products from testing if they have been used previously, have been determined by the distributing agency to be acceptable by recipient agencies, and have had no changes in specifications.

(2) A distributing agency or subdistributing agency may contract for processing on behalf of one or more recipient agencies. All recipient agencies eligible to receive the donated foods to be processed may receive end products made from those foods and produced under such processing contracts by virtue of the distributing agency—recipient agency agreement required by § 250.12(b). Under this arrangement and subject to the approval of the distributing agency:

(i) Processors shall utilize either a discount or a refund system as defined in § 250.3 when they sell end products directly to recipient agencies, or

(ii) When selling end products through a distributor, such sales shall

be in accordance with paragraph (e) of this section.

(3) Distributing agencies shall permit subdistributing agencies and recipient agencies to enter into processing contracts with a processor under arrangements similar to those described in paragraph (b) (1) or (2) of this section.

(c) *Requirements for processing contracts.* (1) Contracts with processors shall be in a standard written form and shall be reviewed by the appropriate FNSRO. Processing contracts shall terminate on June 30 of each year. However, processing contracts may give contracting agencies the option of extending contracts for two 1-year periods, provided that any changed information must be updated before any contract extension is granted, including the information in paragraphs (c)(3), (c)(4)(ii), and (c)(4)(viii)(B) of this section. The processor must have performed to the satisfaction of the contracting agency during the previous contract year, submitted all required reports and any corrections to such reports up to the time that contract extension occurs, and submitted its certified public accountant report as required under paragraph (c)(4)(xi) of this section before the contract may be extended. Distributing agencies shall develop criteria for use in evaluating and selecting processing contracts. The selection criteria shall be used in selecting or rejecting processors in a manner that ensures equitable treatment of processors. The selection criteria shall, at a minimum, include:

(i) The nutritional contribution which the end product will provide;

(ii) The marketability of the end product;

(iii) The distribution method which the processor intends to utilize;

(iv) Price and yield schedule data;

(v) Any applicable labeling requirements; and

(vi) The ability of the processor to meet the terms and conditions set forth in the regulations.

These criteria will be reviewed by the appropriate FNSRO during the management evaluation review of the distributing agency. Distributing agencies and subdistributing agencies which enter into contracts on behalf of recipient agencies but which do not limit the types of end products which can be sold or the number of processors which can sell end products within the State are not required to follow the selection criteria. In addition to utilizing these selection criteria, when a contracting agency enters into a contract both for the processing of donated food and the purchase of the end products produced from the donated food, the procurement standards set forth in Attachment O to OMB Circular A–102 must be followed. Recipient agencies which purchase end products produced under Statewide agreements are also required to comply with Attachment O of OMB Circular A–102. Contracting agencies shall not enter contracts with processors which cannot demonstrate the ability to meet the terms and conditions of the regulations and the distributing agency agreements; furnish prior to the delivery of any donated foods for processing, a performance bond, an irrevocable letter of credit or an escrow account in an amount sufficient to protect the contract value of donated food on hand and on order; demonstrate the ability to distribute end products to eligible recipient agencies; provide a satisfactory record of integrity, business ethics and performance and provide adequate storage.

(2) Standard form contracts shall be prepared or reviewed by the appropriate State legal staff to assure conformity with the requirements of these regulations and of applicable Federal, State and local laws.

(3) The contract shall be signed for the processor by the owner, a partner, or a corporate officer duly authorized to sign the contract, as follows:

(i) In a sole proprietorship, the owner shall sign the contract;

(ii) In a partnership, a partner shall sign the contract;

(iii) In a corporation, a duly authorized corporate officer shall sign the contract.

(4) At a minimum, each processing contract shall include:

(i) The names and telephone numbers of the contracting agency and processor;

(ii) A description of each end product, the quantity of each donated food and

the identification of any other ingredient which is needed to yield a specific number of units of each end product (except that the contracting agency may permit the processor to specify the total quantity of any flavorings or seasonings which may be used without identifying the ingredients which are, or may be, components of flavorings or seasonings), the total weight of all ingredients in the batch formula, the yield factor for each donated food, and any pricing information provided by the processor in addition to that required in paragraph (c)(4)(iii) of this section as requested by the contracting agency and a thorough explanation of what this additional pricing information represents. The yield factor is the percentage of the donated food which must be returned in the end product to be distributed to eligible recipient agencies. For substitutable donated foods, at least 100 percent of the donated food provided to the processor must be physically contained in the end products with no allowable tolerance;

(iii) The contract value of each donated food to be processed and, where processing is to be performed only on a fee-for-service basis as defined in § 250.3, the fee-for-service;

(iv) A provision for:

(A) Termination of the contract upon thirty days written notice by the contracting agency or the processor and

(B) Immediate termination of the contract when there has been noncompliance with its terms and conditions by the contracting agency or the processor;

(v) In the event of contract termination, a provision for disposition of donated foods and end products in the processor's inventories or payment of funds in accordance with paragraph (j) of this section;

(vi) A provision for inspection and certification during processing, where applicable, by the appropriate acceptance service in accordance with paragraphs (g) and (h) of this section;

(vii) A provision that end products containing donated foods that are not substitutable under paragraph (f) of this section shall be delivered only to eligible recipient agencies and that end products containing both substitutable and non-substitutable donated foods may be delivered and sold in accordance with the requirements of paragraph (d) and (e) of this section;

(viii) Provisions that the processor shall:

(A) Fully account for all donated foods delivered into its possession by production and delivery to the contracting agency or eligible recipient agencies of an appropriate number of units of end products meeting the contract specifications, and where end products are sold through a distributor, that the processor remains full accountable for the donated foods until refunds or any other credits equal to their contracted value have been made to eligible recipient agencies in accordance with paragraph (k) of this section or to distributing agencies in accordance with paragraph (n)(2) of this section;

(B) Furnish to the contracting agency prior to the delivery of any donated foods for processing documentation that a performance supply and surety bond from a surety company listed in the most recent U.S. Department of Treasury Circular 570, an irrevocable letter of credit or an escrow account has been obtained in an amount that is sufficient to protect the contract value of all donated foods. Since the distributing agency is held liable by FNS for any donated foods provided to a processor the distributing agency shall determine the dollar value of the performance supply and surety bond, irrevocable letter of credit or the escrow account taking into consideration the

(*1*) Value of donated foods on hand;

(*2*) Value of donated foods on order and

(*3*) Anticipated usage rate during the contract period;

(C) Use or dispose of the containers in which donated foods are received from the Department in accordance with the instructions of the contracting agency;

(D) Apply as credit against the processing fee or return to the contracting agency and identify:

(*1*) Any funds received from the sale of containers, and

(*2*) The market value or the price received from the sale of any by-products of donated foods or commercial foods

which have been substituted for donated foods;

(E) Substitute donated foods with commercially purchased foods only in accordance with paragraph (f) of this section;

(F) Meet the requirements of paragraph (i) of this section for labeling end products;

(G) Maintain accurate and complete records pertaining to the receipt, disposal, and inventory of donated foods in accordance with § 250.16;

(H) Submit processing performance reports in accordance with paragraph (m) of this section; and

(I) Submit annual reconciliation reports and make payments to distributing agencies for any inventory remaining at the termination of the contract in accordance with paragraph (n)(3) of this section.

(ix) A provision that approval of the contract by distributing agency shall not obligate that agency or the Department to deliver donated foods for processing;

(x) A description of the processor's quality control system and assurance that an effective quality control system will be maintained for the duration of the contract;

(xi) In instances when the processor is a multi-State processor as defined in § 250.3, a provision that the processor agrees to obtain an independent audit by a certified public accountant in accordance with § 250.18(b);

(xii) A requirement that inventory drawdowns shall be limited to the actual amount of donated foods contained in the end product. Additional commodity required to account for production loss shall be obtained from non-donated foods;

(xiii) A provision that the fee-for-service or value pass-through system to be used for the sale of end products to recipient agencies shall be described and be consistent with paragraphs (d) and (e) of this section.

(xiv) In instances when the distributing agency has delegated the responsibility for sales verification for end products provided by a distributor to recipient agencies at a discount, assurance that the processor will submit sales verification data to the distributing agency in accordance with § 250.30(m)(l); and

(xv) A provision that the contracting agency shall give the processor a list of all recipient agencies eligible to purchase end products under the contract and provide updates for any changes which occur during the contract period.

(xvi) A provision that the processor shall not assign the processing contract or delegate any aspect of processing under a subcontract or other arrangement without the written consent of the contracting agency and the distributing agency.

(xvii) A provision that the processor shall provide pricing information summaries and updated pricing information summaries as required in paragraphs (d)(3) and (e)(2) of this section.

(xviii) A provision that the processor shall maintain documentation which demonstrates that the level of the processor's commercial production has not been reduced, as required in paragraph (f)(1)(iii) of this section.

(d) *End products sold by processors.* (1) When recipient agencies pay the processor for end products, such sales shall be under:

(i) A refund system as defined in § 250.3 and in accordance with paragraph (k) of this section; or

(ii) A discount system which provides the price of each unit of end product purchased by eligible recipient agencies to be discounted by the stated contract value of the donated foods contained therein; or

(iii) An alternative value pass-through system under which the value of the donated food contained in each unit of end product shall be passed to the recipient agency and which has been approved by FNS at the request of the distributing agency. Any alternative value pass-through system approved under this paragraph must comply with the sales verification requirements specified in § 250.19(b) of this part, or an alternative verification system approved by FNS. The Department retains the authority to inspect and review all pertinent records including records pertaining to the verification of a statistically valid sample of sales. FNS may consider the paperwork and

resource burden associated with alternative value pass-through systems when considering approval and reserves the right to deny the approval of systems which are labor-intensive and provide no greater accountability than those systems permitted under paragraphs (d) and (e) of this section.

(2) When a processor delivers end products produced under a fee-for-service contract, the processor shall separately identify on the bill for the recipient agency the agreed-upon fee-for-service and any delivery costs.

(3) Processors shall provide pricing information summaries to contracting agencies and contracting agencies shall provide this information to recipient agencies as soon as possible after contract approval. If this pricing information changes during the contract period, processors shall provide updated pricing information to the contracting agency 30 days prior to the effective date of the change, which, in turn, shall provide this updated information to eligible recipient agencies.

(e) *End products sold by distributors.*

(1) When a processor transfers end products to a distributor for delivery and sale to recipient agencies, such sales shall be under:

(i) A refund system as defined in § 250.3 and in accordance with paragraph (k) of this section; or

(ii) A hybrid system which provides a refund for the contract value of the donated food shall be provided to the distributor in accordance with paragraph (k) of this section and the price of each unit of end product purchased by eligible recipient agencies through a distributor shall be discounted by the contract value of the donated foods contained therein; or

(iii) An alternative value pass-through system under which the contract value of the donated food contained in each unit of end product shall be passed on to the recipient agency and which has been approved by FNS in accordance with paragraph (d)(1)(iii) of this section; or

(iv) When a processor arranges for delivery of processed end products produced under fee-for-service contracts by distributors, the products shall be delivered and invoiced using one of the following procedures:

(A) The recipient agency is billed by the processor for the fee-for-service and the distributor bills the recipient agency for the storage and delivery of the end products; or

(B) The processor arranges for the delivery of end products through a distributor on behalf of the recipient agency. In this system, the processor's invoice must include both the fee-for-service and the distributor's charges as separate, clearly identifiable charges.

(2) Processors shall provide pricing information summaries to contracting agencies and contracting agencies shall provide this information to recipient agencies as soon as possible after contract approval. If this pricing information changes during the contract period, the processor shall provide updated pricing information to the contracting agency, which, in turn, shall provide this information to the eligible recipient agencies.

(f) *Substitution of donated foods with commercial foods.* (1) The processing contract may provide for substitution of donated foods as defined in § 250.3. If the provision allowing substitution is included, the contract shall stipulate that:

(i) Only butter, cheese, corn grits, cornmeal, flour, macaroni, nonfat dry milk, peanut butter, peanut granules, roasted peanuts, rice, rolled oats, rolled wheat, shortening, vegetable oil, and spaghetti may be substitutable as defined in § 250.3 and such other food as FNS specifically approves as substitutable under paragraph (f)(4) of this section (substitution of meat and poultry items shall not be permitted),

(ii) All components of commercial foods substituted for those donated must be of U.S. origin and be identical or superior in every particular of the donated-food specification as evidenced by certification performed by, or acceptable to, the applicable Federal acceptance service, and

(iii) Processors shall maintain documentation that they have not reduced their level of commercial production because of participation in the State processing program.

(2) Documentation must be maintained by both parties in accordance with § 250.16. Where commercial food is authorized to be substituted for any

donated food specifically listed in paragraph (f)(1)(i) of this section, the processor shall maintain records to substantiate that it continues to acquire on the commercial market sufficient purchases of substitutable food for commercial production and any amounts necessary to meet the 100 percent yield requirement. When there is substitution, the donated foods shall be used by the processor and shall not otherwise be sold or disposed of in bulk form. The applicable Federal acceptance service shall, upon request by the Department, the contracting agency or the distributing agency determine if the quality analysis meets the requirements set forth by the Agricultural Stabilization and Conservation Service (ASCS) in the original inspection of donated foods and, in the case of concentrated skim milk replacing donated nonfat dry milk, determine if the concentrated skim milk contains the amount of milk solids as specified in the contract. When donated foods are nonsubstitutable, the applicable Federal acceptance service shall ensure against unauthorized substitutions, and verify that quantities of donated foods used are as specified in the contract.

(3) When concentrated skim milk is used to replace donated nonfat dry milk, the contract shall also specify (in addition to the requirements in paragraph (c) of this section):

(i) The percent of milk solids that, at a minimum, must be contained in the concentrated skim milk;

(ii) The weight ratio of concentrated skim milk to donated nonfat dry milk;

(A) The weight ratio is the weight of concentrated skim milk which equals one pound of donated nonfat dry milk, based on milk solids;

(B) In calculating this weight, nonfat dry milk shall be considered as containing 96.5 percent milk solids;

(C) If more than one concentration of concentrated skim milk is to be used, a separate weight ratio must be specified for each concentration;

(iii) The processor's method of verifying that the milk solids content of the concentrated skim milk is as stated in the contract;

(iv) A requirement that inventory drawdowns of donated nonfat dry milk shall be limited to an amount equal to the amount of concentrated skim milk, based on the weight ratio, used to produce the end product;

(v) A requirement that the contract value of donated food for a given amount of concentrated skim milk used to produce an end product is the value of the equivalent amount of nonfat dry milk, based on the weight ratio of the two foods;

(vi) A requirement that the concentrated skim milk shall be produced in a USDA approved plant or in a plant approved by the appropriate regulatory authority for the processing of Grade A milk products; and

(vii) A requirement that documentation sufficient to substantiate compliance with the contract provisions shall be maintained in accordance with § 250.16(a)(4).

(4) Processor may request approval to substitute commercial foods for donated foods not specifically listed in paragraph (f)(1)(i) of this section by submitting such request to FNS in writing and satisfying all requirements of paragraphs (f)(1)(ii) and (iii) of this section. FNS will notify the processor in writing of authorization to substitute commercial foods for donated foods not listed in paragraph (f)(1)(i) of this section and such authorization shall apply for the duration of all current contracts entered into by the processor pursuant to this section.

(5) Title to the substituted food shall transfer to the contracting agency upon the initiation of the processing of the end product containing the substituted food. Title to the equivalent amount of donated food shall transfer to the processor at the same time (except when the substitution is necessary to meet the 100 percent yield requirement or to otherwise replace missing or out-of-condition donated food). Once title has transferred, the processor shall use the substituted food in accordance with the terms and conditions of this part.

(g) *Meat and poultry inspection programs.* When donated meat or poultry products are processed or when any commercial meat or poultry products are incorporated into an end product containing one or more donated foods, all of the processing shall be performed

in plants under continuous Federal meat or poultry inspection, or continuous State meat or poultry inspection in States certified to have programs at least equal to the Federal inspection programs. In addition to FSIS inspection, all donated meat and poultry processing shall be performed under AMS acceptance service grading. The cost of this service shall be borne by the processor. In the event the processor can demonstrate that grading is impractical, exemptions in the use of acceptance services shall be approved by the distributing agency prior to processing each order. Exemptions in the use of acceptance service graders will be authorized on the basis of each order to be processed provided the processor can demonstrate:

(1) That even with ample notification time, the processor cannot secure the services of a grader,

(2) That the cost for a grader would be unduly excessive relative to the value of foods being processed and that production runs cannot be combined or scheduled to enable prorating of the costs of services among the purchasers of end products, or

(3) The documented urgency of the recipient agency's need for the end product precludes the use of acceptance services.

Prior to approving a processor's request to waive the acceptance service requirement the distributing agency shall ensure, based on the processor's past performance, that the quality of the end product produced will in no way be adversely affected as a result of waiving the requirement.

(h) *Certification by acceptance service.* (1) All processing activities of donated foods shall be subject to review and audit by the Department, including the applicable Federal acceptance service. The contracting agency may also require acceptance and certification by such acceptance service in addition to the requirements set forth in paragraph (g) of this section.

(2) In the case of substitutable donated foods, in deciding whether to require acceptance and certification, the contracting agency should consider the dollar value of the donated foods delivered to the processor.

(3) When contracting agencies require certification in accordance with paragraph (h) (1) or (2) of this section, the degree of acceptance and certification necessary under the processing contract shall be determined by the appropriate Federal acceptance service after consultation with the distributing agency concerning the type and volume of the donated foods and anticipated value of end products to be processed. The cost of this service shall also be borne by the processor.

(i) *Labeling end products.* (1) Except when end products contain donated foods that are substituted under paragraph (f) of this section, the exterior shipping containers of end products and, where practicable, the individual wrappings or containers of end products, shall be clearly labeled ''Contains Commodities Donated by the United States Department of Agriculture. This Product Shall Be Sold Only to Eligible Recipient Agencies.''

(2) Labels on all end products shall meet applicable Federal labeling requirements.

(3) When a processor makes any claim with regard to an end product's contribution toward meal requirements of any child nutrition program, the processor shall follow procedures established by FNS, the Food Safety and Inspection Service of the Department, the National Marine Fisheries Service of the U.S. Department of Commerce or other applicable Federal agencies for approval of such labels.

(j) *Termination of processing contracts.* (1) When contracts are terminated or completed and the processor has commodities remaining in inventory, the processor shall be directed, at the option of the distributing agency and the FNSRO, to do the following:

(i) With respect to nonsubstitutable commodities, the processor shall:

(A) Return the commodities to the contracting agency;

(B) Pay the contracting agency for the commodities based on the Department's replacement costs, determined by using the most recent data provided by the Department; or

(C) Pay the contracting agency for the commodities based on the contract value stated in the processor's contract;

(D) Pay the contracting agency the CCC unrestricted sales price;

(ii) With respect to substitutable commodities, the processor shall:

(A) With the concurrence of any affected contracting agencies, transfer the donated foods to the accounts of other contracting agencies with which the processor has contracts;

(B) Return the foods donated to the contracting agency;

(C) Replace the commodities with the same foods of equal or better quality as certified in accordance with paragraph (f)(2) of this section and deliver such foods to the contracting agency;

(D) Pay the contracting agency for the commodities based on the Department's replacement costs, determined by using the most recent data provided by the Department; or

(E) Pay the contracting agency for the commodities based on the contract value stated in the processor's contract.

(F) Pay the contracting agency the CCC unrestricted sales price.

(2) When a processor's contract is terminated at the processor's request or due to noncompliance or negligence on the part of the processor and commodities remaining in the processor's inventory are transported pursuant to paragraph (j)(1)(i)(A), (j)(1)(ii)(B) or (j)(1)(ii)(C) of this section, the processor shall pay the transportation costs.

(3) Funds received by distributing agencies upon termination of contracts shall be used in accordance with FNS Instruction 410–1, Non-Audit Claims, Food Distribution Program.

(k) *Refund payments.* (1) When end products are sold to recipient agencies in accordance with the refund provisions of paragraph (d) or (e) of this section, each recipient agency shall submit refund applications to the processor within 30 days from the close of the month in which the sales were made, except that recipient agencies may submit refund applications to a single processor on a Federal fiscal quarterly basis if the total anticipated refund due for all purchases of product from that processor during the quarter is 25 dollars or less.

(2) In instances when refunds are to be provided to distributors which have sold end products to recipient agencies at a discount, distributors shall submit refund applications to processors within 30 days from the close of the month in which the sales were made of the date of sale to recipient agencies in order to receive benefits.

(3) Not later than 30 days after receipt of the application by the processor, the processor shall make a payment to the recipient agency or distributor equal to the stated contract value of the donated foods contained in the purchased end products covered by the refund application, except that processors may group together refund applications for a single recipient agency on a Federal fiscal quarterly basis if the total anticipated refund due that recipient agency during the quarter is 25 dollars or less. Copies of requests for refunds and payments to recipient agencies and/or distributors shall be forwarded to the appropriate distributing agency by the processor.

(l) *Contract approvals.* Distributing agencies shall review and approve processing contracts entered into or renewed by subdistributing and recipient agencies prior to the delivery of commodities for processing under such contracts. The distributing agency which enters into or approves a processing contract shall provide a copy of the contract and of these regulations to the processors, forward a copy of the contract to the appropriate FNSRO, and retain a copy for its files.

(m) *Performance reports.* (1) Processors shall be required to submit to distributing agencies monthly reports of performance under each processing contract with year-to-date totals. Processors contracting with agencies other than a distributing agency shall submit such reports to the distributing agency having authority over that particular contracting agency. Performance reports shall be postmarked no later than the final day of the month following the reporting period; however, the final performance report for the contract period shall be postmarked no later than 60 postmarked days from the close of the contract year. The report shall include:

(i) A list of all recipient agencies purchasing end products under the contract;

(ii) Donated-food inventory at the beginning of the reporting period;

(iii) Amount of donated foods received during the reporting period;

(iv) Amount of donated foods transferred to and/or from existing inventory;

(v) Number of units approved end products delivered to each eligible recipient agency during the reporting period and the number of pounds of each donated food represented by these delivered end products;

(vi) Donated food inventory at the end of the reporting period;

(vii) [Reserved].

(viii) In instances in which sales verification has been delegated to the processor pursuant to § 250.19(b)(2), sales verification findings shall be reported as an attachment to the December and June performance reports in whatever format the State distributing agency deems necessary.

(ix) A certification statement that sufficient donated foods are in inventory or on order to account for the quantities needed for production of end products for State processing contracts and that the processor has on hand or on order adequate quantities of foods purchased commercially to meet the processor's production requirements for commercial sales.

(2) In addition to reporting the information identified in paragraph (m)(1) of this section, processors which substitute concentrated skim milk for donated nonfat dry milk shall also report the following information for the reporting period:

(i) The number of pounds of nonfat dry milk used in commercial products sold to outlets which are not recipient agencies; and

(ii) The number of pounds of concentrated skim milk, and the percent of milk solids contained therein, used in end products sold to recipient agencies.

(3) Distributing agencies shall review and analyze reports submitted by processors to ensure that performance under each contract is in accordance with the provisions set forth in this section.

(n) *Inventory controls.* (1) Distributing agencies shall monitor processor inventories to ensure that the quantity of donated foods for which a processor is accountable is the lowest cost-efficient level but in no event more than a six-month supply based on the processor's average monthly usage, unless a higher level has been specifically approved by the distributing agency on the basis of a written justification submitted by the processor. Under no circumstances should the amount of donated foods ordered by the contracting agency for processing purposes be in excess of anticipated usage or beyond the processor's ability to accept and store the donated foods at any one time. Distributing agencies shall make no further distribution to processors whose inventories exceed these limits until such inventories have been reduced.

(2) For processors substituting concentrated skim milk for donated nonfat dry milk, distributing agencies shall review the processors' monthly performance reports to ensure that:

(i) Donated nonfat dry milk inventory is being drawn down based on the amount of milk solids contained in the concentrated skim milk which was used in end products sold to eligible recipient agencies;

(ii) An amount of milk solids equivalent to the amount in the donated nonfat dry milk is contained in end products sold to eligible recipient agencies; and

(iii) Donated nonfat dry milk is not being sold in bulk form.

(3) The last monthly performance report for the contract period, as required in paragraph (m)(1) of this section, shall serve as the annual reconciliation report. As a part of the annual reconciliation, a processor which has entered into a contract with the contracting agency for the next year shall pay the distributing agency, at the contract value, for any donated food inventory held which is in excess of the inventory level which has been approved by the State distributing agency. A processor whose contract has been completed or terminated shall return or pay for commodities as required by subsection (j).

(4) Distributing agencies shall certify the accuracy of the annual reconciliation report and forward it to the FNS Regional Office. Such report shall be

postmarked no later than 90 days following the close of the contract year. All monies shall be used in accordance with FNS Instruction 410–1, Non-Audit Claims, Food Distribution Program.

(5) Distributing agencies shall not submit food requisitions for processors reporting no sales activity during the prior year's contract period unless documentation is submitted by the processor which outlines specific plans for product promotion or sales expansion.

(o) *Processing inventory reports.* (1) Distributing agencies shall forward to the FNS Regional Office the inventory summary portion of the monthly performance report submitted by the processors in accordance with paragraph (m)(1) of this section for the last month of each Federal fiscal quarter. Such reports shall be postmarked no later than 60 days following the close of each Federal fiscal quarter, except that such reports shall be postmarked no later than 90 days following the close of the contract year.

(2) In addition to the reporting requirements in paragraph (o)(1) of this section, for each processor which substitutes concentrated skim milk for donated nonfat dry milk the distributing agency shall also report the following information for the reporting period:

(i) The number of pounds of nonfat dry milk used in commercial products sold to nonprogram outlets; and

(ii) The number of pounds of concentrated skim milk and the percent of milk solids contained therein used in end products sold to recipient agencies.

(p) *Cooperation with administering agencies for child nutrition programs.* If the distributing agency which enters into or approves contracts for end products to be used in a child nutrition program does not also administer such program, it shall collaborate with the administering agency by;

(1) Giving that agency an opportunity to review all such contracts to determine whether end products to be provided contribute to required nutritional standards for reimbursement under the applicable regulations for such program (7 CFR parts 210, 225, and 226) or are otherwise suitable for use in such program;

(2) Consulting with the agency with regard to the labeling requirements for the end products; and

(3) Otherwise requesting technical assistance as needed from that agency.

(q) *FNSRO review of contracts and inventory reports.* The FNSRO shall:

(1) Review all processing contracts and provide guidance, including written recommendations for termination, where necessary, to distributing agencies concerning any contracts which do not meet the requirements of this section;

(2) Allow distributing agencies 30 days to respond to any recommendation concerning contracts not meeting the requirements of this section;

(3) Review and analyze the processing inventory reports required by paragraph (o) of this section to ensure that no additional donated foods shall be distributed to processors with excess inventories until such inventories have been reduced;

(4) Assist distributing agencies in reducing such inventories; and

(5) Review annual reconciliation reports required by paragraph (n) of this section and ensure that payments for commodities have been made.

(r) *Availability of copies of processing contracts.* Contracts entered into in accordance with this Section are public records and FNS will provide copies of such contracts to any person upon request. The FNSRO will retain copies of processing contracts submitted by distributing agencies for a period of three years from the close of the Federal fiscal year to which they pertain.

(s) *Processing activity guidance.* Distributing agencies shall develop and provide a processing manual or similar procedural material for guidance to contracting agencies, recipient agencies, and processors. Distributing agencies must revise these materials as necessary to reflect policy and regulatory changes. This guidance material shall be provided to contracting agencies, recipient agencies and processors at the time of the approval of the initial agreement by the distributing agency, when there have been regulatory or policy changes which necessitate changes in the guidance materials, and upon request. The manual shall include, at a minimum, statements of the

distributing agency's policies and procedures on (1) contract approval, (2) monitoring and review of processing activities, (3) recordkeeping and reporting requirements, (4) inventory controls, and (5) refund applications.

(t) *Waiver authority*. The Food and Nutrition Service may waive any of the requirements contained in this part for the purpose of conducting demonstration projects to test program changes designed to improve the State processing of donated foods.

(Approved by the Office of Management and Budget under control number 0584–0007)

[53 FR 20226, June 3, 1988, as amended at 53 FR 20598, June 6, 1988; 53 FR 27476, July 21, 1988; 53 FR 46080, Nov. 16, 1988; 54 FR 7525, Feb. 22, 1989; 54 FR 25564, June 16, 1989; 58 FR 39122, July 22, 1993; 59 FR 62984, Dec. 7, 1994; 61 FR 5272, Feb. 12, 1996]

Subpart D—Eligible Recipient Agencies and Programs

§ 250.40 Nonprofit summer camps for children.

(a) *Distribution*. (1) The distributing agency shall distribute donated food only to those summer camps which have entered into a written agreement for participation in the program with the distributing agency in accordance with § 250.12(b). Prior to entering into a written agreement, the summer camp shall provide verification of its tax exempt status under the Internal Revenue Code. In addition to the terms and conditions set forth in § 250.12(b), the written agreement shall, at a minimum, include:

(i) The name and location of the summer camp(s);

(ii) Number of camps or sites;

(iii) Number of sessions to be offered during camping season;

(iv) Number of adults and children participating in the activities of the summer camp at each session;

(v) Total number of days meals will be served;

(vi) Total number of meals to be served daily;

(vii) Assurance that tax exempt status will be maintained;

(viii) Indication of whether the summer camp(s) will employ the services of a food service management company;

(ix) Assurance that a brochure or public announcement of open admission policy will be provided and that the summer camp agrees to maintain racial/ethnic data;

(x) Assurance that a physical inventory will be conducted and reconciled at the end of the camping session; and

(xi) Assurance that any excess inventory will, at the distributing agency's option, be returned to the distributing agency for redonation or transferred in accordance with § 250.13(a)(1).

(2) Distributing agencies shall distribute donated foods only after determining that the number of adults participating in camp activities, as compared with the number of children 18 years of age and under, is not unreasonable in light of the nature of the camp and the characteristics of the children in attendance. Persons 19 years of age and over, including program directors, counselors and others who engage in recreational, educational, and direct administrative functions, are to be considered as adults participating in the activities of a summer camp. Employees whose presence on camp premises is solely for the purpose of performing duties such as cooking, gardening, property maintenance or similar support functions are not considered as adults participating in summer camp activities. In addition, persons such as nurses, therapists, and attendants who perform professional, supervisory, or custodial services are not considered as adults participating in the activities of a summer camp if they perform services essential to the participation of mentally, emotionally, or physically handicapped children.

(3) Distributing agencies shall authorize the transfer or redonation of all donated foods remaining in summer camps at the end of the camping season in accordance with § 250.13 (a) or (g) respectively.

(4) Nonprofit summer camps for children may employ food service management companies to conduct food service operations in accordance with § 250.12(d).

(b) *Quantities and value of donated foods*. Distribution of donated food to eligible summer camps shall be made on the basis of the average number of

meals to be served daily to children as evidence by the most recent written caseload factor information contained in the agreement.

(c) *Types of donated foods authorized for donation.* Nonprofit summer camps for children are eligible to receive donated foods under section 416, section 32, section 709 and section 4(a).

[53 FR 20426, June 3, 1988, as amended at 62 FR 53729, Oct. 16, 1997]

§ 250.41 Charitable institutions.

(a) *Distribution.* (1) The distributing agency shall distribute donated food only to those charitable institutions which have entered into a written agreement for participation in the program with the distributing agency in accordance with § 250.12(b). Prior to entering into a written agreement, the charitable institution shall provide verification of the institution's tax exempt status under the Internal Revenue Code. In addition to the terms and conditions set forth in § 250.12(b), written agreements shall, at a minimum, include:

(i) The name and location of the charitable institution;

(ii) Total number of days meals will be served;

(iii) Average daily number of participants;

(iv) Total number of meals by type to be served daily to needy persons;

(v) Data that show the number of needy persons receiving benefits under another means-tested program or financial data that show the total annual amount of funds received by the institution that are derived, respectively, from (A) subsidized income and (B) nonsubsidized income. For the purpose of this section ''subsidized income'' shall mean income from public tax funds which are provided on behalf of participants that have been determined to be in need of financial assistance through a means-tested program such as Medicaid or income received through private federally tax exempt contributions which are provided for the care of participants which the institution had determined to be in need of financial assistance. ''Nonsubsidized income'' shall mean all other income, including payments made on behalf of participants by persons legally responsible for their support;

(vi) Indication of whether the charitable institution will employ the services of a food service management company to conduct its food service operations;

(vii) Assurance that proper inventory controls will be maintained; and

(viii) Assurance that all reports will be submitted as required by the distributing agency.

(2) Adult correctional institutions are eligible to receive donated foods as charitable institutions, to the extent that needy persons are served, if they conduct rehabilitation programs that are:

(i) Available to either a majority of the total inmate population (including inmates awaiting trial or sentencing) or to a majority of sentenced inmates; and

(ii) Of sufficient scope to permit participation for a minimum of 10 hours per week per inmate by either a majority of the total inmate population or a majority of sentenced inmates.

Prior to entering into an agreement for donation of foods to an adult correctional institution, the distributing agency shall require the institution's director or other responsible official to provide a written statement certifying that the institution conducts such rehabilitation programs. The statement shall be reviewed annually and maintained as part of the agreement.

(3) Charitable institutions may employ food service management companies to conduct food service operations in accordance with § 250.12(d).

(b) *Quantities of donated foods.* Distribution of donated foods to eligible charitable institutions shall be made on the basis of the average number of meals served daily to needy persons. To determine the number of needy persons being served, the distributing agency shall determine the proportion of subsidized income by dividing the subsidized income by the total subsidized and nonsubsidized income (as defined in paragraph (a)(1) of this section) and multiplying that number by the average daily number of participants as required in § 250.41(a)(1)(v), or by simply counting the number of participants that receive benefits under another a

means-tested program. The distributing agency shall use the income and average daily participation figures reflected in the agreement in determining the number of needy persons being served by the institution in accordance with the above formula. Income and participation figures shall be based on the institution's records for the previous year. The distributing agency shall obtain updated pertinent information by September 30 of each fiscal year.

(c) *Types of donated foods authorized for donation.* Charitable institutions are eligible to receive donated foods under section 416, section 32, section 4(a), and section 709.

(Approved by the Office of Management and Budget under control number 0584–0305)

[53 FR 20426, June 3, 1988, as amended at 59 FR 16972, Apr. 11, 1994; 62 FR 53729, Oct. 16, 1997]

§ 250.42 Nutrition programs for the elderly.

(a) *Distribution.* Distributing agencies shall distribute donated foods only to nutrition programs for the elderly which have entered into an agreement for donation of commodities in accordance with § 250.12(b). Food service management companies may be employed to conduct food service operations in accordance with § 250.12(d).

(b) *Quantities and value of donated foods.* (1) *Quantities.* Distribution of donated foods to nutrition programs for the elderly shall be based on the level of assistance per meal as required by the Older Americans Act of 1965, as amended, and on the number of eligible meals served within the State as evidenced by written caseload factor information provided by the State Agency on Aging.

(2) *Value.* (i) For the fiscal years 1986 through 1991, the quantity of donated foods to be made available to each State Agency on Aging for distribution to nutrition programs for the elderly shall be valued at not less than 56.76 cents for each meal which such State Agency on Aging, in accordance with regulations and guidelines authorized by the Commissioner on Aging, United States Department of Health and Human Services, reports as having been served or, where necessary, estimates will be served within the State or to Indian Tribal Organizations during the year: *Provided, however,* That:

(A) This quantity will be reduced to the extent that a State Agency on Aging elects to receive cash in lieu of donated foods in accordance with paragraph (c) of this section and

(B) The quantity of donated foods to be provided to any State Agency on Aging for any fiscal year shall not be adjusted on the basis of meal reports or estimates submitted after July 1 of such fiscal year.

(ii) Notwithstanding the provisions of paragraph (b)(2)(i) of this section, in any fiscal year in which compliance with paragraph (b)(2)(i) of this section costs more than the amounts authorized to be appropriated under the Older Americans Act of 1965, as amended for that fiscal year, the Secretary shall reduce the cents per meal level determined pursuant to paragraph (b)(2)(i) of this section for that fiscal year as necessary to meet the authorization of appropriations for that fiscal year. If such action is necessary, the per meal level will be reduced uniformly for each meal served during that fiscal year.

(c) *Cash in lieu of donated foods.* (1) Any State Agency on Aging may, for the purposes of the programs authorized by titles III and VI of the Older Americans Act of 1965, as amended, elect to receive cash payments in lieu of all or any portion of the donated foods that it would otherwise receive under paragraph (b) of this section during any fiscal year.

(2) When a State Agency on Aging elects to receive cash payments in lieu of donated foods, that election shall be binding on the State Agency on Aging for the entire fiscal year to which it pertains, and FNS shall make cash payments to the State Agency on Aging equivalent in value to the donated foods that would otherwise have been provided. Cash payments shall be made for each fiscal quarter by means of Letters of Credit issued by FNS through the appropriate U.S. Treasury Regional Disbursing Office or, where applicable, by means of U.S. Treasury checks, based on the best data available to FNS as to the number of meals to be served by nutrition programs for

the elderly administered by each State Agency on Aging during that fiscal quarter.

(3) In instances when it is necessary to reduce the annual level of assistance specified in paragraph (b)(2)(i) of this section, the level will be reduced in accordance with paragraph (b)(2)(ii) of this section. Once it has been established that the reduced per meal level will be sufficient to avoid any further adjustment, any remaining funds (up to the level of assistance specified in paragraph (b)(2)(i) of this section) will be disbursed so that each State will receive an equal amount on a per meal basis.

(4) To be eligible for reimbursement by FNS, claims for cash payment for meals served by nutrition programs for the elderly shall be submitted by State Agencies on Aging and Indian Tribal Organizations no later than 90 days following the close of the Federal fiscal quarter for which payment is claimed.

(5) The State Agency on Aging desiring to receive funds under this paragraph shall enter into a written agreement with FNS pursuant to § 250.12(a) to:

(i) Promptly and equitably disburse any cash it receives in lieu of donated foods to nutrition programs for the elderly after consideration of the needs of such programs and the availability of other resources, including any donated foods available under paragraph (b) of this section;

(ii) Establish such procedures as may be necessary to ensure that the cash disbursements are used by nutrition programs for the elderly solely for the purpose of purchasing U.S. agricultural commodities and other foods of U.S. origin for their food service operations;

(iii) Maintain and retain for 3 years from the close of the Federal fiscal year to which they pertain complete and accurate records of:

(A) All amounts received and disbursed under paragraph (c) of this section and

(B) The manner in which consideration was given to the needs and resources as required by paragraph (c)(5)(i) of this section; and

(iv) Permit representatives of the Department and of the General Accounting Office of the United States to inspect, audit, and copy such records at any reasonable time.

(6) Funds provided under paragraph (c) of this section shall be subject to the Department's Uniform Federal Assistance Regulations (7 CFR part 3015).

(d) *Types of donated foods authorized for donation.* Nutrition programs for the elderly are eligible to receive donated foods under section 416, section 32, section 311, section 709, and section 14.

[53 FR 20426, June 3, 1988, as amended at 62 FR 53729, Oct. 16, 1997]

§ 250.43 Disaster food assistance.

(a) *Organizational eligibility.* In instances in which the President has declared a disaster and FNS has determined that, as a result of the disaster, low-income households are unable to purchase adequate amounts of nutritious food, disaster organizations (including agencies of State and Federal government) may be eligible to receive donated foods for congregate meal service or household distribution to disaster victims. Applications submitted by disaster organizations to the distributing agency for the receipt and distribution of donated foods in accordance with paragraphs (b)(2) and (c)(2) of this section shall be initially submitted in writing if circumstances permit and, if not, confirmed in writing in a timely manner. Both the applications and the written approval for the use of USDA commodities shall be maintained in accordance with the recordkeeping requirements of this part.

(b) *Congregate meal service*—(1) *Approval authority and duration.* Distributing agencies may review and approve applications submitted by disaster organizations for the donation of foods for use in preparing congregate meals for disaster victims. Distributing agencies also shall determine the length of such donations, taking into consideration the magnitude of the situation, and may extend the duration of such donations as developing circumstances dictate. Following approval of a request for donated foods, the distributing agency shall make appropriate donated foods available from any source within the State to the disaster organization(s) and within 24 hours of approving the application shall report

the information listed in paragraph (b)(2) of this section to the appropriate FNSRO.

(2) *Applications*. (i) Disaster organizations wishing to receive donated foods for use in preparing meals for disaster victims shall submit applications to the distributing agency. Applications shall, to the extent possible, include the following information:

(A) Description of disaster situation;

(B) Number of people requiring meals;

(C) Period of time for which commodities are requested; and

(D) Quantity and types of food needed for congregate meal service.

(ii) In addition, organizations shall report to the distributing agency the number and location of sites providing congregate meal service as such sites are established.

(c) *Household distribution*—(1) *Approval authority and duration*. In instances in which the distributing agency has determined that the distribution of donated foods to households is appropriate, the distributing agency shall submit applications requesting approval for such distributions to the appropriate FNSRO for submission to FNS for prior approval. FNS will determine the length of time such donations will be made, taking into consideration the magnitude of the situation, and may extend the duration of such donations as developing circumstances dictate.

(2) *Applications*. (i) Disaster organizations wishing to receive and distribute donated foods to households shall submit applications to the distributing agency. Applications shall, to the extent possible, include the following information:

(A) Description of disaster situation;

(B) Identification of the specific area(s) included in the request;

(C) Number of households affected;

(D) Explanation as to why the distribution of commodities to households is warranted;

(E) Anticipated distribution period;

(F) Method(s) of distribution available;

(G) Quantity and types of food needed for distribution;

(H) Statement of assurance that simultaneous disaster food stamp benefits and commodity assistance will not be provided to individual households; and

(I) Description of the system that will be implemented to prevent dual participation.

(ii) In addition, information on the number and location of sites where commodities are to be distributed shall be provided to the distributing agency as such sites are established.

(3) *Collection of household information*. In instances in which the issuance of disaster food stamp benefits has been approved, any entity (i.e., Federal, State, or local) distributing donated foods to households shall, at a minimum, collect the information listed below in a format prescribed by the distributing agency. Such information shall be forwarded to the distributing agency and maintained by the distributing agency in accordance with the recordkeeping requirements contained in this part, except that such information may, at the discretion of the distributing agency, be maintained by the organization distributing commodities if such organization is an agency of the State government.

(i) Name of household member applying for assistance;

(ii) Address;

(iii) Number of household members; and

(iv) Statement signed by the household certifying that the household:

(A) Is in need of food assistance;

(B) Understands that misrepresentation of need, and the sale or exchange of the donated food, are prohibited and could result in a fine, imprisonment, or both;

(C) Is not residing in a shelter which provides food assistance; and

(D) Is not receiving disaster food stamp benefits.

(d) *Quantities and value of donated foods*. The distributing agency shall make donated foods available to approved disaster organizations based on the caseload factor information provided by the disaster organizations.

(e) *Types of donated foods authorized for donation*. Disaster organizations providing food assistance under this Section are eligible to receive donated

foods under section 416, section 32, section 709, section 4(a), and sections 412 and 413 of the Stafford Act.

(f) *Summary report*. Within 45 days following termination of the disaster assistance, the distributing agency shall provide a summary report to the appropriate FNSRO using Form FNS–292, Report of Coupon Issuance and Commodity Distribution for Disaster Relief.

(g) *Replacement*. Distributing agencies which decide to seek replacement of foods used from State and/or local inventories for disaster assistance shall file their request in writing to the FNSRO within 30 days following termination of the assistance. FNS will replace such foods in instances when a request for replacement is submitted within the required 30 days or sufficient justification exists to waive the 30-day requirement.

[62 FR 8365, Feb. 25, 1997]

§ 250.44 Food assistance in situations of distress.

(a) *Organizational eligibility*. In situations of distress in which needs for food assistance cannot be met under other provisions of this Part, organizations (including agencies of State and Federal government) may be eligible to receive donated foods for congregate meal service or household distribution to victims of the situation of distress. Applications submitted to the distributing agency for the receipt and distribution of donated foods in accordance with paragraphs (b)(2) and (c)(2) of this section shall be initially submitted in writing if circumstances permit and, if not, confirmed in writing in a timely manner. Both the applications and the written approval for the use of USDA commodities shall be maintained in accordance with the recordkeeping requirements of this Part.

(b) *Congregate meal service*. (1) *Approval authority and duration*. Distributing agencies may review and approve applications for the donation of foods for use in preparing congregate meals for a period not to exceed 30 days for victims of situations of distress in instances in which the need for such assistance meets the conditions of paragraph (a) of the definition of *situation of distress* in § 250.3. Following approval of a request, distributing agencies shall report the information listed in paragraph (b)(2) of this section to the appropriate FNSRO within 24 hours. In instances when the distributing agency extends the originally approved distribution period from less than 30 days to the 30-day limit, it shall notify the FNSRO of such extensions. Distributing agencies shall request approval from FNS, via the appropriate FNSRO, for donations to exceed 30 days. Upon determining that there is a need for the donation of foods for congregate meals in instances other than those that meet the criteria in paragraph (a) of the definition of *situation of distress* in § 250.3, the distributing agency shall forward applications to the appropriate FNSRO for submission to FNS for prior approval. FNS will determine the duration of such donations, taking into consideration the magnitude of the situation. Determinations as to the length of donations may be revised as developing circumstances dictate.

(2) *Applications*. (i) Organizations wishing to receive donated foods for use in preparing meals shall submit applications to the distributing agency. Applications shall, to the extent possible, include the following information:

(A) Description of the situation of distress;

(B) Number of people requiring meals and congregate meal service period; and

(C) Quantity and types of food needed.

(ii) In addition, information on the number and location of sites providing meals shall be submitted to the distributing agency as such sites are established.

(c) *Household distribution*.—(1) *Approval authority and duration*. In instances in which the distributing agency has determined that the distribution of donated foods to households is appropriate, the distributing agency shall submit applications requesting approval for such distributions to the appropriate FNSRO for submission to FNS for approval. FNS will determine the duration of the donations, taking into consideration the magnitude of the situation. Such determinations

may be revised as developing circumstances dictate.

(2) *Applications.* (i) Organizations wishing to receive and distribute donated foods to households shall submit applications to the distributing agency. Applications shall, to the extent possible, include the following information:

(A) Description of the situation of distress;

(B) Explanation as to why the distribution of commodities to households is warranted;

(C) Identification of the specific area(s) included in the request;

(D) Anticipated distribution period;

(E) Number of households expected to participate;

(F) Quantity and types of food needed for distribution;

(G) Statement of assurance that simultaneous disaster food stamp benefits and commodity assistance will not be provided to individual households; and

(H) Description of the system that will be implemented to prevent dual participation.

(ii) In addition, information on the number and location of sites shall be provided to the distributing agency as such sites are established.

(3) *Collection of household information.* In a format prescribed by the distributing agency, any entity (i.e., Federal, State, or local) distributing donated foods to households in an area where the issuance of disaster food stamp benefits has been approved shall, at a minimum, collect the information listed below. Such information shall be forwarded to the distributing agency and maintained by the distributing agency in accordance with the recordkeeping requirements contained in this part, except that such information may, at the discretion of the distributing agency, be maintained by the organization distributing commodities if such organization is an agency of the State government.

(i) Name of household member applying for assistance;

(ii) Address;

(iii) Number of household members; and

(iv) Statement signed by the household certifying that the household:

(A) Is in need of food assistance;

(B) Understands that misrepresentation of need, and the sale or exchange of the donated food are prohibited and could result in a fine, imprisonment, or both;

(C) Is not residing in a shelter which provides food assistance; and

(D) Is not receiving disaster food stamp benefits.

(d) *Quantities and value of donated foods.* The distributing agency shall make donated foods available to eligible organizations based on the caseload factor information provided by the organizations.

(e) *Types of donated foods authorized for donation.* Organizations providing food assistance in situations of distress are eligible to receive donated foods under section 416, section 32, section 709, and section 4(a).

(f) *Summary report.* Within 45 days following termination of the assistance, the distributing agency shall provide a summary report to the appropriate FNSRO using Form FNS–292, Report of Coupon Issuance and Commodity Distribution for Disaster Relief.

(g) *Replacement.* Distributing agencies which decide to seek replacement of foods used from State and/or local inventories for situations of distress shall file their request in writing to the FNSRO within 30 days following termination of the assistance. FNS will replace such foods to the extent that foods are available.

[62 FR 8366, Feb. 25, 1997]

§ 250.45 Commodity Supplemental Food Program.

(a) *Distribution.* The distributing agency shall distribute donated foods to the State agency which is designated by the State to administer the Commodity Supplemental Food Program for that State and which has entered into a written agreement with the Department for the administration of that program in accordance with 7 CFR part 247, the regulations for that program. The State agency administering the Commodity Supplemental Food Program shall distribute donated foods to local agencies for use by eligible recipients in accordance with the provisions of 7 CFR part 247 and with the provisions of this part, and may

enter into an agreement with the distributing agency for use of the distributing agency's facilities for distribution.

(b) *Quantities of donated foods.* Distribution of donated foods to the designated State agencies for the Commodity Supplemental Food Program shall be made on the basis of each State agency's quarterly estimate of need.

(c) *Types of donated foods authorized for donation.* State agencies distributing donated foods through the Commodity Supplemental Food Program are eligible to receive such foods under section 32, section 416, section 709 and section 4(a).

§ 250.46 Food Distribution Program in the Trust Territory of the Pacific Islands.

(a) *Distribution.* The distributing agency shall make donated foods available for distribution to households in the Trust Territory of the Pacific Islands by those welfare agencies which certify households in accordance with a plan of operation approved by FNS, as required by paragraph (d) of this section. Distribution of donated foods to households shall be made in accordance with the approved plan of operation.

(b) *Quantities and value of donated foods.* Distribution of donated foods shall be based on the actual number of households in need of food assistance.

(c) *Types of donated foods authorized for donation.* Agencies which make distribution to needy persons are eligible to receive foods under section 416, section 32, section 709 and section 4(a).

(d) *Plan of operation.* Prior to making distribution to agencies or households, the distributing agency shall submit a plan of operation for approval by the appropriate FNSRO. Such plans shall incorporate the procedures and methods to be used in certifying households in need of food assistance, in making distribution to households, and in providing a fair hearing to households whose claims for food assistance under the plan are denied or are not acted upon with reasonable promptness, or who are aggrieved by an agency's interpretation of any provision of the plan. No amendment to the plan of operation of the distributing agency shall be made without prior approval of FNS, and FNS may require amendment of any plan as a condition of continuing approval. The distributing agency shall require welfare agencies making distribution to households to conduct distribution programs in accordance with all provisions of the plan of operation. At a minimum, the plan shall include the following:

(1) The name of the public welfare agency or agencies which will be responsible for certification of households;

(2) The manner in which donated food will be distributed, including, but not limited to, the identity of the agency that will distribute donated foods, the storage and distribution facilities to be used and the method of financing;

(3) *The specific criteria to be used in certifying households as in need of food assistance.* The income and resource standards establishes by the distributing agency for use by welfare agencies in determining the eligibility of applicant households, after October 1979, shall continue to be those standards used as of that date which were incorporated in a plan of operation approved by FNS, unless an amendment to such standard is required or approved by FNS;

(4) The method or methods that will be used to verify the information upon which the certification of eligibility is based, including the kinds of documentary evidence that applicants are required to furnish to obtain certification;

(5) Provisions for periodically reviewing the certifications of households to discover any change in their status which would necessitate a change in the determination of eligibility. The eligibility of households shall be reviewed at least every three months, except that such reviews may be made at longer periods, not to exceed 12 months, provided that such longer periods are based upon a determination by the certifying agency that the income and resources available to such households will probably remain essentially unchanged during such period;

(6) Provisions for identifying each person who has been designated to receive donated foods for a household;

(7) Assurance that the distribution of donated foods shall not be used as a means to further the political interest of any individual or party, and that there shall be no discrimination against recipients of donated foods because of race, color, national origin, sex, age or handicap;

(8) Assurance that:

(i) Citizenship or durational residence requirements shall not be imposed as a condition of eligibility and

(ii) Recipients shall not be requiref to make any payments in money, materials or services, for or in connection with the receipt of donated foods, and that they shall not be solicited in connection with the receipt of donated foods for voluntary cash contributions for any purpose;

(9) The manner in which the distributing agency plans to supervise the program; and

(10) Definitions of any terms used which cannot be determined by reference to Webster's New International Dictionary (third edition).

(e) *Operating expense funds*—(1) *Application for funds.* To receive administrative funds, the distributing agency shall submit Form AD–623, ''Application for Federal Assistance,'' to the appropriate FNSRO at least three months prior to the beginning of the Federal fiscal year. Approval of the application by FNS shall be a prerequisite to payment of any funds to the distributing agency. The Department will make payments to the distributing agency to assist it in meeting operating expenses incurred in administering food distribution for needy persons.

(2) *Availability of funds.* FNS will review and evaluate the budget information submitted by the distributing agency in relationship to the distributing agency's plan of operation and any other factors which may be relevant to FNS' determination as to whether the estimated expenditures are reasonable and justified. FNS will give written notification to the distributing agency of:

(i) Its approval or disapproval of any or all of the estimated expenditures; and

(ii) The amount of funds which will be made available.

(3) *Payment of funds.* Payments shall be made to the distributing agency through a Letter of Credit or an advance by Treasury Check. These payments will be issued in accordance with Treasury Department procedures, Treasury Circular No. 1075 and through the appropriate Treasury Regional Disbursing Office (RDO).

(4) *Use of funds.* The distributing agency shall make every reasonable effort to ensure the availability of a food distribution program for needy persons in households and shall assign priority in the use of any funds received under this Section to accomplish that objective. Any remaining funds shall be used to expand and improve distribution to needy households. Such funds may be used for any costs which are not disallowed under Office of Management and Budget Circular A–87 (a copy of which may be obtained from FNS) and which are incurred in distributing donated foods to households, including determining eligibility of recipients, except for the purchase cost of land and buildings. In no event shall such funds be used to pay any portion of any expenses if reimbursement or payment therefore is claimed or made available from any other Federal source.

(5) *Accounting for funds.* The distributing agency which receives administrative funds under this Section shall establish and maintain an effective system of fiscal control and accounting procedures. The accounting procedures maintained by the distributing agency shall be such as to accurately reflect the receipt, expenditure and current balance of funds provided by FNS. The accounting procedures shall also provide for segregation of costs specifically identifiable to the Food Distribution Program from any other costs incurred by the distributing agency. Any budget revisions by the distributing agency which require the transfer of funds from an FNS approved cost category to another shall be in accordance with the budget revision procedures set forth in 7 CFR part 3015 and shall be approved by FNS prior to any transfer of funds.

(6) *Return, reduction and reallocation of funds.* (i) FNS may require the distributing agency to return prior to the end of the Federal fiscal year any or all

unobligated funds received under this section, and may reduce the amount it has apportioned or agreed to pay to the distributing agency if FNS determines that:

(A) The distributing agency is not administering the Food Distribution Program in accordance with its plan of operation approved by FNS and the provisions of this part;

(B) The amount of funds which the distributing agency requested from FNS is in excess of actual need, based on reports of expenditures and current projections of program needs; or

(C) Circumstances or conditions justify the return, reallocation or transfer of funds to accomplish the purposes of this part.

(ii) The distributing agency shall return to FNS within 90 days following the close of each Federal fiscal year any funds received under paragraph (e) of this section which are obligated at that time.

(7) *Financial reports.* The distributing agency shall submit quarterly and annual reports to FNS on Form SF–269 concerning the obligations, expenditure and status of funds received under this Section. In addition, the distributing agency receiving funds under paragraph (e) of this section shall submit any other reports in such form as may be required from time to time by the Department.

(f) *Records, reports and audits.* The distributing agency shall:

(1) Maintain and retain for three years from the close of the Federal fiscal year to which they pertain, complete and accurate records of all amounts received and disbursed under paragraph (e) of this section,

(2) Keep such accounts and records as may be necessary to enable FNS to determine whether there has been compliance with this section, and

(3) Permit representatives of the Department and of a General Accounting Office of the United States to inspect, audit and copy such records and accounts at any reasonable time.

§ 250.47 Food Distribution Program on Indian reservations.

(a) *Distribution.* Distributing agencies which operate a food distribution program on Indian reservations shall comply with the provisions set forth in §§ 250.1, 250.2, 250.3, 250.10, 250.11, 250.12, 250.13 (with the exception of paragraph (d)(2)), § 250.14, §§ 250.15 and 250.17(d) to the extent that these provisions are not inconsistent with the regulations cited in paragraph (b) of this section.

(b) In addition to complying with the provisions identified in paragraph (a) of this section, distributing agencies shall also comply with the provisions set forth in part 253, Food Distribution Program on Indian Reservations or part 254, Food Distribution Program in Oklahoma, as applicable.

[53 FR 20426, June 3, 1988, as amended at 53 FR 27476, July 21, 1988]

§ 250.48 School food authorities and commodity schools.

(a) *Distribution.* (1) School food authorities which participate in the National School Lunch Program or as commodity schools under part 210 of this chapter or the School Breakfast Program under part 220 of this chapter are eligible to receive donated foods. The distributing agency shall distribute donated foods only to those school food authorities whose eligibility for participation in the program has been confirmed in writing by the State agency or FNSRO administering the applicable program. Lists of participating school food authorities which have been provided to the distributing agency by the administering State agency or FNSRO may serve as written confirmation of eligibility. School food authorities may employ food service management companies to conduct food service operations in accordance with § 250.12(d) and parts 210 and 220 of this chapter.

(2) School food authorities which do not participate in the National School Lunch Program or as commodity schools under part 210 of this chapter or in the School Breakfast Program under part 220 of this chapter may receive such commodities as the Secretary may designate, provided the schools are public schools or private schools determined by the Internal Revenue Service to be exempt from income tax under section 501(c)(3) of the Internal Revenue Code of 1954 or, in the Commonwealth of Puerto Rico, certified as nonprofit by the Governor;

and operate a nonprofit school food service. Such schools shall be eligible to receive only those commodities acquired under section 416 of the Agricultural Act of 1949 (7 U.S.C. 1431) to the extent that such commodities become available and the Secretary has determined that surpluses of such commodities exist and surplus quantities are sufficient to distribute to nonprogram schools.

(b) *Quantities and Value of Donated Foods*—(1) *Quantities.* Distribution of donated food to a State for school food authorities shall be calculated by multiplying the number of lunches served in the preceding school year which meet the mealpattern requirements (reimbursable) prescribed in the regulations for the National School Lunch Program under part 210 of this chapter, by the national average value of donated food as described in paragraph (b)(2) of this section. The number of reimbursable lunches served shall be derived from the monthly claims submitted by school food authorities and States as required by regulations for the National School Lunch Program at § 210.8 of this chapter. After the end of each school year, FNS shall reconcile the number of reimbursable lunches served by schools in each State with the number served in the preceding school year and, based on such reconciliation, shall increase or reduce subsequent commodity assistance provided to each State. As early as practicable each school year, but not later than September 1, the estimated number of lunches served in the preceding school year and requests for adjustments shall be provided by the administering State agency or the FNSRO to the distributing agency. At the discretion of FNS, current year adjustments may be made for significant variations in the number of reimbursable lunches served. Such current year adjustments will not be routine and will only be made for unusual problems encountered in a State, such as a teachers' strike or a disaster that necessitates school closures for a prolonged period of time.

(2) *Value.* (i) For each school year, the national average value of donated foods to be made available to States for distribution to school food authorities participating in the National School Lunch Program (7 CFR part 210), or where applicable, cash payments in lieu thereof, shall not be less than 11 cents for each lunch and shall be adjusted on July 1, 1982, and on each July 1 thereafter, to reflect changes in the Price Index for food used in schools and institutions as prescribed by section 6(e) of the National School Lunch Act, as amended. These adjustments shall be computed to the nearest one-fourth cent and shall be made effective as of the beginning of each school year. Not less than 75 percent of the food distribution assistance shall be in the form of donated foods.

(ii) For each school year, the national average value of donated foods to be provided to States for distribution to commodity schools shall not be less than the amount specified in paragraph (b)(2)(i) of this section, plus an amount equal to the national average payment established under section 4 of the National School Lunch Act, as amended, for each lunch served by such schools: *Provided, however:* That this amount shall be reduced to the extent that FNS provides up to 5 cents per lunch of this value in cash in lieu of donated foods for donated food processing and handling expenses on behalf of such school food authorities in accordance with part 240 of this chapter.

(c) *Offering the per-meal value of donated foods*—(1) *Commodity offer value.* Distributing agencies shall offer each school food authority no less than the national average per-meal value of donated foods established by the Department on July 1 of each year, in accordance with paragraph (b)(2) of this section. This value shall be referred to as the commodity offer value. The total value of donated foods which must be offered to school food authorities shall be calculated by multiplying the per-meal value of donated foods times the number of reimbursable meals served by the school food authority during the preceding school year; or by another method which the distributing agency prefers and can justify as providing each school food authority an equitable share of donated food. Distributing agencies shall communicate to school food authorities and FNS regional offices the methods used to establish the

commodity offer value. Distributing agencies shall document commodity offerings and refusals in order to verify that the per-meal value of commodities was offered to all school food authorities.

(2) *Commodity variety offered.* Distributing agencies shall offer and efficiently deliver to each school food authority the full range of all commodities equitably and consistently to the extent that quantities requested or made available are sufficient to make a statewide distribution. At least annually, distributing agencies shall develop and disseminate to school food authorities a procedure for the allocation of commodities when the amount received from the Department is not sufficient to make a statewide distribution to all school food authorities.

(3) *Bonus commodities.* Bonus commodities (i.e., commodities provided in addition to a State's authorized level of assistance) offered shall be distinguished from entitlement commodities (i.e., commodities provided as part of an authorized level of assistance) and shall not be included as a part of the per-meal value of donated foods which must be offered to school food authorities.

(d) *Cash in lieu of donated foods for schools.* Where a State has phased out its food distribution facilities prior to July 1, 1974, such State may, in accordance with part 240 of this chapter, elect to receive cash payments in lieu of donated foods for use in school lunch programs which participate in the National School Lunch Program under part 210 of this chapter.

(e) *Types of donated foods authorized for donation.* School food authorities which participate in the National School Lunch Program or as commodity schools under part 210 of this chapter are eligible to receive donated foods under section 416, section 32, section 709, section 6 and section 14. School food authorities which participate in the School Breakfast Program under part 220 are eligible to receive donated foods under section 416, section 32, section 709 and section 14.

(f) *Refusal of donated foods by school food authorities.* (1) Any school food authority participating in food service programs under the National School Lunch Act, as amended, may refuse, at the time they are offered, donated foods and other foods offered for delivery for lunches in any school year if such foods cannot be used effectively. The school food authority may receive, in lieu of the refused donated foods, other donated foods to the extent that they are available during the school year: *Provided, however:* That not more than 20 percent of the value of the donated foods offered to a school food authority for lunches during the school year shall be subject to replacement with other available donated foods unless replacement based on the refusal of more than 20 percent of such value is feasible and practical. Prior to making distribution to school food authorities, distributing agencies shall notify each school food authority of its right to refuse delivery and to receive other donated foods, if available, in lieu of those refused. Notification of donated food refusal rights shall be provided by means of a letter or by an addendum to the agreement required by § 250.12(b) to each school food authority prior to the beginning of each school year.

(2) If the distributing agency demonstrates on the basis of existing records that it is maintaining an effective offer-and-acceptance system as defined in § 250.3, there can be no refusal of donated foods as provided in paragraph (e)(1) of this section.

(g) *Use of donated foods in home economics courses.* School food authorities receiving donated foods under this part may use such foods for the purpose of training students in home economics, including college students if the same facilities and instructors are used for training both high school and college students in home economics courses. Home economics includes classes in general home economics, food purchases, nutrition, food preparation, cooking, child care and health.

[53 FR 20426, June 3, 1988, as amended at 53 FR 26219, July 12, 1988; 53 FR 27476, July 21, 1988; 58 FR 39122, July 22, 1993; 62 FR 53729, Oct. 16, 1997]

§ 250.49 Nonresidential child and adult care institutions.

(a) *Distribution.* The distributing agency shall distribute donated foods only to those nonresidential child care

institutions whose eligibility for participation in Child Care Food Program has been confirmed in writing by the State agency of FNSRO administering the program, where applicable. Lists of participating nonresidential child care institutions which have been prepared by the administering State agency or FNSRO may serve as written confirmation of eligibility. Nonresidential child care institutions may employ food service management companies to conduct food service operations in accordance with § 250.12(d) and part 226 of this chapter.

(b) *Quantities and value of donated foods*—(1) *Quantities.* Distribution of donated food to a State for nonresidential child and adult care institutions shall be calculated by multiplying the number of lunches and suppers served in the preceding school year which meet the meal-pattern requirements (reimbursable) prescribed in the regulations for the Child and Adult Care Food Program under part 226 of this chapter by the national average value of donated food as described in paragraph (b)(2) of this section. The number of lunches and suppers served shall be derived from the monthly claims submitted by participating institutions as required by Child and Adult Care Food Program regulations at § 226.11(b) of this chapter. After the end of the school year, FNS shall reconcile the number of reimbursable meals served in each State with the number served in the preceding school year and, based on such reconciliation, shall increase or reduce subsequent commodity assistance provided to each State. As early as practicable each year, but not later than September 1, the estimated number of lunches and suppers served in the preceding school year and requests for adjustments shall be provided by the administering State agency or the FNSRO to the distributing agency. At the discretion of FNS, current year adjustments may be made for significant variations in the number of meals served. Such current year adjustments will not be routine and will only be made for unusual problems encountered in a State, such as a disaster that necessitates institutional closures for a prolonged period of time.

(2) *Value.* For each school year, the national average value of donated foods to be made available to States for distribution to nonresidential child care institutions, or cash payments in lieu thereof, shall not be less than 11 cents for each lunch and supper and shall be adjusted on July 1, 1982, and on each July 1 thereafter, to reflect changes in the Price Index for food used in schools and institutions as prescribed by section 6(e) of the National School Lunch Act, as amended. These adjustments shall be computed to the nearest one-fourth cent and shall be made effective at the beginning of each school year.

(c) *Cash in lieu of donated foods.* In accordance with part 240 of this chapter, State agencies may elect to receive cash payments in lieu of donated foods for use by institutions which participate in the Child Care Food Program under part 226 of this chapter.

(d) *Types of donated foods authorized for donations.* Nonresidential child care institutions which participate in the Child Care Food Program under part 226 of this chapter are eligible to receive donated foods under section 416, section 32, section 709, section 6 and section 14.

[53 FR 20426, June 3, 1988, as amended at 58 FR 39123, July 22, 1993; 62 FR 53729, Oct. 16, 1997]

§ 250.50 Service institutions.

(a) *Distribution.* The distributing agency shall distribute donated foods only to those service institutions whose eligibility to receive donated foods for use in the Summer Food Service Program for Children under part 225 of this chapter has been confirmed in writing by the State agency or FNSRO administering the program, where applicable. Lists of participating service institutions which have been prepared by the administering State agency or FNSRO may serve as written confirmation of eligibility.

(b) *Quantities and value of donated foods.* Distribution of donated foods to service institutions shall be made on the basis of the average daily number of meals by type to be served which meet the meal-type requirements prescribed in the regulations for the Summer Food Service Program for Children

under part 225 of this chapter as evidenced by the most recent written caseload factor information which must be provided by the State agency or FNSRO administering the program to the distributing agency by June 1 of each year.

(c) *Types of donated foods authorized for donation.* Service institutions which participate in the Summer Food Service Program for Children under part 225 of this chapter are eligible to receive donated foods under section 416, section 32, section 709, and section 14.

§ 250.51 Special Supplemental Nutrition Program for Women, Infants and Children.

(a) *Distribution.* At the request of the State agency responsible for administering the Special Supplemental Nutrition Program for Women, Infants and Children (WIC Program) under part 246 of this chapter and with approval of the Department, donated foods may be made available for distribution to program participants. In instances when donated foods are made available, State agencies shall pay the Department using funds allocated to the State for the WIC Program for those donated foods which are provided to participants as part of the food package. Donated foods which are provided to participants in addition to the quantities authorized for the food package will be made available to the State agency free of charge.

(b) *Quantities and value of donated foods.* Distribution of donated foods to State agencies for the WIC Program shall be made on the basis of each State agency's quarterly estimate of need.

(c) *Types of donated foods authorized for donation.* State agencies participating in the WIC Program under part 246 of this chapter are eligible to receive donated foods under section 416 and section 32.

Subpart E—Where To Obtain Information

§ 250.60 Program information.

Interested persons desiring information concerning the program may make written request to the following Regional Offices:

(a) Northeast Region, Food and Nutrition Service, USDA, 10 Causeway Street, Boston, Massachusetts 02222–1065 for the following States: Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island and Vermont.

(b) Mid-Atlantic Region, Food and Nutrition Service, USDA, Mercer Corporate Park, Corporate Blvd., CN 02150, Trenton, New Jersey 08650, for the following States: Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Puerto Rico, Virginia, Virgin Islands and West Virginia.

(c) Southeast Region, Food and Nutrition Service, USDA, 1100 Spring Street, NW, Atlanta, Georgia 30367, for the following States: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee.

(d) Midwest Region, Food and Nutrition Service, USDA, 50 East Washington Street, Chicago, Illinois 60602, for the following States: Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin.

(e) Mountain Plains Region, Food and Nutrition Service, USDA, 2420 West 26th Avenue, Room 430–D, Denver, Colorado 80211, for the following States: Colorado, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah and Wyoming.

(f) Southwest Region, Food and Nutrition Service, USDA, 1100 Commerce Street, Room 5–C–30, Dallas, Texas 75242, for the following States: Arkansas, Louisiana, New Mexico, Oklahoma and Texas.

(g) Western Region, Food and Nutrition Service, USDA, 550 Kearney Street, Room 400, San Francisco, California 94108 for the following States: Alaska, American Samoa, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon, Trust Territory and Washington.

PART 251—THE EMERGENCY FOOD ASSISTANCE PROGRAM

Sec.

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AUTHORITY: 7 U.S.C. 7501–7516.

SOURCE: 51 FR 12823, Apr. 16, 1986, unless otherwise noted.

§ 251.1 General purpose and scope.

This part announces the policies and prescribes the regulations necessary to carry out certain provisions of the Emergency Food Assistance Act of 1983, (7 U.S.C. 612c *note*).

[51 FR 12823, Apr. 16, 1986, as amended at 64 FR 72902, Dec. 29, 1999]

§ 251.2 Administration.

(a) *Food and Nutrition Service*. Within the United States Department of Agriculture (the ''Department''), the Food and Nutrition Service (FNS) shall have responsibility for the distribution of food commodities and allocation of funds under the part.

(b) *State Agencies*Within the States, distribution to eligible recipient agencies and receipt of payments for storage and distribution shall be the responsibility of the State agency which has: (1) Been designated for such responsibility by the Governor or other appropriate State executive authority; and (2) entered into an agreement with the Department for such distribution and receipt in accordance with paragraph (c) of this section.

(c) *Agreements*. (1) *Agreements between Department and States*. Each State agency that distributes donated foods to eligible recipient agencies or receives payments for storage and distribution costs in accordance with § 251.8 must perform those functions pursuant to an agreement entered into with the Department. This agreement will be considered permanent, with amendments initiated by State agencies, or submitted by them at the Department's request, all of which will be subject to approval by the Department.

(2) *Agreements between State agencies and eligible recipient agencies, and between eligible recipient agencies*. Prior to making donated foods or administrative funds available, State agencies must enter into a written agreement with eligible recipient agencies to which they plan to distribute donated foods and/or administrative funds. State agencies must ensure that eligible recipient agencies in turn enter into a written agreement with any eligible recipient agencies to which they plan to distribute donated foods and/or administrative funds before donated foods or administrative funds are transferred between any two eligible recipient agencies. All agreements entered into must contain the information specified in paragraph (d) of this section, and be considered permanent, with amendments to be made as necessary, except that agreements must specify that they may be terminated by either party upon 30 days' written notice. State agencies must ensure that eligible recipient agencies provide, on a timely basis, by amendment to the agreement, or other written documents incorporated into the agreement by reference if permitted under paragraph (d) of this section, any information on changes in program administration, including any changes resulting from amendments to Federal regulations or policy.

(d) *Contents of agreements between State agencies and eligible recipient agencies and between eligible recipient agencies*. (1) Agreements between State agencies and eligible recipient agencies and between eligible recipient agencies must provide:

(i) That eligible recipient agencies agree to operate the program in accordance with the requirements of this part, and, as applicable, part 250 of this chapter; and

(ii) The name and address of the eligible recipient agency receiving commodities and/or administrative funds under the agreement.

(2) The following information must also be identified, either in the agreement or other written documents incorporated by reference in the agreement:

(i) If the State agency delegates the responsibility for any aspect of the program to an eligible recipient agency, each function for which the eligible recipient agency will be held responsible;

except that in no case may State agencies delegate responsibility for establishing eligibility criteria for organizations in accordance with § 251.5(a), establishing eligibility criteria for recipients in accordance with § 251.5(b), or conducting reviews of eligible recipient agencies in accordance with § 251.10(e);

(ii) If the receiving eligible recipient agency is to be allowed to further distribute TEFAP commodities and/or administrative funds to other eligible recipient agencies, the specific terms and conditions for doing so, including, if applicable, a list of specific organizations or types of organizations eligible to receive commodities or administrative funds;

(iii) If the use of administrative funds is restricted to certain types of expenses pursuant to § 251.8(e)(2), the specific types of administrative expenses eligible recipient agencies are permitted to incur;

(iv) Any other conditions set forth by the State agency.

[51 FR 12823, Apr. 16, 1986, as amended at 51 FR 17933, May 13, 1987; 59 FR 16974, Apr. 11, 1994; 62 FR 53731, Oct. 16, 1997; 64 FR 72902, 72903, Dec. 29, 1999]

§ 251.3 Definitions.

(a) The terms used in this part that are defined in part 250 of this chapter have the meanings ascribed to them therein, unless a different meaning for such a term is defined herein.

(b) *Charitable institution* (which is defined differently in this part than in part 250 of this chapter) means an organization which—

(1) Is public, or

(2) Is private, possessing tax exempt status pursuant to § 251.5(a)(3); and

(3) Is not a penal institution (this exclusion also applies to correctional institutions which conduct rehabilitation programs); and

(4) Provides food assistance to needy persons.

(c) *Distribution site* means a location where the eligible recipient agency actually distributes commodities to needy persons for household consumption or serves prepared meals to needy persons under this part.

(d) *Eligible recipient agency* means an organization which—

(1) Is public, or

(2) Is private, possessing tax exempt status pursuant to § 251.5(a)(3); and

(3) Is not a penal institution; and

(4) Provides food assistance—

(i) Exclusively to needy persons for household consumption, pursuant to a means test established pursuant to § 251.5 (b), or

(ii) Predominantly to needy persons in the form of prepared meals pursuant to § 251.5(a)(2); and

(5) Has entered into an agreement with the designated State agency pursuant to § 251.2(c) for the receipt of commodities or administrative funds, or receives commodities or administrative funds under an agreement with another eligible recipient agency which has signed such an agreement with the State agency or another eligible recipient agency within the State pursuant to § 251.2(c); and

(6) Falls into one of the following categories:

(i) Emergency feeding organizations (including food banks, food pantries and soup kitchens);

(ii) Charitable institutions (including hospitals and retirement homes);

(iii) Summer camps for children, or child nutrition programs providing food service;

(iv) Nutrition projects operating under the Older Americans Act of 1965 (Nutrition Program for the Elderly), including projects that operate congregate Nutrition sites and projects that provide home-delivered meals; and

(v) Disaster relief programs.

(e) *Emergency feeding organization* means an eligible recipient agency which provides nutrition assistance to relieve situations of emergency and distress through the provision of food to needy persons, including low-income and unemployed persons. Emergency feeding organizations have priority over other eligible recipient agencies in the distribution of TEFAP commodities pursuant to § 251.4(h).

(f) *Food bank* means a public or charitable institution that maintains an established operation involving the provision of food or edible commodities, or the products of food or edible commodities, to food pantries, soup kitchens, hunger relief centers, or other food or feeding centers that, as an integral part of their normal activities, provide

meals or food to feed needy persons on a regular basis.

(g) *Food pantry* means a public or private nonprofit organization that distributes food to low-income and unemployed households, including food from sources other than the Department of Agriculture, to relieve situations of emergency and distress.

(h) *Formula* means the formula used by the Department to allocate among States the commodities and funding available under this part. The amount of such commodities and funds to be provided to each State will be based on each State's population of low-income and unemployed persons, as compared to national statistics. Each State's share of commodities and funds shall be based 60 percent on the number of persons in households within the State having incomes below the poverty level and 40 percent on the number of unemployed persons within the State. The surplus commodities will be allocated to States on the basis of their weight (pounds), and the commodities purchased under section 214 of the Emergency Food Assistance Act of 1983 will be allocated on the basis of their value (dollars). In instances in which a State determines that it will not accept the full amount of its allocation of commodities purchased under section 214 of the Emergency Food Assistance Act of 1983, the Department will reallocate the commodities to other States on the basis of the same formula used for the initial allocation.

(i) *State agency* means the State government unit designated by the Governor or other appropriate State executive authority which has entered into an agreement with the United States Department of Agriculture under § 251.2(c).

(j) *Soup kitchen* means a public or charitable institution that, as an integral part of the normal activities of the institution, maintains an established feeding operation to provide food to needy homeless persons on a regular basis.

(k) *Value of commodities distributed* means the Department's cost of acquiring commodities for distribution under this part.

[64 FR 72903, Dec. 29, 1999]

§ 251.4 Availability of commodities.

(a) *General.* The Department shall make commodities available for distribution and use in accordance with the provisions of this part and also in accordance with the terms and conditions of part 250 of this chapter to the extent that the part 250 terms and conditions are not inconsistent with this part.

(b) *Displacement.* State agencies shall require that eligible recipient agencies receiving commodities under this part shall not diminish their normal expenditures for food because of receipt of commodities. Additionally, the Secretary shall withhold commodities from distribution if it is determined that the commodities would substitute for the same or a similar product that would otherwise be purchased in the market.

(c) *Allocations.* (1) Allocations of commodities shall be made to State agencies on the basis of the formula defined in § 251.3(h).

(2) FNS shall promptly notify State agencies regarding their allocation of commodities to be made available under this part.

(3) State agencies shall notify the appropriate FNSRO of the amount of the commodities they will accept not later than 30 days prior to the beginning of the shipping period.

(d) *Quantities requested.* State agencies shall:

(1) Request commodities only in quantities which can be utilized without waste in providing food assistance to needy persons under this part;

(2) Ensure that no eligible recipient agency receives commodities in excess of anticipated use, based on inventory records and controls, or in excess of its ability to accept and store such commodities; and

(e) *Initial processing and packaging.* The Department will furnish commodities to be distributed to institutions and to needy persons in households in forms and units suitable for institutional and home use.

(f) *Bulk processing by States.* Commodities may be made available to a State agency or, at the direction of the State agency, directly to private companies for processing bulk commodities for use by eligible recipient agencies.

(1) The Department will reimburse the State agency at the current flat rate for such processing.

(2) Minimum yields and product specifications established by the Department shall be met by the processor.

(3) The State shall require the processor to meet State and local health standards.

(4) The external shipping containers of processed products shall be clearly labeled ''Donated by the U.S. Department of Agriculture—Not to be Sold or Exchanged''. Internal packaging shall be clearly marked ''Donated by the U.S. Department of Agriculture—Processed Under Agreement with the State of _____.'' FNS may grant waivers to the internal label requirement if the enforcement of this requirement precludes a State's participation in the program, or in cases where other processors are not available who are able to meet the labeling requirement within the allowed reimbursement.

(5) Processors and State agencies shall also meet the basic minimum requirements of §250.30.

(g) *Availability and control of donated commodities.* Donated commodities will be made available to State agencies only for distribution and use in accordance with this part. Except as otherwise provided in paragraph (f) of this section, donated commodities not so distributed or used for any reason may not be sold, exchanged, or otherwise disposed of without the approval of the Department. However, donated commodities made available under section 32 of Pub. L. 74–320 (7 U.S.C. 612c) may be transferred by eligible recipient agencies receiving commodities under this part, or recipient agencies, as defined in §250.3 of this chapter, to any other eligible recipient agency or recipient agency which agrees to use such donated foods to provide without cost or waste, nutrition assistance to individuals in low-income groups. Such transfers will be effected only with prior authorization by the appropriate State agency and must be documented. Such documentation shall be maintained in accordance with §251.10(a) of this part and §250.16 of this chapter by the distributing agency and the State agency responsible for administering TEFAP and made available for review upon request.

(h) *Distribution to eligible recipient agencies—priority system and advisory boards.* (1) State agencies must distribute commodities made available under this part to eligible recipient agencies in accordance with the following priorities:

(i) *First priority.* When a State agency cannot meet all eligible recipient agencies' requests for TEFAP commodities, the State agency must give priority in the distribution of such commodities to emergency feeding organizations as defined under §251.3(e). A State agency may, at its discretion, concentrate commodity resources upon a certain type or types of such organizations, to the exclusion of others.

(ii) *Second priority.* After a State agency has distributed TEFAP commodities sufficient to meet the needs of all emergency feeding organizations, the State agency must distribute any remaining program commodities to other eligible recipient agencies which serve needy people, but do not relieve situations of emergency and distress. A State agency may, at its discretion, concentrate commodity resources upon a certain type or types of such organizations, to the exclusion of others.

(2) *Delegation.* When a State agency has delegated to an eligible recipient agency the authority to select other eligible recipient agencies, the eligible recipient agency exercising this authority must ensure that any TEFAP commodities are distributed in accordance with the priority system set forth in paragraphs (h)(1)(i) and (h)(1)(ii) of this section. State agencies and eligible recipient agencies will be deemed to be in compliance with the priority system when eligible recipient agencies distribute TEFAP commodities to meet the needs of all emergency feeding organizations under their jurisdiction prior to making commodities available to eligible recipient agencies which are not emergency feeding organizations.

(3) *Existing networks.* Subject to the constraints of paragraphs (h)(1)(i) and (h)(1)(ii) of this section, State agencies may give priority in the distribution of TEFAP commodities to existing food bank networks and other organizations

whose ongoing primary function is to facilitate the distribution of food to low-income households, including food from sources other than the Department.

(4) *State advisory boards.* Each State agency receiving TEFAP commodities is encouraged to establish a State advisory board representing all types of entities in the State, both public and private, interested in the distribution of such commodities. Such advisory boards can provide valuable advice on how resources should be allocated among various eligible outlet types, what areas have the greatest need for food assistance, and other important issues that will help States to use their program resources in the most efficient and effective manner possible. A State agency may expend TEFAP administrative funds to support the activities of an advisory board in accordance with § 251.8 of this part.

(i) *Distribution of non-USDA foods.* Eligible recipient agencies may incorporate the distribution of foods which have been donated by charitable organizations or other entities with the distribution of USDA-donated commodities or distribute them separately.

(j) *Interstate cooperation.* State agencies may enter into interagency cooperative agreements to provide jointly or to transfer commodities to an eligible recipient agency that has signed an agreement with the respective State agencies when such organization serves needy persons in a contiguous area which crosses States' borders.

(k) *Distribution in rural areas.* State agencies shall encourage eligible recipient agencies to implement or expand commodity distribution activities to relieve situations of emergency and distress through the provision of commodities to needy households in rural areas of the State.

(l) *Commodity losses.* (1) The State agency shall be responsible for the loss of commodities:

(i) When the loss arises from the State agency's improper distribution or use of any commodities or failure to provide proper storage, care, or handling; and

(ii) When the State agency fails to pursue claims arising in its favor, fails to provide for the rights to assert such claims, or fails to require its eligible recipient agencies to provide for such rights.

Except as provided in paragraph (l)(4) of this section, the State agency shall begin claims action immediately upon receipt of information concerning the improper distribution, loss of or damage to commodities, and shall make a claim determination within 30 days of the receipt of information, as described in further detail in FNS Instruction 410–1, *Non-Audit Claims—Food Distribution.* The funds received from the collection of claims shall be returned to FNS. In instances in which it has been determined by the Department that the collection of funds will have a significant adverse effect on the operation of the program, the Department may permit in-kind replacement of the donated foods in lieu of payment to FNS. Replacement in kind will only be permitted under such terms and conditions as agreed to by the Secretary.

(2) If the State agency itself causes the loss of commodities and the value exceeds $250, the State agency shall immediately transmit the claim determination to the FNS Regional Office, fully documented as to facts and findings. Except as provided in paragraph (l)(4) of this section, if the State agency itself causes the loss of commodities, and the value does not exceed $250, the State agency shall immediately return funds equal to the claim amount to FNS.

(3) If the State agency determines that a claim exists against an eligible recipient agency, warehouseman, carrier or any other entity and the value of the lost commodities exceeds $2500, the State agency shall immediately transmit the claim determination to the appropriate FNS Regional Office, fully documented as to facts and findings. If FNS determines from its review of the claim determination that a claim exists, the State agency shall make demand for restitution upon the entity liable immediately upon receipt of notice from the FNS Regional Office. Except as provided in paragraph (l)(4) of this section, if the State agency determines that a claim exists in favor of the State agency against an eligible recipient agency, warehouseman, carrier or any other entity and the

value of the lost commodities does not exceed $2500, the State agency shall immediately proceed to collect the claim.

(4) No claim determination shall be required where the value of the lost commodities is $100 or less. However, no such claim shall be disregarded where:

(i) There is evidence of fraud or a violation of Federal, State or local criminal law; or

(ii) Program operations would be adversely affected.

(5) The State agency shall maintain records and substantiating documents, on all claims actions and adjustments including documentation of those cases in which no claim was asserted because of the minimal amount involved.

(6) In making final claim determinations for commodity losses incurred by eligible recipient agencies when there is no evidence of fraud or negligence, State agencies and FNS Regional Offices, as applicable, shall consider the special needs and circumstances of the eligible recipient agencies, and adjust the claim and/or conditions for claim collection as appropriate. These special needs and circumstances include but are not limited to the eligible recipient agency's use of volunteers and limited financial resources and the effect of the claim on the organization's ability to meet the food needs of low-income populations.

(Approved by the Office of Management and Budget under control number 0584–0313 and 0584–0341)

[51 FR 12823, Apr. 16, 1986, as amended at 52 FR 17933, May 13, 1987; 52 FR 42634, Nov. 6, 1987; 59 FR 16974, Apr. 11, 1994; 64 FR 72904, Dec. 29, 1999]

§ 251.5 Eligibility determinations.

(a) *Criteria for determining eligibility of organizations.* Prior to making commodities or administrative funds available, State agencies, or eligible recipient agencies to which the State agency has delegated responsibility for the distribution of TEFAP commodities or administrative funds, must ensure that an organization applying for participation in the program meets the definition of an ''eligible recipient agency'' under § 251.3(d). In addition, applicant organizations must meet the following criteria:

(1) *Agencies distributing to households.* Organizations distributing commodities to households for home consumption must limit the distribution of commodities provided under this part to those households which meet the eligibility criteria established by the State agency in accordance with paragraph (b) of this section.

(2) *Agencies providing prepared meals.* Organizations providing prepared meals must demonstrate, to the satisfaction of the State agency, or eligible recipient agency to which they have applied for the receipt of commodities or administrative funds, that they serve predominantly needy persons. State agencies may establish a higher standard than ''predominantly'' and may determine whether organizations meet the applicable standard by considering socioeconomic data of the area in which the organization is located, or from which it draws its clientele. State agencies may not, however, require organizations to employ a means test to determine that recipients are needy, or to keep records solely for the purpose of demonstrating that its recipients are needy.

(3) *Tax-exempt status.* Private organizations must—

(i) Be currently operating another Federal program requiring tax-exempt status under the Internal Revenue Code (IRC), or

(ii) Possess documentation from the Internal Revenue Service (IRS) recognizing tax-exempt status under the IRC, or

(iii) If not in possession of such documentation, be automatically tax exempt as ''organized or operated exclusively for religious purposes'' under the IRC, or

(iv) If not in possession of such documentation, but required to file an application under the IRC to obtain tax-exempt status, have made application for recognition of such status and be moving toward compliance with the requirements for recognition of tax-exempt status. If the IRS denies a participating organization's application for recognition of tax-exempt status, the organization must immediately notify the State agency or the eligible recipient agency, whichever is appropriate, of such denial, and that agency

will terminate the organization's agreement and participation immediately upon receipt of such notification. If documentation of IRS recognition of tax-exempt status has not been obtained and forwarded to the appropriate agency within 180 days of the effective date of the organization's approval for participation in TEFAP, the State agency or eligible recipient agency must terminate the organization's participation until such time as recognition of tax-exempt status is actually obtained, except that the State agency or eligible recipient agency may grant a single extension not to exceed 90 days if the organization can demonstrate, to the State agency's or eligible recipient agency's satisfaction, that its inability to obtain tax-exempt status within the 180 day period is due to circumstances beyond its control. It is the responsibility of the organization to document that it has complied with all IRS requirements and has provided all information requested by IRS in a timely manner.

(b) *Criteria for determining recipient eligibility*. Each State agency must establish uniform Statewide criteria for determining the eligibility of households to receive commodities provided under this part for home consumption. The criteria must:

(1) Enable the State agency to ensure that only households which are in need of food assistance because of inadequate household income receive TEFAP commodities;

(2) Include income-based standards and the methods by which households may demonstrate eligibility under such standards; and

(3) Include a requirement that the household reside in the geographic location served by the State agency at the time of applying for assistance, but length of residency shall not be used as an eligibility criterion.

(c) *Delegation of authority*. A State agency may delegate to one or more eligible recipient agencies with which the State agency enters into an agreement the responsibility for the distribution of commodities and administrative funds made available under this part. State agencies may also delegate the authority for selecting eligible recipient agencies and for determining the eligibility of such organizations to receive commodities and administrative funds. However, responsibility for establishing eligibility criteria for organizations in accordance with paragraph (a) of this section, and for establishing recipient eligibility criteria in accordance with paragraph (b) of this section, may not be delegated. In instances in which State agencies delegate authority to eligible recipient agencies to determine the eligibility of organizations to receive commodities and administrative funds, eligibility must be determined in accordance with the provisions contained in this part and the State plan. State agencies will remain responsible for ensuring that commodities and administrative funds are distributed in accordance with the provisions contained in this part.

[64 FR 72904, Dec. 29, 1999]

§ 251.6 Distribution plan.

(a) *Contents of the plan*. The State agency must submit for approval by the appropriate FNS Regional Office a plan which contains:

(1) A designation of the State agency responsible for distributing commodities and administrative funds provided under this part, and the address of such agency;

(2) A plan of operation and administration to expeditiously distribute commodities received under this part;

(3) A description of the standards of eligibility for recipient agencies, including any subpriorities within the two-tier priority system; and

(4) A description of the criteria established in accordance with § 251.5(b) which must be used by eligible recipient agencies in determining the eligibility of households to receive TEFAP commodities for home consumption.

(b) *Plan submission*. A complete plan will be required for Fiscal Year 2001, to be submitted no later than August 15, 2000. Thereafter, a complete plan must be submitted every 4 years, due no later than August 15 of the fiscal year prior to the end of the 4 year cycle.

(c) *Amendments*. State agencies must submit amendments to the distribution plan to the extent that such amendments are necessary to reflect any changes in program operations or administration as described in the plan,

or at the request of FNS, to the appropriate FNS Regional Office.

[64 FR 72905, Dec. 29, 1999]

§ 251.7 Formula adjustments. Formula adjustments.

(a) *Commodity adjustments.* The Department will make annual adjustments to the commodity allocation for each State, based on updated unemployment statistics. These adjusted allocations will be effective for the entire fiscal year, subject to reallocation or transfer in accordance with this part.

(b) *Funds adjustments.* The Department will make annual adjustments of the funds allocation for each State based on updated unemployment statistics. These adjusted allocations will be effective for the entire fiscal year unless funds are recovered, withheld, or reallocated by FNS in accordance with § 251.8(f).

[64 FR 72905, Dec. 29, 1999]

§ 251.8 Payment of funds for administrative costs.

(a) *Availability and allocation of funds.* Funds made available to the Department for State and local costs associated with the distribution of commodities under this part shall, in any fiscal year, be distributed to each State agency on the basis of the funding formula defined in § 251.3(h).

(b) *Uniform Federal Assistance Regulations.* Funds provided under this section shall be subject to the Department's regulations issued under 7 CFR part 3016 or part 3019, as applicable.

(c) *Payment to States.* (1) Funds under this section shall be made available by means of letters of credit in favor of the State agency. The State agency shall use any funds received without delay in accordance with paragraph (d) of this section.

(2) Upon notification by the FNS Regional Office that an agreement has been entered into in accordance with § 251.2(c) of this part, FNS shall issue a grant award pursuant to procedures established by FNS, and promptly make funds available to each State agency within the State's allocation through issuance of a letter of credit. To the extent funds are available and subject to the provisions of paragraph (f) of this section, funds will be made available to State agencies on an advance basis.

(3) Each State agency shall return to FNS any funds made available under this section either through the original allocation or through subsequent reallocations which are unobligated as of the end of the fiscal year for which they were made available. Such return shall be made as soon as practicable but in no event later than 30 days following demand made by FNS.

(d) *Priority for eligible recipient agencies distributing USDA commodities.* State agencies and eligible recipient agencies distributing administrative funds must ensure that the administrative funding needs of eligible recipient agencies which receive USDA commodities are met, relative to both USDA commodities and any non-USDA commodities they may receive, before such funding is made available to eligible recipient agencies which distribute only non-USDA commodities.

(e) *Use of funds.* (1) *Allowable administrative costs.* State agencies and eligible recipient agencies may use funds made available under this part to pay the direct expenses associated with the distribution of USDA commodities and commodities secured from other sources to the extent that the commodities are ultimately distributed by eligible recipient agencies which have entered into agreements in accordance with § 251.2. Direct expenses include the following, regardless of whether they are charged to TEFAP as direct or indirect costs:

(i) The intrastate and interstate transport, storing, handling, repackaging, processing, and distribution of commodities; except that for interstate expenditures to be allowable, the commodities must have been specifically earmarked for the particular State or eligible recipient agency which incurs the cost;

(ii) Costs associated with determinations of eligibility, verification, and documentation;

(iii) Costs of providing information to persons receiving USDA commodities concerning the appropriate storage and preparation of such commodities;

(iv) Costs involved in publishing announcements of times and locations of distribution; and

(v) Costs of recordkeeping, auditing, and other administrative procedures required for program participation.

(2) *State restriction of administrative costs.* A State agency may restrict the use of TEFAP administrative funds by eligible recipient agencies by disallowing one or more types of expenses expressly allowed in paragraph (e)(1) of this section. If a State agency so restricts the use of administrative funds, the specific types of expenses the State will allow eligible recipient agencies to incur must be identified in the State agency's agreements with its eligible recipient agencies, or set forth by other written notification, incorporated into such agreements by reference.

(3) *Agreements.* In order to be eligible for funds under paragraph (e)(1) of this section, eligible recipient agencies must have entered into an agreement with the State agency or another eligible recipient agency pursuant to § 251.2(c).

(4) *Pass-through requirement-local support to emergency feeding organizations.* (i) Not less than 40 percent of the Federal Emergency Food Assistance Program administrative funds allocated to the State agency in accordance with paragraph (a) of this section must be:

(A) Provided by the State agency to emergency feeding organizations that have signed an agreement with the State agency as either reimbursement or advance payment for administrative costs incurred by emergency feeding organizations in accordance with paragraph (e)(1) of this section, except that such emergency feeding organizations may retain advance payments only to the extent that they actually incur such costs; or

(B) Directly expended by the State agency to cover administrative costs incurred by, or on behalf of, emergency feeding organizations in accordance with paragraph (e)(1) of this section.

(ii) Any funds allocated to or expended by the State agency to cover costs incurred by eligible recipient agencies which are not emergency feeding organizations shall not count toward meeting the pass-through requirement.

(iii) State agencies must not charge for commodities made available under this part to eligible recipient agencies.

(f) *Recovery and reallocation.* If, during the course of the fiscal year, the Department determines that a State agency is unable to use all of the funds allocated to it during the fiscal year, the Department shall recover or withhold and reallocate such unused funds among other States.

[51 FR 12823, Apr. 16, 1986, as amended at 59 FR 16974, Apr. 11, 1994; 64 FR 72906, Dec. 29, 1999]

§ 251.9 Matching of funds.

(a) *State matching requirement.* The State must provide a cash or in-kind contribution equal to the amount of TEFAP administrative funds received under § 251.8 and retained by the State agency for State-level costs or made available by the State agency directly to eligible recipient agencies that are not emergency feeding organizations as defined in § 251.3(e). The State agency will not be required to match any portion of the Federal grant passed through for administrative costs incurred by emergency feeding organizations or directly expended by the State agency for such costs in accordance with § 251.8(e)(4) of this part.

(b) *Exceptions.* In accordance with the provisions of 48 U.S.C. 1469a, American Samoa, Guam, the Virgin Islands and the Northern Mariana Islands shall be exempt from the matching requirements of paragraph (a) of this section if their respective matching requirements are under $200,000.

(c) *Applicable contributions.* States shall meet the requirements of paragraph (a) of this section through cash or in-kind contributions from sources other than Federal funds which are prohibited by law from being used to meet a Federally mandated State matching requirement. Such contributions shall meet the requirements set forth in 7 CFR 3016.24. In accordance with part 3016 or 3019, as applicable, the matching requirement shall not be met by contributions for costs supported by another Federal grant, except as provided by Federal statute. Allowable

contributions are only those contributions for costs which would otherwise be allowable as State or local-level administrative costs.

(1) *Cash*. An allowable cash contribution is any cash outlay of the State agency for a specifically identifiable allowable State- or local-level administrative cost, including the outlay of money contributed to the State agency by other public agencies and institutions, and private organizations and individuals. Examples of cash contributions include, but are not limited to, expenditures for office supplies, storage space, transportation, loading facilities and equipment, employees' salaries, and other goods and services specifically identifiable as State- or local-level administrative costs for which there has been a cash outlay by the State agency.

(2) *In-kind*. (i) Allowable in-kind contributions are any contributions, which are non-cash outlays, of real property and non-expendable personal property and the value of goods and services specifically identifiable with allowable State administrative costs or, when contributed by the State agency to an eligible recipient agency, allowable local-level administrative costs. Examples of in-kind contributions include, but are not limited to, the donation of office supplies, storage space, vehicles to transport the commodities, loading facilities and equipment such as pallets and forklifts, and other non-cash goods or services specifically identifiable with allowable State-level administrative costs or, when contributed by the State agency to an eligible recipient agency, allowable local-level administrative costs. In-kind contributions shall be valued in accordance with part 3016 or 3019, as applicable.

(ii) In order for a third-party in-kind contribution to qualify as a State-level administrative cost for purposes of meeting the match, all of the following criteria shall be met:

(A) In its administration of food assistance programs, the State has performed this type of function over a sustained period of time in the past;

(B) The function was not previously performed by the State on behalf of eligible recipient agencies; and

(C) The State would normally perform the function as part of its responsibility in administering TEFAP or related food assistance programs if it were not provided as an in-kind contribution.

(d) *Assessment fees*. States shall not assess any fees for the distribution of donated foods to eligible recipient agencies.

(e) *Reporting requirements*. State agencies shall identify their matching contribution on the FNS–667, Report of TEFAP Administrative Costs, in accordance with § 251.10(d).

(f) *Failure to match*. If, during the course of the fiscal year, the quarterly FNS–667 indicates that the State is or will be unable to meet the matching requirements in whole or in part, the Department shall suspend or disallow the unmatched portion of Federal funds subject to the provisions of paragraph (a) of this section. If, upon submission of the final FNS–667 for the fiscal year, the Department determines that the State has not met the requirements of paragraph (a) of this section in whole or in part, the unmatched portion of Federal funds subject to the requirements of paragraph (a) of this section shall be subject to disallowance by FNS.

[52 FR 17934, May 13, 1987, as amended at 59 FR 16975, Apr. 11, 1994; 64 FR 72906, Dec. 29, 1999]

§ 251.10 Miscellaneous provisions.

(a) *Records*. (1) *Commodities*. State agencies, subdistributing agencies (as defined in § 250.3 of this chapter), and eligible recipient agencies must maintain records to document the receipt, disposal, and inventory of commodities received under this part that they, in turn, distribute to eligible recipient agencies. Such records must be maintained in accordance with the requirements set forth in § 250.16 of this chapter. Eligible recipient agencies must sign a receipt for program commodities which they receive under this part for distribution to households or for use in preparing meals, and records of all such receipts must be maintained.

(2) *Administrative funds*. In addition to maintaining financial records in accordance with 7 CFR part 3016, State

agencies must maintain records to document the amount of funds received under this part and paid to eligible recipient agencies for allowable administrative costs incurred by such eligible recipient agencies. State agencies must also ensure that eligible recipient agencies maintain such records.

(3) *Household information.* Each distribution site must collect and maintain on record for each household receiving TEFAP commodities for home consumption, the name of the household member receiving commodities, the address of the household (to the extent practicable), the number of persons in the household, and the basis for determining that the household is eligible to receive commodities for home consumption.

(4) *Record retention.* All records required by this section must be retained for a period of 3 years from the close of the Federal Fiscal Year to which they pertain, or longer if related to an audit or investigation in progress. State agencies may take physical possession of such records on behalf of their eligible recipient agencies. However, such records must be reasonably accessible at all times for use during management evaluation reviews, audits or investigations.

(b) *Commodities not income.* In accordance with section 206 of Pub. L. 98–8, as amended, and notwithstanding any other provision of law, commodities distributed for home consumption and meals prepared from commodities distributed under this part shall not be considered income or resources for any purposes under any Federal, State, or local law.

(c) *Nondiscrimination.* There shall be no discrimination in the distribution of foods for home consumption or availability of meals prepared from commodities donated under this part because of race, color, national origin, sex, age, or handicap.

(d) *Reports.* (1) *Submission of Form FNS–667.* Designated State agencies must identify funds obligated and disbursed to cover the costs associated with the program at the State and local level. State and local costs must be identified separately. The data must be identified on Form FNS–667, Report of Administrative Costs (TEFAP) and submitted to the appropriate FNS Regional Office on a quarterly basis. The quarterly report must be submitted no later than 30 calendar days after the end of the quarter to which it pertains. The final report must be submitted no later than 90 calendar days after the end of the fiscal year to which it pertains.

(2) *Reports of excessive inventory.* Each State agency must complete and submit to the FNS Regional Office reports to ensure that excessive inventories of donated foods are not maintained, in accordance with the requirements of § 250.17(a) of this chapter.

(e) *State monitoring system.* (1) Each State agency must monitor the operation of the program to ensure that it is being administered in accordance with Federal and State requirements. State agencies may not delegate this responsibility.

(2) Unless specific exceptions are approved in writing by FNS, the State agency monitoring system must include:

(i) An annual review of at least 25 percent of all eligible recipient agencies which have signed an agreement with the State agency pursuant to § 251.2(c), provided that each such agency must be reviewed no less frequently than once every four years; and

(ii) An annual review of one-tenth or 20, whichever is fewer, of all eligible recipient agencies which receive TEFAP commodities and/or administrative funds pursuant to an agreement with another eligible recipient agency. Reviews must be conducted, to the maximum extent feasible, simultaneously with actual distribution of commodities and/or meal service, and eligibility determinations, if applicable. State agencies must develop a system for selecting eligible recipient agencies for review that ensures deficiencies in program administration are detected and resolved in an effective and efficient manner.

(3) Each review must encompass, as applicable, eligibility determinations, food ordering procedures, storage and warehousing practices, inventory controls, approval of distribution sites, reporting and recordkeeping requirements, and civil rights.

(4) Upon concurrence by FNS, reviews of eligible recipient agencies which have been conducted by FNS Regional Office personnel may be incorporated into the minimum coverage required by paragraph (e)(2) of this section.

(5) If deficiencies are disclosed through the review of an eligible recipient agency, the State agency must submit a report of the review findings to the eligible recipient agency and ensure that corrective action is taken to eliminate the deficiencies identified.

(f) *Limitation on unrelated activities.* (1) Activities unrelated to the distribution of TEFAP foods or meal service may be conducted at distribution sites as long as:

(i) The person(s) conducting the activity makes clear that the activity is not part of TEFAP and is not endorsed by the Department (impermissible activities include information not related to TEFAP placed in or printed on bags, boxes, or other containers in which commodities are distributed). Recipes or information about commodities, dates of future distributions, hours of operations, or other Federal, State, or local government programs or services for the needy may be distributed without a clarification that the information is not endorsed by the Department;

(ii) The person(s) conducting the activity makes clear that cooperation is not a condition of the receipt of TEFAP commodities for home consumption or prepared meals containing TEFAP commodities (cooperation includes contributing money, signing petitions, or conversing with the person(s)); and

(iii) The activity is not conducted in a manner that disrupts the distribution of TEFAP commodities or meal service.

(2) Eligible recipient agencies and distribution sites shall ensure that activities unrelated to the distribution of TEFAP foods or meal service are conducted in a manner consistent with paragraph (f)(1) of this section.

(3) *Termination for violation.* Except as provided in paragraph (f)(4) of this section, State agencies shall immediately terminate from further participation in TEFAP operations any eligible recipient agency that distributes or permits distribution of materials in a manner inconsistent with the provisions of paragraph (f)(1) of this section.

(4) *Termination exception.* The State agency may withhold termination of an eligible recipient agency's or distribution site's TEFAP participation if the State agency cannot find another eligible recipient agency to operate the distribution in the area served by the violating organization. In such circumstances, the State agency shall monitor the violating organization to ensure that no further violations occur.

(g) *Use of volunteer workers and non-USDA commodities.* In the operation of the Emergency Food Assistance Program, State agencies and eligible recipient agencies shall, to the maximum extent practicable, use volunteer workers and foods which have been donated by charitable and other types of organizations.

(h) *Maintenance of effort.* The State may not reduce the expenditure of its own funds to provide commodities or services to organizations receiving funds or services under the Emergency Food Assistance Act of 1983 below the level of such expenditure existing in the fiscal year when the State first began administering TEFAP, or Fiscal Year 1988, which is the fiscal year in which the maintenance-of-effort requirement became effective, whichever is later.

(Approved by the Office of Management and Budget under control number 0584–0313)

[51 FR 12823, Apr. 16, 1986. Redesignated and amended at 51 FR 17934, May 13, 1987; 53 FR 15357, Apr. 29, 1988; 59 FR 16975, Apr. 11, 1994; 62 FR 53731, Oct. 16, 1997; 64 FR 72907, Dec. 29, 1999]

PART 252—NATIONAL COMMODITY PROCESSING PROGRAM

Sec.

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252.7 OMB control number.

AUTHORITY: Sec. 416, Agricutural Act of 1949 (7 U.S.C. 1431).

SOURCE: 51 FR 23518, June 30, 1986, unless otherwise noted.

§ 252.1 Purpose and scope.

(a) *Purpose*. This part provides a program whereby the Food and Nutrition Service (FNS) and private processors of food may enter into agreements under which the processor will process and distribute designated donated food to eligible recipient agencies. The intent of the program is to encourage private industry, acting in cooperation with the States and FNS, to develop new markets in which donated food may be utilized. It is expected that the processors will use their marketing abilities to encourage eligible recipient agencies to participate in the program. Additionally, recipient agencies will benefit by being able to purchase processed end products at a substantially reduced price.

(b) *Scope*. The terms and conditions set forth in this part are those under which processors may enter into agreements with FNS for the processing of commodities designated by the Secretary of Agriculture and the minimum requirements which NCP processors must meet. Also prescribed are distributing agency and recipient agency responsibilities.

(c) *Eligible recipient agencies*. Recipient agencies shall be eligible to participate in the NCP Program to the extent of their eligibility to receive the food involved in the NCP Program, pursuant to § 250.8 and part 251.

§ 252.2 Definitions.

The terms used in this part that are defined in §§ 250.3 and 251.3 shall have the meanings ascribed to them therein, except as set forth in this section.

Agreement value of the donated commodity means the price assigned by the Department to a donated food which reflects the Department's current acquisition price, transportation and, if applicable, processing costs related to the food.

Distributing agencies means State, Federal or private agencies which enter into agreements with the Department for the distribution of donated food to eligible recipient agencies and recipients; and FNS when it accepts title to commodities from the Commodity Credit Corporation (CCC) for distribution to eligible recipient agencies under the National Commodity Processing Program. A recipient agency may also be a distributing agency.

Donated food value return system means a system used by a processor or distributor to reduce the price of the end product by the agreement value of the donated commodity.

NCP Program means a program under which FNS and private processors of food may enter into agreements under which the processor will process and distribute designated donated food to eligible recipient agencies.

Recipient agency means disaster organizations, charitable institutions, nonprofit summer camps for children, school food service authorities, schools, service institutions, welfare agencies, nutrition programs for the elderly, nonresidential child care institutions and emergency feeding organizations.

Refund means (1) a credit or check issued to a distributor in an amount equal to the NCP contract value of donated foods contained in an end product sold by the distributor to a recipient agency at a discounted price or (2) a check issued to a recipient agency in an amount equal to the NCP contract value of donated foods contained in an end product sold to the recipient agency under a refund system.

Substitution means (1) the replacement of donated food with like quantities of domestically produced commercial food of the same generic identity and of equal or better quality (i.e., cheddar cheese for cheddar cheese, nonfat dry milk for nonfat dry milk, etc.); or (2) in the case of donated nonfat dry milk, substitution as defined under (1) of this paragraph or replacement with an equivalent amount, based on milk solids content, of domestically produced concentrated skim milk.

[51 FR 23518, June 30, 1986, as amended at 52 FR 24977, July 2, 1987; 53 FR 34014, Sept. 2, 1988]

§ 252.3 Administration.

(a) *Role of FNS*. The Secretary will designate those commodities which

will be available under the NCP Program. Only commodities made available without charge or credit under any nutrition program administered by USDA will be available under NCP. FNS will act as the distributing agency and the contracting agency under the NCP Program. The Department will pay costs for delivering donated commodities to participating NCP Program processors.

(b) *Food orders*. When NCP Program processors request donated food, FNS will determine whether the quantities ordered are consistent with the processor's ability to sell end products and/or the processor's past demonstrated performance under the Program. If the quantities are appropriate, FNS will request from CCC the donated food for transfer of title to FNS and delivery to a mutually agreed upon location for use by the NCP Program processor. The title to these commodities transfers to FNS upon their acceptance by the processor. FNS retains title to such commodities until:

(1) They are distributed to eligible recipient agencies in processed form, at which time the recipient agency takes title;

(2) They are disposed of because they are damaged or out-of-condition; or

(3) Title is transferred to the NCP Program processor upon termination of the agreement.

(c) *Substituted food*. When the processor substitutes commercial food for donated food in accordance with § 252.4(c)(7) of this part, title to the substituted food shall transfer to FNS upon the initiation of the processing of the end product containing the substituted food. Title to the equivalent amount of donated food shall transfer to the processor at the same time (except when the substitution is necessary to meet the 100 percent yield requirement or to otherwise replace missing or out-of-condition donated food). Once title has transferred, the processor shall use the substituted food in accordance with the terms and conditions of this part.

(d) *Inventory levels*. FNS will monitor the inventory of each food processor to ensure that the quantity of donated food for which a processor is accountable is at the lowest cost-efficient level. In no event shall a processor hold in inventory more than a six-month supply, based on average monthly usage under the NCP Program, unless a higher level has been specifically approved by FNS on the basis of justification submitted by the processor. Under no circumstances should the amount of donated food requested by the processor be more than the processor can accept and store at any one time. FNS will make no further distribution to a processor whose inventory exceeds these limits until such time as the inventory is reduced.

(e) *Recipient agency registration*. FNS will register, upon request, eligible recipient agencies. FNS will make available to food processors a listing of registered eligible recipient agencies for marketing purposes. Any processor desiring additional listings will be charged a fee for the listing which is commensurate with the Department's policy on user fees.

[51 FR 23518, June 30, 1986, as amended at 52 FR 24978, July 2, 1987; 59 FR 62986, Dec. 7, 1994]

§ 252.4 Application to participate and agreement.

(a) *Application by processors to participate*. Any food processor is eligible to apply for participation in the NCP Program. Agreement applications may be filed with FNS at any time on an FNS-approved form. FNS will accept or reject the application of each individual food processor within 30 days from the date of receipt, except that FNS may, at its discretion, extend such period if it needs more information in order to make its determination. In determining whether to accept or reject an application, FNS shall take into consideration at least the following matters: the financial responsibility of the applicant; the ability of the applicant to meet the terms and conditions of the regulations and the NCP agreement; ability to accept and store commodities in minimum truckload quantities; historical performance under the State and NCP processing programs; anticipated new markets for NCP end products; geographic areas served by the processor; the ability of the applicant to distribute processed products to eligible recipient agencies; and a

satisfactory record of integrity, business ethics and performance. In addition, the processors must demonstrate their ability to sell end products under NCP by submitting supporting documentation such as written intent to purchase, bids awarded, or historical sales performance. FNS will make a final determination based on all available documentation submitted.

(b) *Agreement between FNS and Participating Food Processors.* Upon approval of an application for participating in the NCP Program, FNS shall enter into an agreement with the applicant food processor. All agreements under the NCP Program will terminate on the June 30th following the agreement approval date. However, FNS may extend processing contracts for two 1-year periods, provided that any changed information must be updated before any contract extension is granted, including the information in paragraphs (c)(1) and (c)(5) of this section.

(c) *Processor requirements and responsibilities.* In accordance with the following provisions and the NCP agreement, any processor participating in the NCP Program may sell to any eligible recipient agency nationwide a processed product containing the donated food received from FNS.

(1) The processor shall submit to FNS end product data schedules which include a description of each end product to be processed, the quantity of each donated food and any other ingredient which is needed to yield a specific number of units of each end product. FNS may permit processors to specify the total quantity of any flavorings or seasonings which may be used without identifying the ingredients which are, or may be, components of seasonings or flavorings. The end product data schedule shall provide pricing information supplied by the processor as requested by FNS and a thorough explanation of what this pricing information represents. The end product data schedule shall be made a part of the NCP agreement.

(2) When determining the value of the donated food, the processor shall use the agreement value of the donated food which shall be the price assigned by the Department to a donated food which reflects the Department's current acquisition price, transportation and, if applicable, processing costs related to the food.

(3) The processor shall demonstrate to the satisfaction of FNS that internal controls are in place to insure that duplicate reporting of sales under the NCP Program and any other food distribution program does not occur.

(4) The processor shall use a method of selling end products to recipient agencies which ensures that the price of each case of end product is reduced by the agreement value of the donated commodity and ensures proper accountability. In line with FNS guidelines and subject to FNS approval, the processor shall select one or more of the following donated food value return systems to use during the term of the agreement. Regardless of the method used, processors shall provide pricing information summaries to recipient agencies as soon as possible after contract approval by FNS. If the pricing information changes during the contract period, processors shall provide updated pricing information to FNS and the recipient agencies 30 days prior to the effective date. Regardless of the method chosen for selling end products, the processor shall reduce his inventory only by the amount of donated food represented by the discount or refund placed on the end product.

(i) *Direct sale.* A direct sale is a sale by the processor directly to the eligible recipient agency. The following two methods of direct sales are allowed:

(A) *Discount system.* When the recipient agency pays the processor directly for an end product purchased, the processor shall invoice the recipient agency at the net case price which shall reflect the value of the discount established in the agreement.

(B) *Refund system.* The processor shall invoice the recipient agency for the commercial/gross price of the end product. The recipient agency shall submit a refund application to the processor within 30 days of receipt of the processed end product, except that recipient agencies may submit refund applications to a single processor on a Federal fiscal quarterly basis if the total anticipated refund due for all purchases of end product from that processor during the quarter is 25 dollars or

less. The processor shall pay directly to the eligible recipient agency within 30 days of receipt of the refund application from the recipient agency, an amount equal to the established agreement value of donated food per case of end product multiplied by the number of cases delivered to and accepted by the recipient agency, except that processors may group together refund applications for a single recipient agency on a Federal fiscal quarterly basis if the total anticipated refund due that recipient agency during the quarter is 25 dollars or less. In no event shall refund applications for purchases during the period of agreement be accepted by the processor later than 60 days after the close of the agreement period.

(ii) *Indirect sale.* An indirect sale is a sale by the processor through a distributor to an eligible recipient agency. Indirect sales can be made with or without dual billing. Dual billing involves the processor billing the recipient agency for the end product and the distributor billing the recipient agency for the cost of services rendered in the handling and delivery of the end product. The following three methods of indirect sales are allowed:

(A) *Sale through distributor with dual billing.* When end products are sold to recipient agencies through a distributor under a system utilizing dual billing, the processor shall invoice the recipient agencies directly for the end products purchased at the net case price which reflects the value of the discount established in the agreement. The processor shall ensure that the distributor bills the recipient agencies only for the services rendered in the handling and delivery of the end product. The processor shall maintain delivery and/or billing invoices to substantiate the quantity of end product delivered to each recipient agency and the net case price charged by the processor which reflects the discount established by the agreement.

(B) *Sale through distributor without dual billing.* When end products are sold to recipient agencies through a distributor without dual billing, processors shall provide refunds to the distributor and ensure that the distributor provides discounts of equal value to recipient agencies. Under this system, the processor shall sell end products to a distributor at the processor's commercial/gross price for the end product. The processor's invoice shall reflect the value of commodities contained in the end product as established by the agreement. The processor shall ensure that the distributor submits a refund application to the processor within 30 days after the eligible recipient agency receives the processed end product. The processor shall ensure that the refund application includes documentation of the purchase of end products by the eligible recipient agency through substantiating invoices and that the recipient agency has purchased the end product at the net case price which reflects the value of the discount established by the agreement. Within 30 days of the receipt of the refund application, the processor shall issue payment directly to the distributor in an amount equal to the stated agreement value of the donated food contained in the purchased end products covered by the application. In no event shall refund applications for purchases during the period of agreement be accepted by the processors later than 60 days after the close of the agreement period. The processor shall verify a statistically valid sample of discount sales made by distributors without dual billing in a manner which ensures a 95 percent confidence level. All such sales reported during a quarter shall be verified at the end of that quarter. Processors shall verify that sales were made only to eligible recipient agencies and that the value of donated commodities was passed through to those recipient agencies. The processor shall report to FNS the level of invalid or inaccurate sales identified in each quarter within 60 days after the close of each quarter. At the same time such report is submitted, the processor shall submit to FNS a corrective action plan designed to correct problems identified in the verification effort. The processor shall adjust performance reports to reflect the invalid sales identified during the verification effort required by this paragraph. If, as a result of this verification, FNS determines that the value of donated food has not been passed on the recipient agencies or that end products have

been improperly distributed, FNS may assert a claim against the processor.

(C) *Sale through distributor with a refund.* Under the refund system, processors shall sell end products to distributors at the commercial/gross price of the end product. Distributors shall sell end products to recipient agencies at the commercial/gross price of the end products. Processors shall ensure that their invoices and the invoices of distributors identify the discount established by the agreement. Recipient agencies shall submit refund applications to processors within 30 days of receipt of the processed end product. Within 30 days of the receipt of the refund application from the recipient agency certifying actual purchases of end product from substantiating invoices maintained by the recipient agency, the processor shall compute the amount and issue payment of the refund directly to the recipient agency. In no event shall refund applications for purchases during the period of the agreement be accepted by the processor later than 60 days after the close of the agreement period.

(iii) *Other value pass-through systems.* Processors may submit to FNS for approval any proposed value pass-through (VPT) system not identified in this section. The ''other'' VPT system must, in the judgment of FNS, be verifiable and easily monitored. Any VPT system approved under this part must comply with the sales verification requirements specified in paragraph (c)(4)(ii)(B) of this section or an alternative system approved by FNS. If an alternative system is approved, FNS will notify the States in which the system will be used. The Department retains the authority to inspect and review all pertinent records under all VPT systems, including the verification of a required statistically valid sample of sales. FNS may consider the paperwork and resource burden associated with alternative value pass-through systems when considering approval and reserves the right to deny approval of systems which are labor-intensive and provide no greater accountability than those systems permitted under paragraph (c)(4) of this section.

(5) The processor shall furnish to FNS prior to the ordering of any donated food for processing, a performance supply and surety bond obtained from surety companies listed in the current Department of Treasury Circular 570 or an irrevocable letter of credit to cover the amount of inventory on hand and on order.

(6) The processor shall draw down inventory only for the amount of donated food used to produce the end product. In instances in which concentrated skim milk is substituted for nonfat dry milk, the processor shall draw down donated nonfat dry milk inventory only in an amount equal to the amount of concentrated skim milk, based on milk solids content, used to produce the end product. Processors shall ensure that an amount equivalent to 100 percent of the donated food provided to the processor under the NCP Program is physically contained in end products. Additional commodities required to account for loss of donated food during production shall be obtained from non-donated food.

(7)(i) Only butter, cheese, corn grits, cornmeal, flour, macaroni, nonfat dry milk, peanut butter, peanut granules, roasted peanuts, rice, rolled oats, rolled wheat, shortening, vegetable oil, and spaghetti may be substituted as defined in § 252.2 and such other food as FNS specifically approves as substitutable under paragraph (c)(7)(i)(A) of this section (substitution of meat and poultry items shall not be permitted).

(A) Processors may request approval to substitute commercial foods for donated foods not listed in paragraph (c)(7)(i) of this section by submitting such request to FNS in writing and satisfying the requirements of paragraph (c)(7) of this section. FNS will notify the processor in writing of authorization to substitute commercial foods for donated foods not listed in paragraph (c)(7)(i) of this section and such authorization shall apply for the duration of all current contracts entered into by the processor pursuant to this section.

(B) The processor shall maintain records to substantiate that it continues to acquire on the commercial market amounts of substitutable food consistent with their levels of non-NCP Program production and to document the receipt and disposition of the donated food.

(C) FNS shall withhold deliveries of donated food from processors that FNS determines have reduced their level of non-NCP Program production because of participation in the NCP Program.

(ii) When the processor seeks FNS approval to substitute donated nonfat dry milk with concentrated skim milk under paragraph (c)(7)(i)(A) of this section, an addendum must be added to the request which states:

(A) The percent of milk solids that, at a minimum, must be contained in the concentrated skim milk;

(B) The weight ratio of concentrated skim milk to donated nonfat dry milk:

(*1*) The weight ratio is the weight of concentrated skim milk which equals one pound of donated nonfat dry milk, based on milk solids;

(*2*) In calculating this weight, nonfat dry milk shall be considered as containing 96.5 percent milk solids;

(*3*) If more than one concentration of concentrated skim milk is to be used, a separate weight ratio must be specified for each concentration;

(C) The processor's method of verifying that the milk solids content in the concentrated skim milk is as stated in the request;

(D) A requirement that the concentrated skim milk shall be produced in a USDA approved plant or in a plant approved by an appropriate regulatory authority for the processing of Grade A milk products; and

(E) A requirement that the contact value of donated food for a given amount of concentrated skim milk used to produce an end product is the value of the equivalent amount of donated nonfat dry milk, based on the weight ratio of the two foods.

(iii) Substitution must not be made solely for the purpose of selling or disposing of the donated commodity in commercial channels for profit.

(8) The processor shall be liable for all donated food provided under the agreement. The processor shall immediately report to FNS any loss or damage to donated food and shall dispose of damaged or out-of-condition food in accordance with § 250.7.

(9) The processor shall submit to FNS monthly performance reports reflecting the sale and delivery of end products during the month.

(i) The processor shall ensure that the monthly performance report is postmarked no later than the last day of the month following the month being reported. The processor shall identify the month of delivery for each sale reported. The sale and delivery of end products for any prior month may be included on the monthly performance report. The processor monthly performance report shall include:

(A) The donated food inventory at the beginning of the reporting month;

(B) Amount of donated food received from the Department during the reporting month;

(C) Amount of donated food transferred to and/or from existing inventory;

(D) A list of all recipient agencies purchasing end products and the number of units of end products delivered to each during the report month;

(E) The net price paid for each unit of end product and whether the sale was made under a discount or refund system;

(F) When the sale is made through a distributor, the name of the distributor;

(G) The amount of inventory drawdown represented by reported sales; and

(H) The donated food inventory at the end of the reporting month.

(ii) In addition to reporting the information identified in paragraph (c)(9)(i) of this section, processors substituting concentrated skim milk for donated nonfat dry milk shall report the following information for the reporting period:

(A) The number of pounds of nonfat dry milk used in commercial products sold to outlets which are not recipient agencies; and

(B) The number of pounds of concentrated skim milk and the percent of milk solids contained therein, used in end products sold to recipient agencies.

(iii) At the end of each agreement period, there will be a final 90 day reconciliation period in which processors may adjust NCP sales for any month.

(10) The processor shall maintain complete and accurate records of the receipt, disposal and inventory of donated food including end products processed from donated food.

(i) The processor shall keep production records, formulae, recipes, daily or batch production records, loadout sheets, bills of lading, and other processing and shipping records to substantiate the use of the donated food and the subsequent redelivery to an eligible recipient agency.

(ii) The processor shall document that sales reported on monthly performance reports, specified in paragraph (c)(9) of this section were made only to eligible recipient agencies and that the normal wholesale price of the product was discounted or a refund payment made for the agreement value of the donated commodity.

(iii) When donated food is commingled with commercial food, the processor shall maintain records which will permit an accurate determination of the donated commodity inventory.

(iv) The processor shall make all pertinent records available for inspection and review upon request by FNS, its representatives and the General Accounting Office (GAO). All records must be retained for a period of three years from the close of the Federal fiscal year to which they pertain. Longer retention may be required for resolution of an audit or of any litigation.

(11) The processor shall obtain, upon FNS request, Federal acceptance service grading and review of processing activities and shall be bound by the terms and conditions of the grading and/or review.

(12) The processor shall indemnify and save FNS and the recipient agency free and harmless from any claims, damages, judgments, expenses, attorney's fees, and compensation arising out of physical injury, death, and/or property damage sustained or alleged to have been sustained in whole or in part by any and all persons whatsoever as a result of or arising out of any act or omission of the processor, his/her agents or employees, or caused or resulting from any deleterious substance, including bacteria, in any of the products produced from donated food.

(13) The processor shall be liable for payment for all uncommitted food inventory remaining at agreement termination.

(i) When agreements are terminated at the request of the processor or at FNS' request because there has been noncompliance on the part of the processor with the terms and conditions of the agreement, or if any right of FNS is threatened or jeopardized by the processor, the processor shall pay FNS an amount equal to the CCC unrestricted sales price, the cost CCC of replacement on the date the agreement is terminated, or the agreement value of donated commodities, whichever is highest, for the inventory, plus any expenses incurred by FNS.

(ii) When the agreements are terminated at FNS' request where there has been no fault or negligence on the part of the processor, the processor shall pay FNS an amount equal to the CCC unrestricted sales price, the cost to CCC of replacement on the date the agreement is terminated, or the agreement value of the donated commodities, whichever is highest, for the inventory, unless FNS and the processor mutually agree on another value.

(14) The processor shall not assign the processing contract or delegate any aspect of processing under a subcontract or other arrangement without the written consent of FNS. The subcontractor shall be required to become a party to the processing contract and conform to all conditions contained in that contract.

(15) The processor shall comply fully with the provisions of the NCP agreement and all Federal regulations and instructions relevant to the NCP Program.

(16) The processor shall label end products in accordance with § 250.15(j) and, when end products contain vegetable protein products, in accordance with 7 CFR part 210, 225, or 226 appendix A.

(17) The processor shall return to FNS any funds received from the sale of donated food containers and the market value or the price received from the sale of any by-products of donated food or commercial food which has been substituted for donated food.

(18) For any year in which a processor receives more than $250,000 in donated food, the processor shall obtain an independent audit conducted by a Certified Public Accountant (CPA) for that year. Processors receiving $75,000 to $250,000 in donated food each year

shall obtain an independent audit conducted by a CPA every two years and those receiving less than $75,000 in donated food each year shall obtain an independent audit conducted by a CPA every three years. Processors in the three year audit cycle shall move into the two year audit cycle when the value of donated food received reaches $75,000. If the Department determines that the audit is not acceptable or that the audit has disclosed serious deficiencies, the processor shall be subject to additional audits by OIG at the request of FNS.

(i) Audits shall be conducted in accordance with the auditing provisions set forth under the *Standards for Audit of Government Organizations, Programs, Activities and Functions*, and the FNS Audit Guide for Multi-State Processors.

(ii) The costs of the audits shall be borne by the processor.

(iii) Audit findings shall be submitted by the processors to FNS.

(iv) Noncompliance with the audit requirement contained in this part will render the processor ineligible to enter into another processing contract until the required audit has been conducted and deficiencies corrected.

[51 FR 23518, June 30, 1986, as amended at 52 FR 16369, May 5, 1987; 52 FR 24978, July 2, 1987; 53 FR 16379, May 9, 1988; 53 FR 34014, Sept. 2, 1988; 59 FR 62986, Dec. 7, 1994]

§ 252.5 Recipient agency responsibilities.

(a) *Registration*. Recipient agencies that have approved agreements with State distributing agencies to receive donated food may register with FNS on an FNS approved form to participate in the NCP Program. Upon request, FNS will provide recipient agencies with registration forms. Recipient agencies shall notify FNS when they are no longer eligible to receive donated food under an agreement. Failure to notify FNS shall result in claim action.

(b) *Recipient agency records*. Each recipient agency shall maintain accurate and complete records with respect to the receipt, disposal, and inventory of donated food, including products processed from donated food, and with respect to any funds which arise from the operation of the distribution program.

(c) *Refunds*. A recipient agency purchasing end products under the NCP Program from a processor utilizing a refund system shall submit a refund application supplied by the processor to the processor within 30 days of receipt of the end products, except that recipient agencies may submit refund applications to a single processor on a Federal fiscal quarterly basis if the total anticipated refund due for all purchases of end product from that processor during the quarter is 25 dollars or less. Recipient agencies must insure that any funds received as a result of refund payments be designated for use by the food service department.

(d) *Verification*. If requested by FNS, each recipient agency shall cooperate in the verification of end product sales reported by processors under the NCP Program. The recipient agency may be requested to verify actual purchases of end products as substantiated by the recipient agency's invoices and may also be requested to verify that the invoice correctly identifies the discount included or refund due for the value of the donated ingredient contained in the end product.

[51 FR 23518, June 30, 1986, as amended at 59 FR 62987, Dec. 7, 1994]

§ 252.6 Miscellaneous provisions.

(a) *Improper distribution or loss of or damage to donated food*. If a processor improperly distributes or uses any donated food, or causes loss of or damage to a donated food through its failure to provide proper storage, care, or handling, FNS shall require the processor to pay to the Department the value of the donated food as determined by the Department.

(b) *Disposition of damaged or out-of-condition food*. Donated food which is found to be damaged or out-of-condition and is declared unfit for human consumption by Federal, State, or local health officials, or by any other inspection services or persons deemed competent by the Department, shall be disposed of in accordance with instructions of the Department. This instruction shall direct that unfit donated food be sold in a manner prescribed by the Department with the net proceeds thereof remitted to the Department. Upon a finding by the Department that

donated food is unfit for human consumption at the time of delivery to a recipient agency and when the Department or appropriate health officials require that such donated food be destroyed, the processor shall pay for any expenses incurred in connection with such donated food as determined by the Department. The Department may, in any event, repossess damaged or out-of-condition donated food.

(c) *FNS sales verification.* FNS may conduct a verification of processor reported sales utilizing a statistically valid sampling technique. If, as a result of this verification, FNS determines that the value of the donated food has not been passed on to recipient agencies or if end products have been improperly distributed, FNS may assert a claim against the processor. This claim may include a projection of the verification sample to the total NCP sales reported by the processor.

(d) *Sanctions.* Any processor or recipient agency which has failed to comply with the provisions of this part or any instructions or procedures issued in connection herewith, or any agreements entered into pursuant hereto, may, at the discretion of the Department, be disqualified from further participation in the NCP Program. Reinstatement may be made at the option of the Department. Disqualification shall not prevent the Department from taking other action through other available means when considered necessary, including prosecution under applicable Federal statutes.

(e) *Embezzlement, misuse, theft, or obtainment by fraud of commodities and commodity related funds, assets, or property in child nutrition programs.* Whoever embezzles, willfully misapplies, steals, or obtains by fraud commodities donated for use in the NCP Program, or any funds, assets, or property deriving from such donations, or whoever receives, conceals, or retains such commodities, funds, assets, or property for his own use or gain, knowing such commodities, funds, assets, or property have been embezzled, willfully misapplied, stolen, or obtained by fraud, shall be subject to Federal criminal prosecution under section 12(g) of the National School Lunch Act, as amended, or section 4(c) of the Agriculture and Consumer Protection Act of 1973, as amended. For the purpose of this paragraph ''funds, assets, or property'' include, but are not limited to, commodities which have been processed into different end products as provided for by this part, and the containers in which commodities have been received from the Department.

§ 252.7 OMB control number.

The information collection and reporting requirements contained in this part have been approved by the Office of Management and Budget under control number 0584–0325.

PART 253—ADMINISTRATION OF THE FOOD DISTRIBUTION PROGRAM FOR HOUSEHOLDS ON INDIAN RESERVATIONS

Sec.

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AUTHORITY: 91 Stat. 958 (7 U.S.C. 2011–2032).

SOURCE: 44 FR 35928, June 19, 1979, unless otherwise noted. Redesignated by Amdt. 1, 47 FR 14137, Apr. 2, 1982.

§ 253.1 General purpose and scope.

This part describes the terms and conditions under which: commodities (available under part 250 of this chapter) may be distributed to households on or near all or any part of any Indian reservation, the program may be administered by capable Indian tribal organizations, and funds may be obtained from the Department for the costs incurred in administering the program. This part also provides for the concurrent operation of the Food Distribution Program and the Food Stamp Program on Indian reservations when such concurrent operation is requested by an ITO.

§ 253.2 Definitions.

(a) *Exercises governmental jurisdiction* means the active exercise of the legislative, executive or judicial powers of government by an Indian tribal organization.

(b) *Food distribution program* means a food distribution program for households on Indian reservations operated pursuant to sections 4(b) and 1304(a) of Pub. L. 95–113.

(c) *Indian tribal household* means a household in which at least one household member is recognized as a tribal member by any Indian tribe, as defined in paragraph (d) of this section.

(d) *Indian tribe* means (1) any Indian tribe, Band, or other organized Indian group, for example, a Rancheria, Pueblo, or colony, and including any Alaska Native village or regional or village corporation (established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688)), and that is on a reservation and recognized as eligible for Federal programs and services provided to Indians because of their status as Indians; or (2) any Indian tribe or Band on a reservation holding a treaty with a State government.

(e) *Indian tribal organization (ITO)* means: (1) The recognized governing body of any Indian tribe on a reservation; or (2) the tribally recognized intertribal organization which the recognized governing bodies of two or more Indian tribes on a reservation authorize to operate the Food Stamp Program or a Food Distribution Program on their behalf.

(f) *Overissuance* means the dollar value of commodities issued to a household that exceeds the dollar value of commodities it was eligible to receive.

(g) *Reservation* means the geographically defined area or areas over which an ITO exercises governmental jurisdiction so long as such area or areas are legally recognized by the Federal or a State government as being set aside for the use of Indians.

(h) *State* means any one of the fifty States, the District of Columbia, and the reservation of an Indian tribe whose ITO meets the requirements of the Food Stamp Act of 1977 for participation as a State agency.

(i) *State agency* means:

(1) The agency of State government, including the local offices thereof, which enters into an agreement with FNS for the distribution of commodities on all or part of an Indian reservation, and

(2) The ITO of any Indian tribe, determined by the Department to be capable of effectively administering a Food Distribution Program, which enters into an agreement with FNS for the distribution of commodities on all or part of an Indian reservation.

(j) *Urban place* means a town or city with a population of 10,000 or more.

[44 FR 35928, June 19, 1979. Redesignated and amended by Amdt. 1, 47 FR 14137, Apr. 2, 1982; 59 FR 1449, Jan. 11, 1994; 64 FR 73382, Dec. 30, 1999]

§ 253.3 Availability of commodities.

(a) *Conditions for distribution*. In jurisdictions where the Food Stamp Program is in operation, there shall be no distribution of commodities to households under the authority of any law, except that distribution may be made (1) on a temporary basis under programs authorized by law to meet disaster relief needs, (2) for the purpose of the Commodity Supplemental Food Program, and (3) whenever a request for concurrent or separate Food Distribution Program on a reservation is made by an ITO.

(b) *Concurrent or separate food program operation*. Distribution of commodities, with or without the Food Stamp Program, shall be made whenever an ITO submits to FNS a completed application for the Food Distribution Program on all or part of a reservation and the application is approved by FNS.

(1) Except as provided in paragraph (b)(2) of this section, when the Food Distribution Program is operating on all or part of a reservation, all eligible households within those boundaries may participate in the Food Distribution Program, or, if the ITO has elected concurrent operation of the Food Stamp Program, may elect to participate in either program, without regard to whether the household is an Indian tribal household.

(2) FNS may determine, based on the number of non-Indian tribal households located on all or part of a reservation,

that concurrent operation is necessary. When such a determination has been made all households residing in such areas may apply to participate in either the Food Stamp or the Food Distribution Program.

(c) *Household distribution.* Commodities acquired under section 416 of the Agricultural Act of 1949, as amended; section 32 of Pub. L. 320, 74th Congress, as amended; section 709 of the Food and Agricultural Act of 1963, as amended; and section 4(a) of the Agriculture and Consumer Protection Act of 1973, as amended, by section 1304 of the Food and Agriculture Act of 1977, may be made available under part 250 of this chapter for distribution to households in accordance with the provisions of that part and the additional provisions and requirements of this part.

(d) *Food distribution program benefits.* Households eligible under this part shall receive a monthly food package based on the number of household members. The food package offered to each household shall consist of a quantity and variety of commodities made available by the Department to provide eligible households with an opportunity to obtain a more nutritious diet and shall represent an acceptable nutritional alternative to Food Stamp Program benefits. The food package offered to each household by the State agency shall contain a variety of foods from each of the food groups in the Food Distribution Program on Indian Reservations Monthly Distribution Guide Rates by Household Size—Vegetables, Fruit, Bread-Cereal-Rice-Pasta, Meat-Poultry-Fish-Dry Beans-Eggs-Nuts, Milk-Yogurt-Cheese, and Fats-Oils-Sweets. FNS shall periodically notify State agencies of the kinds of commodities it proposes to make available based, insofar as practicable, on the preferences of eligible households as determined by the State agency. In the event one or more of the proposed commodities cannot be delivered, the Department shall arrange for delivery of a similar commodity within the same food group.

[44 FR 35928, June 19, 1979. Redesignated by Amdt. 1, 47 FR 14137, Apr. 2, 1982, as amended at 65 FR 47833, Aug. 4, 2000]

§ 253.4 Administration.

(a) *Federal administration.* Within the Department of Agriculture, the Food and Nutrition Service (FNS) shall be responsible for the Food Distribution Program. FNS shall have the power to determine the amount of any claim and to settle and adjust any claim.

(b) *State agency administration.* (1) If FNS determines that the ITO is capable of effective and efficient administration, the ITO shall administer the Food Distribution Program on all or part of the reservation. If FNS determines that the ITO is not capable of effective and efficient administration of the Food Distribution Program, the appropriate agency of the State government shall be responsible for the Food Distribution Program on all or part of the Indian reservation. In addition, the appropriate agency of the State government may administer the Program on behalf of an otherwise capable tribe if agreed to in writing by both parties.

(2) In the case where the Indian reservation boundaries cross State lines, the ITO and appropriate State agencies may jointly request FNS approval that a single State agency administer the Food Distribution Program on all or part of the Indian reservation.

(3) An agency of State government responsible for administering the Food Distribution Program may contract Program functions to an ITO. These functions include, but are not limited to, outreach, preparation of bilingual materials, commodity issuance, determination of food preferences of households, publicizing uses of commodities, and transportation and on-site delivery services. The State agency may also use the ITO in prescreening translations, interpretive services and other noncertification functions. The State agency shall not contract responsibility for certification activities such as interviews or eligibility determinations with an ITO that has been determined incapable of administering the Food Distribution Program. In all cases the State agency shall retain full responsibility for program administration.

(c) *Qualification as a reservation.* (1) The appropriate ITO of an established Indian reservation will qualify for participation under the provisions of this

part, when that ITO files an application which demonstrates the status of an area as an established reservation, unless FNS determines that such area(s) does not qualify as a reservation as that term is defined in these regulations. For purposes of this part, established reservation means the geographically defined area(s) currently recognized and established by Federal or State treaty or by Federal statute whereby such geographically defined area(s) is set aside for the use of Indians. Where such established areas exist, the appropriate ITO is presumed to exercise governmental jurisdiction, unless otherwise determined by FNS.

(2) The appropriate ITO for other areas, in order to qualify as reservations for the provisions of this part, must show to FNS:

(i) That the ITO exercises governmental jurisdiction over a geographic area(s) which enjoys legal recognition from the Federal or a State government and is set aside for the use of Indians;

(ii) A clear and precise description of the boundaries of such geographic area(s).

(d) *Application by an ITO.* Any ITO which desires to participate in the Food Distribution Program shall file an application with the FNS Regional Office serving the State or States in which the reservation is located. The ITO shall specify if it is requesting the Food Distribution Program alone or concurrently with the Food Stamp Program. The ITO shall also specify whether it wants either or both programs on all or part of the reservation, and if on part, shall describe the geographic boundaries of the relevant part(s). Additionally, if the ITO wishes to serve areas near the reservation, the ITO shall describe the geographic boundaries of the near area(s) for FNS review and approval. Any urban place inside a reservation can be served by the Food Distribution Program. Any urban place outside reservation boundaries may not be served. However, an ITO or State agency can request the Department to change those limitations with justification. The ITO application shall also provide other information requested by FNS, including but not limited to, that the ITO serves an established reservation or a reservation otherwise qualified as described in paragraph (c) of this section. Properly addressed applications shall be acknowledged by the FNS Regional Office in writing within five working days of receipt.

(e) *Tribal capability.* (1) In determining whether the ITO on a given reservation is potentially capable of effectively and efficiently administering a Food Distribution Program, allowing for fulfillment of that potential through training and technical assistance, FNS shall consult with other sources, such as the BIA, and shall consider the ITO's experience, if any, in operating other government programs and its management and fiscal capabilities. Other factors for evaluation include, but are not limited to, the ITO's ability to:

(i) Order and properly store commodities,

(ii) Certify eligible households,

(iii) Arrange for physical issuance of commodities,

(iv) Keep appropriate records and submit required reports,

(v) Budget and account for administrative funds,

(vi) Determine the food preferences of households, and

(vii) Conduct on-site reviews of certification and distribution procedures and practices.

(2) The Food and Nutrition Service (FNS) shall make a determination of potential Indian Tribal Organization (ITO) capability within 30 days of receipt of a completed application for the Food Distribution Program. FNS shall promptly advise ITOs of the need for additional information if an incomplete application is received.

(3) FNS shall, if requested by an ITO which has been determined by FNS to be potentially capable of administering a Food Distribution Program, provide the ITO's designees with appropriate training and technical assistance to prepare the ITO to take over program administration. In determining what training and technical assistance are

necessary, FNS shall consult with the ITO and other sources, such as the BIA.

[44 FR 35928, June 19, 1979, as amended by Amdt. 163, 45 FR 14006, Mar. 4, 1980. Redesignated and amended by Amdt. 1, 47 FR 14137, Apr. 2, 1982]

§ 253.5 State agency requirements.

(a) *Plan of operation.* (1) The State agency that assumes responsibility for the Food Distribution Program shall submit a plan of operation for approval by FNS. Approval of the plan shall be a prerequisite to the donation of commodities available for use by households under part 250 of this chapter. The approved plan shall be considered permanent, with amendments to be added as changes in State agency administration or management of the program, as described in the plan, are made, or at the request of FNS. No amendment to the plan of operation of any State agency shall be effective without prior approval of FNS, and FNS may require amendment of any plan as a condition of continuing approval. If the agency is not an ITO, the appropriate agency of the State government shall also:

(i) Consult in good faith with the ITO on the reservation where the appropriate agency of the State government is responsible for administering the Food Distribution Program.

(ii) A State agency which is not an ITO shall submit its plan of operation, budget and any substantive subsequent amendments to the ITO for comment at least 45 days prior to submission of the plan, budget or amendment to FNS. Comments by the ITO shall be attached to the plan, budget or amendment which is submitted to FNS. This paragraph does not apply to amendments required by FNS under § 253.7(a)(1).

(2) The plan of operation shall describe the manner in which commodities will be distributed, including, but not limited to, the storage and distribution facilities to be used, the procedures to assure ongoing consultation with the ITO where the appropriate agency of the State government administers the Program, the method by which the food preferences of households shall be determined, the manner in which the State agency plans to supervise the Food Distribution Program, and plans by which the State agency will control dual participation. The plan shall also include by reference or otherwise the following assurances:

(i) No household on any Indian reservation shall be permitted to participate simultaneously in the Food Stamp Program and the Food Distribution Program.

(ii) The value of the commodities provided to any eligible household shall not be considered income or resources for any purposes under any Federal, State, or local laws, including, but not limited to, laws relating to taxation, welfare, and public assistance programs; and no State agency shall decrease any assistance otherwise provided to a household because of the receipt of commodities.

(iii) The distribution of commodities shall not be used as a means for furthering the political interest of any individual or party.

(iv) There shall be no discrimination in the certification of applicant households or in the distribution of commodities because of sex, race, color, age, political beliefs, religion, handicap or national origin.

(v) Households shall not be required to make any payments in money, materials or services for, or in connection with, the receipt of commodities; and they shall not be solicited in connection with the receipt of commodities for voluntary cash contributions for any purpose.

(vi) Adequate personnel, including supervisory personnel, to review the Food Distribution Program shall be provided to ensure compliance with the requirements of this part.

(vii) Use of disclosure of information obtained from food distribution applicant households, exclusively for the Food Distribution Program, shall be restricted to persons directly connected with the administration or enforcement of the provisions of the Food Distribution Programs as defined in this part of this subchapter, the Food Stamp Act or regulations, or with other Federal or federally aided, means-tested assistance programs such as title IV–A (TANF), XIX (Medicaid), or XVI (SSI), or with general assistance programs that are subject to the

joint processing requirements specified in § 273.2(j)(2).

(b) *Operating manuals.* The State agency shall maintain ongoing consultation with the ITO in developing the State agency's written internal policies, instructions, and forms which are necessary to carry out the Food Distribution Program and shall submit them to FNS for approval prior to their use. The State agency shall file any comments or recommendations offered by the ITO, for review by FNS.

(c) *Staffing.* Personnel used in the certification process shall be employed in accordance with (1) the current standards for a Merit System of Personnel Administration or any standards later prescribed by the Office of Personnel Management under section 208 of the Intergovernmental Personnel Act of 1970 or (2) when appropriate, the ITO's personnel system if it incorporates the basic elements of a merit system.

(d) *Bilingual requirements.* (1) The State agency shall provide bilingual staff, certification forms, including the application form and certification notices as specified in § 253.7(a)(2) and (b)(3), respectively, and any form developed by the State agency for reporting changes in household composition and income, pursuant to § 253.7(c), and outreach materials, when either an estimated 100 or more low income households or the majority of low-income households on the reservation are a single language minority. Single-language minority refers to households which speak the same non-English language and which do not contain adults(s) fluent in English as a second language. If the non-English language is spoken but not written, the State agency shall provide bilingual staff, if required, but not bilingual material.

(2) The State agency shall ensure that offices serving reservations subject to the criteria in paragraph (d)(1) of this section provide sufficient bilingual staff for the timely processing of non-English speaking applicants.

(3) The State agency shall develop estimates of the numbers of low-income, single-language minority households by using census data (including the Census Bureau's Current Population Report: Population Estimates and Projections, Series P–25, No. 627) and knowledge of the reservation. Local Bureau of Census offices, Community Services Administration offices, Community Action agencies, Bureau of Indian Affairs, Indian Health Services, planning agencies, the ITO and school officials may be important sources of information in determining the need for bilingual services.

(e) *Outreach and referral.* The State agency shall inform potentially eligible households of the availability of the Food Distribution Program. The State agency shall develop and distribute printed information in the appropriate languages about the Program and eligibility requirements. Outreach material shall contain information about a household's right to file an application on the same date it contacts the certification office. The State agency shall be sufficiently familiar with general eligibility requirements for the Supplemental Food Program for Women, Infants and Children (WIC) or the Commodity Supplemental Food Program, if available to reservation residents, the Supplemental Security Income Program (SSI), and appropriate public and general assistance programs, to identify those applicants whose households contain persons who may be eligible for these programs, to inform the applicants of their potential eligibility, and to provide the applicants with the addresses and telephone numbers for these programs. For example, the State agency should provide information on the WIC program to applicants whose households contain pregnant women, nursing or postpartum women, or children up to the fifth birthday.

(f) *Training requirements.* The State agency shall institute a training program for all personnel who are assigned responsibility for the certification of applicant households, for fair hearing officers, for field supervisors who review local Food Distribution Programs, for those involved in outreach and those responsibile for ordering, storing, and distributing commodities.

(1) State agency training programs shall cover eligibility criteria, certification procedures, commodity ordering, storage and distribution practices, household rights and responsibilities

and other job-related responsibilities. The content of the training material shall be reviewed and revised periodically to correct deficiencies in program operations or reflect changes in policy and procedures.

(2) FNS shall review the effectiveness of State agency training based on information obtained from field reviews, administrative analyses and other sources.

(g) *Nutrition education.* The State agency shall publicize how commodities may be used to contribute to a nutritious diet and how commodities may be properly stored by means of visual displays, and printed material. The State agency shall encourage appropriate organizations, county extension home economists, expanded Food and Nutrition Program aides, and qualified volunteers to provide food and nutrition information, menus, or cooking demonstrations, as appropriate for participating households. The State agency shall encourage the dissemination of food and nutrition information designed to improve the nutrition of households on reservations.

(h) *Records and reports.* The State agency shall keep records and submit reports and other information as required by FNS. Records required under this part shall be retained for a period of three years from the date of the submission of the annual financial status report, SF–269; except that, if any litigation, claim or audit is started before the expiration of the three year period, the records shall be retained until all litigation, claims or audit findings involving the records have been resolved.

(i) *Monitoring.* In accordance with its responsibility for efficient and effective program administration the State agency shall monitor and review its operations under this part to ensure compliance with the provisions of this part and with any applicable instructions of FNS.

(1) The State agency shall review program operations at least annually, document program deficiencies and establish and implement specific plans of corrective action for deficiencies noted.

(2) Reviews of operations shall include, but not be limited to, certification of households, determination of food preferences, distribution of commodities, fair hearing procedures, commodity inventories and timeliness and accuracy of reports to FNS.

(3) Program reviews and corrective action plans shall be available to FNS upon request.

(j) *Investigations and complaints.* The State agency shall promptly investigate complaints received of irregularities in the handling, distribution, receipt or use of commodities, other than use of commodities by eligible households in the preparation of meals for home consumption, and shall take appropriate action to correct any irregularities. The State agency shall also promptly investigate complaints of irregularities relating to certification procedures or the delivery of services and shall take appropriate action to correct any irregularities or noncompliance with provisions relating to certification procedures, provision of services or household rights. The State agency shall document each investigation and action in sufficient detail to allow for FNS review of all State agency actions and information. The Department shall make investigations at the request of the State agency and ITO or when the Department determines an investigation is necessary.

(k) *Sanctions.* If the State agency fails to comply with the provisions of this part or its plan of operation, FNS may:

(1) Take action against any State agency under § 253.11(g) with respect to administrative funds available from FNS for use by the State agency or (2) disqualify the State agency from further distribution of commodities to households. Disqualification of the State agency shall not prevent FNS or the Department from taking other actions, including prosecution under applicable Federal statutes, when deemed necessary. Reinstatement shall be contingent upon approval by FNS of the State agency's plan for corrective action or determination by FNS that the State agency has complied with any other requirements for reinstatement which FNS may set forth. These provisions apply to all State agencies, regardless of whether the Program is administered by an agency of the State government or an ITO. If the ITO is

disqualified as a State agency, an appropriate agency of State government shall administer the Food Distribution Program on the reservation. If an agency of State government is disqualified as the State agency for the Food Distribution Program on the reservation, the ITO may request in writing a capability determination for program administration in accordance with § 253.4.

(l) *Appeals*. (1) The agency of the State government or an ITO may appeal an initial determination by FNS on:

(i) Whether or not the reservation definition is met;

(ii) The capability of an ITO to administer the Food Distribution Program;

(iii) Sanctions taken under paragraph (k) of this section or § 253.11(g); or

(iv) The Federal matching percentage level of administrative funding made available by FNS.

(2) At the time FNS advises the State agency or ITO of its determination, FNS shall also advise the State agency or ITO of its right to appeal and, except for appeals of funding determinations, shall advise the State agency or ITO of its right to request either a meeting to present its position in person or a review of the record. On appeals of funding determinations, FNS shall advise the State agency or ITO that it may indicate if it wishes a meeting, however, FNS need schedule a meeting only if FNS determines a meeting is warranted to reach a proper adjudication of the matter. Otherwise, FNS shall review supportive information submitted by the State agency or ITO in paragraph (l)(3)(ii) of this section.

(3) *Procedure*—(i) *Time limit*. Any State agency or ITO that wants to appeal an initial FNS determination under paragraph (l) of this section must notify the Administrator of FNS, in writing, within 15 days from the date of the determination. If the appeal concerns either paragraph (l)(1) (i) or (ii) of this section, the implementation timeframes as specified in § paragraph (m) of this section and the timeframe for determining an ITO's capability as specified in § 253.4(e)(2) are suspended from the date the appeal is requested to the date of the final determination.

(ii) *Acknowledgment*. Within five days of receipt by the Administrator, of FNS, of a request for review, FNS shall provide the State agency or ITO with a written acknowledgment of the request by certified mail, return receipt requested. The acknowledgment shall include the name and address of the official designated by the Administrator, FNS, to review the appeal. The acknowledgment shall also notify the State agency or ITO that within ten days of receipt of the acknowledgment, the State agency or ITO shall submit written information in support of its position.

(4) *Scheduling a meeting*. If the Administrator, FNS, grants a meeting FNS shall advise the State agency or ITO of the time, date and location of the meeting by certified mail, return receipt requested at least ten days in advance of the meeting. FNS shall schedule and conduct the meeting and make a decision within 60 days of the receipt of the information submitted in response to paragraph (l)(3)(ii) of this section.

(5) *Review*. If no meeting is conducted the official designated by the Administrator, FNS, shall review information presented by a State agency or ITO which requests a review and shall make a final determination in writing within 45 days of the receipt of the State agency's or ITO's information submitted in response to paragraph (l)(3)(ii) of this section setting forth in full the reasons for the determination.

(6) *Final decision*. The official's decision after a meeting or a review shall be final.

(m) *Implementation*. The State agency shall implement changes required by amendments to these regulations in accordance with schedules specified in the amendment.

(1) *Amendment 2*. (i) If an ITO currently participates in, but does not administer, the Food Distribution Program on Indian Reservations:

(A) FNS shall determine tribal eligibility and capability to administer the Food Distribution Program on Indian Reservations within 60 days of receipt of a completed application. If an incomplete application is received, FNS shall within 15 days, notify the ITO of

what additional information is required. The processing time for the capability determination shall start from the date the additional information is received by FNS.

(B) Upon FNS' determination that the ITO will administer the Food Distribution Program on Indian Reservations, FNS shall expeditiously plan for and provide needed training and technical assistance to facilitate timely commencement of tribal administrative responsibilities. The ITO shall have 120 days from FNS' determination in paragraph (m)(1)(i)(A) of this section to submit and have approved a plan of operation, operating manuals, and to commence program operations under the regulations as specified in this part. Extensions may be granted by FNS to ITOs if good cause is shown.

(C) If FNS determines that an ITO is not capable of administering the Food Distribution Program on Indian Reservations, FNS shall direct the State to continue program operations and submit a new plan of operation and to commence program operations under the regulations as specified in this part within 120 days from FNS' determination in paragraph (m)(1)(i)(A) of this section.

(ii) If an ITO currently administers the Food Distribution Program on Indian Reservations, the timeframes specified in paragraph (m)(1)(i) of this section apply except that:

(A) FNS shall determine tribal eligibility and capability to administer the Food Distribution Program on Indian Reservations within 30 days of receipt of a completed application.

(B) If FNS determines that the ITO will not administer the Food Distribution Program on Indian Reservations, FNS shall direct the ITO to continue program operations until the State government can commence program operations. The State government shall have 120 days from FNS' determination in paragraph (m)(1)(i)(A) of this section to submit and have approved a plan of operation and to commence program operations under the regulations as specified in this part.

(iii) If an ITO does not currently participate in a Food Distribution Program on Indian Reservations, the timeframes in paragraph (m)(1)(i) of this section apply except that if FNS determines that an ITO cannot administer the program, FNS shall direct the State to submit a plan of operation and to commence program operations under the regulations as specified in this part within 180 days from the determination.

(iv) Extensions to the above implementation timeframe (except for those timeframes set forth in paragraphs (m)(1) (i)(A) and (ii)(A) of this section) may be granted by FNS to ITOs or State government agencies if there is compelling justification involving circumstances which were not reasonably foreseeable and which are not the fault of the ITO or the State agency and which circumstances present extraordinary problems that would render earlier implementation impossible.

(Approved by the Office of Management and Budget under control number 0584–0071)

(44 U.S.C. 3506; E.O. 12372, July 14, 1982, 47 FR 30959, sec. 401(b) of the Intergovernmental Cooperation Act of 1968, 31 U.S.C. 6506(c))

[44 FR 35928, June 19, 1979, as amended at 47 FR 746, Jan. 7, 1982. Redesignated and amended by Amdt. 1, 47 FR 14137, Apr, 2, 1982; Amdt. 2, 47 FR 19665, May 7, 1982; 48 FR 29123, June 24, 1983; 62 FR 53731, Oct. 16, 1997; 64 FR 73383, Dec. 30, 1999; 65 FR 47833, Aug. 4, 2000]

§ 253.6 Eligibility of households.

(a) *Household concept.* (1) The State agency shall determine eligibility for the Food Distribution Program on a household basis. Household means any of the following individuals or groups of individuals, provided that such individuals or groups are not boarders or residents of an institution and provided that separate household or boarder status shall not be granted to a spouse of a member of the household, or to children under 18 years of age under the parental control of a member of the household.

(i) An individual living alone.

(ii) An individual living with others, but customarily purchasing food and preparing meals for home consumption separate and apart from the others.

(iii) A group of individuals living together for whom food is customarily purchased in common and for whom meals are prepared together for home consumption.

(2) *Nonhousehold members.* The following individuals residing with a household shall not be considered household members in determining the household's eligibility. Nonhousehold members specified in paragraphs (a)(2)(i) and (v) who are otherwise eligible may participate in the Program as separate households.

(i) *Roomers.* Individuals to whom a household furnishes lodging, but not meals, for compensation.

(ii) *SSI recipients in ''cash-out'' States.* Recipients of SSI benefits who reside in a State designated by the Secretary of Health, Education, and Welfare to have specifically included the value of the coupon allotment in its State supplemental payments. These persons are not eligible for Food Distribution Program benefits.

(iii) *Disqualified individuals.* Individuals disqualified from the Food Stamp Program for fraud, as set forth in § 273.16.

(iv) *Illegal residents.* Individuals who are not legal residents of the United States. While U.S. citizenship is not required for participation in the Food Distribution Program, persons receiving food distribution benefits must be lawfully living in the United States.

(v) *Others.* Other individuals who share living quarters with the household but who do not customarily purchase food and prepare meals with the household. For example, if the applicant household shares living quarters with another family to save on rent, but does not purchase and prepare food together with that family, the members of the other family are not members of the applicant household.

(3) *Authorized representatives.* The head of the household, spouse, or any other responsible member of the household may designate an authorized representative to act on behalf of the household in making application for commodities and/or obtaining commodities as provided in § 253.7(a)(10)(i) and § 253.7(a)(10)(ii) respectively.

(b) *Residency or citizenship.* (1) All households residing on a reservation on which the FDPIR operates shall be eligible to apply for program benefits on that reservation regardless of whether they include an Indian member. All Indian tribal households as defined in § 253.2(c) of this part which reside in near areas established under § 253.4(d) of this part shall be eligible to apply for program benefits. The ITO or State agency shall serve all income-eligible applicant households residing on reservations who apply for benefits, and all income-eligible applicant Indian tribal households residing in near areas. The ITO or State agency administering the program in a near area shall, for purposes of determining program eligibility, accept documentation from a household member's tribe of origin as proof of tribal membership. Residency shall not mean domicile nor shall the State agency impose any durational residency requirement. However, persons on the reservation solely for vacations shall not be considered residents. No household may participate in the Food Stamp Program or in the Food Distribution Program in more than one geographical area at the same time.

(2) No person shall participate in the Food Distribution Program on an Indian reservation unless the person is legally a resident of the United States. A further discussion of ''legal residency'' is provided in paragraph (a)(2)(iv) of this section.

(c) *Income and resource eligibility standards of public assistance, supplemental security income, and certain general assistance households.* (1) Households in which all members are included in a federally aided public assistance or supplemental security income grant, except as provided for in paragraph (a)(2)(ii) of this section, shall, if otherwise eligible under this part, be determined to be eligible to participate in the Food Distribution Program while receiving such grants without regard to the income and resources of the household members.

(2) If FNS determines that a State or local general assistance program applies criteria of need the same as or similar to, those applied under any of the federally aided public assistance programs, households in which all members are included in such a general assistance grant, shall, if otherwise eligible under this part, be determined to be eligible to participate in the Food Distribution Program while receiving

such grants without regard to the income and resources of household members.

(d) *Resource eligibility standards*—(1) *Uniform household standards for nonassistance households*. The State agency shall apply uniform national resource standards of eligibility to all applicant households, except those in which all members are recipients of federally aided public assistance, supplemental security income, or certain general assistance program benefits as provided in paragraph (c)(2) of this section. The maximum allowable resources shall not exceed $1,750 for the household; except that, for households of two or more members which include a member or members age 60 or over, such resources shall not exceed $3,000.

(2) *Resources*. In determining the resources of a household, only cash on hand, money in checking or savings accounts, savings certificates, stocks, or bonds, or other readily negotiable and accessible certificates or instruments shall be counted; except that the following resources shall be entirely excluded:

(i) The cash value of life insurance policies and pension funds, including funds in pension plans with interest penalties for early withdrawals, such as a Keogh plan or an Individual Retirement Account (IRA), as long as the funds remain in the pension plans.

(ii) Any governmental payments which are designated for the restoration of a home damaged in a disaster, if the household is subject to a legal sanction if the funds are not used as intended, for example payments made by the Department of Housing and Urban Development through the individual and family grant program of disaster loans or grants made by the Small Business Administration.

(iii) Resources, such as those of students or self-employed persons, which have been prorated as income. The treatment of self-employment income is explained in § 253.7(b)(1)(iii).

(iv) Resources which are excluded by express provision of Federal statute. The following is the current listing of resources excluded by Federal statute:

(A) Payment received under the Alaska Native Claims Settlement Act (Pub. L. 92–203, section 21(a) or the Sac and Fox Indian claims agreement Pub. L. 94–189);

(B) Payments received by certain Indian tribal members under Pub. L. 94–114, section 6, regarding submarginal land held in trust by the United States;

(C) Payments received by certain Indian tribal members under Pub. L. 94–540 regarding the Grand River Bank of Ottawa Indians;

(D) Reimbursements from the Uniform Relocation Assistance and Real Property Acquistion Policy Act of 1970 (Pub. L. 91–646, section 216);

(E) Earned income tax credits received before January 1, 1980, as a result of Pub. L. 95–600, the Revenue Act of 1978.

(3) *Jointly owned resources*. Resources owned jointly by separate households shall be prorated between or among those households unless the applicant can demonstrate that such resources are inaccessible to it because access to the value of the resource is dependent upon the agreement of a joint owner who refuses to comply.

(4) *Resources of disqualified members*. Resources of individuals disqualified from participation in the Food Stamp Program for fraud shall continue to count in their entirety to the remaining household members when determining the household's eligibility for the Food Distribution Program.

(e) *Income*—(1) *Income eligibility standards for nonassistance households*. (i) The State agency shall apply uniform national income eligibility standards for the Food Distribution Program except for households in which all members are recipients of public assistance, supplemental security income except as provided for in paragraph (a)(2)(ii) of this section, paragraph (c) of this section, or certain general assistance program payments as provided in § 283.6(c). The income eligibility standards shall be the monthly income eligibility standards for the Food Stamp Program in the State, increased by the amount of the standard deduction for that State, as published in the appendix to § 273.9.

(ii) The income eligibility standards for the Food Distribution Program shall be adjusted each October 1, as necessary, to reflect changes in the

Food Stamp Program income eligibility limits and standard deductions.

(2) *Definition of income.* Household income shall mean all income from whatever source, excluding only items specified in paragraph (e)(3) of this section.

(i) Earned income shall include:

(A) All wages and salaries of an employee.

(B) The total gross income from a self-employment enterprise, including the net profit from the sale of any capital goods or equipment related to the business. Ownership of rental property shall be considered a self-employment enterprise. Payments from a roomer and returns on rental property shall be considered self-employment income.

(C) Training allowances from vocational and rehabilitative programs recognized by Federal, State or local governments, such as the Work Incentive Program, and programs authorized by the Job Training Partnership Act, to the extent they are not a reimbursement.

(ii) Unearned income shall include, but not be limited to:

(A) Assistance payments from Federal or Federally aided public assistance programs, such as Supplemental Security Income (SSI) or Temporary Assistance for Needy Families (TANF), General Assistance (GA) programs, or other assistance programs based on need.

(B) Annuities; pensions; retirement; veteran's or disability benefits; worker's or unemployment compensation; old-age, survivors, or social security benefits; strike benefits; foster care payments for children or adults.

(C) Support or alimony payments made directly to the household from nonhousehold members.

(D) Scholarships, education grants, fellowships, deferred payment loans for education, veteran's education benefit and the like in excess of amounts excluded under paragraph (e)(3)(iii) of this section.

(E) Payments from Government-sponsored programs, dividends, interest, royalties, and all other direct money payments from any source which can be construed to be a gain or benefit.

(F) The earned or unearned income of an individual disqualified from participation in the Food Stamp Program for fraud shall continue to be counted as income, less the pro rata share for the disqualified member. Procedures for calculating this pro rata share are described in § 253.7.

(iii) Income shall not include the following:

(A) Monies withheld from an assistance payment, earned income or other income source, or monies received from any income source which are voluntarily or involuntarily returned to repay a prior overpayment received from that income source.

(B) Child support payments received by TANF recipients which must be transferred to the agency administering title IV–D of the Social Security Act of 1935, as amended, to maintain TANF eligibility.

(3) *Income exclusions.* Only the following items shall be excluded from household income and no other income shall be disregarded:

(i) Any gain or benefit which is not in the form of money payable directly to the household, including:

(A) *In-kind income.* Nonmonetary or in-kind benefits, such as meals, clothing, public housing, or produce from a garden.

(B) *Vendor payments.* A payment made in money on behalf of a household shall be considered a vendor payment whenever a person or organization outside of the household uses its own funds to make a direct payment to either the household's creditors or a person or organization providing a service to the household. For example, if a relative, who is not a household member, pays out of its own resources the household's rent directly to the landlord, the payment is considered a vendor payment and is not counted as income to the household. Also, payments specified by a court order or other written support or alimony agreement to go directly to a third party rather than the household and support payments which are paid to a third party are excluded as vendor payments. Wages garnished or diverted by employers, or money deducted or otherwise diverted from a household's public assistance grant by a State for purposes such as managing the household's expenses, shall not be considered

a vendor payment, since the person or organization making the payment is using money payable to the household rather than its own funds.

(ii) Any income in the certification period which is received too infrequently or irregularly to be reasonably anticipated, but not in excess of $30 in a quarter.

(iii) Education loans on which payment is deferred, grants scholarships, fellowships, veterans' educational benefits, and the like to the extent that they are used for tuition and mandatory school fees. Mandatory fees are those charged to all students or those charged to all students within a certain curriculum. For example, uniforms, lab fees, or equipment charged to all students to enroll in a chemistry course would be excluded. However, transportation, supplies, and textbook expenses are not uniformly charged to all students and, therefore, would not be excluded as mandatory fees.

(iv) All loans, including loans from private individuals as well as commercial institutions, other than education loans on which repayment is deferred.

(v) Reimbursements for past or future expenses to the extent they do not exceed actual expenses. For example, reimbursements of flat allowances for job or training related expenses such as travel per diem, uniforms, and transportation to and from the job or training site are excluded as income.

(vi) Monies received and used for care and maintenance of a third party beneficiary who is not a household member.

(vii) The earned income (as defined in paragraph (e)(2)(i) of this section) of children who are members of the household, who are students at least half time and who have not attained their eighteenth birthday. The exclusion shall continue to apply during temporary interruptions in school attendance due to semester or vaction breaks, provided the child's enrollment will resume following the break. Individuals are considered children for purposes of this provision if they are under the parental control of another household member.

(viii) Money received in the form of a nonrecurring lump sum payment, including but not limited to, income tax refunds, rebates, or credits; retroactive lump-sum social security, SSI, public assistance, railroad retirement benefits or other payments, or retroactive lump-sum insurance settlements; refunds of security deposits on rental properties or utilities or lump-sum payments arising from land interests held in trust for, or by, a tribe. These payments shall be counted as resources in the month received unless specifically excluded from consideration as a resource by other Federal law.

(ix) The cost of producing self-employment income. The procedures for computing the cost of producing self-employment income are described in § 253.7(b)(1)(iii).

(x) Any income that is specifically excluded by any other Federal statute from consideration as income. The following Federal statutes provide such an exclusion.

(A) Reimbursements from the Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970 (Pub. L. 91–646, section 216).

(B) Payments received under the Alaska Native Claims Settlement Act (Pub. L. 92–203, section 21(a)).

(C) Any payment to volunteers under Title II (RSVP, foster grandparents, and others) and title III (SCORE and ACE) of the Domestic Volunteer Services Act of 1973 (Pub. L. 93–113), as amended. Payments under title I (VISTA) to volunteers shall be excluded for those individuals receiving federally donated commodities, food stamps, or public assistance at the time they joined the title I program, except that households which are receiving an income exclusion for a VISTA or other title I subsistence allowance at the time of implementation of these rules shall continue to receive an income exclusion for VISTA for the length of their volunteer contract in effect at the time of implementation of these rules. Temporary interruptions in food distribution shall not alter the exclusion once an initial determination has been made. New applicants who are not receiving federally donated commodities, food stamps or public assistance at the time they joined VISTA shall have these volunteer payments included as earned income.

(D) Income derived from certain submarginal land of the United States

which is held in trust for certain Indian tribes (Pub. L. 94–114, section 6).

(E) Payments received by certain Indian tribal members under Pub. L. 94–540 regarding the Grand River Band of Ottawa Indians.

(f) *Income deductions*. (1) Households with earned income, as defined in paragraph (e)(2)(i) of this section, shall be allowed a deduction of twenty percent of their earned income. Earned income excluded under paragraph (e)(3) of this section shall not be considered earned income for the purpose of computing this deduction.

(2) Households shall also receive a deduction for the actual costs for the care of a child or other dependent when necessary for a household member to accept or continue employment or attend training or pursue education which is preparatory to employment. This deduction shall not exceed the maximum allowable deduction for dependent care costs allowable under the Food Stamp Program in the 48 States and the District of Columbia.

(3) Households will receive a deduction for legally required child support payments paid by a household member to or for a nonhousehold member, including payments made to a third party on behalf of the nonhousehold member (vendor payments). The State agency must allow a deduction for amounts paid towards overdue child support (arrearages). Alimony payments made to or for a nonhousehold member cannot be included in the child support deduction.

(4) Households will receive a deduction for the full amount of the Medicare Part B medical insurance premium that is withheld from the Federal retirement or disability payment of a household member or is paid by a household member directly to Medicare. This income deduction is not allowed in situations where the premium is paid by the State on behalf of the Medicare beneficiary or where household members are not Medicare beneficiaries because they receive their health care through the Indian Health Service.

[44 FR 35928, June 19, 1979. Redesignated by Amdt. 1, 47 FR 14137, Apr. 2, 1982, and amended at 59 FR 1449, Jan. 11, 1994; 64 FR 73383, Dec. 30, 1999; 65 FR 47833, Aug. 4, 2000]

§ 253.7 Certification of households.

(a) *Application processing*—(1) *General purpose*. The application process includes filing and completing an application form, being interviewed, and having certain information verified. The State agency shall act promptly on all applications. Expedited service shall be available to household in immediate need. When the State agency is other than the ITO, the ITO, when appropriate, may receive copies of certification and/or termination notices to the extent requested or agreed upon by the household. State agencies and ITOs may develop formalized mechanisms to ensure ITO receipt of notices.

(2) *Food Distribution Program application form*. The State agency shall use an application form acceptable to FNS. The State agency shall consult with the ITO in developing the application form. The State agency shall make application forms readily accessible to potentially eligible households and those groups or organizations involved in outreach efforts. The State agency shall also provide an application form to anyone who requests the form. State agencies which elect joint PA or GA/Food Distribution Program procedures shall follow the requirements of paragraph (g) of this section for the application form. State agencies may also use an abbreviated recertification form.

(3) *Filing an application*. Households must file an application for the Food Distribution Program by submitting the form to a certification office in person, through an authorized representative or by mail. The State agency shall document the date the application was received. Each household has the right to file an application form the same day it contacts the certification office during office hours on the reservation where the household resides. The household shall be advised that it does not have to be interviewed before filing the application and may file an incomplete application form as long as the application contains the applicant's name and address and is signed by a responsible member of the household or the household's authorized representative.

(4) *Household cooperation*. To determine eligibility, the application form

must be completed and signed, the household or its authorized representative must be interviewed, and certain information on the application must be verified. If the household refuses to cooperate with the State agency in completing this process, the application shall be denied upon a determination of refusal. For a determination of refusal to be made, the household must be able to cooperate, but clearly demonstrate that it will not take actions that it can take and that are required to complete the application process. For example, to be denied for refusal to cooperate, a household must refuse to be interviewed and not merely fail to appear for the interview. If there is any question as to whether the household has merely failed to cooperate, as opposed to refused to cooperate, the household shall not be denied solely for this reason. The household shall also be determined ineligible if it refuses to cooperate in any subsequent review of its eligibility. Once denied or terminated for refusal to cooperate, the household may reapply but shall not be determined eligible until it cooperates.

(5) *Interviews.* All applicant households, including those submitting applications by mail, shall have an interview with a qualified eligibility worker prior to initial certification and all recertifications. At State agency discretion, applicants may be interviewed by telephone or in the home. No household shall be interviewed by telephone for any two consecutive certifications without a face-to-face interview. State agencies must attempt to schedule home visits in advance. Home visits cannot extend required processing standards set forth in paragraphs (a)(7) and (a)(9) of this section. The individual interviewed may be the head of household, spouse, any other responsible member of the household or an authorized representative. The household, if it wishes, may be accompanied to the interview by anyone of its choice. The interviewer shall not only review the information that appears on the application, but shall explore and resolve with the household unclear and incomplete information. Households shall be advised of their rights and responsibilities during the interview. The interview shall be conducted as an official and confidential discussion of household circumstances. The applicant's right to privacy shall be protected during the interview. Facilities shall be adequate to preserve the privacy and confidentiality of the interview.

(6) *Verification.* Verification is the use of third party information or documentation to establish the accuracy of statements on the application in order to determine eligibility or ineligibility of the household.

(i) *Mandatory verification.*

(A) *Gross non-exempt income.* The State agency must obtain verification of each household's gross non-exempt income prior to certification. Households certified under the expedited service processing standards at paragraph (a)(9) of this section are not subject to this requirement. Income does not need to be verified to the exact dollar amount unless the household's eligibility would be affected, since Food Distribution Program benefits are not reduced as income rises. If the eligibility worker is unable to verify the household's income, the worker must determine an amount to be used for certification purposes based on the best available information. Reasons for inability to verify income include failure of the person or organization providing the income to cooperate with the household and the State agency, or lack of other sources of verification.

(B) *Legal obligation and actual child support payments.* The State agency must obtain verification of the household's legal obligation to pay child support, the amount of the obligation, and the monthly amount of child support the household actually pays. Documentation that verifies the household's legal obligation to pay child support, such as a court order, cannot be used to verify the household's actual monthly child support payments.

(C) *Medicare Part B medical insurance premium.* The State agency must obtain verification of the household's payment of the Medicare Part B medical insurance premium. Documentation of this expense could include:

(*1*) A copy of the current year Social Security benefit statement (SSA–4926–SM), or a similar statement provided to Railroad Retirement Board and Civil

Service Retirement beneficiaries, which identifies the amount of the Medicare Part B premium withheld each month; or

(*2*) A receipt for Medicare Part B premium payments paid directly to Medicare by the household.

(ii) *Verification of questionable information*. Eligibility criteria other than income, including residency on or near the reservation, shall be verified prior to certification only if they are questionable. To be considered questionable, the information on the application must be inconsistent with statements by the applicant, inconsistent with other information on the application or previous applications, or inconsistent with other information received by the State agency. However, due to the difficulty in verifying whether a group of individuals is a household, State agencies shall generally accept the household's statement regarding food preparation and consumption.

(iii) *Responsibility for obtaining verification*. The household has primary responsibility for providing documentary evidence or an acceptable collateral contact to support its income statements and to resolve any questionable information. However, the State agency shall assist the household in obtaining the needed verification. The State agency shall accept any reasonable documentary evidence provided by the household and shall be primarily concerned with how adequately the verification proves the statements on the application. The State agency shall also accept verification from collateral contacts so long as the collateral contacts can provide accurate third party verification. The State agency shall rely on the household to provide the name of the collateral contact. The State agency is not required to use a collateral contact designated by the household if the collateral contact cannot be expected to provide accurate third party verification. If the collateral contact designated by the household is unacceptable to the State agency, the State agency shall ask the household to designate another collateral contact, and the State agency shall document the casefile as to the reason the collateral contact was rejected and an alternate was requested. The State agency shall use collateral contacts, rather than documentary evidence, for verification if such verification is acceptable, and would result in better service to the household. For example, the household may be able to obtain a wage stub from the employer, but the State agency could call the employer the same day to provide the verification of income. Home visits shall be used as verification only if documentary evidence and collateral contacts cannot be obtained, and the State agency attempts to schedule the visit in advance with the household.

(iv) *Documentation*. Casefiles must be documented to support a determination of eligibility or denial. Documentation shall be in sufficient detail to permit a reviewer to determine the reasonableness and accuracy of the determination.

(v) *Verification for recertification*. At recertification, the State agency shall verify a change in income if the source has changed or the amount has changed by more than $50 per month since the last time the income was verified. State agencies may verify income which is unchanged or has changed by $50 per month or less, provided verification is, at a minimum, required when information is questionable as defined in paragraph (a)(6)(ii) of this section. All other changes reported at the time of recertification shall be subject to the same verification procedures as apply at initial certification. Unchanged information, other than income, shall not be verified at recertification unless the information is questionable as defined in paragraph (a)(6)(ii) of this section.

(7) *Processing standards*. The State agency shall provide eligible households that complete the initial application process an opportunity to participate as soon as possible, but not later than seven calendar days excluding weekends and holidays after the application was filed. An application is filed the day the State agency receives an application containing the applicant's name and address and which is signed by either a responsible member of the household or the household's authorized representative.

(8) *Delays in processing*. If the State agency cannot determine a household's

eligibility within seven calendar days excluding weekends and holidays of the date the application was filed due to lack of verification as required in paragraph (a)(6) of this section, the State agency shall authorize the distribution of commodities to the household for one month pending verification. In order to certify the household pending verification, the information on the application form must be complete and indicate that the household will likely be eligible. No further distribution of commodities shall be made without completing the eligibility determination.

(9) *Expedited service.* The State agency shall provide an opportunity to obtain commodities within one calendar day excluding weekends and holidays after the date the application was filed for those households with no income in the current month and also for those households which, in the judgment of the certifying agency, would likely be eligible and would otherwise suffer a hardship. The basis for this determination shall be recorded in the casefile. State agencies shall provide same day service, if possible, to households eligible for expedited service which would likely suffer a hardship if required to return to the office the next day. Warehouses or other distribution points need not be open during all certification hours to meet this need. However, accessibility to federally donated commodities by appropriate certification or other personnel should be established for households in immediate need. When State agencies can demonstrate a need, FNS may approve other expedited timeframes based on circumstances such as distance to warehouses or other distribution points. To expedite the certification of households in immediate need the State agency shall postpone the verification required under paragraph (a)(6) of this section. However, the State agency shall verify the household's identity and address through a collateral contact or readily available documentary evidence. If possible, the household's income statements should be verified at the same time. The State agency shall complete the verification for households certified on an expedited basis prior to the distribution of commodities to the household for any subsequent month.

(10) *Authorized representatives.* The head of the household, spouse, or any other responsible member of the household may designate an authorized representative to act on behalf of the household in one or all of the following capacities:

(i) *Making application for commodities.* When the head of the household or the spouse cannot make application, another household member may apply or an adult nonhousehold member may be designated in writing as the authorized representative for that purpose. The head of the household or the spouse should prepare or review the application whenever possible, even though another household member or the authorized representative will actually be interviewed. Adults who are nonhousehold members may be designated as authorized representatives for certification purposes only if they are sufficiently aware of relevant household circumstances.

(ii) *Obtaining commodities.* An authorized representative of the household may be designated to obtain commodities. Designation shall be made at the time the application is completed except that the household may be permitted to designate an emergency authorized representative in the event that illness or other unforeseen circumstances prevent the household from otherwise obtaining commodities. Designation of an emergency authorized representative must be made in writing by a responsible member of the household. State agencies may distribute commodities to household members or authorized representatives presenting an identification card or other appropriate identification that satisfactorily identifies the member obtaining commodities.

(b) *Eligibility determinations*—(1) *Determining income.* (i) The State agency shall take into account the income already received by the household during the certification period and any anticipated income the household and the State agency are reasonably certain will be received during the remainder of the certification period. If the amount of income that is anticipated is

uncertain, that portion of the household's income that is uncertain shall not be counted by the State agency. For example, a household anticipating income from a new source, such as a new job or recently applied for public assistance benefits, may be uncertain as to the timing and amount of the initial payment. These monies shall not be anticipated by the State agency unless there is reasonable certainty concerning the month in which the payment will be received and in what amount. If the exact amount of the income is not known, that portion of it which can be anticipated with reasonable certainty shall be considered as income. In cases where the receipt of income is reasonably certain but the monthly amount may fluctuate, and the household's income is close to the income eligibility limit the State agency may elect to average income provided that such averaging does not disadvantage the household. Such averaging shall be based on income that is anticipated to be available to the household during the certification period. The State agency shall use income received in the past 30 days as an indicator of future income during the certification period unless changes in income have occurred or can be anticipated.

(ii) Income anticipated during the certification period shall be counted as income only in the month it is expected to be received, unless the income is averaged.

(iii)(A) Self-employment income which represents a household's annual support including the net profit from the sale of any capital goods or equipment related to the business shall be annualized over a 12-month period, even if the income is received in only a short period of time. For example, self-employment income received by farmers shall be averaged over a 12-month period if the income represents the farmer's annual support.

(B) Self-employment income which represents only a part of a household's annual support, including the net profit from the sale of any capital goods or equipment related to the business, shall be averaged over the period of time the income is intended to cover. For example, self-employed vendors who work only in the summer and supplement their income from other sources during the balance of the year shall have their self-employment income averaged over the summer months rather than a 12-month period.

(C) For the period of time over which self-employment income is determined, the State agency shall add all gross self-employment income, exclude the cost of producing the self-employment income and divide the net self-employment income by the number of months over which the income will be averaged. The allowable costs of producing self-employment income include but are not limited to, the identifiable costs of labor, stock, raw materials, seed and fertilizer, interest paid to purchase income producing property, insurance premiums, and taxes paid on income producing property.

(D) In determining net self-employment income, payments on the principal of the purchase price of income-producing real estate and capital assets, equipment, machinery, and other durable goods, net losses from previous periods, Federal, State, and local income taxes, money set aside for retirement purposes, and other work-related personal expenses (such as transportation to and from work) will not be allowable costs of doing business.

(iv) The monthly net self-employment income shall be added to any other earned income received by the household. The total monthly earned income, less the 20 percent earned income deduction, shall then be added to all monthly unearned income received by the household.

(v) Allowable costs for dependent care shall be subtracted from the household's total monthly income to determine net monthly income.

(vi) The total net monthly income shall be compared to the income eligibility standard for the appropriate household size to determine the household's eligibility.

(2) *Certification periods.* (i) The State agency shall establish definite periods of time within which households shall be eligible to receive benefits. Further eligibility shall be established upon a recertification based upon a newly completed application, an interview,

and such verification as required by paragraph (a)(6)(v) of this section.

(ii) Certification periods shall conform to calendar months. The first month in the certification period of initial applicants shall be the month in which eligibility is determined. For example, if a household submits an application in late January and the household is determined eligible on the fifth working day which falls in February, a six-month certification period would include February through July. Upon recertification, the certification period will begin with the month following the last month of the previous certification period.

(iii) A household shall be assigned a certification period for as long a period as the household's circumstances are expected to remain sufficiently stable such that the household is expected to continue to meet the program's eligibility standards. In no event shall a certification period exceed one year.

(3) *Certification notices*—(i) *Notice of eligibility*. If an application is approved, the State agency shall provide the household a written notice of eligibility and the beginning and ending dates of the certification period. Households certified on an expedited basis shall be advised that the subsequent month's eligibility will depend upon completion of the postponed verification.

(ii) *Notice of denial*. If the application is denied, the State agency shall provide the household written notice explaining the basis for the denial, the household's right to request a fair hearing, and the telephone number and address of the person to contact for additional information. If there is an individual or organization available which provides free legal representation, the notice shall also advise the household of the availability of the service.

(iii) *Notice of adverse action*. (A) Prior to any action to reduce or terminate a household's benefits within the certification period, except for households voluntarily switching program participation from the Food Distribution Program to the Food Stamp Program, State agencies shall provide the household timely and adequate advance notice before the adverse action is taken. The notice must be issued within 10 days of determining that an adverse action is warranted. The adverse action must take effect with the next scheduled distribution of commodities that follows the expiration of the advance notice period, unless the household requests a fair hearing.

(B) In State agencies that have elected joint public assistance or general assistance and Food Distribution processing, the notice of adverse action shall be considered timely if the advance notice period conforms to that period of time defined by the State agency as an adequate notice period for its public or general assistance caseload, provided that the period includes at least 10 days from the date the notice is mailed to the date upon which the action becomes effective. In circumstances other than joint processing, the advance notice shall be considered timely if the advance notice period includes at least 10 days from the date the notice is issued to the date upon which the action becomes effective.

(C) The notice of adverse action must include the following in easily understandable language:

(*1*) The reason for the adverse action;

(*2*) The date the adverse action will take effect;

(*3*) The household's right to request a fair hearing and continue to receive benefits pending the outcome of the fair hearing;

(*4*) The date by which the household must request the fair hearing;

(*5*) The liability of the household for any overissuances received while awaiting the outcome of the fair hearing, if the fair hearing official's decision is adverse to the household;

(*6*) The telephone number and address of someone to contact for additional information; and

(*7*) The telephone number and address of an individual or organization that provides free legal representation, if available.

(D) The State agency shall continue distribution of commodities to the household after the end of the adverse notice period if the household requests a fair hearing during the advance notice period.

(E) If the State agency determines that a household received more USDA commodities than it was entitled to receive, it must establish a claim against the household in accordance with § 253.9. The initial demand letter for repayment must be provided to the household at the same time the notice of adverse action is issued. It may be combined with the notice of adverse action.(c) *Reporting changes.* (1) Certified households are required to report changes in household composition and income which would necessitate a change in the determination of eligibility. To facilitate reporting changes in income each certified household shall be advised at the time of certification what the maximum monthly income limit, as defined in § 253.6(e)(1), is for its size household, and shall be required to report any change in income that goes above that limit to the certification office within ten days after the change becomes known to the household. Households must also report within ten days when cash on hand, money in checking or savings accounts, savings certificates, stocks, or bonds, or other readily negotiable instruments exceeds $1,750. The State agency shall develop the procedures for when and how changes in household circumstances are reported. Changes reported over the telephone or in person shall be acted on in the same manner as those reported in writing.

(2) If the State agency determines that the household is no longer eligible or reduces the amount of commodities due the household because the household has lost a member or members, the State agency shall provide the household with a notice of adverse action not later than ten days after the change is reported. If the reported change increases the amount of commodities due the household, the household shall be notified that the increase shall be effective not later than the month following the date the change was reported.

(d) *Recertification.* (1) The State agency shall develop a procedure for notifying the household prior to or shortly after the end of its certification period that the household must reapply and be recertified for continued participation. Households shall also be notified of the date upon which termination from participation will be effective should the household fail to reapply before the expiration of the certification period.

(2) The State agency shall approve or deny a household's application for recertification and notify the household of that determination prior to the expiration of the household's current certification period. Households applying for recertification in the last month of the current certification period must be provided an opportunity to obtain commodity distribution on an uninterrupted basis.

(3) The State agency shall continue distribution of commodities to the household denied at the point of recertification if the household timely requests a fair hearing.

(e) *Controls for dual participation*—(1) *Prohibition on dual participation.* No household shall be allowed to participate simultaneously in the Food Stamp Program and Food Distribution Program. The State agency shall inform each applicant household of this prohibition and shall develop a method to detect dual participation. The method developed by the State agency shall, at a minimum, employ lists of currently certified households provided by and provided to the appropriate food stamp agency on a monthly basis. The State agency may also employ computer checks, address checks and telephone calls to prevent dual participation. The State agency shall coordinate with the appropriate food stamp agency or agencies in developing controls for dual participation.

(2) *Choice of programs.* Households eligible for either the Food Stamp Program or Food Distribution Program on reservations on which both programs are available may elect to participate in either program. Such households may elect to participate in one program, and subsequently elect the other at the end of the certification period. Households may also elect to switch from one program to the other program within a certification period only by terminating their participation, and notifying the State agency of their intention to switch programs. Households certified in either the Food Distribution or Food Stamp Program on

the first day of the month can only receive benefits in the program for which they are currently certified during that month. At the point the household elects to change programs the household should notify the State agency of its intent to switch programs, and should file an application for the program in which it wishes to participate. Households voluntarily withdrawing from one program with the intent of switching to the other shall have their eligibility terminated for the program in which they are currently certified on the last day of the month in which the household notifies the State agency of its intent to change programs. Entitlement in the program for which a household is now filing an application, if all eligibility criteria are met, would begin in the month following the month of termination in the previous program.

(f) *Treatment of disqualified household members.* (1) The following are not eligible to participate in the Food Distribution Program:

(i) Household members disqualified from the Food Distribution Program for an intentional program violation under § 253.8. These household members may participate, if otherwise eligible, in the Food Distribution Program once the period of disqualification has ended.

(ii) Household members disqualified from the Food Stamp Program for an intentional program violation under § 273.16 of this chapter. These household members may participate, if otherwise eligible, in the Food Distribution Program once the period of disqualification under the Food Stamp Program has ended. The State agency must, in cooperation with the appropriate food stamp agency, develop a procedure that ensures that these household members are identified.

(iii) Households disqualified from the Food Distribution Program for failure to pay an overissuance claim. The circumstances under which a disqualification is allowed for such failure are specified in FNS Handbook 501.

(2) During the time a household member is disqualified, the eligibility and food distribution benefits of any remaining household members will be determined as follows:

(i) *Resources.* The resources of the disqualified member will continue to count in their entirety to the remaining household members.

(ii) *Income.* A pro rata share of the income of the disqualified member will be counted as income to the remaining members. This pro rata share is calculated by dividing the disqualified member's earned (less the 20 percent earned income deduction) and unearned income evenly among all household members, including the disqualified member. All but the disqualified member's share is counted as income to the remaining household members.

(iii) *Eligibility and benefits.* The disqualified member will not be included when determining the household's size for purposes of assigning food distribution benefits to the household or for purposes of comparing the household's net monthly income with the income eligibility standards.

(g) *Joint processing PA/GA.* (1) State agencies which are responsible for and administer both the Food Distribution and public assistance (PA) or general assistance (GA) programs on Indian reservations may allow a household to apply for the Food Distribution Program at the same time the household applies for PA or GA benefits. However, while PA households are categorically eligible, GA households except for those households in GA programs which have been determined by FNS to have criteria of need the same as, or similiar to those under federally aided public assistance programs as provided for in § 253.6(c)(2) shall have their eligibility for commodities based solely on Food Distribution eligibility criteria. All criteria provided in this paragraph (f), are applicable to State agencies which administer both the Food Distribution and assistance programs and which elect joint processing. Under joint processing, the State agency shall use joint application forms that contain all the information needed to determine eligibility for commodities or shall attach a form for the other needed information.

(2) The State agency shall process all applications for PA or GA as applications for the Food Distribution Program as well, unless the household

clearly indicates on a space on the application that the household does not want commodities. The State agency shall conduct a single interview for PA or GA and Food Distribution Program eligibility, unless the State agency is unable to do so within the Food Distribution Program processing standards specified in paragraphs (a)(7) and (a)(9)of this section. In such cases the State agency shall provide separate certification for PA or GA and Food Distribution Program eligibility.

(3) The State agency may verify those factors of eligibility which must be verified for PA or GA, under PA or GA rules, but must follow the Food Distribution Program rules for all other factors.

(4) PA households have the same reporting requirements as any other food distribution household. PA households which report a change in circumstances to the PA worker shall be considered to have reported the change for food distribution purposes. All of the requirements pertaining to reporting changes for PA households shall be applied to GA households in project areas where GA and food distribution cases are processed jointly.

(5) The State agency must follow all Food Distribution Program timeliness rules for certification of households for the Food Distribution Program.

(h) *Fair hearing*—(1) *Availability of hearings*. The State agency shall provide a fair hearing to any household aggrieved by any action of the State agency which affects the participation of the household in the Food Distribution Program.

(2) *Timely action on hearings*—(i) *Time frames for the State agency*. The State agency must conduct the hearing, arrive at a decision, and notify the household of the decision within 60 days of receipt of a request for a fair hearing. The fair hearing decision may result in a change in the household's eligibility or the amount of commodities issued to the household based on household size. The State agency must implement these changes to be effective for the next scheduled distribution of commodities following the date of the fair hearing decision. If the commodities are normally made available to the household within a specific period of time (for example, from the first day of the month through the tenth day of the month), the effective date of the disqualification will be the first day of that period.

(ii) *Household requests for postponement*. The household may request and is entitled to receive, a postponement of the scheduled hearing. The postponement shall not exceed 30 days and, the time limit for action on the decision may be extended for as many days as the hearing is postponed.

(3) *Notification of right to request hearing*. At the time of application, each household shall be informed of its right to a hearing, of the method by which a hearing may be requested, and that its case may be presented by a household member or a representative, such as a legal counsel, a relative, a friend or other spokesperson. If there is an individual or organization available which provides free legal representation, the household shall also be informed of the availability of that service. Hearing procedures shall be published by the State agency and made available to any interested party.

(4) *Time period for requesting hearing*. A household shall be allowed to request a hearing on any action by the State agency which occurred in the prior 90 days or which affects current benefits.

(5) *Request for hearing*. A request for a hearing is any clear expression, oral or written, by the household or its representative to the State agency that it wishes to present its case to a higher authority. The freedom to make such a request shall not be limited or interfered with in any way. Upon request, the State agency shall make available without charge the specific materials necessary for a household or its representative to determine whether a hearing should be requested or to prepare for a hearing.

(6) *Denial or dismissal of request for hearing*. The State agency shall not deny or dismiss a request for a hearing unless:

(i) The request is not received within the time period specified in paragraph (g)(4) of this section;

(ii) The request is withdrawn in writing by the household or its representative; or

(iii) The household or its representative fails, without good cause, to appear at the scheduled hearing.

(7) *Notification of time and place of hearing*. The time, date and place of the hearing shall be convenient to the household. At least 15 days prior to the hearing, advance written notice shall be provided to all parties involved to permit adequate preparation of the case. The notice shall:

(i) Advise the household or its representative of the name, address, and the phone number of the person to notify in the event it is not possible for the household to attend the scheduled hearing.

(ii) Specify that the State agency will dismiss the hearing request if the household or its representative fails to appear for the hearing without good cause.

(iii) Include the State agency hearing procedures and any other information that would provide the household with an understanding of the proceedings, and that would contribute to the effective presentation of the household's case.

(iv) Explain that the household or representative may examine the casefile prior to the hearing.

(8) *Hearing official*. Hearings shall be conducted by an impartial official(s), designated by the State agency, who does not have any personal interest or involvement in the case and who was not directly involved in the initial determination of the action which is being contested. The hearing official shall:

(i) Administer oaths or affirmations if required by the State;

(ii) Ensure that all relevant issues are considered;

(iii) Request, receive and make part of the record all evidence determined necessary to decide the issues being raised;

(iv) Regulate the conduct and course of the hearing consistent with due process to ensure an orderly hearing; and

(v) Render a hearing decision in the name of the State agency, in accordance with paragraph (g)(11) of this section, which will resolve the dispute.

(9) *Attendance at hearing*. The hearing shall be attended by a representative of the State agency which initiated the action being contested and by the household and/or its representative. The hearing may also be attended by friends or relatives of the household upon household consent.

(10) *Conduct of hearing*. The household may not be familiar with the rules of order and it may be necessary to make particular efforts to arrive at the facts of the case in a manner that makes the household feel most at ease. The household or its representative must be given adequate opportunity to:

(i) Examine all documents and records to be used at the hearing at a reasonable time before the date of the hearing, as well as during the hearing. The contents of the casefile, including the application forms and documents of verification used by the State agency shall be made available, provided the confidential information is protected from release. The State agency shall provide a free copy of the relevant portions of the casefile if requested by the household or its representative. Confidential information that is protected from release and other documents or records which the household will not otherwise have an opportunity to contest or challenge shall not be introduced at the hearing or affect the hearing official's decision.

(ii) Present the case or have it presented by a legal counsel or other person.

(iii) Bring witnesses.

(iv) Advance arguments without undue interference.

(v) Question or refute any testimony or evidence, including an opportunity to confront and cross-examine adverse witnesses.

(vi) Submit evidence to establish all pertinent facts and circumstances in the case.

(11) *Hearing decisions*. (i) Decisions of the hearing officials shall comply with Federal law or regulations and shall be based on the hearing record. The verbatim transcript or recording of testimony and exhibits or an official report containing the substance of what transpired at the hearing, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for a final decision by the hearing official.

(ii) A decision by the hearing official shall be binding on the State agency and shall summarize the facts of the case, specify the reasons for the decision and identify the supporting evidence and the pertinent FNS regulations. The decision shall become a part of the record.

(iii) Within 10 days of the date the fair hearing decision is issued, the State agency must issue a notice to the household advising it of the decision.

(A) If the decision upheld the adverse action by the State agency, the notice must advise the household of the right to pursue judicial review.

(B) If the decision upheld a disqualification, the notice must also include the reason for the decision, the date the disqualification will take effect, and the duration of the disqualification (that is, 12 months; 24 months; or permanent). The State agency must also advise any remaining household members if the household's benefits will change, or if the household is no longer eligible as a result of the disqualification.

(iv) The State agency must revise the demand letter for repayment issued previously to the household to include the value of all overissued commodities provided to the household during the appeal process, unless the fair hearing decision specifically requires the cancellation of the claim. The State agency must also advise the household that collection action on the claim will continue, in accordance with FNS Handbook 501, unless suspension is warranted.

(12) *Agency conferences.* (i) The State agency shall offer agency conferences to households which request an immediate resolution by a higher authority of a denial of eligibility for food distribution benefits. The State agency may also offer agency conferences to households adversely affected by any agency action. The State agency shall advise households that use of an agency conference is optional and that such use shall in no way delay or replace the fair hearing process. The agency conferences may be attended by the eligibility worker responsible for the agency action, and shall be attended by an eligibility supevisor and/or the agency director, as well as the household and/or its representative. An agency conference may lead to an informal resolution of the dispute. However, a fair hearing must still be held if requested by the household.

(ii) An agency conference for households requesting an immediate resolution by a higher authority of an eligibility issue shall be scheduled within four working days of the request unless the household requests that it be scheduled later or states that it does not wish to have an agency conference.

(Approved by the Office of Management and Budget under control number 0584–0071)

(44 U.S.C. 3506)

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§ 253.8 Administrative disqualification procedures for intentional program violation.

(a) *What is an intentional program violation?* An intentional program violation is considered to have occurred when a household member knowingly, willingly, and with deceitful intent:

(1) Makes a false or misleading statement, or misrepresents, conceals, or withholds facts in order to obtain Food Distribution Program benefits which the household is not entitled to receive; or

(2) Commits any act that violates a Federal statute or regulation relating to the acquisition or use of Food Distribution Program commodities.

(b) *What are the disqualification penalties for an intentional program violation?* Household members determined by the State agency to have committed an intentional program violation will be ineligible to participate in the program:

(1) For a period of 12 months for the first violation;

(2) For a period of 24 months for the second violation; and

(3) Permanently for the third violation.

(c) *Who can be disqualified?* Only the household member determined to have committed the intentional program violation can be disqualified. However, the disqualification may affect the eligibility of the household as a whole, as

addressed under paragraphs (e)(5) and (h) of this section.

(d) *Can the disqualification be appealed?* Household members determined by the State agency to have committed an intentional program violation may appeal the disqualification, as provided under § 253.7(h)(1).

(e) *What are the State agency's responsibilities?*

(1) Each State agency must implement administrative disqualification procedures for intentional program violations that conform to this section.

(2) The State agency must inform households in writing of the disqualification penalties for intentional program violations each time they apply for benefits, including recertifications. This notice must also advise households that an intentional program violation may be referred to authorities for prosecution.

(3) The State agency must attempt to substantiate all suspected cases of intentional program violation. An intentional program violation is considered to be substantiated when the State agency has clear and convincing evidence demonstrating that a household member committed one or more acts of intentional program violation, as defined in paragraph (a) of this section.

(4) Within 10 days of substantiating that a household member has committed an intentional program violation, the State agency must provide the household member with a notice of disqualification, as described in paragraph (f) of this section. A notice must still be issued in instances where the household member is not currently eligible or participating in the program.

(5) The State agency must advise any remaining household members if the household's benefits will change or if the household will no longer be eligible as a result of the disqualification.

(6) The State agency must provide the household member to be disqualified with an opportunity to appeal the disqualification through a fair hearing, as required by § 253.7(h).

(7) The State agency must refer all substantiated cases of intentional program violations to Tribal, Federal, State, or local authorities for prosecution under applicable statutes. However, a State agency that has conferred with its legal counsel and prosecutors to determine the criteria for acceptance for possible prosecution is not required to refer cases that do not meet the prosecutors' criteria.

(8) The State agency must establish claims, and pursue collection as appropriate, on all substantiated cases of intentional program violation in accordance with § 253.9.

(f) *What are the requirements for the notice of disqualification?*

(1) Within 10 days of substantiating the intentional program violation, the State agency must issue to the household member a notice of disqualification. The notice must allow an advance notice period of at least 10 days. The disqualification must begin with the next scheduled distribution of commodities that follows the expiration of the advance notice period, unless the household member requests a fair hearing. A notice must still be issued in instances where the household member is not currently eligible or participating in the program.

(2) The notice must conform to the requirements of § 253.7(b)(3)(iii)(C) for notices of adverse action.

(g) *What are the appeal procedures for administrative disqualifications?*

(1) *Appeal rights.* The household member has the right to request a fair hearing to appeal the disqualification in accordance with the procedures at § 253.7(h).

(2) *Notification of hearing.* The State agency must provide the household member with a notification of the time and place of the fair hearing as described in § 253.7(h)(7). The notice must also include:

(i) A warning that if the household member fails to appear at the hearing, the hearing decision will be based solely on the information provided by the State agency; and

(ii) A statement that the hearing does not prevent the Tribal, Federal, State, or local government from prosecuting the household member in a civil or criminal court action, or from collecting any overissuance(s).

(h) *What are the procedures for applying disqualification penalties?*

(1) If the household member did not request a fair hearing, the disqualification must begin with the next scheduled distribution of commodities that follows the expiration of the advance notice period of the notice of adverse action. If the commodities are normally made available to the household within a specific period of time (for example, from the first day of the month through the tenth day of the month), the effective date of the disqualification will be the first day of that period. The State agency must apply the disqualification period (that is, 12 months, 24 months, or permanent) specified in the notice of disqualification. The State agency must advise any remaining household members if the household's benefits will change or if the household is no longer eligible as a result of the disqualification.

(2) If the household member requested a fair hearing and the disqualification was upheld by the fair hearing official, the disqualification must begin with the next scheduled distribution of commodities that follows the date the hearing decision is issued. If the commodities are normally made available to the household within a specific period of time (for example, from the first day of the month through the tenth day of the month), the effective date of the disqualification will be the first day of that period. The State agency must apply the disqualification period (that is, 12 months, 24 months, or permanent) specified in the notice of disqualification. No further administrative appeal procedure exists after an adverse fair hearing decision. The decision by a fair hearing official is binding on the State agency. The household member, however, may seek relief in a court having appropriate jurisdiction. As provided under § 253.7(h)(11)(iii)(B), the State agency must advise any remaining household members if the household's benefits will change, or if the household is no longer eligible as a result of the disqualification.

(3) Once a disqualification has begun, it must continue uninterrupted for the duration of the penalty period (that is, 12 months; 24 months; or permanent). Changes in the eligibility of the disqualified household member's household will not interrupt or shorten the disqualification period.

(4) The same act of intentional program violation continued over a period of time will not be separated so that more than one penalty can be imposed. For example, a household intentionally fails to report that a household member left the household, resulting in an overissuance of benefits for 5 months. Although the violation occurred over a period of 5 months, only one penalty will apply to this single act of intentional program violation.

(5) If the case was referred for Tribal, Federal, State, or local prosecution and the court of appropriate jurisdiction imposed a disqualification penalty, the State agency must follow the court order.

[64 FR 73384, Dec. 30, 1999.]

§ 253.9 Claims against households.

(a) *What are the procedures for establishing a claim against a household for an overissuance?*

(1) The State agency must establish a claim against any household that has received more Food Distribution Program commodities than it was entitled to receive.

(2) The procedures for establishing and collecting claims against households are specified in FNS Handbook 501, The Food Distribution Program on Indian Reservations.

(b) *Who is responsible for repaying a household overissuance claim?*

(1) All adult household members are jointly and separately liable for the repayment of the value of any overissuance of Food Distribution Program benefits to the household.

(2) Responsibility for repayment continues even in instances where the household becomes ineligible or is not participating in the program.

[64 FR 73385, Dec. 30, 1999]

§ 253.10 Commodity control, storage and distribution.

(a) *Control and accountability*. The State agency shall be responsible for the issuance of commodities to households and the control of and accountability for the commodities upon its acceptance of the commodities at time and place of delivery.

(b) *Commodity inventories.* The State agency shall, in cooperation with the FNS Regional office, develop an appropriate procedure for determining and monitoring the level of commodity inventories at central commodity storage facilities and at each local distribution point. The State agency shall maintain the inventories at proper levels taking into consideration, among other factors, household preferences and the historical and projected volume of distribution at each site. The procedures shall provide that commodity inventories at each central storage facility and each local distribution point are not in excess, but are adequate for, an uninterrupted distribution of commodities.

(c) *Storage facilities and practices.* The State agency shall as a minimum ensure that:

(1) Adequate and appropriate storage facilities are maintained. The facilities shall be clean and neat and safe-guarded against theft, damage, insects, rodents and other pests.

(2) Department recommended dunnage, stacking and ventilation methods are followed.

(3) Commodities are stacked in a manner which facilitates an accurate inventory.

(4) Commodities are issued on a first-in, first-out basis.

(5) Commodities held in storage for a protracted period of time are reinspected prior to issuance.

(6) Out-of-condition commodities are disposed of in accordance with Department approved methods.

(7) Notification is provided to certified households of the location of distribution sites and days and hours of distribution.

(8) An adequate supply of commodities which are available from the Department is on hand at all distribution sites.

(9) Sufficient distribution sites, either stationary or mobile, are geographically located or routed in relation to population density of eligible households.

(10) Days and hours of distribution are sufficient for caseload size and convenience.

(11) Households are advised they may refuse any commodity not desired, even if the commodities are prepackaged by household size.

(12) Emergency issuance of commodities will be made to households certified for expedited service in accordance with the provisions of § 253.7(a)(9).

(13) Eligible households or authorized representatives are identified prior to the issuance of commodities.

(14) Authorized signatures are obtained for commodities issued and the issue date recorded.

(15) Posters are conspicuously displayed advising program participants to accept only those commodities, and in such quantities, as will be consumed by them.

(16) Complete and current records are kept of all commodities received, issued, transferred, and on hand and of any inventory overages, shortages, and losses.

(17) A list of commodities offered by the Department is displayed at distribution sites so that households may indicate preferences for future orders.

(d) *Distribution.* The State agency shall distribute commodities only to households eligible to receive them under this part. If the State agency uses any other agency, administration, bureau, service or similar organization to effect or assist in the certification of households or distribution of commodities, the State agency shall impose upon such organization responsibility for determining that households to whom commodities are distributed are eligible under this part. The State agency shall not delegate to any such organization its responsibilities to the Department for overall management and control of the Food Distribution Program.

(e) *Improper distribution or loss of or damage of commodities.* State agencies shall take action to obtain restitution in connection with claims arising in their favor for improper distribution, use or loss, or damage of commodities in accordance with § 250.13 and § 250.15 of this chapter.

(f) *Damaged or out-of-condition commodities.* The State agency shall immediately notify the appropriate Food and Nutrition Service Regional Office (FNSRO) if any commodities are found to be damaged or out-of-condition at

the time of arrival, or at any subsequent time, whether due to latent defects or any other reason. FNSRO shall advise the State agency of the appropriate action to be taken with regard to such commodities. If the commodities are declared unfit for human consumption in accordance with § 250.13(f) of this chapter, they shall be disposed of as provided for under that section. When out-of-condition commodities do not create a hazard to other food at the same location, they shall not be disposed of until FNSRO or the responsible commodity contractor approves. When circumstances require prior disposal of a commodity, the quantity and manner of disposition shall be reported to the appropriate FNSRO. If any damaged or out-of-condition commodities are inadvertently issued to a household and are rejected or returned by the household because the commodities were unsound at the time of issuance and not because the household failed to provide proper storage, care or handling, the State agency shall replace the damaged or out-of-condition commodities with the same or similar kind of commodities which are sound and in good condition. The State agency shall account for such replacements on its monthly inventory report.

(Approved by the Office of Management and Budget under control number 0584–0071)

(44 U.S.C. 3506)

[44 FR 35928, June 19, 1979, as amended at 47 FR 746, Jan. 7, 1982. Redesignated by Amdt. 1, 47 FR 14137, Apr. 2, 1982, and further redesignatedat 64 FR 73384, Dec. 30, 1999.]

§ 253.11 Administrative funds for State agencies.

(a) *Payments*. Within the limitation of funds available to carry out the provisions of this part, FNS shall, beginning with fiscal year 1980, make available to each State agency 75 percent of approved administrative costs. Any approval for payment of funds in excess of 75 percent shall be based on compelling justification that such additional amounts are necessary for the effective operation of the Food Distribution Program on an Indian reservation. Compelling justification may include, but not be limited to, such factors as the need for a larger Federal contribution during a State agency's first year of operation of the program, and the need to assure that no State agency currently operating the program receives a level of funding that would cause a diminution of program services. Administrative costs must be included in annual or revised budget information submitted by the State agency to FNS for approval prior to the contribution of Federal funds. Administrative costs must be allowable under part 277 of this chapter.

(b) *Use of funds by State agencies*. Any funds received under this section shall be used for any costs which are allowable under part 277 of this chapter and which are incurred in operating the Food Distribution Program for households on a reservation. The value of services rendered by volunteers, part 277 notwithstanding, shall be allowable to meet the matching administrative costs requirements for the Food Distribution Program. In no event shall such funds be used to pay any portion of such expenses if reimbursement or payment therefor is claimed or made available from any other Federal source. State agencies shall also adhere to the provisions of part 277 of this chapter, as apply to the Food Distribution Program, which establish:

(1) Uniform requirements for the adminstration of funds to State agencies; and

(2) Principles for determining costs applicable to activities assisted by the Food Stamp Program funds provided to State agencies. The provisions of part 277 are generally adaptable to this section and the appropriate provisions shall be used in complying with paragraphs (b) and (f) of this section.

(c) *Application for funds*. (1) Any State agency administering a Food Distribution Program that desires to receive administrative funds under this section shall submit form SF–424, ''Application for Federal Assistance,'' to the appropriate FNS Regional Office at least three months prior to the beginning of a Federal fiscal year. The application shall include budget information, reflecting by category of expenditure the State agency's best estimate of the total amount to be expended in the administration of the program during the fiscal year. FNS may require that detailed information be submitted by the

State agency to support or explain the total estimated amounts shown for each budget cost category. As required by 7 CFR part 3015, Subpart V, agencies of State government shall submit the application for Federal assistance to the State clearinghouse before submitting it to the FNSRO. ITOs shall not be subject to this requirement.

(2) Approval of the application by FNS shall be a prerequisite to the payment of any funds to State agencies.

(d) *Availability of funds.* (1) FNS shall review and evaluate the budget information submitted by the State agency in relationship to the State agency's plan of operation and any other factors which may be relevant to FNS' determination as to whether the estimated expenditures itemized by budget category are reasonable and justified. FNS shall give written notification to the State agency of (i) its approval or disapproval of any or all of the itemized expenditures, (ii) the amount of funds which will be made available, and (iii) the period for which funds are available.

(2) FNS shall review and evaluate applications submitted by State agencies for administrative funds available under this section in the following order of priority and shall give preference in making payments of funds under this section in the same order of priority:

(i) Applications from State agencies which desire to continue a Food Distribution Program now in operation,

(ii) Applications from State agencies, in the order received, which FNS determines are immediately capable of effectively and efficiently administering the Program, and

(iii) Applications from other States agencies, in the order received.

(e) *Method of payment to State agencies.* (1) Payments are made to State agencies through a Letter of Credit or an advance by Treasury check. The Letter of Credit funding method shall be used by FNS except when the advances to be made within a 12 month period are estimated to be less than $120,000. However, FNS may, at its option, reimburse a State agency by Treasury check regardless of the amount in response to a valid claim submitted by the State agency.

(2) The Letter of Credit funding method shall be done in conjunction with Treasury Department procedures, Treasury Circular No. 1075 and through an appropriate Treasury Regional Disbursing Office (RDO). The Standard Form 183, ''Request for Payment on Letter of Credit and Status of Funds Report,'' shall be correctly prepared and certified by a duly appointed official of the State for requesting payment from an RDO.

(3) The advance by Treasury check method shall be done by use of the Standard Form 270, ''Request for Advance or Reimbursement,'' and procedures associated with its use. State agencies receiving payments under this method may request payments before cash outlays are made.

(4) Any State agency receiving payment under the Letter of Credit method or the advance by Treasury check method shall have in place and in operation, a financial management system which meets the standards for fund control and accountability prescribed in part 277 of this chapter, as amended. The State agency shall demonstrate on a continuing basis its willingness and ability to have and to function within procedures that will minimize the time lapse between the transfer of funds and its disbursement to meet obligations. For any State agency which does not meet the requirement of this paragraph, the reimbursement by Treasury check method shall be the preferred method for FNS to make payments to that State agency.

(f) *Accounting for funds.* Each State agency which receives administrative funds under this section shall establish and maintain an effective system of fiscal control and accounting procedures. Expenditures and accountability of such funds shall be in accordance with the appropriate provisions of part 277. The accounting procedures maintained by the State agency shall be such as to accurately reflect the receipt, expenditure and current balance of funds provided by FNS and to facilitate the prompt preparation of reports required by FNS. The accounting procedures shall also provide for segregation of costs specifically identifiable to the Food Distribution Program from any other costs incurred by the State

agency. Any budget revisions by a State agency which require the transfer of funds from an approved cost category to another shall be in accordance with the budget revision procedures set forth in OMB Circular No. A–102, Attachment K, and shall be approved by FNS prior to any transfer of funds.

(g) *Return, reduction, and reallocation of funds.* (1) FNS may require State agencies to return prior to the end of the fiscal year any or all unobligated funds received under this section, and may reduce the amount it has apportioned or agreed to pay to any State agency if FNS determines that:

(i) The State agency is not administering the Food Distribution Program in accordance with its plan of operation approved by FNS and the provisions of this part, or

(ii) The amount of funds which the State agency requested from FNS is in excess of actual need, based on reports of expenditures and current projections of Program needs.

(iii) Circumstances or conditions justify the return reallocation or transfer of funds to accomplish the purpose of this part.

(2) The State agency shall return to FNS within 90 days following the close of each Federal fiscal year any funds received under this section which are unobligated at that time.

(h) *Records, reports, audits.* (1) The State agency shall:

(i) Keep such accounts and records as may be necessary to enable FNS to determine whether there has been compliance with this section, and

(ii) Adhere to the retention and custodial requirements for records set forth in § 277.4 of this chapter.

(2) The State agency receiving funds either through a Treasury RDO Letter of Credit system or Treasury check shall submit quarterly reports to FNS on Form SF–269, ''Financial Status Report,'' by the 30th day after close of the reporting quarter and shall submit such other reports as may be required by FNS.

(3) The appropriate provisions of part 277 are adaptable to this section for additional guidance.

(Approved by the Office of Management and Budget under control number 0584–0071)

(44 U.S.C. 3506)

[44 FR 35928, June 19, 1979, as amended at 47 FR 746, Jan. 7, 1982. Redesignated and amended by Amdt. 1, 47 FR 14137, Apr. 2, 1982, as amended at 62 FR 53731, Oct. 16, 1997. Redesignated at 64 FR 73385, Dec. 30, 1999.]

PART 254—ADMINISTRATION OF THE FOOD DISTRIBUTION PROGRAM FOR INDIAN HOUSEHOLDS IN OKLAHOMA

Sec.
254.1 General purpose.
254.2 Definitions.
254.3 Administration by an ITO.
254.4 Application by an ITO.
254.5 Household eligibility.

AUTHORITY: Pub. L. 97–98, sec. 1338; Pub. L. 95–113.

SOURCE: 49 FR 32756, Aug. 16, 1984, unless otherwise noted.

§ 254.1 General purpose.

This part sets the requirement under which commodities (available under part 250 of this chapter) may be distributed to households residing in FNS service areas in Oklahoma. This part also sets the conditions for administration of the Food Distribution Program by eligible Oklahoma tribes determined capable by the Department.

§ 254.2 Definitions.

(a) *Exercises governmental jurisdiction* means the exercise of authorities granted to ITOs under the Oklahoma Indian Welfare Act of 1936 or by BIA regulations (25 CFR part 81 et. seq.).

(b) *FNS service area* means the areas over which FNS has approved the food distribution program in Oklahoma, excluding urban places unless approved by FNS under 254.5(b).

(c) *Food Distribution Program* means a food distribution program for households on Indian reservations administered pursuant to section 4(b) of the

Food Stamp Act and 1304(a) of Pub. L. 97–98.

(d) *Indian tribal household* means a household in which at least one household member is recognized as a tribal member by any Indian tribe, as defined in § 253.2(d) of this title.

(e) *Indian tribal organization (ITO)* means (1) any Indian tribe, band, or group organized under the Oklahoma Indian Welfare Act of 1936, and which has a tribal organization approved by the Bureau of Indian Affairs; (2) a tribal organization established and approved under Federal regulations issued by the Bureau of Indian Affairs; or (3) an intertribal council authorized by eligible tribes to act in behalf of the tribes to operate the program.

(f) *Overissuance* means the dollar value of commodities issued to a household that exceeds the dollar value of commodities it was eligible to receive.

(g) *State agency* means the ITO of an Indian tribe, determined by the Department to be capable of effectively administering a Food Distribution Program, or an agency of State government, which enters into an agreement with FNS for the distribution of commodities on an Indian reservation.

(h) *Urban place* means a town or city with a population of 10,000 or more.

[49 FR 32756, Aug. 16, 1984, as amended at 59 FR 1449, Jan. 11, 1994; 64 FR 73385, Dec. 30, 1999]

§ 254.3 Administration by an ITO.

(a) *Applicability of part 253.* All of the provisions of part 253 are herein incorporated and apply to part 254, except as specifically modified by part 254.

(b) Section 253.4 Administration, does not apply and is replaced by § 254.3.

(c) *Federal administration.* Within the Department of Agriculture, the Food and Nutrition Service (FNS), shall be responsible for the Food Distribution Program. FNS shall have the power to determine the amount of any claim and to settle and adjust any claim against an ITO.

(d) *ITO administration.* The ITO, acting as State agency, shall be responsible for the Food Distribution Program within the approved FNS service areas if FNS determines the ITO capable of effective and efficient administration.

(e) *Qualification as an ITO.* The ITO of a tribe in Oklahoma must document to the satisfaction of FNS that the ITO meets the definition of an ITO in § 254.2, is organized under the provisions of the Oklahoma Indian Welfare Act of 1936 or has a tribal organization established and approved under BIA regulations.

(The information collection requirements contained in paragraph (e) were approved by the Office of Management and Budget under control number 0584–0316)

§ 254.4 Application by an ITO.

(a) *Application to FNS Regional Office.* An ITO which desires to participate in the Food Distribution Program shall file an application with the FNS Regional Office. The application shall also provide other information requested by FNS, including but not limited to, the tribe's qualification as a reservation as described in § 254.2, paragraph (f). Properly addressed applications shall be acknowledged by the FNS Regional Office in writing within five working days of receipt. FNS shall promptly advise ITOs of the need for additional information if an incomplete application is received.

(b) *Tribal capability.* (1) In determining whether the ITO is potentially capable of effectively and efficiently administering a Food Distribution Program in an FNS Service area, allowing for fulfillment of that potential through training and technical assistance, FNS shall consult with other sources such as the BIA, and shall consider the ITO experience, if any, in operating other government programs, as well as its management and fiscal capabilities. Other factors for evaluation include, but are not limited to, the ITO's ability to:

(i) Order and properly store commodities,

(ii) Certify eligible households,

(iii) Arrange for physical issuance of commodities,

(iv) Keep appropriate records and submit required reports,

(v) Budget and account for administrative funds,

(vi) Determine the food preferences of households, and

(vii) Conduct on-site reviews of certification and distribution procedures and practices.

(2) FNS shall make a determination of potential ITO capability within 60 days of receipt of a completed application for the Food Distribution Program. FNS may, however, extend the period for determination of ITO capability if FNS finds that a given ITO's eligibility under § 254.3 is difficult to establish.

(3) FNS shall, if requested by an ITO which has been determined by FNS to be potentially capable of administering a Food Distribution Program, provide the ITO's designees with appropriate training and technical assistance to prepare the ITO to take over program administration. In determining what training and technical assistance are necessary, FNS shall consult with the ITO and other sources, such as the BIA.

(c) *Most capable tribe.* In cases where two or more applicant tribe(s) have overlapping boundaries, FNS shall select the tribe most capable of administering a FDP within that service area.

(The information collection requirements contained in paragaph (a) were approved by the Office of Management and Budget under control number 0584–0316)

§ 254.5 Household eligibility.

(a) *Certification procedures.* All applicant households shall be certified in accordance with the eligibility and certification provisions in § 253.6 and § 253.7.

(b) *Urban places.* No household living in an urban place in Oklahoma shall be eligible for the Food Distribution Program on Indian Reservations. However, an ITO can request the Department to grant individual exemptions from this limitation upon proper justification submitted by the ITO as determined by FNS.

(c) *Eligible households.* Only Indian tribal households, as defined in § 254.2, may be eligible for the Food Distribution Program in FNS service areas.

(The information collection requirements contained in paragraph (a) were approved by the Office of Management and Budget under control number 0584–0316)

[49 FR 32756, Aug. 16, 1984, as amended at 64 FR 1098, Jan. 8, 1999]

SUBCHAPTER C—FOOD STAMP AND FOOD DISTRIBUTION PROGRAM

EDITORIAL NOTE: Nomenclature changes to subchapter C appear by Amdt. 381, 65 FR 64586, Oct. 30, 2000

PART 271—GENERAL INFORMATION AND DEFINITIONS

Sec.
271.1 General purpose and scope.
271.2 Definitions.
271.3 Delegations to FNS for administration.
271.4 Delegations to State agencies for administration.
271.5 Coupons as obligations of the United States, crimes and offenses.
271.6 Complaint procedure.
271.7 Allotment reduction procedures.
271.8 Information collection/recordkeeping—OMB assigned control numbers.

AUTHORITY: 7 U.S.C. 2011–2036.

§ 271.1 General purpose and scope.

(a) *Purpose of the food stamp program.* The food stamp program is designed to promote the general welfare and to safeguard the health and well being of the Nation's population by raising the levels of nutrition among low-income households. Section 2 of the Food Stamp Act of 1977 states, in part:

> Congress hereby finds that the limited food purchasing power of low-income households contributes to hunger and malnutrition among members of such households. Congress further finds that increased utilization of food in establishing and maintaining adequate national levels of nutrition will promote the distribution in a beneficial manner of the Nation's agricultural abundance and will strengthen the Nation's agricultural economy, as well as result in more orderly marketing and distribution of foods. To alleviate such hunger and malnutrition, a food stamp program is herein authorized which will permit low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power for all eligible households who apply for participation.

(b) *Scope of the regulations.* Part 271 contains general information, definitions, and other material applicable to all parts of this subchapter. Part 272 sets forth policies and procedures governing State agencies which participate in the program. Part 273 describes the eligibility criteria to be applied by State agencies and related processing requirements and standards. Part 274 provides requirements for the issuance of coupons to eligible households and establishes related issuance responsibilities. Part 275 sets forth guidelines for monitoring the food stamp program, analyzing the results and formulating corrective action. Part 276 establishes State agency liability and certain Federal sanctions. Part 277 outlines procedures for payment of administrative costs of State agencies. Part 278 delineates the terms and conditions for the participation of retail food stores, wholesale food concerns, meal services, and insured financial institutions. Part 279 establishes the procedures for administrative and judicial reviews requested by food retailers, food wholesalers, and meal services. Part 280 explains procedures for issuing emergency coupon allotments to certain victims of disasters unable to purchase adequate amounts of food. Part 281 sets forth guidelines for designating Indian tribes as State agencies. Part 282 provides guidelines for initiation, selection, and operation of demonstration, research, and evaluation projects. Part 284 provides for a nutrition assistance program for the Commonwealth of the Northern Mariana Islands (CNMI). Part 285 describes the general terms and conditions under which grant funds are provided to the Commonwealth of Puerto Rico.

[Amdt. 132, 43 FR 47882, Oct. 17, 1982, as amended by Amdt. 216, 47 FR 23461, May 28, 1982; Amdt. 248, 48 FR 16832, Apr. 19, 1983; Amdt. 356, 59 FR 29713, June 9, 1994]

§ 271.2 Definitions.

Access device means any card, plate, code, account number, or other means of access that can be used alone, or in conjunction with another access device, to obtain payments, allotments,

benefits, money, goods, or other things of value, or that can be used to initiate a transfer of funds under the Food Stamp Act of 1977, as amended.

Active case means a household which was certified prior to, or during, the sample month and issued food stamp benefits for the sample month.

Active case error rate means an estimate of the proportion of cases with an error in the determination of eligibility or basis of issuance. This estimate will be expressed as a percentage of the completed active quality control reviews excluding all results from cases processed by SSA personnel or participating in a demonstration project identified by FNS as having certification rules that are significantly different from standard requirements.

Adequate notice in a periodic reporting system such as monthly reporting or quarterly reporting means a written notice that includes a statement of the action the agency has taken or intends to take; the reason for the intended action; the household's right to request a fair hearing; the name of the person to contact for additional information; the availability of continued benefits; and the liability of the household for any overissuances received while awaiting a fair hearing if the hearing official's decision is adverse to the household. Depending on the timing of a State's system and the timeliness of report submission by participating households, such notice may be received prior to agency action, at the time reduced benefits are received, or, if benefits are terminated, at the time benefits would have been received if they had not been terminated. In all cases, however, participants will be allowed ten days from the mailing date of the notice to contest the agency action and to have benefits restored to their previous level. If the 10-day period ends on a weekend or a holiday and a request is received the day after the weekend or holiday, the State agency shall consider the request to be timely.

Alien Status Verification Index (ASVI) means the automated database maintained by the Immigration and Naturalization Service which may be accessed by State agencies to verify immigration status.

Allotment means the total value of coupons a household is authorized to receive during each month or other time period.

Application form means: (1) The application form designed or approved by FNS, which is completed by a household member or authorized representative; or

(2) For households consisting solely of public assistance or general assistance recipients, it may also mean the application form used to apply for public assistance or general assistance, including attachments approved by FNS, which is completed by a household member or authorized represen- tative.

Assessment an in-depth evaluation of employability skills coupled with counseling on how and where to search for employment. If combined with work experience, employment search or training, an assessment of this nature could constitute part of an approvable employment and training component.

Authorization document means an intermediary document issued by the State agency and used in an issuance system to authorize a specific benefit amount for a household.

Authorization to participate card (ATP) means a document which is issued by the State agency to a certified household to show the allotment the household is authorized to receive on presentation of such document.

Base of eligibles Employment and training mandatory participants plus persons who volunteer for employment and training participation.

Base period means the first 6-month reporting period of each fiscal year.

Beginning month(s) in a Monthly Reporting and Retrospective Budgeting system means either the first month for which the household is certified for food stamps (where the State agency has adopted a one month accounting system) or the first month for which the household is certified for food stamps and the month thereafter (where the State agency has adopted a two month accounting system). Except for beginning months in sequence as described in the preceding sentences, a beginning month cannot be any month which immediately follows a month in which a household is certified. The

month following the month of termination resulting from a one-month temporary change in household circumstances shall not be considered a beginning month.

Budget month in a Monthly Reporting and Retrospective Budgeting system means the fiscal or calendar month from which the State agency uses income and other circumstances of the household to calculate the household's food stamp allotment to be provided for the corresponding issuance month.

Bulk storage point means an office of the State agency or any person, partnership, corporation, organization, political subdivision, or other entity with which a State agency has contracted for, or to which it has assigned responsibility for, the security and storage of food coupons.

Claims collection point means any office of the State agency or any person, partnership, corporation, organization, political subdivision or other entity with which a State agency has contracted, or to which it has assigned responsibility for the collection of claims.

Communal dining facility means a public or nonprofit private establishment, approved by FNS, which prepares and serves meals for elderly persons, or for supplemental security income (SSI) recipients, and their spouses, a public or private nonprofit establishment (eating or otherwise) that feeds elderly persons or SSI recipients, and their spouses, and federally subsidized housing for the elderly at which meals are prepared for and served to the residents. It also includes private establishments that contract with an appropriate State or local agency to offer meals at concessional prices to elderly persons or SSI recipients, and their spouses.

Coupon means any coupon, stamp, type of certificate, authorization card, cash or check issued in lieu of a coupon, or access device, including an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food Stamp Act of 1977, as amended, for the purchase of eligible food.

Coupon issuer means any office of the State agency or any person, partnership, corporation, organization, political subdivision, or other entity with which a State agency has contracted for, or to which it has assigned responsibility for, the issuance of coupons to households.

Deficiency means any aspect of a State's program operations determined to be out of compliance with the Food Stamp Act, FNS Regulations, or program requirements as contained in the State agency's manual, the State agency's approved Plan of Operation or other State agency plans.

Department means the U.S. Department of Agriculture.

Direct access system means an issuance system in which benefits are issued directly to the household, without the use of an intermediary document, based on the issuance agent's direct access to information in the household's individual record on the master issuance file, which may be a card document or an on-line computer system.

Drug addiction or alcoholic treatment and rehabilitation program means any drug addiction or alcoholic treatment and rehabilitation program conducted by a private, nonprofit organization or institution, or a publicly operated community mental health center, under part B of title XIX of the Public Health Service Act (42 U.S.C. 300x et seq.). Under part B of title XIX of the Public Health Service Act is defined as meeting the criteria which would make it eligible to receive funds, even if it does not actually receive funding under part B of title XIX.

Elderly or disabled member means a member of a household who: (1) Is 60 years of age or older;

(2) Receives supplemental security income benefits under title XVI of the Social Security Act or disability or blindness payments under titles I, II, X, XIV, or XVI of the Social Security Act;

(3) Receives federally or State-administered supplemental benefits under section 1616(a) of the Social Security Act provided that the eligibility to receive the benefits is based upon the disability or blindness criteria used under title XVI of the Social Security Act;

(4) Receives federally or State-administered supplemental benefits under section 212(a) of Pub. L. 93–66;

(5) Receives disability retirement benefits from a governmental agency because of a disability considered permanent under section 221(i) of the Social Security Act.

(6) Is a veteran with a service-connected or non-service-connected disability rated by the Veteran's Administration (VA) as total or paid as total by the VA under title 38 of the United States Code;

(7) Is a veteran considered by the VA to be in need of regular aid and attendance or permanently housebound under title 38 of the United States Code;

(8) Is a surviving spouse of a veteran and considered by the VA to be in need of regular aid and attendance or permanently housebound or a surviving child of a veteran and considered by the VA to be permanently incapable of self-support under title 38 of the United States Code;

(9) Is a surviving spouse or surviving child of a veteran and considered by the VA to be entitled to compensation for a service-connected death or pension benefits for a nonservice-connected death under title 38 of the United States Code *and* has a disability considered permanent under section 221(i) of the Social Security Act. ''Entitled'' as used in this definition refers to those veterans' surviving spouses and surviving children who are receiving the compensation or pension benefits stated or have been approved for such payments, but are not yet receiving them; or

(10) Receives an annuity payment under: section 2(a)(1)(iv) of the Railroad Retirement Act of 1974 *and* is determined to be eligible to receive Medicare by the Railroad Retirement Board; or section 2(a)(1)(v) of the Railroad Retirement Act of 1974 and is determined to be disabled based upon the criteria used under title XVI of the Social Security Act.

(11) Is a recipient of interim assistance benefits pending the receipt of Supplemented Security Income, a recipient of disability related medical assistance under title XIX of the Social Security Act, or a recipient of disability-based State general assistance benefits *provided* that the eligibility to receive any of these benefits is based upon disability or blindness criteria established by the State agency which are at least as stringent as those used under title XVI of the Social Security Act (as set forth at 20 CFR part 416, subpart I, Determining Disability and Blindness as defined in Title XVI).

Eligible foods means: (1) Any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot foods and hot food products prepared for immediate consumption;

(2) Seeds and plants to grow foods for the personal consumption of eligible households;

(3) Meals prepared and delivered by an authorized meal delivery service to households eligible to use coupons to purchase delivered meals; or meals served by an authorized communal dining facility for the elderly, for SSI households or both, to households eligible to use coupons for communal dining;

(4) Meals prepared and served by a drug addict or alcoholic treatment and rehabilitation center to narcotic addicts or alcoholics and their children who live with them;

(5) Meals prepared and served by a group living arrangement facility to residents who are blind or disabled as defined in paragraphs (2) through (11) of the definition of ''Elderly or disabled member'' contained in this section;

(6) Meals prepared by and served by a shelter for battered women and children to its eligible residents;

(7) In the case of certain eligible households living in areas of Alaska where access to food stores is extremely difficult and the households rely on hunting and fishing for subsistence, equipment for the purpose of procuring food for eligible households, including nets, lines, hooks, fishing rods, harpoons, knives, and other equipment necessary for subsistence hunting and fishing but not equipment for the purpose of transportation, clothing or shelter, nor firearms, ammunition or other explosives;

(8) In the case of homeless food stamp households, meals prepared for and served by an authorized public or private nonprofit establishment (e.g. soup

kitchen, temporary shelter), approved by an appropriate State or local agency, that feeds homeless persons; and

(9) In the case of homeless food stamp households, meals prepared by a restaurant which contracts with an appropriate State agency to serve meals to homeless persons at concessional (low or reduced) prices.

Employment and training (E&T) component a work experience, work training or job search program, as described in section 6(d)(4)(B)(iv) of the Food Stamp Act of 1977 (7 U.S.C. 2014(2)(4)(B)) designed to help food stamp recipients move promptly into unsubsidized employment.

Employment and training (E&T) mandatory participant a Food Stamp Program applicant or participant who is required to work register under 7 U.S.C. 2014(d)(1) or (2) and who the State determines should not be exempted from participation in an employment and training program.

Employment and training (E&T) program a program operated by each State agency consisting of one or more work, training, education or job search components.

Error for active cases results when a determination is made by a quality control reviewer that a household which received food stamp benefits during the sample month is ineligible or received an incorrect allotment. Thus, errors in active cases involve dollar loss to either the participant or the government. For negative cases, an ''error'' means that the reviewer determines that the decision to deny, suspend, or terminate a household was incorrect.

Exempted for purposes of § 273.7 excluding paragraphs (a) and (b)—this term refers to a work registered person or persons excused by the State, under the conditions in § 273.7(f) from participation in an employment and training program.

Exercises governmental jurisdiction means the active exercise of the legislative, executive or judicial powers of government by an Indian tribal organization.

Federal fiscal year means a period of 12 calendar months beginning with each October 1 and ending with September 30 of the following calendar year.

Firm's practice means the usual manner in which personnel of a firm or store accept food coupons as shown by the actions of the personnel at the time of the investigation.

FNS means the Food and Nutrition Service of the U.S. Department of Agriculture.

Food Stamp Act means the Food Stamp Act of 1977 (Pub. L. 95–113), including any subsequent amendments thereto.

General assistance (GA) means cash or another form of assistance, excluding in-kind assistance, financed by State or local funds as part of a program which provides assistance to cover living expenses or other basic needs intended to promote the health or well-being of recipients.

Group living arrangement means a public or private nonprofit residential setting that serves no more than sixteen residents that is certified by the appropriate agency or agencies of the State under regulations issued under section 1616(e) of the Social Security Act or under standards determined by the Secretary to be comparable to standards implemented by appropriate State agencies under section 1616(e) of the Social Security Act. To be eligible for food stamp benefits, a resident of such a group living arrangement must be blind or disabled as defined in paragraphs (2) through (11) of the definition of ''Elderly or disabled member'' contained in this section.

Homeless individual means an individual who lacks a fixed and regular nighttime residence or an individual whose primary nighttime residence is:

(1) A supervised shelter designed to provide temporary accommodations (such as a welfare hotel or congregate shelter);

(2) A halfway house or similar institution that provides temporary residence for individuals intended to be institutionalized;

(3) A temporary accommodation for not more than 90 days in the residence of another individual; or

(4) A place not designed for, or ordinarily used, as a regular sleeping accommodation for human beings (a hallway, a bus station, a lobby or similar places).

Homeless meal provider means:

(1) A public or private nonprofit establishment (e.g., soup kitchens, temporary shelters) that feeds homeless persons; or

(2) A restaurant which contracts with an appropriate State agency to offer meals at concessional (low or reduced) prices to homeless persons.

House-to-house trade route means any retail food business operated from a truck, bus, pushcart, or other mobile vehicle.

Identification (ID) card means a card which identifies the bearer as eligible to receive and use food coupons.

Immigration and Naturalization Service (INS) means the Immigration and Naturalization Service, U.S. Department of Justice.

Indian tribe means: (1) Any Indian tribe, Band, Nation, or other organized Indian group on a reservation for example, a Rancheria, Pueblo or Colony, and including any Alaska Native Village or regional or village corporation (established pursuant to the Alaska Native Claims Settlement Act(85 Stat. 688)), that is on a reservation and is recognized as eligible for Federal programs and services provided to Indians because of their status as Indians; or (2) any Indian tribe or Band on a reservation holding a treaty with a State government.

Indian tribal organization (ITO) means: (1) The recognized governing body of any Indian tribe on a reservation; or (2) the tribally recognized intertribal organization which the recognized governing bodies of two or more Indian tribes on a reservation authorizes to operate the Food Stamp Program or a Food Distribution Program on their behalf.

Insured financial institution means a financial institution insured by the Federal Deposit Insurance Corporation (FDIC) or financial institutions which are insured under the Federal Credit Union Act and which have retail food stores or wholesale food concerns in their field of membership.

Issuance month in a Monthly Reporting and Retrospective Budgeting system means the fiscal or calendar month for which the State agency shall issue a food stamp allotment. Issuance is based upon income and circumstances in the corresponding budget month. In prospective budgeting, the budget month and issuance month are the same. In retrospective budgeting, the issuance month follows the budget month and the issuance month shall begin within 32 days after the end of the budget month.

Large project area means those project areas/management units with monthly active caseloads of more than 15,000 households based on the most current information available at the time the large project area review schedule is developed.

Low-income household means a household whose annual income does not exceed 125 percent of the Office of Management and Budget poverty guidelines.

Management Evaluation (ME) reviews means reviews conducted by States at the project area level to determine if State agencies are administering and operating the Food Stamp Program in accordance with program requirements.

Management unit means an area based on a welfare district, region, or other administrative structure designated by the State agency and approved by FNS to be reviewed for ME review purposes.

Master issuance file means a cumulative file containing the individual records and status of households, and the amount of benefits, if any, each household is authorized to receive.

Meal delivery service means a political subdivision, a private nonprofit organization, or a private establishment with which a State or local agency has contracted for the preparation and delivery of meals at concessional prices to elderly persons, and their spouses, and to the physically or mentally handicapped and persons otherwise disabled, and their spouses, such that they are unable to adequately prepare all of their meals.

Medicaid means medical assistance under title XIX of the Social Security Act, as amended.

Medium project area means those project areas/management units with monthly active caseloads of 2,001 to 15,000 households based on the most current information available at the time the medium project area review schedule is developed.

Minimum benefit means the minimum monthly amount of food stamps that one- and two-person households receive. The amount of the minimum benefit shall be $10.

National standard payment error rate means the weighted mean of all States' payment error rates during a base period.

Negative case means a household whose application for food stamp benefits was denied or whose food stamp benefits were suspended or terminated by an action in the sample month or by an action effective for the sample month.

Negative case error rate means an estimate of the proportion of denied, suspended, or terminated cases where the household was incorrectly denied, suspended, or terminated. This estimate will be expressed as a percentage of completed negative quality control reviews excluding all results from cases processed by SSA personnel or participating in a demonstration project identified by FNS as having certification rules that are significantly different from standard requirements.

Newly work registered food stamp participants work registered at the point of application.

Nonprofit cooperative food purchasing venture means any private nonprofit association of consumers whose members pool their resources to buy food.

Offset year means the calendar year during which offsets may be made to collect certain recipient claims from individuals' Federal income tax refunds.

Overissuance means the amount by which coupons issued to a household exceeds the amount it was eligible to receive.

Overpayment error rate means the percentage of the value of all allotments issued in a fiscal year that are either:
(1) Issued to households that fail to meet basic program eligibility requirements, or
(2) Overissued to eligible households.

Payment error rate means the sum of the point estimates of two component error rates: an overpayment error rate and an underpayment error rate. Each component error rate is the value of allotments either overissued or underissued expressed as a percentage of all allotments issued to completed active sample cases, excluding those cases processed by SSA personnel or participating in certain demonstration projects designated by FNS.

Placed in an employment and training (E&T) program a State agency may count a person as ''placed'' in an employment and training program when the individual commences a component or is sent a Notice of Adverse Action (NOAA) for noncompliance with a food stamp employment and training requirement. Persons who refuse to work register or who voluntarily quit a job and are sent a NOAA may not be considered ''placed''.

Program means the food stamp program conducted under the Food Stamp Act and regulations.

Project area means the county or similar political subdivision designated by a State as the administrative unit for program operations. Upon prior FNS approval, a city, Indian reservation, welfare district, or any other entity with clearly defined geographic boundaries, or any combination of such entities, may be designated as a project area, or a State as a whole may be designated as a single project area.

Prospective budgeting in a Monthly Reporting and Retrospective Budgeting system means the computation of a household's food stamp allotment for an issuance month based on an estimate of income and circumstances which will exist in that month.

Public assistance (PA) means any of the following programs authorized by the Social Security Act of 1935, as amended: Old-age assistance, Temporary Assistance for Needy Families (TANF), including TANF for children of unemployed fathers, aid to the blind, aid to the permanently and totally disabled and aid to aged, blind, or disabled.

Quality control review means a review of a statistically valid sample of active and negative cases to determine the extent to which households are receiving

the food stamp allotments to which they are entitled, and to determine the extent to which decisions to deny, suspend, or terminate cases are correct.

Record-for-issuance file means a file which is created monthly from the master issuance file, which shows the amount of benefits each eligible household is to receive for the issuance month, and the amount actually issued to the household.

Regulations means the provisions of this subchapter. Regulatory citations refer to provisions of this subchapter unless otherwise specified.

Reservation means the geographically defined area or areas over which an ITO exercises governmental jurisdiction so long as such area or areas are legally recognized by the Federal or a State government as being set aside for the use of Indians.

Retail food store means: (1) An establishment or house-to-house trade route that sells food for home preparation and consumption normally displayed in a public area, and either offers for sale, on a continuous basis, a variety of foods in sufficient quantities in each of the four categories of staple foods including perishable foods in at least two such categories (Criterion A) as set forth in §278.1(b)(1) of this chapter, or has more than 50 percent of its total gross retail sales in staple foods (Criterion B) as set forth in §278.1(b)(1) of this chapter as determined by visual inspection, marketing structure, business licenses, accessibility of food items offered for sale, purchase and sales records, counting of stockkeeping units, or other inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in §278.1(b)(1) of this chapter. Entities that have more than 50 percent of their total gross retail sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption either for carry-out or on-premises consumption, and require no additional preparation, are not eligible for FSP participation as retail food stores under §278.1(b)(1) of this chapter.

(2) Public or private communal dining facilities and meal delivery services; private nonprofit drug addict or alcoholic treatment and rehabilitation programs; publicly operated community mental health centers which conduct residential programs for drug addicts and/or alcoholics; public or private nonprofit group living arrangements; public or private nonprofit shelters for battered women and children; public or private nonprofit establishments, approved by an appropriate State or local agency, that feed homeless persons; or a restaurant that contracts with an appropriate State agency to provide meals at concessional (low or reduced) prices to homeless food stamp households;

(3) Any stores selling equipment for procuring food by hunting and fishing to eligible households in Alaska, as specified in the definition of eligible foods;

(4) Any private nonprofit cooperative food purchasing venture, including those whose members pay for food prior to receipt of the food; and

(5) A farmers' market.

Retrospective budgeting in a Monthly Reporting and Retrospective Budgeting system means the computation of a household's food stamp allotment for an issuance month based on actual income and circumstances which existed in a previous month, the ''budget month.''

Review date for quality control active cases means a day within the sample month, either the first day of the calendar or fiscal month or the day a certification action was taken to authorize the allotment, whichever is later. The ''review date'' for negative cases, depending on the characteristics of individual State systems, could be the date on which the eligibility worker makes the decision to suspend, deny, or terminate the case, the date on which the decision is entered into the computer system, the date of the notice to the client or the date the negative action becomes effective. For no case is the ''review date'' the day the quality control review is conducted.

Review period means the 12-month period from October 1 of each calendar year through September 30 of the following calendar year.

Sample frame means a list of all units from which a sample is actually selected.

Sample month means the month of the sample frame from which a case is selected (e.g., for all cases selected from a frame consisting of households participating in January, the sample month is January).

Screening an evaluation by the eligibility worker as to whether a person should or should not be referred for participation in an employment and training program. This activity would not be considered an approvable E&T component.

Secretary means the Secretary of the U.S. Department of Agriculture.

Shelter for battered women and children means a public or private nonprofit residential facility that serves battered women and their children. If such a facility serves other individuals, a portion of the facility must be set aside on a long-term basis to serve only battered women and children.

Small project area means those project areas/management units with monthly active caseloads of 2,000 households or fewer based on the most current information available at the time the small project area review schedule is developed.

(2) Who are living together and are holding themselves out to the community as husband and wife by representing themselves as such to relatives, friends, neighbors, or tradespeople.

SSA processed/demonstration case means a case that is participating or has been denied based upon processing by SSA personnel or is participating or has been denied/terminated based upon the rules of a demonstration project with significantly different certification rules (as identified by FNS).

Staple food means those food items intended for home preparation and consumption in each of the following food categories: meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products. Commercially processed foods and prepared mixtures with multiple ingredients shall only be counted in one staple food category. For example, foods such as cold pizza, macaroni and cheese, multi-ingredient soup, or frozen dinners, shall only be counted as one staple food item and will normally be included in the staple food category of the main ingredient as determined by FNS. Hot foods are not eligible for purchase with food stamps and, therefore, do not qualify as staple foods for the purpose of determining eligibility under §278.1(b)(1) of this chapter. Accessory food items including, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices shall not be considered staple foods for the purpose of determining eligibility of any firm. However, accessory foods that are offered for sale in authorized retail food stores are eligible food items which may be purchased with food stamp benefits.

State means any one of the fifty States, the District of Columbia, Guam, the Virgin Islands of the United States, and the reservation of an Indian tribe whose ITO meets the requirements of the Food Stamp Act for participation as a State agency.

State agency means: (1) The agency of State government, including the local offices thereof, which is responsible for the administration of the federally aided public assistance programs within the State, and in those States where such assistance programs are operated on a decentralized basis, it includes the counterpart local agencies which administer such assistance programs for the State agency, and (2) the Indiantribal organization of any Indian tribe determined by the Department to be capable of effectively administering a Food Stamp Program or a Food Distribution Program in accordance with provisions of the Food Stamp Act of 1977.

State Income and Eligibility Verification System (IEVS) means a system of information acquisition and exchange for purposes of income and eligibility verification which meets the requirements of section 1137 of the Social Security Act, generally referred to as the IEVS.

State Wage Information Collection Agency (SWICA) means the State agency administering the State unemployment compensation law, another agency administering a quarterly wage reporting system, or a State agency administering an alternative system which has been determined by the Secretary of Labor, in consultation with the Secretary of Agriculture and the

Secretary of Health and Human Services, to be as effective and timely in providing employment related income and eligibility data as the two just mentioned agencies.

Sub-units means the physical location of an organizational entity within a project area/management unit involved in the operation of the Food Stamp Program, excluding Post Offices.

Supplemental Security Income (SSI) means monthly cash payments made under the authority of: (1) Title XVI of the Social Security Act, as amended, to the aged, blind and disabled; (2) section 1616(a) of the Social Security Act; or (3) section 212(a) of Pub. L. 93–66.

Systematic Alien Verification for Entitlements (SAVE) means the INS program whereby State agencies may verify the validity of documents provided by aliens applying for food stamp benefits by obtaining information from a central data file.

Thrifty food plan means the diet required to feed a family of four persons consisting of a man and a woman 20 through 50, a child 6 through 8, and a child 9 through 11 years of age, determined in accordance with the Secretary's calculations. The cost of such diet shall be the basis for uniform allotments for all households regardless of their actual composition. In order to develop maximum food stamp allotments, the Secretary shall make household size and other adjustments in the Thrifty Food Plan taking into account economies of scale and other adjustments as required by law.

Trafficking means the buying or selling of coupons, ATP cards or other benefit instruments for cash or consideration other than eligible food; or the exchange of firearms, ammunition, explosives, or controlled substances, as defined in section 802 of title 21, United States Code, for coupons.

Underissuance means the amount by which the allotment to which the household was entitled exceeds the allotment which the household received.

Underissuance error rate. (See *Underpayment error rate.*)

Underpayment error rate means the ratio of the value of allotments underissued to recipient households to the total value of allotments issued in a fiscal year by a State agency.

Universe means all units for which information is desired.

Variance means the incorrect application of policy and/or a deviation between the information that was used to authorize the sample month issuance and the verified information that should have been used to calculate the sample month issuance.

Wholesale food concern means an establishment which sells eligible food to retail food stores or to meal services for resale to households.

[Amdt. 132, 43 FR 47882, Oct. 17, 1978]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 271.2, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 271.3 Delegations to FNS for administration.

(a) *Delegation.* Within the Department, FNS acts on behalf of the Department in the administration of the Food Stamp Program with the exception of those functions, which may be delegated to other agencies within the Department. The right is reserved at any time to withdraw, modify, or amend any delegation of authority. When authority is delegated to FNS, the responsibilities may be carried out by the Administrator or by another official of FNS, or by State agencies with respect to claims against households, as designated.

(b) *Claims settlement.* FNS shall have the power to determine the amount of and to settle and adjust any claim arising under the provisions of the act or this subchapter, and to compromise or deny all or part of any claim.

(c) *Demonstration authority.* FNS is authorized to undertake demonstration projects which test new methods designed to improve program administration and benefit delivery. FNS is authorized to initiate program research and evaluation efforts for the purposes of improving and assessing program administration and effectiveness. The procedure for initiating and conducting these projects is established in part 282.

[Amdt. 132, 43 FR 47882, Oct. 17, 1982]

§ 271.4 Delegations to State agencies for administration.

(a) *General delegation.* The State agency shall be responsible for the administration of the program within the State, including, but not limited to:

(1) Certification of applicant households;

(2) Issuance, control, and accountability of coupons;

(3) Developing and maintaining complaint procedures;

(4) Developing, conducting, and evaluating training;

(5) Conducting performance reporting reviews;

(6) Keeping records necessary to determine whether the program is being conducted in compliance with these regulations; and

(7) Submitting accurate and timely financial and program reports.

(b) *Claims delegation.* FNS delegates to the State agency, subject to the standards in § 273.18, the authority to determine the amount of, and settle, adjust, compromise or deny all or part of any claim which results from fraudulent or nonfraudulent overissuances to participating households.

[Amdt. 132, 43 FR 47882, Oct. 17, 1978, as amended by Amdt. 207, 47 FR 52333, Nov. 19, 1982]

§ 271.5 Coupons as obligations of the United States, crimes and offenses.

(a) *Coupons as obligations.* Pursuant to section 15(d) of the Food Stamp Act, coupons are an obligation of the United States within the meaning of 18 United States Code (U.S.C.) 8. The provisions of Title 18 of the United States Code, ''Crimes and Criminal Procedure,'' relative to counterfeiting, misuse and alteration of obligations of the United States are applicable to coupons.

(b) *Penalties.* Any unauthorized issuance, redemption, use, transfer, acquisition, alteration, or possession of coupons, ATP cards, or other program access device may subject an individual, partnership, corporation, or other legal entity to prosecution under sections 15 (b) and (c) of the Food Stamp Act or under any other applicable Federal, State or local law, regulation or ordinance.

(1) Section 15(b)(1) of the Food Stamp Act reads as follows:

Subject to the provisions of paragraph (2) of this subsection, whoever knowingly uses, transfers, acquires, alters, or possesses coupons, authorization cards, or access devices in any manner contrary to this Act or the regulations issued pursuant to this Act shall, if such coupons, authorization cards, or access devices are of a value of $5000 or more, be guilty of a felony and shall be fined not more than $250,000 or imprisoned for not more than twenty years, or both, and shall, if such coupons or authorization cards are of a value of $100 or more but less than $5000 or if the item used, transferred, acquired, altered or possessed is an access device that has a value of $100 or more but less than $5000 be guilty of a felony and shall upon the first conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, and upon the second and any subsequent conviction thereof, shall be imprisoned for not less than six months nor more than five years and may also be fined not more than $10,000 or, if such coupons or authorization cards are of a value of less than $100, or if the item used, transferred, acquired, altered, or possessed is an access device that has a value of less than $100, shall be guilty of a misdemeanor, and upon the first conviction thereof, shall be fined not more than $1000 or imprisoned for not more than one year or both, and upon the second and any subsequent conviction thereof, shall be imprisoned for not more than one year and may also be fined not more than $1000. In addition to such penalties, any person convicted of a felony or misdemeanor violation under this subsection may be suspended by the court from participation in the food stamp program for an additional period of up to eighteen months consecutive to that period of suspension mandated by section 6(b)(1) of this Act.

(2) Section 15(b)(2) of the Food Stamp Act reads as follows:

In the case of any individual convicted of an offense under paragraph (b)(1) of this section, the court may permit such individual to perform work approved by the court for the purpose of providing restitution for losses incurred by the United States and the State agency as a result of the offense for which such individual was convicted. If the court permits such individual to perform such work and such individual agrees thereto, the court shall withhold the imposition of the sentence on the condition that such individual perform the assigned work. Upon the successful completion of the assigned work the court may suspend such sentence.

(3) Section 15(c) of the Food Stamp Act reads as follows:

Whoever presents, or causes to be presented, coupons for payment or redemption

of the value of $100 or more, knowing the same to have been received, transferred, or used in any manner in violation of the provisions of this Act or the regulations issued pursuant to this Act, shall be guilty of a felony and, upon the first conviction thereof, shall be fined not more than $20,000 or imprisoned for not more than five years, or both, and upon the second and any subsequent conviction thereof, shall be imprisoned for not less than one year nor more than five years and may also be fined not more than $20,000 or if such coupons are of a value of less than $100, shall be guilty of a misdemeanor and, upon the first conviction thereof, shall be fined not more than $1,000 or imprisoned for not more than one year, or both, and upon the second and any subsequent conviction thereof, shall be imprisoned for not more than one year and may also be fined not more than $1,000. In addition to such penalties, any persons convicted of a felony or misdemeanor violation under this subsection may be suspended by the court from participation in the food stamp program for an additional period of up to eighteen months consecutive to that period of suspension mandated by section 6(b)(1) of this Act.

(c) *Security for coupons and ATP's.* All individuals, partnerships, corporations, or other legal entities including State agencies and their delegatees (referred to in this paragraph as ''persons'') having custody, care and control of coupons and ATP's shall, at all times, take all precautions necessary to avoid acceptance, transfer, negotiation, or use of spurious, altered, or counterfeit coupons and ATP's and to avoid any unauthorized use, transfer, acquisition, alteration or possession of coupons and ATP's. These persons shall safeguard coupons and ATP's from theft, embezzlement, loss, damage, or destruction.

(d) *Coupon issuers.* (1) Any coupon issuer or any officer, employee or agent, thereof convicted of failing to provide the monthly reports required in §274.5 or convicted of violating part 274 shall be subject to a fine of not more than $1,000, or imprisoned for not more than 1 year, or both.

(2) Any coupon issuer or any officer, employee or agent, thereof convicted of knowingly providing false information in the reports required under §274.5 shall be subject to a fine of not more than $10,000, or imprisoned not more than 5 years, or both.

(e) *Forfeiture and denial of property rights.*

(1) General.

(i) Any nonfood items, moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for food coupons, authorization cards, or other program benefit instruments or access devices in any manner not authorized by the Food Stamp Act or regulations issued pursuant to the Act, shall be subject to forfeiture and denial of property rights. Such property is deemed forfeited to the United States Department of Agriculture (USDA) at the time it is either exchanged or offered in exchange.

(ii) These forfeiture and denial of property rights provisions shall apply to property exchanged or offered in exchange during investigations conducted by the Inspector General, USDA, and by other authorized Federal law enforcement agencies.

(iii) These forfeiture and denial of property rights provisions shall not apply to property exchanged or intended to be exchanged during the course of internal investigations by retail firms, during investigations conducted solely by State and local law enforcement agencies and without the participation of an authorized Federal law enforcement agency, or during compliance investigations conducted by the Food and Nutrition Service.

(2) Custodians and their responsibilities.

(i) The Inspector General, USDA, the Inspector General's designee, and other authorized Federal law enforcement officials shall be custodians of property acquired during investigations.

(ii) Upon receiving property subject to forfeiture the custodian shall:

(A) Place the property in an appropriate location for storage and safekeeping, or

(B) Request that the General Services Administration (GSA) take possession of the property and remove it to an appropriate location for storage and safekeeping.

(iii) The custodian shall store property received at a location in the judicial district where the property was acquired unless good cause exists to store the property elsewhere.

(iv) Custodians shall not dispose of property prior to the fulfillment of the

notice requirements set out in paragraph 3, or prior to the conclusion of any related administrative, civil, or criminal proceeding, without reasonable cause. Reasonable cause to dispense with notice requirements might exist, for example, where explosive materials are being stored which may present a danger to persons or property.

(v) Custodians may dispose of any property in accordance with applicable statutes or regulations relative to disposition. The custodian may:

(A) Retain the property for official use;

(B) Donate the property to Federal, State, or local government facilities such as hospitals or to any nonprofit charitable organizations recognized as such under section 501(c)(3) of the Internal Revenue Code; or

(C) Request that GSA take custody of the property and remove it for disposition or sale.

(vi) Proceeds from the sale of forfeited property and any moneys forfeited shall be used to pay all proper expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, transportation costs, and any recording fees. Moneys remaining after payment of such expenses shall be deposited into the general fund of the United States Treasury.

(3) Notice requirements.

(i) The custodian shall make reasonable efforts to notify the actual or apparent owner(s) of or person(s) with possessory interests in the property subject to forfeiture except for the good cause exception if the owner cannot be notified.

(ii) The notice shall:

(A) Include a brief description of the property;

(B) Inform the actual or apparent owner(s) of or person(s) with possessory interests in the property subject to forfeiture of the opportunity to request an administrative review of the forfeiture;

(C) Inform the actual or apparent owner(s) of or person(s) with possessory interests in the property subject to forfeiture of the requirements for requesting administrative review of the forfeiture; and

(D) State the title and address of the official to whom a request for administrative review of the forfeiture may be addressed.

(iii) Except as provided in paragraphs (e)(3) (iv) and (v) of this section, notice shall be given within 45 days from the date the United States convicts, acquits, or declines to act against the person who exchanged the property.

(iv) Notice may be delayed if it is determined that such action is likely to endanger the safety of a law enforcement official or compromise another ongoing criminal investigation conducted by OIG, the United States Secret Service, the United States Postal Inspection Service, or other authorized Federal law enforcement agency.

(v) Notice need not be given to the general public.

(4) Administrative review.

(i) The actual or apparent owner(s) of or person(s) with possessory interests in the property shall have 30 days from the date of the delivery of the notice of forfeiture to make a request for an administrative review of the forfeiture.

(ii) The request shall be made in writing to the Assistant Inspector General for Investigations, Office of Inspector General, USDA, or to his/her designee, hereinafter referred to as the reviewing official.

(iii) A request for an administrative review of the forfeiture of property shall include the following:

(A) A complete description of the property, including serial numbers, if any;

(B) Proof of the person's property interest in the property; and,

(C) The reason(s) the property should not be forfeited.

(iv) The requestor may, at the time of his/her written request for administrative review, also request an oral hearing of the reasons the property should not be forfeited.

(v) The burden of proof will rest upon the requestor, who shall be required to demonstrate, by a preponderance of the evidence, that the property should not be forfeited.

(vi) Should the administrative determination be in their favor, the actual or apparent owner(s) of or person(s) with possessory interests in the property subject to forfeiture may request

that forfeited items be returned or that compensation be made if the custodian has already disposed of the property.

(vii) The reviewing official shall not remit or mitigate a forfeiture unless the requestor:

(A) Establishes a valid, good faith property interest in the property as owner or otherwise; and

(B) Establishes that the requestor at no time had any knowledge or reason to believe that the property was being or would be used in violation of the law; and

(C) Establishes that the requestor at no time had any knowledge or reason to believe that the owner had any record or reputation for violating laws of the United States or of any State for related crimes.

(viii) The reviewing official may postpone any decision until the conclusion of any related administrative, civil, or criminal proceeding.

(ix) The decision of the reviewing official as to the disposition of the property shall be the final agency determination for purposes of judicial review.

[Amdt. 132, 43 FR 47882, Oct. 17, 1978, as amended by Amdt. 221, 47 FR 35168, Aug. 13, 1982; Amdt. 269, 51 FR 10782, Mar. 28, 1986; Amdt. 334, 57 FR 3911, Feb. 3, 1992; 59 FR 51354, Oct. 11, 1994]

§ 271.6 Complaint procedure.

(a) *State agency responsibility*—(1) *General scope*. The State agency shall maintain a system of its choosing for handling program complaints filed by participants, potential participants, or other concerned individuals or groups. This shall not include complaints alleging discrimination on the basis of race, sex, age, religious creed, national origin, political beliefs or handicap; such complaints shall be handled in accordance with § 272.6. This procedure also need not include complaints that can be pursued through a fair hearing. Complaints regarding such areas as processing standards and service to participants and potential participants would generally be handled under this complaint procedure.

(2) *Minimum requirements*. The State agency shall follow up on complaints, resolve complaints and take corrective action where warranted, and respond to the complainant on the State agency's disposition of the complaint. The State agency shall make information on the complaint system and how to file a complaint available to participants, potential participants and other interested persons. The State agency may make the information available through written materials or posters at certification offices or other appropriate means.

(3) *Complaint analysis*. The State agency shall maintain records of complaints received and their disposition, and shall review records at least annually to assess whether patterns of problems may be present in local offices, project areas, or throughout the State. The results of this review shall be provided to the Performance Reporting System coordinator for appropriate action, and for inclusion, if appropriate, in the State Corrective Action Plan in accordance with § 275.16 of this chapter. The information provided to the Performance Reporting System Coordinator shall include the identification, if any, of potential or actual patterns of deficiencies in local offices, project areas, or throughout the State, and any identification of causes of these problems.

(4) *Monitoring*. FNS shall monitor State compliance with these requirements through the Performance Reporting System.

(b) *Regional office responsibility*. (1) Persons or agencies desiring program information or wishing to file a complaint may contact the appropriate FNS Regional Office.

(i) For Delaware, the District of Columbia, Maryland, New Jersey, Pennsylvania, Puerto Rico, Virginia, the Virgin Islands of the United States, and West Virginia: Mid-Atlantic Regional Office, U.S. Department of Agriculture, Food and Nutrition Service, CN 02150, Trenton, NJ 08650.

(ii) For Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee: Southeast Regional Office, U.S. Department of Agriculture, Food and Nutrition Service, 77 Forsyth Street SW., suite 112, Atlanta, GA 30303-3427.

(iii) For Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin: Midwest Regional Office, U.S. Department

of Agriculture, Food and Nutrition Service, 77 West Jackson Blvd., 20th Floor, Chicago, IL 60604-3507.

(iv) For Arkansas, Louisiana, New Mexico, Oklahoma, and Texas: Southwest Regional Office, U.S. Department of Agriculture, Food and Nutrition Service, 1100 Commerce Street, suite 5–C–30, Dallas, TX 75242.

(v) For Alaska, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon and Washington: Western Regional Office, U.S. Department of Agriculture, Food and Nutrition Service, 550 Kearny Street, room 400, San Francisco, CA 94108.

(vi) For Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont: Northeast Regional Office, U.S. Department of Agriculture, Food and Nutrition Service, 10 Causeway St., Boston, MA 02222-1069.

(vii) For Colorado, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah, and Wyoming: Mountain Plains Regional Office, U.S. Department of Agriculture, Food and Nutrition Service, 1244 Speer Blvd., suite 903, Denver, CO 80204-3581.

(2) Complainants shall be advised of the appropriate State complaint handling and fair hearing procedures. Upon household request, other complaints shall be pursued by the Department rather than the State agency, unless the complaint is one upon which the complainant wishes to request a fair hearing.

[Amdt. 132, 43 FR 47882, Oct. 17, 1978, as amended at 45 FR 71350, Oct. 28, 1980; Amdt. 187, 45 FR 85699, Dec. 30, 1980; Amdt. 211, 47 FR 53315, Nov. 26, 1982; Amdt. 237, 47 FR 57668, Dec. 28, 1982; Amdt. 250, 48 FR 22130, May 17, 1983; Amdt. 269, 51 FR 10782, Mar. 28, 1986; Amdt. 356, 59 FR 29713, June 9, 1994]

§ 271.7 Allotment reduction procedures.

(a) *General purpose*. This section sets forth the procedures to be followed if the monthly food stamp allotments determined in accordance with the provisions of § 273.10 must be reduced, suspended, or cancelled to comply with section 18 of the Food Stamp Act of 1977, as amended. The best available data pertaining to the number of people participating in the program and the amounts of benefits being issued shall be used in deciding whether such action is necessary.

(b) *Nature of reduction action*. Action to comply with section 18 of the Food Stamp Act of 1977, as amended, may be a suspension or cancellation of allotments for one or more months, a reduction in allotment levels for one or more months or a combination of these three actions. If a reduction in allotments is deemed necessary, allotments shall be reduced by reducing maximum food stamp allotments amounts for each household size by the same percentage. This results in all households of a given size having their benefits reduced by the same dollar amount. The dollar reduction would be smallest for one-person households and greatest for the largest households. Since the dollar amount would be the same for all households of the same size, the rate of reduction would be lowest for zero net income households and greatest for the highest net income households. All one- and two-person households affected by a reduction action shall be guaranteed the minimum benefit unless the action is a cancellation of benefits, a suspension of benefits, or a reduction of benefits of 90 percent or more of the total amount of benefits projected to be issued in the affected month.

(c) *Reduction method*. If a reduction in allotments is deemed necessary, the maximum food stamp allotments amounts for all household sizes shall be reduced by a percentage specified by FNS. For example, if it is determined that a 25 per cent reduction in the maximum food stamp allotments amount is to be made, the reduction for all four-person households would be calculated as follows: The maximum food stamp allotments amount for a four-person household ($209 in November 1980) would be reduced by 25% to $157. Then 30 percent of the household's net food stamp income would be deducted from the reduced maximum food stamp allotments amount. For example, 30 per cent of a net food stamp income of $200, $60, would be deducted from the reduced maximum food stamp allotments amount ($157), resulting in a reduced allotment of $97.

(d) *Implementation of allotment reductions*—(1) *Reductions.* (i) If a decision is made to reduce monthly food stamp allotments, FNS shall notify State agencies of the date the reduction is to take effect and by what percentage maximum food stamp allotments amounts are to be reduced.

(ii) Upon receiving notification that a reduction is to be made in an upcoming month's allotment, State agencies shall act immediately to implement the reduction. Such action could differ from State to State depending on the nature of the issuance system in use. Where there are computerized issuance systems, the program used for calculating allotments shall be altered to reflect the appropriate percentage reduction in the maximum food stamp allotments for each household size and the computer program shall be adjusted to allow for the minimum benefit for one- and two-person households. The computer program shall also be adjusted to provide for the rounding of benefit levels of $1, $3 and $5 to $2, $4 and $6, respectively. FNS will provide State agencies with revised issuance tables reflecting the percentage reductions to be made in the maximum food stamp allotments amounts and reduce maximum food stamp allotments levels. In States where manual issuance is used, State agencies shall reproduce the issuance tables provided by FNS and distribute them to issuance personnel. State agencies shall ensure that the revised issuance tables are distributed to issuance agents and personnel in time to allow benefit reductions during the month ordered by FNS. In an HIR card system State agencies have the option of enacting the reduction in benefits either by changing all HIR cards before issuance activity for the affected month begins or by adjusting allotments at the point of issuance as each household appears at the issuance office.

(2) *Suspensions and cancellations.* (i) If a decision is made to suspend or cancel the distribution of food stamp benefits in a given month, FNS shall notify State agencies of the date the suspension or cancellation is to take effect. In the event of a suspension or cancellation of benefits, the provision for the minimum benefit for households with one or two members only shall be disregarded and all households shall have their benefits suspended or cancelled. Upon receiving notification that an upcoming month's issuance is to be suspended or cancelled, State agencies shall take immediate action to effect the suspension or cancellation. This action would involve making necessary computer adjustments, and notifying issuance agents and personnel.

(ii) Upon being notified by FNS that a suspension of benefits is over, State agencies shall act immediately to resume issuing benefits to certified households and shall resume benefit issuance as soon as practicable.

(3) *Affected allotments.* Whenever a reduction of allotments is ordered for a particular month, reduced benefits shall be calculated for all households for the designated month. However, any household with one or two members whose reduced benefits would be less than the minimum benefit shall receive the minimum benefit except as provided in §273.10(e)(2). Allotments or portions of allotments representing restored or retroactive benefits for a prior unaffected month would not be reduced, suspended, or cancelled even though they are issued during an affected month.

(4) *Notification of eligible households.* Reductions, suspensions and cancellations of allotments shall be considered to be Federal adjustments to allotments. As such, State agencies shall notify households of reductions, suspensions and cancellations of allotments in accordance with the notice provisions of §273.12(e)(1), except that State agencies shall not provide notices of adverse action to households affected by reductions, suspensions or cancellations of allotments.

(5) *Restoration of benefits.* Households whose allotments are reduced or cancelled as a result of the enactment of these procedures are not *entitled* to the restoration of the lost benefits at a future date. However, if there is a surplus of funds as a result of the reduction or cancellation, FNS shall direct State agencies to provide affected households with restored benefits unless the Secretary determines that the amount of surplus funds is too small to make this

practicable. The procedures implemented by State agencies for reducing and cancelling benefits shall be designed so that in the event FNS directs the restoration of benefits, such benefits are issued promptly.

(e) *Effects of reductions, suspensions and cancellations on the certification of eligible households.* (1) Except as provided in paragraph (e)(2) of this section, determinations of the eligibility of applicant households shall not be affected by reductions, suspensions or cancellations of allotments. State agencies shall accept and process applications during a month(s) in which a reduction, suspension or cancellation is in effect in accordance with the requirements of part 273. Determinations of eligibility shall also be made according to the provisions of part 273. If an applicant is found to be eligible for benefits and a reduction is in effect, the amount of benefits shall be calculated by reducing the maximum food stamp allotments amount by the appropriate percentage for the applicant's household size and then deducting 30 percent of the household's net food stamp income from the reduced maximum food stamp allotments amount. If an applicant is found to be eligible for benefits while a suspension or cancellation is in effect, no benefits shall be issued to the applicant until issuance is again authorized by FNS.

(2) *Expedited service.* (i) Households eligible to receive expedited processing who apply for program benefits during months in which reductions or suspensions are in effect, shall have their cases processed in accordance with the expedited processing provisions of § 273.2(i).

(A) Those households that receive expedited service in months in which reductions are in effect and that are determined to be eligible shall be issued allotments that are reduced in accordance with the reduction in effect. These reduced allotments shall be made available to the households within the benefit delivery timeframe specified in § 273.2(i).

(B) Those households that receive expedited service in months in which suspensions are in effect and that are determined to be eligible shall have benefits issued to them within the timeframe specified in § 273.2(i). However, if the suspension is still in effect at the time issuance is to be made, the issuance shall be suspended until the suspension is ended.

(ii) Households eligible to receive expedited processing who apply for Program benefits during months in which cancellations are in effect shall receive expedited service. However, the deadline for completing the processing of such cases shall be five calendar days or the end of the month of application, whichever date is later. All other rules pertaining to expedited service, contained in § 273.2(i), shall be applicable to these cases.

(3) The reduction, suspension or cancellation of allotments in a given month shall have no effect on the certification periods assigned to households. Those participating households whose certification periods expire during a month in which allotments have been reduced, suspended or cancelled shall be recertified according to the provisions of § 273.14. Households found eligible to participate during a month in which allotments have been reduced, suspended or cancelled shall have certification periods assigned in accordance with the provisions of § 273.10.

(f) *Fair hearings.* Any household that has its allotment reduced, suspended or cancelled as a result of an order issued by FNS in accordance with these rules may request a fair hearing if it disagrees with the action, subject to the following conditions. State agencies shall not be required to hold fair hearings unless the request for a fair hearing is based on a household's belief that its benefit level was computed incorrectly under these rules or that the rules were misapplied or misinterpreted. State agencies shall be allowed to deny fair hearings to those households who are merely disputing the fact that a reduction, suspension or cancellation was ordered. Furthermore, since the reduction, suspension or cancellation would be necessary to avoid an expenditure of funds beyond those appropriated by Congress, households do not have a right to a continuation of benefits pending the fair hearing. A household may receive retroactive benefits in an appropriate amount if it is

determined that its benefits were reduced by more than the amount by which the State agency was directed to reduce benefits.

(g) *Issuance services*. State agencies must have issuance services available to serve housholds receiving restored or retroactive benefits for a prior, unaffected month.

(h) *Penalties*. Notwithstanding any other provision of this subchapter, FNS may take one or more of the following actions against a State agency that fails to comply with a directive to reduce, suspend or cancel allotments in a particular month.

(1) If FNS ascertains that a State agency does not plan to comply with a directive to reduce, suspend or cancel allotments for a particular month, a warning will be issued advising the State agency that if it does not comply, FNS may cancel 100 percent of the Federal share of the State agency's administrative costs for the affected month(s). If, after receiving such a warning, a State agency does not comply with a directive to reduce, suspend or cancel allotments, FNS may cancel 100 percent of the Federal share of the State agency's administrative costs for the affected month(s).

(2) If FNS ascertains after warning a State agency as provided in paragraph (h)(1) of this section, that the State agency does not plan to comply with a directive to reduce, suspend or cancel allotments, a court injunction may be sought to compel compliance.

(3) If a State agency fails to reduce, suspend or cancel allotments as directed, FNS will bill the State agency for all over issuances that result. If a State agency fails to remit the billed amount to FNS within a prescribed period of time the funds will be recovered through offsets against the Federal share of the State agency's administrative costs, or any other means available under law.

[Amdt. 146, 46 FR 1426, Jan. 6, 1981, as amended by Amdt. 207, 47 FR 52333, Nov. 19, 1982; Amdt. 211, 47 FR 53315, Nov. 26, 1982; Amdt. 233, 47 FR 53830, Nov. 30, 1982; Amdt. 269, 51 FR 10782, Mar. 28, 1986; 54 FR 24154, June 6, 1989; 56 FR 63596, Dec. 4, 1991; Amdt. 356, 59 FR 29713, June 9, 1994]

§ 271.8 Information collection/recordkeeping—OMB assigned control numbers.

7 CFR section where requirements are described	Current OMB control no.
271.7 (d)	0584–0064
272.1 (d)	0584–0274
272.1 (f)	0584–0009
	0584–0010
	0584–0015
	0584–0022
	0584–0025
	0584–0034
	0584–0037
	0584–0052
	0584–0053
	0584–0064
	0584–0069
	0584–0074
	0584–0080
	0584–0081
	0584–0083
	0584–0124
	0584–0274
	0584–0285
	0584–0299
	0584–0301
	0584–0303
	0584–0333
	0584–0334
	0584–0336
	0584–0339
272.2 (a), (c), (d), (e), (f)	0584–0083
272.5 (c)	0584–0083
272.3 (a), (b), (c)	0584–0083
272.6 (g), (h)	0584–0025
272.7 (f), (g), (h), (i), (j), (k), (m)	0584–0064
273.1 (f), (g)	0584–0064
273.2 (b), (c), (f), (g), (h), (i), (j), (k)	0584–0064
273.4 (e)	0584–0274
273.5 (b)	0584–0064
273.6 (a), (b), (g)	0584–0064
273.7 (a), (d), (f)	0584–0339
273.7 (c)	0584–0064
	0584–0083
	0584–0339
273.7 (g)	0584–0064
273.8 (b), (c), (e), (g), (h), (i)	0584–0064
273.9 (d)	0584–0064
273.10 (a), (c), (e), (f), (g)(1)	0584–0064
273.10 (g)(3)	0584–0124
273.11 (a), (b), (c), (d), (e), (f), (h)	0584–0064
273.11 (g)	0584–0334
273.11 (i) (1)–(4)	0584–0080
	0584–0081
273.11 (i)(5)	0584–0009
	0584–0081
273.11 (i)(6)	0584–0009
	0584–0080
	0584–0081
273.12 (a), (b), (c), (d), (e), (f)	0584–0064
273.13 (a)	0584–0064
273.14 (a), (b), (c)	0584–0064
273.15 (a), (c), (d), (f), (i), (k), (l), (m), (q)	0584–0064
273.16 (a), (b), (d), (e), (f), (g), (h), (i)	0584–0064
273.17 (h)	0584–0301
273.18 (a), (c), (d), (e), (f), (g), (k)	0584–0064
273.18 (h)	0584–0069
273.18 (i)	0584–0053
273.21 (a), (c), (e), (f), (g), (h), (i), (j), (m), (p), (q)	0584–0064
273.22 (b), (c), (d), (e), (f), (g)	0584–0285
274.1 (c)	0584–0009.

7 CFR section where requirements are described	Current OMB control no.
274.3 (d)	0584–0009, 0584–0069, 0584–0080.
274.4 (a)	0584–0080.
274.4 (b)	0584–0009, 0584–0015, 0584–0080, 0584–0081.
274.4 (f)	0584–0009, 0584–0053.
274.6 (a), (b) and (e)	0584–0080, 0584–0081.
274.7 (a)	0584–0009.
274.7 (c)	0584–0022.
274.8 (a)–(c)	0584–0009.
274.8 (e)	0584–0053.
274.9 (a)–(d)	0584–0009.
274.11	0584–0009.
275.2 (a)	0584–0010 0584–0303
275.4 (a)	0584–0010 0584–0303
275.4 (b)	0584–0010
275.4 (c)	0584–0034 0584–0074 0584–0299
275.5 (a), (b)	0584–0010
275.6 (b)	0584–0010
275.8 (a)	0584–0010
275.9 (b), (g)	0584–0010
275.10 (a)	0584–0074 0584–0299 0584–0303
275.11 (a)	0584–0303
275.12 (b), (c), (d), (e)	0584–0074
275.12 (f), (g)	0584–0299
275.13 (b), (d), (e)	0584–0034
275.14 (c), (d)	0584–0034 0584–0074 0584–0299
275.16 (b), (c), (d)	0584–0010
275.17 (a), (b)	0584–0010
275.18 (a), (b)	0584–0010
275.19 (a), (b), (c)	0584–0010
275.20 (a)	0584–0010
275.21 (b)	0584–0034 0584–0074 0584–0299
275.21 (c), (d), (e)	0584–0034
275.22 (a), (b)	0584–0010
275.23	0584–0010 0584–0034 0584–0074 0584–0299
276.2 (b)	0584–0015.
277.12 (a)	0584–0341
277.14 (b), (c), (d), (h), (i), (j), (k)	0584–0341
277.15 (c)	0584–0064
277.17 (a), (b), (c), (d), (e), (f), (g)	0584–0341
277.18 (a), (c), (d), (e), (g), (h)	0584–0083
278.1 (a), (b), (l)	0584–0008
278.1 (e), (f)	0584–0064
278.4 (b), (c)	0584–0085
278.5 (a)	0584–0085 0584–0314
278.5 (c), (d), (f)	0584–0008
278.6 (b)	0584–0008
278.7 (b), (c)	0584–0008
278.8 (a)	0584–0008
280.7 (c), (d), (g)	0584–0336
280.9 (b)	0584–0009 0584–0037
280.10 (a)	0584–0336

[50 FR 2660, Jan. 18, 1985, as amended at 54 FR 7002, Feb. 15, 1989; 54 FR 24527, June 7, 1989; 56 FR 55059, Oct. 24, 1991]

PART 272—REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

Sec.
272.1 General terms and conditions.
272.2 Plan of operation.
272.3 Operating guidelines and forms.
272.4 Program administration and personnel requirements.
272.5 Program informational activities.
272.6 Nondiscrimination compliance.
272.7 Procedures for program administration in Alaska.
272.8 State income and eligibility verification system.
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272.11 Systematic Alien Verification for Entitlements (SAVE) Program.

AUTHORITY: 7 U.S.C. 2011–2036.

EDITORIAL NOTE: OMB control numbers relating to this part 272 are contained in § 271.8.

§ 272.1 General terms and conditions.

(a) *Coupons do not reduce benefits.* The coupon allotment provided any eligible household shall not be considered income or resources for any purpose under any Federal, State, or local laws including, but not limited to, laws on taxation, welfare, and public assistance programs. No participating State or political subdivision shall decrease any assistance otherwise provided an individual or individuals because of the receipt of a coupon allotment.

(b) *No sales taxes on food stamp purchases.* (1) A State shall not participate in the Food Stamp Program if State or local sales taxes or other taxes or fees, including but not limited to excise taxes, are collected within the State on purchases made with food stamp coupons. ''Purchases made with food coupons'' for purposes of this provision shall refer to purchases of ''eligible foods'' as defined in § 271.2. Where the total value of groceries being bought by the recipient is larger than the amount of coupons being presented by the recipient, only the portion of the

sale made in exchange for food stamps must be exempt from taxation in order for a State to satisfy the requirements of this provision. Although a food stamp recipient may use a combination of cash and food stamps in making a food purchase, only the dollar amount represented by the food coupons needs to be exempt from taxation.

(2) State and/or local law shall not permit the imposition of tax on food paid for with coupons. FNS may terminate the issuance of coupons and disallow administrative funds otherwise payable pursuant to part 277 in any State where such taxes are charged. Action to disallow administrative funds shall be taken in accordance with the procedures set forth in § 276.4.

(3) A State or local area which taxes some, but not all, eligible food items shall ensure that retail food stores in that locale sequence purchases of eligible foods paid for with a combination of coupons and cash so as to not directly or indirectly charge or assign a tax to food stamp recipients on eligible food items purchased with coupons. Prohibited methods include, but are not limited to, the allocation of coupons first to non-taxable eligible items, and the application of cash, rather than coupons, to taxable eligible food.

(c) *Disclosure*. (1) Use or disclosure of information obtained from food stamp applicant or recipient households shall be restricted to:

(i) Persons directly connected with the administration or enforcement of the provisions of the Food Stamp Act or regulations, other Federal assistance programs, federally-assisted State programs providing assistance on a means-tested basis to low income individuals, or general assistance programs which are subject to the joint processing requirements in § 273.2(j)(2).

(ii) Persons directly connected with the administration or enforcement of the programs which are required to participate in the State income and eligibility verification system (IEVS) as specified in § 272.8(a)(2), to the extent the food stamp information is useful in establishing or verifying eligibility or benefit amounts under those programs;

(iii) Persons directly connected with the verification of immigration status of aliens applying for food stamp benefits, through the Systematic Alien Verification for Entitlements (SAVE) Program, to the extent the information is necessary to identify the individual for verification purposes.

(iv) Persons directly connected with the administration of the Child Support Program under part D, title IV of the Social Security Act in order to assist in the administration of that program, and employees of the Secretary of Health and Human Services as necessary to assist in establishing or verifying eligibility or benefits under titles II and XVI of the Social Security Act;

(v) Employees of the Comptroller General's Office of the United States for audit examination authorized by any other provison of law; and

(vi) Local, State, or Federal law enforcement officials, upon their written request, for the purpose of investigating an alleged violation of the Food Stamp Act or regulation. The written request shall include the identity of the individual requesting the information and his authority to do so, violation being investigated, and the identity of the person on whom the information is requested.

(vii) Local, State or Federal law enforcement officers, upon written request, for the purpose of obtaining the address, social security number, and, if available, photograph of any household member, if the member is fleeing to avoid prosecution or custody for a crime, or an attempt to commit a crime, that would be classified as a felony (or in the State of New Jersey, a high misdemeanor), or is violating a condition of probation or parole imposed under a Federal or State law. The State agency shall not require a household to present photographic identification as a condition of eligibility and must accept any document that reasonably establishes the applicant's identity. The State agency shall also provide information regarding a household member, upon the written request of a law enforcement officer acting in his or her official capacity, where such member has information necessary for the apprehension or investigation of another member who is fleeing to avoid prosecution or custody for a felony, or has violated a condition

of probation or parole. If a law enforcement officer provides documentation indicating that a household member is fleeing to avoid prosecution or custody for a felony, or has violated a condition of probation or parole, the State agency shall terminate the participation of the member. A request for information absent documentation would not be sufficient to terminate the member's participation. The State agency shall disclose only such information as is necessary to comply with a specific written request of a law enforcement agency authorized by this paragraph.

(2) Recipients of information released under paragraph (c)(1) of this section must adequately protect the information against unauthorized disclosure to persons or for purposes not specified in this section. In addition, information received through the IEVS must be protected from unauthorized disclosure as required by regulations established by the information provider. Information released to the State agency pursuant to section 6103(l) of the Internal Revenue Code of 1954 shall be subject to the safeguards established by the Secretary of the Treasury in section 6103(l) of the Internal Revenue Code and implemented by the Internal Revenue Service in its publication, *Tax Information and Security Guidelines*.

(3) If there is a written request by a responsible member of the household, its currently authorized representative, or a person acting on its behalf to review material and information contained in its casefile, the material and information contained in the casefile shall be made available for inspection during normal business hours. However, the State agency may withhold confidential information, such as the names of individuals who have disclosed information about the household without the household's knowledge, or the nature or status of pending criminal prosecutions.

(d) *Information available to the public.* (1) Federal regulations, Federal procedures embodied in FNS notices and policy memos, State Plans of Operation, and corrective action plans shall be available upon request for examination by members of the public during office hours at the State agency headquarters as well as at FNS regional and national offices. State agency handbooks shall be available for examination upon request at each local certification office within each project area as well as at the State agency headquarters and FNS Regional offices. State agencies, at their option, may require other offices within the State to maintain a copy of Federal regulations.

(2) Copies of regulations, plans of operation, State manuals, State corrective action plans, and Federal procedures may be obtained from FNS in accordance with part 295 of this chapter.

(e) *Records and reports.* Each State agency shall keep such records and submit such reports and other information as required by FNS.

(f) *Retention of records.* Each State agency shall retain all program records in an orderly fashion, for audit and review purposes, for a period of 3 years from the month of origin of each record. The State agency shall retain fiscal records and accountable documents for 3 years from the date of fiscal or administrative closure. Fiscal closure means that obligations for or against the Federal government have been liquidated. Administrative closure means that the State agency has determined and documented that no further action to liquidate the obligation is appropriate. Fiscal records and accountable documents include, but are not limited to claims and documentation of lost benefits. Retention methods for ATP cards are provided in part 274.

(g) *Implementation.* The implementation schedule for any amendment to the regulations shall be specified in the amendment.

(1) *Amendment 132.* Program changes required by Amendment 132 to the food stamp regulations shall be implemented as follows:

(i) State agencies shall eliminate the purchase requirement for all households on or before January 1, 1979. The State agency shall designate the month the purchase requirement is to be eliminated. If the month designated is other than January 1979, the State agency shall obtain prior approval of FNS. FNS shall approve the designation of months prior to January 1979, if the State agency demonstrates that an accounting procedure for the new

issuance system will be in place. The submission dates for the forms FNS–250 and FNS–256, stipulated in §274.8(a), shall be effective with the reports for the first month of issuance without a purchase requirement. For example, if EPR is implemented in January, the FNS–250 and FNS–256 for January would be due by March 17, 1979. The FNS–259 shall be submitted in accordance with §274.8(a)(3) starting with the quarter beginning January 1979.

(ii) State agencies may implement all eligibility rules contained in part 273 and all issuance rules contained in part 274 at the same time the purchase requirement is eliminated, but in no case shall eligibility and issuance rules be implemented prior to elimination of the purchase requirement. State agencies may also implement portions of part 273 and part 274 separately after the purchase requirement is eliminated, provided that the eligibility rules setting the income standards, the income deductions and the household allotment calculation are implemented at the same time, and all rules are implemented no later than 3 months after the purchase requirement is eliminated. However, if a State agency implements EPR after December 1, 1978, it shall implement the certification and other issuance regulations for all new applications and recertifications no later than March 1, 1979.

(iii) State agencies shall have up to 4 months following the first day that applications are taken under the new rules, to convert the current caseload to the new program. Households coming due for recertification during this time will be converted to the new program at recertification. Remaining households shall be converted by a desk review during that 4-month period. The new income definition, deductions, and allotment calculation shall be completed for all households which are converted through a desk review. To the extent that the case file and other information available to the State agency permit, other eligibility criteria, such as work registration, resources, tax dependency, and alien status, shall be considered during the desk review. Otherwise, nonincome eligibility factors shall be deferred until the household's scheduled recertification. In no event shall a household's certification period be extended as a result of the desk review. Until recertified or converted by a desk review, a household shall continue to receive the bonus portion of the allotment, calculated in accordance with the income, deduction, and basis of issuance provisons of the Food Stamp Act of 1964. During the case file conversion period, some households may be participating on the basis of the old program rules and some on the new rules. Claims against households and restoration of benefits shall not be assessed provided that whichever program rules are in use for a particular case are correctly applied during the conversion period. However, errors caused by miscalculations based on the old or new program rules which result in an entitlement to restoration of lost benefits or an overissuance shall be assessed in accordance with §§273.17 and 273.18 of these regulations. The procedures for calculating lost benefits or overissuances as specified in §§273.17 and 273.18 shall be applied to any case found to be in error after the implementation of these procedures, even though the action which caused the error may have occurred prior to the date of implementation. Notwithstanding anything to the contrary in the preceding provisions of this paragraph, State agencies shall have up to four months following the first day that applications are taken under the new rules, to convert the current caseload to the new program. Households coming due for recertification during this time shall be converted to the new Program at recertification. However, if the State agency elects to schedule a desk review for these households earlier in the four-month period, conversion shall take place after the desk review. Further, State agencies may elect to do a point-in-time computer conversion in lieu of individual desk reviews. Such a computer conversion must cover entire categories of households, such as public assistance households, all households in a particular project area, all households currently in the computer files, etc., and the State agency may not elect to postpone the conversion of certain cases until recertification.

(iv) State agencies shall implement § 273.17 on the restoration of lost benefits on or before March 1, 1979. State agencies are encouraged to implement restoration of lost benefits concurrent with the elimination of the purchase requirement, especially as they relate to households which are entitled to lost benefits but which have been unable to receive them because the households are currently ineligible. State agencies shall notify currently ineligible households of the availability of their lost benefits by using one of the following procedures:

(A) State agencies which can readily identify the ineligible households which are entitled to lost benefits shall notify these households and restore the lost benefits within 4 months of the date restoration of lost benefits is implemented.

(B) Other State agencies shall issue a one-time-only press release notifying ineligible households that benefits can be restored. The press release shall advise households to contact the local food stamp office for more information. In addition, State agencies issuing the press release shall request the assistance of local Community Action Programs, general assistance agencies, legal services programs funded by the Legal Services Corporation, State employment service and unemployment compensation offices and other State and Federal governmental agencies providing services to low-income households, such as the Social Security Administration or the Community Services Administration. FNS shall provide the State agency with copies of the letter to be used to request assistance from outreach organizations and governmental agencies, and the fliers and posters which will be distributed upon request to such organizations and agencies. The language of the request for assistance, the notice to households and the poster is contained in the appendix to this rulemaking. State agencies shall mail the request for assistance and display posters in all local agency food stamp certification and issuance offices and welfare offices within 30 days of receipt from FNS. In project areas subject to the bilingual requirements of § 272.4(c), State agencies shall provide translations of the posters and fliers. Upon request, FNS shall provide Spanish posters and fliers. FNS shall reimburse State agencies for all costs of providing translations of the posters and fliers in languages other than Spanish. The State agency shall display the posters in its offices for six months. Households whose entitlement to benefits has been clearly established may apply for restoration of lost benefits under this paragraph for an indefinite period. Households whose entitlement to restoration of lost benefits was established more than three years prior to application for retroactive benefits under this paragraph shall be permitted to document entitlement if entitlement cannot be verified from State agency records. Such households shall sign an affidavit under penalty of perjury explaining their entitlement. In lieu of the requirements of this paragraph, State agencies may elect to provide notice pursuant to paragraph (g)(1)(iv)(A) of this section, in any or all project areas within the State.

(v) State agencies shall assume the authority to settle or adjust recipient claims delegated under § 271.4(b) on or before July 1, 1979.

(vi) State agencies without a currently approved utility standard required in § 273.9(d)(5) shall develop and implement an FNS approved utility standard on or before October 1, 1979. The State agency shall notify households certified at the time the utility standard is implemented of the availability of the standard and the conditions for its use in lieu of actual expenses. Households qualified to use the standard and which elect to do so shall have the standard applied as any other change in circumstances. Otherwise, actual utility expenses shall continue to be used for households qualified for the standard until their next recertification.

(vii) State agencies shall advise FNS of their determination of the need for bilingual services as required by § 272.4(c) on or before December 1, 1978. If the State agency cannot determine, based on available information sources, whether or not bilingual services are required in particular project areas, it shall so advise FNS on or before December 1, 1978. The State agency shall

then develop procedures to record the number of non-English-speaking low-income households which make contact with its offices in these project areas as required by § 272.4(c)(6). These procedures shall be implemented on or before March 1, 1979, and shall continue for 6 months. The State agency shall submit to FNS its determination(s) of the need for bilingual services not later than 60 days following the end of the 6-month period. Bilingual outreach materials shall be available for distribution within 90 days of the State agency's determination that such materials are required. When the State agency determines that bilingual staff and certification materials are required, it shall also make a determination of whether volunteers or paid staff will be used. When volunteers are to be used, the State agency shall provide the materials and arrange for volunteers within 90 days. Paid staff and materials shall be provided within 180 days.

(viii) Prior to the certification of households under these regulations, State agencies shall implement staff training for the transition as required in § 272.4(e)(3), and training for outreach workers, receptionists, and others, as required in § 272.4(e)(1) (v) and (vi). Beginning with these training sessions for the transition, State agencies shall implement the requirements for public participation at training sessions, as specified in § 272.4(e)(1)(iv). State agencies shall designate a training coordinator and develop and implement the ongoing training program required by § 272.4(e) on or before July 1, 1979.

(ix) Elimination of the purchase requirement and the implementation of the basic financial and nonfinancial eligibility criteria and other coupon issuance criteria shall not be extended for any reason. FNS may grant extensions for other provisions contained in these rules, provided that the State agency presents compelling justification for a delay and establishes an acceptable alternative schedule in advance of the implementation deadline. In no event will FNS grant an extension in excess of 120 days from the specified implementation date. In those cases where extensions are granted, the relevant Department regulations under the Food Stamp Act of 1964 shall remain in effect until superseded by implementation of the new rules.

(2) *Amendment 137*. Program changes required by Amendment 137 to the food stamp regulations shall be implemented for all households initially applying for food stamp benefits no later than 90 days following the publication of this amendment.

(3) *Amendment 146*. The procedures contained in Amendment 146 shall be implemented by State agencies in time to be able to issue reduced food stamp allotments or to suspend or cancel allotments within 60 days after the date of publication of this amendment in the FEDERAL REGISTER.

(4) *Amendment 141*. State agencies shall begin planning for and conducting ongoing consultations with the Indian tribal organizations of the reservations within their jurisdiction as soon as possible after the effective date of this amendment. Portions of the State Plan of Operation to be submitted for fiscal year 1980 shall be subject to ITO comment as required by § 281.2(a). The funding authority in § 281.9 shall apply to budgets beginning with the fourth quarter of fiscal year 1979.

(5) *Amendment 211*. State agencies shall implement the new Social Security Number (SSN) provisions for new applicants no later than February 1, 1983 and convert the current caseload at recertification or when the case is otherwise reviewed, whichever occurs first. The citizenship provisions must be implemented on or before April 1, 1983. All other provisions shall be implemented at State agency discretion.

(6) *Amendment 149*. Changes to States' Quality Control systems as required by this amendment shall be implemented as follows:

(i) *All* State agencies shall continue conducting modified QC reviews [in accordance with regulations published February 9, 1979 (43 FR 8548)] through August 31, 1979 and submit Form FNS–133 to FNS by September 15.

(ii) State agencies shall implement the requirements in subpart C of part 275 for conducting QC reviews no later than October 1, 1979. A quality control sampling plan (as specified in § 275.11(a)

of these regulations) must be submitted by each State to the appropriate FNS Regional Office no later than September 1, 1979 (30 days prior to implementation). This will allow time necessary for approval of the plans prior to the October 1 implementation date.

(iii) State agencies are encouraged to implement QC September 1, if possible. States opting to implement early would not be required to operate *for this month* under an approved sampling plan. These States must, however, submit sampling plans in accordance with paragraph (g)(6)(ii) of this section. The month of September (sampling month) would serve as a test phase. Therefore, data collected for the sample month would not be required to be submitted to FNS or used in determining a State's cumulative allotment error rate.

(iv) Regulations published October 17, 1978 (43 FR 47846) which implement major aspects of the Food Stamp Act of 1977 provide for the conversion of cases via a desk review (§ 272.1(g)(1)(iii)). Desk converted cases would be converted to the new eligibility criteria for income and deductions but may not have been converted to the new criteria for resources, work registration, tax dependency, etc. Therefore, States will have households participating in the program based on some of the eligibility criteria of the 1964 Food Stamp Act. Desk converted cases as provided in § 272.1(g)(1)(iii) and cases which should have been converted via desk review (some cases may not undergo the conversion process as required), shall be subject to standard QC review procedures. When the QC reviewer detects a variance in one of these cases which results from an element of eligibility which was not converted and was not required to have been converted, the reviewer shall disregard the variance. When the reviewer detects a variance in a case when an element of eligibility was, or should have been converted, the reviewer shall handle the variance like any other QC variance as identified in § 275.12 of these regulations. It is possible that desk converted cases may continue to show up in QC samples through February 1980.

(v) State agencies shall submit reports of QC review activity (one copy to the appropriate FNS Regional Office and one copy to the Deputy Administrator for Family Nutrition Programs, Washington, DC) as follows:

(A) Each State agency shall report the monthly progress of sample selection and completion on a form provided by FNS. This report shall be submitted to FNS so that it is received no later than 10 days after the end of each month, beginning December 10, 1979. Each report shall reflect sampling and review activity for the previous month.

(B) Each State agency shall report the results of QC review activity on a form provided by FNS. This report shall be submitted to FNS so that it is received no later than 90 days from the end of the reporting period.

(C) Corrections to information on the above reports requested by FNS must be submitted within 10 days of the request.

(7) *Amendment 151.* (i) State agencies shall implement the program changes required by amendment for all new applications and recertifications no later than January 1, 1980. Currently eligible households shall be converted at recertification or when they request conversion to the new deduction system by responding to the notice required in paragraph (g)(7)(iii) of this section or by otherwise requesting recomputation.

(ii) State agencies may but are not required to convert the current caseload to the shelter deduction system provided for in § 273.9(d)(5) through desk reviews or by computer search. State agencies are encouraged to convert eligible households to the new shelter deduction as soon as possible to allow these households to benefit during the winter months.

(iii) Notices explaining the changes and their applicability shall be available at all food stamp certification offices and shall also be mailed or otherwise provided individually to all currently certified households at least once prior to implementation. At a minimum, these notices shall be distributed in the month prior to implementation either with the ATP card or separately but no later than the 15th of the month. The notice shall advise the

household of the availability of the new deductions and the procedures for reporting medical and shelter expenses. If the State agency can identify those households to which this amendment would apply, only these households need to receive the notice.

(iv) Fliers advising of the changes contained in this amendment shall be made available to public and general assistance offices, local Social Security offices, and any interested organizations, particularly those dealing with the elderly or disabled or those places where the elderly or disabled congregate, such as housing units. Also, posters explaining the changes shall be displayed in food stamp certification offices and shall be made available to public and general assistance offices, local Social Security offices and any other interested groups. State agencies shall notify all organizations on its outreach contact list of the changes and of the availability of posters and fliers. State agencies shall issue press releases to the news media advising of the impending program changes.

(v) For the first two months of implementation, State agencies shall have up to 30 days to process changes in medical and shelter costs reported in conjunction with this amendment. The change shall be effective for the first issuance following that 30-day period with restoration of lost benefits to the point at which the change would normally become effective under §273.12. The State agency may request an extension of processing time of up to 60 days to act on these changes. The State agency shall submit appropriate documentation to FNS for the State or any part of the State for which such an extension is requested. After the first two months the State agency shall act on these changes in accordance with the normal processing standards in §273.12(c). For changes reported during a period of two months following a State agency's implementation of this amendment, verification of shelter and medical expenses required by §273.2(f) must be obtained prior to the issuance of the third normal monthly allotment after the change is reported. If the household does not provide verification, the household's benefits will revert to the original level. State agencies are encouraged to complete such verification and, if needed, conduct an interview prior to processing the change. After this initial period, State agencies will verify these expenses in accordance with the normal timeliness standards.

(vi) Medical expenses shall be subject to the same rounding procedures used for shelter expenses in §273.10(e)(1)(ii). This procedure shall be in effect until implementation of amendments to §273.10(e)(1)(ii).

(vii) No household shall be entitled to restoration of lost benefits under this amendment for any period prior to the time the State agency has implemented its provisions. For the initial months after implementation, during which the longer processing time allowed under this amendment is in effect, a household shall be entitled to restoration of lost benefits back to the month the change would have become effective under the normal processing standards in §273.12(c). After this initial period, no household shall be entitled to restoration of lost benefits unless the State agency does not act on reported changes in accordance with the timeliness standards in §273.12(c) or the household is otherwise entitled under the provisions of §273.17.

(viii) Implementation of these program changes falls in the last three months of the October 1979 to March 1980 reporting period for quality control. For the months of January, February and March 1980, all cases in which a household member is either 60 years of age or over, receives SSI, or disability benefits under title II of the Social Security Act will be subject to standard quality control review procedures, except that any varying information regarding medical deductions and/or shelter deductions in excess of the cap found in the review shall be disregarded in determining errors. Such information shall be noted on the Face Sheet of Form FNS–245 under part VII, Discrepancies and Other Information, and reported to the State agency for appropriate action on an individual case basis. Starting with the April–September 1980 reporting period, when the reviewer detects a variance in the medical deduction and/or the shelter deduction in excess of the cap, and

these expenses were reported at application, recertification or during the certification period, the reviewer shall handle the variance like any other QC variance as identified in § 275.12 of the Performance Reporting System regulations.

(8) *Amendment 152*. The rounding procedure set forth in § 273.10(e) shall be in effect for new applications and recertifications no later than July 1, 1980. The State agency shall have up to 12 months following the implementation date of final regulations to convert the current caseload to the rounding procedure that is chosen under § 273.10(e)(1)(ii). The State agency shall have a choice of the following three options in converting households that are already participating at the time the new rounding procedure goes into effect:

(i) Convert households at recertification; (ii) convert households by conducting a desk review; or (iii) convert all households, or all households in a certain category, at a point-in-time. For example, the State agency may convert all public assistance households or all households in a project area by computer. Point-in-time mass conversions shall be conducted no later than July 1, 1980. In any case, the State agency shall advise FNS regarding which rounding and caseload conversion procedures are chosen and when the conversion will be completed.

(9) *Amendment 154*. State agencies shall implement the program changes required by Amendment 154 as follows:

(i) State agencies shall begin requiring social security numbers for all new applications and recertifications no later than the first day of the first month which commences 120 days from the date of publication of final rules. Participating households shall be requested to provide or apply for social security numbers (SSN) for appropriate household members at recertification, or at the time of office contact for any other reason. The State agency shall provide advance notification of this requirement and the consequences of noncompliance by sending an individual notice to all participating households and by providing press releases for dissemination through the media. The individual notices may be sent as either a one-time notice prior to implementation and/or with the notices of expiration of a certification period.

(ii) If any affected member(s) of a household does not have his or her SSN readily available at the time of application, recertification, or any office contact, he or she shall follow the procedures for furnishing an SSN in accordance with § 273.6 as amended.

(iii) State agencies shall implement the fraud claims procedures contained in § 273.16 and § 273.18. Implementation shall be no later than the first of the month following the 120th day from the date of publication of final rules. By implementation the State agency shall also have an approved system for handling claims, including a method for accounting for the fifty percent retention of the value of funds collected from fraud claims. Any collection action on fraud claims after implementation is subject to the fifty percent retention including claims established under the Food Stamp Act of 1964 as amended and under the Food Stamp Act of 1977, as amended. However, only individuals found guilty of fraud through an administrative fraud hearing or through a court of law under regulations promulgating the Food Stamp Act of 1977, as amended, are subject to the recovery provisions in §§ 273.16 and 273.18 retroactive to implementation of fraud claim provisions under the 1977 Act.

(10) *Amendment 207*. State agencies shall implement the changes in the rules required by Amendment 207 no later than January 1, 1983. Disabled parents who requested and were denied separate household status on or after September 8, 1982, will be entitled to benefits retroactive to the dates of their applications for separate household status.

(11) *Amendment 160*. State agencies shall implement the provisions of this amendment as follows:

(i) State agencies shall submit the initial State corrective action plans so they are received by FNS within 90 days of publication of these regulations as required in § 275.22(a) of this chapter. This initial plan shall contain all known deficiencies in the State which meet the criteria set forth in § 275.16(b)

of this chapter and shall identify, for each such deficiency, the items required in § 275.17(b) of this chapter. Project areas also shall prepare and submit to the State corrective action plans for all identified deficiencies. These plans shall be submitted within 60 days of identification of a deficiency and shall include any deficiencies known to the project area prior to publication of these regulations for which corrective action has not been completed. Ninety days after publication of these regulations, all provisions of §§ 275.15, 275.16, 275.17, 275.18, 275.19 and 275.22 of this chapter shall be implemented.

(ii) State agencies shall have submitted management evaluation (ME) review schedules within 90 days of publication of these regulations as required by § 275.20 of this chapter. These review schedules shall contain all information required by § 275.20 of this chapter and shall be adhered to unless a change is necessary. If a modification to an ME review schedule is necessary at any time in the review period, the State shall notify the appropriate FNS Regional Office of the modification.

(iii) State agencies shall implement ME reviews within 90 days of publication of these regulations, following the provisions of §§ 275.5, 275.6, 275.7, 275.8, and 275.9 of this chapter. Any waiver from the requirements of § 275.7 or § 275.9 must be requested 60 days prior to its implementation as identified in § 275.5(c). Development or submission of requests for a deviation shall not delay implementation of the ME review subsystem past the required implementation date.

(iv) All provisions of these regulations which are not addressed in paragraphs (g)(11) (i) and (ii) of this section shall be implemented within 90 days of publication of these regulations. While this includes the requirements for a Performance Reporting System Coordinator and designation of an organizational entity for effecting corrective action as identified in § 275.2(a) of this chapter, this position and designation may be established on an interim basis; provided that the provisions of § 275.2(a) of this chapter are fully implemented by October 1, 1980. During this interim period States shall ensure that all responsibilities of the coordinator or entity are adhered to.

(12) [Reserved]

(13) *Amendment 162*. Program changes required by Amendment 162 of the Food Stamp Program regulations shall be implemented as follows:

(i) The fee agent system for conducting interviews is currently in use and its continuing use is approved.

(ii) All other rules except paragraph (p) of § 272.8 shall be implemented as soon as practical but no later than 90 days following the date of final rulemaking. A fee agent training plan must be submitted within 45 days of the date of final rulemaking. Paragraph (p) of § 272.8 concerning points and hours shall be implemented following the time standards contained therein.

(14) *Amendment 142*. (i) State agencies shall restore lost benefits to households who had their eligibility or benefit levels adversely affected because Federal energy assistance payments were counted as income and/or resources. Entitlement to restoration of lost benefits shall be retroactive to October 1, 1979 for payments received under CSA's ECAP; to November 27, 1979 for payments received under DHEW's EAP; and to January 7, 1980 for the one-time-only energy assistance payments to SSI households in accordance with Pub. L. 96–126.

(ii) State agencies shall use the following procedures for notifying households of entitlement to restoration of benefits under Amendment 142:

(A) State agencies which can readily identify those SSI households who received the one-time payment and those households who received payments under the Energy Crisis Assistance or Energy Allowance Programs which lost benefits because their energy assistance payment was counted as income and/or resources must notify such households of entitlement to restoration of lost benefits.

(B) State agencies which cannot readily identify households entitled to restoration of lost benefits due to the circumstances described in § 272.1(g)(14)(i) must issue a one-time-only press release to notify households which have participated since October 1, 1979 of possible entitlement to restoration of lost benefits. State agencies

may, at their option, use additional means of notification such as posters.

(15) *Amendment 163*. State agencies shall implement the provisions in this amendment no later than July 1, 1980.

(16) *Amendment 174*. State agencies shall implement the program changes required by Amendment *174* as follows:

(i) State agencies shall implement the income/resource disregard provision for Federal, State, and local energy assistance payments (§§ 273.8 and 273.9 of this subchapter) no later than October 1, 1981.

(ii) State agencies shall implement the new maximum resource limit and the exemption of vehicles for the physically disabled (§ 273.12 of this subchapter) no later than October 1, 1981 for all new applicants. State agencies shall convert the current caseload to the new resource limit at the time of recertification, or at any other time the casefile is reviewed prior to recertification.

(iii) State agencies shall implement the student participation provisions of this amendment (§§ 273.1, 273.2, 273.5, 273.7 and 273.11 of this subchapter) no later than October 1, 1981 for all new applicants. Current caseload shall be converted at the time of recertification or any time the casefile is reviewed prior to recertification.

(17) *Amendment 158*. (i) The procedures contained in part 273 regarding SSI food stamp joint application processing shall become effective on August 1, 1980 for all State agencies except that:

(A) In those areas designated as SSI/Elderly Cash-out Demonstration Project Sites or Demonstration Project Comparison Sites, implementation of these provisions will be delayed. In addition, Social Security office service areas which contain either demonstration projects sites or demonstration comparison sites will be temporarily exempted, in their entirety, from implementation of these provisions whether or not their boundaries are coterminous with demonstration project sites and/or demonstration comparison site boundaries. This temporary exemption removes the administrative problem of the same SSA office simultaneously operating under both joint processing and cash-out regulations. The procedures contained in this rulemaking shall become effective for these project areas on the first day of the month following the ninetieth day after the termination of the demonstration project.

(B) State agencies in SSI cash-out States as defined in § 273.20 shall not implement the provisions of this rulemaking. In the event an SSI cash-out State loses that status, the State agency shall implement the provisions of this rulemaking on the first day of the month following the ninetieth day after the Secretary of Health and Human Services determines that the State no longer qualifies for cash-out status.

(ii) State agencies shall distribute fliers advising of the changes contained in this amendment to public and general assistance offices, local Social Security offices, any interested organizations, particularly those dealing with the elderly or disabled, and those places where the elderly or disabled congregate, such as housing units senior citizens centers, and elderly feeding programs. Also, posters explaining the changes shall be displayed in food stamp certification offices and shall be made available to public and general assistance offices, local Social Security offices and any other interested groups. State agencies shall notify all organizations on their outreach contact lists of the changes and of the availability of posters and fliers. State agencies shall issue press releases to the news media advising of the impending program changes. FNS will supply State agencies with model language describing the changes which State agencies may use in their publications.

(18) *Amendment 168*. The provisions of Amendment 168 shall be effective on the thirtieth day following their publication. Any claims filed against State agencies for incidents that occur after the publication of this amendment shall be filed in accordance with the provisions of this amendment. Any claims filed against State agencies for incidents that occurred prior to the publication of this amendment shall be filed in accordance with the rules in effect at the time they occurred. However, the administrative review procedures contained in this amendment shall be applicable to all claims that

are filed after the effective date of this amendment.

(19)–(20) [Reserved]

(21) *Amendment 178*. State agencies shall implement the provisions of § 273.8 and § 273.9 of this amendment for all new applicants no later than February 1, 1981. States shall convert the current caseload to the new rules at recertification or at the time the case is otherwise reviewed, whichever comes first.

(22) *Amendment 179*. State agencies shall implement those verification procedures mandated in § 273.2 and § 273.8 no later than the first of the month 120 days following publication of final regulations. State agencies may implement those provisions allowed at State agency option in § 273.2 and § 273.12, once the options have been approved by FNS and the State certification manuals have been revised to incorporate the options.

(23) *Amendment 171*. (i) All States operating an ATP issuance system shall submit the first Form FNS–46, Food Stamp Reconciliation Report, in accordance with Amendment No. 171, for the month of February 1981. This report shall be submitted to the FNS Regional Office within 90 days from the end of the report month.

(ii) All States shall submit the Form FNS–388, State Coupon Issuance and Particpation Estimates, for February 1981 and each month thereafter. Those States that have not submitted procedures for estimating program participation, shall submit them to the FNS Regional Office on or before February 9, 1981.

(24) *Amendment 186*. The procedures of part 275 regarding SSA/food stamp joint processing and demonstration cases shall become effective on August 1, 1980 for all applicable State agencies. These procedures must be implemented by October 1, 1980.

(25) *Amendment 187*. State agencies shall implement the complaint procedures required by § 271.6(a) no later than 180 days following publication of final regulations.

(26) *Amendment 165*. State welfare agencies and State employment agencies shall implement the provisions of Amendment 165 no later than the first of the month following 120 days from publication of amendment 165 in the FEDERAL REGISTER as follows:

(i) Both agencies shall begin immediately to develop the work registration plan and agreements discussed in § 273.7(c) and (d) of Amendment 165. The plan and agreements must be approved and implemented within the 120 day timeframe established for implementation of all provisions of the final rule.

(ii) The provisions of amendment 165 shall be applied to households at the time of initial application, recertification, or reregistration, beginning no later than the first of the month following 120 days from publication of the amendment.

(27) *Amendment 189*. State agencies shall implement the provisions of Amendment No. 189 no later than July 1, 1982.

(28) *Amendment 156*. State agencies shall implement the program changes required by Amendment 156 within 120 days after publication of these regulations, meeting the submittal deadlines outlined in § 272.2 and § 272.3.

(29) *Amendment 190*. State agencies shall implement these regulations no later than January 1, 1982. The rules are effective November 9, 1981.

(30) *Amendment 191*. Areas subject to the photo ID card requirement must have issued photo ID cards (or cards annotated to indicate that the card is valid without a photograph, in accordance with § 273.10(g)(4)(ii)(C)) to all participating households, and shall require presentation of photo ID cards (or the annotated cards) at issuance points as a precondition of issuing coupons to households, no later than the first of the month that is 12 months after the publication of final regulations. Any areas that become subject to the photo ID card requirement at a later date shall also come into full compliance no later than the first of the month that occurs 12 months after FNS notifies the State agency that the area is subject to the requirement.

(31) *Amendment 169*. The provisions of Amendment 169 shall be effective March 30, 1981. These provisions shall apply to the period beginning October 1, 1980, except that the provisions of § 277.4(b)(2) shall apply to the period October 1, 1978 through October 1, 1980. No State shall be subject to sanctions

based upon quality control error rates for any period prior to October 1, 1980. No State shall receive enhanced funding based upon quality control data for a period prior to the date upon which its quality control system was in operation.

(32)–(33) [Reserved]

(34) *Amendment 198*. State agencies opting to match earnings data provided by applicants and participants with information maintained by the Social Security Administration shall first execute data exchange agreements with the Social Security Administration. After the effective date of this rule and after execution of this agreement, State agencies may implement wage match provisions at their discretion.

(35) *Amendment 202*. State agencies shall implement the provisions of Amendment No. 202 as follows:

(i) The rules shall be implemented no later than October 1, 1981, including the provisions for a medical deduction, separate dependent care deduction, and uncapped shelter expense deduction for the elderly and disabled in Puerto Rico, Guam, and the Virgin Islands. All households who apply October 1 or later and those households who are recertified October 1, 1981 or later shall be processed in accordance with these provisions. The proration of initial month benefits shall begin no later than October 1, 1981.

(ii) Conversion of the current caseload to the new gross income test and earned income deduction amount shall be completed no later than 90 days from October 1, 1981, or 90 days from the date of implementation approved through waiver requests in accordance with paragraph (g)(35)(vi) of this section.

(iii) Conversion of the current caseload to the new household definition; ineligibility of strikers and boarders; and, in Puerto Rico, Guam, and the Virgin Islands, a medical deduction, separate dependent care deduction, and uncapped excess shelter expense deduction shall be completed at or before recertification. In no event shall the new medical, dependent care, and excess shelter provisions for Guam, Puerto Rico and the Virgin Islands be implemented prior to October 1, 1981.

(iv) Notification to affected households of these changes shall be done, at a minimum, in the same manner required for mass changes in public assistance grants prescribed in § 273.12(e)(2)(ii).

(v) Beginning October 1,1981, outreach activities engaged in by State agencies shall be ineligible for Federal matching funds.

(vi) FNS will consider requests for waivers to these timeframes, except for the timeframe in paragraph (g)(35)(v) of this section, on a state-by-state basis, if good cause can be established and justified, in writing, for the need for a longer timeframe.

(36) *Amendment 259*. State agencies may implement this Monthly Reporting and Retrospective Budgeting rule at any time, but shall implement this rule no later than January 1, 1984. Prior to January 1, 1984, this rule may be implemented Statewide, in only part of a State (such as in certain project areas), or for only certain reasonable classifications of households (such as for only households receiving Temporary Assistance for Needy Families) so long as the implementation is completed by January 1, 1984. State agencies shall have begun to send monthly reports to households so that they can report their January 1984 circumstances in accordance with § 273.21(h). However, the changes in the interim provisions made by this final rule need not be implemented on January 1, 1984. The changes made by this final rule shall be implemented no later than May 1, 1984. Unless otherwise specified in § 273.21 of this chapter, all other food stamp regulations shall apply to State agencies and to applying or participating households.

(37) *Amendment 205*. The procedures extending eligibility to otherwise eligible residents of shelters for battered women and children contained in Amendment 205 shall be implemented by State agencies no later than April 1, 1982.

(38)–(39) [Reserved]

(40) *Amendment 213*. All State agencies shall execute the appropriate data exchange agreements and implement the provisions of this amendment not later than January 1, 1983. State agencies may opt to match earnings data

with information maintained by the Social Security Administration upon publication of final regulations provided they have executed data exchange agreements with the Social Security Administration. State agencies which are not prohibited by State law from wage matching with agencies administering unemployment compensation may do so upon publication of final regulations, provided they have executed the appropriate data exchange agreements.

(41) State agencies shall implement the provisions of Amendment 215 upon publication.

(42) *Amendment 217*. The regulations concerning the optional workfare program contained in Amendment 217 shall be in effect November 8, 1982. Workfare programs may be implemented after this date provided FNS has approved the workfare plan.

(43) *Amendment 220*. State agencies shall implement Amendment 220 on October 1, 1982.

(44) *Amendment 221*. State agencies shall implement on a case by case basis the provisions of this rule, excluding the provision which revises the application form, beginning the first of the month 30 days from the date of publication. The provision requiring a notice of verification on the application form shall be implemented on or before the first day of the month beginning at least 90 days from the date of publication. If the State agency has not depleted its existing supply of application forms, the State agency may opt to implement this provision by providing an insert to the application form containing the notice of verification.

(45) *Amendment 222*. This amendment shall be implemented by the first day of the month following the 30th day after publication. As of that date prior approval of forms, manuals, instructions, or any other type of operating guidelines will no longer be required and waivers will be granted or denied based on the new criteria contained herein. Additionally, as of that date State agencies shall inform FNS of changes, as they occur, in their organizational outline and agreements with other agencies. The submission requirement for the Budget Projection Statement, Form FNS–366A, as set forth in § 272.2(e) shall become effective on August 15, 1983, for the 1984 Federal fiscal year beginning October 1, 1983 through September 30, 1984.

(46) *Amendment 225*. The State agency shall obtain FNS approval for the exclusion of energy assistance provided under any State or local program, in accordance with the criteria set forth in §§ 273.8(e)(14) and 273.9(c)(11), within six months of the date of publication of the final rule. State or local energy assistance which is not approved during this six month period shall cease to be excluded at the end of the period. The new provisions concerning restoration of lost benefits in § 273.17 (a) and (e) shall be implemented no later than 120 days following publication of the final rule.

(47) *Amendment 227*. (i) In accordance with § 276.2(b)(3) (iii), FNS will hold State agencies strictly liable for losses by issuance agents where reconciliation shows noncompliance with photographic identification (photo ID) card requirements beginning with the fiscal quarter that begins January 1, 1983.

(ii) State agencies shall include provisions establishing the liability to the State agency of an issuing agent for the issuance losses covered in § 274.1(b)(6) in the next contract or agreement between the State agency and the issuing agent that is entered into or renewed after publication of this rule. Not later than one year following such publication, all contracts or agreements shall contain the required provision establishing the liability. However, failure of State agencies to include this language in contracts will not absolve the State agencies of the liability referred to in paragraph (g)(47)(i) of this section.

(48) *Amendment 228*. FNS will consider requests for waivers to monthly reporting requirements beginning November 5, 1982.

(49) *Amendment 245*. The mail issuance loss rates of 0.75 percent and $2,250 are effective January 1, 1983. The mail issuance loss rate of 0.5 percent and $1,500 are effective October 1, 1983. For the second quarter of fiscal year 1983 only, FNS will look at Statewide loss rates and the loss rates of individual reporting units within the State.

Where the loss rate for individual reporting units within the State is over the tolerance in that quarter and the Statewide loss rate is also over tolerance, FNS will assess liability for losses exceeding the tolerance reported for the second quarter of 1983. Where the loss rate for individual reporting units within a State are over tolerance for the second quarter, but the Statewide loss rate is under tolerance, State agencies shall have one additional quarter (the third Fiscal Year 1983 quarter) to bring such individual reporting units' loss rates into compliance with the tolerance levels. Thus for these reporting units, FNS will assess liability beginning with the fourth quarter of fiscal year 1983 and each quarter thereafter for losses which exceed the tolerance levels, regardless of Statewide loss rate. FNS will bill State agencies for losses on a semiannual basis.

(50) *Amendment 230*. State agencies shall implement the provisions of Amendment 230 no later than January 1, 1983.

(51)–(52) [Reserved]

(53) *Amendment 233*. State agencies shall implement these regulations no later than February 1, 1983.

(54) *Amendment 234*. The provisions of Amendment 234 shall apply to those sponsored aliens on behalf of whom the sponsor signed an affidavit of support or similar statement (as a condition of the alien's entry into the United States as a lawful permanent resident) on or after February 1, 1983.

(55) *Amendment 235*. Except for the provisions which simply extend options to State agencies, State agencies shall implement the changes made by Amendment 235 no later than February 1, 1983. Elderly/disabled persons who requested and were denied separate household status or other considerations granted disabled persons on or after September 8, 1982, will be entitled to benefits retroactive to the dates of their applications for separate household status or other special considerations.

(56) [Reserved]

(57) *Amendment 240*. The provisions of Amendment 240 shall be effective on January 11, 1983. The enhanced funding, which the amendment implements, is available to political subdivisions retroactive to October 1, 1982. The enhanced funding is available to a political subdivision for a workfare participant who begins working on or after October 1, 1982.

(58) *Amendment 242*. State agencies shall implement the disqualification penalties for intentional Program violation, and the improved recovery of overpayments provisions contained in Amendment 242 no later than April 1, 1983.

(i) The provision in § 273.11(c) for handling the income and resources of an individual disqualified for intentional Program violation shall apply to any individual disqualified for such a violation since the implementation of the fraud disqualification provisions of the Food Stamp Act of 1977. The disqualification procedures for intentional Program violation in § 273.16 shall apply to any individual alleged to have committed one or more acts of intentional Program violation since the implementation of the fraud disqualification provisions under the Food Stamp Act of 1977. However, the disqualification penalties in § 273.16(b) shall apply only to individuals disqualified for acts of intentional Program violation which occur after implementation of this amendment. In addition, the disqualification penalties in § 273.16(b) shall apply only to individuals disqualified for acts of intentional Program violation which occurred either during a certification period based on an application form containing these penalties or after receipt of written notification from the State agency of these penalties. Recurring acts of intentional Program violation which occur over a period of time prior to and after implementation of this final rule shall not be separated. Only one penalty can be imposed for such recurring violations and the household member shall be disqualified in accordance with the disqualification penalties specified in this amendment. The reporting requirements of § 273.16(i) shall become effective upon implementation, however, the State agency shall have until October 1, 1983, to submit such reports on individuals disqualified under previous regulations implementing the Food Stamp Act of 1977.

(ii) The recovery provisions for claims against households in § 273.18 shall apply to any overissuance caused by an action which occurred after implementation of regulations promulgating the Food Stamp Act of 1977, as amended. And, the procedures for calculating the amount of overissuances as specified in § 273.18(c) shall apply to any month in which an overissuance occurred retroactive to March 1, 1979. However, State agency retention of 50 percent of the value of collected intentional Program violation claims and 25 percent of the value of collected inadvertent household error claims as provided in § 273.18(h) shall apply to any collection action retroactive to January 1, 1982. The State agency shall have the option of reinstating any claim previously suspended, but not terminated, under the recovery provisions of regulations implementing the Food Stamp Act of 1977 and, once reinstated, such claims shall be subject to the recovery provisions contained in this amendment. However, the State agency shall not reinstate any amount of a claim compromised or any claim terminated under previous regulations implementing the Food Stamp Act of 1977, as amended. The submission requirements for the Form FNS–209, Status of Claims Against Households, as set forth in § 273.18(h) shall become effective with the quarter ending March 31, 1983.

(59) *Amendment 243*. (i) State agencies shall implement the provisions contained in § 274.1(d) statewide no later than October 1, 1983. FNS will consider requests for waivers to this timeframe on a State-by-State basis if the State agency establishes good cause through submission of written justification of the need for a longer timeframe and submits a plan that shows when the system will be implemented.

(ii) State agencies shall implement the correction made to § 273.1(a)(1)(iv) retroactive to September 8, 1982.

(iii) The Commonwealth of Puerto Rico shall implement the changes to part 285 on January 1, 1984, as published in the FEDERAL REGISTER for December 21, 1984.

(60) *Amendment 244*. State agencies shall implement the provisions regarding joint food stamp/public assistance case processing at State agency discretion. The provisions regarding certification periods must be implemented at time of application or at recertification no later than July 1, 1983.

(61) [Reserved]

(62) *Amendment 247*. State agencies must implement the provisions relative to noncompliance with other programs no later than April 1, 1985. The provisions relative to disclosure of information must be implemented no later than February 1, 1985.

(63) *Amendment 251*. State agencies shall implement the program changes required by this amendment as follows:

(i) State agencies shall apply the work registration, job search, and voluntary quit provisions of this rule, amending portions of § 273.7, to new applicants no later than January 2, 1985. The provisions shall apply to participating households at recertification or at the time of office contact for any other reason.

(64) *Amendment 252*. (i) The sanction/incentive provisions of § 275.25 were effective October 1, 1982. The previous provisions of § 275.25 shall continue to apply to the review periods prior to October 1982.

(ii) The funding provisions of § 277.4(b)(2) were effective on October 1, 1982, and shall apply to the October 1982, through September 1983, review period and every review period thereafter.

(iii) The revised funding provisions of § 277.4(b)(7) shall apply to the 6-month review periods October 1, 1981 through March 1982 and April through September 1982.

(65) *Amendment 253*. The provisions of § 274.8(a)(6) (i), (ii), and (iii) shall be implemented the first month beginning on or after the 90th day following publication of this final rule. In that month, the FNS–388 report shall provide the actual second preceding month data. The initial semiannual coupon issuance and NA/PA household and person participation data shall be provided in September 1985 for the month of July 1985. State agencies will cease submission of the FNS–256 report as of July 1985.

(66) *Amendment 254*. State agencies shall implement the provisions of

Amendment 254 no later than October 19, 1983.

(67) [Reserved]

(68) *Amendment 260.* (i) The quality control review provisions contained in Amendment 260 are effective starting with the beginning of Fiscal Year 1984, except as provided in the following sentences. All cases sampled for the six months October 1983 through March 1984 shall be disposed of and reported within 95 days of March 31, 1984. Cases sampled for April 1984 and for months thereafter shall be disposed of and reported according to § 275.21. For example, 90 percent of April cases are due within 75 days of April 30, and 100 percent are due within 95 days of that date. The structure of sample frames specified in § 275.11(e) must be implemented no later than the sample month of October 1984.

(ii) Starting with the October 1983 sample month, cases must be determined complete, not complete, or not subject to review according to §§ 275.12(g) and 275.13(e). As of the beginning of Fiscal Year 1984 the sample sizes stated in § 275.11(b) and related sampling plan requirements are effective, and State agencies are required to meet the completion standard stated in § 275.11(d). State agencies currently sampling at the levels provided in § 275.11(b)(1)(iii) must submit to their respective FNS Regional Offices the reliability statement required by § 275.11(a)(2) within 30 days of the publication of this rule, or no later than the second month after publication of this rule begin sampling at the levels specified in § 275.11(b)(1)(ii).

(69) *Amendment 261.* State agencies shall implement this amendment establishing the Alaska urban and rural allotment levels and the new cap for Guam no later than August 1, 1984. Households in rural Alaska which request retroactive benefits by February 1, 1985 will be entitled to retroactive benefits for the period after September 8, 1982, during which they lived in rural Alaska and participated in the Food Stamp Program in that area. These retroacive benefits will be provided over a period of time not to exceed one year. The amount provided each month will be the higher of $50 or one-twelfth of the total amount due. Households in Guam which request retroactive benefits by February 1, 1985 will be entitled to retroactive benefits for the period October 1, 1982, through September 30, 1983, during which they lived in Guam, participated in the Food Stamp Program in that area, and were in household sizes two, five, or eight or more.

(70) *Amendment 264.* These rules are effective on May 29, 1986. No later than that date State agencies are required to submit the attachment to their State Plan of Operation specified in § 272.2 and in § 272.8(i), documenting either full implementation of these rules or good faith efforts to implement them. The documentation of full implementation or of good faith efforts shall show either that the State agency is routinely requesting and using, or shall show the dates when it will begin routinely to request the use, information from the various data sources specified in § 272.8(a) according to the frequencies for requests, timeframes and other requirements of § 272.8(e), (f) and (g). Full implementation shall include requests for available information from the Social Security Administration for all recipients for which such information has not been previously requested. The 30-day timeframe specified in § 272.8(g) is effective for applicant households which become recipients as discussed in § 272.8(e)(1) as soon as a State agency begin receiving information from particular data sources.

(i) A Plan describing good faith efforts shall at a minimum document that the State agency is currently in compliance with wage match criteria as specified in the final rulemaking of November 5, 1982 (47 FR 50180), assure that such compliance will continue at current levels until such time as these provisions are implemented, and provide an implementation schedule that reflects full compliance in the minimum amount of additional time. Requests for delays of implementation beyond May 29, 1986 shall identify the applicable regulation part, the date for implementation, justification for the delay, and the implementation plan.

(ii) The Secretary shall consult with the Secretary of the Department of Health and Human Services and with the Secretary of the Department of Labor prior to the approval of Plans of

Operation documenting good faith efforts. In no event shall the Secretary approve a delay of the provisions of individual notification in § 273.2(f)(9) beyond the initial implementation date of any of these new provisions.

(iii) Implementation schedules beyond September 30, 1986 are not approvable, with the following exception: If on April 1, 1985 no SWICA exists in a particular State, the provisions of the rule as they relate to SWICAs shall be effective upon the designation of a SWICA. Implementation of a SWICA after April 1, 1985 shall take place as soon thereafter as possible but in no event later than September 30, 1988. All SWICAs with delayed implementation shall be in operation so that wage information is reported to them starting with the month of October 1988.

(71) *Amendment No. 266*. The provisions contained in Amendment No. 266 shall be implemented by March 6, 1987.

(i) All Fiscal Year 1987 review schedules shall continue in force despite the implementation of these provisions. However, a State agency may, at its option, seek a change in that schedule.

(ii) Waivers shall remain in force until their expiration. If a State agency wishes to cancel a waiver it should contact its Regional Office and negotiate whatever change it needs.

(iii) The first periodic Corrective Action Plan update required by this amendment shall be submitted by May 1, 1987.

(72) *Amendment 267*. State agencies shall implement the eligibility requirements of this rulemaking as they apply to offsetting farm self-employment losses and publicly operated community mental health centers not later than March 27, 1986. State agencies must begin taking applications from residents of publicly operated community mental health centers (as defined in § 271.2) not later than March 27, 1986. FNS field offices may authorize these centers to act as retail food stores on February 25, 1986.

(73) *Amendment 269*. The correction to § 273.7(n)(1)(v) outlined in amendment 269 is effective retroactively to October 3, 1984. State agencies which may have implemented the voluntary quit error prior to receiving FNS notification not to effectuate the change, shall issue lost benefits to affected households, but not prior to November 2, 1984 (the effective date of the October 3, 1984 final rule). State agencies shall implement the revisions to the rules outlined in amendment 269 for all new applicants no later than the first day of the month following June 26, 1986. Any conversion of the current caseload necessitated by this amendment shall be done at recertification or at the time the case is next reviewed, whichever occurs first.

(74) *Amendment 270*. (i) State agencies shall implement the earned income and dependent care deduction amounts and the resource limit provisions of Amendment 270 on May 1, 1986. If, for any reason, a State agency fails to implement these provisions on that date, households shall be provided the lost benefits which they would have received if the State agency had implemented these provisions as required.

(ii) The provisions of § 272.1(b) regarding the prohibiton of State or local sales taxes on foods purchased with food stamp coupons shall be implemented on October 1 of the calender year during which the first regular session of each State's Legislature is convened following enactment of Pub. L. 99–198 (enacted December 23, 1985). A ''regular session'' means a scheduled session of a State's legislature convened to address the usual range of statutory and budgetary issues. A ''budgetary'' session of a legislature shall be considered a ''regular session'' if State rules allow for statutory issues to be introduced at these ''budgetary'' sessions even if rules governing these special procedures are stringent.

(A) FNS may approve a delay in the above implementation date if a State provides FNS a request documenting that such date would either:

(*1*) Have an adverse and disruptive effect on the administration of the Food Stamp Program in such State; or

(*2*) would provide inadequate time for retail stores to implement required changes in sales tax policy.

(B) FNS has no authority to approve any State implementation schedule with an effective date later than October 1, 1987.

(75) *Amendment 273*. The State agency shall implement this amendment establishing Alaska urban, Rural I, and Rural II allotment levels by April 1, 1986.

(76) *Amendment 274*. (i) The provisions of this amendment at §§271.2, 273.2, 273.5, 273.9, 273.10(d)(6), and 273.21(b) shall be implemented for all new applications and the current caseload no later than August 1, 1986. If, for any reason, a State agency fails to implement these provisions on this date, households shall be provided lost benefits which they would have received if the State agency had implemented these provisions as required.

(ii) The provisions of this amendment at §273.18 and part 285 shall be implemented June 20, 1986.

(iii) The provisions of this amendment at §273.21(a)(4)(i)(A) and the second sentence in §273.10(f)(7) are effective retroactive to August 31, 1981. Section §273.21(a)(4)(ii)(A) and the first two sentences of §273.21(a)(4)(ii)(B) described in this amendment are retroactive to September 8, 1982. The provisions of this amendment at §§272.3, 273.21(a), 273.21(a)(3), 273.21(a)(4)(i)(B), the third sentence at §273.10(f)(7), and the last two sentences of §273.21(a)(4)(ii)(B) are effective retroactive to December 2, 1983. The provision of this amendment at §276.7(j) is effective retroactive to December 23, 1985.

(77) *Amendment 275*. The program change in §273.2(l) of Amendment 275 shall be effective October 1, 1986.

(78) *Amendment 276*. (i) This rule is effective retroactively to December 23, 1985. Any household that applied and was denied benefits from that date until implementation of this rule is entitled to restored benefits if it:

(A) Was categorically eligible as defined in this rule;

(B) Is otherwise entitled to benefits; and

(C) Requests a review of its case or if the State agency otherwise becomes aware that a review is needed.

Restored benefits for these households shall be made available, if appropriate, in accordance with §273.17 back to the date of the food stamp application or December 23, 1985, whichever is later. The State agency shall implement the changes in this rule immediately upon publication and any eligibility determination or issuance made on or after that date shall be made in accordance with this rule.

(ii) For quality control (QC) purposes only, QC reviewers shall not identify variances resulting solely from either implementation or nonimplementation of this rule in cases with review dates between December 23, 1985 and October 31, 1986, inclusive.

(79) *Amendment 277*. State agencies shall implement the provisions of Amendment 277 on August 22, 1986. If, for any reason, a State agency fails to implement the provisions, affected households shall be entitled to restored benefits but not prior to August 22, 1986.

(80) [Reserved]

(81) *Amendment 279*. (i) For State agencies which elected to implement a $160 dependent care deduction limit for all households prior to October 18, 1986, the dependent care deduction provision of Amendment No. 279 is effective retroactive to May 1, 1986 in accordance with section 638 of Pub. L. 99–500. In such States, for QC purposes only, QC reviewers shall not include in the error determination variances which resulted from early implementation by these States of the deduction limit provided the implementation occurred during the period beginning May 1, 1986 through October 1986.

(ii) For all other State agencies, the $160 dependent care deduction provision of Amendment No. 279 shall be implemented for elderly and disabled applicant and participating households on December 1, 1986. State agencies shall implement the provision as a mass change in accordance with §273.12(e), except that affected households in Alaska, Hawaii and Guam shall be issued an individual notice which, at a minimum, informs the households of the general nature of the mass change, the effect of the deduction limit on the household's allotment, and the month the change will take effect. If for any reason the State agency fails to implement the provision on the required date, affected households shall be provided restored benefits, back to December 1, 1986. For

QC purposes only in such States, QC reviewers shall not include in the error determination variances which resulted solely from a State agency's implementation or nonimplementation of the deduction limit between December 1, 1986 and January 1, 1987.

(82) *Amendment 281*. State agencies shall implement the provisions of this amendment no later than April 1, 1987.

(83) *Amendment 282*. The changes to §273.2(i)(3)(i) contained in Amendment No. 282 are effective January 12, 1987 and shall be implemented no later than February 11, 1987.

(84) *Amendment 285*. (i) The provisions of Amendment No. 285 at §§273.9(d)(6)(i), 273.9(d)(6)(ii), 273.9(d)(6)(v)(B), 273.10(d)(1)(i) and 273.10(d)(6) are retroactively effective to October 1, 1986. The State agency shall implement the provisions immediately upon publication and any eligibility determination made on or after that date shall be made in accordance with this rule. The State agency shall review a case to determine if the household was denied benefits under these amendments whenever the household requests a review or the State agency becomes aware that such a denial may have occurred. Any household that was denied benefits as a result of an eligibility or benefit calculation (e.g., processed change report) made on or after October 1, 1986 is entitled to restored benefits. Restored benefits for these households shall be made available, if approporiate, in accordance with §273.17 back to: (A) October 1, 1986 or the date of application whichever is later for new applications; or (B) October 1, 1986 or the first month in which the application of these amendments would have affected the household's benefits, whichever is later, for certified households.

(ii) For quality control (QC) purposes only, a variance resulting solely from either the implementation or non-implementation of this rule shall not be identified between October 1, 1986 and April 1, 1987.

(85) *Amendment No. 286*. (i) The provisions of Amendment No. 286 which permit homeless meal providers to apply for authorization to accept food stamps were effective March 11, 1987.

(ii) All other provisions of this amendment were effective April 1, 1987.

(86) *Amendment No. 287*. The provisions of this amendment are effective April 7, 1987.

(87) *Amendment No. 288*. The removal of the word ''funded'' from the last sentence in §273.11(e)(1), the amendments to the first and fourth sentences in §278.1(e), and the revision of paragraph (a)(2)(iii) in §273.11 are effective February 25, 1986 and shall be implemented not later than March 27, 1986.

(88) *Amendment No. 292*. (i) The effective date of the provisions of this amendment is retroactive to November 6, 1986.

(ii) The actual dates upon which aliens may become eligible under §273.4(a) (8), (9), (10), and (11) are specified in those paragraphs. State agencies must inform their staff of the respective dates as they pertain to the eligibility or ineligibility of applicant aliens.

(89) *Amendment No. 293*. The provisions of Amendment No. 293 are effective retroactively to October 17, 1986 and shall be implemented as follows:

(i) State agencies shall implement the provisions of this amendment for new applicant households which apply for program benefits on or after June 1, 1987.

(ii) State agencies shall convert their affected current caseload to the provisions of this amendment at household request, at recertification, or when the case is next reviewed, whichever occurs first and provide restored benefits, if appropriate, back to the date of application of October 17, 1986, whichever occurred later.

(iii) Any affected household that applied for Program benefits from October 17, 1986 until implementation of this rule and was denied benefits is entitled to restored benefits back to the date of application or October 17, 1986, whichever occurred later, if the household:

(A) Is otherwise entitled to benefits, and

(B) Requests a review of its case or the State agency otherwise becomes aware that review is needed.

(iv) For quality control (QC) purposes only, QC shall not identify variances

resulting solely from either implementation or nonimplementation of the provisions of this amendment for cases with review dates between October 17, 1986 (the date of enactment of Pub. L. 99–498) and August 31, 1987.

(90) *Amendment No. 294.* State agencies shall implement the Title IV–D child support income exclusion provision of Amendment No. 294 at its own option, provided it has procedures in place, at the time of implementation, for applying the provision to all affected households and for calculating and reimbursing FNS as required under the provision. State agencies shall implement the remaining provisions of Amendment No. 294 retroactively to April 1, 1987. State agencies shall provide restored benefits, if appropriate, back to the date of application or April 1, 1987, whichever occurred later. Any affected household that applied for Program benefits from April 1, 1987 until implementation of this rule and was denied benefits is entitled to restored benefits back to the date of application or April 1, 1987, whichever occurred later, if the household is otherwise entitled to benefits and requests a review of its case or the State agency otherwise becomes aware that a review is needed. The provision at 7 CFR 273.17, limiting restored benefits to 12 months, shall not apply to households entitled to resorted benefits under the provisions of *Amendment No. 294.* For QC purposes, implementation variances shall not be identified unless a case meets all four of the following conditions: the case's review date is after August 31, 1987; the State agency certified or recertified the case (or was required to recertify the case) after August 31, 1987; the certification or recertification was effective for the review date (or the required recertification should have been effective for the review date); and in a retrospective budget system, the household's budget month was September 1987 or later or in a prospective budget system, the household's issuance month was September 1987 or later. For the purpose of this amendment, State agencies shall not establish a claim against any household which received overissued benefits resulting solely from retroactive implementation of the JTPA income provision in § 273.9(b)(1)(v).

(91) *Amendment No. 295*—(i) *Automated Federal information exchange systems.* States' QC liability exemption for errors resulting from proper use of a Federal automatic information exchange system is effective beginning with the Fiscal Year 1986 reporting period.

(ii) *FNS timeframes.* The timeframes for notifying States of their payment error rates and payment error rate liabilities, if any, and the timeframe by which FNS must initiate collection action on claims for such liabilities are effective beginning with the Fiscal Year 1986 reporting period.

(92) *Amendment No. 284.* State agencies shall submit their ADP/CIS plans to FNS for approval no later than October 1, 1987. Portions of ADP/CIS plans may be submitted no later than January 1, 1988. Plans must be approvable within 60 days of State agency receipt of FNS comments but no later than March 1, 1988. State agencies must begin to implement provisions contained in their approved plans by October 1, 1988.

(93) *Amendment No. 298.* The provisions of Amendment No. 298 are effective, and shall be implemented, as follows:

(i) The provision in § 271.2 of this amendment which defines ''General assistance'' and the provisions contained in § 273.9(b)(2)(i), § 273.9(c)(1)(ii)(A), (c)(1)(ii)(B), and (c)(1)(ii)(C), regarding exclusion of certain PA/GA vendor payments are effective retroactively to April 1, 1987. The provision in § 273.9(c)(1)(iv)(B), exclusion of emergency/special PA/GA vendor payments, is also effective retroactive to April 1, 1987, however, this provision reflects current policy and requires no implementation efforts by State agencies. State agencies shall immediately implement the other provisions listed above. Affected households shall be entitled to restored benefits back to the date of application or April 1, 1987, whichever occured later.

(ii) The technical amendment to part 277 is effective September 29, 1987, and does not require implementation efforts by State agencies. The remaining provisions of Amendment No. 298 are

effective, and must be implemented, as follows:

(A) Section 271.2, definition of ''Homeless individual,'' effective July 22, 1987. State agencies shall immediately inform caseworkers of the new definition. No other implementation efforts are required to the State agencies.

(B) Section 273.9(c)(1)(ii)(D), the income exclusion of certain PA/GA vendor payments, is effective and shall be implemented for new applicant households which apply for benefits during the period beginning October 20, 1987 and ending September 30, 1989. This provision does not apply to allotments issued to any household for any month beginning before the effective period of the provision. State agencies shall convert their affected current caseload to this provision, if otherwise eligible, at recertification, when the household requests a review of its case, or when the State agency otherwise becomes aware that a review is needed but not prior to October 20, 1987.

(C) Section 272.5, the financial reimbursement for Program informational activities for the homeless, is effective July 22, 1987.

(D) Section 273.1(a)(2)(i)(C), § 273.1(a)(2)(i)(D), § 273.10(f)(2), the exception to certain household composition requirements, and the rule regarding recertification of households subject to the exception, are effective and must be implemented on October 1, 1987. Households which apply for benefits on or after October 1, 1987 may be granted separate household status under this provision. Current participants which may be eligible for separate household status under this provision, may be granted separate status, but not prior to October 1, 1987, if the household requests separate status and the State agency determines that the household meets the requirements of this provision.

(E) Section 273.2(i), the expansion of expedited service, is effective, and must be implemented, for affected households applying for Program benefits on or after December 1, 1987.

(F) Section 273.9(a)(3), regarding the date of making the annual adjustment to the income standards, is effective with the 1988 annual adjustment. The July 1, 1987 income limits will remain in effect until October 1, 1988.

(G) The first three sentences of § 273.9(d)(8)(i), the raising of the shelter deduction limit for the 48 States and DC., Alaska, Hawaii, Guam and Virgin Islands, are effective October 1, 1987. State agencies shall implement the higher deduction limits appearing in the first sentence of § 273.9(d)(8)(i) on October 1, 1987 only for households whose certification periods begin on or after October 1, 1987. State agencies shall implement the lower deduction limits appearing in the second sentence of § 273.9(d)(8)(i) on October 1, 1987 only for households whose certification periods begin before October 1, 1987. The State agency shall implement the higher deduction limits for households whose certification periods begin before October 1, 1987 beginning with the month in which such household is recertified after October 1, 1987.

(H) Section 273.9(d)(7)(i), the change in the standard deduction methodology, is effective October 1, 1987.

(I) The last sentence of § 273.9(d)(8)(i), the change in the excess shelter deduction methodology, is effective, October 1, 1988.

(J) Section 273.18(c)(2)(ii), the earned income deduction penalty, is effective on September 5, 1987. State agencies which issue on a calendar month basis, shall apply this provision to allotments issued for October 1987 and all allotments for subsequent months. State agencies which issue on other than a calendar month basis shall apply the provision to the issuance for the first issuance month beginning after September 5, 1987.

(iii) State agencies must implement the provisions as outlined in paragraph (g)(93)(ii) of this section on the specific dates required for each provision. If, for any reason, the State agency fails to implement the provisions on the required date, affected households, if appropriate, shall be entitled to restored benefits back to the date of application or the effective date of the provision involved, whichever occurred later.

(iv) *Quality control variance exclusion.*

(A) For QC purposes only, QC reviewers shall not identify variances resulting solely from implementation or nonimplementation of the following provisions in cases with review dates during the periods indicated:

(*1*) Sections 273.9(b)(2)(i), 273.9(c)(1)(ii)(A), 273.9(c)(1)(ii)(B), 273.9(c)(1)(ii)(C) and 273.9(c)(1)(iv)(B), concerning PA/GA vendor payments, from April 1, 1987 to December 31, 1987;

(*2*) Section 271.2, concerning the definition of ''Homeless individual'', from July 22, 1987 to December 31, 1987;

(*3*) Section 273.9(c)(1)(ii)(D), concerning PA/GA vendor payments for certain housing assistance provided on behalf of households residing in temporary housing, from October 20, 1987 to December 31, 1987;

(*4*) Sections 273.1(a)(2)(i) (C) and (D), concerning household composition, from October 1, 1987 to December 31, 1987;

(*5*) Section 273.2(i), concerning entitlement to expedited service, from December 1, 1987 to December 31, 1987;

(*6*) Section 273.9(d)(8)(i), the first three sentences only, concerning the shelter deduction limit, from October 1, 1987 to December 31, 1987.

(B) State agencies may choose to exclude these variances in Federal subsample reviews; State agencies are not required to do so. To exclude the variances, they shall provide FNS with the following information by April 1, 1994: The review number of each affected Federal subsample review, the sample month, the reason and justification for excluding the variance, and the revised finding.

(94) *Amendment No. 299*. The changes to § 273.2(i)(3)(ii) are effective January 12, 1987 and shall be implemented no later than February 11, 1987.

(95) *Amendment No. 268*. The QC arbitration provisions shall be implemented by State agencies on February 22, 1988, for all cases for which the regional case findings or the regional arbitrator's decision are received on or after February 22, 1988.

(96) *Amendment 301*. This rule pertains to the Income and Eligibility Verification System (IEVS). It is effective March 18, 1988, except for paragraphs 272.8(i) (3) and (4) and 272.8(j)(1) which will be effective upon publication in the FEDERAL REGISTER of the approval of the information collection burden by the Office of Management and Budget (OMB).

(97) *Amendment No. 278*. State agencies shall implement the provisions of this amendment no later than October 18, 1988.

(98) *Amendment No. 303*. The income exclusion provision § 273.9(c) of *Amendment No. 303* shall be implemented immediately upon publication of the Amendment as follows:

(i) State agencies must apply the provision of this amendment for any eligibility or benefit calculation made on or after February 1, 1988.

(ii) Affected households which were denied benefits because the household's eligibility or benefit calculation during the second Federal fiscal year quarter of 1988 (but not prior to February 1, 1988) did not include the income exclusion provision of this amendment shall be entitled to restored benefits at the time of recertification, whenever the household requests a review of its case, or when the State agency otherwise becomes aware that a review of a particular case is needed.

(iii) Benefits shall be restored back to February 1, 1988 or the date of the food stamp application, whichever occured later. Restoration shall be made in accordance with § 273.17 except that the twelve-month limit for restoring benefits shall not apply.

(iv) For Quality Control (QC) purposes only, QC reviewers shall not identify variances resulting solely from implementation or nonimplementation of *Amendment No. 303* for cases with review dates between February 1, 1988 and August 31, 1988. For retrospectively budgeted cases, QC reviewers shall begin identifying variances when September becomes the budget month. Variances shall not be identified in cases where *Amendment No. 303* was not implemented prior to the QC review when the State agency correctly followed the implementation provisions of this section.

(99) [Reserved]

(100) *Amendment 289*.

(i) This rule is effective August 11, 1988.

(ii) State agency Work Plans setting forth proposals for conducting Simplified Application/Standardized Benefit Projects must be postmarked no later than November 9, 1988. Local agency Work Plans must be postmarked no later than December 9, 1988.

(101) *Amendment No. 291.* The provisions of Amendment No. 291 are effective September 19, 1988.

(102) *Amendment No. 307.* The provisions of this amendment are effective immediately and shall be implemented as follows:

(i) No later than October 1, 1988, for all new applicants, and no later than the first recertification on or after October 1, 1988, for the participating caseload, State agencies shall implement the provisions of § 272.2(b) relating to the alien/citizenship statement and notification of verification with INS; the provisions of § 273.1(b) relating to nonhousehold members; the provisions of § 273.2(f)(1)(ii) relating to the mandatory verification of alien status; the provisions of § 273.2(h)(3) relating to delays in application processing; and the provisions of § 272.11(c) relating to the treatment of income and resources of nonhousehold members; and

(ii) Unless a waiver has been approved by FNS by October 1, 1988, State agencies shall implement all other provisions of this rule no later than October 1, 1988. Implementation by October 1, 1988 shall be accomplished either by obtaining FNS approval to a Plan of Operation as required in the rule at § 272.11(e) or by submitting to FNS a substantially approvable Plan of Operation as described in material which FNS Regional Offices provided State agencies on or about September 2, 1988. That material provided points for State agencies to consider relative to requesting waivers. State agencies should contact FNS Regional Offices if they need further guidance on waivers.

(103) *Amendment No. 308.* The quality control changes to § 275.12(d)(2) shall be implemented for the quality control review period beginning October 1, 1988.

(104) *Amendment No. 300.* State agencies shall implement the requirements of this rulemaking no later than May 1, 1989.

(105) *Amendment No. 271.* This rule becomes effective April 1, 1989, and the State agencies shall implement all provisions on that date, with the exception of the following provisions: the new provisions on replacement issuances shall be implemented *by* October 1, 1989; the new liabilities for State agencies using authorization document issuance systems shall be implemented *on* October 1, 1989; the new mail issuance reporting and liability assessments shall be implemented *on* October 1, 1989; State agencies wanting to change their current unit-level of mail issuance loss reporting must submit their initial plans *by* May 15, 1989; the new provision on quality control case reviews shall be implemented for federal Fiscal Year 1990; State agencies shall begin to use the revised Form *FNS–46*, Issuance Reconciliation Report, to report figures for the month of October 1989; and, provisions pertaining to staggered issuance contained in any currently-approved waivers will automatically be cancelled April 1, 1989.

(106) *Amendment No. 310.* (i) The provisions of this amendment which adopt, as final, interim provisions published July 17, 1987 and those which redesignate or otherwise slightly modify the July 17 interim provisions for clarity only are effective retroactively to April 1, 1987. The conforming amendment at § 273.11(e)(7) is effective retroactively to February 25, 1986. The remaining technical amendments contained in this amendment at § 273.2(e)(2), § 273.7(b)(1)(vii), § 273.9(b)(1)(iii), § 276.2(d) and § 278.1(e) are effective April 24, 1989. These provisions do not alter or change current policy or procedures under which State agency are operating or do not require special implementation efforts by State agencies.

(ii) The provision in § 273.9(b)(1)(v) which limits application of the provision to on-the-job training programs under section 204(5), Title II, of the Job Training Partnership Act is effective retroactively to April 1, 1987 and shall be implemented as follows:

(A) State agencies shall implement the provision for all new applicant households no later than June 1, 1989. Affected applicant households which applied for Program benefits during the period April 1, 1987 and the date the State agency implemented this change

and were denied benefits shall be provided restored benefits, if applicable, back to April 1, 1987 or the date of the food stamp application, whichever occurs later, if the household is otherwise entitled to benefits and requests a review of its case or the State agency otherwise becomes aware that a review is needed.

(B) All other households shall be converted to the provision at household request, at recertification, or when the case is next reviewed, whichever occurs first. Restored benefits shall be provided, if applicable, for such households back to April 1, 1987 or the date of the food stamp application, whichever occurs later.

(C) The provision at 7 CFR 273.17, limiting restored benefits to 12 months, does not apply for households entitled to restored benefits under *Amendment No. 310*.

(107) *Amendment No. 313*. The performance-based funding provisions for Employment and Training programs shall be effective October 1, 1989.

(108) *Amendment No. 314*. (i) The provision of *Amendment No. 314* which adds five sentences to § 273.2(j)(1)(iv) and the provisions which add a new paragraph § 273.2(j)(2)(iii)(B) and amend §§ 273.17 and 273.18 are effective July 7, 1989 and shall be implemented no later than September 1, 1989.

(ii) All remaining provisions of *Amendment No. 314,* which adopt the interim provisions of August 5, 1986 as final without change or modify the interim provisions for clarity only, are effective retroactively to December 23, 1985 (the effective date of the interim rulemaking). These provision do not reflect a change in intended policy and, therefore, do not require special implementation efforts by State agencies.

(109) *Amendment No. 315*. Program changes required by Amendment No. 315 to the food stamp regulations shall be implemented as follows:

(i) The provisions relating to migrant and seasonal farmworkers (7 CFR 273.9(c)(1)(ii)(E) and 273.10(a)(1)(ii)) are effective September 1, 1988 for all households applying or certified subsequent to August 31, 1988. Changes affecting currently participating households are to be implemented at recertification or when it is necessary to implement other changes affecting the household.

(ii) State agencies were required to implement the provision of this rule regarding a technical correction concerning energy assistance payments (7 CFR 273.9(c)(11)) on September 19, 1988.

(iii) State agencies were required to implement revised food stamp allotments on October 1, 1988 (7 CFR 271.2, 271.7, 273.10(e)(2), 273.10(e)(4)(ii), and 273.12(e)). Revised allotments were implemented as mass changes in accordance with 7 CFR 273.12(e).

(iv) State agencies were required to implement the provision relating to the dependent care deduction, 7 CFR 273.9(d)(4), 273.10(d)(1)(i), and 273.10(e)(1)(i)(E), and monthly reporting and retrospective budgeting, 7 CFR 273.21(a) and (b), on October 1, 1988. These provisions were immediately effective for all households certified subsequent to September 30, 1988. Changes affecting currently participating households were to be implemented upon recertification, at the household's request, or when it was necessary to implement other changes affecting the household. (For example, a change reported by a nonmonthly reporting retrospectively budgeted household was to be implemented in accordance with 7 CFR 273.12.) The Department was not requiring State agencies to conduct a casefile review to implement monthly reporting and retrospective budgeting changes for currently participating households. Monthly reports submitted by households which became exempt from MRRB as a result of the Hunger Prevention Act, such as non-migrant seasonal farmworkers or the homeless, were to be treated as change reports and processed prospectively in accordance with 7 CFR 273.12(c).

(v) State agencies were required to implement the provisions of this rule concerning the exclusion of advance payment of earned income tax credits, 7 CFR 273.8(c)(1) and 273.9(c)(14), on January 1, 1989. Households applying subsequent to December 31, 1988 should have had this provision applied to them as of their date of application. Changes affecting households participating as of December 31, 1988 were to be implemented upon recertification, at the household's request, or when it was

necessary to implement other changes affecting the household.

(vi) All other provisions of this rule, relating to technical corrections concerning the urban Alaska TFP (7 CFR 272.7(c)), Alaska proration (7 CFR 272.7(f)(3)(iii)), and the dependent care deduction (7 CFR 273.11(c)(2)(iii) and 273.12(e)(1)(i)(C)), are to be implemented August 1, 1989.

(vii) Quality control errors made as a result of this rule's changes to §§273.9, 273.10, and 273.21 during the required implementation time frame established by this rulemaking shall be handled in accordance with interim regulations published at 53 *FR* 44171, dated November 2, 1988. Food stamp allotment changes are not covered by the interim regulation because this is a mass change.

(viii) State agencies which failed to implement any of these provisions by the required dates shall provide affected households with the lost benefits they would have received if the State agency had implemented these provisions as required.

(110) *Amendment No. 316.* State welfare agencies shall implement the provisions of *Amendment No. 316* as follows:

(i) The provisions contained in §274.2(b) of *Amendment No. 316* are effective retroactively to January 1, 1989 and shall be implemented by State welfare agencies no later than January 1, 1990 for all households which newly apply for Program benefits or apply for recertification on or after that date.

(ii) The remaining provisions are effective July 1, 1989 and must be implemented on that date for all households which newly apply for Program benefits or apply for recertification on or after that date. The current caseload shall be converted to these provisions at household request, at the time of recertification, or when the case is next reviewed, whichever occurs first and restored benefits shall be provided, if appropriate, back to July 1, 1989 or the date of the application, whichever is later. Additionally, households which applied for Program benefits between July 1, 1989 and the date the State agency implemented these provisions, and were denied benefits, shall be entitled to restored benefits back to July 1, 1989 or the date of the application, whichever occurred later, if the household:

(A) Is otherwise entitled to benefits, and

(B) Requests a review of its case or the State agency otherwise becomes aware that a review is needed.

(111) *Amendment No. 296.* The provisions of Amendment 296 are effective July 5, 1989.

(112) *Amendment No. 309.* (i) The State agency shall have until June 18, 1990, to request regional arbitration of regional office case findings which the State received before February 22, 1988.

(ii) The State agency shall have until June 18, 1990, to request national office arbitration of regional arbitration decisions which the State agency received before February 22, 1988.

(113) *Amendment (320).* (i) The provisions of this rule are effective April 2, 1990.

(ii) The provisions relating to the Expanded Food and Nutrition Education Program (§272.5(b)(1)(iv)), the collection of fraud claims §273.18, the monitoring of claims against households (§273.18(k)(5)), adverse action notice on claim demand letters (§273.18(d)(3)), notices of fair hearings (§273.18(d)(3)), and the results of geographic error prone profiles (§275.15(g)) shall be implemented no later than July 2, 1990. The provision relating to fraud detection units (§272.4(h)) shall be implemented no later than September 4, 1990. State agencies shall complete the first review of food stamp office hours (§272.4(g)) during Federal Fiscal Year 1990.

(iii) State agencies may submit attachments to their Plans of Operation pertaining to the intercept of unemployment compensation benefits to repay intentional Program violations claims as specified in §272.2 (a) and (d) and §272.12(a) of this amendment as of February 22, 1990.

(114) *Amendment No. 322.* The changes contained in this amendment are effective October 15, 1990 and shall be implemented no later than that date. The changes to 7 CFR 273.11 contained in this amendment will apply only to disqualifications imposed after the effective date of this rulemaking.

(115) *Amendment No. 324.* The quality control changes to §275.12 that are

made by Amendment No. 324 shall be implemented for the quality control review period beginning January 1, 1991.

(116) *Amendment No. 330.* The provisions of Amendment No. 330 are effective and must be implemented on August 1, 1991. Any variance resulting from implementation of the provisions of this amendment shall be excluded from error analysis for 90 days from this required implementation date in accordance with 7 CFR 275.12(d)(2)(vii). The provisions must be implemented for all households that newly apply for Program benefits on or after the required implementation date. The current caseload shall be converted to these provisions at household request, at the time of recertification, or when the case is next reviewed, whichever occurs first, and the State agency must provide restored benefits back to the required implemention date. If for any reason a State agency fails to implement on the required implementation date, restored benefits shall be provided, if appropriate, back to the required implementation date or the date of application, whichever is later.

(117) *Amendment No. 332.* The provision of *Amendment No. 332* regarding the resource exemption for PA and SSI recipients is effective and must be implemented no later than February 1, 1992. Any variances resulting from implementation of the provisions of this amendment shall be excluded from error analysis for 90 days from this required implementation date, in accordance with 7 CFR 275.12(d)(2)(vii). The provision must be implemented for all households that newly applied for Program benefits on or after the required implementation date. The current caseload shall be converted to these provisions at household request, at the time of recertification, or when the case is next reviewed, whichever occurs first, and the State agency must provide restored benefits back to the required implementation date. If for any reason a State agency fails to implement on the required implementation date, restored benefits shall be provided, if appropriate, back to the required implementation date or the date of application whichever is later.

(118) *Amendment No. 321.* (i) The provisions contained in § 273.7(d)(1)(ii)(A) and 273.9(c)(5)(i) (A) and (F) of Amendment No. 321, which implement section 404(c) of the Hunger Prevention Act of 1988, are effective and must be implemented retroactively to July 1, 1989.

(ii) The remaining provisions of Amendment No. 321 are effective October 1, 1988 and must be implemented no later than March 1, 1992. State agencies may implement the conciliation procedure provisions contained in § 273.7(g)(1)(ii) immediately upon publication of Amendment No. 321. However, in no case shall the conciliation procedures be implemented any later than March 1, 1992. By implemented, the Department means that the State agency shall begin to use conciliation procedures in all cases where the State agency has determined on or after the above implementation date that an individual has refused or failed to comply with an E&T requirement under § 273.7(f).

(119) *Amendment No. 328.* (i) The requirements for State agencies to begin implementation or corrective action for deficiencies which are the cause for non-entitlement to enhanced funding for the Fiscal Year 1986 review period, and review periods thereafter were effective as of October 1, 1985, pursuant to section 604 of Public Law 100–435.

(ii) The requirements for State agencies to begin the implementation of corrective action for deficiencies which result in underissuances, improper denials or improper terminations of benefits to eligible households where such errors are caused by State agency rules, practices or procedures were effective July 1, 1989, pursuant to section 320 of Public Law 100–435. The corrective action must address all such deficiencies which occurred on or after July 1, 1989.

(iii) The State agency shall have until December 27, 1991, to implement changes in the development of quality control sampling plans, such that only those State agencies proposing nonproportional integrated, or other alternative sampling plan designs must:

(A) Demonstrate that the alternative design provides payment error rate estimates with equal-or-better predicted precision than would be obtained had

the State agency reviewed simple random samples of the sizes specified in § 275.11(b)(1) of the regulations,

(B) Describe all weighting, and estimation procedures if the sample design is non-self-weighted, or uses a sampling technique other than systematic sampling,

(C) Demonstrate that self-weighting is actually achieved in sample designs claimed to be self-weighting.

(iv) The State agency shall have until January 27, 1992, to request regional arbitration of any federally subsampled underissuance cases for which the State agency received FNS regional office QC findings on or after February 22, 1988.

(v) The State agency shall have until January 27, 1992, to request national arbitration of any regional arbitration decisions involving underissuance cases for which the State agency received FNS regional arbitration findings on or after February 22, 1988.

(120) *Amendment No. 335.* The provisions contained in *Amendment No. 335* are effective and shall be implemented as follows:

(i) The provisions contained in §§ 271.2, 271.7, 273.1(e)(1)(iii), 273.2(k)(1)(i)(H), 273.2(m), 273.10, 273.18 and 278.1 of Amendment No. 335 are effective on February 1, 1992 and shall be implemented on that date as follows:

(A) The Guam and Virgin Islands State agencies shall communicate the two new group home provisions (§§ 271.2, 273.1(e)(1)(iii) and 278.1) to group homes in their areas by this date so that they can apply for the appropriate certification and residents can apply for food stamps without delay. All State agencies shall implement the expanded group home provisions for applicants newly applying for program benefits on or after February 1, 1992 for approved group homes.

(B) No special implementation efforts are required with regard to the provisions in §§ 273.2(k)(1)(i)(H) and 273.2(m) about informing SSI applicants about the Food Stamp Program and the availability of an application at the social security office.

(C) State agencies are not required to adjust their computers or train their caseworkers immediately in order to implement the provisions in §§ 271.2, 271.7, 273.10 and 273.18 relative to the minimum benefit for one- and two-person households because the methodology for annually adjusting the minimum benefit will not result in an increase in the minimum benefit for some time. However, State agencies are expected to have the capability of implementing a change in the minimum benefit in a timely manner when such a change in announced and, therefore, shall not wait until an actual change in the minimum benefit to adjust computers and train caseworkers.

(ii) The remaining provisions of Amendment No. 335 are effective February 1, 1992. The provisions which reflect that a joint application is no longer required for SSI applicants §§ 273.2 (c)(1), 273.2(i)(3)(i), and 273.2(k)(1)(i)(D) do not require implementation efforts by State agencies. The remaining provisions (§§ 273.4, 273.9(b) and 273.9(c)) also do not require special implementation efforts by State agencies as the provisions reflect current policy.

(iii) Any variance resulting from implementation of the provisions of this amendment shall be excluded from quality control error analysis for 90 days from the required implementation date which shall be handled in accordance with 7 CFR 275.12(d)(2)(vii).

(121) *Amendment No. 336.* The provisions of Amendment No. 336 are effective and must be implemented as follows:

(i) The provision that gives State agencies the option of using retrospective budgeting for nonmonthly reporting households other than those exempt from monthly reports (7 CFR 273.21(b) introductory text) was effective as of November 28, 1990, the date of enactment of the Leland Act.

(ii) The delegation of the responsibility for design of the monthly report form (§ 273.21(h)(3) and § 273.21(j)(1)(ii) of this chapter) must be implemented by February 1, 1992.

(iii) The remaining provisions are effective January 3, 1992 and must be implemented by July 1, 1992.

(iv) Any variances resulting from implementation of the provisions of this amendment shall be excluded from

error analysis for 90 days from the required implementation dates in accordance with 7 CFR 275.12(d)(2)(vii).

(122) *Amendment No. 337.* The provisions of Amendment No. 337 are effective and must be implemented as follows:

(i) State agencies shall implement the provisions of *Amendment No. 337* on February 1, 1992, except as provided in paragraph (g)(122)(ii) of this section.

(ii) The amendments to revise the introductory text of § 273.2(j) and § 273.2(j)(3) as they relate to categorical eligibility and the amendment adding § 273.2(j)(4) are effective and must be implemented February 1, 1992 for recipients of GA from a State program. They are effective and must be implemented August 1, 1992 for recipients of GA from a local program.

(iii) Any variance resulting from implementation of the provisions of this amendment shall be excluded from error analysis in accordance with 7 CFR 275.12(d)(2)(vii) for 90 days from the required implementation date. The provisions must be implemented for all households that newly apply for Program benefits on or after the required implementation date. If for any reason a State agency fails to implement on the required implementation date, restored benefits shall be provided, if appropriate, back to the required implementation date, the date of the food stamp application or the date the household was determined categorically eligible in accordance with § 273.2(j)(4), whichever is later.

(iv) The current caseload shall be converted to these provisions at household request, at the time of recertification, or when the case is next reviewed, whichever occurs first. The State agency must provide restored benefits back to the required implementation date.

(123) *Amendment No. 338.* The provisions of *Amendment No. 338* are effective and must be implemented on February 1, 1992. The provisions must be implemented for all households that newly apply for Program benefits on or after the required implementation date of February 1, 1992. The current caseload shall be converted to these provisions at household request, at the time of recertification, or when the case is next reviewed, whichever occurs first. If, for any reason, a State agency fails to implement by the required implementation date, restored benefits shall be provided, if appropriate, back to the required implementation date or the date of the food stamp application, whichever is later. Any variances resulting from implementation of the provisions of this amendment shall be excluded from error analysis for 90 days from this required implementation date in accordance with 7 CFR 275.12(d)(2)(vii).

(124) *Amendment No. 325.* The quality control changes to § 275.23 that are made by Amendment No. 325 shall be implemented effective January 24, 1992.

(125) *Amendment No. 345.* The provisions of Amendment No. 345 are effective on April 1, 1992, and shall be implemented as follows:

(i) Currently operating demonstration projects shall submit to FNS for approval a plan no later than June 30, 1992, to satisfy the requirements of this regulation. The plan shall address the areas in which the State EBT demonstration project does not comply with the provisions of this rule and how the State agency plans to bring its system into compliance. The State agency shall submit a schedule of any actions it proposes to take and when they are to be completed. Compliance with the provisions of this final regulation shall occur within two years from the effective date unless approved by FNS to continue operations under the authority of section 17 of the Act (7 U.S.C. 2026) as a demonstration project. In seeking FNS approval to continue under Section 17 authority, the State agency shall state what research value would be obtained in continuing the demonstration.

(ii) For State agencies that have proposals or planning documents currently under review by the Department, the State agencies and the Department shall establish at what point the State agency is in the planning process and how the State agency will fit into the approval process of these rules. All such State agencies will be expected to comply with the standards of these rules.

(iii) A State agency that wishes to obtain approval for an EBT system shall submit a Planning Advanced

Planning Document for FNS approval as prescribed herein.

(126) *Amendment No. 327.* (i) The statutory provision reflected in §275.23(e)(6)(v) of Amendment No. 327 was effective October 1, 1985 pursuant to Public Law 100–435.

(ii) The remaining provisions are effective October 28, 1992.

(127) *Amendment No. 340.* (i) The provisions at §273.7(d)(1)(i)(A) and §273.7(d)(1)(i)(B) are effective retroactive to October 1, 1991.

(ii) The provision at §273.7(c)(4)(viii) is effective and must be implemented by August 15, 1993, the date E&T plans must be submitted to FNS.

(iii) The provision at §273.10(d)(1)(i) is effective January 19, 1993 and must be implemented by March 1, 1993.

(iv) The remaining provisions of Amendment No. 340 are effective and must be implemented retroactively to February 1, 1992.

(v) Any variances resulting from implementation of the provision at §273.10(d)(1)(i) shall be excluded from error analysis for 90 days from the required implementation date in accordance with 7 CFR 273.12(d)(2)(vii).

(128) *Amendment No. 326.* The provisions of this amendment are effective and must be implemented no later than December 1, 1993. Any variance resulting from implementation of the provisions of this amendment shall be excluded from quality control error analysis for 60 days from the required implementation date which shall be handled in accordance with 7 CFR 275.12(d)(2)(vii).

(129) *Amendment No. 349.* The provisions of *Amendment No. 349* are effective, and shall be implemented, as follows:

(i) §273.1(a)(2)(i)(C), §273.1(a)(2)(i)(D) and §273.10(f)(2) are effective as of October 1, 1987; §273.2(i)(1) (iii) and (iv) are effective as of December 1, 1987; the new §273.9(c)(1)(ii)(G) is effective as of April 1, 1987. However, application of §273.9(c)(1)(ii)G) in conjunction with the provisions at §273.9 (c)(1)(ii) (A) through (F) and (c)(5)(i)(F) is effective as of the date the individual provisions at 7 CFR 273.9 (c)(1)(ii) (A) through (F) and (c)(5)(i)(F) became effective. Those dates are: §273.9(c)(1)(ii) (A), (B), and (C), April 1, 1987; §273.9(c)(1)(ii)(D), October 20, 1987; §273.9(c)(1)(ii)(E), September 1, 1988, and §273.9(c)(1)(ii)(F), August 1, 1991. The amendment to the first sentence of §273.9(c)(1)(iv)(B) to include a regulatory reference to 7 CFR 273.9(c)(5)(i)(F) is effective as of August 1, 1991 (the date the individual provision at 7 CFR 273.9(c)(5)(i)(F) became effective), and §273.18(c)(2)(ii) is effective as of September 5, 1987. To the extent that these provisions represent new or different policy from that under which the State agency is currently operating, the State agency shall implement the provisions not later than April 1, 1994 for households newly applying for Program benefits on or after such implementation date. State agencies shall convert their affected current caseload to these provisions (except for §273.18(c)(2)(ii)) at recertification, when the household requests a review of its case, or when the State agency otherwise becomes aware that a review is needed, whichever occurs first. To the extent that the provisions will result in restored benefits for affected households, such benefits shall be provided back to the effective date of the provision or the date of the household's first initial application, whichever occurs later;

(ii) The remaining provisions of *Amendment No. 349* adopt as final, without change, interim provisions published September 29, 1987 and are effective as of the date the corresponding interim provision became effective as established at 7 CFR 272.1(g)(93). These provisions and the effective dates are: §271.2, definition of ''Homeless individual,'' July 22, 1987; §272.5, July 22, 1987; §273.9(a)(3), October 1, 1988; §271.2, definition of ''General assistance,'' April 1, 1987; §273.9(b)(2)(i), April 1, 1987; §273.9(c)(1) (ii)(A), (ii)(B) and (ii)(C), April 1, 1987; §273.9(d)(7)(i), October 1, 1987; §273.9(d)(8)(i), October 1, 1987 (except for the last sentence, which is effective October 1, 1988). The provisions do not change policy or procedures under which State agencies are currently operating and, therefore, do not require specific implementation efforts by State agencies.

(130) *Amendment No. 342.* The provision relating to household election of repayment method for IPV claims at §273.18(d)(4)(ii) is effective retroactive

to November 28, 1990. The provision relating to household election of repayment method for IHE claims at § 273.18(d)(4)(i) is effective December 13, 1991. The provisions for State agency retention rates on claim collections at § 273.18(h)(2) and (i) are effective retroactive to October 1, 1990. The provisions at § 277.18 which reduce the enhanced funding level for ADP is effective October 1, 1991, for costs incurred on that date and thereafter and does not apply to ADP funding approved prior to November 28, 1990.

(131) *Amendment No. 347*. The provisions of this amendment are effective as specified in paragraphs (g)(131)(ii)(A), (B), and (C) of this section. State agencies are not required to do file searches for cases relating to PASS households unless the question on an income exclusion for PASS had been raised with the State agency prior to December 13, 1991.

(i) The provisions at § 271.2, § 273.1, and § 273.11 were effective and had to be implemented no later than February 1, 1992.

(ii) The provision at § 273.9(c)(17) is effective the earlier of:

(A) December 13, 1991, the date of enactment of Pub. L. 102–237;

(B) October 1, 1990, for food stamp households for which the State agency knew, or had notice, that a household member had a PASS; or

(C) Beginning on the date that a fair hearing was requested contesting the denial of an income exclusion for amounts provided for a PASS.

(132) *Amendment No. 316*. The provisions of this final rule that amend 7 CFR 273.2(b)(3), 273.2(c)(5), 273.2(f)(8)(i)(A) and (ii), and paragraph (11) of the ''Elderly or disabled member'' definition in 7 CFR 271.2 are effective as of May 6, 1994. The State agency shall implement the provisions not later than September 5, 1994 for all households newly applying for Program benefits on or after such implementation date. The current caseload shall be converted to these provisions at household request, at the time of recertification, or when the case is next reviewed, whichever occurs first, and the State agency must provide restored benefits back to the required implementation date. If for any reason a State agency fails to implement on the required implementation date, restored benefits shall be provided, if appropriate, back to the required implementation date or the date of application whichever is later. Any variances resulting from implementation of the provisions of this amendment shall be excluded from error analysis for 90 days from this required implementation date in accordance with 7 CFR 275.12(d)(2)(vii).

(133) *Amendment No. 352*. The provisions of this amendment are effective April 11, 1994.

(134) *Amendment No. 355*. The provisions of Amendment No. 355 are effective and must be implemented on August 1, 1994. Any variance resulting from implementation of the provisions of this amendment shall be excluded from error analysis for 120 days from this required implementation date in accordance with 7 CFR 275.12(d)(2)(vii) as modified by section 13951(c)(2) of Pub. L. 103–66. The provisions must be implemented for all households that newly apply for Program benefits on or after the required implementation date. The current caseload shall be converted to these provisions at household request, at the time of recertification, or when the case is next reviewed, whichever occurs first, and the State agency must provide restored benefits back to the required implementation date. If for any reason a State agency fails to implement on the required implementation date, restored benefits shall be provided, if appropriate, back to the required implementation date or the date of application, whichever is later.

(135) *Amendment No. 348*. The provisions of Amendment No. 348 are effective August 5, 1994 and must be implemented for all QC billing actions beginning with Fiscal Year 1986.

(136) *Amendment No. 346*. The provision of Amendment No. 346 regarding an income exclusion for homeless households living in transitional housing is effective and must be implemented no later than September 1, 1994. Any variances resulting from implementation of the provisions of this amendment shall be excluded from

error analysis for 120 days from this required implementation date in accordance with 7 CFR 275.12(d)(2)(vii). The provision must be implemented for all households that newly apply for Program benefits on or after the required implementation date. The current caseload shall be converted to these provisions at the household's request, at the time of recertification, or when the case is next reviewed, whichever occurs first. The State agency must provide restored benefits to such households back to the required implementation date or the date of application whichever is later. If for any reason a State agency fails to implement on the required implementation date, restored benefits shall be provided, if appropriate, back to the required implementation date or the date of application, whichever is later.

(137) *Amendment No. 350*. The provisions of Amendment No. 350 are effective and must be implemented as follows:

(i) The provision at § 273.8(e)(12)(i) of this chapter is effective and must be implemented according to statute retroactive to January 1, 1991.

(ii) The provision at § 273.8(e)(12)(ii) of this chapter will be effective and must be implemented on September 1, 1994.

(iii) The provision at § 273.21(b) of this chapter against establishing new monthly reporting requirements for households residing on Indian reservations if no monthly reporting system was in place on March 25, 1994 is effective and must be implemented according to statute retroactive to March 25, 1994.

(iv) The provision in § 273.2(j) of this chapter concerning categorical eligibility for GA recipients is effective and must be implemented according to statute retroactive to February 1, 1992.

(v) The remaining provisions are effective and must be implemented October 28, 1994.

(138) *Amendment No. 359*. The provision of *Amendment No. 359* regarding the medical expense deduction is effective and must be implemented no later than October 1, 1994. Any variances resulting from implementation of the provisions of this amendment shall be excluded from error analysis for 120 days from this required implementation date in accordance with 275.12(d)(2)(vii) of this chapter. The provision must be implemented for all households that newly apply for Program benefits on or after the required implementation date. State agencies must notify households eligible for the deduction of the change in medical deduction reporting requirements and the right of the household to be converted to those new procedures immediately. The current caseload shall be converted to these provisions at the household's request, at the time of recertification, or when the case is next reviewed, whichever occurs first.

(139) *Amendment No. 351*. The provisions of Amendment No. 351 to amend 7 CFR 273.7(d) are effective October 1, 1993. State agencies are not required to take any action to implement these provisions.

(140) *Amendment No. 333*. The provisions of Amendment No. 333 are effective and must be implemented as follows:

(i) The provisions relating to aggregated (combined) allotments to households applying after the 15th of the month and mail issuance in rural areas where households experience transportation difficulties in obtaining benefits are effective and must be implemented by statute retroactive to February 1, 1992.

(ii) The provision relating to staggered issuance on Indian reservations was in place on March 25, 1994, is effective and must be implemented according to statute retroactive to March 25, 1994.

(iii) The remaining provisions are effective and must be implemented September 1, 1995.

(141) *Amendment No. 360*. This provision is effective September 20, 1995, and must be implemented no later than the first day of the first month beginning December 19, 1995.

(142) *Amendment No. 357*. The provisions of Amendment No. 357 are effective and must be implemented as follows:

(i) The provision relating to the increased penalties at 7 CFR 273.16(b) is

effective and must be implemented retroactive to September 1, 1994. This includes providing notification of the increased penalties on the application form.

(ii) The remaining provisions are effective and must be implemented October 23, 1995.

(143) *Amendment 367*. The provisions of Amendment 367 must be implemented no later than October 2, 1995 except that State agencies currently participating in the Federal Income Tax Refund Offset Program (FTROP) must implement section 272.2(d)(1)(xii), which relates to the submission of the Plan of Operations, within November 30, 1995.

(144) *Amendment No. (370)*. The provisions of Amendment No. (370) are effective and must be implemented as follows:

(i) Sections 273.5(b)(1), (b)(4), and (b)(9) are effective February 1, 1992. The introductory paragraph of 273.5(b)(6) is effective February 1, 1992. The introductory paragraph of 273.5(b)(10) is effective February 1, 1992. Sections 273.5(b)(11)(ii), (b)(11)(iii), and (b)(11)(iv) are effective February 1, 1992.

(ii) Sections 273.5(b)(6)(i) and (b)(6)(ii) and sections 273.5(b)(10)(i) and (b)(10)(ii) and the remaining provisions of this regulation are effective November 1, 1995 and shall be implemented no later than February 1, 1996.

(iii) The current caseload shall be converted to these provisions at the household's request, at the time of recertification, or when the case is next reviewed, whichever occurs first. The State agency shall provide restored benefits back to the effective date.

(iv) Any variance resulting from implementation of a provision in this rule shall be excluded from error analysis for 120 days from the required implementation date of that provision.

(145) *Amendment No. 369*. The provisions of *Amendment No. 369* are effective May 31, 1996. State agencies must implement no later than November 27, 1996. The provisions of this amendment are applicable for determinations of intentional failure to comply made on or after the effective date of the amendment.

(146) *Amendment No. 368*. The provisions of Amendment No. 368 are effective on July 29, 1996.

(147) *Amendment No. 364*. Except for the provisions of § 273.14(b)(2), the provisions of *Amendment No. 364* are effective November 18, 1996 and must be implemented no later than May 1, 1997. The effective date and implementation date of the provisions of § 273.14(b)(2) will be announced in a document in the FEDERAL REGISTER. The provisions must be implemented for all households that newly apply for Program benefits on or after either the required implementation date or the date the State agency implements the provision prior to the required implementation date. The current caseload shall be converted to these provisions following implementation at the household's request, at the time of recertification, or when the case is next reviewed, whichever occurs first. The State agency must provide restored benefits to required implementation date or the date the State agency implemented the provision prior to the required implementation date. If for any reason a State agency fails to implement by the required implementation date, restored benefits shall be provided, if appropriate, back to the required implementation date or the date of application whichever is later, but for no more than 12 months in accordance with § 273.17(a) of this chapter. Any variances resulting from implementation of the provisions of this amendment shall be excluded from error analysis for 120 days from this required implementation date in accordance with § 275.12(d)(2)(vii) of this chapter and 7 U.S.C. 2025(c)(3)(A).

(148) *Amendment No. 362*. The provision of section 13921 of Public Law 103–66 establishing a child support deduction was effective September 1, 1994, and was required to be implemented no later than October 1, 1995. The provisions of Amendment No. 362 are effective December 16, 1996 and must be implemented no later than May 1, 1997. State agencies shall implement the provisions no later than the required implementation date. The provisions must be implemented for all households that newly apply for Program benefits on or after either the required implementation date or the date the

State agency implemented the provision prior to the required implementation date, whichever is earlier. State agencies are required to adjust the cases of participating households at the next recertification, at household request, or when the case is next reviewed, whichever comes first. State agencies which fail to implement or adjust cases by the required implementation date shall provide restored benefits as appropriate. For quality control purposes, any variances resulting from implementation of the provisions are excluded from error analysis for 120 days from the required implementation date, in accordance with 7 CFR 275.12(d)(2)(vii) and 7 U.S.C. 2025(c)(3)(A). State agencies which implement prior to the required implementation date must notify the appropriate regional office prior to implementation that they wish the variance exclusion period to begin with actual implementation, as provided in 7 CFR 275.12(d)(2)(vii)(A). Absent such notification, the exclusionary period will begin with the required implementation date.

(149) *Amendment No. 374.* The Higher Education Act Amendments of 1986, as amended in 1987, were effective and required to be implemented for the 1988–89 school year; the Perkins Act was effective and required to be implemented on July 1, 1991; the Mickey Leland Act (as amended by the 1991 Technical Amendments to the Food Stamp Act) was effective and required to be implemented on February 1, 1992, and the exclusions contained in the Higher Education Act Amendments of 1992 for the Tribal Development Student Assistance Revolving Loan Program were effective and required to be implemented on October 1, 1992, and for Title IV and BIA student assistance on July 1, 1993. The provisions of Amendment No. 374 are effective December 16, 1996 and must be implemented by March 1, 1997. The current caseload shall be converted to these provisions at the household's request, at the time of recertification, or when the case is next reviewed, whichever occurs first. If implementation of the acts referenced in this paragraph or this amendment is delayed, benefits shall be restored, as appropriate, in accordance with the Food Stamp Act. Any variance resulting from implementation of this amendment shall be excluded from error analysis for 120 days from March 1, 1997.

(150) *Amendment No. 365.* This provision is effective December 16, 1996 and must be implemented no later than March 1, 1997. Any variances resulting from implementation of the provisions of this amendment shall be excluded from error analysis for 120 days from this required implementation date in accordance with §275.12(d)(2)(vii) of this chapter.

(151) *Amendment No. 375.* Public Law 103–66, the Mickey Leland Childhood Hunger Relief Act, was effective and required to be implemented on September 1, 1994. The provisions of Amendment No. 375 are effective December 16, 1996, and must be implemented by March 1, 1997. The State agency shall implement the provisions of this amendment no later than the appropriate required implementation date for all households newly applying for Program benefits on or after such implementation date. The current caseload shall be converted to these provisions at household request, at the time of recertification, or when the case is next reviewed, whichever occurs first, and the State agency must provide restored benefits, as may be appropriate under the Food Stamp Act, back to the appropriate required implementation date. If for any reason a State agency fails to implement on the appropriate implementation date, restored benefits shall be provided, if appropriate, back to the appropriate required implementation date or the date of application, whichever is later. Any variances resulting from implementation of this amendment shall be excluded from quality control error analysis for 120 days from March 1, 1997.

(152) *Amendment No. 361* The provisions of *Amendment No. 361* are effective December 26, 1996, and must be implemented May 27, 1997. Any variances resulting from implementation of the provisions of this amendment shall be excluded from error analysis for 120 days from this required implementation date in accordance with 7 CFR 275.12(d)(2)(vii). The provision must be implemented for all households that

newly apply for Program benefits on or after the required implementation date. The current caseload shall be converted to these provisions at the household's request, at the time of recertification, or when the case is next reviewed, whichever occurs first. The State agency must provide restored benefits to such households back to the required implementation date or the date of application whichever is later.

If for any reason a State agency fails to implement on the required implementation date, restored benefits shall be provided, if appropriate, back to the required implementation date or the date of application whichever is later, but for no more than 12 months in accordance with § 273.17(a) of this chapter.

(153) *Amendment No. 366.* (i) With the exception of the changes to § 275.3(c)(4) [Arbitration], § 275.23(e)(5) [State agencies' liabilities for payment error-Fiscal Year 1992 and beyond], § 275.23(e)(7) [Good Cause], and § 275.23(e)(9) [timeframes], all quality control changes that are made by Amendment No. 366 shall be implemented July 2, 1997.

(ii) The quality control changes to § 275.3(c)(4) [Arbitration], § 275.23(e)(5) [State agencies' liabilities for payment error-Fiscal Year 1992 and beyond], § 275.23(e)(7) [Good Cause], and § 275.23(e)(9) [Timeframes], shall be implemented after approval of the provisions at § 275.3(c)(4) [Arbitration], and § 275.23(e)(7) [Good Cause] by the Office of Management and Budget under the Paperwork Reduction Act of 1995. FNS will publish a notice in the Federal Register announcing the implementation date. It shall be a date occurring after the publication date of the notice.

(154) *Amendment No. 386.* The provisions of Amendment No.386 are effective August 4, 2000. State agencies may begin implementing the rule August 4, 2000 but not later than January 2, 2001. State agencies that have already implemented EBT shall have one year in which to grandfather adjustment disclosure into their training materials according to 7 CFR 274.12(f)(10)(viii).

(155) *Amendment No. 373.* The provision at § 275.23(e)(5)(iii) is effective and is to be implemented on July 16, 1999. The following provisions are effective on October 1, 1999 and are to be implemented on October 1, 2000, with the start of the Fiscal Year 2001 quality control review period: § 271.2; § 275.3(c)(3)(ii); § 275.10(a); § 275.11(c)(1); § 275.11(e)(2); § 275.11(f)(2); § 275.13(a); § 275.13(b); § 275.13(c)(1); § 275.13(c)(2); § 275.13(f)(2) and § 275.23(c)(4). The remaining provisions of this rule are effective and are to be implemented October 1, 1999, with the start of the Fiscal Year 2000 quality control review period, which begins with the October 1999 sample month.

(156) *Amendment No. 379.* The provision of *Amendment No.* 379 regarding the 15-percent exemption and additional funding for E&T is effective and must be implemented no later than November 2, 1999. Any variances resulting from implementation of the provisions of this amendment shall be excluded from error analysis for 120 days from this required implementation date in accordance with § 275.12(d)(2)(vii) of this chapter.

(157) *Amendment No. 381.* The provisions of Amendment 381 are implemented as follows:

(i) The definition of ''Homeless individual'' in § 271.2, and the amendments to § 273.1(b)(1)(ii), § 273.2(i)(3)(i) and (i)(3)(ii) were to be implemented August 22, 1996;

(ii) The amendments to § 273.8(f)(1) and § 273.10(e)(4)(ii) were to be implemented October 1, 1996;

(iii) The amendment to § 273.9(d)(8) was to be implemented January 1, 1997;

(iv) The amendments to § 273.1(b)(1)(iii) and § 273.8(e)(3)(i)(A) must be implemented no later than March 1, 2001; and

(v) All remaining amendments must be implemented no later than January 1, 2001.

(158) *Amendment No. 382.* The provisions of Amendment No.379 are effective and must be implemented March 30, 2000.

(159) *Amendment (385).* The provisions in § 277.11(d) regarding time limits for State agencies to file claims to amend a prior expenditure report to request retroactive funding for costs previously incurred are effective October 1, 2000. The conforming amendments to Food Stamp Program regulations in §§ 272.1(g), 272.2(c)(3), 272.11(d) and (e), 274.12(k), 277.4(b) and (g), 277.9(b),

277.18(b), (d), (e), (g) and (p)(5), and Appendix A to Part 277 and the removal of §§ 277.15 and 277.19 are effective June 23, 2000.

(160) Amendment 389. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104–193, (PRWORA) set the date of enactment, August 1, 2000, as the effective date for the provisions of the law relating to recipient claims. These non-discretionary provisions of this rule are at § 273.18(c)(1)(ii)(B), § 273.18(f) and § 273.18(g) and are effective retroactive to August 1, 2000. The remaining amendments of this rule are effective and must be implemented no later than August 1, 2000.

(161) *Amendment No. 388* The provisions of Amendment No. 388 are implemented as follows:

(i) State agencies may implement the following amendments at their discretion at any time on or after the effective date: § 272.8; § 272.11(a); § 273.2(f)(9)(i); § 273.2(f)(10); § 273.2(j)(2)(ii); § 273.9(d)(6)(i); § 273.9(d)(6)(iii)(E); § 273.11(a)(3)(v); § 273.12(a)(1)(vii); § 273.25; and § 277.4(b).

(ii) State agencies may implement the following amendment at their discretion at any time after the effective date established by OMB approval of the associated information collection burden: § 273.12(f)(4).

(iii) State agencies must implement the following amendments no later than 180 days after the effective date established by OMB approval of the associated information collection burden for all households newly applying for Program benefits: § 273.2(c)(2)(i), § 273.2(e)(1), § 273.2(e)(2)(i), § 273.2(e)(2)(ii), § 273.2(e)(3), § 273.4(c)(3)(iv); and § 273.12(c)(3). State agencies must convert current caseloads no later than the next recertification following the implementation date.

(iv) State agencies must implement the amendment to § 273.2(b)(4)(iv) no later than August 1, 2001, for all households newly applying for Program benefits.

(v) State agencies must implement all remaining amendments no later than June 1, 2001, for all households newly applying for Program benefits. State agencies must convert current caseloads no later than the next recertification following the implementation date.

(vi) Acting under policy guidance the Department issued previous to the publication of this final rule, several State agencies that have identified programs to confer categorical eligibility for food stamps that do not meet the criteria established at §§ 273.2(j)(2)(i)(B), 273.2(j)(2)(i)(C), 273.2(j)(2)(ii)(A), or 273.2(j)(2)(ii)(B) of this chapter. Any such State agency may continue to use these programs to confer categorical eligibility for food stamp purposes until September 30, 2001.

(vii) A State agency which first implements option 1 under 7 CFR 273.11(c)(3)(ii), and then decides at a later date to implement option 2 under that same paragraph is entitled to a second variance exclusion period under 7 CFR 275.12(d)(2)(vii).

(162) *Amendment No. 384.* The provisions of Amendment No. 384 are effective September 14, 2000, and must be implemented as follows:

(i) Any new contract executed after October 16, 2000, must have provisions for interoperability and portability which include an implementation date for this functionality no later than October 1, 2002, except under the following circumstances:

(A) State agencies with contracts entered into before October 16, 2000, are not required to re-negotiate their EBT services contract to include interoperability and portability, even if the contract expires after the October 1, 2002 deadline; such State agencies are exempt from the interoperability requirement until they re-negotiate or re-procure their EBT contract.

(B) Smart Card systems are not required to be interoperable with other State EBT systems until such time that the Department determines a practicable technological method is available for interoperability with on-line EBT systems.

(ii) Enhanced funding is available for interoperability costs incurred after February 11, 2000, and before October 1, 2002, for State agencies which have implemented standards of interoperability and portability adopted by a majority of State agencies, and for such costs incurred after September 1,

2002, for State agencies that have adopted standards for interoperability and portability in accordance with this regulation at 7 CFR 274.12.

(163) [Reserved]

(164) *Amendment No. 390.* The provisions of Amendment No. 390 are effective November 3, 2000. State agencies may implement the provisions anytime after the effective date. However, Electronic Benefit Transfer (EBT) systems must be in place statewide no later than October 1, 2002, as required by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(165) *Amendment No. 387*—This rule is effective no later than {insert the first day of the month 60 days after publication of the final rule, except for the amendment to 7 CFR 272.2(d)(1)(xiii) which is effective August 1, 2001. State agencies must implement the provisions in this final rule no later than August 1, 2001.

[Amdt. 132, 43 FR 47884, Oct. 17, 1978]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 272.1, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 272.2 Plan of operation.

(a) *General purpose and content*—(1) *Purpose.* State agencies shall periodically plan and budget program operations and establish objectives. When planning and budgeting for program operations for the next year, State agencies shall consider major corrective action objectives, existing program strengths and deficiencies, and other factors anticipated to impact on the operation of the State's Food Stamp Program and on projected expenditures.

(2) *Content.* The basic components of the State Plan of Operation are the Federal/State Agreement, the Budget Projection Statement, and the Program Activity Statement. In addition, certain attachments to the Plan are specified in this section and in § 272.3. The requirements for the basic components and attachments are specified in § 272.2(c) and § 272.2(d) respectively. The Federal/State Agreement is the legal agreement between the State and the Department of Agriculture. This Agreement is the means by which the State elects to operate the Food Stamp Program and to administer the program in accordance with the Food Stamp Act of 1977, as amended, regulations issued pursuant to the Act and the FNS-approved State Plan of Operation. The Budget Projection Statement and Program Activity Statement provide information on the number of actions and amounts budgeted for various functional areas such as certification and issuance. The Plan's attachments include the Quality Control Sample Plan, the Disaster Plan (currently reserved), the Employment and Training Plan, the optional Nutrition Education Plan, the optional plan for Program informational activities directed to low-income households, the optional plan for intercepting Unemployment Compensation (UC) benefits for collecting claims for intentional Program violations, the Systematic Alien Verification for Entitlements (SAVE) Plan, and the plan for the State Income and Eligibility Verification System. The State agency shall either include the Workfare Plan in its State Plan of Operation or append the Workfare Plan to the State Plan of Operation, as appropriate, in accordance with § 273.22(b)(3) of this chapter. The Workfare Plan shall be submitted separately, in accordance with § 273.22(b)(1) of this chapter. The ADP/CIS Plan is considered part of the State Plan of Operation but is submitted separately as prescribed under § 272.2(e)(8). State agencies and/or political subdivisions selected to operate a Simplified Application/Standardized Benefit Project shall include that Project's Work Plan in the State Plan of Operation. The Plan's attachments shall also include the Mail Issuance Loss Reporting Level Plan.

(b) *Federal/State Agreement.* (1) The wording of the pre-printed Federal/State Agreement is as follows:

The State of _____ and the Food and Nutrition Service (FNS), U.S. Department of Agriculture (USDA), hereby agree to act in accordance with the provisions of the Food Stamp Act of 1977, as amended, implementing regulations and the FNS-approved State Plan of Operation. The State and FNS (USDA) further agree to fully comply with any changes in Federal law and regulations. This agreement may be modified with the mutual written consent of both parties.

PROVISIONS

The State agrees to: 1. Administer the program in accordance with the provisions contained in the Food Stamp Act of 1977, as amended, and in the manner prescribed by regulations issued pursuant to the Act; and to implement the FNS-approved State Plan of Operation.

2. Comply with Title VI of the Civil Rights Act of 1964 (Pub. L. 88–352), section 11(c) of the Food Stamp Act of 1977, as amended, the Age Discrimination Act of 1975 (Pub. L. 94–135) and the Rehabilitation Act of 1973 (Pub. L. 93–112, sec. 504) and all requirements imposed by the regulations issued pursuant to these Acts by the Department of Agriculture to the effect that, no person in the United States shall, on the grounds of sex, race, color, age, political belief, religion, handicap, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subject to discrimination under the Food Stamp Program.

3. (For States with Indian Reservations only). Implement the Program in a manner that is responsive to the special needs of American Indians on reservations and consult in good faith with tribal organizations about that portion of the State's Plan of Operation pertaining to the implementation of the Program for members of the tribe on reservations.

FNS agrees to: 1. Pay administrative costs in accordance with the Food Stamp Act, implementing regulations, and an approved Cost Allocation Plan.

2. Carry-out any other responsibilities delegated by the Secretary in the Food Stamp Act of 1977, as amended.

Date _____

Signature _____
(Governor or Authorized Designee)

Date _____

Signature _____
(Regional Administrator, FNS)

(2) The State agency may propose alternative language to any or all the provisions listed in paragraph (b)(1) of this section. The alternative language is subject to approval by both parties before signature.

(c) *Budget Projection Statement and Program Activity Statement.* (1) The State agency shall submit to FNS for approval a Budget Projection Statement and Program Activity Statement in accordance with the submittal dates in § 272.2(e).

(i) The Budget Projection Statement solicits projections of the total costs for major areas of program operations. The Budget Projection Statement shall be submitted annually and updated as necessary through the year. The Budget Projection Statement shall contain projections for each quarter of the next Federal fiscal year. The State agency shall submit with the Budget Projection Statement a narrative justification documenting and explaining the assumptions used to arrive at the projections. The narrative shall cover such subjects as: The number and salary level of employees; other factors affecting personnel costs including anticipated increases in pay rates or benefits, and reallocations of staff among units or functions, insofar as these might result in cost increases or decreases; costs for purchasing, leasing, and maintaining equipment and space, especially as concerns any upcoming, one-time-only purchases of new capital assets such as ADP equipment, renegotiation of leases, changes in depreciation rates or procedures, relocation of offices, maintenance and renovation work, and inflation; issuance system costs, including renegotiation of issuing agent fees and plans to change issuance systems; changes in caseload and factors contributing to increases or decreases in the number of participants; recertifications, including the anticipated impact of economic conditions (and in particular unemployment) and seasonality; cost implications of corrective action plans; anticipated changes in program regulations and operating guidelines and instructions; training needs; travel costs; and adjustments in insurance premiums. The narrative should cover as many of the items listed above, and any other items deemed relevant by the State agency, that will have a significant impact on costs. The State agency is not required to discuss every item in the list in every submission of a Budget Projection Statement. The narrative should concentrate on items that account for increases or decreases in costs from the preceding submissions.

(ii) The Program Activity Statement, to be submitted annually, solicits a summary of program activity for the State agency's operations during the preceding fiscal year.

(2) The organizational outline submitted in 1982 as an attachment to the Program Activity Statement shall be

considered the basic outline. Henceforth, changes to this outline shall be provided to FNS as they occur. The outline contains the following information:

(i) The position of the head of the State agency responsible for administering the Food Stamp Program in relation to the overall State organizational structure, i.e., the Program Director in relation to the Commissioner of Welfare;

(ii) A description of the organizational structure through which the State agency will administer and operate the Food Stamp Program, including whether the Program is State, county, locally, or regionally-administered; whether the workers have single Food Stamp Program or multi-program functions; and the title and position of the individual or panel designated as the hearing authority and whether officials conduct both fair and fraud hearings.

(iii) A description of the funding arrangement by which State, county, and local jurisdictions will contribute to the State agency portion of administrative costs;

(iv) The position within the State organizational structure of the Performance Reporting System (PRS) coordinator, including whether the PRS coordinator is full or part-time, and is responsible for direct supervision over Quality Control or Management Evaluation or if these functions are handled separately, and whether quality control reviewers have single Food Stamp Program or multi-program review responsibilities;

(v) The position of the training coordinator and whether this is a full or part-time position; and

(vi) The organizational entity responsible for corrective action.

(3) *Additional attachments.* Attached for informational purposes (not subject to approval as part of the plan submission procedures) to the Program Activity Statement and submitted as required in paragraph (e)(3) of this section shall be the agreements between the State agency and the United States Postal Service for coupon issuance, and between the State agency and the Social Security Administration for supplemental income/food stamp joint application processing and for routine user status.

(d) *Planning documents.* (1) The following planning documents shall be submitted:

(i) Quality Control Sampling Plan as required by § 275.11(a)(4);

(ii) Disaster Plan as required by § 280.6 (currently reserved), or certification that a previously submitted Disaster Plan has been reviewed and remains current;

(iii) Nutrition Education Plan if the State agency elects to request Federal Food Stamp Program administrative matching funds to conduct nutrition education programs as discussed in paragraph (d)(2) of this section.

(iv) A plan for the State Income and Eligibility Verification System required by § 272.8.

(v) Employment and Training Plan as required in §273.7 (c)(4) and (5).

(vi) ADP/CIS Plan as required by § 272.10.

(vii) A plan for the Systematic Alien Verification for Entitlements (SAVE) Program as required by § 272.11(e).

(viii) Mail Issuance Loss Reporting Level Plan required by § 276.2(b)(4), for the State agency using mail issuance, shall contain the unit level of reporting mail issuance losses for the upcoming fiscal year as elected by the State agency. If a State agency does not revise its Plan by August 15 in any given year, FNS shall continue to require reporting and to assess liabilities for the next fiscal year at the level last indicated by the State agency. If the agency has selected the unit provided for in § 276.2(b)(4)(ii), a listing of the issuance sites or counties comprising each administrative unit within the State agency shall also be included in the Plan.

(ix) A plan for Program informational activities as specified in § 272.5(c).

(x) A plan for intercepting UC benefits for collecting claims for intentional program violations as specified in § 272.12 if the State agency elects to use that procedure.

(xi)—(xii) [Reserved]

(xiii) If the State agency chooses to implement the optional provisions specified in (273.11(k), (l), (o), (p), and (q) of this chapter, it must include in

the Plan's attachment the options it selected, the guidelines it will use, and any good cause criteria under paragraph (o). For § 273.11(k) of this chapter, the State agency must identify which sanctions in the other programs this provision applies to. The State agency must also include in the plan a description of the safeguards it will use to restrict the use of information it collects in implementing the optional provision contained in § 273.11(p) of this chapter.

(2) *Nutrition Education Plan.* If submitted, the Nutrition Education Plan shall contain:

(i) The number and positions of staff that will be conducting nutrition education;

(ii) Description of activities in the nutrition education program; and

(iii) Assurance that nutrition education programs for which USDA provides Food Stamp Program administrative matching funds are conducted exclusively for the benefit of Food Stamp Program applicants and participants and do not duplicate USDA's Expanded Food and Nutrition Education Program's efforts in the State.

(e) *Submittal requirements.* States shall submit to the appropriate FNS Regional Office for approval each of the components of the Plan of Operation for approval within the timeframes established by this paragraph. Approval or denial of the document may be withheld pending review by FNS. However, if FNS fails to either approve, deny, or request additional information within 30 days, the document is approved. If additional information is requested, the State agency shall provide this as soon as possible, and FNS shall approve or deny the Plan within 30 days after receiving the information.

(1) The Federal/State agreement shall be signed by the Governor of the State or authorized designee and shall be submitted to FNS within 120 days after publication of these regulations in final form and shall remain in effect until terminated.

(2) The Budget Projection Statement and Program Activity Statement shall be signed by the head of the State agency or its chief financial officer and submitted as follows:

(i) The Budget Projection Statement shall be submitted annually, no later than August 15 of each year.

(ii) The Program Activity Statement shall be submitted annually, not later than 45 days after the end of the State agency's fiscal year. The first report is due 45 days after the end of the State's 1981 fiscal year. The first report is not required to contain information that is not currently captured by the State agency's information system. State agencies shall amend their data gathering systems so that all items can be completed on the second report, due for the 1982 fiscal year.

(3) Changes to the organizational outline required by § 272.2(c)(2) and the agreements with other agencies outlined in § 272.2(c)(3)(ii) shall be provided to FNS as changes occur. The attachments outlined in § 272.2(c)(3)(i) shall be submitted annually with the Program Activity Statement.

(4) The Quality Control Sampling Plan shall be signed by the head of the State agency and submitted to FNS prior to implementation as follows:

(i) According to the timeframes specified in paragraph (e)(4)(ii) of this section, prior to each annual review period each State agency shall submit any changes in their sampling plan for FNS approval or submit a statement that there are no such changes. These submittals shall include the statement required by § 275.11(a)(2), if appropriate. The Quality Control Sampling Plan in effect for each State agency as of the beginning of Fiscal Year 1984 shall be considered submitted and approved for purposes of this section, provided that the State agency has obtained prior FNS approval of its sampling plan.

(ii) Initial submissions of and major changes to sampling plans and changes in sampling plans resulting from general changes in procedure shall be submitted to FNS for approval at least 60 days prior to implementation. Minor changes to approved sampling plans shall be submitted at least 30 days prior to implementation.

(5) Disaster Plan. [Reserved]

(6) The Nutrition Education Plan shall be signed by the head of the State agency and submitted prior to funding of nutrition education activities when

the State agency elects to request Federal administrative matching funds to conduct Nutrition Education Programs. The plan shall then be submitted annually no later than August 15. The initial submission may be for a period of less than or more than a year in order to meet the August 15 deadline.

(7) Where applicable, State agencies shall consult (on an ongoing basis) with the tribal organization of an Indian reservation about those portions of the State Plan of Operation pertaining to the special needs of the members of the tribe.

(8) *ADP/CIS Plan*. The ADP/CIS Plan shall be signed by the head of the State agency and submitted to FNS by October 1, 1987. State agencies which require additional time to complete their ADP/CIS plan may submit their plan in two phases as described in § 272.10(a)(2), with the first part of the plan being submitted October 1, 1987. State agencies requiring additional time shall submit the second part of their plans by January 1, 1988. If FNS requests additional information to be provided in the State agency ADP/CIS Plan or if FNS requests that changes be made in the State agency ADP/CIS Plan, State agencies must comply with FNS comments and submit an approvable ADP/CIS Plan within 60 days of their receipt of the FNS comments but in no event later than March 1, 1988. Requirements for the ADP/CIS plan are specified in § 272.10.

(9) The Employment and Training Plan shall be submitted as specified under § 273.7(c)(5).

(f) *Revisions*. Revisions to any of the planning documents or the Program and Budget Summary Statement shall be prepared and submitted for approval to the appropriate FNS Regional Office in the same manner as the original document. However, revisions to the budget portion of the Budget Projection Statement and Program Activity Statement shall be submitted as follows:

(1) *Program funds*. (i) For program funds, State agencies shall request prior approvals promptly from FNS for budget revisions whenever:

(A) The revision indicates the need for additional Federal funding;

(B) The program budget exceeds $100,000, and the cumulative amount of transfers among program functions exceeds or is expected to exceed five percent of the program budget. The same criteria apply to the cumulative amount of transfers among functions and activities when budgeted separately for program funds provided to a subagency, except that FNS shall permit no transfer which would cause any Federal appropriation, or part thereof, to be used for purposes other than those intended;

(C) The revisions involve the transfer of amounts budgeted for indirect costs to absorb increases in direct costs; or

(D) The revisions pertain to the addition of items requiring prior approval by FNS in accordance with the provisions of the applicable cost principles specified in part 277 appendix A of the regulations.

(ii) No other changes to the Program fund budget require approval from FNS. Examples of changes which do not require Federal approval are: The use of State agency funds to accomplish program objectives over and above the State agency minimum share included in the approved Program budget; and the transfer of amounts budgeted for direct costs to absorb authorized increases in indirect costs.

(iii) The requirements of paragraph (f)(1)(i)(B) of this section may be waived by FNS provided that:

(A) No different limitation or approval requirement may be imposed; and,

(B) FNS shall not permit a transfer which would cause any Federal appropriation, or part, thereof, to be used for purpose other than those intended.

(2) *Authorized funds exceeding State agency needs*. When it becomes apparent that the funds authorized by the Letter of Credit will exceed the needs of the State agency, FNS will make appropriate adjustments in the Letter of Credit in accordance with part 277.

(3) *Method of requesting approvals*. When requesting approval for budget revisions, State agencies shall use the same format as the Budget Projection Statement used in the previous submission. However, State agencies may request by letter the approvals required by paragraph (f)(1)(i)(D) of this section.

(4) *Notification of approval or disapproval.* Within 30 days from the date of receipt of the request for budget revisions, FNS shall review the request and notify the State agency whether or not the budget revisions have been approved. If the revision is still under consideration at the end of 30 days, FNS shall inform the State agency in writing as to when the decision will be made.

[Amdt. 156, 46 FR 6315, Jan. 21, 1981]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 272.2, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 272.3 Operating guidelines and forms.

(a) *Coverage of operating guidelines.* State agencies shall prepare and provide to staff responsible for administering the Program written operating procedures. In those States which have State regulations that outline these Operating Procedures, these are equivalent to Operating Guidelines. Other examples of Operating Guidelines are manuals, instructions, directives or transmittal memos. The following categories shall be included in the Operating Guidelines:

(1) Certification of households, including but not limited to:

(i) Application processing;

(ii) Nonfinancial eligibility standards;

(iii) Financial criteria and the eligibility determination;

(iv) Actions resulting from eligibility determinations;

(v) Determining eligibility of special situation households as specified in § 273.11;

(vi) Additional certification functions such as processing changes during certification periods and reporting requirements for households;

(vii) Lost benefits/claims against households;

(viii) Fair/fraud hearings;

(ix) A list of Federal and State energy assistance programs that qualify for the resource and income exclusions discussed in § 273.8(e)(14) and § 273.9(c)(11) and how these payments are identified as being eligible for the exemption;

(x) Work registration and employment and training requirements.

(2) Issuance, accountability, and reconciliation;

(3) The Performance Reporting System, including instructions or directives for conducting quality control and management evaluation reviews and the quality control sample plan;

(4) A description of the training program, including a listing of the organizational component which conducts training, to whom and how often training is provided;

(5) The fair/fraud hearing procedures if not included in the Certification Handbook.

(6) The consultation process (where applicable) with the tribal organization of an Indian reservation about the State Plan of Operation and Operating Guidelines in terms of the special needs of members of the tribe and the method to be used for incorporating the comments from the tribal organization into the State Plan of Operations and Operating Guidelines.

(b) *Submittal of operating guidelines and forms.* (1) State agencies shall develop the necessary forms, except the Application for Food Stamps, and other operating guidelines to implement the provisions of the Food Stamp Act and regulations. In accordance with § 273.2(b) and § 273.12(b)(1) State agencies shall use the FNS-designed Application for Food Stamps or an FNS-approved deviation.

(2) State agencies shall submit their operating guidelines and forms and amendments to these materials to FNS for review and audit purposes simultaneous with distribution within the States.

(3) State agencies may request that FNS review and provide comments on their operating guidelines, forms and any amendments to these materials prior to distribution of the materials within the State.

(4) If deficiencies are discovered in a State agency's materials, FNS shall provide the State agency with written notification.

(c) *Waivers.* (1) The Administrator of the Food and Nutrition Service or Deputy Administrator for Family Nutrition Programs may authorize waivers

to deviate from specific regulatory provisions. Requests for waivers may be approved only in the following situations:

(i) The specific regulatory provision cannot be implemented due to extraordinary temporary situations such as a sudden increase in the caseload due to the loss of SSI cash-out status;

(ii) FNS determines that the waiver would result in a more effective and efficient administration of the program; or

(iii) Unique geographic or climatic conditions within a State preclude effective implementation of the specific regulatory provision and require an alternate procedure; for example, the use of fee agents in Alaska to perform many of the duties involved in the certification of households including conducting the interviews.

(2) FNS shall not approve requests for waivers when:

(i) The waiver would be inconsistent with the provisions of the Act; or

(ii) The waiver would result in material impairment of any statutory or regulatory rights of participants or potential participants.

(3) FNS shall approve waivers for a period not to exceed one year unless the waiver is for an on-going situation. If the waiver is requested for longer than a year, appropriate justification shall be required and FNS will determine if a longer period is warranted and if so, the duration of the waiver. Extensions may be granted provided that States submit appropriate justification as part of the State Plan of Operation.

(4) When submitting requests for waivers, State agencies shall provide compelling justification for the waiver in terms of how the waiver will improve the efficiency and effectiveness of the administration of the Program. At a minimum, requests for waivers shall include but not necessarily be limited to:

(i) Reasons why the waiver is needed;

(ii) The portion of caseload or potential caseload which would be affected and the characteristics of the affected caseload such as geographic, urban, or rural concentration;

(iii) Anticipated impact on service to participants or potential participants who would be affected;

(iv) Anticipated time period for which the waiver is needed; and

(v) Thorough explanation of the proposed alternative provision to be used in lieu of the waived regulatory provision.

(5) Notwithstanding the preceding paragraphs, waivers of the certification period timeframes as described in § 273.10(f) may be granted by the Administrator of the Food and Nutrition Service or the Deputy Administrator for Family Nutrition Programs as provided in section 3(c) of the Act. Waivers authorized by this paragraph are not subject to the public comment provisions of § 272.3(d).

(6) Notwithstanding the preceding paragraphs, waivers may be granted by the Administrator of the Food and Nutrition Service or the Deputy Administrator for Family Nutrition Programs as provided in section 5(f) of the Act. Waivers authorized by this paragraph are not subject to the public comment provisions of § 272.3(d).

(7) Notwithstanding the preceding paragraphs, waivers may be granted by the Administrator of the Food and Nutrition Service or the Deputy Administrator for Family Nutrition Programs as provided in section 6(c) of the Act. Waivers authorized by this paragraph are not subject to the public comment provisions of § 272.3(d).

(d) *Public comment.* State agencies shall solicit public input and comment on overall Program operations as State laws require or as the individual State agency believes would be useful.

[Amdt. 156, 46 FR 6315, Jan. 21, 1981]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 272.3, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 272.4 Program administration and personnel requirements.

(a) *Merit personnel.* (1) State agency personnel used in the certification process shall be employed in accordance with the current standards for a merit system of personnel administration or any standards later prescribed by the U.S. Civil Service Commission

under section 208 of the Intergovernmental Personnel Act of 1970.

(2) State agency employees meeting the standards outlined in paragraph (a)(1) of this section shall perform the interviews required in § 273.2(e). Volunteers and other non-State agency employees shall not conduct certification interviews or certify food stamp applicants. Exceptions to the use of State merit system personnel in the interview and certification process are specified in § 273.2(k) for SSI households, § 272.7(d) for households residing in rural Alaska, and part 280 for disaster victims. State agencies are encouraged to use volunteers in activities such as outreach, prescreening, assisting applicants in the application and certification process, and in securing needed verification. Individuals and organizations who are parties to a strike or lockout, and their facilities, may not be used in the certification process except as a source of verification for information supplied by the applicant. Only authorized employees of the State agency, coupon issuers, coupon bulk storage points, and Federal employees involved in administration of the program shall be permitted access to food coupons, ATP's, or other issuance documents.

(b) *Bilingual requirements.* (1) Based on the estimated total number of low-income households in a project area which speak the same non-English language (a single-language minority), the State agency shall provide bilingual program information and certification materials, and staff or interpreters as specified in paragraphs (b) (2) and (3) of this section. Single-language minority refers to households which speak the same non-English language and which do not contain adult(s) fluent in English as a second language;

(2) The State agency shall provide materials used in Program informational activities in the appropriate language(s) as follows:

(i) In project areas with less than 2,000 low-income households, if approximately 100 or more of those households are of a single-language minority;

(ii) In project areas with 2,000 or more low-income households, if approximately 5 percent or more of those households are of a single-language minority; and

(iii) In project areas with a certification office that provides bilingual service as required in paragraph (b)(3) of this section.

(3) The State agency shall provide both certification materials in the appropriate language(s) and bilingual staff or interpreters as follows:

(i) In each individual certification office that provides service to an area containing approximately 100 single-language minority low-income households; and

(ii) In each project area with a total of less than 100 low-income households if a majority of those households are of a single-language minority.

(A) Certification materials shall include the food stamp application form, change report form and notices to households.

(B) If notices are required in only one language other than English, notices may be printed in English on one side and in the other language on the reverse side. If the certification office is required to use several languages, the notice may be printed in English and may contain statements in other languages summarizing the purpose of the notice and the telephone number (toll-free number or a number where collect calls will be accepted for households outside the local calling area) which the household may call to receive additional information. For example, a notice of eligibility could in the appropriate language(s) state:

Your application for food stamps has been approved in the amount stated above. If you need more information telephone _____.

(4) In project areas with a seasonal influx of non-English-speaking households, the State agency shall provide bilingual materials and staff or interpreters, if during the seasonal influx the number of single-language minority low-income households which move into the area meets or exceeds the requirements in paragraphs (b) (2) and (3) of this section.

(5) The State agency shall insure that certification offices subject to the requirements of paragraph (b) (3) or (4) of this section provide sufficient bilingual staff or interpreters for the timely

processing of non-English-speaking applicants.

(6) The State agency shall develop estimates of the number of low-income single-language minority households, both participating and not participating in the program, for each project area and certification office by using census data (including the Census Bureau's Current Population Report: Population Estimates and Projections, Series P–25, No. 627) and knowledge of project areas and areas serviced by certification offices. Local Bureau of Census offices, Community Services Administration offices, community action agencies, planning agencies, migrant service organizations, and school officials may be important sources of information in determining the need for bilingual service. If these information sources do not provide sufficient information for the State agency to determine if there is a need for bilingual staff or interpreters, each certification office shall, for a 6-month period, record the total number of single-language minority households that visit the office to make inquiries about the program, file a new application for benefits, or be recertified. Those certification offices that are contacted by a total of over 100 single-language minority households in the 6-month period shall be required to provide bilingual staff or interpreters. State agencies shall also combine the figures collected in each certification office to determine the need for bilingual outreach materials in each project area.

(c) *Internal controls*—(1) *Requirements.* In order to safeguard certification and issuance records from unauthorized creation or tampering, the State agency shall establish an organizational structure which divides the responsibility for eligibility determinations and coupon issuance among certification, data management, and issuance units. The certification unit shall be responsible for the determination of household eligibility and the creation of records and documents to authorize the issuance of coupons to eligible households. The data management unit, in response to input from the certification unit, shall create and maintain the household issuance record (HIR) master file on cards, computer discs, tapes, or similar memory devices. The issuance unit shall provide certified households with the authorized allotments. In cases where personnel are periodically, or on a part-time basis, shifted from one unit to another, supervisory controls should be sufficient to assure that the unauthorized creation or modification of case records is not possible.

(2) *Exceptions.* With prior written FNS approval, a project area may combine unit responsibilities if the controls specified in paragraph (c)(1) of this section have been found to be administratively infeasible.

(i) To receive approval of combined operations, the State agency shall establish special review requirements which at a minimum include:

(A) Biweekly reconciliation and verification of transactions; and

(B) Semiannual comparison of HIR cards and case records as required by § 274.6(d) and, at least once every other month, second-party review of certification actions.

(ii) The State agency shall annually determine whether each combined operation continues to be justified and shall so advise FNS in writing.

(d) *Court suit reporting.* (1) State agency responsibility. (i) In the event that a State agency is sued by any person(s) in a State or Federal Court in any matter which involves the State agency's administration of the Food Stamp Program, the State agency shall immediately notify FNS that suit has been brought and shall furnish FNS with copies of the original pleadings. State agencies involved in suits shall, upon request of FNS, take such action as is necessary to join the United States and/or appropriate officials of the Federal Government, such as the Secretary of USDA or the Administrator of FNS, as parties to the suit. FNS may request to join the following types of suits:

(A) Class action suits;

(B) A suit in which an adverse decision could have a national impact;

(C) A suit challenging Federal policy such as a provision of the Act or regulations or an interpretation of the regulations; or,

(D) A suit based on an empirical situation that is likely to recur.

(ii) FNS may advise a State agency to seek a settlement agreement of a court suit if the State agency is being sued because it misapplied Federal policy in administering the Program.

(iii) State agencies shall notify FNS when court cases have been dismissed or otherwise settled. State agencies shall also provide FNS with information that is requested regarding the State agency's compliance with the requirements of court orders or settlement agreements.

(2) FNS shall notify all State agencies of any suits brought in Federal court that involve FNS' administration of the Program and which have the potential of affecting many State agencies' Progam operations. (State agencies need not be notified of suits brought in Federal Court involving FNS' administration of the Program which may only affect Program operations in one or two States.) The notification provided to State agencies shall contain a description of the Federal policy that is involved in the litigation.

(e) *State monitoring of duplicate participation.* (1) Each State agency shall establish a system to assure that no individual participates more than once in a month, in more than one jurisdiction, or in more than one household within the State in the Food Stamp Program. To identify such individuals, the system shall use names and social security numbers at a minimum, and other identifiers such as birth dates or addresses as appropriate.

(i) If the State agency detects a large number of duplicates, it shall implement other measures, such as more frequent checks or increased emphasis on prevention.

(ii) If the State agency provides cash assistance in lieu of coupons for SSI recipients or for households participating in cash-out demonstration projects, the State agency shall check to assure that no individual receives both coupons and other benefits provided in lieu of coupons. Checks to detect individuals receiving both food coupons and cash-out benefits, or any other form of duplicate benefits, shall be made at the time of certification, recertification, and whenever a new member is added to an existing household. However, if the State agency can show that these time frames are incompatible with its system, the State agency shall check for duplicate benefits when necessary, but no less often than annually.

(2) Processing standards for duplicate participation checks at certification and recertification shall not delay the issuance of benefits.

(i) If the State agency chooses to check at the time of certification and recertification, the check for duplicates shall not delay processing of the application and provision of benefits beyond the normal processing standards in § 273.2(g).

(ii) If a duplicate is found in making such a check, the duplication needs to be resolved in accordance with § 273.2(f)(4)(iv) before the application can be processed and benefits provided. Delays in processing caused by this resolution shall be handled in accordance with § 273.2(h).

(3) State agencies shall develop follow-up procedures and corrective action requirements, including time frames within which action must be taken, to be applied to data obtained from matching for duplicate participation. Follow-up actions shall include, but not be limited to, the adjustment of benefits and eligibility, filing of claims, disqualification hearings, and referrals for prosecution, as appropriate.

(4) FNS reserves the right to review State agencies' use of data obtained from matching for duplicate participation and may require State agencies to take additional specific action to ensure that such data is being used to protect Program integrity.

(f) *Hours of operation.* State agencies are responsible for setting the hours of operation for their food stamp offices. In doing so, State agencies must take into account the special needs of the populations they serve including households containing a working person.

(g) *Fraud detection units.* State agencies shall establish and operate fraud detection units in all project areas in which 5,000 or more households participate in the Program. The fraud detection unit shall be responsible for detecting, investigating and assisting in the prosecution of Program fraud and

need not be physically located in each 5,000 household ''catchment area''. The workers fulfilling this function need not work full-time in fraud detection nor work exclusively on the Program. A written State agency procedure which systematically identifies and refers potential fraud cases to Investigators shall be considered a ''detection'' activity meeting the requirements of this section. The fraud detection function may be performed by persons not employed by the State agency.

[Amdt. 132, 43 FR 47884, Oct. 17, 1978, as amended by Amdt. 221, 47 FR 35168, Aug. 13, 1982; Amdt. 211, 47 FR 53315, Nov. 26, 1982; Amdt. 237, 47 FR 57668, 57669, Dec. 28, 1982; Amdt. 262, 49 FR 50597, Dec. 31, 1984; 54 FR 7003, Feb. 15, 1989; 54 FR 24527, June 7, 1989; Amdt. 320, 55 FR 6238, Feb. 22, 1990; Amdt. 371, 61 FR 60010, Nov. 26, 1996; Amdt. 388, 65 FR 70192, Nov. 21, 2000]

§ 272.5 Program informational activities.

(a) *Definition.* ''Program informational activities'' are those activities that convey information about the Program, including household rights and responsibilities, through means such as publications, telephone hotlines, and face-to-face contacts.

(b) *Minimum requirements.* State agencies shall comply with the following minimum information requirements for applicants and recipients.

(1) *Nutrition information.* FNS must encourage State agencies to develop Nutrition Education Plans as specified at § 272.2(d)(2) to inform applicant and participant households about the importance of a nutritious diet and the relationship between diet and health.

(2) State agencies shall encourage program participants to participate in the Expanded Food and Nutrition Education Program (EFNEP) and, wherever practicable, allow EFNEP personnel to come into food stamp offices to distribute informational materials and speak with food stamp recipients.

(3) Rights and responsibilities. State agencies shall inform participant and applicant households of their Program rights and responsibilities. This information may be provided through whatever means the State agencies deem appropriate.

(4) All Program informational material shall be available in languages other than English as required in § 272.4(b) and shall include a statement that the Program is available to all without regard to race, color, sex, age, handicap, religious creed, national origin or political belief.

(c) *Program informational activities for low-income households.* At their option State agencies may carry out and claim associated costs for Program informational activities designed to inform low-income households about the availablity, eligibility requirements, application procedures, and benefits of the Food Stamp Program. Program informational materials used in such activities shall be subject to § 272.4(b), which pertains to bilingual requirements. Before FNS considers costs for such activities eligible for reimbursement at the fifty percent rate under part 277, State agencies shall obtain FNS approval for the attachment to their Plans of Operation as specified in § 272.2(d)(1)(ix). In such attachments, State agencies shall describe the subject activities with respect to the socio-economic and demographic characteristics of the target population, types of media used, geographic areas warranting attention, and outside organizations which would be involved. State agencies shall update this attachment to their Plans of Operation when significant changes occur and report projected costs for this Program activity in accordance with § 272.2 (c), (e), and (f).

[Amdt. 207, 47 FR 52334, Nov. 19, 1982. Redesignated by Amdt. 211, 47 FR 53316, Nov. 26, 1982; Amdt. 262, 49 FR 50597, Dec. 31, 1984; 52 FR 36398, Sept. 29, 1987; 54 FR 24527, June 7, 1989; Amdt. 320, 55 FR 6239, Feb. 22, 1990]

§ 272.6 Nondiscrimination compliance.

(a) *Requirement.* State agencies shall not discriminate against any applicant or participant in any aspect of program administration, including, but not limited to, the certification of households, the issuance of coupons, the conduct of fair hearings, or the conduct of any other program service for reasons of age, race, color, sex, handicap, religious creed, national origin, or political beliefs. Discrimination in any aspect of program administration is prohibited by these regulations, the Food Stamp Act, the Age Discrimination

Act of 1975 (Pub. L. 94–135), the Rehabilitation Act of 1973 (Pub. L. 93–112, section 504), and title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d). Enforcement action may be brought under any applicable Federal law. Title VI complaints shall be processed in accord with 7 CFR part 15.

(b) *Right to file a complaint.* Individuals who believe that they have been subject to discrimination as specified in paragraph (a) of this section may file a written complaint with the Secretary or the Administrator, FNS, Washington, DC 20250, and/or with the State agency, if the State agency has a system for processing discrimination complaints. The State agency shall explain both the FNS and, if applicable, the State agency complaint system to each individual who expresses an interest in filing a discrimination complaint and shall advise the individual of the right to file a complaint in either or both systems.

(c) *FNS complaint requirements.* (1) Complaints shall contain the following information to facilitate investigations:

(i) The name, address, and telephone number or other means of contacting the person alleging discrimination.

(ii) The location and name of the organization or office which is accused of discriminatory practices.

(iii) The nature of the incident or action or the aspect of program administration that led the person to allege discrimination.

(iv) The reason for the alleged discrimination (age, race, color, sex, handicap, religious creed, national origin, or political belief).

(v) The names, titles (if appropriate), and addresses of persons who may have knowledge of the alleged discriminatory acts.

(vi) The date or dates on which the alleged discriminatory actions occurred.

(2) If a complainant makes allegations verbally and is unable or is reluctant to put the allegations in writing, the FNS employee to whom the allegations are made shall document the complaint in writing. Every effort shall be made by the individual accepting the complaint to have the complainant provide the information specified in paragraph (c)(1) of this section.

(3) Complaints will be accepted by the Secretary or the Administrator, FNS, even if the information specified in paragraph (c)(1) of this section is not complete. However, investigations will be conducted only if information concerning paragraphs (c)(1) (ii), (iii) or (iv) of this section is provided.

(4) A complaint must be filed no later than 180 days from the date of the alleged discrimination. However, the time for filing may be extended by the Secretary.

(d) *State agency complaint requirements.* (1) The State agency may develop and use a State agency complaint system.

(2) The State agency shall submit to FNS a report on each discrimination complaint processed at the State level. The report shall contain as much information in paragraph (c)(1) of this section as is available to the State agency, the findings of the investigation, and, if appropriate, the corrective action planned or taken.

(e) *Reviews.* [Reserved]

(f) *Public notification.* The State agency shall: (1) Publicize the procedures described in paragraphs (b) and (c) of this section, and, if applicable, the State agency's complaint procedures; (2) insure that all offices involved in administering the program and that also serve the public display the nondiscrimination poster provided by FNS; and (3) insure that participants and other low-income households have access to information regarding nondiscrimination statutes and policies, complaint procedures, and the rights of participants, within 10 days of the date of a request.

(g) *Data collection.* The State agency shall obtain data on households by racial/ethnic category. The racial/ethnic categories are: American Indian or Alaskan Native, Asian or Pacific Islander, black (not of Hispanic origin), Hispanic, and white (not of Hispanic origin). The State agency may request applicants to identify voluntarily their race or ethnicity on the application form. The application form in these States shall clearly indicate that the information is voluntary, that it will not affect eligibility or the level of

benefits, and that the reason for the information is to assure that program benefits are distributed without regard to race, color, or national origin. The State agency shall develop alternative means of providing the racial and ethnic data on households, such as by observation during the interview, when the information is not voluntarily provided by the household on the application form.

(h) *Reports*. As required by FNS, the State agency shall report the racial/ethnic data on participating households on forms provided by FNS.

[Amdt. 132, 43 FR 47884, Oct. 17, 1979. Redesignated by Amdt. 211, 47 FR 53315, Nov. 26, 1982, as amended by Amdt. 356, 59 FR 29713, June 9, 1994]

§ 272.7 Procedures for program administration in Alaska.

(a) *Purpose*. To achieve the efficient and effective administration of the Food Stamp Program in rural areas of Alaska, FNS has determined that it is necessary to develop additional regulations which are specifically designed to accommodate the unique demographic and climatic characteristics which exist in these rural areas. The regulations established in this section, except for paragraph (f) of this section, shall apply only in those areas of Alaska designated as ''rural'' in paragraph (b) of this section. All regulations not specifically modified by this section shall remain in effect.

(b) *Area Designations*. (1) Rural I Alaska TFP refers to a Thrifty Food Plan (TFP) that is the higher of the TFP that was in effect in each area on October 1, 1985, or 28.52 percent higher than the Anchorage TFP, as calculated by FNS, with rounding and other reductions that are appropriate. It is to be used in the following areas: In all places in Kodiak Island Borough with the exception of Kodiak; in all places in the Kenai Peninsula Borough that are west of Cook Inlet (including Tyonek, Kustatan, Kalgin Island, Iliamna, Chenik, and Augustine Island) and Chugach Island, English Bay, Port Graham, Portlock, Pt. Gore, Pye Island, and Seldovia. In the Yukon-Koyukuk Census Area, the city of Nenana; and Skwentna in the Matanuska-Susitna Borough. In the Valdez-Cordova Census Area, all places except Dayville and Valdez; and in the Southeast Fairbanks Census Area all places except Big Delta, Delta Junction, and Fort Greely. In the Skagway-Yakutat-Angoon Census Area, all places except Skagway; in Sitka Borough all places except Sitka; in the Wrangell-Petersburg Census Area, all places except Wrangell and Petersburg; in the Ketchikan Gateway Borough, all places except Ketchikan, Saxman, and Ward Cove; in the Prince of Wales-Outer Ketchikan Census Area, all places except Craig, Hyder, and Metlakatla.

(2) Rural II Alaska TFP refers to a TFP that is 56.42 percent higher than the Anchorage TFP, as calculated by FNS, with rounding and other reductions that are appropriate. It is to be used in the following areas: North Slope Borough; Kobuk Census Area; Nome Census Area; Yukon-Koyukuk Census Area except for the city of Nenana; Wade Hampton Census Area; Bethel Census Area; Denali in the Matanuska-Susitna Borough; Dillingham-Bristol Bay Borough; and in all places in the Aleutian Islands except for Cold Bay and Adak.

(3) Urban Alaska TFP refers to a TFP that is the higher of the TFP that was in effect in each area on October 1, 1985, or .79 percent higher than the Anchorage TFP, as calculated by FNS, with rounding and other reductions that are appropriate. It is to be used in the following areas: Cold Bay and Adak in the Aleutian Islands; Kodiak in Kodiak Island Borough; Valdez and Dayville in the Valdez-Cordova Census Area; all places in Kenai Peninsula Borough that are on the Kenai Peninsula except for those specifically designated as Rural I; the entire Anchorage Borough; the entire Matanuska-Susitna Borough except for Denali and Skwentna; the entire Fairbanks-North Star Borough; the entire Juneau Borough; the entire Haines Borough; Sitka in the Sitka Borough; Skagway in the Skagway-Yakutat-Angoon Census Area; Wrangell and Petersburg in the Wrangell-Petersburg Census Area; Ketchikan, Saxman, and Ward Cove in the Ketchikan-Gateway Borough; Craig, Hyder, and Metlakatla in the

Prince of Wales-Outer Ketchikan Census Area; and Big Delta, Delta Junction, and Fort Greely in the Southeast-Fairbanks Census Area.

(4) The State agency may, in consultation with FNS, change the designation of any Alaska subdivision contained in the Plan of Operation to reflect changes in demographics or the cost of food within the subdivision.

(c) *Fee agents.* ''Fee agent'' means a paid agent who, on behalf of the State, is authorized to make applications available to low-income households, assist in the completion of applications, conduct required interviews, secure required verification, forward completed applications and supporting documentation to the State agency, and provide other services as required by the State agency. Such services shall not include making final decisions on household eligibility or benefit levels.

(d) *Application* processing. The State agency may modify the application processing requirements in § 273.2 of this chapter as necessary to insure prompt delivery of services to eligible households. The following restrictions apply:

(1) *Fee agent processing.* If the signed application is first submitted by a household to a fee agent, the fee agent shall mail the application to the State agency within 5 days of receipt. The fee agent shall give the household the maximum amount of time to provide needed verification as long as the five-day processing period is met.

(2) *Application filing date.* An application is considered filed for purposes of timely processing when it is received by an office of the State agency.

(3) *Application processing timeframes.* Eligible households must be provided an opportunity to participate as soon as possible but no later than 30 days after the application is received by an office of the State agency.

(4) *Expedited service.* (i) If the signed application is first submitted by a household to a fee agent, the fee agent shall mail the application to the State agency within 5 days of receipt. If the household is eligible for expedited service, the State agency will mail the coupons no later than the close of business of the second working day following the date the application was received by the State agency.

(ii) If the signed application is submitted directly to the State agency in person by a rural resident or its authorized representative or by mail, the State agency shall process the application and issue coupons to households eligible for expedited service in accordance with the time standards contained in § 273.2(i)(3) of this chapter.

(iii) If an incomplete application is submitted directly to the State agency by mail, the State agency shall conduct the interview by the first working day following the date the application was received if the fee agent can contact the household or the household can be reached by telephone or radiophone and does not object to this method of interviewing on grounds of privacy. Based on information obtained during the interview, the State agency shall complete the application and process the case. Because of the mailing time in rural areas, the State agency shall not return the completed application to the household for signature. The processing standard shall be calculated from the date the application was filed.

(5) *SSI Joint Processing.* SSA workers shall mail all jointly processed applications to the appropriate State agency office within 5 days of receipt of the application. A jointly processed application shall be considered filed for purposes of timely processing when it is received by an office of the State agency. The household, if determined eligible, shall receive benefits retroactive to the first day of the month in which the jointly processed application was received by the SSA worker.

(6) *Interviews.* The State agency shall interview applicant households in the most efficient manner possible, either by face-to-face contact, telephone, radiophone, or other means of correspondence including written correspondence. In instances in which an interview cannot be conducted, the State agency may postpone the interview until after the household is certified.

(e) *Determining household eligibility and benefit level.* If a household submits its application to a fee agent, it shall, if eligible, receive benefits retroactive

to the date the application is received by the fee agent. If a household submits its application directly to a State agency office, it shall, if determined eligible, receive benefits retroactive to the date the application is received by the State agency.

(f) *Vehicles.* In areas of the State where there are no licensing requirements, snowmobiles and boats used by the household for basic transportation shall be evaluated in accordance with § 273.8(h) of this chapter even though they are unlicensed. Vehicles necessary for subsistence hunting and fishing shall not be counted as a household resource.

(g) *Reporting changes.* The State agency shall allow the household to choose to report changes either directly to the State agency or to the fee agent. If the household reports the change to the fee agent, the fee agent will mail the change report to the State agency office within two working days of the date of receipt. The household's obligation to report the change will have been met if it submits the change to the fee agent within 10 days of the date the change becomes known to the household. However, for purposes of State agency action for increasing or decreasing benefits, the change will be considered to have been reported when it is received by a State agency office.

(h) *Fair hearings, fraud hearings, and agency conferences.* The State agency shall conduct fair hearings, administrative fraud hearings, and agency conferences with households that wish to contest denial of expedited service in the most efficient manner possible, either by face-to-face contact, telephone, radiophone, or other means of correspondence including written correspondence, in order to meet the respective time standards contained in § 273.15 and § 273.16 of this chapter.

(i) *Issuance services.* With the approval of FNS, coupons may be mailed on a quarterly or semiannual basis to certain rural areas of Alaska when provisions are not available on a monthly basis. The decision to allow the distribution of coupons in this manner will be made on an annual basis. These areas shall be listed in the State's Plan of Operation. The State agency shall advise households that live in rural areas where quarterly or semiannual allotments are authorized. If, as the result of the issuance of quarterly or semiannual allotments, food coupons are overissued or underissued, the State agency shall process claim determinations and restore lost benefits.

[Amdt. 162, 45 FR 73003, Nov. 4, 1980, as amended by Amdt. 202, 46 FR 44722, Sept. 4, 1981; Amdt. 215, 47 FR 20741, May 14, 1982. Redesignated and amended by Amdt. 211, 47 FR 53315, 53316, Nov. 26, 1982]

EDITORIAL NOTE: For other FEDERAL REGISTER citations affecting § 272.7, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 272.8 State income and eligibility verification system.

(a) *General.* (1) State agencies may maintain and use an income and eligibility verification system (IEVS), as specified in this section. By means of the IEVS, State agencies may request wage and benefit information from the agencies identified in this paragraph (a)(1) and use that information in verifying eligibility for and the amount of food stamp benefits due to eligible households. Such information may be requested and used with respect to all household members, including any considered excluded household members as specified in § 273.11(c) of this chapter whenever the SSNs of such excluded household members are available to the State agency. If not otherwise documented, State agencies must obtain written agreements from these information provider agencies affirming that they must not record any information about individual food stamp households and that staff in those agencies are subject to the disclosure restrictions of the information provider agencies and § 272.1(c). The information provider agencies, at a minimum, are:

(i) The State Wage Information Collection Agency (SWICA) which maintains wage information;

(ii) The Social Security Administration (SSA) which maintains information about net earnings from self-employment, wages, and payments of retirement income, which is available pursuant to section 6103(1)(7)(A) of the Internal Revenue Service (IRS) Code;

and information which is available from SSA regarding Federal retirement, and survivors, disability, SSI and related benefits;

(iii) The IRS from which unearned income information is available pursuant to section 6103(1)(7)(B) of the IRS Code; and

(iv) The agency administering Unemployment Insurance Benefits (UIB) which maintains claim information and any information in addition to information about wages and UIB available from the agency which is useful for verifying eligibility and benefits, subject to the provisions and limitations of section 303(d) of the Social Security Act.

(2) State agencies may exchange with State agencies administering certain other programs in the IEVS information about food stamp households' circumstances which may be of use in establishing or verifying eligibility or benefit amounts under the Food Stamp Program and those programs. State agencies may exchange such information with these agencies in other States when they determine that the same objectives are likely to be met. These programs are:

(i) Temporary Assistance for Needy Families;

(ii) Medicaid;

(iii) Unemployment Compensation (UC);

(iv) Food Stamps; and

(v) Any State program administered under a plan approved under title I, X, or XIV (the adult categories), or title XVI of the Social Security Act.

(3) State agencies must provide information to those administering the Child Support Program (title IV–D of the Social Security Act) and titles II (Federal Old Age, Survivors, and Disability Insurance Benefits) and XVI (Supplemental Security Income for the Aged, Blind, and Disabled) of the Social Security Act.

(4) Prior to requesting or exchanging information with other agencies, State agencies must execute data exchange agreements with those agencies. The agreements must specify the information to be exchanged and the procedures which will be used in the exchange of information. These agreements are not part of the State agency's Plan of Operation.

(b) *Alternate data sources.* A State agency may continue to use income information from an alternate source or sources to meet any requirement under paragraph (a) of this section.

(c) *Actions on recipient households.* (1) State agency action on information items about recipient households shall include:

(i) Review of the information and comparison of it to case record information;

(ii) For all new or previously unverified information received, contact with the households and/or collateral contacts to resolve discrepancies as specified in §§ 273.2(f)(4)(iv) and 273.2 (f)(9)(iii) and (f)(9)(iv); and

(iii) If discrepancies warrant reducing benefits or terminating eligibility, notices of adverse action.

(2) State agencies must initiate and pursue the actions on recipient households specified in paragraph (c)(1) of this section so that the actions are completed within 45 days of receipt of the information items. Actions may be completed later than 45 days from the receipt of information if:

(i) The only reason that the actions cannot be completed is the nonreceipt of verification requested from collateral contacts; and

(ii) The actions are completed as specified in § 273.12 of this chapter when verification from a collateral contact is received or in conjunction with the next case action when such verification is not received, whichever is earlier.

(3) When the actions specified in paragraph (c)(1) of this section substantiate an overissuance, State agencies must establish and take actions on claims as specified in § 273.18 of this chapter.

(4) State agencies must use appropriate procedures to monitor the timeliness requirements in paragraph (c)(2) of this section.

(5) Except for the claims actions specified in paragraph (c)(3) of this section, State agencies may exclude from the actions required in paragraph (c) of this section information items pertaining to household members who are

participating in one of the other programs listed in paragraph (a)(2) of this section.

(d) *IEVS information and quality control.* The requirements of this section do not relieve the State agency of its responsibility for determining erroneous payments and/or its liability for such payments as specified in part 275 of this chapter (which pertains to quality control) and in guidelines on quality control established under that part.

(e) *Documentation.* The State agency must document, as required by § 273.2(f)(6) of this chapter, information obtained through the IEVS both when an adverse action is and is not instituted.

[65 FR 70192, Nov. 21, 2000]

§ 272.9 Approval of homeless meal providers.

The State food stamp agency, or another appropriate State or local governmental agency identified by the State food stamp agency, shall approve establishments serving the homeless upon sufficient evidence, as determined by the agency, that the establishment does in fact serve meals to homeless persons. Where the State food stamp agency identifies another appropriate State or local agency for the purpose of approving establishments serving the homeless, the State food stamp agency will remain responsible for insuring that the provisions of the preceding sentence are effectively carried out. The State food stamp agency, or another appropriate State or local governmental agency identified by the State food stamp agency or private nonprofit organization under contract with the State food stamp agency shall execute contracts with restaurants wishing to sell meals in exchange for food stamp benefits to homeless food stamp households. Such contracts shall specify that such meals are to be sold at ''concessional'' (low or reduced) prices and shall also specify the approximate prices which will be charged, or the amount and type of price reduction.

[56 FR 54777, Oct. 23, 1991; 61 FR 53600, Oct. 15, 1996]

§ 272.10 ADP/CIS Model Plan.

(a) *General purpose and content*—(1) *Purpose.* All State agencies are required to sufficiently automate their food stamp program operations and computerize their systems for obtaining, maintaining, utilizing and transmitting information concerning the food stamp program. Sufficient automation levels are those which result in effective programs or in cost effective reductions in errors and improvements in management efficiency, such as decreases in program administrative costs. Thus, for those State agencies which operate exceptionally efficient and effective programs, a lesser degree of automation may be considered sufficient than in other State agencies. In order to determine a sufficient level of automation in each State, each State agency shall develop an ADP/CIS plan. FNS may withhold State agency funds under § 276.4(a) for failure to submit an ADP/CIS plan in accordance with the deadlines for submission, for failure to make appropriate changes in their ADP/CIS plan within 60 days of their receipt of FNS comments, or for failure to implement the approved ADP/CIS plan in accordance with the dates specified therein, unless extensions of time or deviations from the plan or schedules have been approved by FNS.

(2) *Content.* In developing their ADP/CIS plans, State agencies shall use one of the following three formats:

(i) State agencies which are sufficiently automated in each area specified in § 272.10(b) may provide a single certification statement that they are sufficiently automated in each area.

(ii) State agencies which are sufficiently automated in some, but not all, areas specified in § 272.10(b) shall submit an ADP/CIS plan which consists of two parts. The first part would be the State agency's certification as to the areas in which they are sufficiently automated. The second part would describe the areas of § 272.10(b) which the State agency has not automated or, in its opinion, has not automated sufficiently and include the State agency's plans for sufficiently automating these areas. State agencies shall include a description of how they intend to automate each area and a timetable for

each planned activity, including a consideration of transfers as discussed in paragraph (a)(3) of this section. State agencies which are not planning to automate each of the areas specified § 272.10(b) or which are not already automated in these areas shall provide justification. Any such justification shall include a cost-effectiveness analysis.

(iii) State agencies which are not sufficiently automated in any of the areas specified in § 272.10(b) shall submit an ADP/CIS plan which describes their plans for sufficiently automating each area, including a timetable for each planned activity, and including a consideration of transfers as discussed in paragraph (a)(3) of this section. State agencies which are not planning to automate each of the areas specified in § 272.10(b) or which are not, in their opinion, sufficiently automated in these areas shall provide justification. Any such justification shall include a cost-effectiveness analysis.

(3) *Transfers*. (i) State agencies planning additional automation shall consult with other State agencies and with the appropriate Regional Office to determine whether a transfer or modification of an existing system from another jurisdiction would be more efficient and cost effective than the development of a new system. In assessing the practicability of a transfer, State agencies should consult with other State agencies that have similar characteristics such as whether they are urban or rural, whether they are county or State administered, the geographic size of the States and the size of the caseload.

(ii) State agencies that plan to automate operations using any method other than transfers will need to be able to justify why they are not using transfers. The justification will need to include the results of the consultations with other State agencies, the relative costs of transfer and the system the State agency plans to develop, and the reasons for not using a transfer. Common reasons for not using transfers include: The State agency is required to use a central data processing facility and the (otherwise) transferable system is incompatible with it; the State agency's data base management software is incompatible with the transferable system; the State agency's ADP experts are not familiar with the software/hardware used by the transferable system and acquiring new expertise would be expensive; the transferable system is interactive or uses ''generic'' caseworkers, the receiving State agency does not and it would be expensive to modify the existing system and/or procedures; and transfer would provoke disputes with the State agency's personnel union. State agencies that cite any of these reasons shall not automatically receive approval to develop non-transferred systems. State agencies shall show what efforts were considered to overcome the problems and that those efforts are cost ineffective. This justification will need to be included as part of the Advance Planning Document that the State agency must submit for approval of its proposed system.

(iii) FNS will assist State agencies that request assistance in determining what other States have systems that should be considered as possible transfers.

(b) *Model Plan*. In order to meet the requirements of the Act and ensure the efficient and effective administration of the program, a food stamp system, at a minimum, shall be automated in each of the following program areas in paragraphs (b)(1), Certification, and (b)(2), Issuance Reconciliation and Reporting of this section. The food stamp system must further meet all the requirements in paragraph (b)(3), General, of this section.

(1) *Certification*. (i) Determine eligibility and calculate benefits or validate the eligibility worker's calculations by processing and storing all casefile information necessary for the eligibility determination and benefit computation (including but not limited to all household members' names, addresses, dates of birth, social security numbers, individual household members' earned and unearned income by source, deductions, resources and household size). Redetermine or revalidate eligibility and benefits based on notices of change in households' circumstances;

(ii) Identify other elements that affect the eligibility of household members such as alien status, presence of an elderly person in the household, status of periodic work registration, disqualification actions, categorical eligibility, and employment and training status;

(iii) Provide for an automatic cutoff of participation for households which have not been recertified at the end of their certification period;

(iv) Notify the certification unit (or generate notices to households) of cases requiring Notices of:

(A) Case Disposition,

(B) Adverse Action and Mass Change, and

(C) Expiration;

(v) Prior to certification, crosscheck for duplicate cases for all household members by means of a comparison with food stamp records within the relevant jurisdiction;

(vi) Meet the requirements of the IEVS system of § 272.8. Generate information, as appropriate, to other programs.

(vii) Provide the capability to effect mass changes: Those initiated at the State level, as well as those resulting from changes at the Federal level (eligibility standards, allotments, deductions, utility standards, SSI, TANF, SAA benefits);

(viii) Identify cases where action is pending or follow-up must be pursued, for example, households and verification pending or households containing disqualified individuals or a striker;

(ix) Calculate or validate benefits based on restored benefits or claims collection, and maintain a record of the changes made;

(x) Store information concerning characteristics of all household members;

(xi) Provide for appropriate Social Security enumeration for all required household members; and

(xii) Provide for monthly reporting and retrospective budgeting as required.

(2) *Issuance, reconciliation and reporting.* (i) Generate authorizations for benefits in issuance systems employing ATP's, direct mail, or online issuance and store all Household Issuance Record (HIR) information including: name and address of household, household size, period of certification, amount of allotment, case type (PA or NA), name and address of authorized representative, and racial/ethnic data;

(ii) Prevent a duplicate HIR from being established for presently participating or disqualified households;

(iii) Allow for authorized under- or over-issuance due to claims collection or restored benefits;

(iv) Provide for reconciliation of all transacted authorization documents to the HIR masterfile. This process must incorporate any manually-issued authorization documents, account for any replacement or supplemental authorization documents issued to a household, and identify cases of unauthorized and duplicate participation;

(v) Provide a mechanism allowing for a household's redemption of more than one valid authorization document in a given month;

(vi) Generate data necessary to meet Federal issuance and reconciliation reporting requirements, and provide for the eventual capability of directly transmitting data to FNS including:

(A) Issuance:

(*1*) FNS–259—Summary of mail issuance and replacement;

(*2*) FNS–250—Reconciliation of redeemed ATPs with reported authorized coupon issuance.

(B) Reconciliation: FNS–46—ATP Reconciliation Report.

(vii) Generate data necessary to meet other reporting requirements and provide for the eventual capability of directly transmitting data to FNS, including:

(A) FNS–101—Program participation by race;

(B) FNS–209—Status of claims against households; and

(C) FNS–388—Coupon issuance and participation estimates.

(viii) Allow for sample selection for quality control reviews of casefiles, and for management evaluation reviews;

(ix) Provide for program-wide reduction or suspension of benefits and restoration of benefits if funds later become available and store information concerning the benefit amounts actually issued;

(x) Provide for expedited issuance of benefits within prescribed timeframes;

(xi) Produce and store a participation history covering three (3) year(s) for each household receiving benefits.

(xii) Provide for cutoff of benefits for households which have not been recertified timely; and

(xiii) Provide for the tracking, aging, and collection of recipient claims and preparation of the FNS–209, Status of Claims Against Households report.

(3) *General.* The following functions shall be part of an overall State agency system but need not necessarily be automated:

(i) All activities necessary to meet the various timeliness and data quality requirements established by FNS;

(ii) All activities necessary to coordinate with other appropriate Federal and State programs, such as TANF or SSI;

(iii) All activities necessary to maintain the appropriate level of confidentiality of information obtained from applicant and recipient households;

(iv) All activities necessary to maintain the security of automated systems to operate the Food Stamp Program;

(v) Implement regulatory and other changes including a testing phase to meet implementation deadlines, generally within 90 days;

(vi) Generate whatever data is necessary to provide management information for the State agency's own use, such as caseload, participation and actions data;

(vii) Provide support as necessary for the State agency's management of Federal funds relative to Food Stamp Program administration, generate information necessary to meet Federal financial reporting requirements;

(viii) Routine purging of case files and file maintenance, and

(ix) Provide for the eventual direct transmission of data necessary to meet Federal financial reporting requirements.

[Amdt. 284, 52 FR 35226, Sept. 18, 1987, as amended by Amdt. 356, 59 FR 29713, June 9, 1994]

§ 272.11 Systematic Alien Verification for Entitlements (SAVE) Program.

(a) *General.* A State agency may participate in the SAVE Program established by the Immigration and Naturalization Service (INS), in order to verify the validity of documents provided by aliens applying for food stamp benefits with the central data files maintained by INS.

(b) *Agreements.* (1) Prior to implementing the SAVE Program, the State agency shall execute an agreement with INS. The agreement shall specify the information to be exchanged and the procedures which will be used in the exchange of information.

(2) The agreement shall cover at least the following areas:

(i) Identification of positions of all agency officials with authority to request immigration status information;

(ii) Identification and location of all SAVE access points covered by the agreement;

(iii) For automated SAVE verification through access to the Alien Status Verification Index (ASVI), a description of the access method and procedures;

(iv) For secondary verification as described in paragraph (d) of this section, the locations of INS District Offices to which verification requests will be directed;

(v) The safeguards limiting release or redisclosure as required by State or Federal law or regulation as discussed in § 272.1(c) and as may be required by other guidelines published by the Secretary; and

(vi) Reimbursement or billing agreements for ongoing SAVE operational costs, as well as any developmental costs associated with establishing access to the ASVI database.

(c) *Use of data.* The State agency shall use information obtained through the SAVE Program only for the purposes of:

(1) Verifying the validity of documentation of alien status presented by an applicant;

(2) Verifying an individual's eligibility for benefits;

(3) Investigating whether participating households received benefits to which they were not entitled, if an individual was previously certified to receive benefits on the basis of eligible alien status; and

(4) Assisting in or conducting administrative disqualification hearings, or

criminal or civil prosecutions based on receipt of food stamp benefits to which participating households were not entitled.

(d) *Method of verification.* The State agency may verify the documentation presented by an alien applicant by completing INS Form G–845 and submitting photocopies of such documentation to the INS for verification as described in § 273.2(f)(10) of this chapter. In States that participate in SAVE, the State agency must use this secondary verification procedure whenever the applicant-individual's documented alien status has not been verified through automated access to the ASVI or significant discrepancies exist between the data on the ASVI and the information provided by the alien applicant.

(e) *Plan of operation.* The requirements for participation in the SAVE Program shall be included in an attachment to the State agency's Plan of Operation as required in § 272.2(d). This document shall include a description of procedures used, method of access and the agreement specified in paragraph (b) of this section, including steps taken to meet requirements of limiting disclosure and safeguarding of information obtained from food stamp households as specified in § 272.1.

[53 FR 39440, Oct. 7, 1988, as amended at 65 FR 33439, May 24, 2000; Amdt. 388, 65 FR 70193, Nov. 21, 2000]

PART 273—CERTIFICATION OF ELIGIBLE HOUSEHOLDS

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AUTHORITY: 7 U.S.C. 2011–2036.

EDITORIAL NOTE: OMB control numbers relating to this part 273 are contained in § 271.8.

§ 273.1 Household concept.

(a) *General household definition.* A household is composed of one of the following individuals or groups of individuals, unless otherwise specified in paragraph (b) of this section:

(1) An individual living alone;

(2) An individual living with others, but customarily purchasing food and preparing meals for home consumption separate and apart from others; or

(3) A group of individuals who live together and customarily purchase food and prepare meals together for home consumption.

(b) *Special household requirements.*—(1) *Required household combinations.* The following individuals who live with others must be considered as customarily purchasing food and preparing meals with the others, even if they do not do so, and thus must be included in the same household, unless otherwise specified.

(i) Spouses;

(ii) A person under 22 years of age who is living with his or her natural or adoptive parent(s) or step-parent(s); and

(iii) A child (other than a foster child) under 18 years of age who lives with and is under the parental control of a household member other than his or her parent. A child must be considered to be under parental control for purposes of this provision if he or she is financially or otherwise dependent on a member of the household, unless State law defines such a person as an adult.

(2) *Elderly and disabled persons.* Notwithstanding the provisions of paragraph (a) of this section, an otherwise eligible member of a household who is

60 years of age or older and is unable to purchase and prepare meals because he or she suffers from a disability considered permanent under the Social Security Act or a non disease-related, severe, permanent disability may be considered, together with his or her spouse (if living there), a separate household from the others with whom the individual lives. Separate household status under this provision must not be granted when the income of the others with whom the elderly disabled individual resides (excluding the income of the elderly and disabled individual and his or her spouse) exceeds 165 percent of the poverty line.

(3) *Boarders.* (i) Residents of a commercial boarding house, regardless of the number of residents, are not eligible to participate in the Program. A commercial boarding house is an establishment licensed to offer meals and lodging for compensation. It does not include any of the entities listed in paragraph (b)(7)(vii) of this section. In project areas without licensing requirements, a commercial boarding house is a commercial establishment that offers meals and lodging for compensation with the intent of making a profit.

(ii) All other individuals or groups of individuals paying a reasonable amount for meals or meals and lodging must be considered boarders and are not eligible to participate in the Program independently of the household providing the board. Such individuals or groups of individuals may participate, along with a spouse or children living with them, as members of the household providing the boarder services, only at the request of the household providing the boarder services. An individual paying less than a reasonable amount for board must not be considered a boarder but must be considered, along with a spouse or children living with him or her, as a member of the household providing the board.

(A) For individuals whose board arrangement is for more than two meals per day, ''reasonable compensation'' must be an amount that equals or exceeds the maximum food stamp allotment for the appropriate size of the boarder household.

(B) For individuals whose board arrangement is for two meals or less per day, ''reasonable compensation'' must be an amount that equals or exceeds two-thirds of the maximum food stamp allotment for the appropriate size of the boarder household.

(iii) Boarders must not be considered to be residents of an institution as outlined in paragraph (b)(7)(vii) of this section.

(4) *Foster care individuals.* Individuals placed in the home of relatives or other individuals or families by a Federal, State, or local governmental foster care program must be considered to be boarders. They cannot participate in the Program independently of the household providing the foster care services. Such foster care individuals may participate, along with a spouse or children living with them, as members of the household providing the foster care services, only at the request of the household providing the foster care.

(5) *Roomers.* Individuals to whom a household furnishes lodging for compensation, but not meals, may participate as separate households. Persons described in paragraph (b)(1) of this section must not be considered roomers.

(6) *Live-in attendants.* A live-in attendant may participate as a separate household. Persons described in paragraph (b)(1) of this section must not be considered live-in attendants.

(7) Ineligible household members. The following persons are not eligible to participate as separate households or as a member of any household:

(i) Ineligible aliens and students as specified in §273.4 and §273.5, respectively;

(ii) SSI recipients in ''cash-out'' States as specified in §273.20;

(iii) Individuals disqualified for noncompliance with the work requirements of §273.7;

(iv) Individuals against whom a sanction was imposed for failure to comply with a workfare requirement as specified in §273.22;

(v) Individuals disqualified for failure to provide an SSN as specified in §273.6;

(vi) Individuals disqualified for an intentional Program violation as specified in §273.16; and

(vii) Residents of an institution, with some exceptions. Individuals must be considered residents of an institution

when the institution provides them with the majority of their meals (over 50 percent of three meals daily) as part of the institution's normal services. Exceptions to this requirement include only the individuals listed in paragraphs (b)(7)(vii)(A) through (b)(7)(vii)(E) of this section. The individuals listed in paragraphs (b)(7)(vii)(A) through (b)(7)(vii)(E) can participate in the Program and must be treated as separate households from the others with whom they reside, subject to the mandatory household combination requirements of paragraph (b)(1) of this section, unless otherwise stated:

(A) Individuals who are residents of federally subsidized housing for the elderly;

(B) Individuals who are narcotic addicts or alcoholics and reside at a facility or treatment center for the purpose of regular participation in a drug or alcohol treatment and rehabilitation program. This includes the children but not the spouses of such persons who live with them at the treatment center or facility;

(C) Individuals who are disabled or blind and are residents of group living arrangements;

(D) Individual women or women with their children who are temporarily residing in a shelter for battered women and children; and

(E) Individuals who are residents of public or private nonprofit shelters for homeless persons.

(viii) Individuals who are ineligible under § 273.11(m) because of a drug-related felony conviction.

(ix) At State agency option, individuals who are disqualified in another assistance program in accordance with § 273.11(k).

(x) Individuals who are fleeing to avoid prosecution or custody for a crime, or an attempt to commit a crime, or who are violating a condition of probation or parole who are ineligible under § 273.11(n).

(xi) Individuals disqualified for failure to cooperate with child support enforcement agencies in accordance with § 273.11(o) or (p), or for being delinquent in any court-ordered child support obligation in accordance with § 273.11(q).

(xii) Persons ineligible under § 273.24, the time limit for able-bodied adults.

(c) *Unregulated situations.* For situations that are not clearly addressed by the provisions of paragraphs (a) and (b) of this section, the State agency may apply its own policy for determining when an individual is a separate household or a member of another household if the policy is applied fairly, equitably and consistently throughout the State.

(d) *Head of household.* (1) A State agency shall not use the head of household designation to impose special requirements on the household, such as requiring that the head of household, rather than another responsible member of the household, appear at the certification office to make application for benefits. When designating the head of household, the State agency shall allow the household to select an adult parent of children (of any age) living in the household, or an adult who has parental control over children (under 18 years of age) living in the household, as the head of household provided that all adult household members agree to the selection. The State agency shall permit such households to select their head at each certification action or whenever there is a change in household composition. The State agency shall provide written notice to all households at the time of application and as otherwise appropriate that specifies the household's right to select its head of household in accordance with this paragraph. The written notice shall identify which households have the option to select their head of household, the circumstances under which a household may change its designation of head of household, and how such changes must be reported to the State agency. If all adult household members do not agree to the selection or decline to select an adult parent as the head of household, the State agency may designate the head of household or permit the household to make another selection. In no event shall the household's failure to select an adult parent of children or an adult who has parental control over children as the head of household delay the certification or result in the denial of benefits of an otherwise eligible household. For households that do not consist of

adult parents and children or adults who have parental control of children living in the household, the State agency shall designate the head of household or permit the household to do so.

(2) For purposes of failure to comply with § 273.7 and § 273.22 (to the extent that workfare programs operated under this paragraph are included as components of State agency E&T programs), the head of household shall be the principal wage earner unless the household has selected an adult parent of children as specified in § 273.1(d)(1). The principal wage earner shall be the household member (including excluded members) who is the greatest source of earned income in the two months prior to the month of the violation. This provision applies only if the employment involves 20 hours or more per week or provides weekly earnings at least equivalent to the Federal minimum wage multiplied by 20 hours. No person of any age living with a parent or person fulfilling the role of a parent who is registered for work or exempt from work registration requirements because such parent or person fulfilling the role of a parent is subject to and participating in any work requirement under title IV of the Social Security Act, or in receipt of unemployment compensation (or has registered for work as part of the application for or receipt of unemployment compensation), or is employed or self-employed and working a minimum of 30 hours weekly or receiving weekly earnings equal to the Federal minimum wage multiplied by 30 hours shall be considered the head of household unless the person is an adult parent of children as specified in § 273.1(d)(1) and the household elects to designate the adult parent as its head of household. If there is no principal source of earned income in the household, the household member, documented in the casefile as the head of the household at the time of the violation, shall be considered the head of household. The designation of head of household through the circumstances of this paragraph shall take precedence over a previous designation of head of household at least until the period of ineligibility is ended.

(e) *Strikers.* Households with a striking member are not eligible to participate in the Program, unless the household was eligible for benefits the day before the strike and is otherwise eligible at the time of application. A striker must be anyone involved in a strike or concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees. Any employee affected by a lockout, however, must not be deemed to be a striker. Further, an individual who goes on strike but is exempt from work registration under § 273.7(b) the day before the strike, other than those exempt solely on the grounds that they are employed, must not be deemed to be a striker. Also, persons such as truck drivers who cannot do their jobs because the strike has left them with nothing to deliver, and employees who are not part of the bargaining unit and do not want to cross the picket line for fear of personal injury or death, must not be deemed to be strikers.

(1) Pre-strike eligibility must be determined by considering the day prior to the strike as the day of application and assuming the strike did not occur.

(2) Eligibility at the time of application must be determined by comparing the striking member's income before the strike to the striker's current income and adding the higher of the two to the current income of non-striking members during the month of application. If the household is eligible, the higher income figure must also be used in determining the household's benefits.

[Amdt. 132, 43 FR 47889, Oct. 17, 1978]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 273.1, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 273.2 Office operations and application processing.

(a) *Operation of food stamp offices and processing of applications*—(1) *Office operations.* State agencies must establish procedures governing the operation of food stamp offices that the State agency determines best serve households in the State, including households with special needs, such as, but not limited

to, households with elderly or disabled members, households in rural areas with low-income members, homeless individuals, households residing on reservations, households with adult members who are not proficient in English, and households with earned income (working households). The State agency must provide timely, accurate, and fair service to applicants for, and participants in, the Food Stamp Program. The State agency cannot, as a condition of eligibility, impose additional application or application processing requirements. The State agency must have a procedure for informing persons who wish to apply for food stamps about the application process and their rights and responsibilities. The State agency must base food stamp eligibility solely on the criteria contained in the Act and this part.

(2) *Application processing*. The application process includes filing and completing an application form, being interviewed, and having certain information verified. The State agency must act promptly on all applications and provide food stamp benefits retroactive to the month of application to those households that have completed the application process and have been determined eligible. The State agency must make expedited service available to households in immediate need. Specific responsibilities of households and State agencies in the application process are detailed below.

(b) *Food Stamp application form*.—(1) *Content*. Each application form shall contain:

(i) In prominent and boldface lettering and understandable terms a statement that the information provided by the applicant in connection with the application for food stamp benefits will be subject to verification by Federal, State and local officials to determine if such information is factual; that if any information is incorrect, food stamps may be denied to the applicant; and that the applicant may be subject to criminal prosecution for knowingly providing incorrect information;

(ii) In prominent and boldface lettering and understandable terms a description of the civil and criminal provisions and penalties for violations of the Food Stamp Act;

(iii) A statement to be signed by one adult household member which certifies, under penalty of perjury, the truth of the information contained in the application, including the information concerning citizenship and alien status of the members applying for benefits;

(iv) A place on the front page of the application where the applicant can write his/her name, address, and signature.

(v) In plain and prominent language on or near the front page of the application, notification of the household's right to immediately file the application as long as it contains the applicant's name and address and the signature of a responsible household member or the household's authorized representative. Regardless of the type of system the State agency uses (paper or electronic), it must provide a means for households to immediately begin the application process with name, address and signature;

(vi) In plain and prominent language on or near the front page of the application, a description of the expedited service provisions described in paragraph (i) of this section;

(vii) In plain and prominent language on or near the front page of the application, notification that benefits are provided from the date of application; and

(viii) The following nondiscrimination statement on the application itself even if the State agency uses a joint application form:

"In accordance with Federal law and U.S. Department of Agriculture policy, this institution is prohibited from discriminating on the basis of race, color, national origin, sex, age, religion, political beliefs, or disability.

"To file a complaint of discrimination, write USDA, Director, Office of Civil Rights, Room 326-W, Whitten Building, 1400 Independence Avenue, S.W., Washington, D.C. 20250–9410 or call (202) 720–5964 (voice and TDD). USDA is an equal opportunity provider and employer."; and

(ix) For multi-program applications, contain language which clearly affords applicants the option of answering only those questions relevant to the program or programs for which they are applying.

(2) *Income and eligibility verification system (IEVS).* If the State agency chooses to use IEVS in accordance with paragraph (f)(9) of this section, it must notify all applicants for food stamp benefits at the time of application and at each recertification through a written statement on or provided with the application form that information available through IEVS will be requested, used and may be verified through collateral contact when discrepancies are found by the State agency, and that such information may affect the household's eligibility and level of benefits. The regulations at § 273.2(f)(4)(ii) govern the use of collateral contacts. The State agency must also notify all applicants on the application form that the alien status of applicant household members may be subject to verification by INS through the submission of information from the application to INS, and that the submitted information received from INS may affect the household's eligibility and level of benefits.

(3) *Jointly processed cases.* If a State agency has a procedure that allows applicants to apply for the food stamp program and another program at the same time, the State agency shall notify applicants that they may file a joint application for more than one program or they may file a separate application for food stamps independent of their application for benefits from any other program. All food stamp applications, regardless of whether they are joint applications or separate applications, must be processed for food stamp purposes in accordance with food stamp procedural, timeliness, notice, and fair hearing requirements. No household shall have its food stamp benefits denied solely on the basis that its application to participate in another program has been denied or its benefits under another program have been terminated without a separate determination by the State agency that the household failed to satisfy a food stamp eligibility requirement. Households that file a joint application for food stamps and another program and are denied benefits for the other program shall not be required to resubmit the joint application or to file another application for food stamps but shall have its food stamp eligibility determined based on the joint application in accordance with the food stamp processing time frames from the date the joint application was initially accepted by the State agency.

(4) *Privacy Act statement.* As a State agency, you must notify all households applying and being recertified for food stamp benefits of the following:

(i) The collection of this information, including the social security number (SSN) of each household member, is authorized under the Food Stamp Act of 1977, as amended, 7 U.S.C. 2011–2036. The information will be used to determine whether your household is eligible or continues to be eligible to participate in the Food Stamp Program. We will verify this information through computer matching programs. This information will also be used to monitor compliance with program regulations and for program management.

(ii) This information may be disclosed to other Federal and State agencies for official examination, and to law enforcement officials for the purpose of apprehending persons fleeing to avoid the law.

(iii) If a food stamp claim arises against your household, the information on this application, including all SSNs, may be referred to Federal and State agencies, as well as private claims collection agencies, for claims collection action.

(iv) Providing the requested information, including the SSN of each household member, is voluntary. However, failure to provide an SSN will result in the denial of food stamp benefits to each individual failing to provide an SSN. Any SSNs provided will be used and disclosed in the same manner as SSNs of eligible household members.

(c) *Filing an application*—(1) *Household's right to file.* Households must file food stamp applications by submitting the forms to the food stamp office either in person, through an authorized representative, by fax or other electronic transmission, by mail, or by completing an on-line electronic application. The State agency must provide households that complete an on-line electronic application in person at the food stamp office the opportunity to review the information that has been

recorded electronically and must provide them with a copy of that information for their records. Applications signed through the use of electronic signature techniques or applications containing a handwritten signature and then transmitted by fax or other electronic transmission are acceptable. State agencies must document the date the application was filed by recording the date of receipt at the food stamp office. When a resident of an institution is jointly applying for SSI and food stamps prior to leaving the institution, the filing date of the application that the State agency must record is the date of release of the applicant from the institution. The length of time a State agency has to deliver benefits is calculated from the date the application is filed in the food stamp office designated by the State agency to accept the household's application, except when a resident of a public institution is jointly applying for SSI and food stamps prior to his/her release from an institution in accordance with § 273.1(e)(2). Residents of public institutions who apply for foods stamps prior to their release from the institution shall be certified in accordance with § 273.2(g)(1) or § 273.2(i)(3)(i), as appropriate. Each household has the right to file an application form on the same day it contacts the food stamp office during office hours. The household shall be advised that it does not have to be interviewed before filing the application and may file an incomplete application form as long as the form contains the applicant's name and address, and is signed by a responsible member of the household or the household's authorized representative. State agencies shall document the date the application was filed by recording on the application the date it was received by the food stamp office. When a resident of an institution is jointly applying for SSI and food stamps prior to leaving the institution, the filing date of the application to be recorded by the State agency on the food stamp application is the date of release of the applicant from the institution.

(2) *Contacting the food stamp office.* (i) State agencies shall encourage households to file an application form the same day the household or its representative contacts the food stamp office in person or by telephone and expresses interest in obtaining food stamp assistance or expresses concerns which indicate food insecurity. If the State agency attempts to discourage households from applying for cash assistance, it shall make clear that the disadvantages and requirements of applying for cash assistance do not apply to food stamps. In addition, it shall encourage applicants to continue with their application for food stamps. The State agency shall inform households that receiving food stamps will have no bearing on any other program's time limits that may apply to the household. If a household contacting the food stamp office by telephone does not wish to come to the appropriate office to file the application that same day and instead prefers receiving an application through the mail, the State agency shall mail an application form to the household on the same day the telephone request is received. An application shall also be mailed on the same day a written request for food assistance is received.

(ii) Where a project area has designated certification offices to serve specific geographic areas, households may contact an office other than the one designated to service the area in which they reside. When a household contacts the wrong certification office within a project area in person or by telephone, the certification office shall, in addition to meeting other requirements in paragraph (c)(2)(i) of this section, give the household the address and telephone number of the appropriate office. The certification office shall also offer to forward the household's application to the appropriate office that same day if the household has completed enough information on the application to file or forward it the next day by any means that ensures the application arrives at the application office the day it is forwarded. The household shall be informed that its application will not be considered filed and the processing standards shall not begin until the application is received by the appropriate office. If the household has mailed its application to the wrong office within a project area, the

certification office shall mail the application to the appropriate office on the same day, or forward it the next day by any means that ensures the application arrives at the application office the day it is forwarded.

(iii) In State agencies that elect to have Statewide residency, as provided in § 273.3, the application processing timeframes begin when the application is filed in any food stamp office in the State.

(3) *Availability of the application form.* The State agency shall make application forms readily accessible to potentially eligible households. The State agency shall also provide an application form to anyone who requests the form. Regardless of the type of system the State agency uses (paper or electronic), the State agency must provide a means for applicants to immediately begin the application process with name, address and signature.

(4) *Notice of right to file.* The State agency shall post signs in the certification office which explain the application processing standards and the right to file an application on the day of initial contact. The State agency shall include similar information about same day filing on the application form.

(5) *Notice of Required Verification.* The State agency shall provide each household at the time of application for certification and recertification with a notice that informs the household of the verification requirements the household must meet as part of the application process. The notice shall also inform the household of the State agency's responsibility to assist the household in obtaining required verification provided the household is cooperating with the State agency as specified in (d)(1) of this section. The notice shall be written in clear and simple language and shall meet the bilingual requirements designated in § 272.4(b) of this chapter. At a minimum, the notice shall contain examples of the types of documents the household should provide and explain the period of time the documents should cover.

(6) *Withdrawing application.* The household may voluntarily withdraw its application at any time prior to the determination of eligibility. The State agency shall document in the case file the reason for withdrawal, if any was stated by the household, and that contact was made with the household to confirm the withdrawal. The household shall be advised of its right to reapply at any time subsequent to a withdrawal.

(d) *Household cooperation.* (1) To determine eligibility, the application form must be completed and signed, the household or its authorized representative must be interviewed, and certain information on the application must be verified. If the household refuses to cooperate with the State agency in completing this process, the application shall be denied at the time of refusal. For a determination of refusal to be made, the household must be able to cooperate, but clearly demonstrate that it will not take actions that it can take and that are required to complete the application process. For example, to be denied for refusal to cooperate, a household must refuse to be interviewed not merely failing to appear for the interview. If there is any question as to whether the household has merely failed to cooperate, as opposed to refused to cooperate, the household shall not be denied, and the agency shall provide assistance required by paragraph (c)(5) of this section. The household shall also be determined ineligible if it refuses to cooperate in any subsequent review of its eligibility, including reviews generated by reported changes and applications for recertification. Once denied or terminated for refusal to cooperate, the household may reapply but shall not be determined eligible until it cooperates with the State agency. The State agency shall not determine the household to be ineligible when a person outside of the household fails to cooperate with a request for verification. The State agency shall not consider individuals identified as nonhousehold members under § 273.1(b)(2) as individuals outside the household.

(2) *Cooperation with QC Reviewer.* In addition, the household shall be determined ineligible if it refuses to cooperate in any subsequent review of its eligibility as a part of a quality control review. If a household is terminated for

refusal to cooperate with a quality control reviewer, in accordance with § 275.3(c)(5) or § 275.12(g)(1)(ii), the household may reapply, but shall not be determined eligible until it cooperates with the quality control reviewer. If a household terminated for refusal to cooperate with a State quality control reviewer reapplies after 95 days from the end of the annual review period, the household shall not be determined ineligible for its refusal to cooperate with a State quality control reviewer during the completed review period, but must provide verification in accordance with § 273.2(f)(1)(ix). If a household terminated for refusal to cooperate with a Federal quality control reviewer reapplies after seven months from the end of the annual review period, the household shall not be determined ineligible for its refusal to cooperate with a Federal quality control reviewer during the completed review period, but must provide verification in accordance with § 273.2(f)(1)(ix).

(e) *Interviews*. (1) Except for households certified for longer than 12 months, and except as provided in paragraph (e)(2) of this section, households must have a face-to-face interview with an eligibility worker at initial certification and at least once every 12 months thereafter. State agencies may not require households to report for an in-office interview during their certification period, though they may request households to do so. For example, State agencies may not require households to report en masse for an in-office interview during their certification periods simply to review their case files, or for any other reason. Interviews may be conducted at the food stamp office or other mutually acceptable location, including a household's residence. If the interview will be conducted at the household's residence, it must be scheduled in advance with the household. If a household in which all adult members are elderly or disabled is certified for 24 months in accordance with § 273.10(f)(1), or a household residing on a reservation is required to submit monthly reports and is certified for 24 months in accordance with § 273.10(f)(2), a face-to-face interview is not required during the certification period. The individual interviewed may be the head of household, spouse, any other responsible member of the household, or an authorized representative. The applicant may bring any person he or she chooses to the interview. The interviewer must not simply review the information that appears on the application, but must explore and resolve with the household unclear and incomplete information. The interviewer must advise households of their rights and responsibilities during the interview, including the appropriate application processing standard and the households' responsibility to report changes. The interviewer must advise households that are also applying for or receiving PA benefits that time limits and other requirements that apply to the receipt of PA benefits do not apply to the receipt of food stamp benefits, and that households which cease receiving PA benefits because they have reached a time limit, have begun working, or for other reasons, may still qualify for food stamp benefits. The interviewer must conduct the interview as an official and confidential discussion of household circumstances. The State agency must protect the applicant's right to privacy during the interview. Facilities must be adequate to preserve the privacy and confidentiality of the interview.

(2) The State agency must notify the applicant that it will waive the face-to-face interview required in paragraph (e)(1) of this section in favor of a telephone interview on a case-by-case basis because of household hardship situations as determined by the State agency. 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 participating in an in-office interview. The State agency must document the case file to show when a waiver was granted because of a hardship. The State agency may opt to waive the face-to-face interview in favor of a telephone interview for all households which have no earned income and all members of the household are elderly or disabled. Regardless of any approved waivers, the State agency must grant a

face-to-face interview to any household which requests one. The State agency has the option of conducting a telephone interview or a home visit that is scheduled in advance with the household if the office interview is waived.

(i) Waiver of the face-to-face interview does not exempt the household from the verification requirements, although special procedures may be used to permit the household to provide verification and thus obtain its benefits in a timely manner, such as substituting a collateral contact in cases where documentary verification would normally be provided.

(ii) Waiver of the face-to-face interview may not affect the length of the household's certification period.

(3) The State agency must schedule an interview for all applicant households who are not interviewed on the day they submit their applications. To the extent practicable, the State agency must schedule the interview to accommodate the needs of groups with special circumstances, including working households. The State agency must schedule all interviews as promptly as possible to insure eligible households receive an opportunity to participate within 30 days after the application is filed. The State agency must notify each household that misses its interview appointment that it missed the scheduled interview and that the household is responsible for rescheduling a missed interview. If the household contacts the State agency within the 30 day application processing period, the State agency must schedule a second interview. The State agency may not deny a household's application prior to the 30th day after application if the household fails to appear for the first scheduled interview. If the household requests a second interview during the 30-day application processing period and is determined eligible, the State agency must issue prorated benefits from the date of application.

(f) *Verification*. Verification is the use of documentation or a contact with a third party to confirm the accuracy of statements or information. The State agency must give households at least 10 days to provide required verification. Paragraph (i)(4) of this section contains verification procedures for expedited service cases.

(1) *Mandatory verification*. State agencies shall verify the following information prior to certification for households initially applying:

(i) *Gross nonexempt income*. Gross nonexempt income shall be verified for all households prior to certification. However, where all attempts to verify the income have been unsuccessful because the person or organization providing the income has failed to cooperate with the household and the State agency, and all other sources of verification are unavailable, the eligibility worker shall determine an amount to be used for certification purposes based on the best available information.

(ii) *Alien eligibility*. (A) The State agency must verify the eligible status of applicant aliens. If an alien does not wish the State agency to contact INS to verify his or her immigration status, the State agency must give the household the option of withdrawing its application or participating without that member. The Department of Justice (DOJ) Interim Guidance On Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Interim Guidance) (62 FR 61344, November 17, 1997) contains information on acceptable documents and INS codes. State agencies should use the Interim Guidance until DOJ publishes a final rule on this issue. Thereafter, State agencies should consult both the Interim Guidance and the DOJ final rule. Where the Interim Guidance and the DOJ final rule conflict, the latter should control the verification of alien eligibility. As provided in § 273.4, the following information may also be relevant to the eligibility of some aliens: date of admission or date status was granted; military connection; battered status; if the alien was lawfully residing in the United States on August 22, 1996; membership in certain Indian tribes; if the person was age 65 or older on August 22, 1996; if a lawful permanent resident can be credited with 40 qualifying quarters of covered work and if any Federal means-tested public benefits were received in any quarter after December

31, 1996; or if the alien was a member of certain Hmong or Highland Laotian tribes during a certain period of time or is the spouse or unmarried dependent of such a person. The State agency must also verify these factors, if applicable to the alien's eligibility. The SSA Quarters of Coverage History System (QCHS) is available for purposes of verifying whether a lawful permanent resident has earned or can receive credit for a total of 40 qualifying quarters. However, the QCHS may not show all qualifying quarters. For instance, SSA records do not show current year earnings and in some cases the last year's earnings, depending on the time of request. Also, in some cases, an applicant may have work from uncovered employment that is not documented by SSA, but is countable toward the 40 quarters test. In both these cases, the individual, rather than SSA, would need to provide the evidence needed to verify the quarters.

(B) An alien is ineligible until acceptable documentation is provided unless:

(*1*) The State agency has submitted a copy of a document provided by the household to INS for verification. Pending such verification, the State agency cannot delay, deny, reduce or terminate the individual's eligibility for benefits on the basis of the individual's immigration status; or

(*2*) The applicant or the State agency has submitted a request to SSA for information regarding the number of quarters of work that can be credited to the individual, SSA has responded that the individual has fewer than 40 quarters, and the individual provides documentation from SSA that SSA is conducting an investigation to determine if more quarters can be credited. If SSA indicates that the number of qualifying quarters that can be credited is under investigation, the State agency must certify the individual pending the results of the investigation for up to 6 months from the date of the original determination of insufficient quarters; or

(*3*) The applicant or the State agency has submitted a request to a Federal agency for verification of information which bears on the individual's eligible alien status. The State agency must certify the individual pending the results of the investigation for up to 6 months from the date of the original request for verification.

(C) The State agency must provide alien applicants with a reasonable opportunity to submit acceptable documentation of their eligible alien status as of the 30th day following the date of application. A reasonable opportunity must be at least 10 days from the date of the State agency's request for an acceptable document. When the State agency fails to provide an alien applicant with a reasonable opportunity as of the 30th day following the date of application, the State agency must provide the household with benefits no later than 30 days following the date of application, provided the household is otherwise eligible.

(iii) *Utility expenses.* The State agency shall verify a household's utility expenses if the household wishes to claim expenses in excess of the State agency's utility standard and the expense would actually result in a deduction. If the household's actual utility expenses cannot be verified before the 30 days allowed to process the application expire, the State agency shall use the standard utility allowance, provided the household is entitled to use the standard as specified in § 273.9(d). If the household wishes to claim expenses for an unoccupied home, the State agency shall verify the household's actual utility expenses for the unoccupied home in every case and shall not use the standard utility allowance.

(iv) *Medical expenses.* The amount of any medical expenses (including the amount of reimbursements) deductible under § 273.9(d)(3) shall be verified prior to initial certification. Verification of other factors, such as the allowability of services provided or the eligibility of the person incurring the cost, shall be required if questionable.

(v) *Social security numbers.* The State agency shall verify the social security number(s) (SSN) reported by the household by submitting them to the Social Security Administration (SSA) for verification according to procedures established by SSA. The State agency shall not delay the certification for or issuance of benefits to an otherwise eligible household solely to verify the

SSN of a household member. Once an SSN has been verified, the State agency shall make a permanent annotation to its file to prevent the unnecessary reverification of the SSN in the future. The State agency shall accept as verified an SSN which has been verified by another program participating in the IEVS described in §272.8. If an individual is unable to provide an SSN or does not have an SSN, the State agency shall require the individual to submit Form SS–5, Application for a Social Security Number, to the SSA in accordance with procedures in §273.6. A completed SSA Form 2853 shall be considered proof of application for an SSN for a newborn infant.

(vi) *Residency*. The residency requirements of §273.3 shall be verified except in unusual cases (such as homeless households, some migrant farmworker households, or households newly arrived in a project area) where verification of residency cannot reasonably be accomplished. Verification of residency should be accomplished to the extent possible in conjunction with the verification of other information such as, but not limited to, rent and mortgage payments, utility expenses, and identity. If verification cannot be accomplished in conjunction with the verification of other information, then the State agency shall use a collateral contact or other readily available documentary evidence. Documents used to verify other factors of eligibility should normally suffice to verify residency as well. Any documents or collateral contact which reasonably establish the applicant's residency must be accepted and no requirement for a specific type of verification may be imposed. No durational residency requirement shall be established.

(vii) *Identity*. The identity of the person making application shall be verified. Where an authorized representative applies on behalf of a household, the identity of both the authorized representative and the head of household shall be verified. Identity may be verified through readily available documentary evidence, or if this is unavailable, through a collateral contact. Examples of acceptable documentary evidence which the applicant may provide include, but are not limited to, a driver's license, a work or school ID, an ID for health benefits or for another assistance or social services program, a voter registration card, wage stubs, or a birth certificate. Any documents which reasonably establish the applicant's identity must be accepted, and no requirement for a specific type of document, such as a birth certificate, may be imposed.

(viii) *Disability*. (A) The State agency shall verify disability as defined in §271.2 as follows:

(*1*) For individuals to be considered disabled under paragraphs (2), (3) and (4) of the definition, the household shall provide proof that the disabled individual is receiving benefits under titles I, II, X, XIV or XVI of the Social Security Act.

(*2*) For individuals to be considered disabled under paragraph (6) of the definition, the household must present a statement from the Veterans Administration (VA) which clearly indicates that the disabled individual is receiving VA disability benefits for a service-connected or non-service-connected disability and that the disability is rated as total or paid at the total rate by VA.

(*3*) For individuals to be considered disabled under paragraphs (7) and (8) of the definition, proof by the household that the disabled individual is receiving VA disability benefits is sufficient verification of disability.

(*4*) For individuals to be considered disabled under paragraphs (5) and (9) of the definition, the State agency shall use the Social Security Administration's (SSA) most current list of disabilities considered permanent under the Social Security Act for verifying disability. If it is obvious to the caseworker that the individual has one of the listed disabilities, the household shall be considered to have verified disability. If disability is not obvious to the caseworker, the household shall provide a statement from a physician or licensed or certified psychologist certifying that the individual has one of the nonobvious disabilities listed as the means for verifying disability under paragraphs (5) and (9) of the definition.

(*5*) For individuals to be considered disabled under paragraph (10) of the

definition, the household shall provide proof that the individual receives a Railroad Retirement disability annuity from the Railroad Retirement Board *and* has been determined to qualify for Medicare.

(*6*) For individuals to be considered disabled under paragraph (11) of the definition, the household shall provide proof that the individual receives interim assistance benefits pending the receipt of Supplemental Security Income; or disability-related medical assistance under title XIX of the SSA; or disability-based State general assistance benefits. The State agency shall verify that the eligibility to receive these benefits is based upon disability or blindness criteria which are at least as stringent as those used under title XVI of the Social Security Act.

(B) For disability determinations which must be made relevant to the provisions of § 273.1(a)(2)(ii), the State agency shall use the SSA's most current list of disabilities as the initial step for verifying if an individual has a disability considered permanent under the Social Security Act. However, only those individuals who suffer from one of the disabilities mentioned in the SSA list who are unable to purchase and prepare meals because of such disability shall be considered disabled for the purpose of this provision. If it is obvious to the caseworker that the individual is unable to purchase and prepare meals because he/she suffers from a severe physical or mental disability, the individual shall be considered disabled for the purpose of the provision even if the disability is not specifically mentioned on the SSA list. If the disability is not obvious to the caseworker, he/she shall verify the disability by requiring a statement from a physician or licensed or certified psychologist certifying that the individual (in the physician's/psychologist's opinion) is unable to purchase and prepare meals because he/she suffers from one of the nonobvious disabilities mentioned in the SSA list or is unable to purchase meals because he/she suffers from some other severe, permanent physical or mental disease or nondisease-related disability. The elderly and disabled individual (or his/her authorized representative) shall be responsible for obtaining the cooperation of the individuals with whom he/she resides in providing the necessary income information about the others to the State agency for purposes of this provision.

(ix) State agencies shall verify all factors of eligibility for households who have been terminated for refusal to cooperate with a State quality control reviewer, and reapply after 95 days from the end of the annual review period. State agencies shall verify all factors of eligibility for households who have been terminated for refusal to cooperate with a Federal quality control reviewer and reapply after seven months from the end of the annual review period.

(x) *Household composition*. State agencies shall verify factors affecting the composition of a household, if questionable. Individuals who claim to be a separate household from those with whom they reside shall be responsible for proving that they are a separate household to the satisfaction of the State agency. Individuals who claim to be a separate household from those with whom they reside based on the various age and disability factors for determining separateness shall be responsible for proving a claim of separateness (at the State agency's request) in accordance with the provisions of § 273.2(f)(1)(viii).

(xi) *Students*. If a person claims to be physically or mentally unfit for purposes of the student exemption contained in § 273.5(b)(2) and the unfitness is not evident to the State agency, verification may be required. Appropriate verification may consist of receipt of temporary or permanent disability benefits issued by governmental or private sources, or of a statement from a physician or licensed or certified psychologist.

(xii) *Legal obligation and actual child support payments*. The State agency shall obtain verification of the household's legal obligation to pay child support, the amount of the obligation, and the monthly amount of child support the household actually pays. Documents that are accepted as verification of the household's legal obligation to pay child support shall not be accepted

as verification of the household's actual monthly child support payments. State agencies may and are strongly encouraged to obtain information regarding a household member's child support obligation and payments from Child Support Enforcement (CSE) automated data files. The State agency shall give the household an opportunity to resolve any discrepancy between household verification and CSE records in accordance with paragraph (f)(9) of this section.

(xiii) [Reserved]

(xiv) *Additional verification for able-bodied adults subject to the time limit.*

(A) *Hours worked.* For individuals subject to the food stamp time limit of § 273.24 who are satisfying the work requirement by working, by combining work and participation in a work program, or by participating in a work or workfare program that is not operated or supervised by the State agency, the individuals' work hours shall be verified.

(B) *Countable months in another state.* For individuals subject to the food stamp time limit of § 273.24, the State agency must verify the number of countable months (as defined in § 273.24(b)(1)) an individual has used in another State if there is an indication that the individual participated in that State. The normal processing standards of 7 CFR 273.2(g) apply. The State agency may accept another State agency's assertion as to the number of countable months an individual has used in another State.

(2) *Verification of questionable information.* (i) The State agency shall verify, prior to certification of the household, all other factors of eligibility which the State agency determines are questionable and affect the household's eligibility and benefit level. The State agency shall establish guidelines to be followed in determining what shall be considered questionable information. These guidelines shall not prescribe verification based on race, religion, ethnic background, or national origin. These guidelines shall not target groups such as migrant farmworkers or American Indians for more intensive verification under this provision.

(ii) If a member's citizenship or status as a non-citizen national is questionable, the State agency must verify the member's citizenship or non-citizen national status in accordance with attachment 4 of the DOJ Interim Guidance. After DOJ issues final rules, State agencies should consult both the Interim Guidance and the final rule. Where the Interim Guidance and the DOJ final rule conflict, the latter should control the eligibility determination. The State agency must accept participation in another program as acceptable verification if verification of citizenship or non-citizen national status was obtained for that program. If the household cannot obtain the forms of verification suggested in attachment 4 of the DOJ Interim Guidance and the household can provide a reasonable explanation as to why verification is not available, the State agency must accept a signed statement, under penalty of perjury, from a third party indicating a reasonable basis for personal knowledge that the member in question is a U.S. citizen or non-citizen national. The signed statement must contain a warning of the penalties for helping someone commit fraud. Absent verification or third party attestation of U.S. citizenship or non-citizen national status, the member whose citizenship or non-citizen national status is in question is ineligible to participate until the issue is resolved. The member whose citizenship or non-citizen national status is in question will have his or her income and resources considered available to any remaining household members as set forth in § 273.11(c).

(iii) Homeless households claiming shelter expenses may provide verification of their shelter expenses to qualify for the homeless shelter deduction if the State agency has such a deduction. If a homeless household has difficulty in obtaining traditional types of verification of shelter costs, the caseworker shall use prudent judgment in determining if the verification obtained is adequate. For example, if a homeless individual claims to have incurred shelter costs for several nights and the costs are comparable to costs typically incurred by homeless people, for shelter, the caseworker may decide to accept this information as adequate

information and not require further verification.

(3) *State agency options.* In addition to the verification required in paragraphs (f)(1) and (f)(2) of this section, the State agency may elect to mandate verification of any other factor which affects household eligibility or allotment level, including household size where not questionable. Such verification may be required Statewide or throughout a project area, but shall not be imposed on a selective, case-by-case basis on particular households.

(i) The State agency may establish its own standards for the use of verification, provided that, at a minimum, all questionable factors are verified in accordance with paragraph (f)(2) of this section and that such standards do not allow for inadvertent discrimination. For example, no standard may be applied which prescribes variances in verification based on race, religion, ethnic background or national origin, nor may a State standard target groups such as migrant farmworkers or American Indians for more intensive verification than other households. The options specified in this paragraph, shall not apply in those offices of the Social Security Administration (SSA) which, in accordance with paragraph (k) of this section, provide for the food stamp certification of households containing recipients of Supplemental Security Income (SSI) and social security benefits. The State agency, however, may negotiate with those SSA offices with regard to mandating verification of these options.

(ii) If a State agency opts to verify a deductible expense and obtaining the verification may delay the household's certification, the State agency shall advise the household that its eligibility and benefit level may be determined without providing a deduction for the claimed but unverified expense. This provision also applies to the allowance of medical expenses as specified in paragraph (f)(1)(iv) of this section. Shelter costs would be computed without including the unverified components. The standard utility allowance shall be used if the household is entitled to claim it and has not verified higher actual costs. If the expense cannot be verified within 30 days of the date of application, the State agency shall determine the household's eligibility and benefit level without providing a deduction of the unverified expense. If the household subsequently provides the missing verification, the State agency shall redetermine the household's benefits, and provide increased benefits, if any, in accordance with the timeliness standards in § 273.12 on reported changes. If the expense could not be verified within the 30-day processing standard because the State agency failed to allow the household sufficient time, as defined in paragraph (h)(1) of this section, to verify the expense, the household shall be entitled to the restoration of benefits retroactive to the month of application, provided that the missing verification is supplied in accordance with paragraph (h)(3) of this section. If the household would be ineligible unless the expense is allowed, the household's application shall be handled as provided in paragraph (h) of this section.

(4) *Sources of verification*—(i) *Documentary evidence.* State agencies shall use documentary evidence as the primary source of verification for all items except residency and household size. These items may be verified either through readily available documentary evidence or through a collateral contact, without a requirement being imposed that documentary evidence must be the primary source of verification. Documentary evidence consists of a written confirmation of a household's circumstances. Examples of documentary evidence include wage stubs, rent receipts, and utility bills. Although documentary evidence shall be the primary source of verification, acceptable verification shall not be limited to any single type of document and may be obtained through the household or other source. Whenever documentary evidence cannot be obtained or is insufficient to make a firm determination of eligibility or benefit level, the eligibility worker may require collateral contacts or home visits. For example, documentary evidence may be considered insufficient when the household presents pay stubs which do not represent an accurate picture of the household's income (such as

out-dated pay stubs) or identification papers that appear to be falsified.

(ii) *Collateral contacts.* A collateral contact is an oral confirmation of a household's circumstances by a person outside of the household. The collateral contact may be made either in person or over the telephone. The State agency may select a collateral contact if the household fails to designate one or designates one which is unacceptable to the State agency. Examples of acceptable collateral contacts may include employers, landlords, social service agencies, migrant service agencies, and neighbors of the household who can be expected to provide accurate third-party verification. When talking with collateral contacts, State agencies should disclose only the information that is absolutely necessary to get the information being sought. State agencies should avoid disclosing that the household has applied for food stamps, nor should they disclose any information supplied by the household, especially information that is protected by §273.1(c), or suggest that the household is suspected of any wrong doing.

(iii) *Home visits.* Home visits may be used as verification only when documentary evidence is insufficient to make a firm determination of eligibility or benefit level, or cannot be obtained, and the home visit is scheduled in advance with the household. Home visits are to be used on a case-by-case basis where the supplied documentation is insufficient. Simply because a household fits a profile of an error-prone household does not constitute lack of verification. State agencies shall assist households in obtaining sufficient verification in accordance with paragraph (c)(5) of this section.

(iv) *Discrepancies.* Where unverified information from a source other than the household contradicts statements made by the household, the household shall be afforded a reasonable opportunity to resolve the discrepancy prior to a determination of eligibility or benefits. The State agency may, if it chooses, verify the information directly and contact the household only if such direct verification efforts are unsuccessful. If the unverified information is received through the IEVS, as specified in §272.8, the State agency may obtain verification from a third party as specified in paragraph (f)(9)(v) of this section.

(5) *Responsibility of obtaining verification.* (i) The household has primary responsibility for providing documentary evidence to support statements on the application and to resolve any questionable information. The State agency must assist the household in obtaining this verification provided the household is cooperating with the State agency as specified under paragraph (d)(1) of this section. Households may supply documentary evidence in person, through the mail, by facsimile or other electronic device, or through an authorized representative. The State agency must not require the household to present verification in person at the food stamp office. The State agency must accept any reasonable documentary evidence provided by the household and must be primarily concerned with how adequately the verification proves the statements on the application.

(ii) Whenever documentary evidence is insufficient to make a firm determination of eligibility or benefit level, or cannot be obtained, the State agency may require a collateral contact or a home visit in accordance with paragraph (f)(4) of this section. The State agency, generally, shall rely on the household to provide the name of any collateral contact. The household may request assistance in designating a collateral contact. The State agency is not required to use a collateral contact designated by the household if the collateral contact cannot be expected to provide an accurate third-party verification. When the collateral contact designated by the household is unacceptable, the State agency shall either designate another collateral contact, ask the household to designate another collateral contact or to provide an alternative form of verification, or substitute a home visit. The State agency is responsible for obtaining verification from acceptable collateral contacts.

(6) *Documentation*. Case files must be documented to support eligibility, ineligibility, and benefit level determinations. Documentation shall be in sufficient detail to permit a reviewer to determine the reasonableness and accuracy of the determination.

(7) *State Data Exchange and Beneficiary Data Exchange*. The State agency may verify SSI benefits through the State Data Exchange (SDX), and Social Security benefit information through the Beneficiary Data Exchange (BENDEX), or through verification provided by the household. The State agency may use SDX and BENDEX data to verify other food stamp eligibility criteria. The State agency may access SDX and BENDEX data without release statements from households, provided the State agency makes the appropriate data request to SSA and executes the necessary data exchange agreements with SSA. The household shall be given an opportunity to verify the information from another source if the SDX or BENDEX information is contradictory to the information provided by the household or is unavailable. Determination of the household's eligibility and benefit level shall not be delayed past the application processing time standards of paragraph (g) of this section if SDX or BENDEX data is unavailable.

(8) *Verification subsequent to initial certification*. (i) *Recertification*—(A) At recertification the State agency shall verify a change in income or actual utility expenses if the source has changed or the amount has changed by more than $25. Previously unreported medical expenses and total recurring medical expenses which have changed by more than $25 shall also be verified at recertification. The State agency shall not verify income if the source has not changed and if the amount is unchanged or has changed by $25 or less, unless the information is incomplete, inaccurate, inconsistent or outdated. The State agency shall also not verify total medical expenses, or actual utility expenses claimed by households which are unchanged or have changed by $25 or less, unless the information is incomplete, inaccurate, inconsistent or outdated. The State agency shall require a household eligible for the child support deduction to verify any changes in the legal obligation to pay child support, the obligated amount, and the amount of legally obligated child support a household member pays to a nonhousehold member. The State agency shall verify reportedly unchanged child support information only if the information is incomplete, inaccurate, inconsistent or outdated.

(B) Newly obtained social security numbers shall be verified at recertification in accordance with verification procedures outlined in § 273.2(f)(1)(v).

(C) For individuals subject to the food stamp time limit of § 273.24 who are satisfying the work requirement by working, by combining work and participation in a work program, or by participating in a work program that is not operated or supervised by the State agency, the individuals' work hours shall be verified.

(D) Other information which has changed may be verified at recertification. Unchanged information shall not be verified unless the information is incomplete, inaccurate, inconsistent or outdated. Verification under this paragraph shall be subject to the same verification procedures as apply during initial verification.

(ii) *Changes*. Changes reported during the certification period shall be subject to the same verification procedures as apply at initial certification, except that the State agency shall not verify changes in income if the source has not changed and if the amount has changed by $25 or less, unless the information is incomplete, inaccurate, inconsistent or outdated. The State agency shall also not verify total medical expenses or actual utility expenses which are unchanged or have changed by $25 or less, unless the information is incomplete, inaccurate, inconsistent or outdated.

(9) *Optional use of IEVS*. (i) The State agency may obtain information through IEVS in accordance with procedures specified in § 272.8 of this chapter and use it to verify the eligibility and benefit levels of applicants and participating households.

(ii) The State agency may access data through the IEVS provided the disclosure safeguards and data exchange agreements required by part 272 are satisfied.

(iii) The State agency shall take action, including proper notices to households, to terminate, deny, or reduce benefits based on information obtain through the IEVS which is considered verified upon receipt. This information is social security and SSI benefit information obtained from SSA, and TANF benefit information and UIB information obtained from the agencies administering those programs. If the State agency has information that the IEVS-obtained information about a particular household is questionable, this information shall be considered unverified upon receipt and the State agency shall take action as specified in paragraph (f)(9)(iv) of this section.

(iv) Except as noted in this paragraph, prior to taking action to terminate, deny, or reduce benefits based on information obtained through the IEVS which is considered unverified upon receipt, State agencies shall independently verify the information. Such unverified information is unearned income information from IRS, wage information from SSA and SWICAs, and questionable IEVS information discussed in paragraph (f)(9)(iii) of this section. Independent verification shall include verification of the amount of the asset or income involved, whether the household actually has or had access to such asset or income such that it would be countable income or resources for food stamp purposes, and the period during which such access occurred. Except with respect to unearned income information from IRS, if a State agency has information which indicates that independent verification is not needed, such verification is not required.

(v) The State agency shall obtain independent verification of unverified information obtained from IEVS by means of contacting the household and/or the appropriate income, resource or benefit source. If the State agency chooses to contact the household, it must do so in writing, informing the household of the information which it has received, and requesting that the household respond within 10 days. If the household fails to respond in a timely manner, the State agency shall send it a notice of adverse action as specified in §273.13. The State agency may contact the appropriate source by the means best suited to the situation. When the household or appropriate source provides the independent verification, the State agency shall properly notify the household of the action it intends to take and provide the household with an opportunity to request a fair hearing prior to any adverse action.

(10) *Optional use of SAVE.* Households are required to submit documents to verify the immigration status of applicant aliens. State agencies that verify the validity of such documents through the INS SAVE system in accordance with §272.11 of this chapter must use the following procedures:

(i) The State agency shall provide an applicant alien with a reasonable opportunity to submit acceptable documentation of their eligible alien status prior to the 30th day following the date of application. A reasonable opportunity shall be at least 10 days from the date of the State agency's request for an acceptable document. An alien who has been given a reasonable opportunity to submit acceptable documentation and has not done so as of the 30th day following the date of application shall not be certified for benefits until acceptable documentation has been submitted. However, if the 10-day reasonable opportunity period provided by the State agency does not lapse before the 30th day following the date of application, the State agency shall provide the household with benefits no later than 30 days following the date of application *Provided* the household is otherwise eligible.

(ii) The written consent of the alien applicant shall not be required as a condition for the State agency to contact INS to verify the validity of documentation.

(iii) State agencies which access the ASVI database through an automated access shall also submit INS Form G–845, with an attached photocopy of the alien's document, to INS whenever the initial automated access does not confirm the validity of the alien's documentation or a significant discrepancy exists between the data provided by the ASVI and the information provided by the applicant. Pending such responses from either the ASVI or INS Form G–

845, the State agency shall not delay, deny, reduce, or terminate the alien's eligibility for benefits on the basis of the individual's alien status.

(iv) If the State agency determines, after complying with the requirements of this section, that the alien is not in an eligible alien status, the State agency shall take action, including proper notices to the household, to terminate, deny or reduce benefits. The State agency shall provide households the opportunity to request a fair hearing under § 273.15 prior to any adverse action.

(v) The use of SAVE shall be documented in the casefile or other agency records. When the State agency is waiting for a response from SAVE, agency records shall contain either a notation showing the date of the State agency's transmission or a copy of the INS Form G–845 sent to INS. Once the SAVE response is received, agency records shall show documentation of the ASVI Query Verification Number or contain a copy of the INS-annotated Form G–845. Whenever the response from automated access to the ASVI directs the eligibility worker to initiate secondary verification, agency records shall show documentation of the ASVI Query Verification Number and contain a copy of the INS Form G–845.

(g) *Normal processing standard*—(1) *Thirty-day processing*. The State agency shall provide eligible households that complete the initial application process an opportunity to participate (as defined in § 274.2(b)) as soon as possible, but no later than 30 calendar days following the date the application was filed, except for residents of public institutions who apply jointly for SSI and food stamp benefits prior to release from the institution in accordance with § 273.1(e)(2). An application is filed the day the appropriate food stamp office receives an application containing the applicant's name and address, which is signed by either a responsible member of the household or the household's authorized representative. Households entitled to expedited processing are specified in paragraph (i) of this section. For residents of public institutions who apply for food stamps prior to their release from the institution in accordance with § 273.1(e)(2), the State agency shall provide an opportunity to participate as soon as possible, but not later than 30 calendar days from the date of release of the applicant from the institution.

(2) *Combined allotments*. Households which apply for initial month benefits (as described in § 273.10(a)) after the 15th of the month, are processed under normal processing timeframes, have completed the application process within 30 days of the date of application, and have been determined eligible to receive benefits for the initial month of application and the next subsequent month, may be issued a combined allotment at State agency option which includes prorated benefits for the month of application and benefits for the first full month of participation. The benefits shall be issued in accordance with § 274.2(c) of this chapter.

(3) *Denying the application*. Households that are found to be ineligible shall be sent a notice of denial as soon as possible but not later than 30 days following the date the application was filed. If the household has failed to appear for a scheduled interviewand has made no subsequent contact with the State agency to express interest in pursuing the application, the State agency shall send the household a notice of denial on the 30th day following the date of application. The household must file a new application if it wishes to participate in the program. In cases where the State agency was able to conduct an interview and request all of the necessary verification on the same day the application was filed, and no subsequent requests for verification have been made, the State agency may also deny the application on the 30th day if the State agency provided assistance to the household in obtaining verification as specified in paragraph (f)(5) of this section, but the household failed to provide the requested verification.

(h) *Delays in processing*. If the State agency does not determine a household's eligibility and provide an opportunity to participate within 30 days following the date the application was filed, the State agency shall take the following action:

(1) *Determining cause*. The State agency shall first determine the cause of the delay using the following criteria:

(i) A delay shall be considered the fault of the household if the household has failed to complete the application process even though the State agency has taken all the action it is required to take to assist the household. The State agency must have taken the following actions before a delay can be considered the fault of the household:

(A) For households that have failed to complete the application form, the State agency must have offered, or attempted to offer, assistance in its completion.

(B) If one or more members of the household have failed to register for work, as required in §273.7, the State agency must have informed the household of the need to register for work, determined if the household members are exempt from work registration, and given the household at least 10 days from the date of notification to register these members.

(C) In cases where verification is incomplete, the State agency must have provided the household with a statement of required verification and offered to assist the household in obtaining required verification and allowed the household sufficient time to provide the missing verification. Sufficient time shall be at least 10 days from the date of the State agency's initial request for the particular verification that was missing.

(D) For households that have failed to appear for an interview, the State agency must notify the household that it missed the scheduled interview and that the household is responsible for rescheduling a missed interview. If the household contacts the State agency within the 30 day processing period, the State agency must schedule a second interview. If the household fails to schedule a second interview, or the subsequent interview is postponed at the household's request or cannot otherwise be rescheduled until after the 20th day but before the 30th day following the date the application was filed, the household must appear for the interview, bring verification, and register members for work by the 30th day; otherwise, the delay shall be the fault of the household. If the household has failed to appear for the first interview, fails to schedule a second interview, and/or the subsequent interview is postponed at the household's request until after the 30th day following the date the application was filed, the delay shall be the fault of the household. If the household has missed both scheduled interviews and requests another interview, any delay shall be the fault of the household.

(ii) Delays that are the fault of the State agency include, but are not limited to, those cases where the State agency failed to take the actions described in paragraphs (h)(1)(i) (A) through (D) of this section.

(2) *Delays caused by the household*. (i) If by the 30th day the State agency cannot take any further action on the application due to the fault of the household, the household shall lose its entitlement to benefits for the month of application. However, the State agency shall give the household an additional 30 days to take the required action, except that, if verification is lacking, the State agency has the option of holding the application pending for only 30 days following the date of the initial request for the particular verification that was missing.

(A) The State agency has the option of sending the household either a notice of denial or a notice of pending status on the 30th day. The option chosen may vary from one project area to another, provided the same procedures apply to all households within a project area. However, if a notice of denial is sent and the household takes the required action within 60 days following the date the application was filed, the State agency shall reopen the case without requiring a new application. No further action by the State agency is required after the notice of denial or pending status is sent if the household failed to take the required action within 60 days following the date the application was filed, or if the State agency chooses the option of holding the application pending for only 30 days following the date of the initial request for the particular verification that was missing, and the household fails to provide the necessary verification by this 30th day.

(B) State agencies may include in the notice a request that the household report all changes in circumstances since it filed its application. The information that must be contained on the notice of denial or pending status is explained in § 273.10(g)(1) (ii) and (iii).

(ii) If the household was at fault for the delay in the first 30-day period, but is found to be eligible during the second 30-day period, the State agency shall provide benefits only from the month following the month of application. The household is not entitled to benefits for the month of application when the delay was the fault of the household.

(3) *Delays caused by the State agency.* (i) Whenever a delay in the initial 30-day period is the fault of the State agency, the State agency shall take immediate corrective action. Except as specified in §§ 273.2(f)(1)(ii)(F) and 273.2(f)(10)(i), the State agency shall not deny the application if it caused the delay, but shall instead notify the household by the 30th day following the date the application was filed that its application is being held pending. The State agency shall also notify the household of any action it must take to complete the application process. If verification is lacking the State agency has the option of holding the application pending for only 30 days following the date of the initial request for the particular verification that was missing.

(ii) If the household is found to be eligible during the second 30-day period, the household shall be entitled to benefits retroactive to the month of application. If, however, the household is found to be ineligible, the State agency shall deny the application.

(4) *Delays beyond 60 days.* (i) If the State agency is at fault for not completing the application process by the end of the second 30-day period, and the case file is otherwise complete, the State agency shall continue to process the original application until an eligibility determination is reached. If the household is determined eligible, and the State agency was at fault for the delay in the initial 30 days, the household shall receive benefits retroactive to the month of application. However, if the initial delay was the household's fault, the household shall receive benefits retroactive only to the month following the month of application. The State agency may use the original application to determine the household's eligibility in the months following the 60-day period, or it may require the household to file a new application.

(ii) If the State agency is at fault for not completing the application process by the end of the second 30-day period, but the case file is not complete enough to reach an eligibility determination, the State agency may continue to process the original application, or deny the case and notify the household to file a new application. If the case is denied, the household shall also be advised of its possible entitlement to benefits lost as a result of State agency caused delays in accordance with § 273.17. If the State agency was also at fault for the delay in the initial 30 days, the amount of benefits lost would be calculated from the month of application. If, however, the household was at fault for the initial delay, the amount of benefits lost would be calculated from the month following the month of application.

(iii) If the household is at fault for not completing the application process by the end of the second 30-day period, the State agency shall deny the application and require the household to file a new application if it wishes to participate. If however, the State agency has chosen the option of holding the application pending only until 30 days following the date of the initial request for the particular verification that was missing, and verification is not received by that 30th day, the State agency may immediately close the application. A notice of denial need not be sent if the notice of pending status informed the household that it would have to file a new application if verification was not received within 30 days of the initial request. The household shall not be entitled to any lost benefits, even if the delay in the initial 30 days was the fault of the State agency.

(i) *Expedited service*—(1) *Entitlement to expedited service.* The following households are entitled to expedited service:

(i) Households with less than $150 in monthly gross income, as computed in

§273.10 provided their liquid resources (i.e., cash on hand, checking or savings accounts, savings certificates, and lump sum payments as specified in §273.9(c)(8)) do not exceed $100;

(ii) Migrant or seasonal farmworker households who are destitute as defined in §273.10(e)(3) provided their liquid resources (i.e., cash on hand, checking or savings accounts, savings certificates, and lump sum payments as specified in §273.9(c)(8)) do not exceed $100;

(iii) Households whose combined monthly gross income and liquid resources are less than the household's monthly rent or mortgage, and utilities (including entitlement to a SUA, as appropriate, in accordance with §273.9(d)).

(2) *Identifying households needing expedited service.* The State agency's application procedures shall be designed to identify households eligible for expedited service at the time the household requests assistance. For example, a receptionist, volunteer, or other employee shall be responsible for screening applications as they are filed or as individuals come in to apply.

(3) *Processing standards.* All households receiving expedited service, except those receiving it during months in which allotments are suspended or cancelled, shall have their cases processed in accordance with the following provisions. Those households receiving expedited service during suspensions or cancellations shall have their cases processed in accordance with the provisions of §271.7(e)(2).

(i) *General.* For households entitled to expedited service, the State agency shall make available to the recipient coupons or an ATP card not later than the seventh calendar day following the date an application was filed. For a resident of a public institution who applies for benefits prior to his/her release from the institution in accordance with §273.1(e)(2) and who is entitled to expedited service, the date of filing of his/her food stamp application is the date of release of the applicant from the institution. Whatever system a State agency uses to ensure meeting this delivery standard shall be designed to allow a reasonable opportunity for redemption of ATPs no later than the seventh calendar day following the day the application was filed.

(ii) *Drug addicts and alcoholics, group living arrangement facilities.* For residents of drug addiction or alcoholic treatment and rehabilitation centers and residents of group living arrangements who are entitled to expedited service, the State agency shall make available to the recipient coupons or an ATP card not later than the 7 calendar days following the date an application was filed.

(iii) *Out-of-office interviews.* If a household is entitled to expedited service and is also entitled to a waiver of the office interview, the State agency shall conduct the interview (unless the household cannot be reached) and complete the application process within the expedited service standards. The first day of this count is the calendar day following application filing. If the State agency conducts a telephone interview and must mail the application to the household for signature, the mailing time involved will not be calculated in the expedited service standards. Mailing time shall only include the days the application is in the mail to and from the household and the days the application is in the household's possession pending signature and mailing.

(iv) *Late determinations.* If the prescreening required in paragraph (i)(2) of this section fails to identify a household as being entitled to expedited service and the State agency subsequently discovers that the household is entitled to expedited service, the State agency shall provide expedited service to households within the processing standards described in paragraphs (i)(3) (i) and (ii) of this section, except that the processing standard shall be calculated from the date the State agency discovers the household is entitled to expedited service.

(v) *Residents of shelters for battered women and children.* Residents of shelters for battered women and children who are otherwise entitled to expedited service shall be handled in accordance with the time limits in paragraph (i)(3)(i) of this section.

(4) *Special procedures for expediting service.* The State agency shall use the

following procedures when expediting certification and issuance:

(i) In order to expedite the certification process, the State agency shall use the following procedures:

(A) In all cases, the applicant's identity (i.e., the identity of the person making the application) shall be verified through a collateral contact or readily available documentary evidence as specified in paragraph (f)(1) of this section.

(B) All reasonable efforts shall be made to verify within the expedited processing standards, the household's residency in accordance with § 273.2(f)(1)(vi), income statement (including a statement that the household has no income), liquid resources and all other factors required by § 273.2(f), through collateral contacts or readily available documentary evidence. However, benefits shall not be delayed beyond the delivery standards prescribed in paragraph (i)(3) of this section, solely because these eligibility factors have not been verified.

State agencies also may verify factors other than identity, residency, and income provided that verification can be accomplished within expedited processing standards. State agencies should attempt to obtain as much additional verification as possible during the interview, but should not delay the certification of households entitled to expedited service for the full timeframes specified in paragraph (i)(3) of this section when the State agency has determined it is unlikely that other verification can be obtained within these timeframes. Households entitled to expedited service will be asked to furnish a social security number for each person applying for benefts or apply for one for each person applying for benefits before the second full month of participation. Those household members unable to provide the required SSN's or who do not have one prior to the second full month of participation shall be allowed to continue to participate only if they satisfy the good cause requirements with respect to SSN's specified in § 273.6(d), except that households with a newborn may have up to 6 months following the month the baby was born to supply an SSN or proof of an application for an SSN for the newborn in accordance with § 273.6(b)(4). The State agency may attempt to register other household members but shall postpone the registration of other household members if it cannot be accomplished within the expedited service timeframes. With regard to the work registration requirements specified in § 273.7, the State agency shall, at a minimum, require the applicant to register (unless exempt or unless the household has designated an authorized representative to apply on its behalf in accordance with § 273.1(f)). The State agency may attempt registration of other household members by requesting that the applicant complete the work registration forms for other household members to the best of his or her ability. The State agency may also attempt to accomplish work registration for other household members in a timely manner through other means, such as calling the household. The State agency may attempt to verify questionable work registration exemptions, but such verification shall be postponed if the expedited service timeframes cannot be met.

(ii) Once an acceptable collateral contact has been designated, the State agency shall promptly contact the collateral contact, in accordance with the provisions of paragraph (f)(4)(ii) of this section. Although the household has the primary responsibility for providing other types of verification, the State agency shall assist the household in promptly obtaining the necessary verification.

(iii) Households that are certified on an expedited basis and have provided all necessary verification required in paragraph (f) of this section prior to certification shall be assigned normal certification periods. If verification was postponed, the State agency may certify these households for the month of application (the month of application and the subsequent month for those households applying after the 15th of the month) or, at the State agency's option, may assign normal certification periods to those households whose circumstances would otherwise warrant longer certification periods. State agencies, at their option, may request any household eligible for

expedited service which applies after the 15th of the month and is certified for the month of application and the subsequent month only to submit a second application (at the time of the initial certification) if the household's verification is postponed.

(A) For households applying on or before the 15th of the month, the State agency may assign a one-month certification period or assign a normal certification period. Satisfaction of the verification requirements may be postponed until the second month of participation. If a one-month certification period is assigned, the notice of eligibility may be combined with the notice of expiration or a separate notice may be sent. The notice of eligibility must explain that the household has to satisfy all verification requirements that were postponed. For subsequent months, the household must reapply and satisfy all verification requirements which were postponed or be certified under normal processing standards. If the household does not satisfy the postponed verification requirements and does not appear for the interview, the State agency does not need to contact the household again.

(B) For households applying after the 15th of the month, the State agency may assign a 2-month certification period or a normal certification period of no more than 12 months. Verification may be postponed until the third month of participation, if necessary, to meet the expedited timeframe. If a two-month certification period is assigned, the notice of eligibility may be combined with the notice of expiration or a separate notice may be sent. The notice of eligibility must explain that the household is obligated to satisfy the verification requirements that were postponed. For subsequent months, the household must reapply and satisfy the verification requirements which were postponed or be certified under normal processing standards. If the household does not satisfy the postponed verification requirements and does not attend the interview, the State agency does not need to contact the household again. When a certification period of longer than 2 months is assigned and verification is postponed, households must be sent a notice of eligibility advising that no benefits for the third month will be issued until the postponed verification requirements are satisfied. The notice must also advise the household that if the verification process results in changes in the household's eligibility or level of benefits, the State agency will act on those changes without advance notice of adverse action.

(C) Households which apply for initial benefits (as described in § 273.10(a)) after the 15th of the month, are entitled to expedited service, have completed the application process, and have been determined eligible to receive benefits for the initial month and the next subsequent month, shall receive a combined allotment consisting of prorated benefits for the initial month of application and benefits for the first full month of participation within the expedited service timeframe. If necessary, verification shall be postponed to meet the expedited timeframe. The benefits shall be issued in accordance with § 274.2(c) of this chapter.

(D) The provisions of paragraph (i)(4)(iii)(C) of this section do not apply to households which have been determined ineligible to receive benefits for the month of application or the following month, or to households which have not satisfied the postponed verification requirements. However, households eligible for expedited service may receive benefits for the initial month and next subsequent month under the verification standards of paragraph (i)(4) of this section.

(E) If the State agency chooses to exercise the option to require a second application in accordance with paragraph (i)(4)(iii) of this section and receives the application before the third month, it shall not deny the application but hold it pending until the third month. The State agency will issue the third month's benefits within 5 working days from receipt of the necessary verification information but not before the first day of the month. If the postponed verification requirements are not completed before the end of the third month, the State agency shall terminate the household's participation and shall issue no further benefits.

(iv) There is no limit to the number of times a household can be certified under expedited procedures, as long as prior to each expedited certification, the household either completes the verification requirements that were postponed at the last expedited certification or was certified under normal processing standards since the last expedited certification. The provisions of this section shall not apply at recertification if a household reapplies before the end of its current certification period.

(v) Households requesting, but not entitled to, expedited service shall have their applications processed according to normal standards.

(j) *PA, GA and categorically eligible households.* The State agency must notify households applying for public assistance (PA) of their right to apply for food stamp benefits at the same time and must allow them to apply for food stamp benefits at the same time they apply for PA benefits. The State agency must also notify such households that time limits or other requirements that apply to the receipt of PA benefits do not apply to the receipt of food stamp benefits, and that households which cease receiving PA benefits because they have reached a time limit, have begun working, or for other reasons, may still qualify for food stamp benefits. If the State agency attempts to discourage households from applying for cash assistance, it shall make clear that the disadvantages and requirements of applying for cash assistance do not apply to food stamps. In addition, it shall encourage applicants to continue with their application for food stamps. The State agency shall inform households that receiving food stamps will have no bearing on any other program's time limits that may apply to the household. The State agency may process the applications of such households in accordance with the requirements of paragraph (j)(1) of this section, and the State agency must base their eligibility solely on food stamp eligibility criteria unless the household is categorically eligible, as provided in paragraph (j)(2) of this section. If a State has a single Statewide GA application form, households in which all members are included in a State or local GA grant may have their application for food stamps included in the GA application form. State agencies may use the joint application processing procedures described in paragraph (j)(1) of this section for GA recipients in accordance with paragraph (j)(3) of this section. The State agency must base eligibility of jointly processed GA households solely on food stamp eligibility criteria unless the household is categorically eligible as provided in paragraph (j)(4) of this section. The State agency must base the benefit levels of all households solely on food stamp criteria. The State agency must certify jointly processed and categorically eligible households in accordance with food stamp procedural, timeliness, and notice requirements, including the 7-day expedited service provisions of paragraph (i) of this section and normal 30-day application processing standards of paragraph (g) of this section. Individuals authorized to receive PA, SSI, or GA benefits but who have not yet received payment are considered recipients of benefits from those programs. In addition, individuals are considered recipients of PA, SSI, or GA if their PA, SSI, or GA benefits are suspended or recouped. Individuals entitled to PA, SSI, or GA benefits but who are not paid such benefits because the grant is less than a minimum benefit are also considered recipients. The State agency may not consider as recipients those individuals not receiving GA, PA, or SSI benefits who are entitled to Medicaid only.

(1) *Applicant PA households.* (i) If a joint PA/food stamp application is used, the application may contain all the information necessary to determine a household's food stamp eligibility and level of benefits. Information relevant only to food stamp eligibility must be contained in the PA form or must be an attachment to it. The joint PA/food stamp application must clearly indicate that the household is providing information for both programs, is subject to the criminal penalties of both programs for making false statements, and waives the notice of adverse action as specified in paragraph (j)(1)(iv) of this section.

(ii) The State agency may conduct a single interview at initial application

for both public assistance and food stamp purposes. A household's eligibility for food stamp out-of-office interview provisions in paragraph (e)(2) of this section does not relieve the household of any responsibility for a face-to-face interview to be certified for PA.

(iii) For households applying for both PA and food stamps, the State agency must follow the verification procedures described in paragraphs (f)(1) through (f)(8) of this section for those factors of eligibility which are needed solely for purposes of determining the household's eligibility for food stamps. For those factors of eligibility which are needed to determine both PA eligibility and food stamp eligibility, the State agency may use the PA verification rules. However, if the household has provided the State agency sufficient verification to meet the verification requirements of paragraphs (f)(1) through (f)(8) of this section, but has failed to provide sufficient verification to meet the PA verification rules, the State agency may not use such failure as a basis for denying the household's food stamp application or failing to comply with processing requirements of paragraph (g) of this section. Under these circumstances, the State agency must process the household's food stamp application and determine eligibility based on its compliance with the requirements of paragraphs (f)(1) through (f)(8) of this section.

(iv) In order to determine if a household will be eligible due to its status as a recipient PA/SSI household, the State agency may temporarily postpone, within the 30-day processing standard, the food stamp eligibility determination if the household is not entitled to expedited service and appears to be categorically eligible. However, the State agency shall postpone denying a potentially categorically eligible household until the 30th day in case the household is determined eligible to receive PA benefits. Once the PA application is approved, the household is to be considered categorically eligible if it meets all the criteria concerning categorical eligibility in §273.2(j)(2). If the State agency can anticipate the amount and the date of receipt of the initial PA payment, but the payment will not be received until a subsequent month, the State agency shall vary the household's food stamp benefit level according to the anticipated receipt of the payment and notify the household. Portions of initial PA payments intended to retroactively cover a previous month shall be disregarded as lump sum payments under §273.9(c)(8). If the amount or date of receipt of the initial PA payment cannot be reasonably anticipated at the time of the food stamp eligibility determination, the PA payments shall be handled as a change in circumstances. However, the State agency is not required to send a notice of adverse action if the receipt of the PA grant reduces, suspends or terminates the household's food stamp benefits, provided the household is notified in advance that its benefits may be reduced, suspended, or terminated when the grant is received. The case may be terminated if the household is not categorically eligible in accordance with §273.12(c). The State agency shall ensure that the denied application of a potentially categorically eligible household is easily retrievable. For a household filing a joint application for food stamps and PA benefits or a household that has a PA application pending and is denied food stamps but is later determined eligible to receive PA benefits and is otherwise categorically eligible, the State agency shall provide benefits using the original application and any other pertinent information occurring subsequent to that application. Except for residents of public institutions who apply jointly for SSI and food stamp benefits prior to their release from a public institution in accordance with §273.1(e)(2), benefits shall be paid from the beginning of the period for which PA or SSI benefits are paid, the original food stamp application date, or December 23, 1985 whichever is later. Residents of public institutions who apply jointly for SSI and food stamp benefits prior to their release from the institution shall be paid benefits from the date of their release from the institution. In situations where the State agency must update and reevaluate the original application of a denied case, the State agency shall not reinterview the

household, but shall use any available information to update the application. The State agency shall then contact the household by phone or mail to explain and confirm changes made by the State agency and to determine if other changes in household circumstances have occurred. If any information obtained from the household differs from that which the State agency obtained from available information or the household provided additional changes in information, the State agency shall arrange for the household or it authorized representative to initial *all* changes, re-sign and date the updated application and provide necessary verification. In no event can benefits be provided prior to the date of the original food stamp application filed on or after December 23, 1985. Any household that is determined to be eligible to receive PA benefits for a period of time within the 30-day food stamp processing time, shall be provided food stamp benefits back to the date of the food stamp application. However, in no event shall food stamp benefits be paid for a month for which such household is ineligible for receipt of any PA benefits for the month, unless the household is eligible for food stamp benefits and an NPA case. Benefits shall be prorated in accordance with § 273.10(a)(1)(ii) and (e)(2)(ii)(B). Household that file joint applications that are found categorically eligible after being denied NPA food stamps shall have their benefits for the initial month prorated from the date from which the PA benefits are payable, or the date of the original food stamp application, whichever is later. The State agency shall act on reevaluating the original application either at the household's request or when it becomes otherwise aware of the household's PA and/or SSI eligibility. The household shall be informed on the notice of denial required by § 273.10(g)(1)(ii) to notify the State agency if its PA or SSI benefits are approved.

(v) The State agency may not require households which file a joint PA/food stamp application and whose PA applications are denied to file new food stamp applications. Rather, the State agency must determine or continue their food stamp eligibility on the basis of the original applications filed jointly for PA and food stamp purposes. In addition, the State agency must use any other documented information obtained subsequent to the application which may have been used in the PA determination and which is relevant to food stamp eligibility or level of benefits.

(2) *Categorically eligible PA and SSI households.* (i) The following households are categorically eligible for food stamps unless the entire household is institutionalized as defined in § 273.1(e) or disqualified for any reason from receiving food stamps.

(A) Any household (except those listed in paragraph (j)(2)(vii) of this section) in which all members receive or are authorized to receive cash through a PA program funded in full or in part with Federal money under Title IV–A or with State money counted for maintenance of effort (MOE) purposes under Title IV–A;

(B) Any household (except those listed in paragraph (j)(2)(vii) of this section) in which all members receive or are authorized to receive non-cash or in-kind benefits or services from a program that is more than 50 percent funded with State money counted for MOE purposes under Title IV–A or Federal money under Title IV–A and that is designed to forward purposes one and two of the TANF block grant, as set forth in Section 401 of P.L. 104–193.

(C) Any household (except those listed in paragraph (j)(2)(vii) of this section) in which all members receive or are authorized to receive non-cash or in-kind benefits or services from a program that is more than 50 percent funded with State money counted for MOE purposes under Title IV–A or Federal money under Title IV–A and that is designed to further purposes three and four of the TANF block grant, as set forth in Section 401 of P.L. 104–193, and requires participants to have a gross monthly income at or below 200 percent of the Federal poverty level.

(D) Any household in which all members receive or are authorized to receive SSI benefits, except that residents of public institutions who apply jointly for SSI and food stamp benefits prior to their release from the institution in accordance with § 273.1(e)(2), are

not categorically eligible upon a finding by SSA of potential SSI eligibility prior to such release. The State agency must consider the individuals categorically eligible at such time as SSA makes a final SSI eligibility and the institution has released the individual.

(E) Any household in which all members receive or are authorized to receive PA and/or SSI benefits in accordance with paragraphs (j)(2)(i)(A) through (j)(2)(i)(D) of this section.

(ii) The State agency, at its option, may extend categorical eligibility to the following households only if doing so will further the purposes of the Food Stamp Act:

(A) Any household (except those listed in paragraph (j)(2)(vii) of this section) in which all members receive or are authorized to receive non-cash or in-kind services from a program that is less than 50 percent funded with State money counted for MOE purposes under Title IV–A or Federal money under Title IV–A and that is designed to further purposes one and two of the TANF block grant, as set forth in Section 401 of P.L. 104–193. States must inform FNS of the TANF services under this paragraph that they are determining to confer categorical eligibility.

(B) Subject to FNS approval, any household (except those listed in paragraph (j)(2)(vii) of this section) in which all members receive or are authorized to receive non-cash or in-kind services from a program that is less than 50 percent funded with State money counted for MOE purposes under Title IV–A or Federal money under Title IV–A and that is designed to further purposes three and four of the TANF block grant, as set forth in Section 401 of P.L 104–193, and requires participants to have a gross monthly income at or below 200 percent of the Federal poverty level.

(iii) Any household in which one member receives or is authorized to receive benefits according to paragraphs (j)(2)(i)(B), (j)(2)(i)(C), (j)(2)(ii)(A) and (j)(2)(ii)(B), of this section and the State agency determines that the whole household benefits.

(iv) For purposes of paragraphs (j)(2)(i), (j)(2)(ii),and (j)(2)(iii) of this section, ''authorized to receive'' means that an individual has been determined eligible for benefits and has been notified of this determination, even if the benefits have been authorized but not received, authorized but not accessed, suspended or recouped, or not paid because they are less than a minimum amount.

(v) The eligibility factors which are deemed for food stamp eligibility without the verification required in paragraph (f) of this section because of PA/SSI status are the resource, gross and net income limits; social security number information, sponsored alien information, and residency. However, the State agency must collect and verify factors relating to benefit determination that are not collected and verified by the other program if these factors are required to be verified under paragraph (f) of this section. If any of the following factors are questionable, the State agency must verify, in accordance with paragraph (f) of this section, that the household which is considered categorically eligible:

(A) Contains only members that are PA or SSI recipients as defined in the introductory paragraph (j) of this section;

(B) Meets the household definition in §273.1(a);

(C) Includes all persons who purchase and prepare food together in one food stamp household regardless of whether or not they are separate units for PA or SSI purposes; and

(D) Includes no persons who have been disqualified as provided for in paragraph (j)(2)(vi) of this section.

(vi) Households subject to retrospective budgeting that have been suspended for PA purposes as provided for in Temporary Assistance for Needy Families (TANF) regulations, or that receive zero benefits shall continue to be considered as authorized to receive benefits from the appropriate agency. Categorical eligibility shall be assumed at recertification in the absence of a timely PA redetermination. If a recertified household is subsequently terminated from PA benefits, the procedures in §273.12(f)(3), (4), and (5) shall be followed, as appropriate.

(vii) Under no circumstances shall any household be considered categorically eligible if:

(A) Any member of that household is disqualified for an intentional Program violation in accordance with § 273.16 or for failure to comply with monthly reporting requirements in accordance with § 273.21;

(B) The entire household is disqualified because one or more of its members failed to comply with workfare in accordance with § 273.22; or

(C) The head of the household is disqualified for failure to comply with the work requirements in accordance with § 273.7.

(D) Any member of that household is ineligible under § 273.11(m) by virtue of a conviction for a drug-related felony.

(viii) These households are subject to all food stamp eligibility and benefits provisions (including the provisions of § 273.11(c)) and cannot be reinstated in the Program on the basis of categorical eligibility provisions.

(ix) No person shall be included as a member in any household which is otherwise categorically eligible if that person is:

(A) An ineligible alien as defined in § 273.4;

(B) Ineligible under the student provisions in § 273.5;

(C) An SSI recipient in a cash-out State as defined in § 273.20; or

(D) Institutionalized in a nonexempt facility as defined in § 273.1(e).

(E) Ineligible because of failure to comply with a work requirement of § 273.7.

(x) For the purposes of work registration, the exemptions in § 273.7(b) shall be applied to individuals in categorically eligible households. Any such individual who is not exempt from work registration is subject to the other work requirements in § 273.7.

(xi) When determining eligibility for a categorically eligible household all provisions of this subchapter except for those listed below shall apply:

(A) Section 273.8 except for the last sentence of paragraph (a).

(B) Section 273.9(a) except for the fourth sentence in the introductory paragraph.

(C) Section 273.10(a)(1)(i).

(D) Section 273.10(b).

(E) Section 273.10(c) for the purposes of eligibility.

(3) *Applicant GA households.* (i) State agencies may use the joint application processing procedures in paragraph (j)(1) of this section for GA households, except for the effective date of categorical eligibility, when the criteria in paragraphs (j)(3)(i) (A) and (B) of this section are met. Benefits for GA households that are categorically eligible, as provided in paragraph (j)(4) of this section, shall be provided from the date of the original food stamp application, the beginning of the period for which GA benefits are authorized, or the effective date of State GA categorical eligibility (February 1, 1991) or local GA categorical eligibility (August 1, 1992), whichever is later:

(A) The State agency administers a GA program which uses formalized application procedures and eligibility criteria that test levels of income and resources; and,

(B) Administration of the GA program is integrated with the administration of the PA or food stamp programs, in that the same eligibility workers process applications for GA benefits and PA or food stamp benefits.

(ii) State agencies in which different eligibility workers process applications for GA benefits and PA or food stamp benefits, but procedures otherwise meet the criteria in paragraph (j)(3)(i) of this section may, with FNS approval, jointly process GA and food stamp applications. If approved, State agencies shall adhere to the joint application processing procedures in paragraph (j)(1) of this section, except for the effective date of categorical eligibility for GA households. Benefits shall be provided GA households that are categorically eligible, as provided in paragraph (j)(4) of this section, from the date of the original food stamp application, the beginning of the period for which GA benefits are authorized, or the effective date of State GA categorical eligibility (February 1, 1992) or local GA categorical eligibility (August 1, 1992), whichever is later.

(4) *Categorically eligible GA households.* Households in which each member receives benefits from a State or local GA program which meets the criteria for conferring categorical eligibility in paragraph (j)(4)(i) of this section shall be categorically eligible for food

stamps unless the individual or household is ineligible as specified in paragraph (j)(4)(iv) and (j)(4)(v) of this section.

(i) *Certification of qualifying programs.* Recipients of benefits from programs that meet the criteria in paragraphs (j)(4)(i)(A) through (j)(4(i)(C) of this section shall be considered categorically eligible to receive benefits from the Food Stamp Program. If a program does not meet all of these criteria, the State agency may submit a program description to the appropriate FNS regional office for a determination. The description should contain, at a minimum, the type of assistance provided, the income eligibility standard, and the period for which the assistance is provided.

(A) The program must have income standards which do not exceed the gross income eligibility standard in § 273.9(a)(1). The rules of the GA program apply in determining countable income.

(B) The program must provide GA benefits as defined in § 271.2 of this part.

(C) The program must provide benefits which are not limited to one-time emergency assistance.

(ii) *Verification requirements.* In determining whether a household is categorically eligible, the State agency shall verify that each member receives PA benefits, SSI, or GA from a program that meets the criteria in paragraph (j)(4)(i) section or that has been certified by FNS as an appropriate program and that it includes no individuals who have been disqualified as provided in paragraph (j)(4)(iv) or (j)(2)(v) of this section. The State agency shall also verify household composition if it is questionable, in accordance with § 273.2(f), in order to determine that the household meets the definition of a household in § 273.1(a).

(iii) *Deemed eligibility factors.* When determining eligibility for a categorically eligible household, all Food Stamp Program requirements apply except the following:

(A) *Resources.* None of the provisions of § 273.8 apply to categorically eligible households except the second sentence of § 273.8(a) pertaining to categorical eligibility and § 273.8(i) concerning transfer of resources. The provision in § 273.10(b) regarding resources available the time of the interview does not apply to categorically eligible households.

(B) *Gross and net income limits.* None of the provisions in § 273.9(a) relating to income eligibility standards apply to categorically eligible households, except the fourth sentence pertaining to categorical eligibility. The provisions in §§ 273.10(a)(1)(i) and 273.10(c) relating to the income eligibility determination also do not apply to categorically eligible households.

(C) *Zero benefit households.* All eligible households of one or two persons must be provided the minimum benefit, as required by § 273.10(e)(2)(ii)(C).

(D) Residency.

(E) Sponsored alien information.

(iv) *Ineligible household members.* No person shall be included as a member of an otherwise categorically eligible household if that person is:

(A) An ineligible alien, as defined in § 273.4;

(B) An ineligible student, as defined in § 273.5;

(C) Disqualified for failure to provide or apply for an SSN, as required by § 273.6;

(D) A household member, not the head of household, disqualified for failure to comply with a work requirement of § 273.7;

(E) Disqualified for intentional program violation, as required by § 273.16;

(F) An SSI recipient in a cash-out State, as defined in § 273.20; or

(G) An individual who is institutionalized in a nonexempt facility, as defined in § 273.1(e).

(v) *Ineligible households.* A household shall not be considered categorically eligible if:

(A) It refuses to cooperate in providing information to the State agency that is necessary for making a determination of its eligibility or for completing any subsequent review of its eligibility, as described in § 273.2(d) and § 273.21(m)(1)(ii);

(B) The household is disqualified because the head of household fails to comply with a work requirement of § 273.7;

(C) The household is ineligible under the striker provisions of § 273.1(g); or

(D) The household is ineligible because it knowingly transferred resources for the purpose of qualifying or attempting to qualify for the Program, as provided in § 273.8(i).

(vi) *Combination households.* Households consisting entirely of recipients of PA, SSI and/or GA from a program that meets the requirements of § 273.2(j)(4)(i) shall be categorically eligible in accordance with the provisions for paragraphs (j)(2)(iii) and (j)(2)(v) of this section for members receiving PA and SSI or provisions of paragraphs (j)(4) (iv) and (v) of this section for members receiving GA.

(5) *Households with some PA or GA recipients.* State agencies that use the joint application processing procedures in paragraphs (j)(1) and (j)(3) of this section may apply these procedures to a food stamp applicant household in which some, but not all, members are in the PA/GA filing unit, except for procedures concerning categorical eligibility. If the State agency decides not to use the joint application procedures for these households, the households shall file separate applications for PA/GA and food stamp benefits. This decision shall not be made on a case-by-case basis, but shall be applied uniformly to all households of this type in a project area.

(k) *SSI households.* For purposes of this paragraph, SSI is defined as Federal SSI payments made under title XVI of the Social Security Act, federally administered optional supplementary payments under section 1616 of that Act, or federally administered mandatory supplementary payments made under section 212(a) of Pub. L. 93–66. Except in cashout States (§ 273.20), households which have not applied for food stamps in the thirty preceding days, and which do not have applications pending, may apply and be certified for food stamp benefits in accordance with the procedures described in § 273.2(k)(1)(i) or § 273.2(k)(1)(ii) and with the notice, procedural and timeliness requirements of the Food Stamp Act of 1977 and its implementing regulations. Households applying simultaneously for SSI and food stamps shall be subject to food stamp eligibility criteria, and benefit levels shall be based solely on food stamp eligibility criteria until the household is considered categorically eligible. However, households in which all members are either PA or SSI recipients or authorized to receive PA or SSI benefits (as discussed in § 273.2(j)) shall be food stamp eligible based on their PA/SSI status as provided for in § 273.2(j)(1)(iv) and (j)(2). Households denied NPA food stamps that have an SSI application pending shall be informed on the notice of denial of the possibility of categorical eligibility if they become SSI recipients. The State agency shall make an eligibility determination based on information provided by SSA or by the household.

(1) *Initial application and eligibility determination.* At each SSA office, the State agency shall either arrange for SSA to complete and forward food stamp applications, or the State agency shall outstation State food stamp eligibility workers at the SSA Offices with SSA's concurrence, based upon an agreement negotiated between the State agency and the SSA.

(i) If the State agency arranges with the SSA to complete and forward food stamp applications the following actions shall be taken:

(A) Whenever a member of a household consisting only of SSI applicants or recipients transacts business at an SSA office, the SSA shall inform the household of:

(*1*) Its right to apply for food stamps at the SSA office without going to the food stamp office; and

(*2*) Its right to apply at a food stamp office if it chooses to do so.

(B) The SSA will accept and complete food stamp applications received at the SSA Office from SSI households and forward them, within one working day after receipt of a signed application, to a designated office of the State agency. SSA shall also forward to the State agency a transmittal form which will be approved by SSA and FNS. The SSA will use the national food stamp application form for joint processing. State agencies may substitute a State food stamp application, provided that prior approval is received from both FNS and SSA. SSA shall approve, deny, or comment upon FNS-approved State food stamp applications within thirty days of their submission to SSA.

(C) SSA will accept and complete food stamp applications from SSI households received by SSA staff in contact stations. SSA will forward all food stamp applications from SSI households to the designated food stamp office.

(D) The SSA staff shall complete joint SSI and food stamp applications for residents of public institutions in accordance with §273.1(e)(2).

(E) The State agency shall designate an address for the SSA to forward food stamp applications and accompanying information to the State agency for eligibility determination. Applications and accompanying information must be forwarded to the agreed upon address in accordance with the time standards contained in §273.2(k)(1)(i)(B).

(F) Except for applications taken in accordance with paragraph (k)(1)(i)(D) of this section, the State agency shall make an eligibility determination and issue food stamp benefits to eligible SSI households within 30 days following the date the application was received by the SSA. Applications shall be considered filed for normal processing purposes when the signed application is received by SSA. The expedited processing time standards shall begin on the date the State agency receives a food stamp application. The State agency shall make an eligibility determination and issue food stamp benefits to a resident of a public institution who applies jointly for SSI and food stamps within 30 days following the date of the applicant's release from the institution. Expedited processing time standards for an applicant who has applied for food stamps and SSI prior to release shall also begin on the date of the applicant's release from the institution in accordance with §273.2 (i)(3)(i). SSA shall notify the State agency of the date of release of the applicant from the institution. If, for any reason, the State agency is not notified on a timely basis of the applicant's release date, the State agency shall restore benefits in accordance with §273.17 to such applicant back to the date of release. Food stamp applications and supporting documentation sent to an incorrect food stamp office shall be sent to the correct office, by the State agency, within one working day of their receipt in accordance with §273.2(c)(2)(ii).

(G) Households in which all members are applying for or participating in SSI will not be required to see a State eligibility worker, or otherwise be subjected to an additional State interview. The food stamp application will be processed by the State agency. The State agency shall not contact the household further in order to obtain information for certification for food stamp benefits unless: the application is improperly completed; mandatory verification required by §273.2(f)(1) is missing; or, the State agency determines that certain information on the application is questionable. In no event would the applicant be required to appear at the food stamp office to finalize the eligibility determination. Further contact made in accordance with this paragraph shall not constitute a second food stamp certification interview.

(H) SSA shall refer non-SSI households to the correct food stamp office. The State agencies shall process those applications in accordance with the procedures noted in §273.2. Applications from such households shall be considered filed on the date the signed application is taken at the correct State agency office, and the normal and expedited processing time standards shall begin on that date.

(I) The SSA shall prescreen all applications for entitlement to expedited services on the day the application is received at the SSA office and shall mark ''Expedited Processing'' on the first page of all households' applications that appear to be entitled to such processing. The SSA will inform households which appear to meet the criteria for expedited service that benfits may be issued a few days sooner if the household applies directly at the food stamp office. The household may take the application from SSA to the food stamp office for screening, an interview, and processing of the application. This provision does not apply to applications described in paragraph (k)(1)(i)(D) of this section.

(J) The State agency shall prescreen all applications received from the SSA for entitlement to expedited service on the day the application is received at

the correct food stamp office. All SSI households entitled to expedited service shall be certified in accordance with § 273.2(i) except that the expedited processing time standard shall begin on the date the application is received at the correct State agency office, unless the applicant is a resident of a public institution as described in § 273.1(e)(2).

(K) The State agency shall develop and implement a method to determine if members of SSI households whose applications are forwarded by the SSA are already participating in the Food Stamp Program directly through the State agency.

(L) If SSA takes an SSI application or redetermination on the telephone from a member of a pure SSI household, a food stamp application shall also be completed during the telephone interview. In these cases, the food stamp application shall be mailed to the claimant for signature for return to the SSA office or to the State agency. SSA shall then forward any food stamp applications it receives to the State agency. The State agency may not require the household to be interviewed again in the food stamp office. The State agency shall not contact the household further in order to obtain information for certification for food stamp benefits except in accordance with § 273.2(k)(1)(i)(F).

(M) To SSI recipients redetermined for SSI by mail, the SSA shall send a stuffer informing them of their right to file a food stamp application at the SSA office (if they are members of a pure SSI household) or at their local food stamp office, and their right to an out-of-office food stamp interview to be performed by the State agency if the household is unable to appoint an authorized representative.

(N) Section 272.4 bilingual requirements shall not apply to the Social Security Administration.

(O) State agencies shall provide and SSA shall distribute an information sheet or brochure to all households processed under this paragraph. This material shall inform the household of the following: The address and telephone number of the household's correct food stamp office, the remaining actions to be taken in the application process, and a statement that a household should be notified of the food stamp determinations within thirty days and can contact the food stamp office if it receives no notification within thirty days, or has other questions or problems. It shall also include the client's rights and responsibilities (including fair hearings, authorized representatives, out-of-office interviews, reporting changes and timely reapplication), information on how and where to obtain coupons, and how to use coupons (including the commodities clients may purchase with coupons).

(P) As part of the SSA-State agency joint food stamp processing agreement, States may negotiate, on behalf of project areas, to have SSA provide initial eligibility and payment data where the local area is unable to access accurate and timely data through the State's SDX. However, in negotiating such agreements, SSA may challenge a State's determination that it does not have the computer capability to use SDX data. If SSA, FNS, and the State are unable to resolve this matter, and SSA determines that a State does have the capability to provide accurate and timely SDX data to the food stamp project area, SSA is not required to provide alternate means of transmitting initial SSI eligibility and payment data.

(ii) If the State agency chooses to outstation eligibility workers at SSA offices, with SSA's concurrence, the following actions shall be completed.

(A) SSA will provide adequate space for State food stamp eligibility workers in SSA offices.

(B) The State agency shall have at least one outstationed worker on duty at all time periods during which households will be referred for food stamp application processing. In most cases this would require the availability of an outstationed worker throughout normal SSA business hours.

(C) The following households shall be entitled to file food stamp applications with, and be interviewed by an outstationed eligibility worker:

(*1*) Households containing an applicant for or recipient of SSI;

(*2*) Households which do not have an applicant for or recipient of SSI, but

which contain an applicant for or recipient of benefits under title II of the Social Security Act, if the State agency and SSA have an agreement to allow the processing of such households at SSA offices.

(D) Households shall be interviewed for food stamps on the day of application unless there is insufficient time to conduct an interview. The State agency shall arrange for the outstationed worker to interview applicants as soon as possible.

(E) The State agency shall not refuse to provide service to persons served by the SSA office because they do not reside in the county or project area in which the SSA office is located, provided, however, that they reside within the jurisdictions served by the SSA office and the State agency. The State agency is not required to process the applications of persons who are not residing within the SSA office jurisdiction but who do reside within the State agency's jurisdiction, other than to forward the forms to the correct food stamp offices.

(F) The State agency may permit the eligibility worker outstationed at the SSA to determine the eligibility of households, or may require that completed applications be forwarded elsewhere for the eligibility determination.

(G) Applications from households entitled to joint processing through an outstationed eligibility worker shall be considered filed on the date they are submitted to that worker. Both the normal and expedited service time standards shall begin on that date.

(H) Households not entitled to joint processing shall be entitled to obtain and submit applications at the SSA office. The outstationed eligibility worker need not process these applications except to forward them to the correct food stamp office where they shall be considered filed upon receipt (any activities beyond acceptance and referral of the application would require SSA concurrence). Both the normal and expedited service time standards shall begin on that date.

(iii) Regardless of whether the State agency or SSA conducts the food stamp interview, the following actions shall be taken:

(A) *Verification.* (*1*) The State agency shall ensure that information required by § 273.2(f) is verified prior to certification for households initially applying. Households entitled to expedited certification services shall be processed in accordance with § 273.2(i).

(*2*) The State agency has the option of verifying SSI benefit payments through the State Data Exchange (SDX), the Beneficiary Data Exchange (BENDEX) and/or through verification provided by the household.

(*3*) State agencies may verify other information through SDX and BENDEX but only to the extent permitted by data exchange agreements with SSA. Information verified through SDX or BENDEX shall not be reverified unless it is questionable. Households shall be given the opportunity to provide verification from another source if all necessary information is not available on the SDX or the BENDEX, or if the SDX/BENDEX information is contradictory to other household information.

(B) *Certification period.* (*1*) State agencies shall certify households under these procedures for up to twelve months, according to the standards in § 273.10(f), except for State agencies which must assign the initial certification period to coincide with adjustments to the SSI benefit amount as designated in § 273.10(f)(3)(iii).

(*2*) In cases jointly processed in which the SSI determination results in denial, and the State agency believes that food stamp eligibility or benefit levels may be affected, the State agency shall send the household a notice of expiration advising that the certification period will expire the end of the month following the month in which the notice is sent and that it must reapply if it wishes to continue to participate. The notice shall also explain that its certification period is expiring because of changes in circumstances which may affect food stamp eligibility or benefit levels and that the household may be entitled to an out-of-office interview, in accordance with § 273.2(e)(2).

(C) *Changes in circumstances.* (*1*) Households shall report changes in accordance with the requirements in

§ 273.12. The State agency shall process changes in accordance with § 273.12.

(*2*) Within ten days of learning of the determination of the application for SSI through SDX, the household, advisement from SSA where SSA agrees to do so for households processed under § 273.2(k)(1)(i), or from any other source, the State agency shall take required action in accordance with § 273.12. State agencies are encouraged to monitor the results of the SSI determination through SDX and BENDEX to the extent practical.

(*3*) The State agency shall process adjustments to SSI cases resulting from mass changes, in accordance with provisions of § 273.12(e).

(D) *SSI households applying at the food stamp office.* The State agency shall allow SSI households to submit food stamp applications to local food stamp offices rather than through the SSA if the household chooses. In such cases all verification, including that pertaining to SSI program benefits, shall be provided by the household, by SDX or BENDEX, or obtained by the State agency rather than being provided by the SSA.

(E) *Restoration of lost benefits.* The State agency shall restore to the household benefits which were lost whenever the loss was caused by an error by the State agency or by the Social Security Administration through joint processing. Such an error shall include, but not be limited to, the loss of an applicant's food stamp application after it has been filed with SSA or with a State agency's outstationed worker. Lost benefits shall be restored in accordance with § 273.17.

(2) *Recertification.* (i) The State agency shall complete the application process and approve or deny timely applications for recertification in accordance with § 273.14 of the food stamp regulations. A face-to-face interview shall be waived if requested by a household consisting entirely of SSI participants unable to appoint an authorized representative. The State agency shall provide SSI households with a notice of expiration in accordance with § 273.14(b), except that such notification shall inform households consisting entirely of SSI recipients that they are entitled to a waiver of a face-to-face interview if the household is unable to appoint an authorized representative.

(ii) Households shall be entitled to make a timely application (in accordance with § 273.14(b)(3)) for food stamp recertification at an SSA office under the following conditions.

(A) In SSA offices where § 273.2(k)(1)(i) is in effect, SSA shall accept the application of a pure SSI household and forward the completed application, transmittal form and any available verification to the designated food stamp office. Where SSA accepts and refers the application in such situations, the household shall not be required to appear at a second office interview, although the State agency may conduct an out-of-office interview, if necessary.

(B) In SSA offices where § 273.2(k)(1)(ii) is in effect, the outstationed worker shall accept the application and interview the recipient and the State agency shall process the application according to § 273.14.

(l) *Households applying for or receiving social security benefits.* An applicant for or recipient of social security benefits under title II of the Social Security Act shall be informed at the SSA office of the availability of benefits under the Food Stamp Program and the availability of a Food Stamp Program application at the SSA office. The SSA office is not required to accept applications and conduct interviews for title II applicants/recipients in the manner prescribed in § 273.2(k) for SSI applicants/recipients unless the State agency has chosen to outstation eligibility workers at the SSA office and has an agreement with SSA to allow the processing of such households at SSA offices. In these cases, processing shall be in accordance with § 273.2(k)(1)(ii).

(m) *Households where not all members are applying for or receiving SSI.* An applicant for or recipient of SSI shall be informed at the SSA office of the availability of benefits under the Food Stamp Program and the availability of a food stamp application at the SSA office. The SSA office is not required to accept applications or to conduct interviews for SSI applicants or recipients who are not members of households in which all are SSI applicants or recipients unless the State agency has

chosen to outstation eligibility workers at the SSA office. In this case, processing shall be in accordance with § 273.2(k)(1)(ii).

(n) *Authorized representatives.* Representatives may be authorized to act on behalf of a household in the application process, in obtaining food stamp benefits, and in using food stamp benefits.

(1) *Application processing and reporting.* The State agency shall inform applicants and prospective applicants that indicate that they may have difficulty completing the application process, that a nonhousehold member may be designated as the authorized representative for application processing purposes. The household member or the authorized representative may complete work registration forms for those household members required to register for work. The authorized representative designated for application processing purposes may also carry out household responsibilities during the certification period, such as reporting changes in the household's income or other household circumstances in accordance with § 273.12(a) and § 273.21. Except for those situations in which a drug and alcohol treatment center or other group living arrangement acts as the authorized representative, the State agency must inform the household that the household will be held liable for any overissuance that results from erroneous information given by the authorized representative.

(i) A nonhousehold member may be designated as an authorized representative for the application process provided that the person is an adult who is sufficiently aware of relevant household circumstances and the authorized representative designation has been made in writing by the head of the household, the spouse, or another responsible member of the household. Paragraph (n)(4) of this section contains further restrictions on who can be designated an authorized representative.

(ii) Residents of drug or alcohol treatment centers must apply and be certified through the use of authorized representatives in accordance with § 273.11(e). Residents of group living arrangements have the option to apply and be certified through the use of authorized representatives in accordance with § 273.11(f).

(2) *Obtaining food stamp benefits.* An authorized representative may be designated to obtain benefits. Even if the household is able to obtain benefits, it should be encouraged to name an authorized representative for obtaining benefits in case of illness or other circumstances which might result in an inability to obtain benefits. The name of the authorized representative must be recorded in the household's case record and on the food stamp identification (ID) card, as provided in § 274.10(a)(1) of this chapter. The authorized representative for obtaining benefits may or may not be the same individual designated as an authorized representative for the application process or for meeting reporting requirements during the certification period. The State agency must develop a system by which a household may designate an emergency authorized representative in accordance with § 274.10(c) of this chapter to obtain the household's benefits for a particular month.

(3) *Using benefits.* A household may allow any household member or nonmember to use its ID card and benefits to purchase food or meals, if authorized, for the household. Drug or alcohol treatment centers and group living arrangements which act as authorized representatives for residents of the facilities must use food stamp benefits for food prepared and served to those residents participating in the Food Stamp Program (except when residents leave the facility as provided in § 273.11(e) and (f)).

(4) *Restrictions on designations of authorized representatives.* (i) The State agency must restrict the use of authorized representatives for purposes of application processing and obtaining food stamp benefits as follows:

(A) State agency employees who are involved in the certification or issuance processes and retailers who are authorized to accept food stamp benefits may not act as authorized representatives without the specific written approval of a designated State agency official and only if that official

determines that no one else is available to serve as an authorized representative.

(B) An individual disqualified for an intentional Program violation cannot act as an authorized representative during the disqualification period, unless the State agency has determined that no one else is available to serve as an authorized representative. The State agency must separately determine whether the individual is needed to apply on behalf of the household, or to obtain benefits on behalf of the household.

(C) If a State agency has determined that an authorized representative has knowingly provided false information about household circumstances or has made improper use of coupons, it may disqualify that person from being an authorized representative for up to one year. The State agency must send written notification to the affected household(s) and the authorized representative 30 days prior to the date of disqualification. The notification must specify the reason for the proposed action and the household's right to request a fair hearing. This provision is not applicable in the case of drug and alcoholic treatment centers and those group homes which act as authorized representatives for their residents. However, drug and alcohol treatment centers and the heads of group living arrangements that act as authorized representatives for their residents, and which intentionally misrepresent households circumstances, may be prosecuted under applicable Federal and State statutes for their acts.

(D) Homeless meal providers, as defined in § 271.2 of this chapter, may not act as authorized representatives for homeless food stamp recipients.

(ii) In order to prevent abuse of the program, the State agency may set a limit on the number of households an authorized representative may represent.

(iii) In the event employers, such as those that employ migrant or seasonal farmworkers, are designated as authorized representatives or that a single authorized representative has access to a large number of authorization documents or coupons, the State agency should exercise caution to assure that each household has freely requested the assistance of the authorized representative, the household's circumstances are correctly represented, the household is receiving the correct amount of benefits and that the authorized representative is properly using the benefits.

[Amdt. 132, 43 FR 47889, Oct. 17, 1978]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 273.2, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 273.3 Residency.

(a) A household shall live in the State in which it files an application for participation. The State agency may also require a household to file an application for participation in a specified project area (as defined in § 271.2 of this chapter) or office within the State. No individual may participate as a member of more than one household or in more than one project area, in any month, unless an individual is a resident of a shelter for battered women and children as defined in § 271.2 and was a member of a household containing the person who had abused him or her. Residents of shelters for battered women and children shall be handled in accordance with § 273.11(g). The State agency shall not impose any durational residency requirements. The State agency shall not require an otherwise eligible household to reside in a permanent dwelling or have a fixed mailing address as a condition of eligibility. Nor shall residency require an intent to reside permanently in the State or project area. Persons in a project area solely for vacation purposes shall not be considered residents.

(b) When a household moves within the State, the State agency may require the household to reapply in the new project area or it may transfer the household's casefile to the new project area and continue the household's certification without reapplication. If the State agency chooses to transfer the case, it shall act on changes in household circumstances resulting from the move in accordance with § 273.12(c) or § 273.21. It shall also ensure that duplicate participation does not occur in accordance with § 272.4(f) of this chapter,

and that the transfer of a household's case shall not adversely affect the household.

[46 FR 60166, Dec. 8, 1981, as amended by Amdt. 211, 47 FR 53317, Nov. 26, 1982; Amdt. 269, 51 FR 10785, Mar. 28, 1986; Amdt. 274, 51 FR 18750, May 21, 1986; Amdt. 364, 61 FR 54317, Oct. 17, 1996]

§ 273.4 Citizenship and alien status.

(a) *Household members meeting citizenship or alien status requirements.* No person is eligible to participate in the Program unless that person is:

(1) A U.S. citizen[1];

(2) A U.S. non-citizen national[1]

(3) An individual who is:

(i) An American Indian born in Canada who possesses at least 50 per centum of blood of the American Indian race to whom the provisions of section 289 of the Immigration and Nationality Act (INA) (8 U.S.C. 1359) apply; or

(ii) A member of an Indian tribe as defined in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)) which is recognized as eligible for the special programs and services provided by the U.S. to Indians because of their status as Indians;

(4) An individual who is:

(i) Lawfully residing in the U.S. and was a member of a Hmong or Highland Laotian tribe at the time that the tribe rendered assistance to U.S. personnel by taking part in a military or rescue operation during the Vietnam era beginning August 5, 1964, and ending May 7, 1975;

(ii) The spouse, or surviving spouse of such Hmong or Highland Laotian who is deceased, or

(iii) An unmarried dependent child of such Hmong or Highland Laotian who is under the age of 18 or if a full-time student under the age of 22; an unmarried child under the age of 18 or if a full time student under the age of 22 of such a deceased Hmong or Highland Laotian provided the child was dependent upon him or her at the time of his or her death; or an unmarried disabled child age 18 or older if the child was disabled and dependent on the person prior to the child's 18th birthday. For purposes of this paragraph (a)(4)(iii), child means the legally adopted or biological child of the person described in paragraph (a)(4)(i) of this section, or

(5) An individual who is *both* a qualified alien as defined in paragraph (a)(5)(i) of this section and an eligible alien as defined in paragraph (a)(5)(ii) of this section.

(i) A qualified alien is:

(A) An alien who is lawfully admitted for permanent residence under the INA;

(B) An alien who is granted asylum under section 208 of the INA;

(C) A refugee who is admitted to the United States under section 207 of the INA;

(D) An alien who is paroled into the U.S. under section 212(d)(5) of the INA for a period of at least 1 year;

(E) An alien whose deportation is being withheld under section 243(h) of the INA as in effect prior to April 1, 1997, or whose removal is withheld under section 241(b)(3) of the INA;

(F) an alien who is granted conditional entry pursuant to section 203(a)(7) of the INA as in effect prior to April 1, 1980;

(G) an alien who has been battered or subjected to extreme cruelty in the U.S. by a spouse or a parent or by a member of the spouse or parent's family residing in the same household as the alien at the time of the abuse, an alien whose child has been battered or subjected to battery or cruelty, or an alien child whose parent has been battered[2]; or

(H) an alien who is a Cuban or Haitian entrant, as defined in section 501(e) of the Refugee Education Assistance Act of 1980.

(ii) A qualified alien, as defined in paragraph (a)(5)(i) of this section, must also be at least one of the following to be eligible to receive food stamps:

(A) An alien lawfully admitted for permanent residence under the INA who has 40 qualifying quarters as determined under title II of the Social Security Act, including qualifying quarters of work not covered by Title II of the Social Security Act, based on

[1] For guidance, see the DOJ Interim Guidance published November 17, 1997 (62 FR 61344).

[2] For guidance, see Exhibit B to Attachment 5 of the DOJ Interim Guidance published on November 17, 1997 (62 FR 61344).

the sum of: quarters the alien worked; quarters credited from the work of a parent of the alien before the alien became 18 (including quarters worked before the alien was born or adopted); and quarters credited from the work of a spouse of the alien during their marriage if they are still married or the spouse is deceased.

(*1*) A spouse may not get credit for quarters of a spouse when the couple divorces prior to a determination of food stamp eligibility. However, if the State agency determines eligibility of an alien based on the quarters of coverage of the spouse, and then the couple divorces, the alien's eligibility continues until the next recertification. At that time, the State agency must determine the alien's eligibility without crediting the alien with the former spouse's quarters of coverage.

(*2*) After December 31, 1996, a quarter in which the alien actually received any Federal means-tested public benefit, as defined by the agency providing the benefit, or actually received food stamps is not creditable toward the 40-quarter total. Likewise, a parent's or spouse's quarter is not creditable if the parent or spouse actually received any Federal means-tested public benefit or actually received food stamps in that quarter. The State agency must evaluate quarters of coverage and receipt of Federal means-tested public benefits on a calendar year basis. The State agency must first determine the number of quarters creditable in a calendar year, then identify those quarters in which the alien (or the parent(s) or spouse of the alien) received Federal means-tested public benefits and then remove those quarters from the number of quarters of coverage earned or credited to the alien in that calendar year. However, if the alien earns the 40th quarter of coverage prior to applying for food stamps or any other Federal means-tested public benefit in that same quarter, the State agency must allow that quarter toward the 40 qualifying quarters total.

(B) An alien admitted as a refugee under section 207 of the INA. Eligibility is limited to 7 years from the date of the alien's entry into the U.S.

(C) An alien granted asylum under section 208 of the INA. Eligibility is limited to 7 years from the date asylum was granted.

(D) An alien whose deportation is withheld under section 243(h) of the INA as in effect prior to April 1, 1997, or whose removal is withheld under section 241(b)(3) or the INA. Eligibility is limited to 7 years from the date deportation or removal was withheld.

(E) An alien granted status as a Cuban or Haitian entrant (as defined in section 501(e) of the Refugee Education Assistance Act of 1980). Eligibility is limited to 7 years from the date the status as a Cuban or Haitian entrant was granted.

(F) An Amerasian admitted pursuant to section 584 of Public Law 100–202, as amended by Public Law 100–461. Eligibility is limited to 7 years from the date admitted as an Amerasian.

(G) An alien with one of the following military connections:

(*1*) A veteran who was honorably discharged for reasons other than alien status, who fulfills the minimum active-duty service requirements of 38 U.S.C. 5303A(d), including an individual who died in active military, naval or air service. The definition of veteran includes an individual who served before July 1, 1946, in the organized military forces of the Government of the Commonwealth of the Philippines while such forces were in the service of the Armed Forces of the U.S. or in the Philippine Scouts, as described in 38 U.S.C. 107;

(*2*) An individual on active duty in the Armed Forces of the U.S. (other than for training); or

(*3*) The spouse and unmarried dependent children of a person described in paragraphs (a)(5)(ii)(G)(*1*) or (G)(*2*) of this section, including the spouse of a deceased veteran, provided the marriage fulfilled the requirements of 38 U.S.C. 1304, and the spouse has not remarried. An unmarried dependent child for purposes of this paragraph (a)(5)(ii)(G)(*3*) is: a child who is under the age of 18 or, if a full-time student, under the age of 22; such unmarried dependent child of a deceased veteran provided such child was dependent upon the veteran at the time of the veteran's death; or an unmarried disabled child age 18 or older if the child

was disabled and dependent on the veteran prior to the child's 18th birthday. For purposes of this paragraph (a)(5)(ii)(G)(*3*), child means the legally adopted or biological child of the person described in paragraph (a)(5)(ii)(G)(*1*) or (G)(*2*) of this section.

(H) An individual who on August 22, 1996, was lawfully residing in the U.S., and is now receiving benefits or assistance for blindness or disability (as specified in § 271.2 of this chapter).

(I) An individual who on August 22, 1996, was lawfully residing in the U.S., and was born on or before August 22, 1931; or

(J) An individual who on August 22, 1996, was lawfully residing in the U.S. and is now under 18 years of age.

(iii) Each category of eligible alien status stands alone for purposes of determining eligibility. Subsequent adjustment to a more limited status does not override eligibility based on an earlier less rigorous status. Likewise, if eligibility expires under one eligible status, the State agency must determine if eligibility exists under another status.

(6) For purposes of determining eligible alien status in accordance with paragraphs (a)(4) and (a)(5)(ii)(H) through (a)(5)(ii)(J) of this section ''lawfully residing in the U.S.'' means that the alien is lawfully present as defined at 8 CFR 103.12(a).

(b) *Reporting illegal aliens.* (1) The State agency must inform the local INS office immediately whenever personnel responsible for the certification or recertification of households determine that any member of a household is ineligible to receive food stamps because the member is present in the U.S. in violation of the INA. The State agency may meet this requirement by conforming with the Interagency Notice providing guidance for compliance with PRWORA section 404 published on September 28, 2000 (65 FR 58301).

(2) When a household indicates inability or unwillingness to provide documentation of alien status for any household member, the State agency must classify that member as an ineligible alien. When a person indicates inability or unwillingness to provide documentation of alien status, the State agency must classify that person as an ineligible alien. In such cases the State agency must not continue efforts to obtain that documentation.

(c) *Households containing sponsored alien members*—(1) *Definition.* A sponsored alien is an alien for whom a person (the sponsor) has executed an affidavit of support (INS Form I–864 or I–864A) on behalf of the alien pursuant to section 213A of the INA.

(2) *Deeming of sponsor's income and resources.* For purposes of this paragraph (c)(2), only in the event a sponsored alien is an eligible alien in accordance with paragraph (a) of this section will the State agency consider available to the household the income and resources of the sponsor and spouse. For purposes of determining the eligibility and benefit level of a household of which an eligible sponsored alien is a member, the State agency must deem the income and resources of sponsor and the sponsor's spouse, if he or she has executed INS Form I–864 or I–864A, as the unearned income and resources of the sponsored alien. The State agency must deem the sponsor's income and resources until the alien gains U. S. citizenship, has worked or can receive credit for 40 qualifying quarters of work as described in paragraph (a)(5)(ii)(A) of this section, or the sponsor dies.

(i) The monthly income of the sponsor and sponsor's spouse (if he or she has executed INS Form I–864 or I–864A) deemed as that of the eligible sponsored alien must be the total monthly earned and unearned income, as defined in § 273.9(b) with the exclusions provided in § 273.9(c) of the sponsor and sponsor's spouse at the time the household containing the sponsored alien member applies or is recertified for participation, reduced by:

(A) A 20 percent earned income amount for that portion of the income determined as earned income of the sponsor and the sponsor's spouse; and

(B) An amount equal to the Program's monthly gross income eligibility limit for a household equal in size to the sponsor, the sponsor's spouse, and any other person who is claimed or could be claimed by the sponsor or the sponsor's spouse as a dependent for Federal income tax purposes.

(ii) If the alien has already reported gross income information on his or her sponsor in compliance with the sponsored alien rules of another State agency administered assistance program, the State agency may use that income amount for Food Stamp Program deeming purposes. However, the State agency must limit allowable reductions to the total gross income of the sponsor and the sponsor's spouse prior to attributing an income amount to the alien to amounts specified in paragraphs (c)(2)(i)(A) and (c)(2)(i)(B) of this section.

(iii) The State agency must consider as income to the alien any money the sponsor or the sponsor's spouse pays to the eligible sponsored alien, but only to the extent that the money exceeds the amount deemed to the eligible sponsored alien in accordance with paragraph (c)(2)(i) of this section.

(iv) The State agency must deem as available to the eligible sponsored alien the total amount of the resources of the sponsor and sponsor's spouse as determined in accordance with § 273.8, reduced by $1,500.

(v) If a sponsored alien can demonstrate to the State agency's satisfaction that his or her sponsor is the sponsor of other aliens, the State agency must divide the income and resources deemed under the provisions of paragraphs (c)(2)(i) and (c)(2)(iii) of this section by the number of such sponsored aliens.

(3) *Exempt aliens.* The provisions of paragraph (c)(2) of this section do not apply to:

(i) An alien who is a member of his or her sponsor's food stamp household;

(ii) An alien who is sponsored by an organization or group as opposed to an individual;

(iii) An alien who is not required to have a sponsor under the Immigration and Nationality Act, such as a refugee, a parolee, an asylee, or a Cuban or Haitian entrant;

(iv) An indigent alien that the State agency has determined is unable to obtain food and shelter taking into account the alien's own income plus any cash, food, housing, or other assistance provided by other individuals, including the sponsor(s). For purposes of this paragraph (c)(3)(iv), the phrase ''is unable to obtain food and shelter'' means that the sum of the eligible sponsored alien's household's own income, the cash contributions of the sponsor and others, and the value of any in-kind assistance the sponsor and others provide, does not exceed 130 percent of the poverty income guideline for the household's size. The State agency must determine the amount of income and other assistance provided in the month of application. If the alien is indigent, the only amount that the State agency must deem to such an alien will be the amount actually provided for a period beginning on the date of such determination and ending 12 months after such date. Each indigence determination is renewable for additional 12-month periods. The State agency must notify the Attorney General of each such determination, including the names of the sponsor and the sponsored alien involved;

(v) A battered alien spouse, alien parent of a battered child, or child of a battered alien, for 12 months after the State agency determines that the battering is substantially connected to the need for benefits, and the battered individual does not live with the batterer.[3] After 12 months, the State agency must not deem the batterer's income and resources if the battery is recognized by a court or the INS and has a substantial connection to the need for benefits, and the alien does not live with the batterer.

(4) *Eligible sponsored alien's responsibilities.* During the period the alien is subject to deeming, the eligible sponsored alien is responsible for obtaining the cooperation of the sponsor and for providing the State agency at the time of application and at the time of recertification with the information and documentation necessary to calculate deemed income and resources in accordance with paragraphs (c)(2)(i) through (c)(2)(v) of this section. The eligible sponsored alien is responsible for providing the names and other identifying factors of other aliens for whom the alien's sponsor has signed an affidavit of support. The State agency

[3] For guidance, see Exhibit B to Attachment 5 of the DOJ Interim Guidance published November 17, 1997 (62 FR 61344).

must attribute the entire amount of income and resources to the applicant eligible sponsored alien until he or she provides the information specified under this paragraph (c)(4). The eligible sponsored alien is also responsible for reporting the required information about the sponsor and sponsor's spouse should the alien obtain a different sponsor during the certification period and for reporting a change in income should the sponsor or the sponsor's spouse change or lose employment or die during the certification period. The State agency must handle such changes in accordance with the timeliness standards described in § 273.12 or § 273.21, as appropriate.

(5) *Awaiting verification*. Until the alien provides information or verification necessary to carry out the provisions of paragraph (c)(2) of this section, the sponsored alien is ineligible. The State agency must determine the eligibility of any remaining household members. The State agency must consider available to the remaining household members the income and resources of the ineligible alien (excluding the deemed income and resources of the alien's sponsor and sponsor's spouse) in determining the eligibility and benefit level of the remaining household members in accordance with § 273.11(c). If the sponsored alien refuses to cooperate in providing information or verification, other adult members of the alien's household are responsible for providing the information or verification required in accordance with the provisions of § 273.2(d). If the State agency subsequently receives information or verification, it must act on the information as a reported change in household membership in accordance with the timeliness standards in § 273.12 or § 273.21, as appropriate. If the same sponsor is responsible for the entire household, the entire household is ineligible until such time as the household provides the needed sponsor information or verification. The State agency must assist aliens in obtaining verification in accordance with the provisions of § 273.2(f)(5).

(6) *Demands for restitution*. The State agency must exclude any sponsor who is participating in the Program from any demand made under 8 CFR 213a.4(a) for the value of food stamp benefits issued to an eligible sponsored alien he or she sponsors.

[Amdt. 388, 65 FR 70200, Nov. 21, 2000]

§ 273.5 Students.

(a) *Applicability*. An individual who is enrolled at least half-time in an institution of higher education shall be ineligible to participate in the Food Stamp Program unless the individual qualifies for one of the exemptions contained in paragraph (b) of this section. An individual is considered to be enrolled in an institution of higher education if the individual is enrolled in a business, technical, trade, or vocational school that normally requires a high school diploma or equivalency certificate for enrollment in the curriculum or if the individual is enrolled in a regular curriculum at a college or university that offers degree programs regardless of whether a high school diploma is required.

(b) *Student Exemptions*. To be eligible for the program, a student as defined in paragraph (a) of the section must meet at least one of the following criteria.

(1) Be age 17 or younger or age 50 or older;

(2) Be physically or mentally unfit;

(3) Be receiving Temporary Assistance for Needy Families under Title IV of the Social Security Act;

(4) Be enrolled as a result of participation in the Job Opportunities and Basic Skills program under Title IV of the Social Security Act or its successor program;

(5) Be employed for a minimum of 20 hours per week and be paid for such employment or, if self-employed, be employed for a minimum of 20 hours per week and receiving weekly earnings at least equal to the Federal minimum wage multiplied by 20 hours;

(6) Be participating in a State or federally financed work study program during the regular school year.

(i) To qualify under this provision, the student must be approved for work study at the time of application for food stamps, the work study must be approved for the school term, and the student must anticipate actually working during that time. The exemption shall begin with the month in which the school term begins or the month

work study is approved, whichever is later. Once begun, the exemption shall continue until the end of the month in which the school term ends, or it becomes known that the student has refused an assignment.

(ii) The exemption shall not continue between terms when there is a break of a full month or longer unless the student is participating in work study during the break.

(7) Be participating in an on-the-job training program. A person is considered to be participating in an on-the-job training program only during the period of time the person is being trained by the employer;

(8) Be responsible for the care of a dependent household member under the age of 6;

(9) Be responsible for the care of a dependent household member who has reached the age of 6 but is under age 12 when the State agency has determined that adequate child care is not available to enable the student to attend class and comply with the work requirements of paragraph (b)(5) or (b)(6) of this section;

(10) Be a single parent enrolled in an institution of higher education on a full-time basis (as determined by the institution) and be responsible for the care of a dependent child under age 12.

(i) This provision applies in those situations where only one natural, adoptive or stepparent (regardless of marital status) is in the same food stamp household as the child.

(ii) If no natural, adoptive or stepparent is in the same food stamp household as the child, another full-time student in the same food stamp household as the child may qualify for eligible student status under this provision if he or she has parental control over the child and is not living with his or her spouse.

(11) Be assigned to or placed in an institution of higher education through or in compliance with the requirements of one of the programs identified in paragraphs (b)(11)(i) through (b)(11)(iv) of this section. Self-initiated placements during the period of time the person is enrolled in one of these employment and training programs shall be considered to be in compliance with the requirements of the employment and training program in which the person is enrolled provided that the program has a component for enrollment in an institution of higher education and that program accepts the placement. Persons who voluntarily participate in one of these employment and training programs and are placed in an institution of higher education through or in compliance with the requirements of the program shall also qualify for the exemption. The programs are:

(i) A program under the Job Training Partnership Act of 1974 (29 U.S.C. 1501, et seq.);

(ii) An employment and training program under § 273.7;

(iii) A program under section 236 of the Trade Act of 1974 (19 U.S.C. 2296); or

(iv) An employment and training program for low-income households that is operated by a State or local government where one or more of the components of such program is at least equivalent to an acceptable food stamp employment and training program component as specified in § 273.7(f)(1). Using the criteria in § 273.7(f)(1), State agencies shall make the determinations as to whether or not the programs qualify.

(c) The enrollment status of a student shall begin on the first day of the school term of the institution of higher education. Such enrollment shall be deemed to continue through normal periods of class attendance, vacation and recess, unless the student graduates, is suspended or expelled, drops out, or does not intend to register for the next normal school term (excluding summer school).

(d) The income and resources of an ineligible student shall be handled as outlined in § 273.11(d).

[46 FR 43025, Aug. 25, 1981, as amended by Amdt. 235, 47 FR 55908, Dec. 14, 1982; Amdt. 269, 51 FR 10785, Mar. 28, 1986; Amdt. 274, 51 FR 18750, May 21, 1986; Amdt. 277, 51 FR 30048, Aug. 22, 1986; Amdt. 370, 60 FR 48869, Sept. 21, 1995]

§ 273.6 Social security numbers.

(a) *Requirements for participation.* The State agency shall require that a household participating or applying for participation in the Food Stamp Program provide the State agency with the social security number (SSN) of

each household member or apply for one before certification. If individuals have more than one number, all numbers shall be required. The State agency shall explain to applicants and participants that refusal or failure without good cause to provide an SSN will result in disqualification of the individual for whom an SSN is not obtained.

(b) *Obtaining SSNs for food stamp household members.* (1) For those individuals who provide SSNs prior to certification, recertification or at any office contact, the State agency shall record the SSN and verify it in accordance with § 273.2(f)(1)(v).

(2) For those individuals who do not have an SSN, the State agency shall:

(i) If an enumeration agreement with SSA exists, complete the application for an SSN, Form SS–5. To complete Form SS–5, the State agency must document the verification of identity, age, and citizenship or alien status as required by SSA and forward the SS–5 to SSA.

(ii) If no enumeration agreement exists, an individual must apply at the SSA, and the State agency shall arrange with SSA to be notified directly of the SSN when it is issued. The State agency shall inform the household where to apply and what information will be needed, including any which may be needed for SSA to notify the State agency of the SSN. The State agency shall advise the household member that proof of application from SSA will be required prior to certification. SSA normally uses the Receipt of Application for a Social Security Number, Form SSA–5028, as evidence that an individual has applied for an SSN. State agencies may also use their own documents for this purpose.

(3) The State agency shall follow the procedures described in paragraphs (b)(2) (i) and (ii) of this section for individuals who do not know if they have an SSN, or are unable to find their SSN.

(4) If the household is unable to provide proof of application for an SSN for a newborn, the household must provide the SSN or proof of application at its next recertification or within 6 months following the month the baby is born, whichever is later. If the household is unable to provide an SSN or proof of application for an SSN at its next recertification within 6 months following the baby's birth, the State agency shall determine if the good cause provisions of paragraph (d) of this section are applicable.

(c) *Failure to comply.* If the State agency determines that a household member has refused or failed without good cause to provide or apply for an SSN, then that individual shall be ineligible to participate in the Food Stamp Program. The disqualification applies to the individual for whom the SSN is not provided and not to the entire household. The earned or unearned income and resources of an individual disqualified from the household for failure to comply with this requirement shall be counted as household income and resources to the extent specified in § 273.11(c) of these regulations.

(d) *Determining good cause.* In determining if good cause exists for failure to comply with the requirement to apply for or provide the State agency with an SSN, the State agency shall consider information from the household member, SSA and the State agency (especially if the State agency was designated to send the SS–5 to SSA and either did not process the SS–5 or did not process it in a timely manner). Documentary evidence or collateral information that the household member has applied for an SSN or made every effort to supply SSA with the necessary information to complete an application for an SSN shall be considered good cause for not complying timely with this requirement. Good cause does not include delays due to illness, lack of transportation or temporary absences, because SSA makes provisions for mail-in applications in lieu of applying in person. If the household member can show good cause why an application for a SSN has not been completed in a timely manner, that person shall be allowed to participate for one month in addition to the month of application. If the household member applying for an SSN has been unable to obtain the documents required by SSN, the State agency caseworker should make every effort to assist the individual in obtaining these documents. Good cause for failure to apply

must be shown monthly in order for such a household member to continue to participate. Once an application has been filed, the State agency shall permit the member to continue to participate pending notification of the State agency of the household member's SSN.

(e) *Ending disqualification*. The household member(s) disqualified may become eligible upon providing the State agency with an SSN.

(f) *Use of SSNs*. The State agency is authorized to use SSNs in the administration of the Food Stamp Program. To the extent determined necessary by the Secretary and the Secretary of Health and Human Services, State agencies shall have access to information regarding individual Food Stamp Program applicants and participants who receive benefits under title XVI of the Social Security Act to determine such a household's eligibility to receive assistance and the amount of assistance, or to verify information related to the benefit of these households. State agencies shall use the State Data Exchange (SDX) to the maximum extent possible. The State agency should also use the SSNs to prevent duplicate participation, to facilitate mass changes in Federal benefits as described in § 273.12(e)(3) and to determine the accuracy and/or reliability of information given by households. In particular, SSNs shall be used by the State agency to request and exchange information on individuals through the IEVS as specified in § 272.8.

(g) *Entry of SSNs into automated data bases*. State agencies with automated food stamp data bases containing household information shall enter all SSNs obtained in accordance with § 273.6(a) into these files.

[Amdt. 264, 51 FR 7206, Feb. 28, 1986; Amdt. 364, 61 FR 54317, Oct. 17, 1996]≤

§ 273.7 Work requirements.

(a) *Persons required to register*. Each household member who is not exempt by paragraph (b)(1) of this section shall be registered for employment by the State agency at the time of application, and once every twelve months after initial registration, as a condition of eligibility. The registration form need not be completed by the member required to register.

(b) *Exemptions from work registration*. (1) The following persons are exempt from the work registration requirement:

(i) A person younger than 16 years of age or a person 60 years of age or older. If a child has its 16th birthday within a certification period, the child shall fulfill the work registration requirement as part of the next scheduled recertification process, unless the child qualifies for another exemption. A person age sixteen or seventeen who is not a head of a household or who is attending school, or enrolled in an employment training program on at least a half-time-basis is exempt.

(ii) A person physically or mentally unfit for employment. If mental or physical unfitness is claimed and the unfitness is not evident to the State agency, verification may be required. Appropriate verification may consist of receipt of temporary or permanent disability benefits issued by governmental or private sources, or of a statement from a physician or licensed or certified psychologist.

(iii) A household member subject to and complying with any work requirement under title IV of the Social Security Act, including WIN registration. If the exemption claimed is questionable, the State agency shall be responsible for verifying the exemption.

(iv) A parent or other household member who is responsible for the care of a dependent child under 6 or an incapacitated person. If the child has its 6th birthday within a certification period, the individual responsible for the care of the child shall fulfill the work registration requirement as part of the next scheduled recertification process, unless the individual qualifies for another exemption.

(v) A person is in receipt of unemployment compensation. A person who has applied for, but has not yet begun to receive, unemployment compensation shall also be exempt if that person was required to register for work with the SESA as part of the unemployment compensation application process. If the exemption claimed is questionable, the State agency shall be responsible

for verifying the exemption with the appropriate office of the SESA.

(vi) A regular participant in a drug addiction or alcoholic treatment and rehabilitation program.

(vii) A person who is employed or self-employed and working a minimum of 30 hours weekly or receiving weekly earnings at least equal to the Federal minimum wage multiplied by 30 hours. This shall include migrant and seasonal farmworkers who are under contract or similar agreement with an employer or crew chief to begin employment within 30 days (although this shall not prevent individuals from seeking additional services from SESA). For work registration purposes, a person residing in certain designated areas of Alaska, as specified in §274.10(a)(4)(iii), who subsistence hunts and/or fishes a minimum of 30 hours weekly as determined by averaging such activity over the certification period shall be considered exempt as self-employed.

(viii) A student enrolled at least half time in any recognized school, training program, or institution of higher education; provided that students enrolled at least half time in an institution of higher education have met the eligibility conditions in §273.5 of this part. A student enrolled in a school, training program or institution of higher education shall remain exempt during normal periods of class attendance, vacation and recess, unless the student graduates, is suspended or expelled, drops out, or does not intend to register for the next normal school term (excluding summer). Persons who are not enrolled at least half time or who experience a break in enrollment status due to graduation, expulsion, or suspension, or who drop out or otherwise do not intend to return to school, shall not be considered students for the purpose of qualifying for this exemption.

(2)(i) Persons losing exemption status due to any changes in circumstances that are subject to the reporting requirements of §273.12 (such as loss of employment that also results in a loss of income of more than $25 a month, or departure from the household of the sole dependent child for whom an otherwise nonexempt household member was caring) shall register for employment when the change is reported. If the State agency does not use a work registration form, it shall annotate the change to the member's exemption status. If a work registration form is used, the State agency shall be responsible for providing the participant with a work registration form when the change is reported. Participants shall be responsible for returning the form to the State agency within 10 calendar days from the date the form was handed to the household member reporting the change in person, or the date the State agency mailed the form. If the participant fails to return the form, the State agency shall issue a notice of adverse action stating that the participant or, if the individual is the head of household, the household is being terminated and why, but that the termination can be avoided by returning the form.

(ii) Those persons who lose their exemption due to a change in circumstances that is not subject to the reporting requirements of §273.12 shall register for employment at their household's next recertification.

(c) *State agency responsibilities.* (1) The State shall register for work each household member not exempted by the provisions of §273.7(b). Upon reaching a determination that an applicant or a member of the applicant's household is required to register, the State agency shall explain to the applicant the pertinent work requirements, the rights and responsibilities of work registered household members, and the consequences of failure to comply. The State agency shall provide a written statement of the above to each work registrant in the household. A notice shall also be provided when a previously exempt member or new household member becomes subject to a work requirement, and at recertification. The State agency shall permit the applicant to complete a record or form for each household member required to register for employment in accordance with paragraph (a) of this section. Household members are considered to have registered when an identifiable work registration form is submitted to the State agency or when

the registration is otherwise annotated or recorded by the State.

(2) The State agency shall be responsible for screening each work registrant to determine whether or not it is appropriate, based on the State's criteria, to refer the individual to an employment and training program, and if appropriate, referring the individual to an employment and training program component. Upon entry into each component the registrant applicant or volunteer, should be told, either orally or in writing, the requirements of the component, what will constitute noncompliance and the sanctions for noncompliance. The State agency shall initiate conciliation procedures, pursuant to paragraph (g)(1)(ii) of this section, upon determining that an individual has not complied with E&T requirements. The State agency shall issue a notice of adverse action (Form FNS–441 or equivalent State-designed form) to the individual or household, as appropriate, no later than the last day of the conciliation period. If the notice of adverse action was issued prior to the end of the conciliation period and the State agency verifies that compliance was achieved by the end of the conciliation period, the notice of adverse action may be cancelled. If States wish to use different intake and sanction systems which are compatible with title IV–A work programs such systems shall be proposed in the State agency's plan, and subject to the Secretary's approval.

(3) The State agency shall design and operate an employment and training program which may consist of one or more or a combination of employment and/or training components as described in § 273.7(f). The State agency must ensure that it is notified by the agency or agencies operating its E&T components within ten days if an E&T mandatory participant fails to comply with E&T requirements.

(4) In accordance with 7 CFR 272.2(e)(9), each State agency must prepare and submit an Employment and Training plan to its appropriate FNS Regional Office and to the FNS National Office. The plan shall be available for public inspection at the State agency headquarters. In its plan, the State shall detail the following:

(i) The nature of the employment and training components the State plans to offer and the reasons for such components, including cost information. The methodology for State reimbursement for education components shall be specifically addressed;

(ii) An operating budget for the Federal fiscal year with an estimate of the cost of operation for one full year. Any State which will request 50 percent federal reimbursement for State E & T administrative costs, other than for participant reimbursements, shall include in its plan, or amendments to its plan, an itemized list of all activities and costs for which those Federal funds will be claimed. Costs in excess of the federal grant shall be allowed only with the prior approval of the Department and must be adequately documented to assure that they are necessary, reasonable and properly allocated. A State agency which intends to spend the supplemental E&T grant allocation for which it is eligible in a fiscal year in accordance with paragraph (d)(1)(i)(B) of this section must declare its intention to maintain its level of expenditures for E&T and workfare at a level not less than the level of such expenditures in FY 1996.

(iii) The categories and types of individuals the State seeks to exempt from E&T participation, the basis used to determine these exemptions, including any cost information and the estimated percentage of work registrants the State plans to exempt;

(iv) The characteristics of the population the State does intend to place;

(v) The estimated number of volunteers the State expects to place in its employment and training program;

(vi) The geographic areas covered and not covered by the plan and why, and the type and location of services to be offered;

(vii) The method the State will use to count all work registrants the first month of each fiscal year;

(viii) The method the State agency uses to report work registrant information and prevent work registrants from being reported twice within a Federal fiscal year on the quarterly FNS Form 583. This method must specify how work registrants are excluded if the State agency work register all food

stamp applicants (i.e., universal work registration) when the applicants are exempt from work registration as specified under paragraph (b) of this section *or* if the State agency work registers nonexempt participants whenever a new application is submitted and the participants may have already been registered within the past twelve months as specified under paragraph (a) of this section. If the method the State agency uses is questionable or unacceptable, FNS reserves the right to adjust a State agency's work registrant count. FNS shall advise a State agency of how the adjusted figure was determined and shall allow the State agency 30 days to submit another method for consideration by FNS.

(ix) If a State plans to offer components which are significantly more intensive than the minimum level of effort specified in §273.7(f), or plans to concentrate its efforts on persons who may be difficult to place, due to employment obstacles, it shall be made clear in the State's employment and training plan. If, because of the nature of its components, or the population served, a State believes that an adjustment to the performance standard established in §273.7(o) is appropriate, and wishes to request a revision in the standard, it shall specify the percentage of its work registered population it intends to serve, and provide the Department with detailed information about why it has chosen to operate such a component or components, or chosen to focus on certain persons, the intended benefits to be gained by the recipient and Federal and State governments, and the number of persons it plans to serve in the component. The information provided to the Department will be used in determining whether the State's performance standard will be affected;

(x) The organizational relationship between the units responsible for certification and the units operating the employment and training components. FNS is specifically concerned that the lines of communication be efficient and that noncompliance be reported to the certification unit within ten working days after such noncompliance is determined;

(xi) The relationship between the State agency and other organizations it plans to coordinate with for the provision of services. Copies of contracts shall be available for inspection;

(xii) The availability, if appropriate, of employment and training programs to Indians living on reservations.

(xiii) Beginning with the Fiscal Year 1992 State E&T plan, the procedures developed by the State agency under paragraph (g)(1)(ii) of this section for conciliation. To the extent possible, State agencies should design conciliation procedures for the E&T program that will be compatible with the conciliation process that State agencies that administer the Temporary Assistance for Needy Families (TANF) Program will establish for the Job Opportunities and Basic Skills Training (JOBS) Program as mandated by the Family Support Act of 1988.

(xiv) The Statewide limit(s) for dependent care reimbursements as established by the State agency. The limit(s) shall not be less than the dependent care deduction amounts specified under §273.9(d)(4).

(xv) The local market rates of dependent care providers in the State. State agencies shall adopt the local market rates already established by programs under section 402(g) of the Social Security Act. State agencies shall establish separate local market rates for categories of care relevant to food stamp E&T which are not addressed under section 402(g) of the Social Security Act and include such rates in the E&T State Plan.

(5) Plans shall be submitted biennially, 45 days before the start of the fiscal year, beginning in FY 1990. States must submit plan revisions to the appropriate FNS regional office for approval if they plan to alter the nature or location of their components or the number or characteristics of persons served. The proposed changes shall be submitted for approval at least 30 days prior to planned implementation.

(6) The State shall submit quarterly reports to FNS no later than 45 days after the end of each Federal fiscal quarter containing monthly figures for the number of:

(i) Participants newly work registered;

(ii) Work registrants exempted by the State from participation in an employment and training program;

(iii) Participants who volunteer for and commence participation in an approved E&T component;

(iv) E&T mandatory participants who commence an approved E&T component including Food Stamp Program applicants in States which operate a component for applicants;

(v) Work registrants sent a Notice of Adverse Action for failure to comply with E&T requirements, and the number of applicants who were denied food stamp certification or recertification for failure to comply with an E&T component.

(vi) The number of filled and offered slots created under a workfare program as described in § 273.22 or a comparable program that are intended to serve recipients subject to the work requirement at section 6(o) of the Food Stamp Act. This information must be broken out to show the number of slots that were created in areas of the State that have received a waiver in accordance with section 6(o)(4) of the Food Stamp Act and in non-waived areas;

(vii) The number of filled and offered slots created under a 20-hour-a-week work program as described in paragraph (d)(1)(ii)(A) of this section that are intended to serve recipients subject to the work requirement at section 6(o) of the Food Stamp Act. This information must be broken out to show the number of slots that were created in areas of the State that have received a waiver in accordance with section 6(o)(4) of the Food Stamp Act and in non-waived areas;

(7) States shall submit annually, on their first quarterly report the number of work registered persons in that State as in October of the new fiscal year.

(8) States shall submit annually, on their final quarterly report the following information:

(i) The number of Food Stamp Program work registrants who were exempted as part of a category of persons during the course of the year separated by the specific reasons for the exemptions.

(ii) The number of food stamp participants (E&T mandatory and volunteers) placed in each E&T component offered by the State agency.

(9) Additional information may be required of individual State agencies on an as needed basis depending on the contents of the State's plan regarding the type of components offered and the characteristics of persons served.

(10) States must ensure, to the maximum extent practicable, that employment and training programs are provided for Indians living on reservations.

(11) If a benefit overissuance is discovered for a month or months in which a mandatory E & T participant has already fulfilled a work component requirement, the State agency shall follow the procedure specified in § 273.22(f)(9) for a workfare overissuance.

(d) *Federal financial participation*—(1) *Employment and training grants.*(i) *Allocation of grants.* Each State agency will receive an E&T program grant for each fiscal year to operate an E&T program. The grant will consist of a base amount that requires no State matching and a supplemental amount which will be available only to those State agencies that elect to meet their maintenance of effort requirements as described in paragraph (d)(1)(iii) of this section.

(A) In determining each State agency's base 100 percent Federal E&T grant amount for FYs 1998 through 2002, FNS will apply the percentage determined in accordance with paragraph (d)(1)(i)(C) of this section to the total amount of 100 percent Federal E&T grant provided under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 for each fiscal year.

(B) In determining each State agency's supplemental 100 percent Federal E&T grant amount for FYs 1998 through 2002, FNS will apply the percentage determined in accordance with paragraph (d)(1)(i)(C) of this section to the total amount of 100 percent Federal E&T grant provided under the Balanced Budget Act of 1997 for each fiscal year.

(C) Except as otherwise provided in paragraph (d)(1)(i)(F) of this section, effective in FY 1998, Federal funding for E&T grants, including both the base and supplemental amounts, shall

be allocated on the basis of food stamp recipients in each State who are not eligible for an exception under section 6(o)(3) of the Food Stamp Act as a percentage of such recipients nationwide. Effective in FY 1999, Federal funding for E&T grants shall be allocated on the basis of food stamp recipients in each State who are not eligible for an exception under section 6(o)(3) of the Food Stamp Act and who either do not reside in an area subject to a waiver granted in accordance with section 6(o)(4) of the Food Stamp Act or do reside in an area subject to a waiver in which the State agency provides employment and training services to food stamp recipients who are not eligible for an exception under section 6(o)(3) of the Food Stamp Act as a percentage of such recipients nationwide.

(D) FNS shall determine each State's percentage of food stamp recipients not eligible for an exception under section 6(o)(3) of the Food Stamp Act using FY 1996 Quality Control survey data adjusted for changes in each State's caseload.

(E) Effective in FY 1998, no State agency shall receive less than $50,000 in Federal E&T funds. To insure that no State agency receives less than $50,000 in FY 1998, each State agency that is allocated to receive more than $50,000 shall have its grant reduced, if necessary, proportionate to the number of food stamp recipients in the State who are not eligible for an exception under section 6(o)(3) of the Food Stamp Act as compared to the total number of such recipients in all the State agencies receiving more than $50,000. The funds from the reduction shall be distributed to State agencies initially allocated to receive less than $50,000. To insure that no State agency receives less than $50,000 in FY 1999 and subsequent years, each State agency that is allocated to receive more than $50,000 shall have its grant reduced, if necessary, proportionate to the number of food stamp recipients in the State who are not eligible for an exception under section 6(o)(3) of the Food Stamp Act, and who do not reside in an area subject to a waiver granted in accordance with section 6(o)(4) of the Food Stamp Act or who do reside in an area subject to a waiver in which the State agency provides employment and training services to food stamp recipients who are not eligible for an exception under section 6(o)(3) of the Food Stamp Act as compared to the total number of such recipients in all the State agencies receiving more than $50,000. The funds from the reduction shall be distributed to State agencies initially allocated to receive less than $50,000 so that they receive the $50,000 minimum.

(F) If a State agency will not expend all of the funds allocated to it for a fiscal year under paragraph (d)(1)(i)(C) of this section, FNS shall reallocate the unexpended funds to other States during the fiscal year or the subsequent fiscal year as it considers appropriate and equitable.

(ii) *Use of funds.* (A) Not less than 80 percent of the funds a State agency receives in a fiscal year under paragraph (d)(1)(i) of this section shall be used to serve food stamp recipients who are not eligible for an exception under section 6(o)(3) of the Food Stamp Act and who are placed in and comply with either a workfare program as described in §273.22 or a comparable program, or a work program for 20 hours or more per week. A qualifying work program is a program operated under the JTPA or, after July 1, 2000, a program that was previously operated under the JTPA that is now operated under the Workforce Investment Act, a program under section 236 of the Trade Act of 1974, *or* an E&T program operated or supervised by the State or a political subdivision that meets standards approved by the Governor of the State, including programs described in paragraphs (f)(1)(iv), (f)(1)(v), (f)(1)(vi) and (f)(1)(vii) of this section. Job search and job search training programs as described in paragraphs (f)(1)(i) and (f)(1)(ii) of this section do not meet the definition of qualifying work program.

(B) Funds which a State agency receives in a fiscal year under paragraph (d)(1)(i) of this section which are used to serve food stamp recipients who are not eligible for an exception under section 6(o)(3) of the Food Stamp Act but who either reside in an area of a State granted a waiver under section 6(o)(4) of the Food Stamp Act or have been granted an exemption under section

6(o)(6) of that Act and which are expended on qualifying work activities as described in paragraph (d)(1)(ii)(A) of this section shall count toward a State's 80 percent expenditure.

(C) Not more than 20 percent of the funds a State agency receives in a fiscal year under paragraph (d)(1)(i) of this section may be used to serve households eligible for an exception under section 6(o)(3) of the Food Stamp Act or on work activities that do not meet the definition of qualifying work activities as described in paragraph (d)(1)(ii)(A) of this section. E&T funds expended in accordance with this paragraph (d)(1)(ii)(C) may be spent independent of whether or not the State agency expends any Federal funds that meet the requirements of paragraph (d)(1)(ii)(A) of this section. E&T funds expended in accordance with this paragraph (d)(1)(ii)(C) are not subject to the component cost reimbursement rates described in paragraph (d)(1)(iv) of this section.

(D) If at the end of a fiscal year, FNS determines that a State agency has spent more than 20 percent of the Federal E&T funds it receives for that fiscal year under paragraph (d)(1)(i) of this section to serve food stamp recipients who are eligible for an exception under section 6(o)(3) of the Food Stamp Act or on work activities that do not meet the definition of qualifying work activities as described in paragraph (d)(1)(ii)(A) of this section, it shall reimburse States for allowable costs incurred in excess of the 20 percent threshold at the normal administrative 50–50 match rate.

(E) State agencies must use E&T program grants to fund the administrative costs of planning, implementing and operating food stamp E&T programs in accordance with approved State agency E&T plans. E&T grants must not be used for the process of determining whether an individual must be work registered, the work registration process, or any further screening performed during the certification process, nor for sanction activity that takes place after the operator of an E&T component reports noncompliance without good cause. For purposes of this paragraph (d)(1)(ii)(E), the certification process is considered ended when an individual is referred to an E&T component for assessment or participation. E&T grants must also not be used to reimburse participants under paragraph (d)(1)(ii) of this section, since these reimbursements which include dependent care and job-related transportation costs are provided for in a separate 50:50 Federal/State matching grant. Lastly, E&T grants must not be used to subsidize the wages of participants, as reflected in current regulations, and in view of section 16(b) of the Food Stamp Act, added by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which provides authority for food stamp recipients who also participate in TANF and other public assistance programs to have their food stamp benefits paid directly to employers.

(F) A State agency's receipt of the E&T program grant as allocated under paragraph (d)(1)(i) of this section is contingent on FNS' approval of the State agency's E&T plan. If an adequate plan is not submitted, FNS may reallocate a State agency's grant among other State agencies with approved plans. Non-receipt of an E&T program grant does not release a State agency from its responsibility under paragraph (c)(3) of this section to operate an E&T program or from sanctions for insufficient performance.

(G) Federal funds made available to a State agency to operate a component under paragraph (f)(1)(vi) of this section must not be used to supplant nonfederal funds for existing educational services and activities that promote the purposes of this component. Education expenses are approvable to the extent that E&T component costs exceed the normal cost of services provided to persons not participating in an E&T program.

(iii) *Maintenance of Effort.* (A) To be eligible for a grant derived from the supplemental level of E&T funding described in paragraph (d)(1)(i)(B) of this section, a State agency must maintain State expenditures on E&T programs and workfare at a level not less than the level of such expenditures in FY 1996. A State agency need not expend all of its required maintenance of effort funds before it begins spending its

supplemental E&T grant. A State agency which intends to spend the supplemental allocation for which it is eligible in a fiscal year must, in accordance with paragraph (c)(4)(ii) of this section, declare in its State E&T plan for that fiscal year its intention to maintain its level of expenditures for E&T and workfare at a level not less than the level of such expenditures in FY 1996.

(B) State funds which a State agency expends in order to meet its maintenance of effort requirement are not subject to the requirements of paragraph (d)(1)(ii) of this section.

(C) Participant reimbursements paid through State funds shall not count toward a State agency's maintenance of effort requirement, except in the case of optional workfare programs in which reimbursements to participants for work-related expenses are counted as part of the State agency's administrative expenses in accordance with section 20(g)(1) of the Food Stamp Act.

(iv) *Component costs.* FNS shall monitor State agencies' expenditures of 100 percent Federal E&T funds, including the costs of individual components of State agencies' programs.

(A) Federal 100 percent E&T funds that State agencies expend in accordance with paragraph (d)(1)(ii)(A) of this section are subject to component cost reimbursement rates. The rates represent the maximum amount of 100 percent Federal funds that FNS will reimburse States on average each month for their expenditures in providing work opportunities or ''slots'' that meet the requirements of section (6)(o)(2)(B) and (C) of the Food Stamp Act.

(B) Separate reimbursement rates will apply for filled slots and for offered slots. A slot is ''filled'' when a participant reports to a work or training site to begin his or her work activities. A slot is ''offered'' when a bona fide workfare or training opportunity is made available to a participant (i.e., the participant is told to report to a work site at a given date and time) but the participant either refuses the assignment or does not report.

(C) A State agency may claim reimbursement for only one filled slot per participant per month. A State agency that assigns one participant to two slots in the same month, for example a workfare slot and a 20-hour-a-week training slot, may only claim reimbursement for one filled slot in that month.

(D) Reconciliation will be conducted on a yearly basis. When applying the rate, FNS will sum the number of filled and offered slots a State agency reports for a fiscal year and multiply each by the appropriate rate. FNS will add the two resulting sums and compare that against the State agency's actual expenditure of Federal 100 percent E&T money for that fiscal year. If the amount spent is less than the amount allowed under the rates, the actual amount would be paid out of the State agency's 100 percent Federal E&T grant for that fiscal year. If the amount spent by the State agency exceeds the amounts allowed under the rates, the State agency will be required to pay that excess amount. State funds used to cover any shortfalls will be eligible for the standard 50 percent Federal match in accordance with paragraph (d)(1)(vi) of this section and § 273.22(g).

(v) *Participant reimbursements.* The State agency shall provide payments to participants in its E&T program, including applicants required to perform job search and volunteers, for expenses that are reasonably necessary and directly related to participation in the E&T program. These payments may be provided as a reimbursement for expenses incurred or in advance as payment for anticipated expenses in the coming month. The State agency shall inform each E&T participant that allowable expenses up to the amounts specified in paragraphs (d)(1)(v)(A) and (d)(1)(v)(B) of this section will be reimbursed by the State agency upon presentation of appropriate documentation. Reimbursable costs may include, but are not limited to, dependent care costs, transportation, and other work, training or education related expenses such as uniforms, personal safety items or other necessary equipment, and books or training manuals. These costs shall not include the cost of meals away from home. Any allowable costs incurred by a noncompliant E&T participant that are reasonably necessary and directly related to participation in

the conciliation process shall be reimbursable under paragraphs (d)(1)(v)(A) and (d)(1)(v)(B) of this section. The State agency may reimburse participants for expenses beyond the amounts specified in paragraphs (d)(1)(v)(A) and (d)(1)(v)(B) of this section, however, only costs which are up to but not in excess of those amounts shall be subject to Federal cost sharing. Reimbursement shall not be provided from E&T grants provided under paragraph (d)(1)(i) of this section. Any expense covered by a reimbursement under this section shall not be deductible under § 273.10(d)(1)(i). Reimbursements shall be provided as follows:

(A) The costs of such dependent care expenses that are determined by the State agency to be necessary for the participation of a household member in the E&T program up to the actual cost of dependent care, the local market rate, or the Statewide limit, whichever is lowest. A dependent care reimbursement shall be provided to an E&T participant for all dependents requiring dependent care unless otherwise prohibited by this section. A reimbursement shall not be provided for a dependent age 13 or older unless the dependent is physically and/or mentally incapable of caring for himself or herself or under court supervision. A reimbursement shall be provided for all dependents who are physically and/or mentally incapable of caring for themselves or who are under court supervision, regardless of age, if dependent care is necessary for the participation of a household member in the E&T program. Verification of the physical and/or mental incapacity is questionable. Also, verification of a court imposed requirement for the supervision of a dependent age 13 or older is necessary if the need for dependent care is questionable. If more than one household member is required to participate in the E&T program, the State agency shall provide reimbursement for the actual cost of dependent care, the local market rate, or the Statewide limit, whichever is lowest, for each dependent in the household, regardless of the number of household members participating in the E&T program. An individual who is the caretaker relative of a dependent in a family receiving benefits under the TANF program in a local area where an employment, training, or education program under the TANF program is in operation, or was in operation on September 19, 1988, is not eligible for such reimbursement. An E&T participant is not entitled to the dependent care reimbursement if a member of the E&T participant's food stamp household provides the dependent care services. The State agency must verify the participant's need for dependent care and the cost of the dependent care prior to the issuance of the reimbursement. The verification must include the name and address of the dependent care provider, the cost and the hours of service, e.g., five hours per day, five days per week for two weeks. A participant may not be reimbursed for dependent care services beyond that which is required for participation in the E&T program. In lieu of providing reimbursements for dependent care expenses, a State agency may arrange for dependent care through providers by the use of purchase of service contracts, by providing vouchers to the household or by other means. A State agency may require that dependent care provided or arranged by the State agency meet all applicable standards of State and local law, including requirements designed to ensure basic health and safety protections, e.g., fire safety. An E&T participant may refuse available appropriate dependent care as provided or arranged by the State agency, if the participant can arrange other dependent care or can show that such refusal will not prevent or interfere with participation in the E&T program as required by the State agency. A State agency may claim 50 percent of costs for dependent care services provided or arranged by the State agency up to the actual cost of dependent care, the local market rate, or the Statewide limit, whichever is lowest.

(B) The actual costs of transportation and other costs (excluding dependent care costs) that are determined by the State agency to be necessary and directly related to participation in the E&T program up to $25 per participant per month. Such costs shall be the actual costs of participation unless the State agency has a

method approved in its State E&T plan for providing allowances to participants to reflect approximate costs of participation. If a State agency has an approved method to provide allowances rather than reimbursements, it must provide participants an opportunity to claim actual expenses which exceed the standard, up to $25 or such other maximum level of reimbursements which is established by the State agency.

(C) No participant cost which has been reimbursed under a workfare program under § 273.22, title IV of the Social Security Act or other work program shall be reimbursed under this section.

(D) Any portion of dependent care costs which are reimbursed under this section may not be claimed as an expense and used in calculating the dependent care deduction under § 273.9(d)(4) for determining benefits.

(E) The State agency shall inform all mandatory E&T participants that they may be exempted from E&T participation if their monthly expenses that are reasonably necessary and directly related to participation in the E&T program exceed the allowable reimbursement amount. Persons for whom allowable monthly expenses in an E&T component exceed the amounts specified under paragraphs (d)(1)(v)(A) and (d)(1)(v)(B) of this section shall not be required to participate in that component. These individuals shall be placed, if possible, in another suitable component in which the individual's monthly E&T expenses would not exceed the allowable reimbursable amount paid by the State agency. If a suitable component is not available, these individuals shall be exempted from E&T participation until a suitable component is available or the individual's circumstances change and his/her monthly expenses do not exceed the allowable reimbursable amount paid by the State agency. Individuals exempted because their monthly expenses exceed the allowable reimbursable amounts specified under paragraphs (d)(1)(v)(A) and (d)(1)(v)(B) of this section may volunteer to participate in the E&T program. Volunteers must be informed that their allowable expenses in excess of the reimbursable amounts will not be reimbursed. Dependent care expenses incurred that are otherwise allowable but not reimbursed because they exceed the reimbursable amount specified under paragraph (d)(1)(v)(B) shall be considered in determining a dependent care deduction under 7 CFR 273.9(d)(4).

(vi) Fifty percent of all other administrative costs incurred by State agencies in operating employment and training programs, above the costs referenced in paragraphs (d)(1)(i) of this section, shall be funded by the Federal government.

(vii) Enhanced cost-sharing due to placement of workfare participants in paid employment is available only for workfare programs funded under § 273.22(g) at the 50 percent reimbursement level and reported as such.

(2) *Funding mechanism.* Employment and training program funding will be disbursed through States' Letters of Credit in accordance with § 277.5 of the regulations. The State agency shall ensure that records are maintained which support the financial claims being made to FNS.

(3) *Fiscal recordkeeping and reporting requirements.* Total employment and training expenditures shall be reported on the Financial Status Report (SF–269) in the column containing ''other'' expenses. Employment and training expenditures shall also be separately identified in an attachment to the SF–269 to show, as provided in instructions, total State and Federal employment and training expenditures; expenditures funded with the unmatched Federal grants; State and Federal expenditures for participant reimbursements; State and Federal expenditures for employment and training costs at the 50 percent reimbursement level; and State and Federal expenditures for optional workfare program costs, operated under section 20 of the Food Stamp Act and § 273.22 of the regulations. Claims for enhanced funding for placements of participants in employment after their initial participation in the optional workfare program shall be submitted in accordance with § 273.22. States shall include as footnotes to the FNS–269 the amount of Federal 100 percent E&T funding spent

on slots created under a workfare program as described in § 273.22 or a comparable program, and the amount of Federal 100 percent E&T funding spent on slots created under a 20-hour-a-week work program as described in paragraph (d)(1)(ii)(A) of this section.

(e) *Work registrant requirements.* Work registrants shall:

(1) Participate in an employment and training program if assigned by the State agency;

(2) Respond to a request from the State agency or its designee for supplemental information regarding employment status or availability for work;

(3) Report to an employer to whom referred by the State agency or its designee if the potential employment meets the suitability requirements described in paragraph (i) of this section;

(4) Accept a bona fide offer of suitable employment at a wage not less than the higher of either the applicable State or Federal minimum wage;

(f) *Employment and training programs.* Persons required to register for work and not exempted by the State agency from placement in an employment and training program shall be subject to the requirements imposed by the State agency for that individual. Such individuals are referred to in this section as E&T mandatory participants. Requirements may vary among participants. Failure to comply without good cause with the requirements imposed by the State agency shall result in disqualification as specified in § 273.7(g).

(1) *Components.* To be considered acceptable by FNS, any component offered by a State agency shall entail certain levels of effort by the participants. The level of effort should be comparable to spending approximately 12 hours a month for two months (or less in workfare or work experience components if the household's benefit divided by the minimum wage is less than this amount) making job contacts; however, FNS may approve components which do not meet this guideline which it determines will advance program goals. An initial screening by an eligibility worker to determine whom to place in an employment and training program does not constitute a component. An employment and training program offered by a State agency must offer one or more of the following components:

(i) A job search program comparable to that required for the TANF program under Part A of title IV of the Social Security Act. The State may require that an individual participate in a job search program from the time an application is filed for an initial period of up to eight consecutive weeks. Following this initial period (which may extend beyond the date when eligibility is determined) the State may require an additional job search period, not to exceed eight weeks (or its equivalent) in any period of 12 consecutive months. The first such period of 12 consecutive months shall begin at any time following the close of the initial period. States must not impose requirements which would delay the determination of an individual's eligibility for aid or in issuing benefits to any household which is otherwise eligible.

(ii) A job search training program that includes reasonable job search training and support activities. Such a program may consist of job skills assessments, job finding clubs, training in techniques for employability, job placement services, or other direct training or support activities, including educational programs determined by the State agency to expand the job search abilities or employability of those subject to the program. Job search training activities are approvable if they directly enhance the employability of the participants. A direct link between the job search training activities and job-readiness must be established for a component to be approved.

(iii) A workfare program as described in § 273.22;

(iv) A program designed to improve the employability of household members through actual work experience or training, or both, and to enable individuals employed or trained under such programs to move promptly into regular public or private employment. Such an employment or training experience shall:

(A) Limit employment experience assignments to projects that serve a useful public purpose in fields such as health, social services, environmental

protection, urban and rural development, welfare, recreation, public facilities, public safety, and day care;

(B) To the extent possible, use the prior training, experience, and skills of the participating member in making appropriate employment or training experience assignments;

(C) Not provide any work that has the effect of replacing the employment of an individual not participating in the employment or training experience program; and

(D) Provide the same benefits and working conditions that are provided at the job site to employees performing comparable work for comparable hours.

(v) A project, program or experiment such as a supported work program, or a JTPA or State or local program aimed at accomplishing the purpose of the employment and training program.

(vi) Educational programs or activities to improve basic skills or otherwise improve employability including educational programs determined by the State agency to expand the job search abilities or employability of those subject to the program as specified under paragraph (f) of this section. Allowable educational activities may include, but are not limited to, high school or equivalent educational programs, remedial education programs to achieve a basic literacy level, and instructional programs in English as a second language. Only educational components that directly enhance the employability of the participants are allowable. A direct link between the education and job-readiness must be established for a component to be approved.

(vii) A program designed to improve the self-sufficiency of recipients through self-employment including programs that provide instruction for self-employment ventures.

(2) *Exemptions*. Subject to the requirements for overall plan approval by the Secretary, State agencies may exempt certain work registered individuals and categories of individuals from employment and training participation. Individual exemptions shall be evaluated at each recertification and exemptions granted to categories of persons should be reviewed no less frequently than annually to determine whether they remain valid. If a State recognizes that because of changes in its caseload the exemption limit set forth in its approved plan is insufficient, the State may seek to amend its State plan during the year. FNS will consider changes in a State's caseload in determining whether a State has complied with its exemption limit.

(i) Persons who have participated in the Food Stamp Program for 30 days or less may be exempted from participation.

(ii) Categories of persons for whom an employment and training requirement would be impracticable may be exempted. Factors such as the availability of work opportunities and the cost-effectiveness of the requirements may be considered. In making the determination of exemption, the State agency may designate a category of all households residing in a specific area of the State.

(iii) State agencies may exempt from participation individual household members for whom participation is impracticable because of personal circumstances such as lack of job readiness, the remote location of work opportunities, physical condition, the unavailability of dependent care, and monthly E&T expenses that exceed the allowable reimbursable amounts specified in paragraphs (d)(1)(ii)(A) and (d)(1)(ii)(B) of this section.

(iv) Persons who are assigned to a job or training component, do not commence the component and are determined to have good cause shall be considered exempted if the reason for good cause will last for 60 days or longer. When the reason for the exemption is no longer applicable, the person may be placed in a component.

(3) *Time spent in an employment and training program*. (i) The number of months a participant spends in an employment and training component shall be determined by the State agency with the exception of the limitations placed on job search in paragraph (f)(1)(i). The State agency may also determine the number of successive components in which a participant may be placed.

(ii) The time spent by the members of a household collectively each month in

an employment and training work program including, but not limited to those carried out under § 273.7(f)(1) (iii) and (iv), combined with any hours worked that month in a workfare program under § 273.22 shall not exceed the number of hours equal to the household's allotment for that month divided by the higher of the applicable State or Federal minimum wage. The total hours of participation in an E&T component for any household member individually in any month, together with any hours worked in a workfare program under § 273.22 and any hours worked for compensation (in cash or in kind), shall not exceed 120.

(4) *Voluntary participation.* (i) A State agency may operate program components in which individuals elect to participate.

(ii) A State agency shall permit, to the extent it deems practicable, persons exempt from the work registration or employment and training requirements, or those not exempt who have complied or are complying with the requirements, to participate in any employment and training program it offers.

(iii) Voluntary participants in an employment and training component shall not be disqualified for failure to comply with employment and training requirements.

(iv) The hours of participation or work of a volunteer may not exceed the hours required of E&T mandatory participants, as specified in paragraph (f)(3) of this section.

(5) *Priority Service to Volunteers.* With prior approval from FNS, two State agencies may provide priority service to volunteers through September 30, 1995. State agencies that submit an application to provide priority service to volunteers have the flexibility to establish procedures that deviate from regulations specified under paragraph (f)(4) of this section.

(i) To be eligible for FNS approval, a State agency shall submit an application that:

(A) Describes the volunteer population it intends to serve (e.g., number served, volunteer definition, characteristics of the target group, percent of volunteer population that are mandatory work registrants under normal E&T requirements and percent that are exempt from work registration);

(B) Describes the component activities that will be offered to volunteer participants;

(C) Identifies where the volunteer program will operate (i.e., Statewide or selected counties);

(D) Specifies the duration of the volunteer program;

(E) Identifies the criteria and research design the State agency recommends to evaluate the effectiveness of the program;

(F) Provides assurances that applicants who are subject to work registration as specified under § 273.7 (a) and (b) are required to work register as a condition of eligibility;

(G) Provides assurances that the State agency will meet the established performance standards under § 273.7(o); and

(H) Provides assurances that the evaluation will be conducted by an organization separate from the administration of the State agency and that ongoing and final result of the evaluation will be provided to FNS.

(ii) State agencies which receive approval to provide priority volunteer service shall:

(A) Submit a revised E&T plan that incorporates the voluntary service provisions;

(B) Continue to report quarterly (i.e., Form FNS 583) as specified under paragraph (c)(6) of this section;

(C) Meet the performance standards as specified under § 273.7(o); and

(D) Submit data annually which show the number of volunteers who fail to complete an assigned E&T activity.

(g) *Failure to comply*—(1) *Noncompliance with Food Stamp Program work regulations.* (i) If the State agency determines that an individual other than the head of household as defined in § 273.1(d) has refused or failed without good cause to comply with the requirements imposed by this section and by the State agency, that individual shall be ineligible to participate in the Food Stamp Program for two months, as provided in this paragraph, and shall be considered an ineligible household member, pursuant to § 273.1(b)(2). If the head of household fails to comply, the

entire household is ineligible to participate as provided in this paragraph. Ineligibility in both cases shall continue either until the member who caused the violation complies with the requirement as specified in paragraph (h) of this section, leaves the household, becomes exempt from work registration through paragraph (b) of this section, other than through the exemptions of paragraphs (b)(1)(iii) or (b)(1)(v), or for two months, whichever occurs earlier. A household determined to be ineligible due to failure to comply with the provisions of this section may reestablish eligibility if a new and eligible person joins the household as its head of household, as defined in § 273.1(d)(2). If any household member who failed to comply joins another household as head of the household as specified under §273.1(d)(1) or (d)(2), that entire new household is ineligible for the remainder of the disqualification period. If the member who failed to comply joins another household where he/she is not head of household, the individual shall be ineligible for two months and shall be considered an ineligible household member pursuant to § 273.1(b)(2).

(ii) The State agency shall develop conciliation procedures to be used upon determining that an individual has refused or failed to comply with an E&T requirement. The purpose of the conciliation effort is to determine the reason(s) the work registrant did not comply with the E&T requirement and provide the noncomplying individual with an opportunity to comply prior to the issuance of the notice of adverse action. The conciliation period shall begin the day following the date the State agency learns of the noncompliance and shall continue for a period not to exceed 30 calendar days. Within this conciliation period, the State agency shall, at a minimum, contact the noncomplying household member to ascertain the reason(s) for the noncompliance and determine whether good cause for the noncompliance exists, as discussed in paragraph (m) of this section. If good cause does not exist, the State agency shall inform the household member of the pertinent E&T requirements and the consequences of failing to comply. The household member shall be informed of the action(s) necessary for compliance and the date by which compliance must be achieved to avoid the notice of adverse action. This date may not exceed the end of the conciliation period. To avoid the notice of adverse action, the noncomplying household member must perform a verifiable act of compliance, such as attending a job search training session or submitting a report of job contacts. Verbal commitment by the household member is not sufficient, unless the household member is prevented from complying by circumstances beyond the household member's control, such as the unavailability of a suitable component. If it is apparent that the individual will not comply (i.e., the individual refuses to comply and does not have good cause), the State agency may end the conciliation period early and proceed with the issuance of the notice of adverse action under paragraph (g)(1)(iii) of this section. The individual's refusal to comply shall be documented in the casefile.

(iii) If the work registrant does not comply during the conciliation period the State agency shall issue a notice of adverse action to the individual or household, as specified in § 273.13, no later than the last day of the conciliation period. If the notice of adverse action is issued prior to the end of the conciliation period, the notice may be cancelled if the State agency is able to verify that compliance was achieved by the end of the conciliation period.

(iv) If an individual refuses or fails to comply with any of the work requirements imposed by this section, other than the E&T requirements, the State agency shall determine whether good cause for the noncompliance exists, as discussed in paragraph (m) of this section. Within ten days of the State agency determining the noncompliance was without good cause, the State agency shall provide the individual or household with a notice of adverse action, as specified in § 273.13.

(v) The notice of adverse action shall contain the particular act of noncompliance committed, the proposed period of disqualification and shall specify that the individual or household may reapply at the end of the disqualification period. Information shall

also be included on or with the notice describing the action which can be taken to end or avoid the sanction, and procedures contained in paragraph (h) of this section. The disqualification period shall begin with the first month following the expiration of the ten-day adverse notice period, unless a fair hearing is requested.

(vi) Each individual or household has a right to request a fair hearing, in accordance with § 273.15, to appeal a denial, reduction, or termination of benefits due to a determination of nonexempt status, or a State agency determination of failure to comply with the work registration or employment and training requirements of this section. Individuals or households may appeal State agency actions such as exemption status, the type of requirement imposed, or State agency refusal to make a finding of good cause if the individual or household believes that a finding of failure to comply has resulted from improper decisions on these matters. The State agency or its designee operating the relevant component shall receive sufficient advance notice to either permit the attendance of a representative or ensure that a representative will be available for questioning over the phone during the hearing. A representative of the appropriate agency shall be available through one of these means. A household shall be allowed to examine its E&T component casefile at a reasonable time before the date of the fair hearing, except for confidential information (which may include test results) that the agency determines should be protected from release. Confidential information not released to a household may not be used by either party at the hearing. The results of the fair hearing shall be binding on the State agency.

(2) *Failure to comply with a work requirement under title IV of the Social Security Act, or unemployment compensation work requirement.* A household containing a member who was exempt from work registration in accordance with paragraph (b)(1)(iii) or (b)(1)(v) of this section because he or she was registered for work under title IV or unemployment compensation and who fails to comply with a title IV or unemployment compensation requirement comparable to a food stamp work registration or employment and training program requirement shall be treated as though the member had failed to comply with the corresponding food stamp requirements.

(i) If the State agency learns that a household member has refused or failed without good cause to comply with a title IV or unemployment compensation requirement, the State agency shall determine whether the requirement was comparable. Similarly, if the household reports the loss or denial of TANF or unemployment compensation or if the State agency otherwise learns of such loss or denial, the State agency will determine whether the loss or denial was caused by a determination by the administering agency that a household member refused or failed without good cause to comply with the work requirement and, if so, whether the requirement was comparable to the work registration or employment and training program requirement. The title IV or unemployment compensation requirement shall not be considered comparable if it places responsibilities on the household which exceed those imposed by the food stamp work registration or FNS approved employment and training program requirements.

(ii) If the State determines that the title IV or unemployment compensation requirement is comparable, the individual or household (if the individual who committed the violation is the head of household) shall be disqualified in accordance with the following provisions. The State agency shall provide a notice of adverse action as specified in § 273.13 within 10 days after learning of the household member's noncompliance with the unemployment compensation or title IV requirement. The notice shall comply with the requirements of § 273.7(g)(1). An individual or household shall not be disqualified from participation if the noncomplying member meets one of the work registration exemptions provided in § 273.7(b) other than the exemptions provided in paragraphs (b)(1)(iii) and (b)(1)(v) of that section. Household members who fail to comply with a noncomparable title IV or unemployment compensation requirement shall

lose their exemption under § 273.7(b)(1)(iii) and (v), and must register for work if required to do so in § 273.7(a).

(iii) If the State agency determination of noncompliance with a comparable title IV or unemployment compensation work requirement leads to a denial or termination of the individuals or household's food stamp benefits, the individual or household has a right to appeal the decision in accordance with the provisions of § 273.7(g)(1).

(iv) A disqualified individual or household may resume participation in the Program in accordance with paragraph (h) of this section.

(h) *Ending disqualification.* Following the end of the 2 month disqualification period for noncompliance with the work registration or employment and training requirements, participation may resume if a disqualified individual or household applies again and is determined eligible. Eligibility may be reestablished by a household during a disqualification period and the household shall (if otherwise eligible) be permitted to resume participation if the head of the household becomes exempt from the work registration requirement, is no longer a member of the household, or complies with the appropriate requirement listed in paragraph (h)(1) through (h)(5) of this section. An individual who has been disqualified for noncompliance may be permitted to resume participation during the disqualification period (if otherwise eligible) by becoming exempt from work registration or by complying with the following appropriate requirements:

(1) Refusal to register—registration by the household member.

(2) Refusal to respond to a request from the State agency or its designee requiring supplemental information regarding employment status or availability for work—compliance with the request.

(3) Refusal to report to an employer to whom referred—reporting to this employer if work is still available or to another employer to whom referred.

(4) Refusal to accept a bona fide offer of suitable employment to which referred—acceptance of the employment if still available to the participant, or securing other employment which yields earnings per week equivalent to the refused job, or securing any other employment of at least 30 hours per week or securing employment of less than 30 hours per week but with weekly earnings equal to the Federal minimum wage multiplied by 30 hours.

(5) Refusal to comply with a State agency (or its designee) assignment as part of an FNS approved employment and training program—compliance with the assignment or an alternative assignment by the State agency.

(i) *Suitable employment.* (1) In addition to any criteria established by State agencies, employment shall be considered unsuitable if:

(i) The wage offered is less than the highest of:

(A) The applicable Federal minimum wage; (B) the applicable State minimum wage; or (C) eighty percent (80%) of the Federal minimum wage if neither the Federal nor State minimum wage is applicable.

(ii) The employment offered is on a piece-rate basis and the average hourly yield the employee can reasonably be expected to earn is less than the applicable hourly wages specified under paragraph (i)(1)(i) of this section.

(iii) The household member, as a condition of employment or continuing employment, is required to join, resign from, or refrain from joining any legitimate labor organization.

(iv) The work offered is at a site subject to a strike or lockout at the time of the offer unless the strike has been enjoined under section 208 of the Labor-Management Relations Act (29 U.S.C. 78) (commonly known as the Taft-Hartley Act), or unless an injunction has been issued under section 10 of the Railway Labor Act (45 U.S.C. 160).

(2) In addition, employment shall be considered suitable unless the household member involved can demonstrate or the State agency otherwise becomes aware that:

(i) The degree of risk to health and safety is unreasonable.

(ii) The member is physically or mentally unfit to perform the employment, as documented by medical evidence or by reliable information from other sources.

(iii) The employment offered within the first 30 days of registration is not

in the member's major field of experience.

(iv) The distance from the member's home to the place of employment is unreasonable considering the expected wage and the time and cost of commuting. Employment shall not be considered suitable if daily commuting time exceeds 2 hours per day, not including the transporting of a child to and from a child care facility. Nor shall employment be considered suitable if the distance to the place of employment prohibits walking and neither public nor private transportation is available to transport the member to the jobsite.

(v) The working hours or nature of the employment interferes with the member's religious observances, convictions, or beliefs. For example, a Sabbatarian could refuse to work on the Sabbath.

(j) *Participation of strikers.* Strikers whose households are eligible under the criteria in § 273.1(g) shall be subject to the work registration requirements unless exempt under paragraph (b) of this section at the time of application.

(k) *Registration of certain PA, GA, and refugee households.* (1) State agencies may request approval from FNS to substitute State or local procedures for work registration for PA households not subject to the work requirements under title IV of the Social Security Act or for GA households. Work requirements imposed on refugees participating in refugee resettlement programs including but not limited to the Indochinese Refugee Assistance Program may also be substituted, with FNS approval. To receive approval, it must be demonstrated that:

(i) The work registration procedures are at least equivalent to food stamp work registration requirements;

(ii) Registrants' activities are monitored so that appropriate sanctions as required by these regulations will be applied. However, if additional work requirements (beyond those required under this section) are placed on household members, a household's food stamp benefits shall not be denied for the failure of a household member to comply with a requirement that exceeds the requirements of this section. For example, if a State rule requires individuals to register for work through age 65, any individual 60 years of age or older who fails to comply shall not be denied food stamp benefits as a result of that failure;

(iii) All household members which are not exempt under paragraph (b)(1) of this section are either registered for work under such Federal, State or local programs as described in this paragraph, or are registered for work as provided in paragraph (a) of this section.

(2) Household members who are program participants under title IV of the Social Security Act or registered for work under unemployment compensation and fail to comply with comparable work requirements of those programs shall be handled in accordance with the provisions in § 273.7(g)(2).

(l) Household members who are applying for SSI and for food stamps under § 273.2(k)(1)(i) shall have the requirement for work registration waived until:

(1) They are determined eligible for SSI and thereby become exempt from work registration, or

(2) They are determined ineligible for SSI and where applicable, a determination of their work registration status is then made through recertification procedures in accordance with § 273.2(k)(1)(iii)(B)(*2*), or through other means.

(m) *Determining good cause.* The State agency shall be responsible for determining good cause in those instances where the work registrant has failed to comply with the work registration, employment and training, and voluntary quit requirements of this section. In determining whether or not good cause exists, the State agency shall consider the facts and circumstances, including information submitted by the household member involved and the employer. Good cause shall include circumstances beyond the member's control, such as, but not limited to, illness, illness of another household member requiring the presence of the member, a household emergency, the unavailability of transportation, or the lack of adequate child care for children who have reached age six but are under age 12.

(n) *Voluntary quit.* No household whose head of household, as defined in §273.1(d)(2), voluntarily quits a job of 20 hours a week or more without good cause 60 days or less prior to the date of application or at any time thereafter shall be eligible for participation in the program as specified below. At the time of application, the State agency shall explain to the applicant the consequences of the head of household quitting a job without good cause, and of the consequence of a person joining the household as its head if that individual has voluntarily quit employment.

(1) *Determining whether a voluntary quit occurred and application processing.* (i) When a household files an application for participation, or when a participating household reports the loss of a source of income, the State agency shall determine whether any household member voluntarily quit his or her job. Benefits shall not be delayed beyond the normal processing times specified in §273.2 pending the outcome of this determination. This provision applies only if the employment involved 20 hours or more per week or provided weekly earnings at least equivalent to the Federal minimum wage multiplied by 20 hours; the quit occurred within 60 days prior to the date of application or anytime thereafter; and the quit was without good cause. Changes in employment status that result from reducing hours of employment while working for the same employer, terminating a self-employment enterprise or resigning from a job at the demand of the employer will not be considered a voluntary quit for purposes of this section. An employee of the Federal Government, or of a State or local government who participates in a strike against such government, and is dismissed from his or her job because of participation in the strike, shall be considered to have voluntarily quit his or her job without good cause. If an individual quits a job, secures new employment at comparable wages or hours and is then laid off or, through no fault of his own loses the new job, the earlier quit will not form the basis of a disqualification.

(ii) In the case of an applicant household, the State agency shall determine whether any currently unemployed (i.e. employed less than 20 hours per week or receiving less than weekly earnings equivalent to the Federal minimum wage multiplied by 20 hours) household member who is required to register for work or who is exempt through §273.7(b)(1)(vii) has voluntarily quit his or her job within the last 60 days. If the State agency learns that a household has lost a source of income after the date of application but before the household is certified, the State agency shall determine whether a voluntarily quit occurred.

(iii) The State agency shall determine whether any household member voluntarily quit his or her job while participating in the Program, within 60 days prior to applying for participation, or in the time between application and certification. If a household is already participating when a quit which occurred prior to certification is discovered, the household shall be regarded as a participating household and the 90 day sanction shall be imposed in accordance with §273.7(n)(1)(vi).

(iv) If a determination of voluntary quit is established, the State agency shall then determine if the member who quit is the head of household as defined in §273.1(d)(2).

(v) Upon the determination that the head of household voluntarily quit employment, the State agency shall determine if the voluntary quit was with good cause as defined in §273.7(n)(3). In the case of an applicant household, if the voluntary quit was without good cause, the household's application for participation shall be denied and sanction imposed for 90 days, starting from the date of quit. The State agency shall provide the applicant household with a notice of denial in accordance with §273.2(g)(3). The notice shall inform the household of the proposed period of disqualification; its right to reapply at the end of the 90 day period; and of its right to a fair hearing. In the case of participating households, benefits shall be terminated for a period of 90 days, in accordance with paragraph (n)(1)(vi) of this section.

(vi) If the State agency determines that the head of a participating household voluntarily quit his or her job

while participating in the program or discovers a quit which occured within 60 days prior to application for benefits or between application and certification, the State agency shall provide the household with a notice of adverse action as specified in § 273.13 within 10 days after the determination of a quit. Such notification shall contain the particular act of noncompliance committed, the proposed period of ineligibility, the actions which may be taken to end or avoid the disqualification, and shall specify that the household may reapply at the end of the disqualification period. Except as otherwise specified in this paragraph, the period of ineligibility shall run continuously for three months or 90 days, beginning with the first of the month after all normal procedures for taking adverse action have been followed. The 90 day disqualification period may be converted to a three calendar month period only for participating households. If a voluntary quit occurs in the last month of a certification period or is determined in the last 30 days of the certification period the household shall be denied recertification for a period of 90 days beginning with the day after the last certification period ends. If such household does not apply for food stamp benefits by the end of the certification period, a claim shall be established for the benefits received by the household for up to 90 days beginning the first of the month after the month in which the quit occurred. If there are fewer than 90 days from the first of the month after the month in which the quit occurred to the end of the certification period, a claim shall be imposed, and the household shall remain ineligible for benefits for a prorated number of days, with the end result that a claim was established or the household was ineligible for a full 90 day period. Each household has a right to a fair hearing to appeal a denial or termination of benefits due to a determination that the head of household voluntarily quit his or her job without good cause. If the participating household's benefits are continued pending a fair hearing and the State agency determination is upheld, the disqualification period shall begin the first of the month after the hearing decision is rendered.

(vii) Persons who have been disqualified for quitting a job as head of one household will carry their sanction with them if they join a new household as its head. The new household will remain ineligible for the remainder of the sanction period unless the person who caused the disqualification ends it in a manner prescribed in § 273.7(n)(5). If an individual who voluntarily quit joins a new household and is not the household head the sanction shall be terminated as specified under §273.1(d)(1) or (d)(2).

(viii) If an application for participation in the Program is filed in the third month of disqualification, the State agency shall in accord with § 273.10(a)(3) use the same application for the denial of benefits in the remaining month of disqualification and certification for any subsequent month(s) if all other eligibility criteria are met.

(2) *Exemptions from voluntary quit provisions.* Persons who are exempt from the work registration provisions in § 273.7(b) at the time of the quit, with the exception of those exempted by § 273.7(b)(1)(vii) shall be exempt from the voluntary quit provisions.

(3) *Good cause.* Good cause for leaving employment includes the good cause provisions found in § 273.7(m), and resigning from a job that does not meet the suitability criteria specified in § 273.7(i). Good cause for leaving employment shall also include:

(i) Discrimination by an employer based on age, race, sex, color, handicap, religious beliefs, national origin or political beliefs;

(ii) Work demands or conditions that render continued employment unreasonable, such as working without being paid on schedule;

(iii) Acceptance by the head of household of employment, or enrollment of at least half-time in any recognized school, training program or institution of higher education, that requires the head of household to leave employment;

(iv) Acceptance by any other household member of employment or enrollment at least half-time in any recognized school, training program or institution of higher education in another

county or similar political subdivision which requires the household to move and thereby requires the head of household to leave employment;

(v) Resignations by persons under the age of 60 which are recognized by the employer as retirement;

(vi) Employment which becomes unsuitable by not meeting the criteria specified in §273.7(i) after the acceptance of such employment;

(vii) Acceptance of a bona fide offer of employment of more than 20 hours a week or in which the weekly earnings are equivalent to the Federal minimum wage multiplied by 20 hours which, because of circumstances beyond the control of the primary wage earner, subsequently either does not materialize or results in employment of less than 20 hours a week or weekly earnings of less than the Federal minimum wage multiplied by 20 hours; and

(viii) Leaving a job in connection with patterns of employment in which workers frequently move from one employer to another such as migrant farm labor or construction work. There may be some circumstances where households will apply for food stamp benefits between jobs particularly in cases where work may not yet be available at the new job site. Even though employment at the new site has not actually begun, the quitting of the previous employment shall be considered as with good cause if part of the pattern of that type of employment.

(4) *Verification.* (i) To the extent that the information given by the household is questionable, as defined in §273.2(f)(2), State agencies shall request verification of the household's statements. The primary responsibility for providing verification as provided in §273.2(f)(5) rests with the household. If it is difficult or impossible for the household to obtain documentary evidence in a timely manner, the State agency shall offer assistance to the household to obtain the needed verification. Acceptable sources of verification include but are not limited to the previous employer, employee associations, union representatives and grievance committees or organizations. Whenever documentary evidence cannot be obtained, the State agency shall substitute a collateral contact. The State agency is responsible for obtaining verification from acceptable collateral contacts provided by the household.

(ii) If the household and State agency are unable to obtain requested verification from these or other sources because the cause for the quit resulted from circumstances that for good reason cannot be verified, such as a resignation from employment due to discrimination practices or unreasonable demands by an employer or because the employer cannot be located, the household will not be denied access to the Program.

(5) *Ending a voluntary quit disqualification.* (i) Following the end of the disqualification period a household may begin participation in the program if it applies again and is determined eligible.

(ii) Eligibility may be reestablished during a disqualification period and the household shall, if otherwise eligible, be permitted to resume participation if the member who caused the disqualification secures new employment which is comparable in salary or hours to the job which was quit, or leaves the household. Comparable employment may entail fewer hours or a lower net salary than the job which was quit. Eligibility may also be reestablished if the violator becomes exempt from the work registration requirements through §273.7(b) other than paragraphs (b)(1)(iii) or (b)(1)(v) of that section. Should a household which has been determined to be noncompliant without good cause split into more than one household, the sanction shall follow the member who caused the disqualification. If a head of household who committed the violation joins another food stamp household as head of the household, that household shall be ineligible for the balance of the period of ineligibility.

(iii) A household determined ineligible due to a voluntary quit without good cause may reestablish eligibility if a new and otherwise eligible member joins as its head of household as defined by §273.1(d)(2).

(o) *Performance standards.* The Secretary shall establish an annual performance standard for the minimum number of eligible persons that States

must place in employment and training programs.

(1) *Performance formula.* To ascertain a State's level of performance at the end of each fiscal year, FNS will divide the number of E&T mandatory participants plus volunteers the State has ''placed'' in its E&T program over the course of the year (the numerator) by the number of E&T mandatory participants who were eligible to have been placed in the program over the course of the year plus volunteers (the denominator). The denominator is herein referred to as the ''base of eligibles.''

(2) *Counting placements in an employment and training program.* State agencies may consider a person placed in an E&T program, for purposes of performance standards, if the person commences an employment and training component, or fails to comply with E&T requirements and is denied certification or is sent a Notice of Adverse Action for the noncompliance. NOAAs sent for noncompliance with work registration optional workfare or voluntary quit shall not count as placements. Assigned persons who have good cause for noncompliance shall not be counted as placed. If the good cause for the noncompliance is temporary (less than 60 days), the person shall be referred again to a component as soon as practicable. If the good cause represents a situation or condition which will continue for 60 days or more, the person shall be considered exempt by the State agency. If a participant reports to a component which involves several months, that individual would be counted as placed in the initial month only. Each time a participant is placed in a different component after having completed a prior component, he/she may be counted as placed. If participation in one type of E&T component is not continuous, the participant may be counted as having been placed more than once in the same component. If an E&T mandatory participant does not comply with E&T requirements, and a Notice of Adverse Action is sent, the person is counted as placed in the month the NOAA is mailed.

(3) *Counting the ''base of eligibles''.* The base of persons eligible to participate in an E&T program (the denominator) consists of all nonexempt work registrants in the month of October plus newly work registered food stamp recipients who have not been exempted by the State under § 273.7(f)(2) of these regulations from participation in an E&T program, and food stamp program applicants who are assigned by the State to enter an E&T component at the time of application and are subsequently certified for food stamp participation. These groups are considered E&T mandatory participants. In addition, volunteers who are placed in an E&T component shall be counted in the base of eligibles. State agencies need not count any individual in the base of eligibles more than once in a fiscal year. For purposes of computing the base of eligibles for the two performance standard reporting periods of Fiscal Year 1989 (first quarter and the remaining three quarters) the first quarter base of eligibles is the cumulative total of 25 percent of the number of E&T mandatory participants in the State in October 1988 (including persons in work registrant status carried over from the previous fiscal year), plus new E&T mandatory participants registered during November and December 1988, plus volunteers placed in E&T components during the quarter. The second performance period base of eligibles is the total of 75 percent of the October 1988 count of E&T mandatory participants plus new E&T mandatory participants registered during the months of January through September 1989, plus volunteers placed in E&T components during these same nine months.

(4) *Applicant participation.* Some States may wish to operate a job search or other component which begins at the time of Food Stamp Program application. The applicants who are placed in this component (who either perform the job search or who do not and are denied eligibility for failure to comply with the E&T requirement) should be counted as ''placed''. These persons need be counted in the base of eligibles, or the denominator, only if their application is approved, they are certified for food stamp benefits and they are work registered. At that time, they should be counted as ''newly work registered'' if they have not been counted in this category in

the previous 12 months. If an applicant performs a job search and is either denied eligibility, for causes other than non-compliance with the E&T requirements, or certified but exempted from work registration, the individual need not be counted in the base of eligibles.

(5) *Accounting for short-term participants.* There are a number of work registrants considered E&T mandatory who are counted in the base of eligibles but who remain on the Food Stamp Program for such a short period of time States are unable to place them in an E&T component. These short term recipients inflate the State's base of eligibles and make it more difficult for States to meet their performance standard. States may choose one of two methods to counteract the effects of short term participants.

(i) States may exempt from E&T participation persons who will leave the Food Stamp Program within 30 days of application. This may mean that States will not attempt to serve such persons unless they volunteer for E&T participation. States must count each individual as having been exempted under the reporting requirements of § 273.7(c)(6)(ii).

(ii) States may, at the close of the fiscal year, subtract 10 percent from their base of eligibles (denominator) to account for E&T mandatory participants who have left the program within 30 days of application. This 10 percent adjustment may be made without supporting documentation. Since the short term mandatory participants are not exempted from participation, States may attempt to place them in a component and may count them as placed (in their numerator) if they meet the placement criteria of paragraph (o)(2) of this section. For Fiscal Year 1989, this 10 percent adjustment may be applied to the base of eligible totals for each reporting period resulting from the computations specified in paragraph (o)(3) of this section.

(6) *Performance data collection.* To determine the annual total in the base of eligibles (denominator), State agencies shall count the number of E&T mandatory participants (non-exempt work registrants) in the State during the month of October, including persons in that status who were work registered the prior year. The number of newly work registered E&T mandatory participants for each subsequent month should be added to the October count. Volunteers placed in components shall be added for each month of the fiscal year. Separate counts shall be maintained for E&T mandatory participants and volunteers. To determine the number of persons ''placed'' in an E&T program (numerator), the State agency shall count and add cumulatively every month non-exempt work registrants and volunteers who were ''placed'' in a component, as defined in paragraph (o)(2) of this section.

(7) *Percentage of persons to be placed.* Beginning in Fiscal Year 1992, 10 percent of the number of mandatory E&T participants, plus volunteers who participated, shall be placed in an E&T Program. This performance standard shall remain in effect through Fiscal Year 1995.

(8) *Variations in performance standards.* (i) The Department will adjust the performance standard for an individual State agency if the State agency can show, prospectively, that the components it plans to offer or the type of participant it plans to serve will require significantly higher levels of service. If a State proposes that its performance standard be adjusted, it should propose the amount of the requested adjustment and provide a justification. The additional documentation called for in § 273.7(c) must be submitted to FNS in the State's employment and training plan. In determining whether an adjustment of the performance standard is warranted and the level of the adjustment, FNS will consider the number of persons who will be placed, the percentage of planned placements compared to the State's E&T mandatory population, the intensity and effectiveness of the components, and the cost.

(ii) Only in extraordinary circumstances should a State expect to have a performance standard approved which is lower than 40 percent of the nationwide standard.

(p) *State noncompliance with Employment and Training requirements.* (1) If a State agency fails to efficiently and effectively administer its employment

and training program, the provisions of § 276.1(a)(3) shall apply.

(2) If a State has failed to meet its established performance standard, FNS shall determine whether there was good cause for the noncompliance. Good cause for State noncompliance is specified in § 276.6. In determining whether a State agency has met a performance standard, the Secretary will also consider factors such as the extent to which volunteers have participated in the employment and training program, placements in unsubsidized employment, increases in earnings and the reduction in the number of persons participating in the Food Stamp Program, and changes in the States caseload, if the State supplies the Agency with appropriate documentation. Lack of E & T funding at the 100 percent Federal level shall not constitute good cause.

(3) If the Agency finds that there was not sufficient good cause for the State's failure to meet its performance standards the Agency may disallow administrative funds. The dollar amount of the funds disallowed shall be calculated by reducing the amount of the State's 100 percent Federal employment and training allocation for the pertinent year proportionately to the percentage below its standard the State's performance fell. This amount shall then be disallowed from the State's administrative funds as specified in § 276.4(c) except that no formal warning is required. The Secretary may withhold a larger percentage of the allocation depending on the severity of the noncompliance. Appeal and administrative review provisions of § 276.1(b), shall apply.

(4) In addition to the disallowance described in paragraph (p)(2) of this section, a State agency shall not receive performance-based funding for a given fiscal year in accordance with paragraph (d)(1)(i)(B) of this section, if the State agency does not meet its performance standard (as establish prospectively) for the second preceding fiscal year.

[Amdt. 132, 43 FR 47889, Oct. 17, 1978]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 273.7, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 273.8 Resource eligibility standards.

(a) *Uniform standards.* The State agency shall apply the uniform national resource standards of eligibility to all applicant households, including those households in which members are recipients of federally aided public assistance, general assistance, or supplemental security income. Households which are categorically eligible as defined in § 273.2(j)(2) or 273.2(j)(4) do not have to meet the resource limits or definitions in this section.

(b) *Maximum allowable resources.* The maximum allowable resources, including both liquid and nonliquid assets, of all members of the household shall not exceed $2,000 for the household, except that, for households including a member or members age 60 or over, such resources shall not exceed $3,000.

(c) *Definition of resources.* In determining the resources of a household, the following shall be included and documented by the State agency in sufficient detail to permit verification:

(1) Liquid resources, such as cash on hand, money in checking or savings accounts, savings certificates, stocks or bonds, lump sum payments as specified in § 273.9(c)(8), funds held in individual retirement accounts (IRA's), and funds held in Keogh plans which do not involve the household member in a contractual relationship with individuals who are not household members. In counting resources of households with IRA's or includable Keogh plans, the State agency shall include the total cash value of the account or plan minus the amount of the penalty (if any) that would be exacted for the early withdrawal of the entire amount in the account or plan; and

(2) Nonliquid resources, personal property, licensed and unlicensed vehicles, buildings, land, recreational properties, and any other property, provided that these resources are not specifically excluded under paragraph (e) of this section. The value of nonexempt resources, except for licensed vehicles as specified in paragraph (f) of this section, shall be its equity value. The equity value is the fair market value less encumbrances.

(3) For a household containing a sponsored alien, the State agency must deem the resources of the sponsor and the sponsor's spouse in accordance with § 273.4(c)(2).

(d) *Jointly owned resources.* Resources owned jointly by separate households shall be considered available in their entirety to each household, unless it can be demonstrated by the applicant household that such resources are inaccessible to that household. If the household can demonstrate that it has access to only a portion of the resource, the value of that portion of the resource shall be counted toward the household's resource level. The resource shall be considered totally inaccessible to the household if the resource cannot practically be subdivided and the household's access to the value of the resource is dependent on the agreement of a joint owner who refuses to comply. For the purpose of this provision, ineligible aliens or disqualified individuals residing with the household shall be considered household members. Resources shall be considered inaccessible to persons residing in shelters for battered women and children, as defined in § 271.2, if

(1) The resources are jointly owned by such persons and by members of their former household; and

(2) The shelter resident's access to the value of the resources is dependent on the agreement of a joint owner who still resides in the former household.

(e) *Exclusions from resources.* In determining the resources of a household, only the following shall be excluded:

(1) The home and surrounding property which is not separated from the home by intervening property owned by others. Public rights of way, such as roads which run through the surrounding property and separate it from the home, will not affect the exemption of the property. The home and surrounding property shall remain exempt when temporarily unoccupied for reasons of employment, training for future employment, illness, or uninhabitability caused by casualty or natural disaster, if the household intends to return. Households that currently do not own a home, but own or are purchasing a lot on which they intend to build or are building a permanent home, shall receive an exclusion for the value of the lot and, if it is partially completed, for the home.

(2) Household goods, personal effects, the cash value of life insurance policies, one burial plot per household member, and the value of one bona fide funeral agreement per household member, provided that the agreement does not exceed $1,500 in equity value, in which event the value above $1,500 is counted. The cash value of pension plans or funds shall be excluded, except that Keogh plans which involve no contractual relationship with individuals who are not household members and individual retirement accounts (IRA's) shall not be excluded under this paragraph.

(3)(i) Licensed vehicles that meet the following conditions:

(A) Used for income-producing purposes such as, but not limited to, a taxi, truck, or fishing boat, or a vehicle used for deliveries, to call on clients or customers, or required by the terms of employment. Licensed vehicles that have previously been used by a self-employed household member engaged in farming but are no longer used in farming because the household member has terminated his/her self-employment from farming must continue to be excluded as a resource for one year from the date the household member terminated his/her self-employment farming;

(B) Annually producing income consistent with its fair market value, even if used only on a seasonal basis;

(C) Necessary for long-distance travel, other than daily commuting, that is essential to the employment of a household member (or ineligible alien or disqualified person whose resources are being considered available to the household)—for example, the vehicle of a traveling sales person or a migrant farm worker following the work stream;

(D) Used as the household's home and, therefore, excluded under paragraph (e)(1) of this section;

(E) Necessary to transport a physically disabled household member (or physically disabled ineligible alien or physically disabled disqualified person whose resources are being considered available to the household) regardless of the purpose of such transportation

(limited to one vehicle per physically disabled household member). The vehicle need not have special equipment or be used primarily by or for the transportation of the physically disabled household member; or

(F) Necessary to carry fuel for heating or water for home use when the transported fuel or water is anticipated to be the primary source of fuel or water for the household during the certification period. Households must receive this resource exclusion without having to meet any additional tests concerning the nature, capabilities, or other uses of the vehicle. Households must not be required to furnish documentation, as mandated by § 273.2(f)(4), unless the exclusion of the vehicle is questionable. If the basis for exclusion of the vehicle is questionable, the State agency may require documentation from the household, in accordance with § 273.2(f)(4).

(G) The value of the vehicle is inaccessible, in accordance with paragraph (e)(18) of this section, because its sale would produce an estimated return of not more than $1,500.

(ii) On those Indian reservations that do not require vehicles driven by tribal members to be licensed, such vehicles must be treated as licensed vehicles for the purpose of this exclusion.

(iii) The exclusions in paragraphs (e)(3)(i)(A) through (e)(3)(i)(C) of this section will apply when the vehicle is not in use because of temporary unemployment, such as when a taxi driver is ill and cannot work, or when a fishing boat is frozen in and cannot be used.

(4) Property which annually produces income consistent with its fair market value, even if only used on a seasonal basis. Such property shall include rental homes and vacation homes.

(5) Property, such as farm land or work related equipment, such as the tools of a tradesman or the machinery of a farmer, which is essential to the employment or self-employment of a household member. Property essential to the self-employment of a household member engaged in farming shall continue to be excluded for one year from the date the household member terminates his/her self-employment from farming.

(6) Installment contracts for the sale of land or buildings if the contract or agreement is producing income consistent with its fair market value. The exclusion shall also apply to the value of the property sold under the installment contract, or held as security in exchange for a purchase price consistent with the fair market value of that property.

(7) Any governmental payments which are designated for the restoration of a home damaged in a disaster, if the household is subject to a legal sanction if the funds are not used as intended; for example, payments made by the Department of Housing and Urban Development through the individual and family grant program or disaster loans or grants made by the Small Business Administration.

(8) Resources having a cash value which is not accessible to the household, such as but not limited to, irrevocable trust funds, security deposits on rental property or utilities, property in probate, and real property which the household is making a good faith effort to sell at a reasonable price and which has not been sold. The State agency may verify that the property is for sale and that the household has not declined a reasonable offer. Verification may be obtained through a collateral contact or documentation, such as an advertisement for public sale in a newspaper of general circulation or a listing with a real estate broker. Any funds in a trust or transferred to a trust, and the income produced by that trust to the extent it is not available to the household, shall be considered inaccessible to the household if:

(i) The trust arrangement is not likely to cease during the certification period and no household member has the power to revoke the trust arrangement or change the name of the beneficiary during the certification period;

(ii) The trustee administering the funds is either:

(A) A court, or an institution, corporation, or organization which is not under the direction or ownership of any household member, or (B) an individual appointed by the court who has court imposed limitations placed on his/her use of the funds which meet the requirements of this paragraph;

(iii) Trust investments made on behalf of the trust do not directly involve or assist any business or corporation under the control, direction, or influence of a household member; and

(iv) The funds held in irrevocable trust are either:

(A) Established from the household's own funds, if the trustee uses the funds solely to make investments on behalf of the trust or to pay the educational or medical expenses of any person named by the household creating the trust, or (B) established from nonhousehold funds by a nonhousehold member.

(9) Resources, such as those of students or self-employed persons, which have been prorated as income. The treatment of student income is explained in § 273.10(c) and the treatment of self-employment income is explained in § 273.11(a).

(10) Indian lands held jointly with the Tribe, or land that can be sold only with the approval of the Department of the Interior's Bureau of Indian Affairs; and

(11) Resources which are excluded for food stamp purposes by express provision of Federal statute.

(12) Earned income tax credits shall be excluded as follows:

(i) A Federal earned income tax credit received either as a lump sum or as payments under section 3507 of the Internal Revenue Code for the month of receipt and the following month for the individual and that individual's spouse.

(ii) Any Federal, State or local earned income tax credit received by any household member shall be excluded for 12 months, provided the household was participating in the Food Stamp Program at the time of receipt of the earned income tax credit and provided the household participates continuously during that 12-month period. Breaks in participation of one month or less due to administrative reasons, such as delayed recertification or missing or late monthly reports, shall not be considered as nonparticipation in determining the 12-month exclusion.

(13) Where an exclusion applies because of use of a resource by or for a household member, the exclusion shall also apply when the resource is being used by or for an ineligible alien or disqualified person whose resources are being counted as part of the household's resources. For example, work related equipment essential to the employment of an ineligible alien or disqualified person shall be excluded (in accordance with paragraph (e)(5) of this section), as shall one burial plot per ineligible alien or disqualified household member (in accordance with paragraph (e)(2) of this section).

(14) Energy assistance payments or allowances excluded as income under § 273.9(c)(11).

(15) Non-liquid asset(s) against which a lien has been placed as a result of taking out a business loan and the household is prohibited by the security or lien agreement with the lien holder (creditor) from selling the asset(s).

(16) Property, real or personal, to the extent that it is directly related to the maintenance or use of a vehicle excluded under paragraphs (e)(3)(i)(A), (e)(3)(i)(B) or (e)(3)(i)(C) of this section. Only that portion of real property determined necessary for maintenance or use is excludable under this provision. For example, a household which owns a produce truck to earn its livelihood may be prohibited from parking the truck in a residential area. The household may own a 100-acre field and use a quarter-acre of the field to park and/or service the truck. Only the value of the quarter-acre would be excludable under this provision, not the entire 100-acre field.

(17) The resources of a household member who receives SSI or PA benefits. A household member is considered a recipient of these benefits if the benefits have been authorized but not received, if the benefits are suspended or recouped, or if the benefits are not paid because they are less than a minimum amount. For purposes of this paragraph (e)(17), if an individual receives noncash or in-kind services from a program specified in §§ 273.2(j)(2)(i)(B), 273.2(j)(2)(i)(C), 273.2(j)(2)(ii)(A), or 273.2(j)(2)(ii)(B), the State agency must determine whether the individual or the household benefits from the assistance provided, in accordance with § 273.2(j)(2)(iii). Individuals entitled to Medicaid benefits only are not considered recipients of SSI or PA.

(18) The State agency must develop clear and uniform standards for identifying kinds of resources that, as a practical matter, the household is unable to sell for any significant return because the household's interest is relatively slight or the costs of selling the household's interest would be relatively great. The State agency must so identify a resource if its sale or other disposition is unlikely to produce any significant amount of funds for the support of the household or the cost of selling the resource would be relatively great. This provision does not apply to financial instruments such as stocks, bonds, and negotiable financial instruments. The determination of whether any part of the value of a vehicle is included as a resource must be made in accordance with the provisions of paragraphs (e)(3) and (f) of this section. The State agency may require verification of the value of a resource to be excluded if the information provided by the household is questionable. The State agencies must use the following definitions in developing these standards:

(i) ''Significant return'' means any return, after estimating costs of sale or disposition, and taking into account the ownership interest of the household, that the State agency determines are more than $1,500; and

(ii) ''Any significant amount of funds'' means funds amounting to more than $1,500.

(f) *Determining the value of non-excluded vehicles.* (1) The State agency must:

(i) Individually evaluate the fair market value of each licensed vehicle that is not excluded under paragraph (e)(3) of this section;

(ii) Count in full toward the household's resource level, regardless of any encumbrances on the vehicle, that portion of the fair market value that exceeds $4,650 beginning October 1, 1996;

(iii) Evaluate such licensed vehicles as well as all unlicensed vehicles for their equity value (fair market value less encumbrances), unless specifically exempt from the equity value test; and

(iv) Count as a resource only the greater of the two amounts if the vehicle has a countable fair market value of more than $4,650 after October 1, 1996, and also has a countable equity value.

(2) Only the following vehicles are exempt from the equity value test outlined in paragraph (f)(1)(iii) of this section:

(i) Vehicles excluded under paragraph (e)(3)(i) of this section;

(ii) One licensed vehicle per adult household member (or an ineligible alien or disqualified household member whose resources are being considered available to household), regardless of the use of the vehicle; and

(iii) Any other vehicle a household member under age 18 (or an ineligible alien or disqualified household member under age 18 whose resources are being considered available to household) drives to commute to and from employment, or to and from training or education which is preparatory to employment, or to seek employment. This equity exclusion applies during temporary periods of unemployment to a vehicle which a household member under age 18 customarily drives to commute to and from employment.

(3) State agencies will be responsible for establishing methodologies for determining the fair market value of vehicles. In establishing such methodologies, the State agency must not increase the basic value of a vehicle by adding the value of low mileage or other factors such as optional equipment or special apparatus for the handicapped. Any household that claims that the State agency's determination of the value of its vehicle(s) is not accurate must be given the opportunity to acquire verification of the true value of the vehicle from a reliable source.

(g) *Handling of excluded funds.* Excluded funds that are kept in a separate account, and that are not commingled in an account with nonexcluded funds, shall retain their resource exclusion for an unlimited period of time. The resources of students and self-employment households which are excluded as provided in paragraph (e)(9) of this section and are commingled in an account with nonexcluded funds shall retain their exclusion for the period of time over which they have been prorated as income. All other excluded moneys which are commingled in an

account with nonexcluded funds shall retain their exemption for six months from the date they are commingled. After six months from the date of commingling, all funds in the commingled account shall be counted as a resource.

(h) *Transfer of resources.* (1) At the time of application, households shall be asked to provide information regarding any resources which any household member (or ineligible alien or disqualified person whose resources are being considered available to the household) had transferred within the 3-month period immediately preceding the date of application. Households which have transferred resources knowingly for the purpose of qualifying or attempting to qualify for food stamp benefits shall be disqualified from participation in the program for up to 1 year from the date of the discovery of the transfer. This disqualification period shall be applied if the resources are transferred knowingly in the 3-month period prior to application or if they are transferred knowingly after the household is determined eligible for benefits. An example of the latter would be assets which the household acquires after being certified and which are then transferred to prevent the household from exceeding the maximum resource limit.

(2) Eligibility for the program will not be affected by the following transfers:

(i) Resources which would not otherwise affect eligibility, for example, resources consisting of excluded personal property such as furniture or of money that, when added to other nonexempt household resources, totaled less at the time of the transfer than the allowable resource limits;

(ii) Resources which are sold or traded at, or near, fair market value;

(iii) Resources which are transferred between members of the same household (including ineligible aliens or disqualified persons whose resources are being considered available to the household); and

(iv) Resources which are transferred for reasons other than qualifying or attempting to qualify for food stamp benefits, for example, a parent placing funds into an educational trust fund described in paragraph (e)(9) of this section.

(3) In the event the State agency establishes that an applicant household knowingly transferred resources for the purpose of qualifying or attempting to qualify for food stamp benefits, the household shall be sent a notice of denial explaining the reason for and length of the disqualification. The period of disqualification shall begin in the month of application. If the household is participating at the time of the discovery of the transfer, a notice of adverse action explaining the reason for and length of the disqualification shall be sent. The period of disqualification shall be made effective with the first allotment to be issued after the notice of adverse action period has expired, unless the household has requested a fair hearing and continued benefits.

(4) The length of the disqualification period shall be based on the amount by which nonexempt transferred resources, when added to other countable resources, exceeds the allowable resource limits. The following chart will be used to determine the period of disqualification.

Amount in excess of the resource limit	Period of disqualification (months)
$0 to 249.99	1
250 to 999.99	3
1,000 to 2999.99	6
3,000 to 4,999.99	9
5,000 or more	12

(i) *Resources of non-household members.* (1) The resources of non-household members, as defined in § 273.1(b)(7)(i) and (ii), must be handled as outlined in § 273.11(d).

(2) The resources of non-household members, as defined in § 273.1(b)(7)(iii) through (vi), must be handled as outlined in § 273.11(c) and (d), as appropriate.

[Amdt. 132, 43 FR 47889, Oct. 17, 1978]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 273.8, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 273.9 Income and deductions.

(a) *Income eligibility standards*. Participation in the Program shall be limited to those households whose incomes are determined to be a substantial limiting factor in permitting them to obtain a more nutritious diet. Households which contain an elderly or disabled member shall meet the net income eligiblity standards for the Food Stamp Program. Households which do not contain an elderly or disabled member shall meet both the net income eligibility standards and the gross income eligibility standards for the Food Stamp Program. Households which are categorically eligible as defined in § 273.2(j)(2) or 273.2(j)(4) do not have to meet either the gross or net income eligibility standards. The net and gross income eligibility standards shall be based on the Federal income poverty levels established as provided in section 673(2) of the Community Services Block Grant Act (42 U.S.C. 9902(2)).

(1) The gross income eligibility standards for the Food Stamp Program shall be as follows:

(i) The income eligibility standards for the 48 contiguous States and the District of Columbia, Guam and the Virgin Islands shall be 130 percent of the Federal income poverty levels for the 48 contiguous States and the District of Columbia.

(ii) The income eligibility standards for Alaska shall be 130 percent of the Federal income poverty levels for Alaska.

(iii) The income eligibility standards for Hawaii shall be 130 percent of the Federal income poverty levels for Hawaii.

(2) The net income eligibility standards for the Food Stamp Program shall be as follows:

(i) The income eligibility standards for the 48 contiguous States and the District of Columbia, Guam and the Virgin Islands shall be the Federal income poverty levels for the 48 contiguous States and the District of Columbia.

(ii) The income eligibility standards for Alaska shall be the Federal income poverty levels for Alaska.

(iii) The income eligibility standard for Hawaii shall be the Federal income poverty levels for Hawaii.

(3) The income eligibility limits, as described in this paragraph, are revised each October 1 to reflect the annual adjustment to the Federal income poverty guidelines for the 48 States and the District of Columbia, for Alaska, and for Hawaii.

(i) 130 percent of the annual income poverty guidelines shall be divided by 12 to determine the monthly gross income standards, rounding the results upwards as necessary. For households greater than eight persons, the increment in the Federal income poverty guidelines is multiplied by 130 percent, divided by 12, and the results rounded upward if necessary.

(ii) The annual income poverty guidelines shall be divided by 12 to determine the monthly net income eligibility standards, rounding the results upward as necessary. For households greater than eight persons, the increment in the Federal income poverty guidelines is divided by 12, and the results rounded upward if necessary.

(4) The monthly gross and net income eligibility standards for all areas will be prescribed in tables posted on the FNS web site, at www.fns.usda.gov/fsp.

(b) *Definition of income*. Household income shall mean all income from whatever source excluding only items specified in paragraph (c) of this section.

(1) Earned income shall include: (i) All wages and salaries of an employee.

(ii) The gross income from a self-employment enterprise, including the total gain from the sale of any capital goods or equipment related to the business, excluding the costs of doing business as provided in paragraph (c) of this section. Ownership of rental property shall be considered a self-employment enterprise; however, income derived from the rental property shall be considered earned income only if a member of the household is actively engaged in the management of the property at least an average of 20 hours a week. Payments from a roomer or boarder, except foster care boarders, shall also be considered self-employment income.

(iii) Training allowances from vocational and rehabilitative programs recognized by Federal, State, or local governments, such as the work incentive program, to the extent they are not a

reimbursement. Training allowances under Job Training Partnership Act, other than earnings as specified in paragraph (b)(1)(v) of this section, are excluded from consideration as income.

(iv) Payments under Title I (VISTA, University Year for Action, etc.) of the Domestic Volunteer Service Act of 1973 (Pub. L. 93–113 Stat., as amended) shall be considered earned income and subject to the earned income deduction prescribed in § 273.10(e)(1)(i)(B), excluding payments made to those households specified in paragraph (c)(10)(iii) of this section.

(v) Earnings to individuals who are participating in on-the-job training programs under section 204(b)(1)(C) or section 264(c)(1)(A) of the Workforce Investment Act. This provision does not apply to household members under 19 years of age who are under the parental control of another adult member, regardless of school attendance and/or enrollment as discussed in paragraph (c)(7) of this section. For the purpose of this provision, earnings include monies paid under the Workforce Investment Act and monies paid by the employer.

(vi) Educational assistance which has a work requirement (such as work study, an assistantship or fellowship with a work requirement) in excess of the amount excluded under § 273.9(c)(3).

(2) Unearned income shall include, but not be limited to:

(i) Assistance payments from Federal or federally aided public assistance programs, such as supplemental security income (SSI) or Temporary Assistance for Needy Families (TANF); general assistance (GA) programs (as defined in § 271.2); or other assistance programs based on need. Such assistance is considered to be unearned income even if provided in the form of a vendor payment (provided to a third party on behalf of the household), unless the vendor payment is specifically exempt from consideration as countable income under the provisions of paragraph (c)(1) of this section. Assistance payments from programs which require, as a condition of eligibility, the actual performance of work without compensation other than the assistance payments themselves, shall be considered unearned income.

(ii) Annuities; pensions; retirement, veteran's, or disability benefits; worker's or unemployment compensation including any amounts deducted to repay claims for intentional program violations as provided in § 272.12; old-age, survivors, or social security benefits; strike benefits; foster care payments for children or adults who are considered members of the household; gross income minus the cost of doing business derived from rental property in which a household member is not actively engaged in the management of the property at least 20 hours a week.

(iii) Support or alimony payments made directly to the household from nonhousehold members.

(iv) Scholarships, educational grants, deferred payment loans for education, veteran's educational benefits and the like, other than educational assistance with a work requirement, in excess of amounts excluded under § 273.9(c).

(v) Payments from Government-sponsored programs, dividends, interest, royalties, and all other direct money payments from any source which can be construed to be a gain or benefit.

(vi) Monies which are withdrawn or dividends which are or could be received by a household from trust funds considered to be excludable resources under § 273.8(e)(8). Such trust withdrawals shall be considered income in the month received, unless otherwise exempt under the provisions of paragraph (c) of this section. Dividends which the household has the option of either receiving as income or reinvesting in the trust are to be considered as income in the month they become available to the household unless otherwise exempt under the provisions of paragraph (c) of this section.

(3) The earned or unearned income of an individual disqualified from the household for intentional Program violation, in accordance with § 273.16, or as a result of a sanction imposed while he/she was participating in a household disqualified for failure to comply with workfare requirements, in accordance with § 273.22, shall continue to be attributed in their entirety to the remaining household members. However, the earned or unearned income of individuals disqualified from households

for failing to comply with the requirement to provide an SSN, in accordance with § 273.6, or for being an ineligible alien, in accordance with § 273.4, shall continue to be counted as income, less a pro rata share for the individual. Procedures for calculating this pro rata share are described in § 273.11(c).

(4) For a household containing a sponsored alien, the income of the sponsor and the sponsor's spouse must be deemed in accordance with § 273.4(c)(2).

(5) Income shall not include the following:

(i) Moneys withheld from an assistance payment, earned income, or other income source, or moneys received from any income source which are voluntarily or involuntarily returned, to repay a prior overpayment received from that income source, provided that the overpayment was not excludable under paragraph (c) of this section. However, moneys withheld from assistance from another program, as specified in § 273.11(k), shall be included as income.

(ii) Child support payments received by TANF recipients which must be transferred to the agency administering title IV–D of the Social Security Act, as amended, to maintain TANF eligibility.

(c) *Income exclusions*. Only the following items shall be excluded from household income and no other income shall be excluded:

(1) Any gain or benefit which is not in the form of money payable directly to the household, including in-kind benefits and certain vendor payments. In-kind benefits are those for which no monetary payment is made on behalf of the household and include meals, clothing, housing, or produce from a garden. A vendor payment is a money payment made on behalf of a household by a person or organization outside of the household directly to either the household's creditors or to a person or organization providing a service to the household. Payments made to a third party on behalf of the household are included or excluded as income as follows:

(i) *Public assistance (PA) vendor payments*. PA vendor payments are counted as income unless they are made for:

(A) Medical assistance;

(B) Child care assistance;

(C) Energy assistance as defined in paragraph (c)(11) of this section;

(D) Emergency assistance (including, but not limited to housing and transportation payments) for migrant or seasonal farmworker households while they are in the job stream;

(E) Housing assistance payments made through a State or local housing authority;

(F) *Emergency and special assistance*. PA provided to a third party on behalf of a household which is not specifically excluded from consideration as income under the provisions of paragraphs (c)(1)(i)(A) through (c)(1)(i)(E) of this section shall be considered for exclusion under this provision. To be considered emergency or special assistance and excluded under this provision, the assistance must be provided over and above the normal PA grant or payment, or cannot normally be provided as part of such grant or payment. If the PA program is composed of various standards or components, the assistance would be considered over and above the normal grant or not part of the grant if the assistance is not included as a regular component of the PA grant or benefit or the amount of assistance exceeds the maximum rate of payment for the relevant component. If the PA program is not composed of various standards or components but is designed to provide a basic monthly grant or payment for all eligible households and provides a larger basic grant amount for all households in a particular category, e.g., all households with infants, the larger amount is still part of the normal grant or benefit for such households and not an ''extra'' payment excluded under this provision. On the other hand, if a fire destroyed a household item and a PA program provides an emergency amount paid directly to a store to purchase a replacement, such a payment is excluded under this provision. If the PA program is not composed of various standards, allowances, or components but is simply designed to provide assistance on an as-needed basis rather than to provide routine, regular

monthly benefits to a client, no exclusion would be granted under this provision because the assistance is not provided over and above the normal grant, it is the normal grant. If it is not clear whether a certain type of PA vendor payment is covered under this provision, the State agency shall apply to the appropriate FNS Regional Office for a determination of whether the PA vendor payments should be excluded. The application for this exclusion determination must explain the emergency or special nature of the vendor payment, the exact type of assistance it is intended to provide, who is eligible for the assistance, how the assistance is paid, and how the vendor payment fits into the overall PA benefit standard. A copy of the rules, ordinances, or statutes which create and authorize the program shall accompany the application request.

(ii) *General assistance (GA) vendor payments*. Vendor payments made under a State or local GA program or a comparable basic assistance program are excluded from income except for some vendor payments for housing. A housing vendor payment is counted as income unless the payment is for:

(A) Energy assistance (as defined in paragraph (c)(11) of this section);

(B) Housing assistance from a State or local housing authority;

(C) Emergency assistance for migrant or seasonal farmworker households while they are in the job stream;

(D) Emergency or special payments (as defined in paragraph (c)(1)(i)(F) of this section; or

(E) Assistance provided under a program in a State in which no GA payments may be made directly to the household in the form of cash.

(iii) *Department of Housing and Urban Development (HUD) vendor payments*. Rent or mortgage payments made to landlords or mortgagees by HUD are excluded.

(iv) *Educational assistance vendor payments*. Educational assistance provided to a third party on behalf of the household for living expenses shall be treated the same as educational assistance payable directly to the household.

(v) *Vendor payments that are reimbursements*. Reimbursements made in the form of vendor payments are excluded on the same basis as reimbursements paid directly to the household in accordance with paragraph (c)(5) of this section.

(vi) *Demonstration project vendor payments*. In-kind or vendor payments which would normally be excluded as income but are converted in whole or in part to a direct cash payment under a federally authorized demonstration project or waiver of provisions of Federal law shall be excluded from income.

(vii) *Other third-party payments*. Other third-party payments shall be handled as follows: moneys legally obligated and otherwise payable to the household which are diverted by the provider of the payment to a third party for a household expense shall be counted as income and not excluded. If a person or organization makes a payment to a third party on behalf of a household using funds that are not owed to the household, the payment shall be excluded from income. This distinction is illustrated by the following examples:

(A) A friend or relative uses his or her own money to pay the household's rent directly to the landlord. This vendor payment shall be excluded.

(B) A household member earns wages. However, the wages are garnished or diverted by the employer and paid to a third party for a household expense, such as rent. This vendor payment is counted as income. However, if the employer pays a household's rent directly to the landlord in addition to paying the household its regular wages, the rent payment shall be excluded from income. Similarly, if the employer provides housing to an employee in addition to wages, the value of the housing shall not be counted as income.

(C) A household receives court-ordered monthly support payments in the amount of $400. Later, $200 is diverted by the provider and paid directly to a creditor for a household expense. The payment is counted as income. Money deducted or diverted from a court-ordered support or alimony payment (or other binding written support or alimony agreement) to a third party for a household's expense shall be included as income because the payment is taken from money that is owed to the household. However, payments specified by a court order or other legally

binding agreement to go directly to a third party rather than the household are excluded from income because they are not otherwise payable to the household. For example, a court awards support payments in the amount of $400 a month and in addition orders $200 to be paid directly to a bank for repayment of a loan. The $400 payment is counted as income and the $200 payment is excluded from income. Support payments not required by a court order or other legally binding agreement (including payments in excess of the amount specified in a court order or written agreement) which are paid to a third party on the household's behalf shall be excluded from income.

(2) Any income in the certification period which is received too infrequently or irregularly to be reasonably anticipated, but not in excess of $30 in a quarter.

(3)(i) Educational assistance, including grants, scholarships, fellowships, work study, educational loans on which payment is deferred, veterans' educational benefits and the like.

(ii) To be excluded, educational assistance referred to in paragraph (c)(3)(i) must be:

(A) Awarded to a household member enrolled at a:

(*1*) Recognized institution of post-secondary education (meaning any public or private educational institution which normally requires a high school diploma or equivalency certificate for enrollment or admits persons who are beyond the age of compulsory school attendance in the State in which the institution is located, provided that the institution is legally authorized or recognized by the State to provide an educational program beyond secondary education in the State or provides a program of training to prepare students for gainful employment, including correspondence schools at that level),

(*2*) School for the handicapped,

(*3*) Vocational education program,

(*4*) Vocational or technical school,

(*5*) Program that provides for obtaining a secondary school diploma or the equivalent;

(B) Used for or identified (earmarked) by the institution, school, program, or other grantor for the following allowable expenses:

(*1*) Tuition,

(*2*) Mandatory school fees, including the rental or purchase of any equipment, material, and supplies related to the pursuit of the course of study involved,

(*3*) Books,

(*4*) Supplies,

(*5*) Transportation,

(*6*) Miscellaneous personal expenses, other than normal living expenses, of the student incidental to attending a school, institution or program,

(*7*) Dependent care,

(*8*) Origination fees and insurance premiums on educational loans,

(*9*) Normal living expenses which are room and board are not excludable.

(*10*) Amounts excluded for dependent care costs shall not also be excluded under the general exclusion provisions of paragraph § 273.9(c)(5)(i)(C). Dependent care costs which exceed the amount excludable from income shall be deducted from income in accordance with paragraph § 273.9(d)(4) and be subject to a cap.

(iii) Exclusions based on use pursuant to paragraph (c)(3)(ii)(B) must be incurred or anticipated for the period the educational income is intended to cover regardless of when the educational income is actually received. If a student uses other income sources to pay for allowable educational expenses in months before the educational income is received, the exclusions to cover the expenses shall be allowed when the educational income is received. When the amounts used for allowable expense are more than amounts earmarked by the institution, school, program or other grantor, an exclusion shall be allowed for amounts used over the earmarked amounts. Exclusions based on use shall be subtracted from unearned educational income to the extent possible. If the unearned educational income is not enough to cover the expense, the remainder of the allowable expense shall be excluded from earned educational income.

(iv) An individual's total educational income exclusions granted under the provisions of paragraph (c)(3)(i)

through (c)(3)(iii) of this section cannot exceed that individual's total educational income which was subject to the provisions of paragraph (c)(3)(i) through (c)(3)(iii) of this section.

(4) All loans, including loans from private individuals as well as commercial institutions, other than educational loans on which repayment is deferred. Educational loans on which repayment is deferred shall be excluded pursuant to the provisions of §273.9(c)(3)(i). A loan on which repayment must begin within 60 days after receipt of the loan shall not be considered a deferred repayment loan.

(5) Reimbursements for past or future expenses, to the extent they do not exceed actual expenses, and do not represent a gain or benefit to the household. Reimbursements for normal household living expenses such as rent or mortgage, personal clothing, or food eaten at home are a gain or benefit and, therefore, are not excluded. To be excluded, these payments must be provided specifically for an identified expense, other than normal living expenses, and used for the purpose intended. When a reimbursement, including a flat allowance, covers multiple expenses, each expense does not have to be separately identified as long as none of the reimbursement covers normal living expenses. The amount by which a reimbursement exceeds the actual incurred expense shall be counted as income. However, reimbursements shall not be considered to exceed actual expenses, unless the provider or the household indicates the amount is excessive.

(i) Examples of excludable reimbursements which are not considered to be a gain or benefit to the household are:

(A) Reimbursements or flat allowances, including reimbursements made to the household under §273.7(d)(1)(ii), for job- or training-related expenses such as travel, per diem, uniforms, and transportation to and from the job or training site. Reimbursements which are provided over and above the basic wages for these expenses are excluded; however, these expenses, if not reimbursed, are not otherwise deductible. Reimbursements for the travel expenses incurred by migrant workers are also excluded.

(B) Reimbursements for out-of-pocket expenses of volunteers incurred in the course of their work.

(C) Medical or dependent care reimbursements.

(D) Reimbursements received by households to pay for services provided by Title XX of the Social Security Act.

(E) Any allowance a State agency provides no more frequently than annually for children's clothes when the children enter or return to school or daycare, provided the State agency does not reduce the monthly TANF payment for the month in which the school clothes allowance is provided. State agencies are not required to verify attendance at school or daycare.

(F) Reimbursements made to the household under §273.7(d)(1)(ii) for expenses necessary for participation in an education component under the E&T program.

(ii) The following shall not be considered a reimbursement excludable under this provision:

(A) No portion of benefits provided under title IV–A of the Social Security Act, to the extent such benefits are attributed to an adjustment for work-related or child care expenses (except for payments or reimbursements for such expenses made under an employment, education or training program initiated under such title after September 19, 1988), shall be considered excludable under this provision.

(B) No portion of any educational assistance that is provided for normal living expenses (room and board) shall be considered a reimbursement excludable under this provision.

(6) Moneys received and used for the care and maintenance of a third-party beneficiary who is not a household member. If the intended beneficiaries of a single payment are both household and nonhousehold members, any identifiable portion of the payment intended and used for the care and maintenance of the nonhousehold member shall be excluded. If the nonhousehold member's portion cannot be readily identified, the payment shall be evenly prorated among intended beneficiaries and the exclusion applied to the nonhousehold member's pro rata share or

the amount actually used for the nonhousehold member's care and maintenance, whichever is less.

(7) The earned income (as defined in paragraph (b)(1) of this section) of any household member who is under age 18, who is an elementary or secondary school student, and who lives with a natural, adoptive, or stepparent or under the parental control of a household member other than a parent. For purposes of this provision, an elementary or secondary school student is someone who attends elementary or secondary school, or who attends classes to obtain a General Equivalency Diploma that are recognized, operated, or supervised by the student's state or local school district, or who attends elementary or secondary classes through a home-school program recognized or supervised by the student's state or local school district. The exclusion shall continue to apply during temporary interruptions in school attendance due to semester or vacation breaks, provided the child's enrollment will resume following the break. If the child's earnings or amount of work performed cannot be differentiated from that of other household members, the total earnings shall be prorated equally among the working members and the child's pro rata share excluded.

(8) Money received in the form of a nonrecurring lump-sum payment, including, but not limited to, income tax refunds, rebates, or credits; retroactive lump-sum social security, SSI, public assistance, railroad retirement benefits, or other payments; lump-sum insurance settlements; or refunds of security deposits on rental property or utilities. These payments shall be counted as resources in the month received, in accordance with § 273.8(c) unless specifically excluded from consideration as a resource by other Federal laws. TANF payments made to divert a family from becoming dependent on welfare may be excluded as a nonrecurring lump-sum payment if the payment is not defined as assistance because of the exception for non-recurrent, short-term benefits in 45 CFR 261.31(b)(1).

(9) The cost of producing self-employment income. The procedures for computing the cost of producing self-employment income are described in § 273.11.

(10) Any income that is specifically excluded by any other Federal statute from consideration as income for the purpose of determining eligibility for the food stamp program. The following laws provide such an exclusion:

(i) Reimbursements from the Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970 (Pub. L. 91–646, section 216).

(ii) Payments received under the Alaska Native Claims Settlement Act (Pub. L. 92–203, section 21(a));

(iii) Any payment to volunteers under Title II (RSVP, Foster Grandparents and others) of the Domestic Volunteer Services Act of 1973 (Pub. L. 93–113) as amended. Payments under title I of that Act (including payments from such title I programs as VISTA, University Year for Action, and Urban Crime Prevention Program) to volunteers shall be excluded for those individuals receiving food stamps or public assistance at the time they joined the title I program, except that households which were receiving an income exclusion for a Vista or other title I Subsistence allowance at the time of conversion to the Food Stamp Act of 1977 shall continue to receive an income exclusion for VISTA for the length of their volunteer contract in effect at the time of conversion. Temporary interruptions in food stamp participation shall not alter the exclusion once an initial determination has been made. New applicants who were not receiving public assistance or food stamps at the time they joined VISTA shall have these volunteer payments included as earned income. The FNS National Office shall keep FNS Regional Offices informed of any new programs created under title I and II or changes in programs mentioned above so that they may alert State agencies.

(iv) Income derived from certain submarginal land of the United States which is held in trust for certain Indian tribes (Pub. L. 94–114, section 6).

(v) Allowances, earnings, or payments (including reimbursements) to individuals participating in programs under the Job Training Partnership Act (Pub. L. 90–300), except as provided

for under paragraph (b)(1)(v) of this section.

(vi) Income derived from the disposition of funds to the Grand River Band of Ottawa Indians (Pub. L. 94–540).

(vii) Earned income tax credits received as a result of Pub. L. 95–600, the Revenue Act of 1978 which are received before January 1, 1980.

(viii) Payments by the Indian Claims Commission to the Confederated Tribes and Bands of the Yakima Indian Nation or the Apache Tribe of the Mescalero Reservation (Pub. L. 95–433).

(ix) Payments to the Passamaquoddy Tribe and the Penobscot Nation or any of their members received pursuant to the Maine Indian Claims Settlement Act of 1980 (Pub. L. 96–420, section 5).

(x) Payments of relocation assistance to members of the Navajo and Hopi Tribes under Pub. L. 93–531.

(11) Energy assistance as follows:

(i) Any payments or allowances made for the purpose of providing energy assistance under any Federal law other than part A of Title IV of the Social Security Act (42 U.S.C. 601 *et seq.*), including utility reimbursements made by the Department of Housing and Urban Development and the Rural Housing Service, or

(ii) A one-time payment or allowance applied for on an as-needed basis and made under a Federal or State law for the costs of weatherization or emergency repair or replacement of an unsafe or inoperative furnace or other heating or cooling device. A down-payment followed by a final payment upon completion of the work will be considered a one-time payment for purposes of this provision.

(12) Cash donations based on need received on or after February 1, 1988 from one or more private nonprofit charitable organizations, but not to exceed $300 in a Federal fiscal year quarter.

(13) Earned income tax credit payments received either as a lump sum or payments under section 3507 of the Internal Revenue Code of 1986 (relating to advance payment of earned income tax credits received as part of the paycheck or as a reduction in taxes that otherwise would have been paid at the end of the year).

(14) Any payment made to an E&T participant under § 273.7(d)(1)(ii) for costs that are reasonably necessary and directly related to participation in the E&T program. These costs include, but are not limited to, dependent care costs, transportation, other expenses related to work, training or education, such as uniforms, personal safety items or other necessary equipment, and books or training manuals. These costs shall not include the cost of meals away from home. Also, the value of any dependent care services provided for or arranged under § 273.7(d)(1)(ii)(A) would be excluded.

(15) Governmental foster care payments received by households with foster care individuals who are considered to be boarders in accordance with § 273.1(c).

(16) Income of an SSI recipient necessary for the fulfillment of a plan for achieving self-support (PASS) which has been approved under section 1612(b)(4)(A)(iii) or 1612(b)(4)(B)(iv) of the Social Security Act. This income may be spent in accordance with an approved PASS or deposited into a PASS savings account for future use.

(d) *Income deductions.* Deductions shall be allowed only for the following household expenses:

(1) *Standard deduction.* Effective October 1, 1996, for each household in the 48 contiguous States and the District of Columbia, Alaska, Hawaii, Guam and the Virgin Islands of the United States, the standard deduction must be $134, $229, $189, $269, and $118, respectively.

(2) *Earned income deduction.* Twenty percent of gross earned income as defined in paragraph (b)(1) of this section. Earnings excluded in paragraph (c) of this section shall not be included in gross earned income for purposes of computing the earned income deduction.

(3) *Excess medical deduction.* That portion of medical expenses in excess of $35 per month, excluding special diets, incurred by any household member who is elderly or disabled as defined in § 271.2. Spouses or other persons receiving benfits as a dependent of the SSI or disability and blindness recipient are not eligible to receive this deduction but persons receiving emergency SSI

benefits based on presumptive eligibility are eligible for this deduction. Allowable medical costs are:

(i) Medical and dental care including psychotherapy and rehabilitation services provided by a licensed practitioner authorized by State law or other qualified health professional.

(ii) Hospitalization or outpatient treatment, nursing care, and nursing home care including payments by the household for an individual who was a household member immediately prior to entering a hospital or nursing home provided by a facility recognized by the State.

(iii) Prescription drugs when prescribed by a licensed practitioner authorized under State law and other over-the-counter medication (including insulin) when approved by a licensed practitioner or other qualified health professional; in addition, costs of medical supplies, sick-room equipment (including rental) or other prescribed equipment are deductible;

(iv) Health and hospitalization insurance policy premiums. The costs of health and accident policies such as those payable in lump sum settlements for death or dismemberment or income maintenance policies such as those that continue mortgage or loan payments while the beneficiary is disabled are not deductible;

(v) Medicare premiums related to coverage under Title XVIII of the Social Security Act; any cost-sharing or spend down expenses incurred by Medicaid recipients;

(vi) Dentures, hearing aids, and prosthetics;

(vii) Securing and maintaining a seeing eye or hearing dog including the cost of dog food and veterinarian bills;

(viii) Eye glasses prescribed by a physician skilled in eye disease or by an optometrist;

(ix) Reasonable cost of transportation and lodging to obtain medical treatment or services;

(x) Maintaining an attendant, homemaker, home health aide, or child care services, housekeeper, necessary due to age, infirmity, or illness. In addition, an amount equal to the one person coupon allotment shall be deducted if the household furnishes the majority of the attendant's meals. The allotment for this meal related deduction shall be that in effect at the time of initial certification. The State agency is only required to update the allotment amount at the next scheduled recertification; however, at their option, the State agency may do so earlier. If a household incurs attendant care costs that could qualify under both the medical deduction and dependent care deduction, the State agency shall treat the cost as a medical expense.

(4) *Dependent care.* Payments for the actual costs for the care of children or other dependents when necessary for a household member to accept or continue employment, comply with the employment and training requirements as specified under § 273.7(f), or attend training or pursue education which is preparatory to employment, except as provided in § 273.10(d)(1)(i). The maximum monthly dependent care deduction amount households shall be granted under this provision is $200 a month for each dependent child under two (2) years of age and $175 a month for each other dependent.

(5) *Child support deduction.* Legally obligated child support payments paid by a household member to or for a nonhousehold member, including payments made to a third party on behalf of the nonhousehold member (vendor payments). The State agency shall allow a deduction for amounts paid toward arrearages. Alimony payments made to or for a nonhousehold member shall not be included in the child support deduction.

(6) *Standard utility allowance.*—(i) *Homeless shelter deduction.* A State agency may develop a standard homeless shelter deduction up to a maximum of $143 a month for shelter expenses specified in paragraphs (d)(6)(ii)(A), (d)(6)(ii)(B) and (d)(6)(ii)(C) of this section that may reasonably be expected to be incurred by households in which all members are homeless individuals but are not receiving free shelter throughout the month. The deduction must be subtracted from net income in determining eligibility and allotments for the households. The State agency may make a household with extremely low shelter costs ineligible for the deduction. A household receiving the homeless shelter deduction

cannot have its shelter expenses considered under paragraphs (d)(6)(ii) or (d)(6)(iii) of this section. However, a homeless household may choose to claim actual costs under paragraph (d)(6)(ii) of this section instead of the homeless shelter deduction if actual costs are higher and verified.

(ii) *Excess shelter deduction.* Monthly shelter expenses in excess of 50 percent of the household's income after all other deductions in paragraphs (d)(1) through (d)(5) of this section have been allowed. If the household does not contain an elderly or disabled member, as defined in §271.2 of this chapter, the shelter deduction cannot exceed the maximum shelter deduction limit established for the area. FNS will notify State agencies of the amount of the limit. Only the following expenses are allowable shelter expenses:

(A) Continuing charges for the shelter occupied by the household, including rent, mortgage, condo and association fees, or other continuing charges leading to the ownership of the shelter such as loan repayments for the purchase of a mobile home, including interest on such payments.

(B) Property taxes, State and local assessments, and insurance on the structure itself, but not separate costs for insuring furniture or personal belongings.

(C) The cost of fuel for heating; cooling (*i.e.,* the operation of air conditioning systems or room air conditioners); electricity or fuel used for purposes other than heating or cooling; water; sewerage; well installation and maintenance; septic tank system installation and maintenance; garbage and trash collection; all service fees required to provide service for one telephone, including, but not limited to, basic service fees, wire maintenance fees, subscriber line charges, relay center surcharges, 911 fees, and taxes; and fees charged by the utility provider for initial installation of the utility. One-time deposits cannot be included.

(D) The shelter costs for the home if temporarily not occupied by the household because of employment or training away from home, illness, or abandonment caused by a natural disaster or casualty loss. For costs of a home vacated by the household to be included in the household's shelter costs, the household must intend to return to the home; the current occupants of the home, if any, must not be claiming the shelter costs for food stamp purposes; and the home must not be leased or rented during the absence of the household.

(E) Charges for the repair of the home which was substantially damaged or destroyed due to a natural disaster such as a fire or flood. Shelter costs shall not include charges for repair of the home that have been or will be reimbursed by private or public relief agencies, insurance companies, or from any other source.

(iii) *Standard utility allowances.*

(A) With FNS approval, a State agency may develop the following standard utility allowances (standards) to be used in place of actual costs in determining a household's excess shelter deduction: an individual standard for each type of utility expense; a standard utility allowance for all utilities that includes heating or cooling costs (HCSUA); and, a limited utility allowance (LUA) that includes electricity and fuel for purposes other than heating or cooling, water, sewerage, well and septic tank installation and maintenance, telephone, and garbage or trash collection. The LUA must include expenses for at least two utilities. However, at its option, the State agency may include the excess heating and cooling costs of public housing residents in the LUA if it wishes to offer the lower standard to such households. The State agency may use different types of standards but cannot allow households the use of two standards that include the same expense. In States in which the cooling expense is minimal, the State agency may include the cooling expense in the electricity component. The State agency may vary the allowance by factors such as household size, geographical area, or season. Only utility costs identified in paragraph (d)(6)(ii)(C) of this section must be used in developing standards.

(B) The State agency must review the standards annually and make adjustments to reflect changes in costs, rounded to the nearest whole dollar. State agencies must provide the amounts of standards to FNS when

they are changed and submit methodologies used in developing and updating standards to FNS for approval when the methodologies are developed or changed.

(C) A standard with a heating or cooling component must be made available to households that incur heating or cooling expenses separately from their rent or mortgage and to households that receive direct or indirect assistance under the Low Income Home Energy Assistance Act of 1981 (LIHEAA). A heating or cooling standard is available to households in private rental housing who are billed by their landlords on the basis of individual usage or who are charged a flat rate separately from their rent. However, households in public housing units which have central utility meters and which charge households only for excess heating or cooling costs are not entitled to a standard that includes heating or cooling costs based only on the charge for excess usage. Households that receive direct or indirect energy assistance that is excluded from income consideration (other than that provided under the LIHEAA) are entitled to a standard that includes heating or cooling only if the amount of the expense exceeds the amount of the assistance. Households that receive direct or indirect energy assistance that is counted as income and incur a heating or cooling expense are entitled to use a standard that includes heating or cooling costs. A household that has both an occupied home and an unoccupied home is only entitled to one standard.

(D) At initial certification, recertification, and when a household moves, the household may choose between a standard or verified actual utility costs for any allowable expense identified in paragraph (d)(6)(ii)(C) of this section (except the telephone standard), unless the State agency has opted, with FNS approval, to mandate use of a standard. The State agency may require use of the telephone standard for the cost of basic telephone service even if actual costs are higher. Households certified for 24 months may also choose to switch between a standard and actual costs at the time of the mandatory interim contact required by § 273.10(f)(1)(i), if the State agency has not mandated use of the standard.

(E) A State agency may mandate use of standard utility allowances for all households with qualifying expenses if the State has developed one or more standards that include the costs of heating and cooling and one or more standards that do not include the costs of heating and cooling, the standards will not result in increased program costs, and FNS approves the standard. The prohibition on increasing Program costs does not apply to necessary increases to standards resulting from utility cost increases. Under this option households entitled to the standard may not claim actual expenses, even if the expenses are higher than the standard. Households not entitled to the standard may claim actual allowable expenses. Households in public housing units that have central utility meters and charge households only for excess heating or cooling costs are not entitled to the HCSUA but, at State agency option, may claim the LUA. Requests for approval to use a standard for a single utility must include the cost figures upon which the standard is based. Requests to use an LUA should include the approximate number of food stamp households that would be entitled to the nonheating and noncooling standard, the average utility costs prior to use of the mandatory standard, the proposed standards, and an explanation of how the standards were computed.

(F) If a household lives with and shares heating or cooling expenses with another individual, another household, or both, the State agency must prorate a standard that includes heating or cooling expenses among the household and the other individual, household, or both. However, the State agency may not prorate the SUA if all the individuals who share utility expenses but are not in the food stamp household are excluded from the household only because they are ineligible.

[Amdt. 132, 43 FR 47889, Oct. 17, 1978]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 273.9, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 273.10 Determining household eligibility and benefit levels.

(a) *Month of application*—(1) *Determination of eligibility and benefit levels.* (i) A household's eligibility shall be determined for the month of application by considering the household's circumstances for the entire month of application. Most households will have the eligibility determination based on circumstances for the entire calendar month in which the household filed its application. However, State agencies may, with the prior approval of FNS, use a fiscal month if the State agency determines that it is more efficient and satisfies FNS that the accounting procedures fully comply with certification and issuance requirements contained in these regulations. A State agency may elect to use either a standard fiscal month for all households, such as from the 15th of one calendar month to the 15th of the next calendar month, or a fiscal month that will vary for each household depending on the date an individual files an application for the Program. Applicant households consisting of residents of a public institution who apply jointly for SSI and food stamps prior to release from the public institution in accordance with § 273.1(e)(2) will have their eligibility determined for the month in which the applicant household was released from the institution.

(ii) A household's benefit level for the initial months of certification shall be based on the day of the month it applies for benefits and the household shall receive benefits from the date of application to the end of the month unless the applicant household consists of residents of a public institution. For households which apply for SSI prior to their release from a public institution in accordance with § 273.1(e)(2), the benefit level for the initial month of certification shall be based on the date of the month the household is released from the institution and the household shall receive benefits from the date of the household's release from the institution to the end of the month. As used in this section, the term ''initial month'' means the first month for which the household is certified for participation in the Food Stamp Program following any period during which the household was not certified for participation, except for migrant and seasonal farmworker households. In the case of migrant and seasonal farmworker households, the term ''initial month'' means the first month for which the household is certified for participation in the Food Stamp Program following any period of more than 1 month during which the household was not certified for participation. Recertification shall be processed in accordance with § 273.10(a)(2). The State agency shall prorate a household's benefits according to one of the two following options:

(A) The State agency shall use a standard 30-day calendar or fiscal month. A household applying on the 31st of a month will be treated as though it applied on the 30th of the month.

(B) The State agency shall prorate benefits over the exact length of a particular calendar or fiscal month.

(iii) To determine the amount of the prorated allotment, the State agency shall use either the appropriate Food Stamp Allotment Proration Table provided by FNS or whichever of the following formulae is appropriate:

(A) For State agencies which use a standard 30-day calendar or fiscal month the formula is as follows, keeping in mind that the date of application for someone applying on the 31st of a month is the 30th:

$$X = \frac{a \times b}{c}$$

full month's benefits × ———————— = allotment

(B) For State agencies which use the exact number of days in a month, the formula is:

$$X = \frac{a \times b}{c}$$

$$\text{full month's benefits} \times \frac{\qquad\qquad}{\qquad\qquad} = \text{allotment}$$

(C) If after using the appropriate formula the result ends in 1 through 99 cents, the State agency shall round the product down to the nearest lower whole dollar. If the computation results in an allotment of less than $10, then no issuance shall be made for the initial month.

(2) *Application for recertification.* Eligibility for recertification shall be determined based on circumstances anticipated for the certification period starting the month following the expiration of the current certification period. The level of benefits for recertifications shall be based on the same anticipated circumstances, except for retrospectively budgeted households which shall be recertified in accordance with § 273.21(f)(2). If a household, other than a migrant or seasonal farmworker household, submits an application after the household's certification period has expired, that application shall be considered an initial application and benefits for that month shall be prorated in accordance with paragraph (a)(1)(ii) of this section. If a household's failure to timely apply for recertification was due to an error of the State agency and therefore there was a break in participation, the State agency shall follow the procedures in § 273.14(e). In addition, if the household submits an application for recertification prior to the end of its certification period but is found ineligible for the first month following the end of the certification period, then the first month of any subsequent participation shall be considered an initial month. Conversely, if the household submits an application for recertification prior to the end of its certification period and is found eligible for the first month following the end of the certification period, then that month shall not be an initial month.

(3) *Anticipated changes.* Because of anticipated changes, a household may be eligible for the month of application, but ineligible in the subsequent month. The household shall be entitled to benefits for the month of application even if the processing of its application results in the benefits being issued in the subsequent month. Similarly, a household may be ineligible for the month of application, but eligible in the subsequent month due to anticipated changes in circumstances. Even though denied for the month of application, the household does not have to reapply in the subsequent month. The same application shall be used for the denial for the month of application and the determination of eligibility for subsequent months, within the timeliness standards in § 273.2.

(4) *Changes in allotment levels.* As a result of anticipating changes, the household's allotment for the month of application may differ from its allotment in subsequent months. The State agency shall establish a certification period for the longest possible period over which changes in the household's circumstances can be reasonably anticipated. The household's allotment shall vary month to month within the certification period to reflect changes anticipated at the time of certification, unless the household elects the averaging techniques in paragraphs (c)(3) and (d)(3) of this section.

(b) *Determining resources.* Available resources at the time the household is interviewed shall be used to determine the household's eligibility.

(c) *Determining income*—(1) *Anticipating income.* (i) For the purpose of determining the household's eligibility and level of benefits, the State agency shall take into account the income already received by the household during the certification period and any anticipated income the household and the

State agency are reasonably certain will be received during the remainder of the certification period. If the amount of income that will be received, or when it will be received, is uncertain, that portion of the household's income that is uncertain shall not be counted by the State agency. For example, a household anticipating income from a new source, such as a new job or recently applied for public assistance benefits, may be uncertain as to the timing and amount of the initial payment. These moneys shall not be anticipated by the State agency unless there is reasonable certainty concerning the month in which the payment will be received and in what amount. If the exact amount of the income is not known, that portion of it which can be anticipated with reasonable certainty shall be considered as income. In cases where the receipt of income is reasonably certain but the monthly amount may fluctuate, the household may elect to income average. Households shall be advised to report all changes in gross monthly income as required by § 273.12.

(ii) Income received during the past 30 days shall be used as an indicator of the income that is and will be available to the household during the certification period. However, the State agency shall not use past income as an indicator of income anticipated for the certification period if changes in income have occurred or can be anticipated. If income fluctuates to the extent that a 30-day period alone cannot provide an accurate indication of anticipated income, the State agency and the household may use a longer period of past time if it will provide a more accurate indication of anticipated fluctuations in future income. Similarly, if the household's income fluctuates seasonally, it may be appropriate to use the most recent season comparable to the certification period, rather than the last 30 days, as one indicator of anticipated income. The State agency shall exercise particular caution in using income from a past season as an indicator of income for the certification period. In many cases of seasonally fluctuating income, the income also fluctuates from one season in one year to the same season in the next year. However, in no event shall the State agency automatically attribute to the household the amounts of any past income. The State agency shall not use past income as an indicator of anticipated income when changes in income have occurred or can be anticipated during the certification period.

(2) *Income only in month received.* (i) Income anticipated during the certification period shall be counted as income only in the month it is expected to be received, unless the income is averaged. Whenever a full month's income is anticipated but is received on a weekly or biweekly basis, the State agency shall convert the income to a monthly amount by multiplying weekly amounts by 4.3 and biweekly amounts by 2.15, use the State Agency's PA conversion standard, or use the exact monthly figure if it can be anticipated for each month of the certification period. Nonrecurring lump-sum payments shall be counted as a resource starting in the month received and shall not be counted as income.

(ii) Wages held at the request of the employee shall be considered income to the household in the month the wages would otherwise have been paid by the employer. However, wages held by the employer as a general practice, even if in violation of law, shall not be counted as income to the household, unless the household anticipates that it will ask for and receive an advance, or that it will receive income from wages that were previously held by the employer as a general practice and that were, therefore, not previously counted as income by the State agency. Advances on wages shall count as income in the month received only if reasonably anticipated as defined in paragraph (c)(1) of this section.

(iii) Households receiving income on a recurring monthly or semimonthly basis shall not have their monthly income varied merely because of changes in mailing cycles or pay dates or because weekends or holidays cause additional payments to be received in a month.

(3) *Income averaging.* (i) Households, except destitute households, and PA households subject to a monthly reporting requirement, may elect to have income averaged. Income shall not be

averaged for a destitute household since averaging would result in assigning to the month of application income from future periods which is not available to the destitute household for its current food needs. To average income, the State agency shall use the household's anticipation of income fluctuations over the certification period. The number of months used to arrive at the average income need not be the same as the number of months in the certification period. For example, if fluctuating income for the past 30 days and the month of application are known and, with reasonable certainty, are representative of the income fluctuations anticipated for the coming months, the income from the 2 known months may be averaged and projected over a certification period of longer than 2 months.

(ii) Households which, by contract or self-employment, derive their annual income in a period of time shorter than 1 year shall have that income averaged over a 12-month period, provided the income from the contract is not received on an hourly or piecework basis. These households may include school employees, sharecroppers, farmers, and other self-employed households. However, these provisions do not apply to migrant or seasonal farmworkers. The procedures for averaging self-employed income are described in § 273.11. Contract income which is not the household's annual income and is not paid on an hourly or piecework basis shall be prorated over the period the income is intended to cover.

(iii) Earned and unearned educational income, after allowable exclusions, shall be averaged over the period which it is intended to cover. Income shall be counted either in the month it is received, or in the month the household anticipates receiving it or receiving the first installment payment, although it is still prorated over the period it is intended to cover.

(d) *Determining deductions*. Deductible deductions include only certain dependent care, shelter, child support and medical costs as described in § 273.9.

(1) *Disallowed expenses*. (i) Any expense, in whole or part, covered by educational income which has been excluded pursuant to the provisions of § 273.9(c)(3) shall not be deductible. For example, the portion of rent covered by excluded vendor payments shall not be calculated as part of the household's shelter cost. In addition, an expense which is covered by an excluded vendor payment that has been converted to a direct cash payment under the approval of a federally authorized demonstration project as specified under § 273.9(c)(1) shall not be deductible. However, that portion of an allowable medical expense which is not reimbursable shall be included as part of the household's medical expenses. If the household reports an allowable medical expense at the time of certification but cannot provide verification at that time, and if the amount of the expense cannot be reasonably anticipated based upon available information about the recipient's medical condition and public or private medical insurance coverage, the household shall have the nonreimbursable portion of the medical expense considered at the time the amount of the expense or reimbursement is reported and verified. A dependent care expense which is reimbursed or paid for by the Job Opportunities and Basic Skills Training (JOBS) program under title IV–F of the Social Security Act (42 U.S.C. 681) or the Transitional Child Care (TCC) program shall not be deductible. A utility expense which is reimbursed or paid by an excluded payment, including HUD or FmHA utility reimbursements, shall not be deductible.

(ii) Expenses shall only be deductible if the service is provided by someone outside of the household and the household makes a money payment for the service. For example, a dependent care deduction shall not be allowed if another household member provides the care, or compensation for the care is provided in the form of an inkind benefit, such as food.

(2) *Billed expenses*. Except as provided in paragraph (d)(3) of this section a deduction shall be allowed only in the month the expense is billed or otherwise becomes due, regardless of when the household intends to pay the expense. For example, rent which is due each month shall be included in the household's shelter costs, even if the household has not yet paid the expense.

Amounts carried forward from past billing periods are not deductible, even if included with the most recent billing and actually paid by the household. In any event, a particular expense may only be deducted once.

(3) *Averaging expenses.* Households may elect to have fluctuating expenses averaged. Households may also elect to have expenses which are billed less often than monthly averaged forward over the interval between scheduled billings, or, if there is no scheduled interval, averaged forward over the period the expense is intended to cover. For example, if a household receives a single bill in February which covers a 3-month supply of fuel oil, the bill may be averaged over February, March, and April. The household may elect to have one-time only expenses averaged over the entire certification period in which they are billed. Households reporting one-time only medical expenses during their certification period may elect to have a one-time deduction or to have the expense averaged over the remaining months of their certification period. Averaging would begin the month the change would become effective. For households certified for 24 months that have one-time medical expenses, the State agency must use the following procedure. In averaging any one-time medical expense incurred by a household during the first 12 months, the State agency must give the household the option of deducting the expense for one month, averaging the expense over the remainder of the first 12 months of the certification period, or averaging the expense over the remaining months in the certification period. One-time expenses reported after the 12th month of the certification period will be deducted in one month or averaged over the remaining months in the certification period, at the household's option.

(4) *Anticipating expenses.* The State agency shall calculate a household's expenses based on the expenses the household expects to be billed for during the certification period. Anticipation of the expense shall be based on the most recent month's bills, unless the household is reasonably certain a change will occur. When the household is not claiming the utility standard, the State agency may anticipate changes during the certification period based on last year's bills from the same period updated by overall price increases; or, if only the most recent bill is available, utility cost increases or decreases over the months of the certification period may be based on utility company estimates for the type of dwelling and utilities used by the household. The State agency shall not average past expenses, such as utility bills for the last several months, as a method of anticipating utility costs for the certification period. At certification and recertification, the household shall report and verify all medical expenses. The household's monthly medical deduction for the certification period shall be based on the information reported and verified by the household, and any anticipated changes in the household's medical expenses that can be reasonably expected to occur during the certification period based on available information about the recipient's medical condition, public or private insurance coverage, and current verified medical expenses. The household shall not be required to file reports about its medical expenses during the certification period. If the household voluntarily reports a change in its medical expenses, the State agency shall verify the change in accordance with § 273.2(f)(8)(ii) if the change would increase the household's allotment. The State agency has the option of either requiring verification prior to acting on the change, or requiring the verification prior to the second normal monthly allotment after the change is reported. In the case of a reported change that would decrease the household's allotment, or make the household ineligible, the State agency shall act on the change without requiring verification, though verification which is required by § 273.2(f)(8) shall be obtained prior to the household's recertification. If a child in the household reaches his or her second birthday during the certification period, the $200 maximum dependent care deduction defined in § 273.9(d)(4) shall be adjusted in accordance with this section not later than the household's next regularly scheduled recertification.

(5) *Conversion of deductions.* The income conversion procedures in paragraph (c)(2) of this section shall also apply to expenses billed on a weekly or biweekly basis.

(6) *Energy Assistance Payments.* Except for payments made under the Low Income Energy Assistance Act of 1981, the State agency shall prorate energy assistance payments as provided for in § 273.9(d) over the entire heating or cooling season the payment is intended to cover.

(7) Households which contain a member who is a disabled SSI recipient in accordance with paragraphs (2), (3), (4) or (5) of the definition of a disabled member in § 271.2 or households which contain a member who is a recipient of SSI benefits and the household is determined within the 30-day processing standard to be categorically eligible (as discussed in § 273.2(j)) or determined to be eligible as an NPA household and later becomes a categorically eligible household, shall be entitled to the excess medical deduction of § 273.9(d)(3) and the uncapped excess shelter expense deduction of § 273.9(d)(5) for the period for which the SSI recipient is authorized to receive SSI benefits or the date of the food stamp application, whichever is later, if the household incurs such expenses. Households, which contain an SSI recipient as discussed in this paragraph, which are determined ineligible as an NPA household and later become categorically eligible and entitled to restored benefits in accordance with § 273.2(j)(1)(iv), shall receive restored benefits using the medical and excess shelter expense deductions from the beginning of the period for which SSI benefits are paid, the original food stamp application date or December 23, 1985, whichever is later, if the household incurs such expenses.

(8) *Child support deduction.* State agencies may budget child support payments prospectively, in accordance with paragraphs (d)(2) through (d)(5) of this section, or retrospectively, in accordance with § 273.21(b) and § 273.21(f)(2), regardless of the budgeting system used for the household's other circumstances.

(e) *Calculating net income and benefit levels*—(1) *Net monthly income.* (i) To determine a household's net monthly income, the State agency shall:

(A) Add the gross monthly income earned by all household members and the total monthly unearned income of all household members, minus income exclusions, to determine the household's total gross income. Net losses from the self-employment income of a farmer shall be offset in accordance with § 273.11(a)(2)(iii).

(B) Multiply the total gross monthly earned income by 20 percent and subtract that amount from the total gross income; or multiply the total gross monthly earned income by 80 percent and add that to the total monthly unearned income, minus income exclusions.

(C) Subtract the standard deduction.

(D) If the household is entitled to an excess medical deduction as provided in § 273.9(d)(3), determine if total medical expenses exceed $35. If so, subtract that portion which exceeds $35.

(E) Subtract allowable monthly dependent care expenses, if any, up to a maximum amount as specified under § 273.9(d)(4) for each dependent.

(F) Subtract allowable monthly child support payments in accordance with § 273.9(d)(7).

(G) Subtract the homeless shelter deduction, if any, up to the maximum of $143.

(H) Total the allowable shelter expenses to determine shelter costs, unless a deduction has been subtracted in accordance with paragraph (e)(1)(i)(G) of this section. Subtract from total shelter costs 50 percent of the household's monthly income after all the above deductions have been subtracted. The remaining amount, if any, is the excess shelter cost. If there is no excess shelter cost, the net monthly income has been determined. If there is excess shelter cost, compute the shelter deduction according to paragraph (e)(1)(i)(I) of this section.

(I) Subtract the excess shelter cost up to the maximum amount allowed for the area (unless the household is entitled to the full amount of its excess shelter expenses) from the household's monthly income after all other applicable deductions. Households not subject to a capped shelter expense shall

have the full amount exceeding 50 percent of their net income subtracted. The household's net monthly income has been determined.

(ii) In calculating net monthly income, the State agency shall use one of the following two procedures:

(A) Round down each income and allotment calculation that ends in 1 through 49 cents and round up each calculation that ends in 50 through 99 cents; or

(B) Apply the rounding procedure that is currently in effect for the State's Temporary Assistance for Needy Families (TANF) program. If the State TANF program includes the cents in income calculations, the State agency may use the same procedures for food stamp income calculations. Whichever procedure is used, the State agency may elect to include the cents associated with each individual shelter cost in the computation of the shelter deduction and round the final shelter deduction amount. Likewise, the State agency may elect to include the cents associated with each individual medical cost in the computation of the medical deduction and round the final medical deduction amount.

(2) *Eligibility and benefits.* (i)(A) Households which contain an elderly or disabled member as defined in § 271.2, shall have their net income, as calculated in paragraph (e)(1) of this section (except for households considered destitute in accordance with paragraph (e)(3) of this section), compared to the monthly income eligibility standards defined in § 273.9(a)(2) for the appropriate household size to determine eligibility for the month.

(B) In addition to meeting the net income eligibility standards, households which do not contain an elderly or disabled member shall have their gross income, as calculated in accordance with paragraph (e)(1)(i)(A) of this section, compared to the gross monthly income standards defined in § 273.9(a)(1) for the appropriate household size to determine eligibility for the month.

(C) For households considered destitute in accordance with paragraph (e)(3) of this section, the State agency shall determine a household's eligibility by computing its gross and net income according to paragraph (e)(3) of this section, and comparing, as appropriate, the gross and/or net income to the corresponding income eligibility standard in accordance with § 273.9(a)(1) or (2).

(D) If a household contains a member who is fifty-nine years old on the date of application, but who will become sixty before the end of the month of application, the State agency shall determine the household's eligibility in accordance with paragraph (e)(2)(i)(A) of this section.

(E) If a household contains a student whose income is excluded in accordance with § 273.9(c)(7) and the student becomes 18 during the month of application, the State agency shall exclude the student's earnings in the month of application and count the student's earnings in the following month. If the student becomes 18 during the certification period, the student's income shall be excluded until the month following the month in which the student turns 18.

(ii)(A) Except as provided in paragraphs (a)(1), (e)(2)(iii) and (e)(2)(vi) of this section, the household's monthly allotment shall be equal to the maximum food stamp allotment for the household's size reduced by 30 percent of the household's net monthly income as calculated in paragraph (e)(1) of this section. If 30 percent of the household's net income ends in cents, the State agency shall round in one of the following ways:

(*1*) The State agency shall round the 30 percent of net income up to the nearest higher dollar; or

(*2*) The State agency shall not round the 30 percent of net income at all. Instead, after subtracting the 30 percent of net income from the appropriate Thrifty Food Plan, the State agency shall round the allotment down to the nearest lower dollar.

(B) If the calculation of benefits in accordance with paragraph (e)(2)(ii)(A) of this section for an initial month would yield an allotment of less than $10 for the household, no benefits shall be issued to the household for the initial month.

(C) Except during an initial month, all eligible one- and two-person households shall receive minimum monthly

allotments equal to the minimum benefit and all eligible households with three or more members which are entitled to $1, $3, and $5 allotments shall receive allotments, of $2, $4, and $6, respectively, to correspond with current coupon book determinations.

(iii) For an eligible household with three or more members which is entitled to no benefits (except because of the proration requirements of paragraph (a)(1) and the provision precluding issuances of less than $10 in an initial month of paragraph (e)(2)(ii)(B)) of this section:

(A) The State agency shall deny the household's application on the grounds that its net income exceeds the level at which benefits are issued; or

(B) The State agency shall certify the household but suspend its participation, subject to the following conditions:

(*1*) The State agency shall inform the suspended household, in writing, of its suspended status, and of its rights and responsibilities while it is in that status.

(*2*) The State agency shall set the household's change reporting requirements and the manner in which those changes will be reported and processed.

(*3*) The State agency shall specify which changes shall entitle the household to have its status converted from suspension to issuance, and which changes shall require the household to reapply for participation.

(*4*) The household shall retain the right to submit a new application while it is suspended.

(*5*) The State agency shall convert a household from suspension to issuance status, without requiring an additional certification interview, and issue its initial allotment, within ten days of the date the household reports the change.

(*6*) The State agency shall prorate the household's benefits, in the first month after the suspension period, from the date the household reports a change, in accordance with paragraph (a)(1) of this section.

(*7*) The State agency may delay the work registration of the household's members until the household is determined to be entitled to benefits.

(iv) For those eligible households which are entitled to no benefits in their initial month of application, in accordance with paragraph (a)(1) or (e)(2)(ii)(B) of this section, but are entitled to benefits in subsequent months, the State agency shall certify the households beginning with the month of application.

(v) When a household's circumstances change and it becomes entitled to a different income eligibility standard, the State agency shall apply the different standard at the next recertification or whenever the State agency changes the household's eligibility, benefit level or certification period, whichever occurs first.

(vi) During a month when a reduction, suspension or cancellation of allotments has been ordered pursuant to the provisions of § 271.7, eligible housholds shall have their benefits calculated as follows:

(A) If a benefit reduction is ordered, State agencies shall reduce the maximum food stamp allotment amounts for each household size by the percentage ordered in the Department's notice on benefit reductions. State agencies shall multiply the maximum food stamp allotment amounts by the percentage specified in the FNS notice; if the result ends in 1 through 99 cents, round the result up to the nearest higher dollar; and subtract the result from the normal maximum food stamp allotment amount. In calculating benefit levels for eligible households, State agencies would follow the procedures detailed in paragraph (e)(2)(ii) of this section and substitute the reduced maximum food stamp allotment amounts for the normal maximum food stamp allotment amounts.

(B) Except as provided in paragraphs (a)(1), (e)(2)(ii)(B), and (e)(2)(vi)(C) of this section, one- and two-person households shall be provided with at least the minimum benefit.

(C) In the event that the national reduction in benefits is 90 percent or more of the benefits projected to be issued for the affected month, the provision for a minimum benefit for households with one or two members only may be disregarded and all households may have their benefits lowered

by reducing maximum food stamp allotment amounts by the percentage specified by the Department. The benefit reduction notice issued by the Department to effectuate a benefit reduction will specify whether minimum benefits for households with one or two members only are to be provided to households.

(D) If the action in effect is a suspension or cancellation, eligible households shall have their allotment levels calculated according to the procedures in paragraph (e)(2)(ii) of this section. However, the allotments shall not be issued for the month the suspension or cancellation is in effect. The provision for the minimum benefit for households with one or two members only shall be disregarded and all households shall have their benefits suspended or cancelled for the designated month.

(E) In the event of a suspension or cancellation, or a reduction exceeding 90 percent of the affected month's projected issuance, all households, including one and two-person households, shall have their benefits suspended, cancelled or reduced by the percentage specified by FNS.

(3) *Destitute households.* Migrant or seasonal farmworker households may have little or no income at the time of application and may be in need of immediate food assistance, even though they receive income at some other time during the month of application. The following procedures shall be used to determine when migrant or seasonal farmworker households in these circumstances may be considered destitute and, therefore, entitled to expedited service and special income calculation procedures. Households other than migrant or seasonal farmworker households shall not be classified as destitute.

(i) Households whose only income for the month of application was received prior to the date of application, and was from a terminated source, shall be considered destitute households and shall be provided expedited service.

(A) If income is received on a monthly or more frequent basis, it shall be considered as coming from a terminated source if it will not be received again from the same source during the balance of the month of application or during the following month.

(B) If income is normally received less often than monthly, the nonreceipt of income from the same source in the balance of the month of application or in the following month is inappropriate to determine whether or not the income is terminated. For example, if income is received on a quarterly basis (e.g., on January 1, April 1, July 1, and October 1), and the household applies in mid-January, the income should not be considered as coming from a terminated source merely because no further payments will be received in the balance of January or in February. The test for whether or not this household's income is terminated is whether the income is anticipated to be received in April. Therefore, for households that normally receive income less often than monthly, the income shall be considered as coming from a terminated source if it will not be received in the month in which the next payment would normally be received.

(ii) Households whose only income for the month of application is from a new source shall be considered destitute and shall be provided expedited service if income of more than $25 from the new source will not be received by the 10th calendar day after the date of application.

(A) Income which is normally received on a monthly or more frequent basis shall be considered to be from a new source if income of more than $25 has not been received from that source within 30 days prior to the date the application was filed.

(B) If income is normally received less often than monthly, it shall be considered to be from a new source if income of more than $25 was not received within the last normal interval between payments. For example, if a household applies in early January and is expecting to be paid every 3 months, starting in late January, the income shall be considered to be from a new source if no income of more than $25 was received from the source during October or since that time.

(iii) Households may receive both income from a terminated source prior to the date of application, and income

from a new source after the date of application, and still be considered destitute if they receive no other income in the month of application and income of more than $25 from the new source will not be received by the 10th day after the date of application.

(iv) Destitute households shall have their eligibility and level of benefits calculated for the month of application by considering only income which is received between the first of the month and the date of application. Any income from a new source that is anticipated after the day of application shall be disregarded.

(v) Some employers provide travel advances to cover the travel costs of new employees who must journey to the location of their new employment. To the extent that these payments are excluded as reimbursements, receipt of travel advances will not affect the determination of when a household is destitute. However, if the travel advance is by written contract an advance of wages that will be subtracted from wages later earned by the employee, rather than a reimbursement, the wage advance shall count as income. In addition, the receipt of a wage advance for travel costs of a new employee shall not affect the determination of whether subsequent payments from the employer are from a new source of income, nor whether a household shall be considered destitute. For example, if a household applies on May 10, has received a $50 advance for travel from its new employer on May 1 which by written contract is an advance on wages, but will not receive any other wages from the employer until May 30, the household shall be considered destitute. The May 30 payment shall be disregarded, but the wage advance received prior to the date of application shall be counted as income.

(vi) A household member who changes jobs but continues to work for the same employer shall be considered as still receiving income from the same source. A migrant farmworker's source of income shall be considered to be the grower for whom the migrant is working at a particular point in time, and not the crew chief. A migrant who travels with the same crew chief but moves from one grower to another shall be considered to have moved from a terminated income source to a new source.

(vii) The above procedures shall apply at initial application and at recertification, but only for the first month of each certification period. At recertification, income from a new source shall be disregarded in the first month of the new certification period if income of more than $25 will not be received from this new source by the 10th calendar day after the date of the household's normal issuance cycle.

(4) Thrifty Food Plan (TFP) and Maximum Food Stamp Allotments.

(i) Maximum food stamp allotment level. Maximum food stamp allotments shall be based on the TFP as defined in § 271.2, and they shall be uniform by household size throughout the 48 contiguous States and the District of Columbia. The TFP for Hawaii shall be the TFP for the 48 States and DC adjusted for the price of food in Honolulu. The TFPs for urban, rural I, and rural II parts of Alaska shall be the TFP for the 48 States and DC adjusted by the price of food in Anchorage and further adjusted for urban, rural I, and rural II Alaska as defined in § 272.7(c). The TFPs for Guam and the Virgin Islands shall be adjusted for changes in the cost of food in the 48 States and DC, provided that the cost of these TFPs may not exceed the cost of the highest TFP for the 50 States. The TFP amounts and maximum allotments in each area are adjusted annually and will be prescribed in a table posted on the FNS web site, at www.fns.usda.gov/fsp.

(ii) *Adjustment*. Effective October 1, 1996, the maximum food stamp allotments must be based on 100% of the cost of the TFP as defined in § 271.2 of this chapter for the preceding June, rounded to the nearest lower dollar increment, except that on October 1, 1996, the allotments may not fall below those in effect on September 30, 1996.

(f) *Certification periods*. The State agency must certify each eligible household for a definite period of time. State agencies must assign the longest certification period possible based on the predictability of the household's circumstances. The first month of the certification period will be the first

month for which the household is eligible to participate. The certification period cannot exceed 12 months, except as specified in paragraphs (f)(1) and (f)(2) of this section:

(1) *Households in which all adult members are elderly or disabled*. The State agency may certify for up to 24 months households in which all adult members are elderly or disabled. The State agency must have at least one contact with each household every 12 months. The State agency may use any method it chooses for this contact.

(2) *Households residing on a reservation*. The State agency must certify for 24 months those households residing on a reservation which it requires to submit monthly reports in accordance with § 273.21, unless the State agency obtains a waiver from FNS. In the waiver request the State agency must include justification for a shorter period and input from the affected Indian tribal organization(s). When households move off the reservation, the State agency must either continue their certification periods until they would normally expire or shorten the certification periods in accordance with paragraph (f)(4) of this section.

(3) *Certification period length*. The State agency should assign each household the longest certification period possible, consistent with its circumstances.

(i) Households should be assigned certification periods of at least 6 months, unless the household's circumstances are unstable or the household contains an ABAWD.

(ii) Households with unstable circumstances, such as households with zero net income, and households with an ABAWD member should be assigned certification periods consistent with their circumstances, but generally no less than 3 months.

(iii) Households may be assigned 1- or 2-month certification periods when it appears likely that the household will become ineligible for food stamps in the near future.

(4) *Shortening certification periods*. The State agency may not end a household's certification period earlier than its assigned termination date, unless the State agency receives information that the household has become ineligible, or the household has not complied with the requirements of § 273.12(c)(3). Loss of public assistance or a change in employment status is not sufficient in and of itself to meet the criteria necessary for shortening the certification period. The State agency must close the household's case or adjust the household's benefit amount in accordance with § 273.12(c)(1) or (c)(2) in response to reported changes. The State agency may not use the Notice of Expiration to shorten a certification period.

(5) *Lengthening certification periods*. State agencies may lengthen a household's current certification period once it is established, as long as the total months of the certification period do not exceed 24 months for households in which all adult members are elderly or disabled, or 12 months for other households. If the State agency extends a household's certification period, it must advise the household of the new certification ending date with a notice containing the same information as the notice of eligibility set forth in paragraph (g)(1)(i)(A) of this section.

(g) *Certification notices to households*. (1) *Initial applications*. State agencies shall provide applicants with one of the following written notices as soon as a determination is made, but no later than 30 days after the date of the initial application:

(i) *Notice of eligibility*. (A) If an application is approved, the State agency shall provide the household with written notice of the amount of the allotment and the beginning and ending dates of the certification period. The household shall also be advised of variations in the benefit level based on changes anticipated at the time of certification. If the initial allotment contains benefits for both the month of application and the current month's benefits, the notice shall explain that the initial allotment includes more than 1 month's benefits, and shall indicate the monthly allotment amount for the remainder of the certification period. The notice shall also advise the household of its right to a fair hearing, the telephone number of the food stamp office (a toll-free number or a number where collect calls will be accepted for households outside the local calling

area), and, if possible, the name of the person to contact for additional information. If there is an individual or organization available that provides free legal representation, the notice shall also advise the household of the availability of the services. The State agency may also include in the notice a reminder of the household's obligation to report changes in circumstance and of the need to reapply for continued participation at the end of the certification period. Other information which would be useful to the household may also be included.

(B) In cases where a household's application is approved on an expedited basis without verification, as provided in § 273.2(i), the notice shall explain that the household must provide the verification which was waived. If the State agency has elected to assign a longer certification period to some households certified on an expedited basis, the notice shall also explain the special conditions of the longer certification period, as specified in § 273.2(i), and the consequences of failure to provide the postponed verification.

(C) For households provided a notice of expiration at the time of certification, as required in § 273.14(b), the notice of eligibility may be combined with the notice of expiration or separate notices may be sent.

(ii) *Notice of denial.* If the application is denied, the State agency shall provide the household with written notice explaining the basis for the denial, the household's right to request a fair hearing, the telephone number of the food stamp office (a toll-free number or a number where collect calls will be accepted for households outside the local calling area), and, if possible, the name of the person to contact for additional information. If there is an individual or organization available that provides free legal representation, the notice shall also advise the household of the availability of the service. A household which is potentially categorically eligible but whose food stamp application is denied shall be asked to inform the State agency if it is approved to receive PA and/or SSI benefits or benefits from a State or local GA program. In cases where the State agency has elected to use a notice of denial when a delay was caused by the household's failure to take action to complete the application process, as provided in § 273.2(h)(2), the notice of denial shall also explain: The action that the household must take to reactivate the application; that the case will be reopened without a new application if action is taken within 30 days of the date the notice of denial was mailed; and that the household must submit a new application if, at the end of the 30-day period, the household has not taken the needed action and wishes to participate in the program. If the State agency chooses the option specified in § 273.2(h)(2) of reopening the application in cases where verification is lacking only if household provides verification within 30 days of the date of the initial request for verification, the State agency shall include on the notice of denial the date by which the household must provide the missing verification.

(iii) *Notice of pending status.* If the application is to be held pending because some action by the State is necessary to complete the application process, as specified in § 273.2(h)(2), or the State agency has elected to pend all cases regardless of the reason for delay, the State agency shall provide the household with a written notice which informs the household that its application has not been completed and is being processed. If some action by the household is also needed to complete the application process, the notice shall also explain what action the household must take and that its application will be denied if the household fails to take the required action within 60 days of the date the application was filed. If the State agency chooses the option specified in § 273.2(h) (2) and (3) of holding the application pending in cases where verification is lacking only until 30 days following the date verification was initially requested, the State agency shall include on the notice of pending status the date by which the household must provide the missing verification.

(2) *Applications for recertification.* The State agency shall provide households that have filed an application by the 15th of the last month of their certification period with either a notice of eligibility or a notice of denial by the

end of the current certification period if the household has complied with all recertification requirements. The State agency shall provide households that have received a notice of expiration at the time of certification, and have timely reapplied, with either a notice of eligibility or a notice of denial not later than 30 days after the date of the household's initial opportunity to obtain its last allotment.

[Amdt. 132, 43 FR 47889, Oct. 17, 1978]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 273.10, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 273.11 Action on households with special circumstances.

(a) *Self-employment income*. The State agency must calculate a household's self-employment income as follows:

(1) *Averaging self-employment income*. (i) Self-employment income must be averaged over the period the income is intended to cover, even if the household receives income from other sources. If the averaged amount does not accurately reflect the household's actual circumstances because the household has experienced a substantial increase or decrease in business, the State agency must calculate the self-employment income on the basis of anticipated, not prior, earnings.

(ii) If a household's self-employment enterprise has been in existence for less than a year, the income from that self-employment enterprise must be averaged over the period of time the business has been in operation and the monthly amount projected for the coming year.

(iii) Notwithstanding the provisions of paragraphs (a)(1)(i) and (a)(1)(ii) of this section, households subject to monthly reporting and retrospective budgeting who derive their self-employment income from a farming operation and who incur irregular expenses to produce such income have the option to annualize the allowable costs of producing self-employment income from farming when the self-employment farm income is annualized.

(2) *Determining monthly income from self-employment*. (i) For the period of time over which self-employment income is determined, the State agency must add all gross self-employment income (either actual or anticipated, as provided in paragraph (a)(1)(i) of this section) and capital gains (according to paragraph (a)(3) of this section), exclude the costs of producing the self-employment income (as determined in paragraph (a)(4) of this section), and divide the remaining amount of self-employment income by the number of months over which the income will be averaged. This amount is the monthly net self-employment income. The monthly net self-employment income must be added to any other earned income received by the household to determine total monthly earned income.

(ii) If the cost of producing self-employment income exceeds the income derived from self-employment as a farmer (defined for the purposes of this paragraph (a)(2)(ii) as a self-employed farmer who receives or anticipates receiving annual gross proceeds of $1,000 or more from the farming enterprise), such losses must be prorated in accordance with paragraph (a)(1) of this section, and then offset against countable income to the household as follows:

(A) Offset farm self-employment losses first against other self-employment income.

(B) Offset any remaining farm self-employment losses against the total amount of earned and unearned income *after* the earned income deduction has been applied.

(iii) If a State agency determines that a household is eligible based on its monthly net income, the State may elect to offer the household an option to determine the benefit level by using either the same net income which was used to determine eligibility, or by unevenly prorating the household's total net income over the period for which the household's self-employment income was averaged to more closely approximate the time when the income is actually received. If income is prorated, the net income assigned in any month cannot exceed the maximum monthly income eligibility standards for the household's size.

(3) *Capital gains*. The proceeds from the sale of capital goods or equipment must be calculated in the same manner as a capital gain for Federal income

tax purposes. Even if only 50 percent of the proceeds from the sale of capital goods or equipment is taxed for Federal income tax purposes, the State agency must count the full amount of the capital gain as income for food stamp purposes. For households whose self-employment income is calculated on an anticipated (rather than averaged) basis in accordance with paragraph (a)(1) of this section, the State agency must count the amount of capital gains the household anticipates receiving during the months over which the income is being averaged.

(b) *Allowable costs of producing self-employment income.* (1) Allowable costs of producing self-employment income include, but are not limited to, the identifiable costs of labor; stock; raw material; seed and fertilizer; payments on the principal of the purchase price of income-producing real estate and capital assets, equipment, machinery, and other durable goods; interest paid to purchase income-producing property; insurance premiums; and taxes paid on income-producing property.

(2) In determining net self-employment income, the following items are not allowable costs of doing business:

(i) Net losses from previous periods;

(ii) Federal, State, and local income taxes, money set aside for retirement purposes, and other work-related personal expenses (such as transportation to and from work), as these expenses are accounted for by the 20 percent earned income deduction specified in § 273.9(d)(2);

(iii) Depreciation; and

(iv) Any amount that exceeds the payment a household receives from a boarder for lodging and meals.

(3) When calculating the costs of producing self-employment income, State agencies may elect to use actual costs for allowable expenses in accordance with paragraphs (b)(1) and (b)(2) of this section or determine self-employment expenses as follows:

(i) For income from day care, use the current reimbursement amounts used in the Child and Adult Care Food Program or a standard amount based on estimated per-meal costs.

(ii) For income from boarders, other than those in commercial boarding houses or from foster care boarders, use:

(A) The maximum food stamp allotment for a household size that is equal to the number of boarders; or

(B) A flat amount or fixed percentage of the gross income, provided that the method used to determine the flat amount or fixed percentage is objective and justifiable and is stated in the State's food stamp manual.

(iii) For income from foster care boarders, refer to § 273.1(c)(6).

(iv) Use the standard amount the State uses for its TANF program.

(v) Use an amount approved by FNS. State agencies may submit a proposal to FNS for approval to use a simplified self-employment expense calculation method that does not result in increased Program costs. Different methods may be proposed for different types of self-employment. The proposal must include a description of the proposed method, the number and type of households and percent of the caseload affected, and documentation indicating that the proposed procedure will not increase Program costs.

(c) *Treatment of income and resources of certain nonhousehold members.*

During the period of time that a household member cannot participate for the reasons addressed in this section, the eligibility and benefit level of any remaining household members shall be determined in accordance with the procedures outlined in this section.

(1) *Intentional Program violation, felony drug conviction, or fleeing felon disqualifications, and workfare or work requirement sanctions.* The eligibility and benefit level of any remaining household members of a household containing individuals determined ineligible because of a disqualification for an intentional Program violation, a felony drug conviction, their fleeing felon status, noncompliance with a work requirement of § 273.7, or imposition of a sanction while they were participating in a household disqualified because of failure to comply with workfare requirements shall be determined as follows:

(i) *Income, resources, and deductible expenses.* The income and resources of the ineligible household member(s) shall continue to count in their entirety,

and the entire household's allowable earned income, standard, medical, dependent care, child support, and excess shelter deductions shall continue to apply to the remaining household members.

(ii) *Eligibility and benefit level*. The ineligible member shall not be included when determining the household's size for the purposes of:

(A) Assigning a benefit level to the household;

(B) Comparing the household's monthly income with the income eligibility standards; or

(C) Comparing the household's resources with the resource eligibility limits. The State agency shall ensure that no household's coupon allotment is increased as a result of the exclusion of one or more household members.

(2) *SSN disqualifications, comparable disqualifications, child support disqualifications, and ineligible ABAWDs*. The eligibility and benefit level of any remaining household members of a household containing individuals determined to be ineligible for refusal to obtain or provide an SSN, for meeting the time limit for able-bodied adults without dependents or for being disqualified under paragraphs (k), (o), (p), or (q) of this section shall be determined as follows:

(i) *Resources*. The resources of such ineligible members shall continue to count in their entirety to the remaining household members.

(ii) *Income*. A pro rata share of the income of such ineligible members shall be counted as income to the remaining members. This pro rata share is calculated by first subtracting the allowable exclusions from the ineligible member's income and dividing the income evenly among the household members, including the ineligible members. All but the ineligible members' share is counted as income for the remaining household members.

(iii) *Deductible expenses*. The 20 percent earned income deduction shall apply to the prorated income earned by such ineligible members which is attributed to their households. That portion of the households' allowable child support payment, shelter and dependent care expenses which are either paid by or billed to the ineligible members shall be divided evenly among the households' members including the ineligible members. All but the ineligible members' share is counted as a deductible child support payment, shelter or dependent care expense for the remaining household members.

(iv) *Eligibility and benefit level*. Such ineligible members shall not be included when determining their households' sizes for the purposes of:

(A) Assigning a benefit level to the household;

(B) Comparing the household's monthly income with the income eligibility standards; or

(C) Comparing the household's resources with the resource eligibility limits.

(3) *Ineligible alien*. The State agency must determine the eligibility and benefit level of any remaining household members of a household containing an ineligible alien as follows:

(i) The State agency must count all or, at the discretion of the State agency, all but a pro rata share, of the ineligible alien's income and deductible expenses and all of the ineligible alien's resources in accordance with paragraphs (c)(1) or (c)(2) of this section. In exercising its discretion under this paragraph (c)(3)(i), the State agency may count all of the alien's income for purposes of applying the gross income test for eligibility purposes while only counting all but a pro rata share to apply the net income test and determine level of benefits. This paragraph (c)(3)(i) does not apply to an alien:

(A) Who is lawfully admitted for permanent residence under the INA;

(B) Who is granted asylum under section 208 of the INA;

(C) Who is admitted as a refugee under section 207 of the INA;

(D) Who is paroled in accordance with section 212(d)(5) of the INA;

(E) Whose deportation or removal has been withheld in accordance with section 243 of the INA;

(F) Who is aged, blind, or disabled in accordance with section 1614(a)(1) of the Social Security Act and is admitted for temporary or permanent residence under section 245A(b)(1) of the INA; or

(G) Who is a special agricultural worker admitted for temporary residence under section 210(a) of the INA.

(ii) For an ineligible alien within a category described in paragraphs (c)(3)(i)(A) through (c)(3)(i)(G) of this section, State agencies may either:

(A) Count all of the ineligible alien's resources and all but a pro rata share of the ineligible alien's income and deductible expenses; or

(B) Count all of the ineligible alien's resources, count none of the ineligible alien's income and deductible expenses, count any money payment (including payments in currency, by check, or electronic transfer) made by the ineligible alien to at least one eligible household member, not deduct as a household expense any otherwise deductible expenses paid by the ineligible alien, but cap the resulting benefit amount for the eligible members at the allotment amount the household would receive if the household member within the one of the categories described in paragraphs (c)(3)(i)(A) through (c)(3)(i)(G) of this section were still an eligible alien. The State agency must elect one State-wide option for determining the eligibility and benefit level of households with members who are aliens within the categories described paragraphs (c)(3)(i)(A) through (c)(3)(i)(G) of this section.

(iii) For an alien who is ineligible under § 273.4(a) because the alien's household indicates inability or unwillingness to provide documentation of the alien's immigration status, the State agency must count all or, at the discretion of the State agency, all but a pro rata share of the ineligible alien's income and deductible expenses and all of the ineligible alien's resources in accordance with paragraphs (c)(1) or (c)(2) of this section. In exercising its discretion under this paragraph (c)(3)(iii), the State agency may count all of the alien's income for purposes of applying the gross income test for eligibility purposes while only counting all but a pro rata to apply the net income test and determine level of benefits.

(iv) The State agency must compute the income of the ineligible aliens using the income definition in § 273.9(b) and the income exclusions in § 273.9(c).

(v) For purposes of this paragraph (c)(3), the State agency must not include the resources and income of the sponsor and the sponsor's spouse in determining the resources and income of an ineligible sponsored alien.

(4) *Reduction or termination of benefits within the certification period.* Whenever an individual is determined ineligible within the household's certification period, the State agency shall determine the eligibility or ineligibility of the remaining household members based, as much as possible, on information in the case file.

(i) *Excluded for intentional Program violation disqualification.* If a household's benefits are reduced or terminated within the certification period because one of its members was excluded because of disqualification for intentional Program violation, the State agency shall notify the remaining members of their eligibility and benefit level at the same time the excluded member is notified of his or her disqualification. The household is not entitled to a notice of adverse action but may request a fair hearing to contest the reduction or termination of benefits, unless the household has already had a fair hearing on the amount of the claim as a result of consolidation of the administrative disqualification hearing with the fair hearing.

(ii) *Disqualified or determined ineligible for reasons other than intentional Program violation.* If a household's benefits are reduced or terminated within the certification period for reasons other than an Intentional Program Violation disqualification, the State agency shall issue a notice of adverse action in accordance with § 273.13(a)(2) which informs the household of the ineligibility, the reason for the ineligibility, the eligibility and benefit level of the remaining members, and the action the household must take to end the ineligibility.

(d) *Treatment of income and resources of other nonhousehold members.* (1) For all other nonhousehold members defined in § 273.1 (b)(1) and (b)(2) who are not specifically mentioned in paragraph (c) of this section, the income and resources of such individuals shall not be considered available to the household with whom the individual

resides. Cash payments from the nonhousehold member to the household will be considered income under the normal income standards set in § 273.9(b). Vendor payments, as defined in § 273.9(c)(1), shall be excluded as income. If the household shares deductible expenses with the nonhousehold member, only the amount actually paid or contributed by the household shall be deducted as a household expense. If the payments or contributions cannot be differentiated, the expenses shall be prorated evenly among persons actually paying or contributing to the expense and only the household's pro rata share deducted.

(2) When the earned income of one or more household members and the earned income of a nonhousehold member are combined into one wage, the income of the household members shall be determined as follows:

(i) If the household's share can be identified, the State agency shall count that portion due to the household as earned income.

(ii) If the household's share cannot be identified the State agency shall prorate the earned income among all those whom it was intended to cover and count that prorated portion to the household.

(3) Such nonhousehold members shall not be included when determining the size of the household for the purposes of:

(i) Assigning a benefit level to the household;

(ii) Comparing the household's monthly income with the income eligibility standards; or

(iii) Comparing the household's resources with the resource eligibility limits.

(e) *Residents of drug and alcohol treatment and rehabilitation programs.* (1) Narcotic addicts or alcoholics who regularly participate in publicly operated or private non-profit drug addict or alcoholic (DAA) treatment and rehabilitation programs on a resident basis may voluntarily apply for the Food Stamp Program. Applications must be made through an authorized representative who is employed by the DAA center and designated by the center for that purpose. The State agency may require the household to designate the DAA center as its authorized representative for the purpose of receiving and using an allotment on behalf of the household. Residents must be certified as one-person households unless their children are living with them, in which case their children must be included in the household with the parent.

(2)(i) Prior to certifying any residents for food stamps, the State agency must verify that the DAA center is authorized by FNS as a retailer in accordance with § 278.1(e) of this chapter or that it comes under part B of title XIX of the Public Health Service Act, 42 U.S.C. 300x *et seq.*, (as defined in ''Drug addiction or alcoholic treatment and rehabilitation program'' in § 271.2 of this chapter).

(ii) Except as otherwise provided in this paragraph (e)(2), the State agency must certify residents of DAA centers by using the same provisions that apply to all other households, including, but not limited to, the same rights to notices of adverse action and fair hearings.

(iii) DAA centers in areas without EBT systems may redeem the households' paper coupons through authorized food stores. DAA centers in areas with EBT systems may redeem benefits in various ways depending on the State's EBT system design. The designs may include DAA use of individual household EBT cards at authorized stores, authorization of DAA centers as retailers with EBT access via POS at the center, DAA use of a center EBT card that is an aggregate of individual household benefits, and other designs. Guidelines for approval of EBT systems are contained in § 274.12 of this chapter.

(iv) The treatment center must notify the State agency of changes in the household's circumstances as provided in § 273.12(a).

(3) The DAA center must provide the State agency a list of currently participating residents that includes a statement signed by a responsible center official attesting to the validity of the list. The State agency must require submission of the list on either a monthly or semimonthly basis. In addition, the State agency must conduct periodic random on-site visits to the center to assure the accuracy of the

list and that the State agency's records are consistent and up to date.

(4) The State agency may issue allotments on a semimonthly basis to households in DAA centers.

(5) When a household leaves the center, the center must notify the State agency and the center must provide the household with its ID card. If possible, the center must provide the household with a change report form to report to the State agency the household's new address and other circumstances after leaving the center and must advise the household to return the form to the appropriate office of the State agency within 10 days. After the household leaves the center, the center can no longer act as the household's authorized representative for certification purposes or for obtaining or using benefits.

(i) The center must provide the household with its EBT card if it was in the possession of the center, any untransacted ATP, or the household's full allotment if already issued and if no coupons have been spent on behalf of that individual household. If the household has already left the center, the center must return them to the State agency. These procedures are applicable at any time during the month.

(ii) If the coupons have already been issued and any portion spent on behalf of the household, the following procedures must be followed.

(A) If the household leaves prior to the 16th of the month and benefits are not issued under an EBT system, the center must provide the household with one-half of its monthly coupon allotment unless the State agency issues semi-monthly allotments and the second half has not been turned over to the center. If benefits are issued under an EBT system, the State must ensure that the EBT design or procedures for DAAs prohibit the DAA from obtaining more than one-half of the household's allotment prior to the 16th of the month or permit the return of one-half of the allotment to the household's EBT account through a refund, transfer, or other means if the household leaves prior to the 16th of the month.

(B) If the household leaves on or after the 16th day of the month, the State agency, at its option, may require the center to give the household a portion of its allotment. Under an EBT system where the center has an aggregate EBT card, the State agency may, but is not required to transfer a portion of the household's monthly allotment from a center's EBT account back to the household's EBT account. However, the household, not the center, must be allowed to receive any remaining benefits authorized by the household's HIR or ATP or posted to the EBT account at the time the household leaves the center.

(iii) The center must return to the State agency any EBT card or coupons not provided to departing residents by the end of each month. These coupons include those not provided to departing residents because they left either prior to the 16th and the center was unable to provide the household with the coupons or the household left on or after the 16th of the month and the coupons were not returned to the household.

(6) The organization or institution shall be responsible for any misrepresentation or intentional Program violation which it knowingly commits in the certification of center residents. As an authorized representative, the organization or institution must be knowledgeable about household circumstances and should carefully review those circumstances with residents prior to applying on their behalf. The organization or institution shall be strictly liable for all losses or misuse of food coupons held on behalf of resident households and for all overissuances which occur while the households are residents of the treatment center.

(7) The organization or institution authorized by FNS as a retail food store may be penalized or disqualified, as described in § 278.6, if it is determined administratively or judicially that coupons were misappropriated or used for purchases that did not contribute to a certified household's meals. The State agency shall promptly notify FNS when it has reason to believe that an organization or institution is misusing coupons in its possession. However, the State agency shall take no action prior to FNS action against the organization or institution. The State agency shall establish a

claim for overissuances of food coupons held on behalf of resident clients as stipulated in paragraph (e)(6) of this section if any overissuances are discovered during an investigation or hearing procedure for redemption violations. If FNS disqualifies an organization or institution as an authorized retail food store, the State agency shall suspend its authorized representative status for the same period.

(f) *Residents of a group living arrangement.* (1) Disabled or blind residents of a group living arrangement (GLA) (as defined in § 271.2 of this chapter) may apply either through use of an authorized representative employed and designated by the group living arrangement or on their own behalf or through an authorized representative of their choice. The GLA must determine if a resident may apply on his or her own behalf based on the resident's physical and mental ability to handle his or her own affairs. Some residents of the GLA may apply on their own behalf while other residents of the same GLA may apply through the GLA's representative. Prior to certifying any residents, the State agency must verify that the GLA is authorized by FNS or is certified by the appropriate agency of the State (as defined in § 271.2 of this chapter) including the agency's determination that the center is a nonprofit organization.

(i) If the residents apply on their own behalf, the household size must be in accordance with the definition in § 273.1. The State agency must certify these residents using the same provisions that apply to all other households. If FNS disqualifies the GLA as an authorized retail food store, the State agency must suspend its authorized representative status for the same time; but residents applying on their own behalf will still be able to participate if otherwise eligible.

(ii) If the residents apply through the use of the GLA's authorized representative, their eligibility must be determined as a one-person household.

(2) Each group living arrangement shall provide the State agency with a list of currently participating residents. This list shall include a statement signed by a responsible center official attesting to the validity of the list. The State shall require the list on a periodic basis. In addition, the State agency shall conduct periodic random onsite visits to assure the accuracy of the list and that the State agency's records are consistent and up to date.

(3) The same provisions applicable in § 273.11(e)(3) to residents of treatment centers also apply to blind or disabled residents of group living arrangements when the facility acts as the resident's authorized representative.

(4) If the resident has made application on his/her own behalf, the household is responsible for reporting changes to the State agency as provided in § 273.12(a). If the group living arrangement is acting in the capacity of an authorized representative, the group living arrangement shall notify the State agency, as provided in § 273.12(a), of changes in the household's income or other household circumstances and when the individual leaves the group living arrangement. The group living arrangement shall return any household's ATP card or coupons to the State agency if they are received after the household has left the group living arrangement.

(5)(i) When the household leaves the facility, the group living arrangement, either acting as an authorized representative or retaining use of the coupons on behalf of the residents (regardless of the method of application), shall provide residents with their ID cards (if applicable) and any untransacted ATP cards. The household, not the group living arrangement, shall be allowed to sign for and receive any remaining authorized benefits reflected on HIR cards. Also, the departing household shall receive its full allotment if issued and if no coupons have been spent on behalf of that individual household. These procedures are applicable at any time during the month. However, if the coupons have already been issued and any portion spent on behalf of the individual, and the household leaves the group living arrangement prior to the 16th day of the month, the facility shall provide the household with its ID card (if applicable) and one half of its monthly coupon allotment. If the household leaves on or after the 16th day of the month and the coupons have already been issued and used, the

household does not receive any coupons. If a group of residents have been certified as one household and have returned the coupons to the facility to use, the departing residents shall be given a pro rata share of one-half of the coupon allotment if leaving prior to the 16th day of the month and shall be instructed to obtain ID cards or written authorizations to use the coupons from the local office.

(ii) Once the resident leaves, the group living arrangement no longer acts as his/her authorized representative. The group living arrangement, if possible, shall provide the household with a change report form to report to the State agency the individual's new address and other circumstances after leaving the group living arrangement and shall advise the household to return the form to the appropriate office of the State agency within 10 days.

(iii) The group living arrangement shall return to the State agency any coupons not provided to departing residents at the end of each month. These returned coupons shall include those not provided to departing residents because they left on or after the 16th of the month or they left prior to the 16th and the facility was unable to provide them with the coupons.

(6) The same provisions applicable to drug and alcoholic treatment center in paragraphs (e) (6) and (7) of this section also apply to group living arrangements when acting as an authorized representative. These provisions, however, are not applicable if a resident has applied on his/her own behalf. The resident applying on his/her own behalf shall be responsible for overissuances as would any other household as discussed in § 273.18.

(7) If the residents are certified on their own behalf, the food stamp benefits may either be returned to the GLA to be used to purchase meals served either communally or individually to eligible residents or retained and used to purchase and prepare food for their own consumption. The GLA may purchase and prepare food to be consumed by eligible residents on a group basis if residents normally obtain their meals at a central location as part of the GLA's service or if meals are prepared at a central location for delivery to the individual residents. If personalized meals are prepared and paid for with food stamps, the GLA must ensure that the resident's food stamp benefits are used for meals intended for that resident.

(g) *Shelters for battered women and children.* (1) Prior to certifying its residents under this paragraph, the State agency shall determine that the shelter for battered women and children meets the definition in § 271.2 and document the basis of this determination. Shelters having FNS authorization to redeem at wholesalers shall be considered as meeting the definition and the State agency is not required to make any further determination. The State agency may choose to require local project area offices to maintain a list of shelters meeting the definition to facilitate prompt certification of eligible residents following the special procedures outlined below.

(2) Many shelter residents have recently left a household containing the person who has abused them. Their former household may be certified for participation in the Program, and its certification may be based on a household size that includes the women and children who have just left. Shelter residents who are included in such certified households may nevertheless apply for and (if otherwise eligible) participate in the Program as separate households if such certified household which includes them is the household containing the person who subjected them to abuse. Shelter residents who are included in such certified households may receive an additional allotment as a separate household only once a month.

(3) Shelter residents who apply as separate households shall be certified solely on the basis of their income and resources and the expenses for which they are responsible. They shall be certified without regard to the income, resources, and expenses of their former household. Jointly held resources shall be considered inaccessible in accordance with § 273.8. Room payments to the shelter shall be considered as shelter expenses.

(4) Any shelter residents eligible for expedited service shall be handled in accordance with § 273.2(i).

(5) State agencies must take prompt action to ensure that the former household's eligibility or allotment reflects the change in the household's composition. Such action must include acting on the reported change in accordance with § 273.12 or § 273.21, as appropriate, by issuing a notice of adverse action in accordance with § 273.13.

(h) *Homeless food stamp households.* Homeless food stamp households shall be permitted to use their food stamp benefits to purchase prepared meals from homeless meal providers authorized by FNS under § 278.1(h).

(i) *Prerelease applicants.* A household which consists of a resident or residents of a public institution(s) which applies for SSI under SSA's Prerelease Program for the Institutionalized shall be allowed to apply for food stamp benefits jointly with their application for SSI prior to their release from the institution. Such households shall be certified in accordance with the provisions of § 273.1(e), § 273.2(c), (g), (i), (j) and (k), and § 273.10(a), as appropriate.

(j) *Reduction of public assistance benefits.* If the benefits of a household that is receiving public assistance are reduced under a Federal, State, or local means-tested public assistance program because of the failure of a food stamp household member to perform an action required under the assistance program or for fraud, the State agency shall not increase the household's food stamp allotment as the result of the decrease in income. In addition to prohibiting an increase in food stamp benefits, the State agency may impose a penalty on the household that represents a percentage of the food stamp allotment that does not exceed 25 percent. The 25 percent reduction in food stamp benefits must be based on the amount of food stamp benefits the household should have received under the regular food stamp benefit formula, taking into account its actual (reduced) income. However, under no circumstances can the food stamp benefits be allowed to rise. Reaching a time limit for time-limited benefits, having a child that is not eligible because of a family cap, failing to reapply or complete the application process for continued assistance under the other program, failing to perform an action that the individual is unable to perform as opposed to refusing to perform, or failing to comply with a purely procedural requirement, shall not be considered a failure to perform an action required by an assistance program for purposes of this provision. A procedural requirement, which would not trigger a food stamp sanction, is a step that an individual must take to continue receiving benefits in the assistance program such as submitting a monthly report form or providing verification of circumstances. A substantive requirement, which would trigger a food stamp sanction, is a behavioral requirement in the assistance program designed to improve the well being of the recipient family, such as participating in job search activities. The State agency shall not apply this provision to individuals who fail to perform a required action at the time the individual initially applies for assistance. The State agency shall not increase food stamp benefits, and may reduce food stamp benefits only if the person is receiving such assistance at the time the reduction in assistance is imposed or the reduction in assistance is imposed at the time of application for continued assistance benefits if there is no break in participation. The individual must be certified for food stamps at the time of the failure to perform a required action for this provision to apply. Assistance benefits shall be considered reduced if they are decreased, suspended, or terminated.

(1) For purposes of this provision a Federal, State or local ''means-tested public assistance program'' shall mean public or general assistance as defined in § 271.2 of this chapter, and is referred to as ''assistance''. This provision must be applied to all applicable cases. If a State agency is not successful in obtaining the necessary cooperation from another Federal, State or local means-tested welfare or public assistance program to enable it to comply with the requirements of this provision, the State agency shall not be held responsible for noncompliance as long as the State agency has made a good faith effort to obtain the information. The State agency, rather than the household, shall be responsible for obtaining information about sanctions from

other programs and changes in those sanctions.

(2) The prohibition on increasing food stamp benefits applies for the duration of the reduction in the assistance program. If at any time the State agency can no longer ascertain the amount of the reduction, then the State agency may terminate the food stamp sanction. However, the sanction may not exceed the sanction in the other program. If the sanction is still in effect at the end of one year, the State agency shall review the case to determine if the sanction continues to be appropriate. If, for example, the household is not receiving assistance, it would not be appropriate to continue the sanction. Sanctions extended beyond one year must be reviewed at least annually but may be ended by the State agency at any time. It shall be concurrent with the reduction in the other assistance program to the extent allowed by normal food stamp change processing and notice procedures.

(3) The State agency shall determine how to prevent an increase in food stamp benefits. Among other options, the State agency may increase the assistance grant by a flat percent, not to exceed 25 percent, for all households that fail to perform a required action in lieu of computing an individual amount or percentage for each affected household.

(4) If the allotment of a household is reduced under Title IV–A of the Social Security Act, the State agency may use the same procedures that apply under Title IV–A to prevent an increase in food stamp benefits as the result of the decrease in Title IV–A benefits. For example, the same budgeting procedures and combined notices and hearings may be used, but the food stamp allotment may not be reduced by more than 25 percent.

(5) The State agency must lift the ban on increasing food stamp benefits if it becomes aware that the person has become ineligible for the assistance program during the disqualification period for some other reason, or the person's assistance case is closed.

(6) If an individual moves within the State, the prohibition on increasing food stamp benefits shall be applied to the gaining household unless that person is ineligible for the assistance program for some other reason. If such individual moves to a new State the prohibition on increasing benefits shall not be applied.

(7) The State agency must restore lost benefits when necessary in accordance with § 273.17 if it is later determined that the reduction in the public assistance grant was not appropriate.

(8) The State agency must act on changes which are not related to the assistance violation and that would affect the household's benefits.

(9) The State agency must include in its State Plan of Operations any options it has selected in this paragraph (j).

(k) *Comparable disqualifications.* If a disqualification is imposed on a member of a household for failure to perform an action required under a Federal, State or local means-tested public assistance program, the State agency may impose the same disqualification on the member of the household under the Food Stamp Program. The program must be authorized by a Federal, State, or local law, but the provision itself does not have to be specified in the law. A State agency may choose to apply this provision to one or more of these programs, and it may select the types of disqualifications within a program that it wants to impose on food stamp recipients. The State agency shall be responsible for obtaining information about sanctions from other programs and changes in those sanctions.

(1) For purposes of this section Federal, State or local ''means-tested public assistance program'' shall mean public and general assistance as defined in § 271.2 of this chapter.

(2) The State agency shall not apply this provision to individuals who are disqualified at the time the individual initially applies for assistance benefits. It may apply the provision if the person was receiving such assistance at the time the disqualification in the assistance program was imposed and to disqualifications imposed at the time of application for continued assistance benefits if there is no break in participation with the following exceptions: Reaching a time limit for time-limited benefits, having a child that is not eligible because of a family cap, failing to

reapply or complete the application process for continued assistance, failing to perform an action that the individual is unable to perform as opposed to refusing to perform, and failing to perform purely procedural requirements, shall not be considered failures to perform an action required by an assistance program. A procedural requirement, which would not trigger a food stamp sanction, is a step that an individual must take to continue receiving benefits in the assistance program such as submitting a monthly report form or providing verification of circumstances. A substantive requirement, which would trigger a food stamp sanction, is a behavioral requirement in the assistance program designed to improve the well being of the recipient family, such as participating in job search activities. The individual must be receiving food stamps at the time of the disqualification in the assistance program to be disqualified from the Food Stamp Program under this provision.

(3) The State agency must stop the food stamp disqualification when it becomes aware that the person has become ineligible for assistance for some other reason, or the assistance case is closed.

(4) If a disqualification is imposed for a failure of an individual to perform an action required under a program under Title IV–A of the Social Security Act, the State may use the rules and procedures that apply under the Title IV–A program to impose the same disqualification under the Food Stamp Program.

(5) Only the individual who committed the violation in the assistance program may be disqualified for food stamp purposes even if the entire assistance unit is disqualified for Title IV–A purposes.

(6) A comparable disqualification for food stamp purposes shall be imposed concurrently with the disqualification in the assistance program to the extent allowed by normal food stamp processing times and notice requirements. The State agency may determine the length of the disqualification, providing that the disqualification does not exceed the disqualification in the other program. If the sanction is still in effect at the end of one year, the State agency shall review the case to determine if the sanction continues to be appropriate. If, for example, the household is not receiving assistance, if would not be appropriate to continue the sanction. Sanctions extended beyond one year must be reviewed at least annually but may be ended by the State agency at any time.

(7) If there is a pending disqualification for a food stamp violation and a pending comparable disqualification, they shall be imposed concurrently to the extent appropriate. For example, if the household is disqualified for June for a food stamp violation and an individual is disqualified for June and July for an assistance program violation, the whole household shall be disqualified for June and the individual shall be disqualified for July for food stamp purposes.

(8) The State agency must treat the income and resources of the disqualified individual in accordance with § 273.11(c)(2).

(9) After a disqualification period has expired, the person may apply for food stamp benefits and shall be treated as a new applicant or a new household member, except that a current disqualification based on a food stamp work requirement shall be considered in determining eligibility.

(10) A comparable food stamp disqualification may be imposed in addition to any coupon allotment reductions made in accordance with paragraph (j) of this section.

(11) State agencies shall state in their Plan of Operation if they have elected to apply comparable disqualifications, identify which sanctions in the other programs this provision applies to, and indicate the options and procedures allowed in paragraphs (k)(1), (k)(2), (k)(3), (k)(4), and (k)(10) of this section which they have selected.

(12) The State agency must act on changes which are not related to the assistance violation and that would affect the household's benefits.

(13) The State agency must restore lost benefits when necessary in accordance with 7 CFR 273.17 if it is later determined that the reduction in the public assistance grant was not appropriate.

(l) *School Attendance*. Section 404(i) of Part A of the Social Security Act, 42 U.S.C. 601, et seq., provides that any state receiving a TANF block grant cannot be prohibited from sanctioning a family that includes an adult who has received assistance financed with federal TANF dollars or provided from the food stamp program if such adult fails to ensure that the minor dependent children of such adult attend school as required by the law of the State in which the minor children reside. Section 404(j) of Part A of the Social Security Act, 42 U.S.C. 601, *et seq.*, provides that States shall not be prohibited from sanctioning a family that includes an adult who is older than 20 and younger than 51 and who has received assistance that is either financed with federal TANF funds or provided through the food stamp program if such adult does not have, or is not working toward attaining, a secondary school diploma or recognized equivalent. These provisions do not provide independent authority for food stamp sanctions beyond any that may apply through paragraphs (j) and (k) of this section.

(m) *Individuals convicted of drug-related felonies*. An individual convicted (under Federal or State law) of any offense which is classified as a felony by the law of the jurisdiction involved and which has as an element the possession, use, or distribution of a controlled substance (as defined in section 102(6) of the Controlled Substance Act, 21 U.S.C. 802(6)) shall not be considered an eligible household member unless the State legislature of the State where the individual is domiciled has enacted legislation exempting individuals domiciled in the State from the above exclusion. If the State legislature has enacted legislation limiting the period of disqualification, the period of ineligibility shall be equal to the length of the period provided under such legislation. Ineligibility under this provision is only limited to convictions based on behavior which occurred after August 22, 1996. The income and resources of individuals subject to disqualification under this paragraph (m) shall be treated in accordance with the procedures at paragraph (c)(1) of this section.

(n) *Fleeing felons and probation or parole violators*. Individuals who are fleeing to avoid prosecution or custody for a crime, or an attempt to commit a crime, that would be classified as a felony (or in the State of New Jersey, a high misdemeanor) or who are violating a condition of probation or parole under a Federal or State law shall not be considered eligible household members. The income and resources of the ineligible member shall be handled in accordance with (c)(1) of this section.

(o) *Custodial parent's cooperation with the State Child Support Agency*. For purposes of this provision, a custodial parent is a natural or adoptive parent who lives with his or her child, or other individual who is living with and exercises parental control over a child under the age of 18.

(1) *Option to disqualify custodial parent for failure to cooperate*. At the option of a State agency, subject to paragraphs (o)(2) and (o)(4) of this section, no natural or adoptive parent or, at State agency option, other individual (collectively referred to in this paragraph (o) as ''the individual'') who is living with and exercising parental control over a child under the age of 18 who has an absent parent shall be eligible to participate in the Food Stamp Program unless the individual cooperates with the agency administering a State Child Support Enforcement Program established under Part D of Title IV of the Social Security Act (42 U.S.C. 651, *et seq.*), hereafter referred to as the State Child Support Agency.

(i) If the State agency chooses to implement paragraph (o)(1) of this section, it must notify all individuals of this requirement in writing at the time of application and reapplication for continued benefits.

(ii) If the State agency chooses to implement paragraph (o)(1) of this section, it must refer all appropriate individuals to the State Child Support Agency.

(iii) If the individual is receiving TANF or Medicaid, or assistance from the State Child Support Agency, and has already been determined to be cooperating, or has been determined to have good cause for not cooperating, then the State agency shall consider

the individual to be cooperating for food stamp purposes.

(iv) The individual must cooperate with the State Child Support Agency in establishing paternity of the child, and in establishing, modifying, or enforcing a support order with respect to the child and the individual in accordance with section 454(29) of the Social Security Act (42 U.S.C. 654(29)).

(v) Pursuant to Section 454(29)(E) of the Social Security Act (42 U.S.C. 654(29)(E) the State Child Support Agency will notify the individual and the State agency whether or not it has determined that the individual is cooperating in good faith.

(2) *Claiming good cause for non-cooperation.* Prior to requiring cooperation under paragraph (o)(1) of this section, the State agency will notify the household in writing at initial application and at application for continued benefits of the right to good cause as an exception to the cooperation requirement and of all the requirements applicable to a good cause determination. Paragraph (o)(1) of this section shall not apply to the individual if good cause is found for refusing to cooperate, as determined by the State agency:

(i) *Circumstances under which cooperation may be ''against the best interests of the child.''* The individual's failure to cooperate is deemed to be for ''good cause'' if:

(A) The individual meets the good cause criteria established under the State program funded under Part A of Title IV or Part D of Title IV of the Social Security Act (42 U.S.C. 601, *et seq*, or 42 U.S.C. 651, *et seq.*) (whichever agency is authorized to define and determine good cause) for failing to cooperate with the State Child Support Agency; or

(B) Cooperating with the State Child Support Agency would make it more difficult for the individual to escape domestic violence or unfairly penalize the individual who is or has been victimized by such violence, or the individual who is at risk of further domestic violence. For purposes of this provision, the term ''domestic violence'' means the individual or child would be subject to physical acts that result in, or are threatened to result in, physical injury to the individual; sexual abuse; sexual activity involving a dependent child; being forced as the caretaker relative of a dependent child to engage in nonconsensual sexual acts or activities; threats of, or attempts at physical or sexual abuse; mental abuse; or neglect or deprivation of medical care.

(C) The individual meets any other good cause criteria identified by the State agency. These criteria will be defined in consultation with the Child Support Agency or TANF program, whichever is appropriate, and identified in the State plan according to § 272.2(d) (xiii).

(ii) *Proof of good cause claim.* (A) The State agency will accept as corroborative evidence the same evidence required by Part A of Title IV or Part D of Title IV of the Social Security Act (42 U.S.C. 601, *et seq.* or 42 U.S.C. 651, *et seq.*) to corroborate a claim of good cause.

(B) The State agency will make a good cause determination based on the corroborative evidence supplied by the individual only after it has examined the evidence and found that it actually verifies the good cause claim.

(iii) *Review by the State Child Support or TANF Agency.* Prior to making a final determination of good cause for refusing to cooperate, the State agency will afford the State Child Support Agency or the agency which administers the program funded under Part A of the Social Security Act the opportunity to review and comment on the findings and the basis for the proposed determination and consider any recommendation from the State Child Support or TANF Agency.

(iv) *Delayed finding of good cause.* The State agency will not deny, delay, or discontinue assistance pending a determination of good cause for refusal to cooperate if the applicant or recipient has complied with the requirements to furnish corroborative evidence and information. In such cases, the State agency must abide by the normal processing standards according to § 273.2(g).

(3) *Individual disqualification.* If the State agency has elected to implement this provision and determines that the individual has not cooperated without good cause, then that individual shall be ineligible to participate in the Food

Stamp Program. The disqualification shall not apply to the entire household. The income and resources of the disqualified individual shall be handled in accordance with paragraph(c)(2) of this section.

(4) *Fees*. A State electing to implement this provision shall not require the payment of a fee or other cost for services provided under Part D of Title IV of the Social Security Act (42 U.S.C. 651, *et seq*.)

(5) *Terminating the Disqualification*. The period of disqualification ends once it has been determined that the individual is cooperating with the State Child Support Agency. The State agency must have procedures in place for re-qualifying such an individual.

(p) *Non-custodial parent's cooperation with child support agencies*. For purposes of this provision, a ''non-custodial parent'' is a putative or identified parent who does not live with his or her child who is under the age of 18.

(1) *Option to disqualify non-custodial parent for refusal to cooperate*. At the option of a State agency, subject to paragraphs (p)(2) and (p)(4) of this section, a putative or identified non-custodial parent of a child under the age of 18 (referred to in this subsection as ''the individual'') shall not be eligible to participate in the Food Stamp Program if the individual refuses to cooperate with the State agency administering the program established under Part D of Title IV of the Social Security Act (42 U.S.C. 651, *et seq*.), hereafter referred to as the State Child Support Agency, in establishing the paternity of the child (if the child is born out of wedlock); and in providing support for the child.

(i) If the State agency chooses to implement paragraph (p)(1) of this section, it must notify all individuals in writing of this requirement at the time of application and reapplication for continued benefits.

(ii) If the individual is receiving TANF, Medicaid, or assistance from the State Child Support Agency, and has already been determined to be cooperating, or has been determined to have good cause for not cooperating, then the State agency shall consider the individual is cooperating for food stamp purposes.

(iii) If the State agency chooses to implement paragraph (p)(1) of this section, it must refer all appropriate individuals to the State Child Support Agency established under Part D of Title IV of the Social Security Act (42 U.S.C. 651, *et seq*.).

(iv) The individual must cooperate with the State Child Support Agency in establishing the paternity of the child (if the child is born out of wedlock), and in providing support for the child.

(v) Pursuant to Section 454(29)(E) of the Social Security Act (42 U.S.C. 654(29)(E)), the State Child Support Agency will notify the individual and the State agency whether or not it has determined that the individual is cooperating in good faith.

(2) *Determining refusal to cooperate*. If the State Child Support Agency determines that the individual is not cooperating in good faith, then the State agency will determine whether the non-cooperation constitutes a refusal to cooperate. Refusal to cooperate is when an individual has demonstrated an unwillingness to cooperate as opposed to an inability to cooperate.

(3) *Individual disqualification*. If the State agency determines that the non-custodial parent has refused to cooperate, then that individual shall be ineligible to participate in the Food Stamp Program. The disqualification shall not apply to the entire household. The income and resources of the disqualified individual shall be handled according to paragraph (c)(2) of this section.

(4) *Fees*. A State electing to implement this provision shall not require the payment of a fee or other cost for services provided under Part D of Title IV of the Social Security Act (42 U.S.C. 651, *et seq*.)

(5) *Privacy*. The State agency shall provide safeguards to restrict the use of information collected by a State agency administering the program established under Part D of Title IV of the Social Security Act (42 U.S.C. 651, *et seq*.) to purposes for which the information is collected.

(6) *Termination of disqualification*. The period of disqualification ends once it has been determined that the individual is cooperating with the child support agency. The State agency must

have procedures in place for re-qualifying such an individual.

(q) *Disqualification for child support arrears.*—(1) *Option to disqualify.* At the option of a State agency, no individual shall be eligible to participate in the Food Stamp Program as a member of any household during any month that the individual is delinquent in any payment due under a court order for the support of a child of the individual. The State agency may opt to apply this provision to only non-custodial parents.

(2) *Exceptions.* A disqualification under paragraph (q)(1) of this section shall not apply if:

(i) A court is allowing the individual to delay payment;

(ii) The individual is complying with a payment plan approved by a court or the State agency designated under Part D of Title IV of the Social Security Act (42 U.S.C., 651 *et seq.*) to provide support of a child of the individual; or

(iii) The State agency determines the individual has good cause for non-support.

(3) *Individual disqualification.* If the State agency has elected to implement this provision and determines that the individual should be disqualified for child support arrears, then that individual shall be ineligible to participate in the Food Stamp Program. The disqualification shall not apply to the entire household. The income and resources of the disqualified individual shall be handled according to paragraph (c)(2) of this section.

(4) *Collecting claims.* State agencies shall initiate collection action as provided for in § 273.18 for any month a household member is disqualified for child support arrears by sending the household a written demand letter which informs the household of the amount owed, the reason for the claim and how the household may pay the claim. The household should also be informed as to the adjusted amount of income, resources, and deductible expenses of the remaining members of the household for the month(s) a member is disqualified for child support arrears.

[Amdt. 132, 43 FR 47889, Oct. 17, 1978]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 273.11, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 273.12 Reporting changes.

(a) *Household responsibility to report.* (1) Certified households are required to report the following changes in circumstances:

(i) Changes in the sources of income or in the amount of gross monthly income of more than $25, except changes in the public assistance grant, or the general assistance grant in project areas where GA and food stamp cases are jointly processed in accord with § 273.2(j)(2). Since the State agency has prior knowledge of all changes in the public assistance grant and general assistance grants, action shall be taken on the State agency information;

(ii) All changes in household composition, such as the addition or loss of a household member;

(iii) Changes in residence and the resulting change in shelter costs;

(iv) The acquisition of a licensed vehicle not fully excludable under § 273.8(e); and

(v) When cash on hand, stocks, bonds, and money in a bank account or savings institution reach or exceed a total of $2,000.

(vi) Changes in the legal obligation to pay child support.

(vii) State agencies may opt to require households with earned income that are assigned 6-month or longer certification periods to report only changes in the amount of gross monthly income that result in their gross monthly income exceeding 130 percent of the monthly poverty income guideline for their household size.

(A) Households with earned income certified for 6 months in accordance with paragraph (a)(1)(vii) of this section must not be required to report changes in accordance with paragraphs (a)(1)(ii) through (a)(1)(vi) of this section. The State agency must act on any change reported by such households that would increase their benefits in accordance with paragraph (c)(1) of this section. The State agency must not act on changes that would result in a decrease in benefits unless:

(*1*) The household has voluntarily requested that its case be closed in accordance with § 273.13(b)(12);

(*2*) The State agency has information about the household's circumstances considered verified upon receipt; or

(*3*) There has been a change in the household's PA grant, or GA grant in project areas where GA and food stamp cases are jointly processed in accord with § 273.2(j)(2).

(B) Households with earned income certified for longer than 6 months under this option shall be required to submit an interim report at 6 months in accordance with paragraphs (a)(1)(i) through (a)(1)(vi) of this section. The State agency must act on any change reported by such households on the interim report in accordance with paragraph (c) of this section. If the household files a complete report resulting in reduction or termination of benefits, the State agency shall send an adequate notice, as defined in § 271.2 of this chapter. The notice must be issued so that it will be received by the household no later than the time that its benefits are normally received. If the household fails to provide sufficient information or verification regarding a deductible expense, the State agency will not terminate the household, but will instead determine the household's benefits without regard to the deduction.

(viii) For able-bodied adults subject to the time limit of § 273.24, any changes in work hours that bring an individual below 20 hours per week, averaged monthly, as defined in § 273.24(a)(1)(i). An individual shall report this information in accordance with the reporting system for income to which he is subject.

(2) Certified households shall report changes within 10 days of the date the change becomes known to the household. Optional procedures for reporting changes are contained in § 273.12(f) for households in States with FNS-approved forms for jointly reporting food stamp and public assistance changes and food stamp and general assistance changes.

(3) An applying household shall report all changes related to its food stamp eligibility and benefits at the certification interview. Changes, as provided in paragraph (a)(1) of this section, which occur after the interview but before the date of the notice of eligibility, shall be reported by the household within 10 days of the date of the notice.

(4) The State agency may require a household that is eligible to receive a child support deduction in accordance with § 273.9(d)(7) to report information required by the State agency regarding child support on a change report, a monthly report, or quarterly report. The State agency shall process the reports in accordance with procedures for the systems used in budgeting the household's income and deductions. The following requirements apply to quarterly reports:

(i) The State agency shall provide the household a reasonable period after the end of the last month covered by the report in which to return the report. If the household does not file the report by the due date or files an incomplete report, the State agency shall provide the household with a reminder notice advising the household that it has 10 days from the date the State agency mails the notice to file a complete report. If the household does not file a complete report by the extended filing date as specified in the reminder notice, the State agency shall determine the household's eligibility and benefits without consideration of the child support deduction. The State agency shall not terminate the benefits of a household for failure to submit a quarterly report unless the household is otherwise ineligible. The State agency shall send the household an adequate notice as defined in § 271.2 of this chapter if the household fails to submit a complete report or if the information contained on a complete report results in a reduction or termination of benefits. The quarterly report shall meet the requirements specified in paragraph (b) of this section. The State agency may combine the content of the reminder notice and the adequate notice as long as the notice meets the requirements of the individual notices.

(ii) The quarterly report form, if required, shall be the sole reporting requirement for reporting child support

payments during the certification period. Households excluded from monthly reporting as specified in § 273.21(b) and households required to submit monthly reports shall not be required to submit quarterly reports.

(5) State agencies shall not impose any food stamp reporting requirements on households except as provided in paragraph (a) of this section.

(b) *Report forms.* (1) The State agency shall provide the household with a form for reporting the changes required in paragraph (a)(1) of this section to be reported within 10 days and shall pay the postage for return of the form. The change report form shall, at a minimum, include the following:

(i) A space for the household to report whether the change shall continue beyond the report month;

(ii) The civil and criminal penalties for violations of the Act in understandable terms and in prominent and boldface lettering;

(iii) A reminder to the household of its right to claim actual utility costs if its costs exceed the standard;

(iv) The number of the food stamp office and a toll-free number or a number where collect calls will be accepted for households outside the local calling area; and

(v) A statement describing the changes in household circumstances contained in § 273.12(a)(1) that must be reported and a statement which clearly informs the household that it is required to report these changes.

(2) A quarterly report form for reporting changes in the child support obligation and payments shall be written in clear, simple language and meet the bilingual requirements described in § 272.4(b) of this chapter. The report shall meet the requirements of § 273.21(h)(2)(iii) through (h)(2)(vii).

(3) Changes reported over the telephone or in person by the household shall be acted on in the same manner as those reported on the change report form.

(4) A change report form shall be provided to newly certified households at the time of certification, at recertification if the household needs a new form; and a new form shall be sent to the household whenever a change report form is returned by the household. A change report may be provided to households more often at the State agency's option.

(c) *State agency action on changes.* The State agency shall take prompt action on all changes to determine if the change affects the household's eligibility or allotment. However, during the certification period, the State agency shall not act on changes in the medical expenses of households eligible for the medical expense deduction which it learns of from a source other than the household and which, in order to take action, require the State agency to contact the household for verification. The State agency shall only act on those changes in medical expenses that it learns about from a source other than the household if those changes are verified upon receipt and do not necessitate contact with the household. Even if there is no change in the allotment, the State agency shall document the reported change in the casefile, provide another change report form to the household, and notify the household of the receipt of the change report. If the reported change affects the household's eligibility or level of benefits, the adjustment shall also be reported to the household. The State agency shall also advise the household of additional verification requirements, if any, and state that failure to provide verification shall result in increased benefits reverting to the original allotment. The State agency shall document the date a change is reported, which shall be the date the State agency receives a report form or is advised of the change over the telephone or by a personal visit. Restoration of lost benefits shall be provided to any household if the State agency fails to take action on a change which increases benefits within the time limits specified in paragraph (c)(1) of this section.

(1) *Increase in benefits.* (i) For changes which result in an increase in a household's benefits, other than changes described in paragraph (c)(1)(ii) of this section, the State agency shall make the change effective no later than the first allotment issued 10 days after the date the change was reported to the State agency. For example, a $30 decrease in income reported on the 15th

of May would increase the household's June allotment. If the same decrease were reported on May 28, and the household's normal issuance cycle was on June 1, the household's allotment would have to be increased by July.

(ii) For changes which result in an increase in a household's benefits due to the addition of a new household member who is not a member of another certified household, or due to a decrease of $50 or more in the household's gross monthly income, the State agency shall make the change effective not later than the first allotment issued 10 days after the date the change was reported. However, in no event shall these changes take effect any later than the month following the month in which the change is reported. Therefore, if the change is reported after the 20th of a month and it is too late for the State agency to adjust the following month's allotment, the State agency shall issue a supplementary ATP or otherwise provide an opportunity for the household to obtain the increase in benefits by the 10th day of the following month, or the household's normal issuance cycle in that month, whichever is later. For example, a household reporting a $100 decrease in income at any time during May would have its June allotment increased. If the household reported the change after the 20th of May and it was too late for the State agency to adjust the ATP normally issued on June 1, the State agency would issue a supplementary ATP for the amount of the increase by June 10.

(iii) The State agency may elect to verify changes which result in an increase in a household's benefits in accordance with the verification requirements of § 273.2(f)(8)(ii), prior to taking action on these changes. If the State agency elects this option, it must allow the household 10 days from the date the change is reported to provide verification required by § 273.2(f)(8)(ii). If the household provides verification within this period, the State shall take action on the changes within the timeframes specified in paragraphs (c)(1) (i) and (ii) of this section. The timeframes shall run from the date the change was reported, not from the date of verification. If, however, the household fails to provide the required verification within 10 days after the change is reported but does provide the verification at a later date, then the timeframes specified in paragraphs (c)(1) (i) and (ii) of this section for taking action on changes shall run from the date verification is provided rather than from the date the change is reported. If the State agency does not elect this option, verification required by § 273.2(f)(8)(ii) must be obtained prior to the issuance of the second normal monthly allotment after the change is reported. If in these circumstances the household does not provide verification, the household's benefits will revert to the original benefit level. Whenever a State agency increases a household's benefits to reflect a reported change and subsequent verification shows that the household was actually eligible for fewer benefits, the State agency shall establish a claim for the overissuance in accordance with § 273.18. In cases where the State agency has determined that a household has refused to cooperate as defined in § 273.2(d), the State agency shall terminate the household's eligibility following the notice of adverse action.

(2) *Decreases in benefits.* (i) If the household's benefit level decreases or the household becomes ineligible as a result of the change, the State agency shall issue a notice of adverse action within 10 days of the date the change was reported unless one of the exemptions to the notice of adverse action in § 273.13 (a)(3) or (b) applies. When a notice of adverse action is used, the decrease in the benefit level shall be made effective no later than the allotment for the month following the month in which the notice of adverse action period has expired, provided a fair hearing and continuation of benefits have not been requested. When a notice of adverse action is not used due to one of the exemptions in § 273.13 (a)(3) or (b), the decrease shall be made effective no later than the month following the change. Verification which is required by § 273.2(f) must be obtained prior to recertification.

(ii) The State agency may suspend a household's certification prospectively

for one month if the household becomes temporarily ineligible because of a periodic increase in recurring income or other change not expected to continue in the subsequent month. If the suspended household again becomes eligible, the State agency shall issue benefits to the household on the household's normal issuance date. If the suspended household does not become eligible after one month, the State agency shall terminate the household's certification. Households are responsible for reporting changes as required by paragraph (a) of this section during the period of suspension.

(3) *Unclear information*. During the certification period, the State agency may obtain information about changes in a household's circumstances from which the State agency cannot readily determine the effect of the change on the household's benefit amount. The State agency might receive such unclear information from a third party or from the household itself. The State agency must pursue clarification and verification of household circumstances using the following procedure:

(i) The State agency must issue a written request for contact (RFC) which clearly advises the household of the verification it must provide or the actions it must take to clarify its circumstances, which affords the household at least 10 days to respond and to clarify its circumstances, either by telephone or by correspondence, as the State agency directs, and which states the consequences if the household fails to respond to the RFC.

(ii) If the household does not respond to the RFC, or does respond but refuses to provide sufficient information to clarify its circumstances, the State agency must issue a notice of adverse action as described in § 273.13 which terminates the case, explains the reasons for the action, and advises the household of the need to submit a new application if it wishes to continue participating in the program. When the household responds to the RFC and provides sufficient information, the State agency must act on the new circumstances in accordance with paragraphs (c)(1) or (c)(2) of this section.

(iii) If the household does not respond to the RFC, or does respond but refuses to provide sufficient information to clarify its circumstances, the State agency may elect to issue a notice of adverse action as described in § 273.13 which suspends the household for 1 month before the termination becomes effective, explains the reasons for the action, and advises the household of the need to submit a new application if it wishes to continue participating in the program. If a household responds satisfactorily to the RFC during the period of suspension, the State agency must reinstate the household without requiring a new application, issue the allotment for the month of suspension, and if necessary, adjust the household's participation with a new notice of adverse action.

(d) *Failure to report*. If the State agency discovers that the household failed to report a change as required by paragraph (a) of this section and, as a result, received benefits to which it was not entitled, the State agency shall file a claim against the household in accordance with § 273.18. If the discovery is made within the certification period, the household is entitled to a notice of adverse action if the household's benefits are reduced. A household shall not be held liable for a claim because of a change in household circumstances which it is not required to report in accordance with § 273.12(a)(1). Individuals shall not be disqualified for failing to report a change, unless the individual is disqualified in accordance with the disqualification procedures specified in § 273.16.

(e) *Mass changes*. Certain changes are initiated by the State or Federal government which may affect the entire caseload or significant portions of the caseload. These changes include, but are not limited to, adjustments to the income eligibility standards, the shelter and dependent care deductions, the maximum food stamp allotment and the standard deduction; annual and seasonal adjustments to State utility standards; periodic cost-of-living adjustments to Retirement, Survivors, and Disability Insurance (RSDI), Supplemental Security Income (SSI) and other Federal benefits; periodic adjustments to Temporary Assistance for

Needy Families (TANF) or General Assistance (GA) payments; and other changes in the eligibility and benefit criteria based on legislative or regulatory changes.

(1) *Federal adjustments to eligibility standards, allotments, and deductions, and State adjustments to utility standards.* (i) State agencies shall implement these changes for all households at a specific point in time. Adjustments to Federal standards shall be implemented prospectively regardless of the household's budgeting system. Annual and seasonal adjustments in State utility standards shall also be implemented prospectively for all households.

(A) Adjustments in the maximum food stamp allotment shall be effective in accordance with § 273.10(e)(4)(ii).

(B) Adjustments in the standard deduction shall be effective in accordance with § 273.9(d)(7).

(C) Adjustments in the shelter deduction shall be effective in accordance with § 273.9(d)(8).

(D) Adjustments in the income eligibility standards shall be effective in accordance with § 273.9(a)(3).

(ii) A notice of adverse action shall not be used for these changes. At a minimum, the State agencies shall publicize these mass changes through the news media; posters in certification offices, issuance locations, or other sites frequented by certified households; or general notices mailed to households. At its option, the State agency may send the notice described in paragraph (e)(4) of this section or some other type of written explanation of the change. A household whose certification period overlaps a seasonal variation in the State utility standard shall be advised at the time of initial certification of when the adjustment will occur and what the variation in the benefit level will be, if known.

(2) *Mass changes in public assistance and general assistance.* (i) When the State agency makes an overall adjustment to public assistance (PA) payments, corresponding adjustments in households' food stamp benefits shall be handled as a mass change in accordance with the procedures in paragraphs (e) (4), (5) and (6) of this section. When the State agency has at least 30 days, advance knowledge of the amount of the PA adjustment, the State agency shall make the change in benefits effective in the same month as the PA change. If the State agency does not have sufficient notice, the food stamp change shall be effective no later than the month following the month in which the PA change was made.

(ii) State agencies which also administer a general assistance (GA) program shall handle mass adjustments to GA payments in accordance with the schedules outlined in paragraph (e)(2)(i) and the procedures in paragraphs (e) (4), (5) and (6) of this section. However, where State agencies do not administer both programs, mass changes in GA payments shall be subject to the schedule in paragraph (e)(3) and the procedures in paragraphs (e) (4), (5) and (6) of this section.

(3) *Mass changes in Federal benefits.* The State agency shall establish procedures for making mass changes to reflect cost-of-living adjustments (COLAs) in benefits and any other mass changes under RSDI, SSI, and other programs such as veteran's assistance under title 38 of the United States Code and the Black Lung Program, where information on COLA's is readily available and is applicable to all or a majority of those programs' beneficiaries. Households on retrospective budgeting but not monthly reporting shall have the change reflected in accordance with the State's system. Monthly reporting households shall report the change on the appropriate monthly report but are not required to report these types of changes outside the monthly report. The State agency shall handle such information provided on the monthly report in accordance with its normal procedures. Households not subject to monthly reporting shall not be responsible for reporting these changes. The State agency shall be responsible for automatically adjusting a household's food stamp benefit level. The change shall be reflected no later than the second allotment issued to nonmonthly reporting households issued after the month in which the change becomes effective.

(4) *Notice for Mass Changes.* When the State agency makes a mass change in

food stamp eligibility or benefits by simultaneously converting the caseload or that portion of the caseload that is affected, or by conducting individual desk reviews in place of a mass change, it shall notify all households whose benefits are reduced or terminated in accordance with the requirements of this paragraph, except for mass changes made under § 273.12(e)(1); and

(i) At a minimum, the State agency shall inform the household of:

(A) The general nature of the change;

(B) Examples of the change's effect on households' allotments;

(C) The month in which the change will take effect;

(D) The household's right to a fair hearing;

(E) The household's right to continue benefits and under what circumstances benefits will be continued pending a fair hearing;

(F) General information on whom to contact for additional information; and

(G) The liability the household will incur for any overissued benefits if the fair hearing decision is adverse.

(ii) At a minimum, the State agency shall notify the household of the mass change or the result of the desk review on the date the household is scheduled to receive the allotment which has been changed.

(iii) In addition, the State shall notify the household of the mass change as much before the household's scheduled issuance date as reasonably possible, although the notice need not be given any earlier than the time required for advance notice of adverse action.

(5) *Fair hearings.* The household shall be entitled to request a fair hearing when it is aggrieved by the mass change.

(6) *Continuation of benefits.* A household which requests a fair hearing due to a mass change shall be entitled to continued benefits at its previous level only if the household meets three criteria;

(i) The household does not specifically waive its right to a continuation of benefits;

(ii) The household requests a fair hearing in accordance with § 273.13(a)(1); and

(iii) The household's fair hearing is based upon improper computation of food stamp eligibility or benefits, or upon misapplication or misinterpretation of Federal law or regulation.

(f) *PA and GA households.* (1) Except as provided in paragraph (f)(2) of this section, PA households have the same reporting requirements as any other food stamp household. PA households which report a change in circumstances to the PA worker shall be considered to have reported the change for food stamp purposes. All of the requirements pertaining to reporting changes for PA households shall be applied to GA households in project areas where GA and food stamp cases are processed jointly in accordance with provisions of § 273.2(j)(3).

(2)(i) State agencies may use a joint change reporting form for households to report changes for both PA and food stamp purposes. Whenever a joint change reporting form is used, the State agency shall insure that adjustments are made in a household's eligibility status or allotment for the months determined appropriate given the household's budgeting cycle.

(ii) State agencies may combine the use of a joint PA/food stamp change reporting form with a PA reporting system that demands the regular submission of reports, such as a monthly reporting system. The State agency shall insure that the procedures in § 273.21(h) are followed.

(3) The State agency may not terminate a household's food stamp benefits solely because it has terminated the household's PA benefits without a separate determination that the household fails to satisfy the eligibility requirements for participation in the Program. Whenever a change results in the reduction or termination of a household's PA benefits within its food stamp certification period, the State agency must follow the procedures set forth below:

(i) If a change in household circumstances requires a reduction or termination in the PA payment and the State agency has sufficient information to determine how the change affects the household's food stamp eligibility and benefit level, the State agency must take the following actions:

(A) If the change requires a reduction or termination of food stamp benefits, the State agency must issue a single notice of adverse action for both the PA and food stamp actions. If the household requests a fair hearing within the period provided by the notice of adverse action, the State agency must continue the household's food stamp benefits on the basis authorized immediately prior to sending the notice. If the fair hearing is requested for both programs' benefits, the State agency must conduct the hearing according to PA procedures and timeliness standards. However, the household must reapply for food stamp benefits if the food stamp certification period expires before the fair hearing process is completed. If the household does not appeal, the State agency must make the change effective in accordance with the procedures specified in paragraph (c) of this section.

(B) If the household's food stamp benefits will increase as a result of the reduction or termination of PA benefits, the State agency must issue the PA notice of adverse action, but must not take any action to increase the household's food stamp benefits until the household decides whether it will appeal the PA adverse action. If the household decides to appeal and its PA benefits are continued, the household's food stamp benefits must continue at the previous level. If the household does not appeal, the State agency must make the change effective in accordance with the procedures specified in paragraph (c) of this section, except that the time limits for the State agency to act on changes which increase a household's benefits must be calculated from the date the PA notice of adverse action period expires.

(ii) Whenever a change results in the termination of a household's PA benefits within its food stamp certification period, and the State agency does not have sufficient information to determine how the change affects the household's food stamp eligibility and benefit level (such as when an absent parent returns to a household, and the household asks to have its TANF case closed without providing any information on the income of the new household member), the State agency must take the following action:

(A) If the situation requires a reduction or termination of PA benefits, the State agency must issue a request for contact (RFC) in accordance with paragraph (c)(3)(i) of this section at the same time it sends a PA notice of adverse action. Before taking further action, the State agency must wait until the household's PA notice of adverse action period expires or until the household requests a fair hearing, whichever occurs first. If the household requests a fair hearing and elects to have its PA benefits continued pending the appeal, the State agency must continue the household's food stamp benefits at the same level. If the household decides not to request a fair hearing and continuation of its PA benefits, the State agency must resume action on the changes as required in paragraph (c)(3) of this section.

(B) If the situation does not require a PA notice of adverse action, the State agency must issue a RFC and take action in accordance with paragraph (c)(3) of this section.

(iii) Depending on the household's response to the RFC, the State agency must take appropriate action, if necessary, to close the household's case or adjust the household's benefit amount.

(4) *Transitional Benefits Alternative.* The State agency may elect to provide households leaving TANF with transitional food stamp benefits as provided in this paragraph (f)(4). A State agency electing the Transitional Benefits Alternative (TBA) must provide transitional benefits, at a minimum, to all families with earnings who leave TANF. The State agency may not provide transitional benefits to a household which is leaving TANF when: the State agency has determined that the household is noncompliant with TANF requirements and the State agency is imposing a comparable food stamp sanction in accordance with § 273.11; the State agency has determined that the household has violated a food stamp work requirement in accordance with § 273.7; the State agency has determined that a household member has committed an intentional Program violation in accordance with § 273.16, or

the State agency is closing the household's TANF case in response to information indicating the household failed to comply with food stamp reporting requirements. The State agency must use procedures at paragraph (f)(3) of this section to determine the continued eligibility and benefit level of households denied transitional benefits under this paragraph (f)(4).

(i) When a household leaves TANF, the State agency may freeze for up to 3 months the household's benefit amount at the level the household received when it was receiving TANF. This is the household's transition period. If the household is losing income as a result of leaving TANF, the State agency must adjust the food stamp benefit amount before initiating the transition period. To provide the transition period, the State agency may extend the certification period for up to 3 months, not to exceed the maximum periods specified in § 273.10(f)(1) and (f)(2).

(ii) The State agency must issue a transition notice (TN) advising the household of the following: that the State agency must reevaluate its food stamp case no more than 3 months from the effective date of the TANF case closing; that its benefit amount will remain the same as when it was receiving cash assistance (or that the State agency has adjusted the food stamp benefit amount if the household's income is decreasing as the result of leaving cash assistance); that it is not required to report and provide verification for any changes in household circumstances until the deadline established in accordance with paragraph (c)(3) of this section (or its recertification interview, if the certification period is expiring); and that it may report changes if income decreases or expenses or household size increase.

(iii) If the household does report changes in its circumstances during the transition period, the State agency must adjust the household's benefit amount in accordance with paragraph (c) of this section, *except that*, if the reported change would cause a reduction in the household's benefit amount, the State agency must make the change effective the month following the last month of the transition period.

(iv) Before the end of the transition period, the State agency must issue the RFC specified in paragraph (c)(3) of this section and act on any information it has about the household's new circumstances in accordance with paragraph (c)(3) of this section, or recertify the household in accordance with § 273.14. At the end of the transition period, the State agency may extend the household's certification period in accordance with § 273.10(f)(5).

[Amdt. 132, 43 FR 47889, Oct. 17, 1978]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 273.12, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 273.13 Notice of adverse action.

(a) *Use of notice*. Prior to any action to reduce or terminate a household's benefits within the certification period, the State agency shall, except as provided in paragraph (b) of this section, provide the household timely and adequate advance notice before the adverse action is taken.

(1) The notice of adverse action shall be considered timely if the advance notice period conforms to that period of time defined by the State agency as an adequate notice period for its public assistance caseload, provided that the period includes at least 10 days from the date the notice is mailed to the date upon which the action becomes effective. Also, if the adverse notice period ends on a weekend or holiday, and a request for a fair hearing and continuation of benefits is received the day after the weekend or holiday, the State agency shall consider the request timely received.

(2) The notice of adverse action shall be considered adequate if it explains in easily understandable language: The proposed action; the reason for the proposed action; the household's right to request a fair hearing; the telephone number of the food stamp office (toll-free number or a number where collect calls will be accepted for households outside the local calling area) and, if possible, the name of the person to contact for additional information; the availability of continued benefits; and the liability of the household for any overissuances received while awaiting

a fair hearing if the hearing official's decision is adverse to the household. If there is an individual or organization available that provides free legal representation, the notice shall also advise the household of the availability of the service.

(3) The State agency may notify a household that its benefits will be reduced or terminated, no later than the date the household receives, or would have received, its allotment, if the following conditions are met:

(i) The household reports the information which results in the reduction or termination.

(ii) The reported information is in writing and signed by the household.

(iii) The State agency can determine the household's allotment or ineligibility based solely on the information provided by the household as required in paragraph (a)(3)(ii) of this section.

(iv) The household retains its right to a fair hearing as allowed in § 273.15.

(v) The household retains its right to continued benefits if the fair hearing is requested within the time period set by the State agency in accordance with § 273.13(a)(1).

(vi) The State agency continues the household's previous benefit level, if required, within five working days of the household's request for a fair hearing.

(4) The State agency shall notify a household that its benefits will be reduced if an EBT system-error has occurred during the redemption process resulting in an out-of-balance settlement condition. This notification shall be made no later than the date the action is initiated against the household account. The State agency shall adjust the benefit in accordance with § 274.12 of this chapter.

(b) *Exemptions from notice.* Individual notices of adverse action shall not be provided when:

(1) The State initiates a mass change as described in § 273.12(e).

(2) The State agency determines, based on reliable information, that all members of a household have died.

(3) The State agency determines, based on reliable information, that the household has moved from the project area.

(4) The household has been receiving an increased allotment to restore lost benefits, the restoration is complete, and the household was previously notified in writing of when the increased allotment would terminate.

(5) The household's allotment varies from month to month within the certification period to take into account changes which were anticipated at the time of certification, and the household was so notified at the time of certification.

(6) The household jointly applied for PA/GA and food stamp benefits and has been receiving food stamp benefits pending the approval of the PA/GA grant and was notified at the time of certification that food stamp benefits would be reduced upon approval of the PA/GA grant.

(7) A household member is disqualified for intentional Program violation, in accordance with § 273.16, or the benefits of the remaining household members are reduced or terminated to reflect the disqualification of that household member. The notice requirements for individuals or households affected by intentional Program violation disqualifications are explained in § 273.16.

(8) The State agency has elected to assign a longer certification period to a household certified on an expedited basis and for whom verification was postponed, provided the household has received written notice that the receipt of benefits beyond the month of application is contingent on its providing the verification which was initially postponed and that the State agency may act on the verified information without further notice as provided in § 273.2(i)(4).

(9) The State agency must change the household's benefits back to the original benefit level as required in § 273.12(c)(1)(iii).

(10) Converting a household from cash and/or food stamp coupon repayment to benefit reduction as a result of failure to make agreed upon repayment as discussed in § 273.18.

(11) The State agency is terminating the eligibility of a resident of a drug or alcoholic treatment center or a group living arrangement if the facility loses either its certification from the appropriate agency or agencies of the State

(as defined in § 271.2) or has its status as an authorized representative suspended due to FNS disqualifying it as a retailer. However, residents of group living arrangements applying on their own behalf are still eligible to participate.

(12) The household voluntarily requests, in writing or in the presence of a caseworker, that its participation be terminated. If the household does not provide a written request, the State agency shall send the household a letter confirming the voluntary withdrawal. Written confirmation does not entail the same rights as a notice of adverse action except that the household may request a fair hearing.

(13) The State agency determines, based on reliable information, that the household will not be residing in the project area and, therefore, will be unable to obtain its next allotment. The State agency shall inform the household of its termination no later than its next scheduled issuance date. While the State agency may inform the household before its next issuance date, the State agency shall not delay terminating the household's participation in order to provide advance notice.

(14) The State agency initiates recoupment of a claim as specified in § 273.18(g)(4) against a household which has previously received a notice of adverse action with respect to such claim.

(c) *Optional notice.* The State agency may, at its option, send the household an adequate notice as provided in paragraph (b)(3) of this section when the household's address is unknown and mail directed to it has been returned by the post office indicating no known forwarding address.

[Amdt. 132, 43 FR 47889, Oct. 17, 1978]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 273.13, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 273.14 Recertification.

(a) *General.* No household may participate beyond the expiration of the certification period assigned in accordance with § 273.10(f) without a determination of eligibility for a new period. The State agency must establish procedures for notifying households of expiration dates, providing application forms, scheduling interviews, and recertifying eligible households prior to the expiration of certification periods. Households must apply for recertification and comply with interview and verification requirements.

(b) *Recertification process.* (1) *Notice of expiration.* (i) The State agency shall provide households certified for one month or certified in the second month of a two-month certification period a notice of expiration (NOE) at the time of certification. The State agency shall provide other households the NOE before the first day of the last month of the certification period, but not before the first day of the next-to-the-last month. Jointly processed PA and GA households need not receive a separate food stamp notice if they are recertified for food stamps at the same time as their PA or GA redetermination.

(ii) Each State agency shall develop a NOE. The NOE must contain the following:

(A) The date the certification period expires;

(B) The date by which a household must submit an application for recertification in order to receive uninterrupted benefits;

(C) The consequences of failure to apply for recertification in a timely manner;

(D) Notice of the right to receive an application form upon request and to have it accepted as long as it contains a signature and a legible name and address;

(E) Information on alternative submission methods available to households which cannot come into the certification office or do not have an authorized representative and how to exercise these options;

(F) The address of the office where the application must be filed;

(G) The household's right to request a fair hearing if the recertification is denied or if the household objects to the benefit issuance;

(H) Notice that any household consisting only of Supplemental Security Income (SSI) applicants or recipients is entitled to apply for food stamp recertification at an office of the Social Security Administration;

(I) Notice that failure to attend an interview may result in delay or denial of benefits; and

(J) Notice that the household is responsible for rescheduling a missed interview and for providing required verification information.

(iii) To expedite the recertification process, State agencies are encouraged to send a recertification form, an interview appointment letter that allows for either in-person or telephone interviews, and a statement of needed verification required by § 273.2(c)(5) with the NOE.

(2) *Application*. The State agency must develop an application to be used by households when applying for recertification. It may be the same as the initial application, a simplified version, a monthly reporting form, or other method such as annotating changes on the initial application form. A new household signature and date is required at the time of application for recertification. The recertification process can only be used for those households which apply for recertification prior to the end of their current certification period, except for delayed applications as specified in paragraph (e)(3) of this section. The process, at a minimum, must elicit from the household sufficient information that, when added to information already contained in the casefile, will ensure an accurate determination of eligibility and benefits. The State agency must notify the applicant of information which is specified in § 273.2(b)(2), and provide the household with a notice of required verification as specified in § 273.2(c)(5).

(3) *Interview*. As part of the recertification process, the State agency must conduct a face-to-face interview with a member of the household or its authorized representative at least once every 12 months for households certified for 12 months or less. The provisions of § 273.2(e) also apply to interviews for recertification. The State agency may choose not to interview the household at interim recertifications within the 12-month period. The requirement for a face-to-face interview once every 12 months may be waived in accordance with § 273.2(e)(2).

(ii) If a household receives PA/GA and will be recertified for food stamps more than once in a 12-month period, the State agency may choose to conduct a face-to-face interview with that household only once during that period. At any other recertification during that year period, the State agency may interview the household by telephone, conduct a home visit, or recertify the household by mail.

(iii) State agencies shall schedule interviews so that the household has at least 10 days after the interview in which to provide verification before the certification period expires. If a household misses its scheduled interview, the State agency shall send the household a Notice of Missed Interview that may be combined with the notice of denial. If a household misses its scheduled interview and requests another interview, the State agency shall schedule a second interview.

(4) *Verification*. Information provided by the household shall be verified in accordance with § 273.2(f)(8)(i). The State agency shall provide the household a notice of required verification as provided in § 273.2(c)(5) and notify the household of the date by which the verification requirements must be satisfied. The household must be allowed a minimum of 10 days to provide required verification information. Any household whose eligibility is not determined by the end of its current certification period due to the time period allowed for submitting any missing verification shall receive an opportunity to participate, if eligible, within 5 working days after the household submits the missing verification and benefits cannot be prorated.

(c) *Timely application for recertification*. (1) Households reporting required changes in circumstances that are certified for one month or certified in the second month of a two-month certification period shall have 15 days from the date the NOE is received to file a timely application for recertification.

(2) Other households reporting required changes in circumstances that submit applications by the 15th day of the last month of the certification period shall be considered to have made a timely application for recertification.

(3) For monthly reporting households, the filing deadline shall be either the 15th of the last month of the certification period or the normal date for filing a monthly report, at the State agency's option. The option chosen must be uniformly applied to the State agency's entire monthly reporting caseload.

(4) For households consisting only of SSI applicants or recipients who apply for food stamp recertification at SSA offices in accordance with § 273.2(k)(1), an application shall be considered filed for normal processing purposes when the signed application is received by the SSA.

(d) *Timely processing.* (1) Households that were certified for one month or certified for two months in the second month of the certification period and have met all required application procedures shall be notified of their eligibility or ineligibility. Eligible households shall be provided an opportunity to receive benefits no later than 30 calendar days after the date the household received its last allotment.

(2) Other households that have met all application requirements shall be notified of their eligibility or ineligibility by the end of their current certification period. In addition, the State agency shall provide households that are determined eligible an opportunity to participate by the household's normal issuance cycle in the month following the end of its current certification period.

(e) *Delayed processing.* (1) If an eligible household files an application before the end of the certification period but the recertification process cannot be completed within 30 days after the date of application because of State agency fault, the State agency must continue to process the case and provide a full month's allotment for the first month of the new certification period. The State agency shall determine cause for any delay in processing a recertification application in accordance with the provisions of § 273.3(h)(1).

(2) If a household files an application before the end of the certification period, but fails to take a required action, the State agency may deny the case at that time, at the end of the certification period, or at the end of 30 days. Notwithstanding the State's right to issue a denial prior to the end of the certification period, the household has 30 days after the end of the certification period to complete the process and have its application be treated as an application for recertification. If the household takes the required action before the end of the certification period, the State agency must reopen the case and provide a full month's benefits for the initial month of the new certification period. If the household takes the required action after the end of the certification period but within 30 days after the end of the certification period, the State agency shall reopen the case and provide benefits retroactive to the date the household takes the required action. The State agency shall determine cause for any delay in processing a recertification application in accordance with the provisions of § 273.3(h)(1).

(3) If a household files an application within 30 days after the end of the certification period, the application shall be considered an application for recertification; however, benefits must be prorated in accordance with § 273.10(a). If a household's application for recertification is delayed beyond the first of the month of what would have been its new certification period through the fault of the State agency, the household's benefits for the new certification period shall be prorated based on the date of the new application, and the State agency shall provide restored benefits to the household back to the date the household's certification period should have begun had the State agency not erred and the household been able to apply timely.

(f) *Expedited service.* A State agency is not required to apply the expedited service provisions of § 273.2(i) at recertification if the household applies for recertification before the end of its current certification period.

[Amdt. 364, 61 FR 54318, Oct. 17, 1996, as amended by Amdt. 388, 65 FR 70210, Nov. 21, 2000]

§ 273.15 Fair hearings.

(a) *Availability of hearings.* Except as provided in § 271.7(f), each State agency shall provide a fair hearing to any household aggrieved by any action of

the State agency which affects the participation of the houshold in the Program.

(b) *Hearing system.* Each State agency shall provide for either a fair hearing at the State level or for a hearing at the local level which permits the household to further appeal a local decision to a State level fair hearing. State agencies may adopt local level hearings in some project areas and maintain only State level hearings in other project areas.

(c) *Timely action on hearings*—(1) *State level hearings.* Within 60 days of receipt of a request for a fair hearing, the State agency shall assure that the hearing is conducted, a decision is reached, and the household and local agency are notified of the decision. Decisions which result in an increase in household benefits shall be reflected in the coupon allotment within 10 days of the receipt of the hearing decision even if the State agency must provide a supplementary ATP or otherwise provide the household with an opportunity to obtain the allotment outside of the normal issuance cycle. However, the State agency may take longer than 10 days if it elects to make the decision effective in the household's normal issuance cycle, provided that the issuance will occur within 60 days from the household's request for the hearing. Decisions which result in a decrease in household benefits shall be reflected in the next scheduled issuance following receipt of the hearing decision.

(2) *Local level hearings.* Within 45 days of receipt of a request for a fair hearing, the State agency shall assure that the hearing is conducted, and that a decision is reached and reflected in the coupon allotment.

(3) *Appeals of local level decisions.* Within 45 days of receipt of any request for a State level review of a decision or for a new State level hearing, the State agency shall assure that the review or the new hearing is conducted, and that a decision is reached and reflected in the coupon allotment.

(4) *Household requests for postponement.* The household may request and is entitled to receive a postponement of the scheduled hearing. The postponement shall not exceed 30 days and the time limit for action on the decision may be extended for as many days as the hearing is postponed. For example, if a State level hearing is postponed by the household for 10 days, notification of the hearing decision will be required within 70 days from the date of the request for a hearing.

(d) *Agency conferences.* (1) The State agency shall offer agency conferences to households which wish to contest a denial of expedited service under the procedures in § 273.2(i). The State agency may also offer agency conferences to households adversely affected by an agency action. The State agency shall advise households that use of an agency conference is optional and that it shall in no way delay or replace the fair hearing process. The agency conferences may be attended by the eligibility worker responsible for the agency action, and shall be attended by an eligibility supervisor and/or the agency director, and by the household and/or its representative. An agency conference may lead to an informal resolution of the dispute. However, a fair hearing must still be held unless the household makes a written withdrawal of its request for a hearing.

(2) An agency conference for households contesting a denial of expedited service shall be scheduled within 2 working days, unless the household requests that it be scheduled later or states that it does not wish to have an agency conference.

(e) *Consolidated hearings.* State agencies may respond to a series of individual requests for hearings by conducting a single group hearing. State agencies may consolidate only cases where individual issues of fact are not disputed and where related issues of State and/or Federal law, regulation or policy are the sole issues being raised. In all group hearings, the regulations governing individual hearings must be followed. Each individual household shall be permitted to present its own case or have its case presented by a representative.

(f) *Notification of right to request hearing.* At the time of application, each household shall be informed in writing of its right to a hearing, of the method by which a hearing may be requested, and that its case may be presented by

a household member or a representative, such as a legal counsel, a relative, a friend or other spokesperson. In addition, at any time the household expresses to the State agency that it disagrees with a State agency action, it shall be reminded of the right to request a fair hearing. If there is an individual or organization available that provides free legal representation, the household shall also be informed of the availability of that service.

(g) *Time period for requesting hearing.* A household shall be allowed to request a hearing on any action by the State agency or loss of benefits which occurred in the prior 90 days. Action by the State agency shall include a denial of a request for restoration of any benefits lost more than 90 days but less than a year prior to the request. In addition, at any time within a certification period a household may request a fair hearing to dispute its current level of benefits.

(h) *Request for hearing.* A request for a hearing is defined as a clear expression, oral or written, by the household or its representative to the effect that it wishes to appeal a decision or that an opportunity to present its case to a higher authority is desired. If it is unclear from the household's request what action it wishes to appeal, the State agency may request the household to clarify its grievance. The freedom to make a request for a hearing shall not be limited or interfered with in any way.

(i) *State agency responsibilities on hearing requests.* (1) Upon request, the State agency shall make available without charge the specific materials necessary for a household or its representative to determine whether a hearing should be requested or to prepare for a hearing. If the individual making the request speaks a language other than English and the State agency is required by § 272.4(c)(3) to provide bilingual staff or interpreters who speak the appropriate language, the State agency shall insure that the hearing procedures are verbally explained in that language. Upon request, the State agency shall also help a household with its hearing request. If a household makes an oral request for a hearing, the State agency shall complete the procedures necessary to start the hearing process. Households shall be advised of any legal services available that can provide representation at the hearing.

(2) The State agency shall expedite hearing requests from households, such as migrant farmworkers, that plan to move from the jurisdiction of the hearing official before the hearing decision would normally be reached. Hearing requests from these households shall be processed faster than others if necessary to enable them to receive a decision and a restoration of benefits if the decision so indicates before they leave the area.

(3) The State agency shall publish clearly written uniform rules of procedure that conform to these regulations and shall make the rules available to any interested party. At a minimum, the uniform rules of procedure shall include the time limits for hearing requests as specified in paragraph (g) of this section, advance notification requirements as specified in paragraph (i)(1) of this section, hearing timeliness standards as specified in paragraph (c) of this section, and the rights and responsibilities of persons requesting a hearing as specified in paragraph (p) of this section.

(j) *Denial or dismissal of request for hearing.* (1) The State agency must not deny or dismiss a request for a hearing unless:

(i) The State agency does not receive the request within the appropriate time frame specified in paragraph (g) of this section, provided that the State agency considers untimely requests for hearings as requests for restoration of lost benefits in accordance with § 273.17;

(ii) The household or its representative fails, without good cause, to appear at the scheduled hearing;

(iii) The household or its representative withdraws the request in writing; or

(iv) The household or its representative orally withdraws the request and the State agency has elected to allow such oral requests.

(2) The State agency electing to accept an oral expression from the household or its representative to withdraw a fair hearing may discuss the option with the household when it appears that the State agency and household

have resolved issues related to the fair hearing. However, the State agency is prohibited from coercion or actions which would influence the household or its representative to withdraw the household's fair hearing request. The State agency must provide a written notice to the household within 10 days of the household's request confirming the withdrawal request and providing the household with an opportunity to request a hearing. The written notice must advise the household it has 10 days from the date it receives the notice to advise the State agency of its desire to request, or reinstate, the hearing. If the household timely advises the State agency that it wishes to reinstate the fair hearing, the State agency must provide the household with a fair hearing, within the time frames specified in paragraph (c) of this section and beginning the date the household advises the State agency that it wishes to reinstate its request. The State agency must reinstate a fair hearing as requested from a household at least once. The State agency must not deny a household's request for a fair hearing if the household is aggrieved by a State agency action that differs from the reinstated action.

(k) *Continuation of benefits.* (1) If a household requests a fair hearing within the period provided by the notice of adverse action, as set forth in § 273.13, and its certification period has not expired, the household's participation in the program shall be continued on the basis authorized immediately prior to the notice of adverse action, unless the household specifically waives continuation of benefits. The form for requesting a fair hearing shall contain space for the household to indicate whether or not continued benefits are requested. If the form does not positively indicate that the household has waived continuation of benefits, the State agency shall assume that continuation of benefits is desired and the benefits shall be issued accordingly. If the State agency action is upheld by the hearing decision, a claim against the household shall be established for all overissuances, with one exception. In the case of an EBT adjustment, as defined in § 274.12(f)(4)(ii) of this chapter, once an adverse action is upheld, the State agency shall immediately debit the household's account for the total amount stated in its original notice. If there are no benefits or insufficient benefits remaining in the household's account at the time the State agency action is upheld, the State agency may only make the adjustment from the next month's benefits, regardless of whether this satisfies the full adjustment amount. If a hearing request is not made within the period provided by the notice of adverse action, benefits shall be reduced or terminated as provided in the notice. However, if the household establishes that its failure to make the request within the advance notice period was for good cause, the State agency shall reinstate the benefits to the prior basis. When benefits are reduced or terminated due to a mass change, participation on the prior basis shall be reinstated only if the issue being contested is that food stamp eligibility or benefits were improperly computed or that Federal law or regulation is being misapplied or misinterpreted by the State agency.

(2) Once continued or reinstated, the State agency must not reduce or terminate benefits prior to the receipt of the official hearing decision unless:

(i) The certification period expires. The household may reapply and may be determined eligible for a new certification period with a benefit amount as determined by the State agency;

(ii) The hearing official makes a preliminary determination, in writing and at the hearing, that the sole issue is one of Federal law or regulation and that the household's claim that the State agency improperly computed the benefits or misinterpreted or misapplied such law or regulation is invalid;

(iii) A change affecting the household's eligibility or basis of issuance occurs while the hearing decision is pending and the household fails to request a hearing after the subsequent notice of adverse action;

(iv) A mass change affecting the household's eligibility or basis of issuance occurs while the hearing decision is pending; or

(v) The household, or its representative, orally withdrew its request for a fair hearing and did not advise the

State agency of its desire to reinstate the fair hearing within the time frame specified in paragraph (j)(2) of this section.

(3) The State agency shall promptly inform the household in writing if benefits are reduced or terminated pending the hearing decision.

(l) *Notification of time and place of hearing*. The time, date, and place of the hearing shall be arranged so that the hearing is accessible to the household. At least 10 days prior to the hearing, advance written notice shall be provided to all parties involved to permit adequate preparation of the case. However, the household may request less advance notice to expedite the scheduling of the hearing. The notice shall:

(1) Advise the household or its representative of the name, address, and phone number of the person to notify in the event it is not possible for the household to attend the scheduled hearing.

(2) Specify that the State agency will dismiss the hearing request if the household or its representative fails to appear for the hearing without good cause.

(3) Include the State agency hearing procedures and any other information that would provide the household with an understanding of the proceedings and that would contribute to the effective presentation of the household's case.

(4) Explain that the household or representative may examine the case file prior to the hearing.

(m) *Hearing official*. Hearings shall be conducted by an impartial official(s) who: Does not have any personal stake or involvement in the case; was not directly involved in the initial determination of the action which is being contested; and was not the immediate supervisor of the eligibility worker who took the action. State level hearings shall be conducted by State level personnel and shall not be conducted by local level personnel.

(1) *Designation of hearing official*. The hearing official shall be:

(i) An employee of the State agency;

(ii) An individual under contract with the State agency;

(iii) An employee of another public agency designated by the State agency to conduct hearings;

(iv) A member or official of a statutory board or other legal entity designated by the State agency to conduct hearings; or

(v) An executive officer of the State agency, a panel of officials of the State agency or a person or persons expressly appointed to conduct State level hearings or to review State and/or local level hearing decisions.

(2) *Power and duties*. The hearing official shall:

(i) Administer oaths or affirmations if required by the State;

(ii) Insure that all relevant issues are considered;

(iii) Request, receive and make part of the record all evidence determined necessary to decide the issues being raised;

(iv) Regulate the conduct and course of the hearing consistent with due process to insure an orderly hearing;

(v) Order, where relevant and useful, an independent medical assessment or professional evaluation from a source mutually satisfactory to the household and the State agency;

(vi) Provide a hearing record and recommendation for final decision by the hearing authority; or, if the hearing official is the hearing authority, render a hearing decision in the name of the State agency, in accordance with paragraph (q) of this section, which will resolve the dispute.

(n) *Hearing authority*. The hearing authority shall be the person designated to render the final administrative decision in a hearing. The same person may act as both the hearing official and the hearing authority. The hearing authority shall be subject to the requirements specified in paragraph (m) of this section.

(o) *Attendance at hearing*. The hearing shall be attended by a representative of the State agency and by the household and/or its representative. The hearing may also be attended by friends or relatives of the household if the household so chooses. The hearing official shall have the authority to limit the number of persons in attendance at the hearing if space limitations exist.

(p) *Household rights during hearing.* The household may not be familiar with the rules of order and it may be necessary to make particular efforts to arrive at the facts of the case in a way that makes the household feel most at ease. The household or its representative must be given adequate opportunity to:

(1) Examine all documents and records to be used at the hearing at a reasonable time before the date of the hearing as well as during the hearing. The contents of the case file including the application form and documents of verification used by the State agency to establish the household's ineligibility or eligibility and allotment shall be made available, provided that confidential information, such as the names of individuals who have disclosed information about the household without its knowledge or the nature or status of pending criminal prosecutions, is protected from release. If requested by the household or its representative, the State agency shall provide a free copy of the portions of the case file that are relevant to the hearing. Confidential information that is protected from release and other documents or records which the household will not otherwise have an opportunity to contest or challenge shall not be introduced at the hearing or affect the hearing official's decision.

(2) Present the case or have it presented by a legal counsel or other person.

(3) Bring witnesses.

(4) Advance arguments without undue interference.

(5) Question or refute any testimony or evidence, including an opportunity to confront and cross-examine adverse witnesses.

(6) Submit evidence to establish all pertinent facts and circumstances in the case.

(q) *Hearing decisions.* (1) Decisions of the hearing authority shall comply with Federal law and regulations and shall be based on the hearing record. The verbatim transcript or recording of testimony and exhibits, or an official report containing the substance of what transpired at the hearing, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for a final decision by the hearing authority. This record shall be retained in accordance with § 272.1(f). This record shall also be available to the household or its representative at any reasonable time for copying and inspection.

(2) A decision by the hearing authority shall be binding on the State agency and shall summarize the facts of the case, specify the reasons for the decision, and identify the supporting evidence and the pertinent Federal regulations. The decision shall become a part of the record.

(3) The household and the local agency shall each be notified in writing of: The decision; the reasons for the decision in accordance with paragraph (q)(2) of this section; the available appeal rights; and that the household's benefits will be issued or terminated as decided by the hearing authority. The notice shall also state that an appeal may result in a reversal of the decision. The following are additional notice requirements and the available appeal rights:

(i) After a State level hearing decision which upholds the State agency action, the household shall be notified of the right to pursue judicial review of the decision. In addition, in States which provide for rehearings of State level decisions, the household shall be notified of the right to pursue a rehearing.

(ii) After a local level hearing decision which upholds the State agency action, the household shall be notified of the right to request a completely new State agency level hearing, and that a reversal of the decision may result in the restoration of lost benefits to the household. In addition, the household shall be advised that if a new hearing would pose an inconvenience to the household, a State level review of the decision based on the hearing record may be requested instead of a new hearing. A clear description of the two appeal procedures must be included to enable the household to make an informed choice, if it wishes to appeal. If the household indicates that it wishes to appeal, but does not select the method, the State agency shall proceed with a new State level hearing.

(4) If the household wishes to appeal a local level hearing decision, the appeal request must be filed within 15 days of the mailing date of the hearing decision notice. Within 45 days of receipt of any request for a State level review of the decision or for a new State level hearing, the State agency shall assure that the review or the hearing is conducted, and that a decision is reached and reflected in the coupon allotment. If a new hearing will not be held, the State level hearing official will review the local level hearing record to determine if the local decision was supported by substantial evidence. State level review procedures shall provide for notifying the local agency and the household that each may file a summary of arguments which shall become a part of the record if timely received. Both parties shall be advised that failure to file a summary will not be considered in deciding the case and that the summary must be postmarked within 10 days of receipt of the notice.

(5) All State agency hearing records and decisions shall be available for public inspection and copying, subject to the disclosure safeguards provided in § 272.1(c), and provided identifying names and addresses of household members and other members of the public are kept confidential.

(r) *Implementation of local level hearing decision*. (1) In the event the local hearing decision upholds the State agency action, any benefits to the household which were continued pending the hearing shall be discontinued beginning with the next scheduled issuance, regardless of whether or not an appeal is filed. Collection action for any claims against the household for overissuances shall be postponed until the 15-day appeal request period has elapsed, or if an appeal is requested, until the State agency upholds the decision of the local hearing authority.

(2) In the event the local hearing authority decides in favor of the household, benefits to the household shall begin or be reinstated, as required by the decision, within the 45-day time limit allowed for local hearing procedures. Any lost benefits due to the household shall be issued as soon as administratively feasible. The State agency shall restore benefits to households which are leaving the project area before the departure whenever possible. If benefits are not restored prior to the household's departure, the State agency shall forward an authorization to the benefits to the household or to the new project area if this information is known. The new project area shall accept an authorization and issue the appropriate benefits whether the notice is presented by the household or received directly from another project area.

(s) *Implementation of final State agency decisions*. The State agency is responsible for insuring that all final hearing decisions are reflected in the household's coupon allotment within the time limits specified in paragraph (c) of this section.

(1) When the hearing authority determines that a household has been improperly denied program benefits or has been issued a lesser allotment than was due, lost benefits shall be provided to the household in accordance with § 273.17. The State agency shall restore benefits to households which are leaving the project area before the departure whenever possible. If benefits are not restored prior to the household's departure, the State agency shall forward an authorization to the benefits to the household or to the new project area if this information is known. The new project area shall accept an authorization and issue the appropriate benefits whether the notice is presented by the household or received directly from another project area.

(2) When the hearing authority upholds the State agency's action, a claim against the household for any overissuances shall be prepared in accordance with § 273.18.

(t) *Review of appeals of local level decisions*. State agencies which adopt a local level hearing system shall establish a procedure for monitoring local level hearing decisions. The number of local level decisions overturned upon appeal to a State level hearing shall be examined. If the number of reversed decisions is excessive, the State agency shall take corrective action.

(u) *Departmental review of decisions contrary to Federal law and regulations.* [Reserved]

[Amdt. 132, 43 FR 47889, Oct. 17, 1978, as amended by Amdt. 132, 44 FR 33385, June 8, 1979; Amdt. 146, 46 FR 1427, Jan. 6, 1981; Amdt. 269, 51 FR 10793, Mar. 28, 1986; Amdt. 356, 59 FR 29713, June 9, 1994; 64 FR 48938, Sept. 9, 1999; Amdt. 378, 65 FR 41325, July 5, 2000; Amdt. 388, 65 FR 70211, Nov. 21, 2000]

§ 273.16 Disqualification for intentional Program violation.

(a) *Administrative responsibility.* (1) The State agency shall be responsible for investigating any case of alleged intentional Program violation, and ensuring that appropriate cases are acted upon either through administrative disqualification hearings or referral to a court of appropriate jurisdiction in accordance with the procedures outlined in this section. Administrative disqualification procedures or referral for prosecution action should be initiated by the State agency in cases in which the State agency has sufficient documentary evidence to substantiate that an individual has intentionally made one or more acts of intentional Program violation as defined in paragraph (c) of this section. If the State agency does not initiate administrative disqualification procedures or refer for prosecution a case involving an overissuance caused by a suspected act of intentional Program violation, the State agency shall take action to collect the overissuance by establishing an inadvertent household error claim against the household in accordance with the procedures in § 273.18. The State agency should conduct administrative disqualification hearings in cases in which the State agency believes the facts of the individual case do not warrant civil or criminal prosecution through the appropriate court system, in cases previously referred for prosecution that were declined by the appropriate legal authority, and in previously referred cases where no action was taken within a reasonable period of time and the referral was formally withdrawn by the State agency. The State agency shall not initiate an administrative disqualification hearing against an accused individual whose case is currently being referred for prosecution or subsequent to any action taken against the accused individual by the prosecutor or court of appropriate jurisdiction, if the factual issues of the case arise out of the same, or related, circumstances. The State agency may initiate administrative disqualification procedures or refer a case for prosecution regardless of the current eligibility of the individual.

(2) Each State agency shall establish a system for conducting administrative disqualifications for intentional Program violation which conforms with the procedures outlined in paragraph (e) of this section. FNS shall exempt any State agency from the requirement to establish an administrative disqualification system if the State agency has already entered into an agreement, pursuant to paragraph (g)(1) of this section, with the State's Attorney General's Office or, where necessary, with county prosecutors. FNS shall also exempt any State agency from the requirement to establish an administrative disqualification system if there is a State law that requires the referral of such cases for prosecution and if the State agency demonstrates to FNS that it is actually referring cases for prosecution and that prosecutors are following up on the State agency's referrals. FNS may require a State agency to establish an administrative disqualification system if it determines that the State agency is not promptly or actively pursuing suspected intentional Program violation claims through the courts.

(3) The State agency shall base administrative disqualifications for intentional Program violations on the determinations of hearing authorities arrived at through administrative disqualification hearings in accordance with paragraph (e) of this section or on determinations reached by courts of appropriate jurisdiction in accordance with paragraph (g) of this section. However, any State agency has the option of allowing accused individuals either to waive their rights to administrative disqualification hearings in accordance with paragraph (f) of this section or to sign disqualification consent agreements for cases of deferred adjudication in accordance with paragraph (h) of this section. Any State agency

which chooses either of these options may base administrative disqualifications for intentional Program violation on the waived right to an administrative disqualification hearing or on the signed disqualification consent agreement in cases of deferred adjudication.

(b) *Disqualification penalties.* (1) Individuals found to have committed an intentional Program violation either through an administrative disqualification hearing or by a Federal, State or local court, or who have signed either a waiver of right to an administrative disqualification hearing or a disqualification consent agreement in cases referred for prosecution, shall be ineligible to participate in the Program:

(i) For a period of twelve months for the first intentional Program violation, except as provided under paragraphs (b)(2), (b)(3), (b)(4), and (b)(5) of this section;

(ii) For a period of twenty-four months upon the second occasion of any intentional Program violation, except as provided in paragraphs (b)(2), (b)(3), (b)(4), and (b)(5) of this section; and

(iii) Permanently for the third occasion of any intentional Program violation.

(2) Individuals found by a Federal, State or local court to have used or received benefits in a transaction involving the sale of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) shall be ineligible to participate in the Program:

(i) For a period of twenty four months upon the first occasion of such violation; and

(ii) Permanently upon the second occasion of such violation.

(3) Individuals found by a Federal, State or local court to have used or received benefits in a transaction involving the sale of firearms, ammunition or explosives shall be permanently ineligible to participate in the Program upon the first occasion of such violation.

(4) An individual convicted by a Federal, State or local court of having trafficked benefits for an aggregate amount of $500 or more shall be permanently ineligible to participate in the Program upon the first occasion of such violation.

(5) Except as provided under paragraph (b)(1)(iii) of this section, an individual found to have made a fraudulent statement or representation with respect to the identity or place of residence of the individual in order to receive multiple food stamp benefits simultaneously shall be ineligible to participate in the Program for a period of 10 years.

(6) The penalties in paragraphs (b)(2) and (b)(3) of this section shall also apply in cases of deferred adjudication as described in paragraph (h) of this section, where the court makes a finding that the individual engaged in the conduct described in paragraph (b)(2) and (b)(3) of this section.

(7) If a court fails to impose a disqualification or a disqualification period for any intentional Program violation, the State agency shall impose the appropriate disqualification penalty specified in paragraphs (b)(1), (b)(2), (b)(3), (b)(4), and (b)(5) of this section unless it is contrary to the court order.

(8) One or more intentional Program violations which occurred prior to April 1, 1983 shall be considered as only one previous disqualification when determining the appropriate penalty to impose in a case under consideration.

(9) Regardless of when an action taken by an individual which caused an intentional Program violation occurred, the disqualification periods specified in paragraphs (b)(2) and (b)(3) of this section shall apply to any case in which the court makes the requisite finding on or after September 1, 1994.

(10) For the disqualification periods in paragraphs (b)(1), (b)(5) or (b)(6) of this section, if the offense occurred prior to the implementation of these penalties, the State agency may establish a policy of disqualifying these individuals in accordance with the disqualification periods in effect at the time of the offense. This policy must be consistently applied for all affected individuals.

(11) State agencies shall disqualify only the individual found to have committed the intentional Program violation, or who signed the waiver of the

right to an administrative disqualification hearing or disqualification consent agreement in cases referred for prosecution, and not the entire household.

(12) Even though only the individual is disqualified, the household, as defined in § 273.1, is responsible for making restitution for the amount of any overpayment. All intentional Program violation claims must be established and collected in accordance with the procedures set forth in § 273.18.

(13) The individual must be notified in writing once it is determined that he/she is to be disqualified. The disqualification period shall begin no later than the second month which follows the date the individual receives written notice of the disqualification. The disqualification period must continue uninterrupted until completed regardless of the eligibility of the disqualified individual's household.

(c) *Definition of intentional Program violation*. Intentional Program violations shall consist of having intentionally:

(1) made a false or misleading statement, or misrepresented, concealed or withheld facts; or

(2) committed any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any State statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of coupons, authorization cards or reusable documents used as part of an automated benefit delivery system (access device).

(d) *Notification to applicant households*. The State agency shall inform the household in writing of the disqualification penalties for intentional Program violation each time it applies for Program benefits. The penalties shall be in clear, prominent, and boldface lettering on the application form.

(e) *Disqualification hearings*. The State agency shall conduct administrative disqualification hearings for individuals accused of intentional Program violation in accordance with the requirements outlined in this section.

(1) *Consolidation of administrative disqualification hearing with fair hearing*. The State agency may combine a fair hearing and an administrative disqualification hearing into a single hearing if the factual issues arise out of the same, or related, circumstances and the household receives prior notice that hearings will be combined. If the disqualification hearing and fair hearing are combined, the State agency shall follow the timeframes for conducting disqualification hearings. If the hearings are combined for the purpose of settling the amount of the claim at the same time as determining whether or not intentional Program violation has occurred, the household shall lose its right to a subsequent fair hearing on the amount of the claim. However, the State agency shall, upon household request, allow the household to waive the 30-day advance notice period required by paragraph (e)(3)(i) of this section when the disqualification hearing and fair hearing are combined.

(2) *Disqualification hearing procedures*. (i) State agencies have the option of using the same hearing officials for disqualification hearings and fair hearings or designating hearing officials to conduct only disqualification hearings.

(ii) The provisions of § 273.15 (m), (n), (o), (p), and (q)(1) are also applicable for disqualification hearings.

(iii) At the disqualification hearing, the hearing official shall advise the household member or representative that they may refuse to answer questions during the hearing.

(iv) Within 90 days of the date the household member is notified in writing that a State or local hearing initiated by the State agency has been scheduled, the State agency shall conduct the hearing, arrive at a decision and notify the household member and local agency of the decision. The household member or representative is entitled to a postponement of the scheduled hearing, provided that the request for postponement is made at least 10 days in advance of the date of the scheduled hearing. However, the hearing shall not be postponed for more than a total of 30 days and the State agency may limit the number of postponements to one. If the hearing is postponed, the above time limits shall be extended for as many days as the hearing is postponed.

(v) The State agency shall publish clearly written rules of procedure for

disqualification hearings, and shall make these procedures available to any interested party.

(3) *Advance notice of hearing.* (i) The State agency shall provide written notice to the individual suspected of committing an intentional Program violation at least 30 days in advance of the date a disqualification hearing initiated by the State agency has been scheduled. If mailed, the notice shall be sent either first class mail or certified mail-return receipt requested. The notice may also be provided by any other reliable method. If the notice is sent using first class mail and is returned as undeliverable, the hearing may still be held.

(ii) If no proof of receipt is obtained, a timely (as defined in paragraph (e)(4) of this section) showing of nonreceipt by the individual due to circumstances specified by the State agency shall be considered good cause for not appearing at the hearing. Each State agency shall establish the circumstances in which non-receipt constitutes good cause for failure to appear. Such circumstances shall be consistent throughout the State agency.

(iii) The notice shall contain at a minimum:

(A) The date, time, and place of the hearing;

(B) The charge(s) against the individual;

(C) A summary of the evidence, and how and where the evidence can be examined;

(D) A warning that the decision will be based solely on information provided by the State agency if the individual fails to appear at the hearing;

(E) A statement that the individual or representative will, upon receipt of the notice, have 10 days from the date of the scheduled hearing to present good cause for failure to appear in order to receive a new hearing;

(F) A warning that a determination of intentional Program violation will result in disqualification periods as determined by paragraph (b) of this section, and a statement of which penalty the State agency believes is applicable to the case scheduled for a hearing;

(G) A listing of the individual's rights as contained in § 273.15(p);

(H) A statement that the hearing does not preclude the State or Federal Government from prosecuting the individual for the intentional Program violation in a civil or criminal court action, or from collecting any overissuance(s); and

(I) If there is an individual or organization available that provides free legal representation, the notice shall advise the affected individual of the availability of the service.

(iv) A copy of the State agency's published hearing procedures shall be attached to the 30-day advance notice or the advance notice shall inform the individual of his/her right to obtain a copy of the State agency's published hearing procedures upon request.

(v) Each State agency shall develop an advance notice form which contains the information required by this section.

(4) *Scheduling of hearing.* The time and place of the hearing shall be arranged so that the hearing is accessible to the household member suspected of intentional Program violation. If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. Even though the household member is not represented, the hearing official is required to carefully consider the evidence and determine if intentional Program violation was committed based on clear and convincing evidence. If the household member is found to have committed an intentional Program violation but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct the new hearing. In instances where good cause for failure to appear is based upon a showing of nonreceipt of the hearing notice as specified in paragraph (e)(3)(ii) of this section, the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, the

household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record.

(5) *Participation while awaiting a hearing.* A pending disqualification hearing shall not affect the individual's or the household's right to be certified and participate in the Program. Since the State agency cannot disqualify a household member for intentional Program violation until the hearing official finds that the individual has committed intentional Program violation, the State agency shall determine the eligibility and benefit level of the household in the same manner it would be determined for any other household. For example, if the misstatement or action for which the household member is suspected of intentional Program violation does not affect the household's current circumstances, the household would continue to receive its allotment based on the latest certification action or be recertified based on a new application and its current circumstances. However, the household's benefits shall be terminated if the certification period has expired and the household, after receiving its notice of expiration, fails to reapply. The State agency shall also reduce or terminate the household's benefits if the State agency has documentation which substantiates that the household is ineligible or eligible for fewer benefits (even if these facts led to the suspicion of intentional Program violation and the resulting disqualification hearing) and the household fails to request a fair hearing and continuation of benefits pending the hearing. For example, the State agency may have facts which substantiate that a household failed to report a change in its circumstances even though the State agency has not yet demonstrated that the failure to report involved an intentional act of Program violation.

(6) *Criteria for determining intentional Program violation.* The hearing authority shall base the determination of intentional Program violation on clear and convincing evidence which demonstrates that the household member(s) committed, and intended to commit, intentional Program violation as defined in paragraph (c) of this section.

(7) *Decision format.* The hearing authority's decision shall specify the reasons for the decision, identify the supporting evidence, identify the pertinent FNS regulation, and respond to reasoned arguments made by the household member or representative.

(8) *Imposition of disqualification penalties.* (i) If the hearing authority rules that the individual has committed an intentional Program violation, the household member must be disqualified in accordance with the disqualification periods and procedures in paragraph (b) of this section. The same act of intentional Program violation repeated over a period of time must not be separated so that separate penalties can be imposed.

(ii) No further administrative appeal procedure exists after an adverse State level hearing. The determinaton of intentional Program violation made by a disqualification hearing official cannot be reversed by a subsequent fair hearing decision. The household member, however, is entitled to seek relief in a court having appropriate jurisdiction. The period of disqualification may be subject to stay by a court of appropriate jurisdiction or other injunctive remedy.

(iii) Once a disqualification penalty has been imposed against a currently participating household member, the period of disqualification shall continue uninterrupted until completed regardless of the eligibility of the disqualifed member's household. However, the disqualified member's household shall continue to be responsible for repayment of the overissuance which resulted from the disqualified member's intentional Program violation regardless of its eligibility for Program benefits.

(9) *Notification of hearing decision.* (i) If the hearing official finds that the household member did not commit intentional Program violation, the State agency shall provide a written notice which informs the household member of the decision.

(ii) If the hearing official finds that the household member committed intentional Program violation, the State agency shall provide written notice to

the household member prior to disqualification. The notice shall inform the household member of the decision and the reason for the decision. In addition, the notice shall inform the household member of the date the disqualification will take effect. If the individual is no longer participating, the notice shall inform the individual that the period of disqualification will be deferred until such time as the individual again applies for and is determined eligible for Program benefits. The State agency shall also provide written notice to the remaining household members, if any, of either the allotment they will receive during the period of disqualification or that they must reapply because the certification period has expired. The procedures for handling the income and resources of the disqualified member are described in § 273.11(c). A written demand letter for restitution, as described in § 273.18(d)(3), shall also be provided.

(iii) Each State agency shall develop a form for notifying individuals that they have been found by an administrative disqualification hearing to have committed intentional Program violation. The form shall contain the information required by this section.

(10) *Local level hearings.* (i) The State agency may choose to provide administrative disqualification hearings at the local level in some or all of its project areas with a right to appeal to a State level hearing. If a local level disqualification hearing determines that a household member committed intentional Program violation, the notification of hearing decision described in paragraph (e)(9) of this section shall also inform the household member of the right to appeal the decision within 15 days after the receipt of the notice, the date the disqualification will take effect unless a State level hearing is requested, and that benefits will be continued pending a State level hearing if the household is otherwise eligible. If the household member appeals the local level decision, the advance notice of hearing, as described in paragraph (e)(3) of this section, shall be provided at least 10 days in advance of the scheduled State level hearing and shall also inform the household member that the local hearing decision will be upheld if the household or its representative fails to appear for the hearing without good cause. When a local level decision is appealed, the State agency shall conduct the State level hearing, arrive at a decision, and notify the household member and local agency of the decision within 60 days of the date the household member appealed its case. The prior decision shall not be taken into consideration by the State hearing officer in making the final determination. In all other respects, local level disqualification hearings shall be handled in accordance with the procedures specified in this section for State level hearings.

(ii) The State agency shall develop appropriate forms which contain the information required by this section for notification of a local level hearing decision and advance notice of a scheduled State level hearing for appeal of a local level decision.

(f) *Waived hearings.* Each State agency shall have the option of establishing procedures to allow accused individuals to waive their rights to an administrative disqualification hearing. For State agencies which choose the option of allowing individuals to waive their rights to an administrative disqualification hearing, the procedures shall conform with the requirements outlined in this section.

(1) *Advance notification.* (i) The State agency shall provide written notification to the household member suspected of intentional Program violation that the member can waive his/her right to an administrative disqualification hearing. Prior to providing this written notification to the household member, the State agency shall ensure that the evidence against the household member is reviewed by someone other than the eligibility worker assigned to the accused individual's household and a decision is obtained that such evidence warrants scheduling a disqualification hearing.

(ii) The written notification provided to the household member which informs him/her of the possibility of waiving the administrative disqualification hearing shall include, at a minimum:

(A) The date that the signed waiver must be received by the State agency

to avoid the holding of a hearing and a signature block for the accused individual, along with a statement that the head of household must also sign the waiver if the accused individual is not the head of household, with an appropriately designated signature block;

(B) A statement of the accused individual's right to remain silent concerning the charge(s), and that anything said or signed by the individual concerning the charge(s) can be used against him/her in a court of law;

(C) The fact that a waiver of the disqualification hearing will result in disqualification and a reduction in benefits for the period of disqualification, even if the accused individual does not admit to the facts as presented by the State agency;

(D) An opportunity for the accused individual to specify whether or not he/she admits to the facts as presented by the State agency. This opportunity shall consist of the following statements, or statements developed by the State agency which have the same effect, and a method for the individual to designate his/her choice:

(*1*) I admit to the facts as presented, and understand that a disqualification penalty will be imposed if I sign this waiver; and

(*2*) I do not admit that the facts as presented are correct. However, I have chosen to sign this waiver and understand that a disqualification penalty will result;

(E) The telephone number and, if possible, the name of the person to contact for additional information; and

(F) The fact that the remaining household members, if any, will be held responsible for repayment of the resulting claim.

(iii) The State agency shall develop a waiver of right to an administrative disqualification hearing form which contains the information required by this section as well as the information described in paragraph (e)(3) of this section for advance notice of a hearing. However, if the household member is notified of the possibility of waiving his/her right to an administrative disqualification hearing before the State agency has scheduled a hearing, the State agency is not required to notify the household member of the date, time and place of the hearing at that point as required by paragraph (e)(3)(i)(A) of this section.

(2) *Imposition of disqualification penalties.* (i) If the household member suspected of intentional Program violation signs the waiver of right to an administrative disqualification hearing and the signed waiver is received within the timeframes specified by the State agency, the household member shall be disqualified in accordance with the disqualification periods specified in paragraph (b) of this section. The period of disqualification shall begin with the first month which follows the date the household member receives written notification of the disqualification. However, if the act of intentional Program violation which led to the disqualification occurred prior to the written notification of the disqualification periods specified in paragraph (b) of this section, the household member shall be disqualified in accordance with the disqualification periods in effect at the time of the offense. The same act of intentional Program violation repeated over a period of time shall not be separated so that separate penalties can be imposed.

(ii) No further administrative appeal procedure exists after an individual waives his/her right to an administrative disqualification hearing and a disqualification penalty has been imposed. The disqualification penalty cannot be changed by a subsequent fair hearing decision. The household member, however is entitled to seek relief in a court having appropriate jurisdiction. The period of disqualification may be subject to stay by a court of appropriate jurisdiction or other injunctive remedy.

(iii) Once a disqualification penalty has been imposed against a currently participating household member, the period of disqualification shall continue uninterrupted until completed regardless of the eligibility of the disqualified member's household. However, the disqualified member's household shall continue to be responsible for repayment of the overissuance which resulted from the disqualified member's intentional Program violation regardless of its eligibility for Program benefits.

(3) *Notification of disqualification*. The State agency shall provide written notice to the household member prior to disqualification. The State agency shall also provide written notice to any remaining household members of the allotment they will receive during the period of disqualification or that they must reapply because the certification period has expired. The notice(s) shall conform to the requirements for notification of a hearing decision specified in paragraph (e)(9) of this section. A written demand letter for restitution, as described in § 273.18(d)(3), shall also be provided.

(4) *Waiver of hearing at local level*. Any State agency which has adopted the two-tiered approach for administrative disqualification hearings may also provide for waiver of the right to disqualification hearing procedures outlined in this section.

(g) *Court referrals*. Any State agency exempted from the requirement to establish an administrative disqualification system in accordance with paragraph (a) of this section shall refer appropriate cases for prosecution by a court of appropriate jurisdiction in accordance with the requirements outlined in this section.

(1) *Appropriate cases*. (i) The State agency shall refer cases of alleged intentional Program violation for prosecution in accordance with an agreement with prosecutors or State law. The agreement shall provide for prosecution of intentional Program violation cases and include the understanding that prosection will be pursued in cases where appropriate. This agreement shall also include information on how, and under what circumstances, cases will be accepted for possible prosecution and any other criteria set by the prosecutor for accepting cases for prosecution, such as a minimum amount of overissuance which resulted from intentional Program violation.

(ii) State agencies are encouraged to refer for prosecution under State or local statutes those individuals suspected of committing intentional Program violation, particularly if large amounts of food stamps are suspected of having been obtained by intentional Program violation, or the individual is suspected of committing more than one act of intentional Program violation. The State agency shall confer with its legal representative to determine the types of cases which will be accepted for possible prosecution. State agencies shall also encourage State and local prosecutors to recommend to the courts that a disqualification penalty as provided in section 6(b) of the Food Stamp Act be imposed in addition to any other civil or criminal penalties for such violations.

(2) *Imposition of disqualification penalties*. (i) State agencies shall disqualify an individual found guilty of intentional Program violation for the length of time specified by the court. If the court fails to impose a disqualification period, the State agency shall impose a disqualification period in accordance with the provisions in paragraph (b) of this section, unless contrary to the court order. If disqualification is ordered but a date for initiating the disqualification period is not specified, the State agency shall initiate the disqualification period for currently eligible individuals within 45 days of the date the disqualification was ordered. Any other court-imposed disqualification shall begin within 45 days of the date the court found a currently eligible individual guilty of civil or criminal misrepresentation or fraud.

(ii) Once a disqualification penalty has been imposed against a currently participating household member, the period of disqualification shall continue uninterrupted until completed regardless of the eligibility of the disqualified member's household. However, the disqualified member's household shall continue to be responsible for repayment of the overissuance which resulted from the disqualified member's intentional Program violation regardless of its eligibility for Program benefits.

(3) *Notification of disqualification*. If the court finds that the household member committed intentional Program violation, the State agency shall provide written notice to the household member. The notice shall be provided prior to disqualification, whenever possible. The notice shall inform the household member of the disqualification and the date the disqualification

will take effect. The State agency shall also provide written notice to the remaining household members, if any, of the allotment they will receive during the period of disqualification or that they must reapply because the certification period has expired. The procedures for handling the income and resources of the disqualified member are described in § 273.11(c). In addition, the State agency shall provide the written demand letter for restitution described in § 273.18(d)(3).

(h) *Deferred adjudication*. Each State agency shall have the option of establishing procedures to allow accused individuals to sign disqualification consent agreements for cases of deferred adjudication. State agencies are encouraged to use this option for those cases in which a determination of guilt is not obtained from a court due to the accused individual having met the terms of a court order or which are not prosecuted due to the accused individual having met the terms of an agreement with the prosecutor. For State agencies which choose the option of allowing individuals to sign disqualification consent agreements in cases referred for prosecution, the procedures shall conform with the requirements outlined in this section.

(1) *Advance notification*. (i) The State agency shall enter into an agreement with the State's Attorney General's Office or, where necessary, with county prosecutors which provides for advance written notification to the household member of the consequences of consenting to disqualification in cases of deferred adjudication.

(ii) The written notification provided to the household member which informs him/her of the consequences of consenting to disqualification as a part of deferred adjudication shall include, at a minimum:

(A) A statement for the accused individual to sign that the accused individual understands the consequences of consenting to disqualification, along with a statement that the head of household must also sign the consent agreement if the accused individual is not the head of household, with an appropriately designated signature block.

(B) A statement that consenting to disqualification will result in disqualification and a reduction in benefits for the period of disqualification, even though the accused individual was not found guilty of civil of criminal misrepresentation or fraud.

(C) A warning that the disqualification periods for intentional Program violations under the Food Stamp Program are as specified in paragraph (b) of this section, and a statement of which penalty will be imposed as a result of the accused individual having consented to disqualification.

(D) A statement of the fact that the remaining household members, if any, will be held responsible for repayment of the resulting claim, unless the accused individual has already repaid the claim as a result of meeting the terms of the agreement with the prosecutor or the court order.

(iii) The State agency shall develop a disqualification consent agreement, or language to be included in the agreements reached between the prosecutors and accused individuals or in the court orders, which contains the information required by this section for notifying a household member suspected of intentional Program violation of the consequences of signing a disqualification consent agreement.

(2) *Imposition of disqualification penalties*. (i) If the household member suspected of intentional Program violation signs the disqualification consent agreement, the household member shall be disqualified in accordance with the disqualification periods specified in paragraph (b) of this section, unless contrary to the court order. The period of disqualification shall begin within 45 days of the date the household member signed the disqualification consent agreement. However, if the court imposes a disqualification period or specifies the date for initiating the disqualification period, the State agency shall disqualify the household member in accordance with the court order.

(ii) Once a disqualification penalty has been imposed against a currently participating household member, the period of disqualification shall continue uninterrupted until completed regardless of the eligibility of the disqualified member's household. However, the disqualified member's household shall continue to be responsible

for repayment of the overissuance which resulted from the disqualified member's intentional Program violation regardless of its eligibility for Program benefits.

(3) *Notification of disqualification*. If the household member suspected of intentional Program violation signs the disqualification consent agreement, the State agency shall provide written notice to the household member. The notice shall be provided prior to disqualification, whenever possible. The notice shall inform the household member of the disqualification and the date the disqualification will take effect. The State agency shall also provide written notice to the remaining household members, if any, of the allotment they will receive during the period of disqualification or that they must reapply because the certification period has expired. The procedures for handling the income and resources of the disqualified member are described in § 273.11(c). In addition, the State agency shall provide the written demand letter for restitution described in § 273.18(d)(3).

(i) *Reporting requirements*. (1) Each State agency shall report to FNS information concerning individuals disqualified for intentional Program violation, including those individuals disqualified based on the determination of an administrative disqualification hearing official or a court of appropriate jurisdiction and those individuals disqualified as a result of signing either a waiver of right to a disqualification hearing or a disqualification consent agreement in cases referred for prosecution. This information shall be submitted to FNS so that it is received no later than 30 days after the date the disqualification took effect, or would have taken effect for a currently ineligible individual whose disqualification is pending future eligibility.

(2) Each State agency shall report information concerning each individual disqualified for intentional Program violation in a format designed by FNS. This format shall include the individual's social security number, date of birth, and full name, the number of the disqualification (1st, 2nd, or 3rd), the State and county in which the disqualification took place, the date on which the disqualification took effect, and the length of the disqualification period imposed.

(3) Each State agency shall submit the required information on each individual disqualified for intentional Program violation through a reporting system in accordance with procedures specified by FNS.

(4) All the data submitted by State agencies will be available for use by any State Welfare Agency.

(i) State agencies shall, at a minimum, use the data for the following:

(A) To determine the eligibility of individual Program applicants prior to certification in cases where the State agency has reason to believe a household member is subject to disqualification in another political jurisdiction, and

(B) To ascertain the appropriate penalty to impose, based on past disqualifications, in a case under consideration.

(ii) State agencies may also use the data in other ways, such as the following:

(A) To screen all program applicants prior to certification, and

(B) To periodically match the entire list of disqualified individuals against their current caseloads.

(5) The disqualification of an individual for intentional Program violation in one political jurisdiction shall be valid in another. However, one or more intentional Program violations which occurred prior to April 1, 1983 shall be considered as only one previous disqualification when determining the appropriate penalty to impose in a case under consideration, regardless of where the disqualification(s) took place. State agencies are required to identify any individuals disqualified for fraud prior to implementation of this rule and to submit the information required by this section on such individuals.

(6) In cases where the imposition of a disqualification penalty is being held pending the future eligibility of a household member found to have committed intentional Program violation, the State agency shall submit a report revising the original disqualification report once the individual begins the

period of disqualification in accordance with instructions provided by FNS.

(7) In cases where the disqualification for intentional Program violation is reversed by a court of appropriate jurisdiction, the State agency shall submit a report to purge the file of the information relating to the disqualification which was reversed in accordance with instructions provided by FNS.

(j) *Reversed disqualifications*. In cases where the determination of intentional program violation is reversed by a court of appropriate jurisdiction, the State agency shall reinstate the individual in the program if the household is eligible. The State agency shall restore benefits that were lost as a result of the disqualification in accordance with the procedures specified in § 273.17(e).

[Amdt. 242, 48 FR 6855, Feb. 15, 1983, as amended by Amdt. 269, 51 FR 10793, Mar. 28, 1986; Amdt. 357, 60 FR 43515, Aug. 22, 1995; 66 FR 4468, Jan. 17, 2001]

§ 273.17 Restoration of lost benefits.

(a) *Entitlement*. (1) The State agency shall restore to households benefits which were lost whenever the loss was caused by an error by the State agency or by an administrative disqualification for intentional Program violation which was subsequently reversed as specified in paragraph (e) of this section, or if there is a statement elsewhere in the regulations specifically stating that the household is entitled to restoration of lost benefits. Furthermore, unless there is a statement elsewhere in the regulations that a household is entitled to lost benefits for a longer period, benefits shall be restored for not more than twelve months prior to whichever of the following occurred first:

(i) The date the State agency receives a request for restoration from a household; or

(ii) The date the State agency is notified or otherwise discovers that a loss to a household has occurred.

(2) The State agency shall restore to households benefits which were found by any judicial action to have been wrongfully withheld. If the judicial action is the first action the recipient has taken to obtain restoration of lost benefits, then benefits shall be restored for a period of not more than twelve months from the date the court action was initiated. When the judicial action is a review of a State agency action, the benefits shall be restored for a period of not more than twelve months from the first of the following dates:

(i) The date the State agency receives a request for restoration:

(ii) If no request for restoration is received, the date the fair hearing action was initiated; but

(iii) Never more than one year from when the State agency is notified of, or discovers, the loss.

(3) Benefits shall be restored even if the household is currently ineligible.

(b) *Errors discovered by the State agency*. If the State agency determines that a loss of benefits has occurred, and the household is entitled to restoration of those benefits, the State agency shall automatically take action to restore any benefits that were lost. No action by the household is necessary. However, benefits shall not be restored if the benefits were lost more than 12 months prior to the month the loss was discovered by the State agency in the normal course of business, or were lost more than 12 months prior to the month the State agency was notified in writing or orally of a possible loss to a specific household. The State agency shall notify the household of its entitlement, the amount of benefits to be restored, any offsetting that was done, the method of restoration, and the right to appeal through the fair hearing process if the household disagrees with any aspect of the proposed lost benefit restoration.

(c) *Disputed benefits*. (1) If the State agency determines that a household is entitled to restoration of lost benefits, but the household does not agree with the amount to be restored as calculated by the State agency or any other action taken by the State agency to restore lost benefits, the household may request a fair hearing within 90 days of the date the household is notified of its entitlement to restoration of lost benefits. If a fair hearing is requested prior to or during the time lost benefits are being restored, the household shall receive the lost benefits as determined by the State agency pending the results of the fair hearing. If

the fair hearing decision is favorable to the household, the State agency shall restore the lost benefits in accordance with that decision.

(2) If a household believes it is entitled to restoration of lost benefits but the State agency, after reviewing the case file, does not agree, the household has 90 days from the date of the State agency determination to request a fair hearing. The State agency shall restore lost benefits to the household only if the fair hearing decision is favorable to the household. Benefits lost more than 12 months prior to the date the State agency was initially informed of the household's possible entitlement to lost benefits shall not be restored.

(d) *Computing the amount to be restored*. After correcting the loss for future months and excluding those months for which benefits may have been lost prior to the 12-month time limits described in paragraphs (b) and (c) of this section, the State agency shall calculate the amount to be restored as follows:

(1) If the household was eligible but received an incorrect allotment, the loss of benefits shall be calculated only for those months the household participated. If the loss was caused by an incorrect delay, denial, or termination of benefits, the months affected by the loss shall be calculated as follows:

(i) If an eligible household's application was erroneously denied, the month the loss initially occurred shall be the month of application, or for an eligible household filing a timely reapplication, the month following the expiration of its certification period.

(ii) If an eligible household's application was delayed, the months for which benefits may be lost shall be calculated in accordance with procedures in § 273.2(h).

(iii) If a household's benefits were erroneously terminated, the month the loss initially occurred shall be the first month benefits were not received as a result of the erroneous action.

(iv) After computing the date the loss initially occurred, the loss shall be calculated for each month subsequent to that date until either the first month the error is corrected or the first month the household is found ineligible.

(2) For each month affected by the loss, the State agency shall determine if the household was actually eligible. In cases where there is no information in the household's case file to document that the household was actually eligible, the State agency shall advise the household of what information must be provided to determine eligibility for these months. For each month the household cannot provide the necessary information to demonstrate its eligibility, the household shall be considered ineligible.

(3) For the months the household was eligible, the State agency shall calculate the allotment the household should have received. If the household received a smaller allotment than it was eligible to receive, the difference between the actual and correct allotments equals the amount to be restored.

(4) If a claim against a household is unpaid or held in suspense as provided in § 273.18, the amount to be restored shall be offset against the amount due on the claim before the balance, if any, is restored to the household. At the point in time when the household is certified and receives an initial allotment, the initial allotment shall not be reduced to offset claims, even if the initial allotment is paid retroactively.

(e) *Lost benefits to individuals disqualified for intentional Program violation*. Individuals disqualified for intentional Program violation are entitled to restoration of any benefits lost during the months that they were disqualified, not to exceed twelve months prior to the date of State agency notification, only if the decision which resulted in disqualification is subsequently reversed. For example, an individual would not be entitled to restoration of lost benefits for the period of disqualification based solely on the fact that a criminal conviction could not be obtained, unless the individual successfully challenged the disqualification period imposed by an administrative disqualification in a separate court action. For each month the individual was disqualified, not to exceed twelve months prior to State agency notification, the amount to be restored, if any, shall be determined by comparing the allotment the household received with

the allotment the household would have received had the disqualified member been allowed to participate. If the household received a smaller allotment than it should have received, the difference equals the amount to be restored. Participation in an administrative disqualification hearing in which the household contests the State agency assertion of intentional Program violation shall be considered notification that the household is requesting restored benefits.

(f) *Method of restoration*. Regardless of whether a household is currently eligible or ineligible, the State agency shall restore lost benefits to a household by issuing an allotment equal to the amount of benefits that were lost. The amount restored shall be issued in addition to the allotment currently eligible households are entitled to receive. The State agency shall honor reasonable requests by households to restore lost benefits in monthly installments if, for example, the household fears the excess coupons may be stolen, or that the amount to be restored is more than it can use in a reasonable period of time.

(g) *Changes in household composition*. Whenever lost benefits are due a household and the household's membership has changed, the State agency shall restore the lost benefits to the household containing a majority of the individuals who were household members at the time the loss occurred. If the State agency cannot locate or determine the household which contains a majority of household members the State agency shall restore the lost benefits to the household containing the head of the household at the time the loss occurred.

(h) *Accounting procedures*. Each State agency shall be responsible for maintaining an accounting system for documenting a household's entitlement to restoration of lost benefits and for recording the balance of lost benefits that must be restored to the household. Each State agency shall at a minimum, document how the amount to be restored was calculated and the reason lost benefits must be restored. The accounting system shall be designed to readily identify those situations where a claim against a household can be used to offset the amount to be restored.

[Amdt. 132, 43 FR 47889, Oct. 17, 1978, as amended by Amdt. 225, 48 FR 16831, Apr. 19, 1983; Amdt. 314, 54 FR 24518, June 7, 1989; Amdt. 356, 59 FR 29713, June 9, 1994]

§ 273.18 Claims against households.

(a) *General*. (1) A recipient claim is an amount owed because of:

(i) Benefits that are overpaid or

(ii) Benefits that are trafficked. Trafficking is defined in 7 CFR 271.2.

(2) This claim is a Federal debt subject to this and other regulations governing Federal debts. The State agency must establish and collect any claim by following these regulations.

(3) As a State agency, you must develop a plan for establishing and collecting claims that provides orderly claims processing and results in claims collections similar to recent national rates of collection. If you do not meet these standards, you must take corrective action to correct any deficiencies in the plan.

(4) The following are responsible for paying a claim:

(i) Each person who was an adult member of the household when the overpayment or trafficking occurred;

(ii) A sponsor of an alien household member if the sponsor is at fault; or

(iii) A person connected to the household, such as an authorized representative, who actually trafficks or otherwise causes an overpayment or trafficking.

(b) *Types of claims*. There are three types of claims:

An . . .	is . . .
(1) Intentional Program violation (IPV) claim.	any claim for an overpayment or trafficking resulting from an individual committing an IPV. An IPV is defined in § 273.16.
(2) Inadvertent household error (IHE) claim.	any claim for an overpayment resulting from a misunderstanding or unintended error on the part of the household.

An . . .	is . . .
(3) Agency error (AE) claim	any claim for an overpayment caused by an action or failure to take action by the State agency. The only exception is an overpayment caused by a household transacting an untampered expired Authorization to Participate (ATP) card.

(c) *Calculating the claim amount*—(1) *Claims not related to trafficking.*

(i) As a State agency, you		
must calculate a claim . . .	and . . .	and . . .
back to at least twelve months prior to when you become aware of the overpayment.	for an IPV claim, the claim must be calculated back to the month the act of IPV first occurred.	for all claims, don't include any amounts that occurred more than six years before you became aware of the overpayment.

(ii) The actual steps for calculating a claim are		
you . . .	unless . . .	then . . .
(A) determine the correct amount of benefits for each month that a household received an overpayment.		
(B) do not apply the earned income deduction to that part of any earned income that the household failed to report in a timely manner when this act is the basis for the claim.	the claim is an AE claim	apply the earned income deduction.
(C) subtract the correct amount of benefits from the benefits actually received. The answer is the amount of the overpayment.	this answer is zero or negative.	dispose of the claim referral.
(D) reduce the overpayment amount by any EBT benefits expunged from the household's EBT benefit account in accordance with your own procedures. The difference is the amount of the claim.	you are not aware of any expunged benefits.	the amount of the overpayment calculated in paragraph (e)(1)(ii)(C) of this section is the amount of the claim.

(2) *Trafficking-related claims.* Claims arising from trafficking-related offenses will be the value of the trafficked benefits as determined by:

(i) The individual's admission;

(ii) Adjudication; or

(iii) The documentation that forms the basis for the trafficking determination.

(d) *Claim referral management.*

(1) As a State agency, you		
must . . .	and you . . .	unless . . .
establish a claim before the last day of the quarter following the quarter in which the overpayment or trafficking incident was discovered.	will ensure that no less than 90 percent of all claim referrals are either established or disposed of according to this time frame.	you develop and use your own standards and procedures that have been approved by us (see paragraph (d)(2) of this section).

(2) Instead of using the standard in paragraph (d)(1) of this section, you may opt to develop and follow your own plan for the efficient and effective management of claim referrals.

(i) This plan must be approved by us.

(ii) At a minimum, this plan must include:

(A) Justification as to why your standards and procedures will be more efficient and effective than our claim referral standard;

(B) Procedures for the detection and referral of potential overpayments or trafficking violations;

(C) Time frames and procedures for tracking claim referrals through date of discovery to date of establishment;

(D) A description of the process to ensure that these time frames are being met;

(E) Any special procedures and time frames for IPV referrals; and

(F) A procedure to track and follow-up on IPV claim referrals when these referrals are referred for prosecutorial or similar action.

(e) *Initiating collection action and managing claims*—(1) *Applicability*. State agencies must begin collection action on all claims unless the conditions under paragraph (g)(2) of this section apply.

(2) *Pre-establishment cost effectiveness determination*. A State agency may opt not to establish and subsequently collect an overpayment that is not cost effective. The following is our cost-effectiveness policy for State agencies:

(i) You may follow your own cost effectiveness plan and		
opt not to establish any claim if . . .	unless . . .	or . . .
you determine that the claim referral is not cost effective to pursue.	you do not have a cost-effectiveness plan approved by us.	you already established the claim or discovered the overpayment in a quality control review.
(ii) Or you may follow the FNS threshold and		
opt not to establish any claim if . . .	unless . . .	or . . .
you determine that the claim referral is $125 or less.	the household is currently participating in the Program.	you already established the claim or discovered the overpayment in a quality control review.

(3) *Notification of claim*. (i) Each State agency must develop and mail or otherwise deliver to the household written notification to begin collection action on any claim.

(ii) The claim will be considered established for tracking purposes as of the date of the initial demand letter or written notification.

(iii) If the claim or the amount of the claim was not established at a hearing, the State agency must provide the household with a one-time notice of adverse action. The notice of adverse action may either be sent separately or as part of the demand letter.

(IV) THE INITIAL DEMAND LETTER OR NOTICE OF ADVERSE ACTION MUST INCLUDE LANGUAGE STATING:
(A) The amount of the claim.
(B) The intent to collect from all adults in the household when the overpayment occurred.
(C) The type (IPV, IHE, AE or similar language) and reason for the claim.
(D) The time period associated with the claim.
(E) How the claim was calculated.
(F) The phone number to call for more information about the claim.
(G) That, if the claim is not paid, it will be sent to other collection agencies, who will use various collection methods to collect the claim.
(H) The opportunity to inspect and copy records related to the claim.
(I) Unless the amount of the claim was established at a hearing, the opportunity for a fair hearing on the decision related to the claim. The household will have 90 days to request a fair hearing.
(J) That, if not paid, the claim will be referred to the Federal government for federal collection action.
(K) That the household can make a written agreement to repay the amount of the claim prior to it being referred for Federal collection action.
(L) That, if the claim becomes delinquent, the household may be subject to additional processing charges.
(M) That the State agency may reduce any part of the claim if the agency believes that the household is not able to repay the claim.
(N) A due date or time frame to either repay or make arrangements to repay the claim, unless the State agency is to impose allotment reduction.
(O) If allotment reduction is to be imposed, the percentage to be used and the effective date.

(v) The due date or time frame for repayment must be not later than 30 days after the date of the initial written notification or demand letter.

(vi) Subsequent demand letters or notices may be sent at the discretion of the State agency. The language to be used and content of these letters is left up to the State agency.

(4) *Repayment agreements*. (i) Any repayment agreement for any claim must contain due dates or time frames for the periodic submission of payments.

(ii) The agreement must specify that the household will be subject to involuntary collection action(s) if payment is not received by the due date and the claim becomes delinquent.

(5) *Determining Delinquency*. (i) Unless specified in paragraph (e)(5)(iv) of this section, a claim must be considered delinquent if:

(A) The claim has not been paid by the due date and a satisfactory payment arrangement has not been made; or

(B) A payment arrangement has been established and a scheduled payment has not been made by the due date.

(ii) The date of delinquency for a claim covered under paragraph (e)(5)(i)(A) of this section is the due date on the initial written notification/demand letter. The claim will remain delinquent until payment is received in full, a satisfactory payment agreement is negotiated, or allotment reduction is invoked.

(iii) The date of delinquency for a claim covered under paragraph (e)(5)(i)(B) of this section is the due date of the missed installment payment. The claim will remain delinquent until payment is received in full, allotment reduction is invoked, or if the State agency determines to either resume or re-negotiate the repayment schedule.

(iv) A claim will not be considered delinquent if another claim for the same household is currently being paid either through an installment agreement or allotment reduction and you, as a State agency, expect to begin collection on the claim once the prior claim(s) is settled.

(v) A claim is not subject to the requirements for delinquent debts if the State agency is unable to determine delinquency status because collection is coordinated through the court system.

(6) *Fair hearings and claims.* (i) A claim awaiting a fair hearing decision must not be considered delinquent.

(ii) If the hearing official determines that a claim does, in fact, exist against the household, the household must be re-notified of the claim. The language to be used in this notice is left up to the State agency. The demand for payment may be combined with the notice of the hearing decision. Delinquency must be based on the due date of this subsequent notice and not on the initial pre-hearing demand letter sent to the household.

(iii) If the hearing official determines that a claim does not exist, the claim is disposed of in accordance with paragraph (e)(8) of this section.

(7) *Compromising claims.* (i) As a State agency, you may compromise a claim or any portion of a claim if it can be reasonably determined that a household's economic circumstances dictate that the claim will not be paid in three years.

(ii) You may use the full amount of the claim (including any amount compromised) to offset benefits in accordance with § 273.17.

(iii) You may reinstate any compromised portion of a claim if the claim becomes delinquent.

(8) *Terminating and writing-off claims*–(i) *A terminated claim* is a claim in which all collection action has ceased. A *written-off claim* is no longer considered a receivable subject to continued Federal and State agency collection and reporting requirements.

(ii) The following is our claim termination policy:

As a State agency, if . . .	Then you . . .	Unless . . .
(A) you find that the claim is invalid.	must discharge the claim and reflect the event as a balance adjustment rather than a termination.	it is appropriate to pursue the overpayment as a different type of claim (e.g., as an IHE rather than an IPV claim).
(B) all adult household members die.	must terminate and write-off the claim.	you plan to pursue the claim against the estate.
(C) the claim balance is $25 or less and the claim has been delinquent for 90 days or more.	must terminate and write-off the claim.	other claims exist against this household resulting in an aggregate claim total of greater than $25.
(D) you determine it is not cost effective to pursue the claim any further.	must terminate and write-off the claim.	we have not approved your overall cost-effectiveness criteria.

As a State agency, if . . .	Then you . . .	Unless . . .
(E) the claim is delinquent for three years or more.	must terminate and write-off the claim.	you plan to continue to pursue the claim through Treasury's Offset Program.
(F) you cannot locate the household.	may terminate and write-off the claim.	
(G) a new collection method or a specific event (such as winning the lottery) substantially increases the likelihood of further collections.	may reinstate a terminated and written-off claim.	you decide not to pursue this option.

(f) *Acceptable forms of payment.*

You may collect a claim by:	However . . .
(1) Reducing benefits prior to issuance. This includes allotment reduction and offsets to restored benefits.	You must follow the instructions and limits found in paragraphs (g)(1) and (g)(3) of this section.
(2) Reducing benefits after issuance. These are benefits from electronic benefit transfer (EBT) accounts.	You must follow the instructions and limits found in paragraph (g)(2) of this section.
(3) Accepting cash or any of its generally accepted equivalents. These equivalents include check, money order, and credit or debit cards.	You do not have to accept credit or debit cards if you do not have the capability to accept these payments.
(4) Accepting paper food coupons	You must destroy any coupons or coupon books that are not returned to inventory and document as appropriate.
(5) Conducting your own offsets and intercepts. This includes but is not limited to wage garnishments and intercepts of various State payments. These collections are considered ''cash'' for FNS claim accounting and reporting purposes.	You must follow any limits that may apply in paragraph (g) of this section.
(6) Requiring the household to perform public service.	This form of payment must be ordered by a court and specifically be in lieu of paying any claim.
(7) Participating in the Treasury collection programs.	You must follow the procedures found in paragraph (n) of this section.

(g) *Collection methods.*

(1) *Allotment reduction.* The following is our allotment reduction policy:

As a State agency, you must . . .	Unless . . .
(i) Automatically collect payments for any claim by reducing the amount of monthly benefits that a household receives.	the claim is being collected at regular intervals at a higher amount or another household is already having its allotment reduced for the same claim (see paragraph (g)(1)(vi) of this section).

As a State agency, you must . . .	Unless . . .
(ii) For an IPV claim, limit the amount reduced to the greater of $20 per month or 20 percent of the household's monthly allotment or entitlement.	the household agrees to a higher amount.
(iii) For an IHE or AE claim, limit the amount reduced to the greater of $10 per month or 10 percent of the household's monthly allotment.	the household agrees to a higher amount.
(iv) Not reduce the initial allotment when the household is first certified.	the household agrees to this reduction.
(v) Not use additional involuntary collection methods against individuals in a household that is already having its benefit reduced.	the additional payment is voluntary; or the source of the payment is irregular and unexpected such as a State tax refund or lottery winnings offset.
You may . . .	
(vi) Collect using allotment reduction from two separate households for the same claim. However, you are not required to perform this simultaneous reduction.	
(vii) Continue to use any other collection method against any individual who is not a current member of the household that is undergoing allotment reduction.	

(2) *Benefits from EBT accounts.* (i) As a State agency, you must allow a household to pay its claim using benefits from its EBT benefit account.

(ii) You must comply with the following EBT benefit claims collection and adjustment requirements:

(A) For collecting from active (or reactivated) EBT benefits . . .		
You . . .	or . . .	and . . .
need written permission which may be obtained in advance and done in accordance with paragraph (g)(2)(iv) of this section;.	oral permission for one time reductions with you sending the household a receipt of the transaction within 10 days.	the retention rules do apply to this collection.
(B) For collecting from stale EBT benefits . . .		
You . . .	and . . .	and . . .
must mail or otherwise deliver to the household written notification that you intend to apply the benefits to the outstanding claim.	give the household at least 10 days to notify you that it doesn't want to use these benefits to pay the claim.	the retention rules apply to this collection.
(C) For making an adjustment with expunged EBT benefits . . .		
You . . .	and . . .	and . . .
must adjust the amount of any claim by subtracting any expunged amount from the EBT benefit account for which you become aware.	this can be done anytime	the retention rules do not apply to this adjustment.

(iii) A collection from an EBT account must be non-settling against the benefit drawdown account.

(iv) At a minimum, any written agreement with the household to collect a claim using active EBT benefits must include:

(A) A statement that this collection activity is strictly voluntary;

(B) The amount of the payment;

(C) The frequency of the payments (i.e., whether monthly or one time only);

(D) The length (if any) of the agreement; and

(E) A statement that the household may revoke this agreement at any time.

(3) *Offsets to restored benefits.* You must reduce any restored benefits owed to a household by the amount of any outstanding claim. This may be done at any time during the claim establishment and collection process.

(4) *Lump sum payments.* You must accept any payment for a claim whether it represents full or partial payment. The payment may be in any of the acceptable formats.

(5) *Installment payments.* (i) You may accept installment payments made for a claim as part of a negotiated repayment agreement.

(ii) As a household, if you fail to submit a payment in accordance with the terms of your negotiated repayment schedule, your claim becomes delinquent and it will be subject to additional collection actions.

(6) *Intercept of unemployment compensation benefits.* (i) As a State agency, you may arrange with a liable individual to intercept his or her unemployment compensation benefits for the collection of any claim. This collection option may be included as part of a repayment agreement.

(ii) You may also intercept an individual's unemployment compensation benefits by obtaining a court order.

(iii) You must report any intercept of unemployment compensation benefits as ''cash'' payments when they are reported to us.

(7) *Public service.* If authorized by a court, the value of a claim may be paid by the household performing public service. As a State agency, you will report these amounts in accordance with our instructions.

(8) *Other collection actions.* You may employ any other collection actions to collect claims. These actions include, but are not limited to, referrals to collection and/or other similar private and public sector agencies, state tax refund and lottery offsets, wage garnishments, property liens and small claims court.

(9) *Unspecified joint collections.* When an unspecified joint collection is received for a combined public assistance/food stamp recipient claim, each program must receive its pro rata share of the amount collected. An unspecified joint collection is when funds are received in response to correspondence or a referral that contained both the food stamp and other program claim(s) and the debtor does not specify to which claim to apply the collection.

(h) *Refunds for overpaid claims.* (1) As a household, if you overpay a claim, the State agency must provide a refund for the overpaid amount as soon as possible after the State agency finds out about the overpayment. You will be paid by whatever method the State agency deems appropriate considering the circumstances.

(2) You are not entitled to a refund if the overpaid amount is attributed to an expunged EBT benefit.

(i) *Interstate claims collection.* (1) Unless a transfer occurs as outlined in paragraph (i)(2) of this section, as a State agency, you are responsible for initiating and continuing collection action on any food stamp recipient claim regardless of whether the household remains in your State.

(2) You may accept a claim from another State agency if the household with the claim moves into your State. Once you accept this responsibility, the claim is yours for future collection and reporting. You will report interstate transfers to us in accordance with our instructions.

(j) *Bankruptcy.* A State agency may act on our behalf in any bankruptcy proceeding against a bankrupt household with outstanding recipient claims.

(k) *Retention rates.* (1) The retention rates for State agencies are as follows:

If you collect an . . .	then the retention rate is . . .
(i) IPV claim	35 percent.
(ii) IHE claim	20 percent.
(iii) IHE claim by reducing a person's unemployment compensation benefit.	35 percent.
(iv) AE claim	nothing.

(2) These rates do not apply to any reduction in benefits when you disqualify someone for an IPV.

(l) *Submission of payments to us.* A State agency must send us the value of funds collected for IHE, IPV or AE claims according to our instructions. We must pay you for claims collection retention by electronic funds transfer.

(m) *Accounting procedures.* (1) As a State agency, you must maintain an accounting system for monitoring recipient claims against households. This accounting system shall consist of both the system of records maintained for individual debtors and the accounts receivable summary data maintained for these debts.

(2) At a minimum, the accounting system must document the following for each claim:

(i) The date of discovery;

(ii) The reason for the claim;

(iii) The calculation of the claim;

(iv) The date you established the claim;

(v) The methods used to collect the claim;

(vi) The amount and incidence of any claim processing charges;

(vii) The reason for the final disposition of the claim;

(viii) Any collections made on the claim;

(ix) Any correspondence, including follow-up letters, sent to the household.

(3) At a minimum, your accounting or certification system must also identify the following for each claim:

(i) Those households whose claims have become delinquent;

(ii) Those situations in which an amount not yet restored to a household can be used to offset a claim owed by the household; and

(iii) Those households with outstanding claims that are applying for benefits.

(4) When requested and at intervals determined by us, your accounting system must also produce:

(i) Accurate and supported outstanding balances and collections for established claims; and

(ii) Summary reports of the funds collected, the amount submitted to FNS, the claims established and terminated, any delinquent claims processing charges, the uncollected balance and the delinquency of the unpaid debt.

(5) On a quarterly basis, unless otherwise directed by us, your accounting system must reconcile summary balances reported to individual supporting records.

(n) *Treasury's Offset Programs (TOP).* (1) *Referring debts to TOP.* (i) As a State agency, you must refer to TOP all recipient claims that are delinquent for 180 or more days.

(ii) You must certify that all of these claims to be referred to TOP are 180 days delinquent and legally enforceable.

(iii) You must refer these claims in accordance with our and the Department of the Treasury's (Treasury) instructions.

(iv) You must not refer claims to TOP that:

(A) You become aware that the debtor is a member of a participating household that is having its allotment reduced to collect the claim; or

(B) Fall into any other category designated by us as non-referable to TOP.

(2) *Notifying debtors of referral to TOP.* (i) As a State agency, you must notify the debtor of the impending referral to TOP according to our instructions relating to:

(A) What constitutes an adequate address to send the notice;

(B) What specific language will be included in the TOP referral notice;

(C) What will be the appropriate time frames and appeal rights; and

(D) Any other information that we determine necessary to fulfill all due process and other legal requirements as well as to adequately inform the debtor of the impending action.

(ii) You must also follow our instructions regarding procedures connected with responding to inquiries, subsequent reviews and hearings, and any other procedures determined by us as necessary in the debtor notification process.

(3) *Effect on debtors.* (i) If you, as a debtor, have your claim referred to TOP, any eligible Federal payment that you are owed may be intercepted through TOP.

(ii) You may also be responsible for paying any collection or processing fees charged by the Federal government to intercept your payment.

(4) *Procedures when a claim is in TOP.* (i) As a State agency, you must follow FNS and Treasury procedures when the claim is in TOP.

(ii) You must remove a claim from TOP if:

(A) FNS or Treasury instruct you to remove the debt; or

(B) You discover that:

(*1*) The debtor is a member of a food stamp household undergoing allotment reduction;

(*2*) The claim is paid up;

(*3*) The claim is disposed of through a hearing, termination, compromise or any other means;

(*4*) The claim was referred to TOP in error; or

(*5*) You make an arrangement with the debtor to resume payments.

(5) *Receiving and reporting.* As a State agency, you must follow our procedures on receiving and reporting TOP payments.

(6) *Security or confidentiality agreements.* As a State agency, you must follow our procedures regarding any security or confidentiality agreements or processes necessary for TOP participation.

[Amdt. 389, 66 FR 41775, July 6, 2000; 65 FR 47587, Aug. 2, 2000]

§ 273.19 [Reserved]

§ 273.20 SSI cash-out.

(a) *Ineligibility.* No individual who receives supplemental security income (SSI) benefits and/or State supplementary payments as a resident of California is eligible to receive food stamp benefits. The Secretary of the Department of Health and Human Services has determined that the SSI payments in California have been specifically increased to include the value of the food stamp allotment.

(b) *Receipt of SSI benefits.* In California, an individual must actually receive, not merely have applied for, SSI benefits to be determined ineligible for the food stamp program. If the State agency provides payments at least equal to the level of SSI benefits to individuals who have applied for but are awaiting an SSI eligibility determination, receipt of these substitute payments will terminate the individual's eligibility for food stamp benefits. Once SSI benefits are received, the individual will remain ineligible for food stamp benefits, even during months in which receipt of the SSI benefits is interrupted, or suspended, until the individual is terminated from the SSI program.

(c) *Income and resources.* In California, the income and resources of the SSI recipient living in a household shall not be considered in determining eligibility or level of benefits of the household, as specified in § 273.11(d).

[Amdt. 132, 43 FR 47889, Oct. 17, 1978, as amended by Amdt. 132, 44 FR 33383, June 8, 1979. Redesignated at 45 FR 7217, Jan. 31, 1980, and amended by Amdt. 237, 47 FR 57669, Dec. 28, 1982; Amdt. 269, 51 FR 10793, Mar. 28, 1986; Amdt. 356, 59 FR 29713, June 9, 1994; Amdt. 364, 61 FR 54320, Oct. 17, 1996]

§ 273.21 Monthly Reporting and Retrospective Budgeting (MRRB).

(a) *System design.* This section provides for an MRRB system for determining household eligibility and benefits. For included households, this system replaces the prospective budgeting system provided in the preceding sections of this part. The MRRB system provides for the use of retrospective information in calculating household benefits, normally based on information submitted by the household in monthly reports. The State agency shall establish an MRRB system as follows:

(1) In establishing either a one-month or a two-month MRRB system, the State agency shall use the same system it uses in its TANF Program unless it has been granted a waiver by FNS. Differences between a one-month and a two-month system are described in paragraph (d) of this section.

(2) The State agency shall determine eligibility, either prospectively or retrospectively, on the same basis that it uses for its TANF program, unless it has been granted a waiver by FNS.

(3) *Budgeting waivers.* FNS may approve waivers of the budgeting requirements of this section to conform to budgeting procedures in the TANF program, except for households excluded from retrospective budgeting under paragraph (b) of this section.

(b) *Included and excluded households.* The establishment of either a monthly reporting or retrospective budgeting system is a State agency option. Certain households are specifically excluded from both monthly reporting and retrospective budgeting. A household that is included in a monthly reporting system must be retrospectively budgeted. Households not required to submit monthly reports may have their benefits determined on either a prospective or retrospective basis at the State agency's option, unless specifically excluded from retrospective budgeting.

(1) The following households are excluded from both monthly reporting and retrospective budgeting:

(i) Migrant or seasonal farmworker households.

(ii) Households in which all members are homeless individuals.

(iii) Households with no earned income in which all adult members are elderly or disabled.

(2) Households residing on an Indian reservation where there was no monthly reporting system in operation on March 25, 1994 are excluded from monthly reporting.

(c) *Information on MRRB.* At the certification and recertification interview, the State agency shall provide the household with the following:

(1) An oral explanation of the purpose of MRRB;

(2) A copy of the monthly report and an explanation of how to complete and file it;

(3) An explanation that information required to be reported on the monthly report is the only reporting requirement for such information;

(4) An explanation of what the household shall verify when it submits a monthly report and how it will verify it;

(5) A telephone number (toll-free number or a number where collect calls will be accepted outside the local calling area) which the household may call to ask questions or to obtain help in completing the monthly report; and

(6) Written explanations of this information.

(7) *Special assistance.* The State agency shall provide special assistance in completing and filing monthly reports to households whose adult members are all either mentally or physically handicapped or are non–English speaking or otherwise lacking in reading and writing skills such that they cannot complete and file the required reports.

(d) *One and two-month systems.* Each State agency shall adopt either a one-month or two-month MRRB system. A one-month system shall have either one or two beginning months in the certification period and a two-month system shall have two beginning months. Except for beginning months in sequence as described in the preceding sentence, the State agency shall not consider as a beginning month any month which immediately follows a month in which a household is certified.

(1) *One-month system.* In the one-month system, the issuance month immediately follows its corresponding budget month.

(2) *Two-month system.* In the two-month system, the issuance month is the second month following its corresponding budget month. There are two beginning months of participation in this system, the first month and the following month.

(e) *Determining eligibility for households not certified under the beginning months' procedures of § 273.21(g).* The State agency shall determine eligibility consistent with paragraph (a)(2)

of this section and in accordance with either of the following options.

(1) *Prospective eligibility*. The State agency shall determine eligibility by considering all factors of eligibility prospectively for each of the issuance months.

(2) *Retrospective eligibility*. The State agency shall determine eligibility by considering all factors of eligibility retrospectively using the appropriate budget month except for residency and compliance with the requirements regarding social security numbers. Compliance with work registration provisions shall be considered as of the issuance month or month of application. The 60-day time frame for determining the applicability of the voluntary quit provision of § 273.7(n) shall be measured by the State agency from the date of application.

(f) *Calculating allotments for households following the beginning months*—(1) *Household composition*. (i) If eligibility is determined retrospectively the State agency shall determine the household's composition as of the last day of the budget month.

(ii) If eligibility is determined prospectively (during the beginning months or for households processed under paragraph (e)(1) of this section), the State agency shall determine the household's composition as of the issuance month.

(iii) In a two-month system, the following provisions shall apply with regard to a household which reports, in the month between the budget month and the corresponding issuance month, that it has gained a new member.

(A) The State agency shall use the same household composition for determining the household's eligibility that it uses for calculating the household's benefit level.

(B) If the new member is not already certified to receive food stamps in another household participating within the State, the new member's income, deductible expenses, and resources from the issuance month shall be considered in determining the household's eligibility and benefit level. If the new member had been providing income to the household on an ongoing basis prior to becoming a member of the household, the State agency shall exclude the previously provided income in determining the household's issuance month benefits and eligibility.

(C) If the individual has moved out of one household receiving food stamps within the State and into another, with no break in participation, the State agency shall use the individual's income, deductible expenses, and resources from the budget month in determining benefits to be provided in the issuance month. The State agency shall include such an individual and the individual's income, deductible expenses, and resources in determining the issuance month eligibility and benefit level of either the household from which the individual has moved or the household into which the individual has moved, but not both. In determining the issuance month eligibility and benefit level of the household into which the individual has moved, the State agency shall disregard budget month income received by the new member from a terminated source.

(D) The State agency may add new members to the household effective either the month the household reports the gain of a new household member or the first day of the issuance month following the month the household reports the gain of a new member. The benefits shall not be prorated.

(iv) The State agency shall add a previously excluded member who was disqualified for an intentional program violation or failure to comply with workfare or work requirements, was ineligible because of failure to comply with the social security number requirement, or was previously an ineligible alien retrospectively to the household the month after the disqualification period ends. All other previously excluded members shall be added in accordance with the procedures in paragraph (f)(1)(iii)(B) of this section, using the new member's issuance month income and expenses.

(2) *Income and deductions*. For the household members as determined in accordance with paragraph (f)(1) of this section, the State agency shall calculate the allotment using the household members' income and deductions from the budget month, except as follows:

(i) The State agency shall annualize self-employment income which is received other than monthly, in accordance with § 273.11(a). Such income shall be budgeted either prospectively or retrospectively and shall not affect more benefit months than the number of months in the period over which it is annualized or prorated. Except that, households which receive self-employment income from a farm operation monthly but incur irregular expenses to produce such self-employment farm income shall be given the option to annualize the self-employment farm income and expenses over a 12-month period.

(ii) The State agency shall prorate contract income received over a period of less than one year and either prospectively or retrospectively budget such income. Such income shall not effect more benefit months than the number of months in the period over which it is prorated.

(iii) Earned and unearned educational income shall be prorated over the period it is intended to cover in accordance with § 273.10(c)(3)(iii), and it shall be budgeted either prospectively or retrospectively. Such income shall not effect more benefit months than the number of months in the period over which it is prorated.

(iv) The State agency shall budget deductible expenses prorated over two or more months, except medical expenses, either prospectively or retrospectively, *provided* That such deductions are not budgeted over more months than they are intended to cover, and the total amount deducted does not exceed the total amount of the expenses. Medical expenses shall be budgeted prospectively. The State agency shall continue to allow deductions for expenses incurred even if billed on other than a monthly basis unless the household reports a change in the expense. The State agency may average the child support expense and budget it prospectively or retrospectively.

(v) The State agency shall budget stable income regularly received as a single monthly payment for the month such income is intended to cover. The State agency shall budget deductions regularly billed as a single monthly payment for the month such deductions are intended to cover.

(vi) The State agency may budget interest income using one of the following methods in paragraphs (f)(2)(vi)(A), (B), or (C) of this section. The State agency shall either establish categories of interest to be handled by each of the methods or shall offer each household the option of which method to budget the interest income.

(A) Actual interest income received in the budget month.

(B) Prorated interest income calculated by dividing the amount of interest anticipated during the certification period by the number of months in the certification period.

(C) An averaged amount adjusted for anticipated changes.

(vii) For a new household member described under paragraph (f)(1)(iii)(B) of this section, the State agency shall consider the new member's income and deductible expenses prospectively until the new member's first month living with the household becomes the budget month.

(viii) The options provided under paragraph (j)(1)(vii) of this section may affect the calculation of income and deductions.

(g) *Determining eligibility and allotments in the beginning months.* The State agency shall use the prospective budgeting procedures of this paragraph for determining the allotments and eligibility of households in the MRRB system during this first month, or first and second month of participation. The State agency shall not apply the procedures of this paragraph to the month(s) following the month of termination resulting from a temporary one-month change.

(1) *Determining eligibility during the beginning months.* The State agency shall determine eligibility prospectively in the beginning month(s).

(2) *Calculating allotments during the beginning months.* the State agency shall calculate allotments prospectively in the beginning month(s).

(3) *The first months of retrospective budgeting following the beginning months.* The State agency shall begin to base issuances to the household on retrospective budgeting during the

first month for which the State's system can use the month of application as a budget month. In a one-month system, the first month for which the issuance is based on retrospective budgeting shall be the second month of participation. In a two-month system, the first month for which the issuance is based on retrospective budgeting shall be the third month of participation. If the State agency had been averaging income or converting weekly or biweekly income to a monthly amount in the beginning months, it may begin using the household's actual budget month income when the household becomes subject to retrospective budgeting. For purposes of this paragraph, any income received in either or both of the beginning months from a source which no longer provides income to the household (terminated income), which was included in the household's prospective budget, shall be disregarded when the beginning month becomes the budget month.

(h) *The monthly report form*—(1) *General.* (i) The State agency shall give the household a reasonable period of time after close of the budget month to submit the monthly reports.

(ii) The State agency shall require each household in the MRRB system to report on household circumstances on a monthly basis as a condition of continuing eligibility.

(iii) The State agency shall provide an individual or agency unit which a household may contact to receive prompt answers about the completion of the form. A telephone number (toll free for households outside the local calling area) which a household may use to obtain further information shall also be available.

(iv) The State agency shall ensure that households are informed about the availability and amount of the standard utility allowances, if the State agency offers them.

(2) *Monthly report form.* The State agency's monthly report form shall meet the following requirements:

(i) Be written in clear, simple language;

(ii) Meet the bilingual requirements described in § 272.4(b) of this chapter;

(iii) Specify the date by which the agency must receive the form and the consequences of a late or incomplete form, including whether the State agency shall delay payment if the form is not received by the specified date;

(iv) Specify the verification which the household must submit with the form, in accordance with § 273.21(i);

(v) Identify the individual or agency unit available to assist in completing the form:

(vi) Include a statement to be signed by a member of the household, indicating his or her understanding that the provided information may result in changes in the level of benefits, including reduction and termination;

(vii) Include, in prominent and boldface lettering, an understandable description of the Act's civil and criminal penalties for fraud.

(viii) If the form requests Social Security numbers, include a statement of the State agency's authority to require Social Security numbers (SSN's) (including the statutory citation, the title of the statute, and the fact that providing SSN's is mandatory), the purpose of requiring SSN's, the routine uses for SSN's, and the effect of not providing SSN's. This statement may be on the form itself or included as an attachment to the form.

(3) *Reported information.* The State agency may determine the information relevant to eligibility and benefit determination to be included on the monthly report form except that the State agency shall not require households to monthly report medical expenses. Medical expenses may be reported in accordance with § 273.10(d)(4).

(4) *Combined form.* If the State agency uses a combined monthly report for food stamps and TANF, the State agency shall clearly indicate on the form that non-TANF food stamp households need not provide TANF-only information.

(i) *Verification.* Each month the household shall verify information for those items designated by the State agency. The State agency may designate that verification be submitted for any item that has changed or appears questionable. If the household voluntarily reports a change in its medical expenses, the State agency shall verify the change in accordance with § 273.2(f)(8)(ii) before acting on it if

the change would increase the household's allotment. In the case of a reported change that would decrease the household's allotment, or make the household ineligible, the State agency shall act on the change without requiring verification, though verification which is required by § 273.2(f)(8)(i) shall be obtained prior to the household's recertification.

(j) *State agency action on reports*—(1) *Processing*. Upon receiving a monthly report, the State agency shall:

(i) Review the report to ensure accuracy and completeness.

(ii) Consider the report incomplete only if:

(A) It is not signed by the head of the household, an authorized representative or a responsible member of the household;

(B) It is not accompanied by verification required by the State agency on the monthly report;

(C) It omits information required by the State agency on the monthly report necessary either to determine the household's eligibility or to compute the household's level of food stamp benefits.

(iii) Determine those items which will require additional verification, in accordance with paragraph (i) of this section.

(iv) Contact the household directly, and take action as needed, to obtain further information on specific items. These items include:

(A) The effect of a reported change in resources on a household's total resources; and

(B) The effect of a reported change in household composition or loss of a job or source of earned income on the applicability of the work registration requirement.

(v) Notify the household, in accordance with paragraph (j)(3)(ii) of this section, of the need to submit a report, correct an incomplete or inaccurate report, or submit the necessary verification within the extension period.

(vi) Determine the household's eligibility by considering all factors, including income, in accordance with paragraphs (e) or (g) of this section.

(vii) Determine the household's level of benefits in accordance with § 273.10(e) based on the household composition determined in accordance with paragraph (f)(1) of this section. For those household members the following (except as provided in paragraph (f)(2) of this section) income and deductions shall be considered:

(A) Earned and unearned income received in the corresponding budget month, including income that has been averaged in accordance with paragraph (f) of this section. The earned income of an elementary or secondary school student excluded in accordance with § 273.9(c)(7) shall be excluded until the budget month following the budget month in which the student turns 18. The State agency has the option of converting to a regular monthly amount the income that a household receives weekly or biweekly. If the State agency elects to convert weekly or biweekly income for MRRB households, it shall do so for all households in its MRRB caseload. The State agency may convert or average income in the beginning months and use actual earned or unearned income received in the budget month following the beginning months of participation.

(B) The PA grant paid in the corresponding budget month or the PA grant to be paid in the issuance month. If the State agency elects to use the PA grant to be paid in the issuance month, the State agency shall ensure that:

(*1*) Any additional or corrective payments are counted, either prospectively or retrospectively; and

(*2*) the State agency shall disregard income received in the budget month from a terminated source which results in an increase in the PA grant, provided the household has reported the termination of the income either in the monthly report for the budget month or in some other manner which, as determined by the State agency, allows the State agency sufficient time to process the change and affect the allotment in the issuance month.

A State agency which elects to use the PA grant to be paid in the issuance month shall implement mass changes in accordance with the procedures at § 273.12(e)(2).

(C) Deductions as billed or averaged from the corresponding budget month,

including those shelter costs billed less often than monthly which the household has chosen to average.

(viii) Issue benefits in accordance with part 274 of this chapter and on the time schedule set forth in paragraph (k) of this section.

(ix) Provide specific information on how the State agency calculated the benefit level if it has changed since the preceding month, either with the issuance or in a separate notification.

(2) *Notices*. (i) All notices regarding changes in a household's benefits shall meet the definition of adequate notice as defined in § 271.2.

(ii) The State agency shall notify a household of any change from its prior benefit level and the basis for its determination. If the State agency reduces, suspends or terminates benefits, it shall send the notice so the household receives it no later than either the date the resulting benefits are to be received or in place of the benefits.

(iii) The State agency shall notify a household, in accordance with paragraph (j)(3)(iii), if its monthly report is late or incomplete, or further information is needed.

(3) *Incomplete filing*. (i) If a household fails to file a monthly report, or files an incomplete report, by the specified filing date, the State agency shall give the household at least ten more days, from the date the State agency mails the notice to file a complete monthly report.

(ii) The State agency shall notify the household within five days of the filing date:

(A) That the monthly report is either overdue or incomplete;

(B) What the household must do to complete the form;

(C) If any verification is missing and the lack of that verification will adversely affect the household's allotment;

(D) That the Social Security number of a new member must be reported, if the household has reported a new member but not the new member's Social Security number;

(E) What the extended filing date is;

(F) That the State agency will assist the household in completing the report.

(iii) When a State agency requires verification for the item listed and the household does not provide the verification, the State agency shall take the following actions:

(A) If the household does not verify earned income, the State agency shall regard the household's report as incomplete, take action in accordance with paragraphs (j)(3)(i) and (j)(3)(ii) of this section and, if appropriate, terminate the household in accordance with paragraph (m) of this section.

(B) If the household is using its actual utility costs to establish its shelter cost deduction in accordance with § 273.9(d) and it does not verify a change in its actual utility expenses, the State agency shall not allow a deduction for such costs.

(C) If a household fails to verify a change in reported medical expenses in accordance with § 273.2(f)(8), and that change would increase the household's allotment, the State agency shall not make the change. The State agency shall act on reported changes without requiring verification if the changes would decrease the household's allotment, or make the household ineligible.

(D) If the household does not verify other items for which verification is required, the State agency shall:

(*1*) Act on the reported change if it would decrease benefits.

(*2*) Not act on the reported change if it would increase benefits.

(E) If the household does not report or verify changes in child support, the State agency shall not allow a child support deduction.

(k) *Issuance of benefits*—(1) *Timely issuance*. (i) For an eligible household which has filed a complete monthly report by the scheduled filing date, the State agency shall provide an opportunity to participate within the month following the budget month in a one-month system, or within the second month following the budget month in a two-month system.

(ii) The State agency shall provide each household with an issuance cycle so that the household receives its benefits at about the same time each month and has an opportunity to participate before the end of each issuance month.

(2) *Delayed issuance.* (i) If an eligible household files a complete monthly report during its extension period, the State agency shall provide it with an opportunity to participate no later than ten days after its normal issuance date.

(ii) If an eligible household which has been terminated for failure to file a complete report files a complete report after its extended filing date, but before the end of the issuance month, the State agency may choose to reinstate the household by providing it with an opportunity to participate. If the household has requested a fair hearing on the basis that a complete monthly report was filed, the State agency shall reinstate the household if a completed monthly report is filed before the end of the issuance month.

(iii) If an eligible household files a complete report after the issuance month, the State agency shall not provide the household with an opportunity to participate for that month.

(l) *Other reporting requirements.* (1) *Information reported on the monthly report.* The monthly report shall be the sole reporting requirement for information required to be included in the monthly report. Changes in household circumstances not subject to monthly reporting shall be reported in accordance with § 273.12.

(2) *Households excluded from monthly reporting.* Households which are excluded from monthly reporting shall report changes in accordance with § 273.12.

(m) *Termination.* (1) The State agency shall terminate a household's food stamp participation if the household:

(i) Is ineligible for food stamps, unless suspended in accordance with paragraph (n) of this section:

(ii) Fails to file a complete report by the extended filing date; or

(iii) Fails to comply with a nonfinancial eligibility requirement, such as registering for employment.

(2) The State agency shall issue a notice to the household which:

(i) Complies with the requirements of § 271.2 for adequate notice;

(ii) Informs the household of the reason for its termination;

(iii) If the State agency allows reinstatement under paragraph (k)(2)(ii), explains how the household may be reinstated;

(iv) Informs the household of its rights to request a fair hearing and to receive continued benefits. If termination is for failure to submit a monthly report and the household states that a monthly report has been filed, the notice must advise the household that a completed monthly report must be filed prior to the end of the issuance month as a condition for continued receipt of benefits.

(3) The State agency shall issue the notice to the household so that it receives the notice no later than the household's normal or extended issuance date.

(n) *Suspension.* The State agency may suspend a household's issuance in accordance with this paragraph. If the State agency does not choose this option, it shall instead terminate households in accordance with paragraph (m) of this section.

(1) The State agency may suspend a household's issuance for one month if the household becomes temporarily ineligible due to a periodic increase in recurring income or other change not expected to continue in the subsequent month. The State agency may on a Statewide basis either suspend the household's certification prospectively for the issuance month or retrospectively for the issuance month corresponding to the budget month in which the noncontinuing circumstance occurs.

(2) The State agency shall continue to supply monthly reports to the household for one month.

(3) If the suspended household again becomes eligible, the State agency shall issue benefits on the household's normal issuance date.

(4) If the suspended household does not become eligible after one month, the State agency shall terminate the household.

(o) If a household has been terminated or suspended based on an anticipated change in circumstances, the State agency shall not count any noncontinuing circumstances which caused the prospective ineligibility when calculating the household's benefits retrospectively in a subsequent month.

(p) *Fair hearings*—(1) *Entitlement*. All households participating in a MRRB system shall be entitled to fair hearings in accordance with § 273.15.

(2) *Continuation of benefits*. (i) Any household which requests a fair hearing and does not waive continuation of benefits, and is otherwise eligible for continuation of benefits, shall have its benefits continued until the end of the certification period or the resolution of the fair hearing, whichever is first. If the State agency did not receive a monthly report from the household by the extended filing date and the household states that a monthly report was submitted, the household is entitled to continued benefits, *provided* That a completed report is submitted no later than the last day of the issuance month.

(ii) The State agency shall provide continued benefits no later than five working days from the day it receives the household's request.

(iii) A household whose benefits have been continued shall file montly reports until the end of the certification period. If the fair hearing is with regard to termination for nonreceipt of the monthly report by the State agency, a completed monthly report for the month in question shall be submitted by the household no later than the last day of the issuance month.

(iv) During the fair hearing period the State agency shall adjust allotments to take into account reported changes, except for the factor(s) on which the fair hearing is based.

(q) *Recertification*—(1) *Timeliness*. The State agency shall recertify an eligible household which timely reapplies and provides it with an opportunity to participate in the household's normal issuance cycle.

(2) *Retrospective Recertification*. (i) The State agency shall recertify the household using retrospective information to determine the household's benefit level for the first month of the new certification period.

(ii) If the State agency is operating a two-month MRRB system, the State agency may delay reflecting information from the recertification interview in the household's eligibility and benefit level until the second month of the new certification period.

(iii) The State agency shall recertify households according to one of the three options set forth in paragraphs (q) (3), (4), or (5) of this section.

(3) *Option One: Recertification form*. (i) The State agency shall provide each household with a recertification form to obtain all necessary information about the household's circumstances for the budget month.

(ii) The State agency shall mail the form to the household, along with a notice of expiration, in place of the monthly report form. The State agency shall either: Mail the recertification form along with the notice of expiration; use a recertification form which contains a notice of expiration; or mail the recertification form and the notice of expiration separately, as long as the forms are mailed at the same time.

(iii) The household shall submit the form to the State agency in accordance with paragraph (h)(1)(i) of this section.

(4) *Option Two: Monthly report and addendum*. (i) The State agency shall provide each household with a notice of expiration and monthly report form and an addendum to obtain all additional information necessary for recertification.

(ii) The State agency shall either: Mail the monthly report form along with the notice of expiration; use a monthly report form which contains a notice of expiration; or mail the monthly report form and the notice of expiration separately, as long as the forms are mailed at the same time.

(iii) The household shall submit the monthly report to the State agency in accordance with paragraph (h)(1)(i) of this section.

(iv) The State agency shall deliver the recertification addendum to the household along with the monthly report form or obtain the necessary information from the household at the interview.

(v) The household shall submit the addendum to the State agency no later than the time of the interview.

(5) *Option Three: Signed Statement*. (i) The State agency shall recertify households based on the monthly report and the interview.

(ii) At the interview, the State agency shall obtain all of the information

not provided in the monthly report which is necessary for recertification.

(iii) The State agency shall ensure that it has on file a statement signed by the appropriate household member that the household has applied for recertification.

(6) *Interview*. (1) The State agency shall conduct a complete interview with a household member or an authorized representative.

(ii) The State agency shall schedule the interview at any time during the last month of the old certification period.

(iii) If the State agency schedules the interview for a date on or before the normal filing due date of the monthly report, the State agency shall permit the household member and authorized representative to bring the recertification form or monthly report to the interview.

(r) *Procedures for households that change their reporting and budgeting status*. The State agency shall use one of the following procedures for households subject to change in reporting/budgeting status.

(1) *Households which become subject to MRRB*. The State agency may change the reporting/budgeting status of households which become subject to monthly reporting at any time following the change in household circumstances which results in the change in the household's reporting/budgeting status, subject to the following conditions:

(i) The State agency shall provide the household with information provided to MRRB households under paragraph (c) of this section. If the State agency elects to implement the change during the certification period, it may omit the oral explanation of MRRB required under paragraph (c)(1).

(ii) The State agency shall not require the household to submit a monthly report during any month in which the household was subject to the change reporting requirements of § 273.12.

(2) *Households which are no longer subject to MRRB*. The agency shall use one of the following procedures to remove households from the MRRB system.

(i) *Procedures for households exempt from MRRB*. For any household which becomes exempt from MRRB under paragraph (b) of this section, the State agency shall notify the household within 10 days of the date the State agency becomes aware of the change that the household has become exempt from monthly reporting and is no longer required to file any future monthly reports and has also become exempt from retrospective budgeting and when the change in budgeting will go into effect. The State agency shall begin determining the household's benefits prospectively no later than the first issuance month for which a household has not submitted a monthly report for the budget month.

(ii) *Other households moving from MRRB to change reporting and prospective budgeting*. When a household is no longer subject to MRRB under a State agency's system, the State agency may begin determining the household's benefits prospectively in any month following the month the State agency becomes aware of the changed circumstances which necessitate the need to change the household's reporting/budgeting status. If the State agency elects to change the household's reporting/budgeting status prior recertification it shall provide the household with a notice explaining the change in the month prior to the month the change is effective. If the State agency elects to change the household's status at recertification it shall advise the household at the recertification interview that its reporting/budgeting status is being changed.

(iii) *Households moving from MRRB to retrospective budgeting and change reporting*. If a household's status necessitates changing it from a monthly reporter to a change reporter while continuing to be budgeted retrospectively, the State agency may change the household's status at any time. If the State agency elects to change the household immediately, the State agency shall provide the household with a notice that it is no longer subject to monthly reporting. The notice shall include information about the household's reporting requirements under § 273.12.

(s) *Implementation of Regulatory Changes*. The State agency shall implement changes in regulatory provisions

for households subject to MRRB prospectively based on the effective date and implementation time frame published in the FEDERAL REGISTER. Rules are effective as of the same date for all households regardless of the budgeting system.

(t) *Monthly reporting requirements for households residing on reservations.* The following procedures shall be used for households which reside on reservations and are required to submit monthly reports:

(1) *Definition of a reservation.* For purposes of this section, the term ''reservation'' shall mean the geographically defined area or areas over which a tribal organization exercises governmental jurisdiction. The term ''tribal organization'' shall mean the recognized governing body of an Indian tribe (including the tribally recognized intertribal organization of such tribes), as well as any Indian tribe, band, or community holding a treaty with a State government.

(2) *Benefit determination for missing reports.* The State agency shall not delay, reduce, or suspend the allotment of a household that fails to submit a report by the issuance date.

(3) *Reinstatement.* If a household is terminated for failing to submit a monthly report, the household shall be reinstated without being required to submit a new application if a monthly report is submitted no later than the last day of the month following the month the household was terminated.

(4) *Notices.* (i) All notices regarding changes in a household's benefits shall meet the definition of adequate notice as defined in § 271.2 of this chapter.

(ii) If a household fails to file a monthly report by the specified filing date, the State agency shall notify the household within five days of the filing date:

(A) That the monthly report is either overdue or incomplete;

(B) What the household must do to complete the form;

(C) If any verification is missing;

(D) That the Social Security number of a new member must be reported, if the household has reported a new member but not the new member's Social Security number;

(E) What the extended filing date is;

(F) That the State agency will assist the household in completing the report; and

(G) That the household's benefits will be issued based on the previous month's submitted report without regard to any changes in the household's circumstances if the missing report is not submitted.

(iii) Simultaneously with the issuance, the State agency shall notify a household, if its report has not been received, that the benefits being provided are based on the previous month's submitted report and that this benefit does not reflect any changes in the household's circumstances. This notice shall also advise the household that, if a complete report is not filed timely, the household will be terminated.

(iv) If the household is terminated, the State agency shall send the notice so the household receives it no later than the date benefits would have been received. This notice shall advise the household of its right to reinstatement if a complete monthly report is submitted by the end of the month following termination.

(5) *Supplements and claims.* If the household submits the missing monthly report after the issuance date but in the issuance month, the State agency shall provide the household with a supplement, if warranted. If the household submits the missing monthly report after the issuance date or the State agency becomes aware of a change that would have decreased benefits in some other manner, the State agency shall file a claim for any benefits overissued.

[48 FR 54965, Dec. 8, 1983]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 273.21, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 273.22 Optional workfare program.

(a) *General.* This section contains rules which are to be followed in operating a Food Stamp Workfare Program. Under this program, nonexempt food stamp recipients may be required to perform work in a public service capacity as a condition of eligibility to receive the coupon allotment to which their household is normally entitled.

The primary goal of workfare is to improve employability and enable individuals to move into regular employment.

(b) *Program administration*. (1) A food stamp workfare program may be operated as part of a State's employment and training program, required in § 273.7(f) or may be operated independent of such a program. If the workfare program is part of the State's employment and training program it shall be included as a component in the State's employment and training plan in accordance with the requirements of § 273.7(c). If it is operated independent of the E&T program, the State must submit a workfare plan to FNS for its approval in accordance with the requirements of this section. For the purpose of this section, a political subdivision is any local government, including, but not limited to, any county, city, town or parish. A State agency may implement a workfare program statewide or in only some areas of the State. The areas of operation must be identified in the State workfare or employment and training plan.

(2) Political subdivisions are encouraged, but not required, to submit their plans to FNS through their respective State agencies. At a minimum, however, plans shall be submitted to the State agencies concurrent with their submission to FNS. Workfare plans and subsequent amendments shall not be implemented prior to their approval by FNS.

(3) When a State agency chooses to sponsor a workfare program by submitting a plan to FNS, it shall incorporate the approved plan into its State Plan of Operations. When a political subdivision chooses to sponsor a workfare program by submitting a plan to FNS, the State agency shall be responsible as a facilitator in the administration of the program by disbursing Federal funding and meeting the requirements identified in paragraph (d) of this section. Upon notification that FNS has approved a workfare plan submitted by a political subdivision in its State, the State agency shall append that political subdivision's workfare plan to its own State Plan of Operations.

(4) The operating agency is that administrative organization which has been identified in the workfare plan as being responsible for establishing job sites, assigning eligible recipients to the job sites, and meeting the requirements of this section. The operating agency may be any public or private, nonprofit organization. The State agency or political subdivision which submitted the workfare plan shall be responsible for monitoring the operating agency's compliance with the requirements of this section or of the workfare plan. The Secretary may suspend or terminate some or all workfare program funding, or withdraw approval of the workfare program from the State agency or political subdivision which submitted the workfare plan upon finding that that State agency or political subdivision, or their respective operating agencies have failed to comply with the requirements of this section or of the workfare plan.

(5) State agencies or other political subdivisions shall describe in detail in the plan how the political subdivision, working with the State agency and any other cooperating agencies that may be involved in the program, shall fulfill the provisions of this section. The plan shall include workload projections, staffing plans, interagency communication plans, and specific operational agreements developed by the agencies involved. The plan shall be a one-time submittal, with amendments submitted as needed to cover any changes in the workfare program as they occur.

(6) State agencies or political subdivisions submitting a workfare plan shall submit with the plan an operating budget covering the period from the initiation of the workfare program's implementation schedule to the close of the Federal fiscal year. In addition, an estimate of the cost for one full year of operation shall be submitted together with the workfare plan. For subsequent fiscal years, the workfare program budget shall be included in the State agency's budget.

(7) If workfare plans are submitted by more than one political subdivision, each representing the same population (such as a city within a county), the Department shall determine which political subdivision will have its plan approved. Under no circumstances shall a food stamp recipient be subject

to more than one food stamp workfare program. If a political subdivision chooses to operate a workfare program and represents a population which is already, at least in part, subject to a food stamp workfare program administered by another political subdivision, it must establish in its workfare plan how food stamp recipients will not be subject to more than one food stamp workfare program.

(c) *Operating agency responsibilities.* (1) The operating agency, as designated by the State agency or other political subdivision which submits a plan, shall be responsible for establishing and monitoring job sites, interviewing and assessing eligible recipients, assigning eligible recipients to appropriate job sites, monitoring participant compliance, making initial determinations of good cause for household noncompliance, and otherwise meeting the requirements of this section.

(2) *Establishment of job sites.* Workfare job slots may only be located in public or private, nonprofit agencies. Contractual agreements must be established between the operating agency and organizations providing jobs which include but are not limited to designation of the slots available and designation of responsibility for provision of benefits, if any are required, to the workfare participant.

(3) *Notifying State agency of noncompliance.* The operating agency shall notify the State agency of noncompliance by a household with a workfare obligation when it has determined that the household did not have good cause for the non-compliance. This notification shall occur within five days of such determination so that the State agency may make a final determination as provided in paragraph (d)(4) of this section.

(4) *Notifications.* Notices shall be established to be used as follows: (i) For the State agency to notify the operating agency of workfare-eligible households. Included in this notice shall be the case name, case number, names of workfare-eligible household members, address of the household, certification period, and indication of any part-time work. If the State agency is calculating the hours of obligation, this shall also be included in this notice. If the operating agency is computing the hours to be worked, the monthly allotment shall be included.

(ii) For operating agencies to notify the workfare participant of where and when the participant is to report, to whom the participant is to report, a brief description of duties for the particular placement, and the number of hours to be worked.

(iii) For operating agencies to notify the State agency of failure by a household to meet its workfare obligation.

(5) *Recordkeeping requirements.* (i) Files must be maintained which record activity by workfare participants. At a minimum, these records must contain job sites and hours assigned, hours completed, and communications with the State agency and job sites.

(ii) Program records shall be maintained in an orderly fashion, for audit and review purposes, for a period of 3 years from the month of origin of each record. Fiscal records and accountable documents shall be retained for 3 years from the date of fiscal or administrative closure of the workfare program. Fiscal closure, as used in this paragraph, means that workfare program obligations for or against the Federal government have been liquidated. Administrative closure, as used in this paragraph, means that the operating agency or Federal government has determined and documented that no further action to liquidate the workfare program obligation is appropriate. Fiscal records and accountable records shall be kept in a manner which will permit verification of direct monthly reimbursements to recipients, in accordance with paragraph (f)(4) of this section.

(6) *Reporting requirements.* The operating agency shall be responsible for providing information needed by the State agency to fulfill the reporting requirements stated in paragraph (d)(6) of this section.

(7) *Disclosure.* The provisions of § 272.1(c) restricting the use and disclosure of information obtained from food stamp households shall be applicable to the administration of the workfare program.

(8) *Grievance procedures.* The operating agency may establish a system for handling complaints filed by workfare participants regarding their

working conditions, perceived noncompliance by job sites with the provisions of this section, or any other area related to their workfare participation. This procedure need not handle complaints that can be pursued through a fair hearing nor may choosing not to use this procedure preclude a participant from requesting a fair hearing. If established, a description of this system shall be included in the workfare plan. Complaints which have not been resolved through this system and those against the operating agency shall be forwarded to the State agency and handled by the State agency according to the provisions of § 271.6. Workfare participants shall be informed of the grievance procedure.

(d) *State agency responsibilities.* (1) If a political subdivision chooses to operate a workfare program, the State agency shall cooperate with the political subdivision in developing a plan. This includes providing caseload and cost estimates, as well as being available for consultation on the design of the administrative structure and interagency communications for the program. The State agency may decide what its workfare policy shall be in three areas. They are the definition of reimbursable expenses, the definition of good cause, and the sanctioning of members of divided households (paragraphs (f)(4), (f)(5), and (f)(6)(ii) of this section, respectively). The State agency may either accept the policies contained in these paragraphs or determine its own policies, subject to the requirements of section 20 of the Food Stamp Act of 1977, as amended, and the approval of FNS. Until the Food and Nutrition Service approves any alternate policies of the State agency, the provisions of paragraphs (f)(4), (f)(5), and (f)(6)(ii) of this section shall apply.

(2) The State agency shall determine at certification or recertification which household members are eligible for the workfare program and inform the household representative of the nature of the program and of the penalties for noncompliance. If the State agency is not the operating agency, each member of a household who is subject to workfare under paragraph (e)(1) of this section shall be referred to the organization which is the operating agency. The information identified in paragraph (c)(4)(i) of this section shall be forwarded to the operating agency within 5 days after the date of household certification. Computation of hours to be worked may be delegated to the operating agency.

(3) The State agency shall inform the household and the operating agency of the effect of any changes in a household's circumstances on the household's workfare obligation. This includes changes in benefit levels or workfare eligibility.

(4) Upon notification by the operating agency that a participant has failed to comply with the workfare requirement without good cause, the State agency shall make a final determination as to whether or not such failure occurred and whether there was good cause for any such failure. If the State agency determines that the participant did not have good cause for noncompliance, a sanction shall be processed as provided in paragraph (f)(6) of this section. The State agency shall immediately inform the operating agency of the months during which the sanction shall apply.

(5) The State agency shall maintain in each household's casefile all workfare-related forms used by the State agency in meeting the requirements of this section.

(6) The State agency shall submit quarterly reports to FNS within 45 days of the end of each quarter identifying for that quarter for that State:

(i) The number of households referred to the operating agency as containing workfare-eligible recipients. A household shall be counted as referred each time it is referred to the operating agency.

(ii) The number of households assigned to jobs each month by the operating agency.

(iii) The number of individuals assigned to jobs each month by the operating agency.

(iv) The total number of hours worked by participants.

(v) The number of households against which sanctions were applied. A household being sanctioned over two quarters should only be reported as sanctioned for the earlier quarter.

(7) The State agency may, at its option, assume responsibility for monitoring all workfare programs in its State to assure that there is compliance with this section and with the plan submitted and approved by FNS. Should the State agency assume this responsibility, it would act as agent for FNS which is ultimately responsible for ensuring such compliance. Should the State agency determine that noncompliance exists, it may withhold funding until compliance is achieved or FNS directs otherwise. FNS shall be notified prior to the withholding of funds of the circumstances leading to that action. At a minimum, the State agency shall perform onsite reviews of each workfare program once within six months of the program's implementation and then in accordance with the Management Evaluation review schedule for that program area.

(e) *Household responsibilities*—(1) *Persons subject to workfare.* Household members subject to the work registration requirements as provided in § 273.7(a) shall also be subject to the workfare requirements. In addition:

(i) Those recipients exempt from work registration requirements due to being subject to the work incentive program (WIN) under title IV of the Social Security Act shall be subject to workfare if they are currently involved less than 20 hours a week in WIN. Those recipients involved 20 hours a week or more may be subject to workfare at the option of the political subdivision.

(ii) Those recipients exempt from work registration requirements due to the application for or receipt of unemployment compensation shall be subject to workfare requirements; and

(iii) Those recipients exempt from work registration requirements due to being a parent or other household member responsible for the care of a dependent child between the ages of six and twelve shall be subject to workfare requirements. If the child has its sixth birthday within a certification period, the individual responsible for the care of the child shall be subject to the workfare requirement as part of the next scheduled recertification process, unless the individual qualifies for another exemption.

(2) *Household obligation.* The maximum total number of hours of work required of a household each month shall be determined by dividing the household's coupon allotment by the Federal or State minimum wage, whichever is higher. Fractions of hours of obligation may be rounded down. The household's hours of obligation for any given month may not be carried over into another month except when the household wishes to end a disqualification due to noncompliance with workfare in accordance with paragraph (f)(8) of this section.

(f) *Other program requirements*—(1) *Priority placements.* The State agency or political subdivision submitting the plan shall indicate in the plan how it will determine priority for placement at job sites when the number of eligible participants is greater than the number of available positions at job sites.

(2) *Conditions of employment.* (i) Recipients may be required to work up to, but not to exceed, 30 hours per week. In addition, the total number of hours worked by a recipient under workfare together with any other hours worked in any other compensated capacity, including hours of participation in a WIN training program, by such recipient on a regular or predictable part-time basis, shall not exceed thirty hours a week. With the recipient's consent, the hours to be worked may be scheduled in such a manner that more than thirty hours are worked in one week, as long as the total for that month does not exceed the weekly average of thirty hours a week.

(ii) No participant shall be required to work more than eight hours on any given day, except that with the recipient's consent, more than eight hours may be scheduled.

(iii) No participant shall be required to accept an offer of workfare employment if such employment fails to meet the criteria established in § 273.7(i)(1)(iii) and (iv); and § 273.7(i)(2) (i), (ii), (iv), and (v).

(iv) If the workfare participant is unable to report for job scheduling, to appear for scheduled workfare employment, or to complete the entire workfare obligation due to compliance

with Unemployment Insurance requirements, the additional work requirements established in § 273.7(e) (1), (2), (3), or (4), or the job search requirements established in § 273.7(f), such inability shall not be considered a refusal to accept workfare employment. If the workfare participant informs the operating agency of the time conflict, the operating agency shall, if possible, reschedule the missed activity. If such rescheduling cannot be completed before the end of the month, this shall not be cause for disqualification.

(v) The operating agency shall assure that all persons employed in workfare jobs receive job-related benefits at the same levels and to the same extent as similar non-workfare employees. These shall be benefits related to the actual work being performed, such as workers' compensation, and not to the employment by a particular agency, such as health benefits. Of those benefits required to be offered, any elective benefit which requires a cash contribution by the participant shall be optional at the discretion of the participant.

(vi) All persons employed in workfare jobs shall be assured by the operating agency of working conditions provided other employees similarly employed.

(vii) The provisions of section 2(a)(3) of the Service Contract Act of 1965 (Pub. L. 89–286), relating to health and safety conditions, shall apply to the workfare program.

(viii) Operating agencies shall not provide work to a workfare participant which has the effect of replacing or preventing the employment of an individual not participating in the workfare program. Vacancies, due to hiring freezes, terminations, or layoffs, shall not be filled by a workfare participant unless it can be demonstrated that such vacancies are a result of insufficient funds to sustain former staff levels.

(ix) The workfare jobs shall in no way infringe upon the promotional opportunities which would otherwise be available to regular employees.

(x) Workfare jobs shall not be related in any way to political or partisan activities.

(xi) Workfare assignments should, to the greatest extent possible, take into consideration previous training, experience, and skills of a participant.

(xii) The cost of workers' compensation or comparable protection provided to workfare participants by the State agency, political subdivision, or operating agency is a matchable cost under paragraph (g) of this section. Whether or not this coverage is provided, in no case is the Federal government the employer in these workfare programs (unless a Federal agency is the job site), and therefore, USDA does not assume liability for any injury to or death of a workfare participant while on the job.

(xiii) The nondiscrimination requirement provided in § 272.6(a) shall apply to all agencies involved in the workfare program.

(3) *Job search period.* The operating agency may establish a job search period of up to 30 days following certification prior to making a workfare assignment during which the potential participant is expected to look for a job. This period may only be established at household certification, not at recertification. The potential participant would not be subject to any job search requirements beyond those required under § 273.7 during this time.

(4) *Participant reimbursement.* Participants shall be reimbursed by the operating agency for transportation and other costs that are reasonably necessary and directly related to participation in the program. These other costs may include the cost of child care, or the cost of personal safety items or equipment required for performance of work if these items are also purchased by regular employees. These other costs shall not include the cost of meals away from home. No participant cost which has been reimbursed under a workfare program operated under Title IV of the Social Security Act or any other workfare program shall be reimbursed under the food stamp workfare program. Only reimbursement of participant costs which are up to but not in excess of $25 per month for any participant will be subject to Federal cost sharing as provided in paragraph (g)(1) of this section. Child care costs which are reimbursed may not be claimed as expenses and used in calculating the child care deduction for determining household

benefits. Pursuant to paragraph (d)(1) of this section, a State agency may decide what its reimbursement policy shall be.

(5) *Good cause*. For the purpose of this section, unless a State agency has determined its good cause policy pursuant to paragraph (d)(1) of this section, good cause shall include:

(i) Circumstances beyond a household member's control, such as, but not limited to: Illness; the illness or incapacitation of another household member requiring the presence of the workfare participant; a household emergency; or the lack of transportation when transportation is not provided by the operating agency;

(ii) Necessity for a parent or other responsible household member to care for a child between the age of six and 12 because adequate child care is not otherwise available;

(iii) Becoming exempt from the workfare eligibility requirements under the terms established in paragraph (e)(1) of this section.

(iv) Household moving out of the area of the workfare project.

(v) Instances where cost of transportation and other costs have exceeded $25 per month and are not being reimbursed by the operating agency.

(6) *Failure to comply*. (i) Where a workfare participant has been determined by the State agency to have failed or refused without good cause to comply with the requirements of this section, the entire household shall be ineligible to participate. Such ineligibility shall continue until either the household meets the provisions of paragraph (f)(8) of this section or for 2 consecutive months, whichever occurs earlier. Within 10 days after receiving notification of the household's failure to comply with the requirements of this section, the State agency shall, if it determines that there is not good cause for the noncompliance, provide the household with a notice of adverse action, as specified in § 273.13. Such notification shall contain the proposed period of disqualification and shall specify the terms and conditions on which disqualification can be ended. Information shall also be included with the notification on the procedures and requirements contained in paragraph (f)(8) of this section. The disqualification period shall begin with the first month following the expiration of the adverse notice period, or following a fair hearing decision if a fair hearing is requested, in which the household would normally have received benefits. A household member shall not be required to perform work at a job site when the household is no longer receiving benefits unless the household has chosen to meet the conditions for ending disqualification specified in paragraph (f)(8) of this section. Until the disqualification is actually invoked, the household, if otherwise eligible, will continue to have a workfare obligation.

(ii) Should a household have two or more consecutive months of noncompliance while being certified for food stamps, the total corresponding months of sanction shall be a cumulative total; that is, two months of noncompliance shall entail a four-month sanction. Should a household which has been determined to be noncompliant without good cause split into more than one household, the sanction shall follow all the members of the household at the time of the noncompliance. None of those household members shall be eligible to participate in the food stamp program for the length of the sanction beginning at the point when the sanction can be placed against any one of them.

(iii) If a sanctioned household member joins another food stamp household, that household's eligibility and benefit level shall be determined as follows:

(A) *Income, resources, and deductible expenses*. The income and resources of the household member(s) disqualified for noncompliance with workfare shall count in their entirety, and the entire household's allowable earned income standard, medical, dependent care and excess shelter deductions shall apply to the remaining household members.

(B) *Eligibility and benefit level*. An individual disqualified for noncompliance with workfare shall not be included when determining the household's size for the purpose of assigning a benefit level to the household or of comparing the household's monthly income with income eligibility standards. The State

agency shall ensure that no household's coupon allotment is increased as a result of the disqualification of one or more household member for workfare noncompliance.

(7) *Fair hearings.* Each household has a right to a fair hearing to appeal a denial or termination of benefits due to a State agency determination of failure to comply with the requirements of this section. The fair hearing requirements provided in § 273.15 shall apply. If a fair hearing is scheduled, the operating agency shall be available to participate in the hearing. The State agency shall provide the operating agency sufficient advance notice to permit the attendance of an operating agency representative.

(8) *Ending disqualification.* Following the end of the 2-month disqualification period for noncompliance with the workfare provisions of this section, a household may resume participation in the program if it applies again and is determined eligible. Eligibility may be reestablished during a disqualification period and the household shall (if it makes application and is determined otherwise eligible) be permitted to resume participation if the member who failed to comply or any other workfare-eligible member of the household satisfies all outstanding workfare obligations. A workfare position shall be made available for a household which wishes to end disqualification in this manner.

(9) Benefit overissuances. If a benefit overissuance is discovered for a month or months in which a participant has already performed a workfare or work component requirement, the State agency shall follow claim recovery procedures specified below.

(i) If the person who performed the work is still subject to a work obligation, the State shall determine how may extra hours were worked because of the improper benefit. The participant should be credited that number of hours toward future work obligations.

(ii) If a workfare or work component requirement does not continue, the State agency shall determine whether the overissuance was the result of an intentional program violation, an inadvertent household error, or a State agency error. For an intentional program violation a claim should be established for the entire amount of the overissuance. If the overissuance was caused by an inadvertent household error or State agency error, the State agency shall determine whether the number of hours worked in workfare are more than the number which could have been assigned had the proper benefit level been used in calculating the number of hours to work. A claim shall be established for the amount of the overissuance not ''worked off,'' if any. If the hours worked equal the amount of hours calculated by dividing the overissuance by the minimum wage, no claim shall be established. No credit for future work requirements shall be given.

(g) *Federal financial participation*—(1) *Administrative costs.* Fifty percent of all administrative costs incurred by State agencies or political subdivisions in operating a workfare program shall be funded by the Federal government. Such costs include those related to recipient participation in workfare, up to $25 per month for any participant, as indicated in paragraph (f)(4) of this section. Such costs shall not include the costs of equipment, capital expenditures, tools or materials used in connection with the work performed by workfare participants, the costs of supervising workfare participants, the costs of reimbursing participants for meals away from home, or reimbursed expenses in excess of $25 per month for any participant.

(2) *Funding mechanism.* The State agencies shall have responsibility for disbursing Federal funds used for the workfare program through the State agencies' Letters of Credit. The State agency shall also assure that records are being maintained which support the financial claims being made to FNS. This will be for all programs, regardless of who submits the plan. Mechanisms for funding local political subdivisions which have submitted plans must be established by the State agencies.

(3) *Fiscal recordkeeping and reporting requirements.* Workfare-related costs shall be identified by the State agency on the Financial Status Report (Form SF–269) as a separate column. All financial records, supporting documents,

statistical records, negotiated contracts, and all other records pertinent to workfare program funds shall be maintained in accordance with § 277.12.

(4) *Sharing workfare savings*—(i) *Entitlement*. A political subdivision is entitled to share in the benefit reductions which occur when a workfare participant begins employment while participating in workfare for the first time, or within thirty days of ending the first participation in workfare.

(A) To begin employment means to appear at the place of employment and to begin working.

(B) First participation in workfare means performing work for the first time in a particular workfare program. The only break in participation which shall not end first participation shall be due to the participant's taking a job which does not affect the household's allotment by an entire month's wages and which is followed by a return to workfare.

(ii) *Calculating the benefit reductions*. The political subdivision shall calculate benefit reductions from each workfare participant's employment as follows.

(A) Unless the political subdivision knows otherwise, it shall presume that the benefit reduction equals the difference between the last allotment issued before the participant began the new employment and the first allotment which reflects a full months wages, earned income deduction, and dependent care deduction attributable to the new job.

(B) If the political subdivision knows of other changes besides the new job, which affect the household's allotment after the new job began, the political subdivision shall obtain the first allotment affected by an entire month's wages from the new job. The political subdivision shall then recalculate the allotment to account for the wages, earned income deduction, and dependent care deduction attributable to the new job. In recalculating the allotment the political subdivision shall also replace any TANF grant received after the new job with the one received in the last month before the new job began. The difference between the first allotment that accounts for the new job and the recalculated allotment shall be the benefit reduction.

(C) The political subdivision's share of the benefit reduction is three times this difference, divided by two.

(D) If, during these procedures, an error is discovered in the last allotment issued before the new employment began, that allotment shall be corrected before the savings are calculated.

(iii) *Accounting*. The reimbursement from workfare shall be reported and paid as follows:

(A) The political subdivision shall report its enhanced reimbursement to the State agency in accordance with paragraph (g)(3) of this section.

(B) The Food and Nutrition Service shall reimburse the political subdivision in accordance with paragraph (g)(2) of this section.

(C) The political subdivision shall, upon request, make available for review sufficient documentation to justify the amount of the enhanced reimbursement.

(D) The Food and Nutrition Service shall reimburse only the political subdivision's reimbursed administrative costs in the fiscal year in which the workfare participant began new employment and which are acceptable according to paragraph (g)(1) of this section.

(h) *Coordination with other workfare-type programs*. State agencies and political subdivisions may operate workfare programs as provided in this section jointly with a workfare program operated under Title IV of the Social Security Act to the extent that provisions and protections of the statute are maintained or with other workfare programs operated by the subdivision to the extent that the provisions and protections of this section are maintained. Statutory provisions include, but are not limited to, eligible recipients as provided in paragraph (e)(1) of this section, maximum hours of work per week as provided in paragraph (f)(2)(i) of this section and the penalty for noncompliance as provided in paragraph (f)(6)(i) of this section. When a household receives benefits from more than one program with a workfare requirement and the household is determined to have a food stamp workfare obligation,

the food stamp obligation may be combined with the obligation from the other program. However, this may be done only to the extent that eligible food stamp workfare participants are not required to work more than 30 hours a week in accordance with paragraph (f)(2)(i) of this section. Any intent to coordinate programs should be described in the plan. Waivers of provisions in this section, for the purpose of operating workfare jointly with local general assistance workfare-type programs may be requested and provided in accordance with § 272.3(c). Statutory provisions, shall not be waived.

(i) *Voluntary workfare program.* State agencies and political subdivisions may operate workfare programs whereby participation by food stamp recipients is voluntary. In such a program, the penalty for failure to comply as provided in paragraph (f)(6) of this section shall not apply for noncompliance. The amount of hours to be worked will be negotiated between the household and the operating agency, though not to exceed the limits provided under paragraph (f)(2) of this section. In addition, all protections provided under paragraph (f)(2) of this section shall continue to apply. Those State agencies and political subdivisions choosing to operate such a program shall indicate in their workfare plan how their staffing will adapt to anticipated and unanticipated levels of participation. The Department will not approve plans which do not show that the benefits of the workfare program, in terms of hours worked by participants and reduced food stamp allotments due to successful job attainment, are expected to exceed the costs of such a program. In addition, if the Department finds that an approved voluntary program does not meet this criteria, the Department reserves the right to withdraw approval.

[Amdt. 217, 47 FR 44697, Oct. 8, 1982, as amended by Amdt. 240, 48 FR 1173, Jan. 11, 1983; Amdt. 269, 51 FR 10793, Mar. 28, 1986, 53 FR 31646, Aug. 19, 1988; Amdt. 356, 59 FR 29713, June 9, 1994]

§ 273.23 Simplified application and standardized benefit projects.

(a) *General.* This subpart establishes rules under which Simplified Application and Standardized Benefit Projects shall operate. State agencies and political subdivisions chosen as project operators may designate households containing members receiving TANF, SSI, or Medicaid benefits as project eligible. Project eligible households shall have their food stamp eligibility determined using simplified application procedures. Food stamp eligibility shall be determined using information contained in their TANF, or Medicaid application, or, in the case of SSI, on the State Data Exchange (SDX) tape, and any appropriate addendum. Project-eligible households shall be considered categorically food stamp resource eligible based on their eligibility for these other programs and shall be required to meet food stamp income eligibility standards. However, income definitions appropriate to the TANF, SSI or Medicaid programs shall be used instead of food stamp income definitions in determining eligibility. In addition, such households shall, as a condition of program eligibility, meet and/or fulfill all food stamp nonfinancial eligibility requirements. (Project-eligible households defined as categorically eligible in § 273.2 (j) and (k) of these regulations are not required to meet the income eligibility standards.) To further simplify program administration, benefits provided to such households may be standardized by category of assistance and household size.

(b) *Program administration.* (1) Simplified application and standardized benefit procedures are applicable in five States and five political subdivisions. For the purpose of this section, a political subdivision is a project area as defined in § 271.2 of these regulations.

(2) State agencies and political subdivisions seeking to operate a Simplified Application and Standardized Benefit Project shall submit Work Plans to FNS in accordance with the requirements of this section.

(3) FNS shall evaluate Work Plans according to the criteria set forth in the Simplified Application/Standardized Benefit Notice of Intent.

(4) Political subdivisions shall submit their Work Plans to FNS through their respective State agencies for review and approval.

(5) A State agency selected by FNS to operate a Simplified Application and Standardized Benefit Project shall include the Work Plan in its State Plan of Operations. A political subdivision chosen to operate a Simplified Application and Standardized Benefit Project shall assure that the responsible State agency include that political subdivision's project Work Plan in its own State Plan of Operations. The Work Plan shall be updated, as needed, to reflect changes in the benefit methodology, subject to prior FNS approval.

(c) *Contents of the work plan.* The Work Plan submitted by each applicant shall contain the following information:

(1) Background information on the proposed site's characteristics, current operating procedures, and a general description of the proposed procedures;

(2) A description of the proposed project design, including the benefit methodology, households which will be project eligible, operational procedures, and the need for waivers;

(3) An implementation and monitoring plan describing tasks, staffing and a timetable for implementation;

(4) An estimate of project impacts including implementation costs and, on an annual basis, operating costs, administrative costs, error reduction, and benefit changes; and

(5) A statement signed by the State official with authority to commit the State or political subdivisions to the project's operation.

(d) *Project-eligible households.* Each operating agency shall decide which of the following categories of household shall be eligible to participate in the project.

(1) Households all of whose members receive TANF benefits under part A of title IV of the Social Security Act;

(2) Households all of whose members receive SSI benefits under title XVI of the Social Security Act;

(3) Households all of whose members receive Medicaid benefits under title XIX of the Social Security Act;

(4) Households each of whose members receive one or more of the following: TANF, SSI, or Medicaid benefits (multiple-benefit households); and

(5) Households only some of whose members receive TANF, SSI, and/or Medicaid benefits (mixed households).

(e) *Determining Food Stamp Program eligibility.* Under the Simplified Application and Standardized Benefit Project, project eligible households shall have their food stamp eligibility determined using the following criteria.

(1) Certain households, at the operating agency's option, which contain members receiving TANF, SSI, or Medicaid benefits, shall be designated project eligible and need not make separate application for food stamp benefits. Once such households indicate in writing a desire to receive food stamps, their eligibility will be determined based on information contained in their application for TANF or Medicaid benefits or, in the case of SSI, on the State Data Exchange (SDX) tape. TANF or Medicaid applications may need to be modified, or be subject to an addendum in order to accommodate any additional information required by the operating agency.

(2) The income definitions and resource requirements prescribed under § 273.9 (b) and (c) and § 273.8 are inapplicable to project-eligible households. Project-eligible households which have met the resource requirements of the TANF, SSI, and/or Medicaid programs shall be considered to have satisfied the food stamp resource requirements. Gross income less any allowed exclusions, as defined by the appropriate categorical aid program, shall be used to determine food stamp income eligibility (unless the project household is categorically income eligible as defined in § 273.2 (j) and (k)) and benefit levels. Deemed income, as defined under TANF, SSI or Medicaid rules, shall be excluded to the extent that households with such income are part of the food stamp household providing the deemed income.

(3) Project-eligible households which are not categorically income eligible shall meet the gross and net income standards prescribed in § 273.9(a). Net income shall be determined by subtracting from gross income either actual or standardized deduction amounts. If standardized deduction

amounts are used, they may be initially determined using recent historical data on deductions claimed by such households. Such deductions must be updated, as necessary, on at least an annual basis. Such deductions shall include:

(i) The current standard deduction for all households;

(ii) An excess shelter deduction and a dependent care deduction for households not containing an elderly or disabled member;

(iii) A dependent care deduction, an uncapped excess shelter deduction and a medical deduction for households containing a qualified elderly or disabled member; and

(iv) A standardized or actual earned income deduction for households containing members with earned income.

(4) All non-financial food stamp eligibility requirements shall be applicable to project-eligible households.

(f) *Benefit levels.* (1) In establishing benefits for project eligible households, either the appropriate State standard of need (maximum aid payment) or gross income as determined for the appropriate categorical aid program plus the value of any monetary categorical benefits received, if any, may be used as the gross income amount. If mixed households are designated project eligible, procedures shall be developed to include as household income the income of those household members not receiving categorical aid.

(2) If allotments are standardized, the average allotment for each category of household, by household size, shall be no less than average allotments would have been were the project not in operation.

(3) Benefit methodologies shall be constructed to ensure that benefits received by households having higher than average allotments under normal program rules are not significantly reduced as a result of standardization.

(4) Benefit methodologies shall be structured to ensure that decreases in household benefits are not reduced by more than $10 or 20%, whichever is less.

(5) The methodology to be used in developing benefit levels shall be determined by the operating agency but shall be subject to FNS approval.

(6) With FNS approval, operating agencies may develop an alternate methodology for standardizing allotments/deductions for specific sizes and categories of households where such size and category is so small as to make the use of average deductions and/or allotments impractical.

(7) FNS may require operating agencies to revise their standardized allotments during the course of the project to reflect changes in items such as household characteristics, the Thrifty Food Plan, deduction amounts, the benefit reduction rate, or benefit levels in TANF or SSI. Such changes will be documented by revising the Work Plan amendment to the State Plan of Operations.

(g) *Household notification.* All certified project-eligible households residing in the selected project sites shall be provided with a notice, prior to project commencement, informing them of the revised procedures and household requirements under the project. If household allotments are to be standardized, the notice shall also provide specific information on the value of the newly computed benefit and the formula used to calculate the benefit. The notice shall meet the requirements of a notice of adverse action as set forth in § 273.13(a)(2).

(h) *Application processing procedures.* (1) The operating agency shall allow project-eligible households to indicate in writing their desire to receive food stamps. Such households shall be notified in writing, at the time such indication is made, that information contained in their TANF, SSI, or Medicaid application will be the basis of their food stamp eligibility determination. If mixed households are included in the project-eligible universe, the project operator shall develop a procedure to collect the necessary information on household members not receiving categorical aid.

(2) The operating agency may use simplified application and standardized benefit procedures only for those households containing at least one member certified to receive either TANF, SSI, or Medicaid benefits. If simplified procedures are to be used, the State agency shall make all eligibility determinations for households

jointly applying for food stamps and TANF, SSI, or Medicaid benefits within the 30-day food stamp processing period. If a household's eligibility for TANF, SSI, or Medicaid cannot be established within the 30-day period, normal food stamp application, certification, and benefit determination procedures shall be used and benefits shall be issued within 30 days if the household is eligible. Households which are jointly applying for TANF, SSI, or Medicaid, and which qualify for expedited service, shall be certified for food stamps using procedures prescribed at § 273.2(i). However, if the State agency can process the application of an expedited service household for categorical assistance within the expedited period prescribed at § 273.2(i), it may use simplified application and standardized benefit procedures to certify the household for food stamp benefits.

(i) *Regulatory requirements.* (1) All Food Stamp Program regulations shall remain in effect unless they are expressly altered by the provisions of this section or the provisions contained within the approved SA/SB Work Plan.

(2) *Certification periods for mixed households.* At the option of the operating agency, mixed households may be assigned certification periods of up to one year. Such households, if circumstances warrant, may be required to attend a face-to-face interview on a schedule which would conform to certification periods normally assigned such households as specified in § 273.10(f). At the time of the interview, the household shall be required to complete a modified application and provide additional information in accordance with § 273.2(f). If the household fails to comply with the interview review requirement or if information obtained indicates a revision in household eligibility or benefits, action will be taken in accordance with § 273.13, Notice of Adverse Action.

(j) *Quality control.* (1) Project eligible households selected for quality control review shall be reviewed by the State agency using special procedures, based on project requirements, which have been developed by the State agency and approved by FNS.

(2) The error rate(s) determined using the special quality control review procedures shall be included when determining the State agency's overall error rate.

(k) *Funding.* Operating agencies shall be reimbursed for project costs at the rates prescribed in § 277.4.

(l) *Evaluation.* Each project site shall conduct a self-evaluation of the project's impact on benefits, administrative costs and participation. Such evaluation shall be conducted within three months of project implementation. The results of the self-evaluation shall be sent to FNS within six months of project implementation. The impact of the project on project-eligible households' error rates shall be reported on an annual basis in accordance with § 273.23(m).

(m) *Reporting requirements.* Operating agencies shall be required to prepare and submit to FNS an annual report on the error rate attributable to project-eligible households. The timing of such reports shall coincide with the due date for the annual quality control report prescribed in § 275.21(d).

(n) *State agency monitoring.* Monitoring shall be undertaken to ensure compliance with these regulations and the Work Plan submitted to and approved by FNS. Project monitoring shall be conducted in accordance with the appropriate sections of part 275, Performance Reporting System, of these regulations. At a minimum, onsite reviews of the Simplified Application and Standardized Benefit Project shall be conducted once within six months of the project's implementation and then in accordance with the Management Evaluation review schedule for the project area.

(o) *Termination.* (1) FNS may terminate project operations for any reason and at any time on 60 days written notice to the administering State agency or political subdivision. State or local agencies may also choose to terminate their participation with 60 days written notice to FNS. In either such event, operating agencies shall be given sufficient time to return to normal operations in an orderly fashion.

(2) If termination occurs, FNS may select another site for project operations. Such selection shall be based on

either previously received project proposals or proposals received under a new solicitation.

[53 FR 26224, July 12, 1988]

§ 273.24 Time limit for able-bodied adults.

(a) *Definitions.* For purposes of the food stamp time limit, the terms below have the following meanings:

(1) *Fulfilling the work requirement* means:

(i) Working 20 hours per week, averaged monthly; for purposes of this provision, 20 hours a week averaged monthly means 80 hours a month;

(ii) Participating in and complying with the requirements of a work program 20 hours per week, as determined by the State agency;

(iii) Any combination of working and participating in a work program for a total of 20 hours per week, as determined by the State agency; or

(iv) Participating in and complying with a workfare program;

(2) *Working* means:

(i) Work in exchange for money;

(ii) Work in exchange for goods or services (''in kind'' work); or

(iii) Unpaid work, verified under standards established by the State agency.

(iv) Any combination of paragraphs (a)(2)(i), (a)(2)(ii) and (a)(2)(iii) of this section.

(3) *Work Program* means:

(i) A program under the Workforce Investment Act (Pub. L. 105–220);

(ii) A program under section 236 of the Trade Act of 1974 (19 U.S.C. 2296); or

(iii) An employment and training program, other than a job search or job search training program, operated or supervised by a State or political subdivision of a State that meets standards approved by the Governor of the State, including a program under § 273.7(f). Such a program may contain job search or job search training as a subsidiary component as long as such component is less than half the requirement.

(4) *Workfare program* means:

(i) A program under § 273.22; or

(ii) A comparable program established by a State or political subdivision of a State.

(5) *Caseload* means the average monthly number of individuals receiving food stamps during the 12-month period ending the preceding June 30.

(6) *Covered individual* means a food stamp recipient, or an individual denied eligibility for food stamp benefits solely due to paragraph 6(o)(2) of the Food Stamp Act who:

(i) Is not exempt from the work requirements under paragraph 6(o)(3) of the Food Stamp Act,

(ii) Does not reside in an area covered by a waiver granted under paragraph 6(o)(4) of the Food Stamp Act,

(iii) Is not fulfilling the work requirements of 6(o)(2) of the Food Stamp Act by working 20 hours a week averaged monthly, participating and complying with the requirements of a work program for 20 hours or more per week, participating in and complying with the requirements of a program under section 20 or a comparative program established by a State or political subdivision of a State,

(iv) Is not receiving food stamp benefits during the 3 months of eligibility provided under paragraph 6(o)(2) of the Food Stamp Act, and

(v) Is not receiving food stamp benefits under paragraph 6(o)(5) of the Food Stamp Act.

(b) *General Rule.* Individuals are not eligible to participate in the Food Stamp Program as a member of any household if the individual received food stamps for more than three countable months during any three-year period, except that individuals may be eligible for up to three additional countable months in accordance with paragraph (e) of this section.

(1) *Countable months.* Countable months are months during which an individual receives food stamps for the full benefit month while not:

(i) Exempt under paragraph (c) of this section;

(ii) Covered by a waiver under paragraph (f) of this section;

(iii) Fulfilling the work requirement as defined in paragraph (a)(1) of this section; or

(iv) Receiving benefits that are prorated in accordance with § 273.10.

(2) *Good cause.* As determined by the State agency, if an individual would have worked an average of 20 hours per

week but missed some work for good cause, the individual shall be considered to have met the work requirement if the absence from work is temporary and the individual retains his or her job. Good cause shall include circumstances beyond the individual's control, such as, but not limited to, illness, illness of another household member requiring the presence of the member, a household emergency, or the unavailability of transportation.

(3) *Measuring the three-year period.* The State agency may measure and track the three-year period as it deems appropriate. The State agency may use either a ''fixed'' or ''rolling'' clock. If the State agency chooses to switch tracking methods it must inform FNS in writing. With respect to a State, the three-year period:

(i) Shall be measured and tracked consistently so that individuals who are similarly situated are treated the same; and

(ii) Shall not include any period before the earlier of November 22, 1996, or the date the State notified food stamp recipients of the application of Section 824 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub. L. 104–193).

(4) *Treatment of income and resources.* The income and resources of an individual made ineligible under this paragraph (b) shall be handled in accordance with § 273.11(c)(2).

(5) *Benefits received erroneously.* If an individual subject to this section receives food stamp benefits erroneously, the State agency shall consider the benefits to have been received for purposes of this provision unless or until the individual pays it back in full.

(6) *Verification.* Verification shall be in accordance with § 273.2(f)(1) and (f)(8).

(7) *Reporting.* A change in work hours below 20 hours per week, averaged monthly, is a reportable change in accordance with § 273.12(a)(1)(viii). Regardless of the type of reporting system the State agency assigns to potential ABAWDs, the State agency must adhere to the statutory requirements of time-limited benefits for individuals who are subject to the work requirement. The State agency may opt to consider work performed in a job that was not reported according to the requirements of § 273.12 ''work.''

(8) *Applicability of Food Stamp Act.* Nothing in this paragraph (b) shall make an individual eligible for food stamp benefits if the individual is not otherwise eligible for benefits under the other provisions of these regulations and the Food Stamp Act of 1977, as amended.

(c) *Exemptions.* An individual is exempt from the time limit if he or she is;

(1) Under 18 or 50 years of age or older;

(2) Determined by the State agency to be medically certified as physically or mentally unfit for employment. An individual is medically certified as physically or mentally unfit for employment if he or she:

(i) Is receiving temporary or permanent disability benefits issued by governmental or private sources;

(ii) Is obviously mentally or physically unfit for employment as determined by the State agency; or

(iii) If the unfitness is not obvious, provides a statement from a physician, physician's assistant, nurse, nurse practitioner, designated representative of the physician's office, a licensed or certified psychologist, a social worker, or any other medical personnel the State agency determines appropriate, that he or she is physically or mentally unfit for employment.

(3) Is a parent (natural, adoptive, or step) of a household member under age 18, even if the household member who is under 18 is not himself eligible for food stamps;

(4) Is residing in a household where a household member is under age 18, even if the household member who is under 18 is not himself eligible for food stamps;

(5) Is otherwise exempt from work requirements under section 6(d)(2) of the Food Stamp Act, as implemented in regulations at § 273.7(b); or

(6) Is pregnant.

(d) *Regaining eligibility.* (1) An individual denied eligibility under paragraph (b) of this section, or who did not reapply for benefits because he was not meeting the work requirements under paragraph (b) of this section, shall regain eligibility to participate in the

Food Stamp Program if, as determined by the State agency, during any 30 consecutive days, he or she:

(i) Worked 80 or more hours;

(ii) Participated in and complied with the requirements of a work program for 80 or more hours;

(iii) Any combination of work and participation in a work program for a total of 80 hours; or participated in and complied with a workfare program; or

(iv) At State agency option, verifies that the he or she will meet one of the requirements in paragraphs (d)(1)(i), (d)(1)(ii), (d)(1)(iii), or (d)(1)(v) of this section, within the 30 days subsequent to application; or

(v) Becomes exempt.

(2) An individual regaining eligibility under paragraph (d)(1) of this section shall have benefits calculated as follows:

(i) For individuals regaining eligibility by working, participating in a work program, or combining hours worked and hours participating in a work program, the State agency may either prorate benefits from the day the 80 hours are completed or from the date of application, or

(ii) For individuals regaining eligibility by participating in a workfare program, and the workfare obligation is based on an estimated monthly allotment prorated back to the date of application, then the allotment issued must be prorated back to this date.

(3) There is no limit on how many times an individual may regain eligibility and subsequently maintain eligibility by meeting the work requirement.

(e) *Additional three-month eligibility.* An individual who regained eligibility under paragraph (d) of this section and who is no longer fulfilling the work requirement as defined in paragraph (a) of this section is eligible for a period of three consecutive countable months (as defined in paragraph (b) of this section), starting on the date the individual first notifies the State agency that he or she is no longer fulfilling the work requirement, unless the individual has been satisfying the work requirement by participating in a work or workfare program, in which case the period starts on the date the State agency notifies the individual that he or she is no longer meeting the work requirement. An individual shall not receive benefits under this paragraph (e) more than once in any three-year period.

(f) *Waivers.*

(1) *General.* On the request of a State agency, FNS may waive the time limit for a group of individuals in the State if we determine that the area in which the individuals reside:

(i) Has an unemployment rate of over 10 percent; or

(ii) Does not have a sufficient number of jobs to provide employment for the individuals.

(2) *Required data.* The State agency may submit whatever data it deems appropriate to support its request. However, to support waiver requests based on unemployment rates or labor force data, States must submit data that relies on standard Bureau of Labor Statistics (BLS) data or methods. A nonexhaustive list of the kinds of data a State agency may submit follows:

(i) To support a claim of unemployment over 10 percent, a State agency may submit evidence that an area has a recent 12 month average unemployment rate over 10 percent; a recent three month average unemployment rate over 10 percent; or an historical seasonal unemployment rate over 10 percent; or

(ii) To support a claim of lack of sufficient jobs, a State may submit evidence that an area: is designated as a Labor Surplus Area (LSA) by the Department of Labor's Employment and Training Administration (ETA); is determined by the Department of Labor's Unemployment Insurance Service as qualifying for extended unemployment benefits; has a low and declining employment-to-population ratio; has a lack of jobs in declining occupations or industries; is described in an academic study or other publications as an area where there are lack of jobs; has a 24-month average unemployment rate 20 percent above the national average for the same 24-month period. This 24-month period may not be any earlier than the same 24-month period the ETA uses to designate LSAs for the current fiscal year.

(3) *Waivers that are readily approvable.* FNS will approve State agency waivers where FNS confirms:

(i) Data from the BLS or the BLS cooperating agency that shows an area has a most recent 12 month average unemployment rate over 10 percent;

(ii) Evidence that the area has been designated a Labor Surplus Area by the ETA for the current fiscal year; or

(iii) Data from the BLS or the BLS cooperating agency that an area has a 24 month average unemployment rate that exceeds the national average by 20 percent for any 24-month period no earlier than the same period the ETA uses to designate LSAs for the current fiscal year.

(4) *Effective date of certain waivers.* In areas for which the State certifies that data from the BLS or the BLS cooperating agency show a most recent 12 month average unemployment rate over 10 percent; or the area has been designated as a Labor Surplus Area by the Department of Labor's Employment and Training Administration for the current fiscal year, the State may begin to operate the waiver at the time the waiver request is submitted. FNS will contact the State if the waiver must be modified.

(5) *Duration of waiver.* In general, waivers will be approved for one year. The duration of a waiver should bear some relationship to the documentation provided in support of the waiver request. FNS will consider approving waivers for up to one year based on documentation covering a shorter period, but the State agency must show that the basis for the waiver is not a seasonal or short term aberration. We reserve the right to approve waivers for a shorter period at the State agency's request or if the data is insufficient. We reserve the right to approve a waiver for a longer period if the reasons are compelling.

(6) *Areas covered by waivers.* States may define areas to be covered by waivers. We encourage State agencies to submit data and analyses that correspond to the defined area. If corresponding data does not exist, State agencies should submit data that corresponds as closely to the area as possible.

(g) *15 percent exemptions.* Subject to paragraphs (c) through (e) of this section, a State agency may provide an exemption from the time limits of paragraph 6(o)(2) of the Food Stamp Act for covered individuals. Exemptions do not count towards a State's allocation if they are provided to an individual who is otherwise exempt from the time limit during that month.

(1) *Fiscal year 1998.* A State agency may provide a number of exemptions such that the average monthly number of exemptions in effect during FY 1998 does not exceed 15 percent of the number of covered individuals in the State in FY 1998, as estimated by FNS, based on FY 1996 quality control data, and other factors FNS deems appropriate.

(2) *Subsequent fiscal years.* For FY 1999 and each subsequent fiscal year, a State agency may provide a number of exemptions such that the average monthly number of exemptions in effect during the fiscal year does not exceed 15 percent of the number of covered individuals in the State, as estimated by FNS, and adjusted by FNS to reflect changes in:

(i) The State's caseload, and

(ii) FNS' estimate of changes in the proportion of food stamp recipients covered by waivers granted under paragraph 6(o)(4) of the Food Stamp Act.

(h) *Adjustments* will be made as follows:

(1) *Caseload adjustments.* FNS shall adjust the number of covered individuals estimated for a State under paragraphs (c) and (d) of this section during a fiscal year if the number of food stamp recipients in the State varies from the State's caseload by more than 10 percent, as estimated by FNS.

(2) *Exemption adjustments.* During FY 1999 and each subsequent fiscal year, FNS shall adjust the number of exemptions allocated to a State agency based on the number of exemptions in effect in the State for the preceding fiscal year.

(i) If the State agency does not use all of its exemptions by the end of the fiscal year, FNS shall increase the estimated number of exemptions allocated to the State agency for the subsequent fiscal year by the remaining balance.

(ii) If the State agency exceeds its exemptions by the end of the fiscal

year, FNS shall reduce the estimated number of exemptions allocated to the State agency for the subsequent fiscal year by the corresponding number.

(i) *Reporting requirement.* The State agency shall track the number of exemptions used each month and report this number to the regional office on a quarterly basis as an addendum to the quarterly employment and training report (Form FNS–583) required by § 273.7(c)(6).

(j) *Other Program rules.* Nothing in this section shall make an individual eligible for benefits under the Food Stamp Act if the individual is not otherwise eligible for benefits under the other provisions of the Food Stamp Act.

[Amdt. 379, 64 FR 48257, Sept. 3, 1999, as amended at 66 FR 4469, Jan. 17, 2001]

§ 273.25 Simplified Food Stamp Program.

(a) *Definitions.* For purposes of this section:

(1) Simplified Food Stamp Program (SFSP) means a program authorized under 7 U.S.C. 2035.

(2) Temporary Assistance for Needy Families (TANF) means a State program of family assistance operated by an eligible State under its TANF plan as defined at 45 CFR 260.30.

(3) Pure-TANF household means a household in which all members receive assistance under a State program funded under part A of title IV of the Social Security Act (42 U.S.C. 601 *et seq.*).

(4) Mixed-TANF household means a household in which 1 or more members, but not all members, receive assistance under a State program funded under part A of title IV of the Social Security Act (42 U.S.C. 601 *et seq.*).

(5) Assistance under a State program funded under part A of title IV of the Social Security Act (42 U.S.C. 601 *et seq.*) means ''assistance'' as defined in regulations at 45 CFR 260.31.

(b) *Limit on benefit reduction for mixed-TANF households under the SFSP.* If a State agency chooses to operate an SFSP and includes mixed-TANF households in its program, the following requirements apply in addition to the statutory requirements governing the SFSP.

(1) If a State's SFSP reduces benefits for mixed-TANF households, then no more than 5 percent of these participating households can have benefits reduced by 10 percent of the amount they are eligible to receive under the regular FSP and no mixed-TANF household can have benefits reduced by 25 percent or more of the amount it is eligible to receive under the regular FSP. Reductions of $10 or less will be disregarded when applying this requirement.

(2) The State must include in its State SFSP plan an analysis showing the impact its program has on benefit levels for mixed-TANF households by comparing the allotment amount such households would receive using the rules and procedures of the State's SFSP with the allotment amount these households would receive if certified under regular Food Stamp Program rules and showing the number of households whose allotment amount would be reduced by 9.99 percent or less, by 10 to 24.99 percent, and by 25 percent or more, excluding those households with reductions of $10 or less. In order for FNS to accurately evaluate the program's impact, States must describe in detail the methodology used as the basis for this analysis.

(3) To ensure compliance with the benefit reduction requirement once an SFSP is operational, States must describe in their plan and have approved by FNS a methodology for measuring benefit reductions for mixed-TANF households on an on-going basis throughout the duration of the SFSP. In addition, States must report to FNS on a periodic basis the amount of benefit loss experienced by mixed-TANF households participating in the State's SFSP. The frequency of such reports will be determined by FNS taking into consideration such factors as the number of mixed-TANF households participating in the SFSP and the amount of benefit loss attributed to these households through initial or on-going analyses.

(c) *Application processing standards.* Under statutory requirements, a household is not eligible to participate in an SFSP unless it is receiving TANF assistance. If a household is not receiving TANF assistance (payments have not

been authorized) at the time of its application for the SFSP, the State agency must process the application using the regular Food Stamp Program requirements of § 273.2, including processing within the 30-day regular or 7-day expedited time frame, and screening for and provision of expedited service if eligible. The State agency must determine under regular food stamp rules the eligibility and benefits of any household that it has found ineligible for TANF assistance because of time limits, more restrictive resource standards, or other rules that do not apply to food stamps.

(d) *Standards for shelter costs.* Legislation governing the SFSP requires that State plans must address the needs of households with high shelter costs relative to their income. If a State chooses to standardize shelter costs under the SFSP, it must, therefore, use multiple standards that take into consideration households with high shelter costs versus those with low shelter costs. A State is prohibited from using a single standard based on average shelter costs for all households participating in an SFSP.

(e) *Opportunity for public comment.* States must provide an opportunity for public input on proposed SFSP plans (with special attention to changes in benefit amounts that are necessary in order to ensure that the overall proposal not increase Federal costs) through a public comment period, public hearings, or meetings with groups representing participants' interests. Final approval will be given after the State informs the Department about the comments received from the public. After the public comment period, the State agency must inform the Department about the comments received from the public and submit its final SFSP plan for Departmental approval.

[Amdt. 388, 65 FR 70211, Nov. 21, 2000]

PART 274—ISSUANCE AND USE OF COUPONS

Sec.

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SOURCE: 54 FR 7004, Feb. 15, 1989, unless otherwise noted.

EDITORIAL NOTE: OMB control numbers relating to this part 274 are contained in § 271.8.

§ 274.1 State agency issuance responsibility.

(a) *Basic issuance requirements.* State agencies shall establish issuance and accountability systems which ensure that only certified eligible households receive benefits; that coupons are accepted, stored, and protected after delivery to receiving points within the State; that Program benefits are timely distributed in the correct amounts; and that coupon issuance and reconciliation activities are properly conducted and accurately reported to FNS.

(b) *Contracting or delegating issuance responsibilities.* State agencies may assign to others such as banks, savings and loan associations, the Postal Service, community action and migrant service agencies, and other commercial businesses, the responsibility for the issuance and storage of food coupons. State agencies may permit contractors to subcontract assigned issuance responsibilities.

(1) Any assignment of issuance functions shall clearly delineate the responsibilities of both parties. The State agency remains responsible, regardless of any agreements to the contrary, for ensuring that assigned duties are carried out in accordance with these regulations. In addition, the State agency is strictly liable to FNS for all losses of coupons, even if those losses are the result of the performance of issuance, security, or accountability duties by another party.

(2) All issuance contracts shall follow procurement standards set forth in part 277.

(3) The State agency shall not assign the issuance of coupons to any retail food firm unless the State agency provides evidence that such an arrangement is needed to maintain or increase the efficient and effective operation of the Program, as described below.

(i) Coupons may be issued inside or within a retail food store, if the issuance is performed by a bank, credit union or other financial organization independent of the retail food store.

(ii) Coupons may be issued on-site by a retail food store under the following conditions:

(A) The State agency adequately documents that unless the retail food store is permitted to issue coupons on-site there will be a hardship, not just an inconvenience, to recipients. The State agency shall contract directly with the retail food firm and shall provide oversight to such entity; or

(B) In the absence of the hardship documentation, a retail food firm itself may perform issuance as a subcontractor to a bank, credit union or other independent financial organization, with strict oversight by the financial organization.

(4) The State agency may contract with the U.S. Postal Service for the issuance of benefits. The Department and the Postal Service have signed an agreement which governs benefit issuance by the Postal Service. A State agency's contract with the Postal Service does not exempt the State agency from the requirement that it comply with these regulations. However, State agencies may negotiate contracts with the Postal Service on all terms and conditions as long as such provisions do not conflict with these regulations.

(5) In project areas or parts of project areas where FNS has required a Photographic identification (Photo ID) system to be used, the State agency shall include in any contract or agreement with an issuing agent a provision establishing the agent's liability to the State agency for the face value of coupons issued in any authorization document transaction where the authorization document is found to have been stolen or otherwise not received by the household certified as eligible, if the cashier has not fulfilled the requirements contained in § 274.10. This same provision shall apply to issuance contracts in project areas or parts of project areas where FNS has granted a waiver or waivers of any provision(s) of the Photo ID requirements based on a determination that State agency alternatives will not compromise the security of the ID system.

(c) *State monitoring of coupon issuers.* The State agency's accountability system shall include procedures for monitoring coupon issuers to assure that the day-to-day operations of all coupon issuers comply with these regulations, to identify and correct deficiencies, and to report violations of the Act or regulations to FNS.

(1) The State agency shall conduct an onsite review of each coupon issuer and bulk storage point at least once every three years. All offices or units of a coupon issuer are subject to this review requirement. The State agency shall base each review on the specific activities performed by each coupon issuer or bulk storage point. A physical inventory of coupons shall be taken at each location and that count compared with perpetual inventory records and the monthly reports of the coupon issuer or bulk storage point. This review may be conducted at branch sites as well as the main offices of each issuer and bulk storage point that operates in more than one office. Except in unusual circumstances, the Postal Inspection Service will conduct onsite reviews of Postal Service issuance operations.

(2) This review requirement may be fulfilled in part or in total by the performance reporting review system, part 275. The State agency may delegate this review responsibility to another unit of the State government or contract with an outside firm with expertise in auditing and accounting. State agencies may use the results of reviews of coupon issuers by independent audit or accounting firms as long as the food coupon issuance operations of the coupon issuer are included in the review.

(d) *Changes.* The State agency shall inform FNS whenever a project area, issuance point, reconciliation point, replacement point, bulk storage reporting point or coupon shipment receiving point is created, relocated, or terminated. The State agency shall report

the change at least 30 days prior to the effective date of the change. Initial notification may be made by telephone but the State agency shall confirm the information in writing as soon as possible.

(e) *Advance planning documentation.* State agencies must comply with the procurement requirements of part 277 for the acquisition, design, development, or installation of automated data processing (ADP) equipment. With certain exceptions detailed in part 277, State agencies must receive prior approval for the design and acquisition of ADP systems through submission of advance planning documents (APD's).

§ 274.2 Providing benefits to participants.

(a) *General.* Each State agency is responsible for the timely and accurate issuance of benefits to certified eligible households in accordance with these regulations. Those households comprised of elderly or disabled members which have difficulty reaching issuance offices, and households which do not reside in a permanent dwelling or of a fixed mailing address shall be given assistance in obtaining their regular monthly benefits. State agencies shall assist these households by arranging for the mail issuance of coupons to them, by assisting them in finding authorized representatives who can act on their behalf, or by using other appropriate means.

(b) *Availability of benefits.* All newly-certified households, except those that are given expedited service, shall be given an opportunity to participate no later than 30 calendar days following the date the application was filed. An opportunity to participate consists of providing households with coupons or authorization documents and having issuance facilities open and available for the households to obtain their benefits. State agencies must mail authorization documents or coupons in time to assure that the documents can be transacted, or the coupons spent after they are received but before the 30-day standard expires. A household has not been provided an opportunity to participate within the 30-day standard if the authorization document or benefits are mailed on the 29th or 30th day. Neither has an opportunity to participate been provided if the authorization document is mailed on the 28th day but no issuance facility is open on the 30th day. For households entitled to expedited service, the State agency shall make benefits available to the household not later than the fifth calendar day following the date of application. Whatever system a State agency uses to ensure meeting this delivery standard shall be designed to allow a reasonable opportunity for redemption of ATPs no later than the fifth calendar day following the date of application.

(c) *Combined allotments.* For those households which are to receive a combined allotment, the State agency shall provide the benefits for both months as an aggregate (combined) allotment, or as two separate allotments, with the same validity period, made available at the same time, in accordance with the timeframes specified in § 273.2 of this chapter.

(d) *Ongoing households.* All households shall be placed on an issuance schedule so that they receive their benefits on or about the same date each month. The date upon which a household receives its initial allotment after certification need not be the date that the household must receive its subsequent allotments.

(1) State agencies that use direct-mail issuance shall stagger issuance over at least 10 days of the issuance month, and may stagger issuance over the entire issuance month. State agencies using a method other than direct-mail issuance may stagger issuance throughout the month, or for a shorter period. When staggering benefit delivery, however, State agencies shall not allow more than 40 days to elapse between the issuance of any two allotments provided to a household participating longer than two consecutive, complete months. Regardless of the issuance schedule used, the State agency shall adhere to the reporting requirements specified in § 274.4.

(2) Upon the request of the tribal organization that exercises governmental jurisdiction over a reservation, the State agency shall stagger the issuance of benefits for eligible households located on reservations for at least 15 days each month.

(3) When a participating household is transferred from one issuance system or procedure to another issuance system or procedure, the State agency shall not permit more than 40 days to elapse between the last issuance under the previous system or procedure, and the first issuance under the new system or procedure. The 40-day requirement does not apply to instances in which actions by recipients, such as failure to submit a monthly report, disrupt benefits. Transfers include, but are not limited to, households being moved into or out of a staggered issuance procedure, households on a fluctuating schedule within a staggered system, and households being moved from a direct-mail issuance system to an authorization document system. If the State agency determines that more than 40 days may elapse between issuances, the State agency shall divide the new issuance into two parts, with one part being issued within the 40-day period, and the second part, or supplemental issuance, being issued on the household's established issuance date in the new system or procedure. The supplemental issuance cannot provide the household more benefits than the household is entitled to receive.

(4) Notwithstanding the above provisions, in months in which benefits have been suspended under the provisions of § 271.7, State agencies may stagger issuance to certified households following the end of the suspension. In such situations, State agencies may, at their option, stagger issuance from the date issuance resumes through the end of the month or over a five-day period following the resumption of issuance, even if this results in benefits being issued after the end of the month in which the suspension occurred.

(e) *Issuance services.* State agencies are responsible for determining the location and hours of operation of issuance services. In doing so, State agencies shall ensure that the issuance schedules set forth in paragraphs (b) and (c) of this section are met. In addition, issuance authorization documents, such as ATP cards, should be valid only in the geographic area within the State that is encompassed by the reconciliation system through which the issuance will be processed; however, the validity area may be extended within the State at the State agency's option. State agencies may also restrict the validity of these documents to smaller areas or particular issuance sites with minimal practicable inconvenience to affected households.

(f) *Issuance of coupons to households.* The State agency shall issue coupon books in accordance with a table for coupon-book issuance provided by FNS, except as provided in paragraphs (e)(1), (e)(2), and (e)(3) of this section. The State agency shall issue the coupon books in consecutive serial number order whenever possible, starting with the lowest serial number in each coupon book denomination. The household member whose name appears on the ID card shall sign the coupon books; if more than one name appears, any named member may sign the books.

(1) The State agency may deviate from the table if the specified coupon books are unavailable.

(2) Exceptions from the table are authorized for blind and visually-handicapped participants who request that all coupons be of one denomination. Recipients who have no fixed address (homeless), and residents of shelters for battered women and children, as defined in § 271.2, and which are not authorized by FNS to redeem through wholesalers, may request that all or part of their coupons be of the $1 denomination. State agencies are authorized to grant this request when feasible.

(3) If a household is eligible for an allotment of $1, $3, or $5, the State agency shall adjust those allotments to $2, $4, or $6, respectively.

(g) *Issuance in rural areas.* Unless the area is served by an electronic benefit transfer system, State agencies must use direct-mail issuance in any rural areas where the State agency determines that recipients face substantial difficulties in obtaining transportation in order to obtain their food stamp benefits by methods other than direct-mail issuance. State agencies must report any exceptions to direct-mail

issuance as specified under § 272.3(a)(2) and (b)(2) of this chapter.

[54 FR 7004, Feb. 15, 1989, as amended at 54 FR 51351, Dec. 15, 1989; 60 FR 20182, Apr. 25, 1995; 65 FR 70212, Nov. 21, 2000]

§ 274.3 Issuance systems.

(a) *System classification*. State agencies may issue benefits to households through any of the following systems:

(1) An authorization document system that uses a document produced for each month's issuance. The intermediary document, such as an ATP, may be distributed on a monthly basis to each household and surrendered by the household to the coupon issuer, or provided monthly to issuers with either single household authorizations or multiple household authorizations on each (such as a computer-generated listing). For reconciliation and identification purposes, the authorization document shall contain the following:

(i) Serial number;

(ii) Case name and address;

(iii) Case number;

(iv) Allotment amount;

(v) Benefit month or expiration date;

(vi) Name of issuing project area; and,

(vii) Space for signature of household member. An additional space for an authorized representative may be included.

(2) A direct access system that directly accesses a master issuance file at the time that benefits are issued to households. This system shall use manual card access or an automated access to the master issuance file. Systems of this type include the manual Household Issuance Record (HIR) card system and on-line issuance terminals.

(3) A mail issuance system that directly delivers coupons through the mail to households.

(4) An on-line Electronic Benefit Transfer system in which food stamp benefits are stored in a central computer database and electronically accessed by households at the point-of-sale via reusable plastic cards.

(5) An off-line Electronic Benefit Transfer system in which benefit allotments can be stored on a card or in a card access device and used to purchase authorized items at a point-of-sale terminal without real-time authorization from a central processor.

(b) *Other systems*. A State agency may develop an issuance system which cannot be readily categorized into one of the systems described in paragraph (a) of this section. FNS shall prescribe the reporting and reconciliation requirements which apply to that system.

(c) *Alternative benefit issuance system*. (1) If the Secretary, in consultation with the Office of the Inspector General, determines that Program integrity would be improved by changing the issuance system of a State, the Secretary shall require the State agency to issue or deliver coupons using another method. The alternative method may be one of the methods described in paragraph (a) of this section, or the Secretary may require a State agency to issue, in lieu of coupons, reusable documents to be used as part of an automated data processing and information retrieval system and to be presented by, and returned to, recipients at retail food firms for the purpose of purchasing food. The determination of which alternative to use will be made by FNS after consultation with the State agency. The cost of conversion will be shared by the Department and the State agency in accordance with the cost accounting provision of part 277.

(2) The cost of documents or systems which may be required as a result of a permanent alternative issuance system pursuant to this section shall not be imposed upon retail food firms participating in the Program.

(d) *System requirements*. (1) The State agency shall establish a master issuance file which is a composite of the issuance records of all certified food stamp households. The State agency shall establish the master issuance file in a manner compatible with its system used for maintaining case record information and shall separate the information on the master issuance file into active and inactive case file categories. The master issuance file shall contain all the information needed to identify certified households, issue household benefits, record the participation activity for

each household and supply all information necessary to fulfill the reporting requirements prescribed in § 274.4.

(i) The master issuance file shall be kept current and accurate. It shall be updated and maintained through the use of documents such as notices of change and controls for expired certification periods.

(ii) Before entering a household's data on the master issuance file, the State agency shall review the master issuance file to ensure that the household is not currently participating in, or disqualified from, the Program. If an authorization document is issued under the expedited service requirements of §§ 273.2(i) and 274.2(b), the State agency shall complete as much of the master issuance file review as possible prior to issuing the authorization document. Any uncompleted reviews shall be completed after issuance and appropriate corrective action shall be taken to recover overissuance.

(2) State agencies should divide issuance responsibilities between at least two persons to prevent any single individual from having complete control over the authorization of issuances and the issuances themselves. Responsibilities to be divided include maintenance of inventory records, assembly of benefits and preparation of envelopes for mailing. If issuance functions in an office are handled by one person, a second-party review shall be made to verify coupon inventory, the reconciliation of the mail log, and the number of mailings prepared.

(3) State agencies shall establish controls to prevent a household from concurrently receiving benefits through more than one issuance system.

(4) State agencies shall clearly identify issuances in their accountability systems as initial, supplemental, replacement, or restored benefits.

(5) State agencies shall establish a Statewide record of replacement issuances granted to households to prevent a household from receiving more than two countable replacement issuances as defined in § 274.6(b) in a six-month period.

(6) State agencies which issue benefits by mail shall, at a minimum, use first class mail and sturdy nonforwarding envelopes or packages to send benefits to households.

(e) *Validity periods.* (1) State agencies shall establish validity periods for issuances made in both authorization document and direct access systems. A validity period is the time frame during which a household may obtain benefits by transacting an authorization document, or receiving the benefits directly at an issuance point. Generally, the validity period coincides with the issuance month or the period of intended use, which may or may not be a calendar month. However, in instances in which authorization documents are distributed, or benefits become available for ongoing households late in the issuance month, the State agency shall extend the validity or availability period for either twenty (20) additional days, or until the end of the following issuance month, at the State agency's option. The State agency may also choose one of two dates which will initiate this extension of the validity or availability period. The State agency may choose to extend the period for authorization documents distributed or for benefits made available, on or after the 20th day of the issuance month or after the 15th day of the issuance month. Whichever date the State agency chooses to initiate the required extension, the State agency must use the date consistently for all extensions in this category. A household which does not transact its authorization document, or obtain the benefits directly from an issuance point during the issuance's validity period, shall lose its entitlement to the benefits, and the State agency shall not issue benefits to such a household for such a period.

(2) State agencies experiencing excessive issuance losses may develop systems that have authorization documents that expire in shorter time frames than those set forth in paragraph (e) of this section. However, such systems shall include methods that allow households the opportunity to obtain their benefits for the full validity period of a month's issuance.

[54 FR 7004, Feb. 15, 1989, as amended at 54 FR 51351, Dec. 15, 1989; 57 FR 11249, Apr. 1, 1992; 60 FR 20183, Apr. 25, 1995; Amdt. 390, 65 FR 59110, Oct. 4, 2000]

§ 274.4 Reconciliation and reporting.

(a) *Reconciliation*. State agencies shall account for all issuance through a reconciliation process. The manner in which this is done varies depending on the type of issuance system being used.

(1) Described below are the required reconciliation procedures for each type of system.

(i) In all issuance systems coupon issuers shall reconcile their issuances daily using daily tally sheets, cashiers' daily reports, tapes or printouts.

(ii) In systems where a record-for-issuance is used, all issuances authorized for the month shall be merged into one record-for-issuance at the end of each month. All issuances made during the month shall then be posted to the record-for-issuance. The record-for-issuance shall then be compared with the master issuance file. Findings from this comparison shall be reported on the Form *FNS–46* as prescribed in paragraph (b)(2) of this section.

(iii) In systems where no record-for-issuance is used, issuances made during each month shall be reconciled to the master issuance file. Findings from this reconciliation shall be reported on the Form *FNS–46* as prescribed in paragraph (b)(2) of this section.

(iv) In addition to the reconciliation activity prescribed in the paragraphs (a)(1)(i), (a)(1)(ii) and (a)(1)(iii) of this section, the following steps shall be followed in authorization document systems:

(A) The State agency shall determine and verify the transacted value of authorized coupon issuances.

(B) Any batches of transacted authorization documents that do not reconcile shall be maintained intact by the State agency until the discrepancy is resolved with the coupon issuer and/or a review of the case files.

(C) The State agency shall compare all transacted authorization documents with the record-for-issuance or master issuance file as appropriate. Any documents that do not match with the record-for-issuance or master issuance file shall be identified and reported as required in paragraph (b)(2) of this section.

(b) *Required reports*. The State agency shall review and submit the following reports to FNS on a monthly basis:

(1) Form *FNS–250*, Food Coupon Accountability Report.

(i) This report, executed monthly by coupon issuers and bulk storage points, shall be signed by the coupon issuer or appropriate official, certifying that the information is true and correct to the best of that person's knowledge and belief.

(ii) Coupon issuers and bulk storage points shall submit supporting documentation to the State agency which will allow verification of the monthly report. At a minimum, such documentation shall include documents supporting coupon shipments, transfers, issuances, and destruction.

(iii) For those State agencies which use an authorization document issuance system, coupon issuers shall submit transacted authorization documents batched according to each day's activity in accordance with a schedule prescribed by the State agency, but not less often than monthly.

(iv) All mail issuance activity, including the value of mail issuance replacements, shall be reported. Original allotments (first benefits issued for a particular month to an ongoing household) subsequently recovered by the issuance office during the current month shall be returned to inventory and noted on the mail issuance log. When the original allotment is returned to inventory and the replacement issuance is issued during the current month (month in which original benefits were issued), the ''replacement'' shall not be reported.

(v) The Form *FNS–250* shall be reviewed by the State agency for accuracy, completeness and reasonableness. The State agency shall attest to the accuracy of these reports and shall submit the reports so they will be received by FNS by the 45th day after the report month. Any revisions to the Form *FNS–250* for a given month shall be submitted to FNS within 105 days after the end of the report month.

(vi) FNS shall review each form, submitted through the State agency, for completeness, accuracy and reasonableness and shall reconcile inventory with shipping records, and shall review State agency verification of coupon issuer and bulk storage point monthly reports. FNS may supplement the

above reviews by unannounced spot checks of inventory levels and coupon security arrangements at coupon issuers and at bulk storage points.

(2) Form *FNS–46*, Issuance Reconciliation Report, shall be submitted by each State agency operating an issuance system. The report shall be prepared at the level of the State agency where the actual reconciliation of the record-for-issuance and master issuance file occurs.

(i) The State agency shall identify and report the number and value of all issuances which do not reconcile with the record-for-issuance and/or master issuance file. All unreconciled issuances shall be identified as specified on this reporting document.

(ii) The report shall be received by FNS no later than 90 days following the end of the report month.

(3) Form *FNS–259*, Food Stamp Mail Issuance Report.

(i) Form *FNS–259* reports shall be submitted by State agencies for each unit using a mail issuance system as specified in the Mail Issuance Loss Reporting Plan required in § 272.2(d)(1)(iv). The State agency shall submit the Form *FNS–259* reports so that they are received in FNS by the 45th day following the end of each quarter.

(ii) The State agency shall verify the issuance by a comparison with issuance on the appropriate coupon issuer's Form *FNS–250*.

(4) Form *FNS–388*, State Coupon Issuance and Participation Estimates.

(i) State agencies shall telephone or transmit by computer the Form *FNS–388* data and mail the reports to the FNS regional office no later than the 19th day of each month. When the 19th falls on a weekend or holiday, the Form *FNS–388* data shall be reported by telephone or transmitted by computer and mailed on the first work day after the 19th. The Form *FNS–388* report shall be signed by the person responsible for completing the report or a designated State agency official.

(ii) The Form *FNS–388* report shall provide Statewide estimated or actual totals of issuance and participation for the current and previous month, and actual or final participation totals for the second preceding month. In addition to the participation totals for the second preceding months of January and July, provided on the March and September reports, non-assistance (NA) and public assistance (PA) household and person participation breakdowns shall be provided. As an attachment to the March and September Form *FNS–388* reports, State agencies shall provide project area breakdowns of the coupon issuance and NA/PA household and person participation data for the second preceding months of January and July.

(iii) State agencies shall submit any proposed changes in their estimation procedures to be used in determining the Form *FNS–388* data to the FNS regional office for review and comment. FNS shall monitor the accuracy of the estimated dollar value of coupons issued as reported on the Form *FNS–388* against the Statewide total dollar value of coupons as reported by the issuance agents on the Form *FNS–250*, Food Stamp Accountability Report, for the corresponding month. FNS shall monitor the accuracy of the Statewide estimated number of households and persons participating as reported on the Form *FNS–388* report against the Statewide actual total participation as reported on succeeding Form *FNS–388* reports and against the semiannual project area participation totals attached to the March and September Form *FNS–388* reports. The FNS accuracy standards for the issuance and participation estimates are that estimates for the current month be within (+) or (−) four (4) percent of actual levels, and the estimates for the previous month be within (+) or (−) two (2) percent of actual levels. State agencies shall explain any unusual circumstances that cause coupon issuance and/or participation data to not meet these accuracy standards. If a State agency fails to meet these accuracy standards, FNS shall notify the State agency and assist the State agency in revising its estimating procedures to improve its reporting.

(iv) A participating household is one that is certified and has been, or will be, issued benefits (whether or not the benefits are used), and households that

have met the eligibility requirements, but will receive zero benefits.

[54 FR 7004, Feb. 15, 1989, as amended at 54 FR 51351, Dec. 15, 1989]

§ 274.5 [Reserved]

§ 274.6 Replacement issuances to households.

(a) *Providing replacement issuance.* (1) Subject to the restrictions in paragraph (b) of this section, State agencies shall provide replacement issuances to a household when the household reports that:

(i) Its authorization document was not received in the mail or was stolen from the mail, was stolen after receipt, was destroyed in a household misfortune, or was improperly manufactured or mutilated;

(ii) Its coupons were not received in the mail, were stolen from the mail, were destroyed in a household misfortune, or were improperly manufactured or mutilated;

(iii) Food purchased with food stamps was destroyed in a household misfortune; or

(iv) It received a partial coupon allotment.

(2) State agencies shall not provide replacement issuances to households when coupons are lost, stolen or misplaced after receipt, authorization documents are lost or misplaced after receipt, when authorization documents or coupons are totally destroyed after receipt in other than a disaster or misfortune, or when coupons sent by registered or certified mail are signed for by anyone residing with or visiting the household. In addition, replacement issuances shall not be made if the household or its authorized representative has not signed and returned the household statement required in paragraph (c) of this section, where applicable.

(3) Where FNS has issued a disaster declaration and the household is eligible for disaster food stamp benefits under the provisions of part 280, the household shall not receive both the disaster allotment and a replacement allotment for a misfortune.

(4) In order for a replacement to be considered non-countable, the replacement must not result in a loss to the Program.

(b) *Replacement restrictions.* (1) Replacement issuances shall be provided only if a household timely reports a loss orally or in writing, and provides a statement of nonreceipt if the original authorization document or allotment has not been returned to the State agency at the time of the request for replacement. The report will be considered timely if it is made to the State agency within 10 days of the date an authorization document is stolen from the household, or an authorization document, coupons, or food purchased with food stamps is destroyed in a household misfortune. In mail issuance (ATPs or coupons), the report must be made within the period of intended use, unless the original issuance was made after the 20th of the month, in which case the period of intended use is 20 days from original issuance, or the last day of the next month (State agency option).

(2) The number of replacement issuances which a household may receive shall be limited as follows:

(i) State agencies shall limit replacement issuances to a total of two countable replacements in six months for authorization documents or coupons not received in, or stolen from, the mail; authorization documents stolen after receipt; and partial coupon allotments. However, no limit shall be put on the number of replacements of partial allotments if the partial allotments were due to State agency error. Separate limits shall not apply for each of these types of loss.

(ii) State agencies shall limit replacement issuances per household to two countable replacements in six months for authorization documents or coupons reported as destroyed in a household misfortune. This limit is in addition to the limit in paragraph (b)(2)(i) of this section.

(iii) No limit on the number of replacements shall be placed on the replacement of authorization documents or coupons which were improperly manufactured or mutilated or food purchased with food stamp benefits which was destroyed in a household misfortune.

(iv) The replacement issuance shall *not* be considered a countable replacement if:

(A) The original or replacement issuance is returned or otherwise recouped by the State agency;

(B) The original authorization document is not transacted;

(C) The replacement authorization document is not transacted; or

(D) The replacement is being issued due to a State agency issuance error.

(3) Except for households certified under 7 CFR part 280, replacement issuances shall be provided in the amount of the loss to the household, up to a maximum of one month's allotment, unless the issuance includes restored benefits which shall be replaced up to their full value.

(c) *Household statement of nonreceipt.* (1) Prior to issuing a replacement, the State agency shall obtain from a member of the household a signed statement attesting to the household's loss. This statement shall not be required if the reason for the replacement is that the original authorization document or coupons were improperly manufactured or mutilated, or if the original issuance has already been returned. The required statement may be mailed to the State agency if the household member is unable to come into the office because of age, handicap or distance from the office and is unable to appoint an authorized representative.

(2) If the signed statement or affidavit is not received by the State agency within 10 days of the date of report, no replacement shall be made. If the 10th day falls on a weekend or holiday, and the statement is received the day after the weekend or holiday, the State agency shall consider the statement timely received.

(3) The statement shall be retained in the case record. It shall attest to the nonreceipt, theft, loss or destruction of the original issuance and specify the reason for the replacement. It shall also state that the original or replacement issuance will be returned to the State agency if the original issuance is recovered by the household and that the household is aware of the penalties for intentional misrepresentation of the facts, including but not limited to, a charge of perjury for a false claim. In addition, the statement shall advise the household that:

(i) The household may request to be placed on an alternate issuance system after one report of nonreceipt;

(ii) After two reports in a six-month period of loss or theft prior to receipt, the household shall be placed on an alternate delivery system;

(iii) After two reports in a six-month period of loss or theft prior to receipt and/or theft of an authorization document after receipt the State agency may delay or deny further replacements for such causes; and

(iv) If the statement of nonreceipt is not signed and returned within ten (10) days of the date the loss was reported, the State agency shall not replace the coupons or authorization document.

(d) *Time limits for making replacements.* (1) Replacement issuances shall be provided to households within 10 days after report of nondelivery or loss (15 days if issuance was by certified or registered mail) or within two (2) working days of receiving the signed household statement required in paragraph (c) of this section, whichever date is later.

(i) Replacement of mutilated coupons shall be delayed until a determination of the value of the coupons can be made in accordance with paragraph (f)(3) of this section.

(ii) If the household has already been issued the maximum allowable number of countable replacements, subsequent replacements shall be delayed until the agency has verified that the original issuance was returned or the original authorization document was not transacted. In a system using authorization documents, due to the time it takes to post and reconcile all authorization documents, it may not be known at the time of the replacement request whether prior replacements are countable replacements and, therefore, whether the household has reached its limit. In such cases, the allotment shall be restored when the State agency verifies that the limit on countable replacements has not been reached.

(iii) The State agency shall deny or delay replacement issuances in cases in which available documentation indicates that the household's request for replacement appears to be fraudulent.

(2) The household shall be informed of its right to a fair hearing to contest the denial or delay of a replacement issuance. Replacements shall not be made while the denial or delay is being appealed.

(e) *Replacing issuances lost in the mail or stolen prior to receipt by the household.* State agencies shall comply with the following procedures in replacing issuances reported lost in the mail or stolen prior to receipt by the household:

(1) Determine if the authorization documents or benefits were validly issued, if they were actually mailed, if sufficient time has elapsed for delivery or if they were returned in the mail. If a delivery of a partial allotment is reported, the State agency shall determine the value of the coupons not delivered and determine whether the report of receipt of a partial allotment is corroborated by evidence that the coupon loss was due to damage in the mail before delivery or by a discrepancy in the issuance unit's inventory;

(2) Determine, to the extent possible, the validity of the request for a replacement. This includes determining whether the original issuance has been returned to the State agency and, in a system utilizing authorization documents, whether the original authorization document has been transacted and, if so, whether the recipient's signature on the authorization document matches the signature on the ID card. In a Photo ID area, the State agency shall determine if the ID serial number annotated on the authorization document matches the serial number on the recipient's ID card;

(3) Issue a replacement in accordance with paragraphs (b), (c) and (d) of this section if the household is eligible;

(4) Place the household on an alternate delivery system, if warranted, in accordance with paragraph (g) of this section; and

(5) Take other action, such as correcting the address on the master issuance file, warranted by the reported nondelivery.

(f) *Replacing issuances after receipt by the household.* Upon receiving a request for replacement of an issuance reported as stolen or destroyed after receipt by the household, the State agency shall determine if the issuance was validly issued. The State agency shall also comply with all applicable provisions in paragraphs (b), (c) and (d) of this section, as well as the following procedures for each type of replacement:

(1) Prior to replacing an authorization document which was reported stolen after receipt by the household, the State agency shall determine, to the extent possible, the validity of the request for replacement. For example, the State agency may determine whether the original authorization document has been transacted and, if so, whether the signature on the original authorization document matches that on the household statement. In a Photo ID or serialized area, the State agency shall determine if the ID serial number annotated on the authorization document matches the serial number on the recipient's ID card. Any replacement which results in duplicate participation shall be considered a household error, and the replacement countable, when the ID serial number shown on the authorization document matches the serial number on the recipient's card, unless the ID card was reported lost or stolen prior to the replacement. The State agency may require households, on a case-by-case basis, to report the theft to a law enforcement agency and to provide verification of such report.

(2) Prior to replacing destroyed coupons or authorization documents, or destroyed food that was purchased with food stamp benefits, the State agency shall determine that the destruction occurred in a household misfortune or disaster, such as, but not limited to, a fire or flood. This shall be verified through a collateral contact, documentation from a community agency including, but not limited to, the fire department or the Red Cross, or a home visit. The State agency shall provide replacements of coupons, authorization documents, and/or food in the actual amount of the loss, but not exceeding one month's allotment, unless the exception in paragraph (b)(3) of this section, applies.

(3) Households cannot receive a replacement for coupons lost or stolen after receipt.

(4) The State agency shall provide replacements for improperly manufactured or mutilated coupons or authorization documents as follows:

(i) Coupons received by a household, and subsequently mutilated or found to be improperly manufactured shall be replaced in the amount of the loss to the household. State agencies shall replace mutilated coupons when three-fifths of a coupon is presented by the household. The State agency shall examine the improperly manufactured or mutilated coupons to determine the validity of the claim and the amount of coupons to be replaced. If the State agency can determine the value of the improperly manufactured or mutilated coupons, the State agency shall replace the unusable coupons in a dollar-for-dollar exchange. After exchanging the coupons and completing a Form *FNS–135*, Affidavit of Return or Exchange of Food Coupons, the State agency shall destroy the coupons in accordance with the procedures contained in § 274.7(f). If the State agency cannot determine the value of the improperly manufactured or mutilated coupons, the State agency shall cancel the coupons by writing or stamping ''canceled'' across the face of the coupons and forward the coupons to FNS for a determination of the value by the U.S. Bureau of Engraving and Printing.

(ii) Authorization documents received by a household and subsequently mutilated or found to be improperly manufactured shall be replaced only if they are identifiable. ''Identifiable'' means that the State agency is able to determine the amount of the issuance and that the authorization document was validly issued to the household within the last 30 days. For example, if the authorization document serial number is legible, the State agency can determine from the record-for-issuance or manual authorization document log to which household the authorization document was issued, the date of issuance, and the amount. Similarly, if the case number and validity period are legible, the State agency may be able to determine to whom the authorization document was issued and the amount. If more than one authorization document was issued to the household and the State agency cannot determine which authorization document was mutilated, the replacement shall be issued in the lesser amount. Improperly manufactured or mutilated authorization documents shall be surrendered to the State agency.

(g) *Alternate issuance system for a household.* The State agency shall offer to place a household in an alternate issuance system after the first report of nonreceipt, or when circumstances exist that indicate that the household may not receive its benefits through the normal issuance system, such as when a household has a history of reported nonreceipt of ATP's. After two requests for replacement of original or replacement ATP's reported as non-delivered in a six-month period, the State agency shall issue benefits to that household under an alternate issuance system. The two requests may be for either an original or a replacement ATP. The State agency shall keep the household on the alternate issuance system for the length of time the State agency determines to be necessary. The State agency may return the household to the regular issuance system if the State agency finds that the circumstances leading to the loss have changed and the risk of loss has lessened. The placement of a household on an alternate issuance system and the length of time the household is on this system is not subject to the fair hearing process.

(h) *Documentation and reconciliation of replacement issuances.* (1) The State agency shall document in the household's case file each request for replacement, the date, the reason, and whether or not the replacement was provided. This information may be recorded exclusively on the household statement required in paragraph (c) of this section.

(2) The State agency shall maintain, in readily-identifiable form, a record of the replacements granted to the household, the reason, the month, and whether the replacement was countable as defined in paragraph (b)(2)(iv) of this section. The record may be a case action sheet maintained in the case file, notations on the master issuance file, if readily accessible, or a document maintained solely for this purpose. At a minimum, the system

shall be able to identify and differentiate among:

(i) Authorization documents or coupons not received in, or stolen from, the mail, and authorization documents stolen after receipt; and

(ii) Replacement issuances which are not subject to a replacement limit.

(3) Upon completion of reconciliation in a system utilizing authorization documents, the State agency shall update the record required in paragraph (h)(2) of this section to indicate whether both the original and replacement authorization documents were transacted. If both were not transacted, the record shall clearly indicate that the replacement authorization document was not a countable replacement.

(4) When a request for replacement is made late in an issuance month, the replacement will be issued in a month subsequent to the month in which the original authorization document was issued. All replacements shall be posted and reconciled to the month of issuance of the replacement and may be posted to the month of issuance of the original authorization document, so that all duplicate transactions may be identified.

(i) *Further action on replacement issuances*. The State agency shall take the following further actions on replacements:

(1) On at least a monthly basis, the State agency shall report to the appropriate office of the Postal Inspection Service all authorization documents reported as stolen or lost in the mail. The State agency shall assist the Postal Service during any investigation thereof and shall, upon request, supply the Postal Service with facsimiles of the original authorization document, if transacted, and the replacement authorization document and a copy of the nonreceipt statement.

The State agency shall advise the Postal Service if the original authorization document is not transacted.

(2) When a duplicate replacement authorization document is transacted, the State agency shall, at a minimum:

(i) Compare the handwriting on the authorization documents to documents contained in the household's case file, including the nonreceipt statement;

(ii) Establish a claim in accordance with § 273.18, where it appears that the household has transacted, or caused both authorization documents to be transacted; and

(iii) Refer the matter to the State agency's investigation unit, where indicated.

[54 FR 7004, Feb. 15, 1989, as amended at 54 FR 51351, Dec. 15, 1989; 56 FR 63617, Dec. 4, 1991]

§ 274.7 Coupon management.

(a) *Coupon inventory management*. State agencies shall establish coupon inventory management systems which ensure that coupons are requisitioned and inventories are maintained in accordance with the requirements of these regulations.

(1) State agencies shall monitor the coupon inventories of coupon issuers and bulk storage points to ensure that inventories are neither excessive nor insufficient to meet the issuance needs and requirements. In determining reasonable inventory needs, State agencies shall consider, among other things, the ease and feasibility of resupplying such inventories from bulk storage points within the State. The inventory levels at coupon issuers and bulk storage points should not exceed a six-month supply, taking into account coupons on hand and on order.

(2) State agencies shall establish accounting systems for monitoring the inventory activities of coupon issuers. State agencies shall review the Form *FNS–250*, from coupon issuers and bulk storage points, to determine the propriety and reasonableness of the inventories. Forms *FNS–261*, Advice of Shipment, Forms *FNS–300*, Advice of Transfer (or an approved State agency form), and reports of returned mail-issued coupons, reports of replacements of mail-issued coupons, reports of improperly manufactured or mutilated coupons, reports of shortage or overage of food coupon books and physical inventory controls shall be used by State agencies to assure the accuracy of monthly reports, issuers' compliance with required inventory levels, and the accuracy and reasonableness of coupon orders.

(b) *Coupon controls*. State agencies shall establish control and security

procedures to safeguard coupons that are similar to those used to protect currency. The exact nature of security arrangements will depend on State agency evaluation of local coupon issuance and storage facilities. These arrangements must permit the timely issuance of coupons while affording a reasonable degree of coupon security. The State agencies, as well as all persons or organizations acting on their behalf, shall:

(1) Safeguard coupons from theft, embezzlement, loss, damage, or destruction;

(2) Avoid unauthorized transfer, negotiation, or use of coupons;

(3) Avoid issuance and transfer of altered or counterfeit coupons; and

(4) Promptly report in writing to FNS any loss, theft, or embezzlement of coupons.

(c) *Coupon requisitioning, shipping and transferring.* (1) State agencies shall arrange for the ordering of coupons on the Form *FNS–260*, Requisition for Food Coupon Books, and the prompt verification and written acceptance of each coupon shipment. FNS shall be furnished with appropriate delivery hours and the names of the persons authorized to sign delivery acknowledgements.

(2) FNS shall assess the reasonableness and propriety of food stamp requisitions submitted by State agencies based on prior inventory changes and shall notify the State agency of any adjustments made to requisitions.

(3) FNS shall ship coupons, in such denominations as it may determine necessary, directly to State agency receiving points approved by FNS. FNS shall promptly advise the State agency in writing when coupons are shipped to receiving points using Form *FNS–261*, Advice of Shipment. Coupons shall be considered delivered to the State agency when FNS or its carrier has a signed receipt.

(4) Once coupons have been accepted by receiving points within the State, any further movement of the coupons between coupon issuers and bulk storage points within the State is at the risk of the State agency. To minimize the risk of loss, coupons should be shipped by armored vehicle or some other method of transportation that affords the State agency the maximum security available.

(5) In every instance when coupons are transported within a State, the person(s) transporting coupons shall:

(i) Acknowledge in writing the receipt of the coupons;

(ii) Provide as much protection for the coupons as is reasonable;

(iii) Advise issuance supervisors of the routes to be taken, the shipment departure time and the estimated arrival time. This information, if in written form, may be destroyed after the coupons have been received.

(d) *Specimen coupons.* FNS may provide upon written request, non-negotiable specimen coupons to State agencies for the administration of the Program and enforcement of the rules, and to authorized food firms for the purpose of educating and training employees on Program operations.

(1) The State agency or firm shall store specimen coupons in secure storage with access limited to authorized personnel. The State agency or firm should maintain a record of specimen coupons received.

(2) Specimen coupons that are mutilated, improperly manufactured, or otherwise unusable, shall not be distributed by the State agency. Such coupons shall be destroyed by the State agency and the destruction shall be witnessed by two persons and noted on the perpetual inventory records maintained by the FNS regional offices for specimen coupons.

(3) Specimen coupons shall not be issued to private individuals or firms for the purpose of collection or display.

(e) *Replacement and destruction of coupons and authorization documents by issuance points.* (1) The State agency shall provide for the replacement to issuers of improperly manufactured or mutilated coupons as provided below. Replacement provisions pertaining to households are contained in § 274.6.

(i) The State agency shall examine the improperly manufactured or mutilated coupons to determine the validity of the claim and the amount of coupons to be replaced.

(ii) If the State agency can determine the value of an improperly manufactured or mutilated coupon, the State

agency shall replace the unusable coupon, dollar for dollar, when at least three-fifths of the coupon is presented by the issuer. After the exchange, the State agency shall destroy the unusable coupon in accordance with the procedures contained in paragraph (f) of this section.

(iii) If the State agency cannot determine the value of the improperly manufactured or mutilated coupons, the State agency shall cancel the coupons by writing or stamping ''canceled'' across the face of the coupons and forward the coupons to FNS for a determination of the value by the U.S. Bureau of Engraving and Printing. The dollar amount shall be shown on the Form *FNS–250* report.

(2) The State agency shall void all authorization documents mutilated or otherwise rejected during the preparation process. The voided authorization documents shall either be filed for audit purposes or destroyed, provided destruction is witnessed by at least two persons and the State agency maintains a list of all destroyed authorization documents. Provisions pertaining to the replacement of authorized documents mutilated subsequent to receipt by a household are provided in § 274.6.

(f) *Destruction of unusable coupons found in inventory or received as claim payments.* (1) The State agency shall require coupon issuers, bulk storage points, and claims collection points to dispose of unusable coupons received from the manufacturer or received as payment for claims within 30 days after the close of the month in which unusable coupons shipped from the manufacturer are discovered, or are received from recipients as payment for claims. There is no dollar limit on the amount of coupons which may be disposed of by the State agency. Disposal shall be by one of the following two methods:

(i) Sending unusable coupons to the State agency for destruction; or

(ii) Holding the unusable coupons in secure storage pending examination and destruction by the State agency at the coupon issuance, bulk storage, or claims collection point.

(2) Prior to the destruction of improperly manufactured or mutilated coupons or coupon books that were exchanged, or collected from households for claims, the State agency shall:

(i) Verify that the coupons were improperly manufactured or mutilated.

If one or more boxes of coupons were improperly manufactured, the State agency shall contact FNS prior to disposition for instructions on the disposition of the coupons. If FNS has not responded within the 30-day time limit, the State agency shall destroy the box of coupons and document the manufacturing irregularity and the book numbers, and retain a copy of the State agency's request to FNS for permission to destroy.

(ii) If either the coupon issuer or bulk storage point, or the State agency cannot determine whether coupons or coupon books were in fact improperly manufactured or cannot establish the value of the coupons involved, the State agency shall promptly forward a written statement of findings and the canceled coupon(s) or coupon book(s) to FNS for determination.

(3) The State agency shall destroy the coupons and coupon books by burning, shredding, tearing, or cutting so they are not negotiable. Two State agency officials shall witness and certify the destruction and report the destruction information as follows:

(i) The destruction of improperly manufactured, mutilated or exchanged coupons from coupon issuers and bulk storage points shall be reported on the Form *FNS–471*, Coupon Account and Destruction Report, and submitted with the Form *FNS–250* for the appropriate month. For coupons received from recipients, a Form *FNS–135* shall be completed and attached to the Form *FNS–471*.

(ii) The destruction of coupons received from claims collection points that are the result of the payment of household claims shall be reported on the Form *FNS–471* (with Form *FNS–135* documentation) and submitted with the Form *FNS–209*, Status of Claims Against Households, for the appropriate rnonths. A State agency may consolidate its monthly Form *FNS–471* for claims collection destruction reporting by providing one completed Form *FNS–471* that reflects the total claims destruction figure for each

month. However, the State agency must attach a breakdown which reports the required Form *FNS–471* information for each reporting point. If a State agency chooses to submit a consolidated Form *FNS–471*, all individual Forms *FNS–471* must be retained by the State agency for future review and audit purposes. The Form *FNS–135* may not be consolidated, and all originals of that form must accompany a consolidated Form *FNS–471*.

(g) *Undeliverable or returned benefits.* The State agency shall exercise the following security and controls for authorization documents and coupons that are undeliverable or returned during the valid issuance period. Forms *FNS–471* and *FNS–135* shall be completed by the State agencies, as appropriate.

(1) Coupons which are in book form, complete, and with original and unsigned covers shall be returned to inventory and noted as such on the issuance log, and the Form *FNS–250*.

(2) Authorization documents shall be recorded in the control log noting the serial number, household name and case number. The documents shall be kept in secure storage with limited access. The documents may be voided as long as households which report nondelivery are provided an immediate replacement.

(h) *Old series coupon exchange.* Households which have old-series (no longer issued) coupons shall be entitled to a dollar-for-dollar exchange of old-series coupons for current series coupons. Households in possession of old-series coupons shall submit the coupons and a request for exchange to the State agency. State agencies may make direct exchange to claimants or request FNS to make the exchange. Forms *FNS–471* and *FNS–135* shall be completed by the State agencies, as appropriate.

[54 FR 7004, Feb. 15, 1989, as amended at 54 FR 51351, Dec. 15, 1989]

§ 274.8 Responsibilities of coupon issuers, and bulk storage and claims collection points.

(a) *Receipt of coupons.* Coupon issuers, and bulk storage and claims collection points shall promptly verify and acknowledge, in writing, the content of each coupon shipment or coupon transfer delivered to them and shall be responsible for the custody, care, control, and storage of coupons.

(b) *Inventory levels.* Coupon issuers and bulk storage points shall maintain a proper level of coupon inventory not in excess of reasonable needs, taking into consideration the ease and feasibility of resupplying such coupon inventories. Such inventory levels should not exceed the six-month supply provided for in § 274.7(a).

(c) *Monthly reporting.* Coupon issuers, and bulk storage and claims collection points shall report monthly to FNS, through the State agency, using Form *FNS–250*, as provided in § 274.4.

(d) *Supporting documentation.* Coupon issuers and bulk storage points shall submit to the State agency supporting documentation which will allow verification of the monthly report as provided in § 274.4. At a minimum, such documentation shall include documents supporting coupon shipments, transfers, and issuances. In those States using issuance systems with authorization documents, coupon issuers shall submit transacted authorization documents batched according to each day's activity, in accordance with the schedule prescribed by the State agency but, in any case, not less often than monthly.

(e) *Handling of improperly manufactured or mutilated coupons.* Coupon issuers, and bulk storage and claims collection points shall cancel improperly manufactured or mutilated coupons or coupon books by writing or stamping ''canceled'' across the face of the coupon(s) and coupon book(s). Depending upon State agency policy, the coupon issuer or bulk storage point shall forward the coupons with the appropriate documentation (determined by the State agency) to the State agency, or hold the coupons in secure storage, pending examination and destruction by the State agency at the coupon issuer, bulk storage point or claims collection location. The documentation is not required if the State agency inspects the coupons at the issuance, storage or collection point. Additional requirements pertaining to the handling of these types of coupons by the State agency are provided in § 274.7(e).

§ 274.9 Closeout of a coupon issuer.

(a) *Definition of responsibilities.* Whenever the services of a coupon issuer or bulk storage point are terminated, the State agency shall perform the responsibilities described below. If a coupon issuer or bulk storage point has more than one functioning unit and one of these facilities is terminated, the coupon issuer or bulk storage point shall fulfill the responsibilities described in paragraphs (b) and (c) of this section. The coupon issuer or bulk storage point shall notify the State agency of the pending termination of any of its services prior to the actual termination. The State agency shall promptly notify FNS as provided in § 274.1(d).

(b) *Closeout accountability.* The State agency shall perform a closeout audit of a coupon issuer or bulk storage point within 30 days of termination of the issuance or storage point. The State agency shall report the findings of the audit to FNS immediately upon its completion. If the audit determines that the final Form *FNS–250* is incorrect, the State agency shall promptly provide a corrected report to FNS.

(c) *Transfer of coupon inventory.* (1) Prior to the transfer of coupon inventory to another coupon issuer or bulk storage point, the State agency shall perform an actual physical count of coupons on hand.

(2) The State agency shall transfer the inventory to another coupon issuer or bulk storage point, preferably within the same project area. The transfer of coupons shall be properly reported and documented by both the point being terminated and the point receiving the inventory.

(d) *Maintenance of participant service.* (1) At least 30 days before actual termination of a coupon issuer, the State agency shall notify project area participants of the impending closure. Notification shall include identification of alternative issuance locations and available public transportation. The State agency shall post notices at the offices of the coupon issuer of the impending closure and may use mass media or notices with allotments to advise participants about the expected closure of the issuance office.

(2) If closure of the issuer will affect a substantial portion of the caseload or a specific geographic area, the State agency shall take whatever action is necessary to maintain participant service without interruption.

(3) If a coupon issuer or bulk storage point is to be closed for noncompliance with contractual requirements and alternative issuance facilities or systems are not readily available, the State agency may continue to use the coupon issuer or bulk storage point for a limited time. In this situation, the State agency shall perform weekly onsite reconciliations of coupon issuance. The State agency shall continue to actively seek other issuance or storage alternatives.

§ 274.10 Use of identification cards and redemption of coupons by eligible households.

(a) *General provisions.* State agencies shall issue an ID card to each certified household as proof of Program eligibility. Upon request, the household or the authorized representative, shall present the household's ID card at issuance points, retail food stores or meal services in order to transact the allotment authorization or when exchanging benefits for eligible food. The household member or members whose name(s) appear on the ID card shall sign the coupon books issued to the household.

(1) All ID cards shall be issued in the name of the household member who is authorized to receive the household's issuance. In areas not designated by FNS as requiring Photo ID cards, the ID card shall contain space for the name and signature of the household member to whom the coupon allotment is to be issued and for any authorized representatives designated by the household. Section 274.5(b) provides further requirements pertaining to emergency authorized representatives. Any person listed on the ID card shall sign the ID card before that person can use it to obtain benefits. If the household does not name an authorized representative, the State agency shall void that area of the ID card to prevent names and signatures being entered at a later date. The ID card may be serially numbered.

(2) The State agency shall limit issuance of ID cards to the time of initial certification, with replacements made only in instances of loss, mutilation, destruction, changes in the person authorized to obtain coupons, or when the State agency determines that new ID cards are needed to keep the photographs up-to-date or if the State agency changes its ID card format or system. Whenever possible, the State agency shall collect the ID card that it is replacing.

(3) The State agency shall place an expiration date on all temporary ID cards, and on the regular ID cards issued to households certified for delivered meals for a specific period, and to homeless households certified for restaurant meals.

(4) Specially-marked ID cards shall be issued in the following circumstances:

(i) Eligible household members 60 years of age or over or members who are housebound, physically handicapped, or otherwise disabled to the extent that they are unable to adequately prepare all their meals, and their spouses, may use coupons to purchase meals prepared for and delivered to them by a nonprofit meal delivery service authorized by FNS. Any household eligible for and interested in using delivered meal services shall have its ID card marked with the letter ''M''.

(ii) Eligible household members 60 years of age or over and their spouses, or those receiving SSI and their spouses, may use coupons issued to them to purchase meals prepared especially for them at communal dining facilities authorized by FNS for that purpose. Any household eligible for and interested in using communal dining facilities in those States or project areas where restaurants are authorized to accept food stamps, shall have its ID card marked with the letters ''CD''. In areas where restaurants are not authorized to accept food stamps, the State or project area may mark such ID's with the letters ''CD''.

(iii) Eligible homeless households may use food stamp benefits to purchase meals from restaurants authorized by FNS for such purpose. Any homeless household eligible for, and interested in, using restaurants in those areas where restaurants are authorized to accept food stamp benefits shall have a specially-marked ID card. The State agency shall provide samples of specially-marked ID cards to authorized restaurants.

(iv) Eligible households residing in areas of Alaska determined by FNS as areas where access to retail food stores is difficult and which rely substantially on hunting and fishing for subsistence may use all or any part of the coupons issued to purchase hunting and fishing equipment such as nets, hooks, rods, harpoons and knives, but may not use coupons to purchase firearms, ammunition, and other explosives. Any household residing in a remote section of Alaska which has been determined by FNS to be an area in which food coupons may be used to purchase hunting and fishing equipment shall have its ID card marked with the letters ''HF''.

(5) ID cards delivered to households by mail shall not be mailed in the same envelope with authorization documents or coupons.

(b) *Photo ID cards.* (1) Photo ID cards shall be issued in those project areas or portions thereof with 100,000 or more food stamp participants, except for those project areas serviced entirely by mail issuance or an Electronic Benefit Transfer system, or where FNS, in consultation with the Office of the Inspector General, approves a State agency's request for an exemption. FNS shall respond to a State agency's request for exemption within 30 days of its receipt of the request.

(i) FNS shall evaluate the January participation data reported as an attachment to the March Form *FNS–388* report. Based on the evaluation, FNS shall notify State agencies at the beginning of each fiscal year of any areas that either require or no longer require the use of Photo ID cards. In cases where an entire State is a single project area, FNS shall consult with the State agency to determine whether Photo IDs should be required in any specific parts of the project area. At the conclusion of this consultation, FNS shall inform the State agency whether the use of Photo IDs will be mandated in any parts of the State agency, based on the need to protect

Program integrity, and the cost-effectiveness of Photo ID cards.

(ii) In cases where a project area serves between 100,000 and 110,000 participants, FNS shall inform the State agency in which the project area is located that it is prepared to mandate the use of Photo IDs in the project area. FNS shall also inform the State agency that it will not mandate use of Photo ID's if, within 30 days of being notified by FNS that Photo ID's must be used, the State agency demonstrates to FNS that participation in the project areas has fallen below the 100,000 participant level in the recent past, or justifies to FNS why participation is likely to fall below that level during the next year.

(2) FNS may, at any time, in consultation with the Office of the Inspector General, designate project areas or portions thereof with less than 100,000 participants as requiring the use of Photo ID cards if, in reviewing such factors as the level of duplicate issuances and results of management evaluation reviews, the Department determines that the issuance of Photo ID cards in such areas would be justified.

(3) A State agency may request that FNS require that Photo IDs be mandated throughout either the entire State or specified project areas. FNS shall respond to such requests within 30 days of the request and, if the request is not approved, FNS shall justify its reasons for the disapproval to the State agency.

(4) In project areas where issuance of Photo ID cards is mandatory, the State agency shall issue a Photo ID card at the time of certification to each eligible household except those listed in § 274.10(b)(4). Households exempt from mandated Photo ID cards shall be issued ID cards which meet the specifications in paragraph (d) of this section except that in lieu of a photograph, the State agency shall annotate the cards to show an exception was granted to the household and that the ID card is valid. The following households are exempt from the Photo ID requirement:

(i) Households certified by out-of-office interviews as specified in § 273.2(e)(2). However, the State agency shall replace the non-Photo ID card issued to such households with a Photo ID card when the appropriate household member or authorized representative visits the certification office. The State agency shall not require any member of such a household to visit the office exclusively for the purpose of issuing a Photo ID card;

(ii) Household members whose religion does not allow them to be photographed. The State agency shall require such a household to provide a signed statement to the effect that the members' religious beliefs do not allow them to be photographed;

(iii) Households entitled to expedited service if the State agency's Photo ID card system is incapable of producing a Photo ID card in time for the household to participate as required by § 273.2(i). A Photo ID card shall be issued to the household prior to issuance of the household's next allotment;

(iv) Households certified under the SSA-food stamp joint processing rules in § 273.2(k). State agencies shall not require such households to obtain Photo IDs as long as they continue to be certified for food stamps at SSA offices. However, a household shall obtain a Photo ID if a household member or authorized representative reports to a food stamp office for recertification; and,

(v) Residents of drug/alcohol treatment and rehabilitation programs.

(5) In addition to the general provisions in paragraph (a) of this section, Photo ID cards shall include the photograph of the person who will receive the household's issuance; i.e., who will either transact the household's authorization document or pick up the household's allotment. A Photo ID card shall be signed by only the person pictured on the card, who may be the household member or authorized representative. Only the person photographed may obtain the household's coupons. All Photo ID card formats are subject to FNS approval.

(6) Photo ID cards shall be serially numbered and laminated after they are signed by the person whose photograph appears on the card. ID cards shall also include a color photograph of the person designated by the household to obtain coupons and the household's case

number or other identifying information.

(7) A Photo ID card used to receive benefits under a welfare or public assistance program may be adapted for food stamp purposes if it meets the specifications contained in this section and can be annotated to indicate food stamp eligibility.

(8) The State agency shall provide a household with a reasonable opportunity to obtain a food stamp Photo ID card in any project area where its use is mandated.

(i) A household required to have a Photo ID card shall not participate until such time as a household member or a designated authorized representative obtains such a card. If a designated authorized representative does not obtain the required Photo ID, the household may designate a household member or another authorized representative to be photographed.

(ii) If the person whose photograph appears on the ID is unable to travel to the issuance point to obtain a particular allotment, the household may use the emergency authorized representative procedures provided in § 274.5 and in paragraph (c) of this section.

(9) State agencies which have the capability may develop systems to issue more than one household member a Photo ID card. These systems shall ensure that the safeguards provided by Photo ID cards, as specified in this section, are maintained.

(10) If a mutilated or altered Photo ID card is presented at the issuance point, the household shall obtain a replacement Photo ID card prior to issuance.

(11) A household shall be entitled to unobtained benefits, lost as a result of being unable to obtain a particular allotment, if the issuance month elapses between the time the household requested a replacement Photo ID card and the delivery of that card to the household.

(12) FNS may waive one or more of the requirements in this section if a State agency can demonstrate to FNS that its alternate ID card or system will provide adequate safeguards against fraudulent and/or duplicate issuances.

(c) *Emergency authorized representative and recipient identification.* State agencies shall develop a method by which a household may designate an emergency authorized representative to obtain the household's allotment when none of the persons specified on the ID is available.

(1) At a minimum, the method developed by the State agency shall require a document with the signature of the emergency authorized representative as well as a place for the household member named on the ID card to sign designating the emergency authorized representative and attesting to the signature of the emergency authorized representative. The designation may be on the ID card or authorization document or a separate form. The household shall not be required to travel to a food stamp office to execute an emergency designation. The emergency authorized representative may present a separately written and signed statement from the head of the household or his or her spouse, authorizing the issuance of the certified household's food stamps to the authorized representative. The emergency representative shall sign the written statement from the household and present the statement and the household ID card to obtain the allotment. A separate written designation is required each time an emergency representative is authorized.

(2) In any issuance system, the cashier shall compare the signatures on the issuance document and on the ID card. If they do not match, issuance shall not be made.

(i) If the household is required by these regulations to present a Photo ID card, coupons shall be issued only when the person presenting the authorization document or requesting the coupons is pictured on the ID card. The cashier shall write the serial number of the Photo ID card on the authorization or issuance document.

(ii) If the Photo ID card appears to be mutilated or altered, the issuing agent shall not issue the coupons, but shall require the household to obtain a replacement ID card from the State agency.

(d) *Eligible food.* A household member should sign each coupon book issued to

the household. The coupons may be used only by the household, or other persons the household selects, to purchase eligible food for the household, which includes, for certain households residing in certain designated areas of Alaska, the purchase of hunting and fishing equipment with coupons. Uncanceled and unendorsed coupons of $1 denomination, returned as change by authorized retail food stores, may be presented as payment for eligible food. All other detached coupons may be accepted only if accompanied by the coupon book which bears the same serial number as the detached coupons. It is the right of the household or the authorized representative to detach the coupons from the book.

(e) *Meals-on-wheels.* Eligible household members 60 years of age or over or members who are housebound, physically handicapped, or otherwise disabled to the extent that they are unable to adequately prepare all their meals, and their spouses, may use coupons to purchase meals prepared for and delivered to them by a nonprofit meal delivery service authorized by FNS.

(f) *Residents of certain institutions.* (1) Members of eligible households who are narcotics addicts or alcoholics and who regularly participate in a drug or alcoholic treatment and rehabilitation program may use coupons to purchase food prepared for them during the course of such program by a private nonprofit organization or institution or a publicly operated community mental health center which is authorized by FNS to redeem the coupons through wholesalers in accordance with § 278.1, or which redeems coupons at retail food stores as the authorized representative of participating households in accordance with § 278.2(g).

(2) Eligible residents of a group living arrangement may use coupons issued to them to purchase meals prepared especially for them at a group living arrangement which is authorized by FNS to redeem coupons at wholesalers in accordance with § 278.1, or which redeems coupons at retail food stores as the authorized representative of participating households in accordance with § 278.2(g).

(3) Residents of shelters for battered women and children as defined in s271.2 may use their coupons to purchase meals prepared especially for them at a shelter which is authorized by FNS in accordance with § 278.1 to redeem at wholesalers, or which redeems at retailers as the authorized representative of participating household in accordance with § 278.2(g).

(g) *Homeless food stamp households.* Homeless food stamp households may use their food stamp benefits to purchase prepared meals from authorized homeless meal providers.

(h) *Use of ID cards.* Upon request, the household or the authorized representative shall present the household's ID card to the retail food store or meal service when exchanging food coupons for eligible food.

(i) *Prior payment prohibition.* Coupons shall not be used to pay for any eligible food purchased prior to the time at which the coupons are presented to authorized retail food stores or meal services. Neither shall coupons be used to pay for any eligible food in advance of the receipt of food, except when prior payment is for food purchased from a nonprofit cooperative food purchasing venture.

(j) *Cash change.* When change in an amount less than $1 is required in a coupon transaction, the household shall receive the change in cash not to exceed 99 cents. However, in the case of homeless food stamp households, neither cash change nor credit slips shall be returned for coupons used for the purchase of prepared meals from authorized homeless meal providers. Such meal providers may use uncancelled and unmarked $1 coupons which were previously accepted for meals served to food stamp recipients when change is required for $5 and $10 coupons. However, in the case of homeless food stamp households, neither cash change nor credit slips shall be returned for food stamps used for the purchase of prepared meals from authorized public and private nonprofit homeless meal providers. Such meal providers may use the lowest denomination coupons that are uncancelled and unmarked for making change in food stamp transactions. Restaurants which are authorized by FNS under § 278.1 to provide

meals to homeless food stamp recipients shall return cash change to such recipients in food stamp transactions when the amount of change due is less than one dollar. If change of one dollar or more is due, uncancelled and unmarked one dollar coupons shall also be used for change.

[54 FR 7004, Feb. 15, 1989, as amended at 54 FR 51352, Dec. 15, 1989; 57 FR 11249, Apr. 1, 1992; 61 FR 53600, Oct. 15, 1996]

§ 274.11 Issuance and inventory record retention, and forms security.

(a) *Availability of records.* The State agency shall maintain issuance, inventory, reconciliation, and other accountability records for a period of three years as specified in § 272.1(f) of this chapter. This period may be extended at the written request of FNS.

(1) Issuance, inventory, reconciliation, and other accountability records shall include all Agency, State, and local forms involved in the State agency's receipt, storage, handling, issuance, and destruction of coupons completed by contract agents or any other individuals or entities involved in issuance or inventory, as well as those completed by the State agency.

(2) In lieu of the records themselves, easily retrievable microfilm, microfiche, or computer tapes which contain the required information may be maintained.

(b) *Control of issuance documents.* The State agency shall control all issuance documents which establish household eligibility while the documents are transferred and processed within the State agency. The State agency shall use numbers, batching, inventory control logs, or similar controls from the point of initial receipt through the issuance and reconciliation process. The State agency shall also ensure the security and control of authorization documents in transit from the manufacturer to the State agency.

(c) *Accountable documents.* (1) HIR cards, authorization documents, and mandated Photo ID cards shall be considered accountable documents. The State agency shall provide the following minimum security and control procedures for these documents:

(i) Preprinted serial numbers;

(ii) Secure storage;

(iii) Access limited to authorized personnel;

(iv) Bulk inventory control records;

(v) Subsequent control records maintained through the point of issuance or use, and

(vi) Periodic review and validation of inventory controls and records by parties not otherwise involved in maintaining control records.

(2) For notices of change which initiate, update or terminate the master issuance file, and blank ID cards, the State agency shall, at a minimum, provide secure storage and shall limit access to authorized personnel.

[54 FR 7004, Feb. 15, 1989, as amended at 60 FR 20183, Apr. 25, 1995]

§ 274.12 Electronic Benefit Transfer issuance system approval standards.

(a) *General.* This section establishes rules for the approval, implementation and operation of Electronic Benefit Transfer (EBT) systems for the Food Stamp Program as an alternative to issuing food stamp coupons. By October 1, 2002, State agencies must have EBT systems implemented statewide, unless the Secretary provides a waiver for a State agency that faces unusual barriers to implementing an EBT system. In general, these rules apply to both on-line and off-line EBT systems, unless stated otherwise herein, or unless FNS determines otherwise for off-line systems during the system planning and development process.

(b) *Program administration.* (1) The State food stamp agency shall submit Planning and Implementation Advanced Planning Documents (APDs) for FNS approval in accordance with the requirements of § 277.18 of this chapter and this section. The State agency shall implement EBT systems in a pilot area prior to expansion Statewide or to other project areas. The areas of pilot operation and full-scale operation shall be identified in the Planning APD when submitted to FNS for approval.

(2) The State agency shall be responsible for the coordination and management of the EBT system. The Secretary may suspend or terminate some or all EBT system funding or withdraw approval of the EBT system from the State agency upon a finding that the

State agency or its contracted representative has failed to comply with the requirements of this section and/or § 277.18 of this chapter.

(3) All EBT systems within a State must follow a singular EBT APD and system architecture submitted by the State agency. Multiple EBT designs will be acceptable only if: such designs can be fully justified by the State agency; the system differences are transparent to participating households that move within the State; operating costs are the same or lower; and the ability of the different systems to readily communicate (transaction interchange) with one another.

(4) The State agency must provide written approval of the Planning and Implementation APDs from other participating Federal agencies or indicate that approval is being sought simultaneously from participating Federal agencies. The State agency shall indicate how it plans to incorporate additional programs into the EBT system if it anticipates the addition of other public assistance programs concurrent with or after implementation of the Food Stamp Program EBT system. The State agency shall also consult with the State agency officials responsible for administering the Special Supplemental Nutrition Program for Women, Infants and Children (WIC) prior to submitting the Planning APD for FNS approval.

(c) *Pilot project approval requirements*—(1) *EBT Planning APD*. The State agency shall comply with the two-stage approval process for APDs in submitting an EBT system proposal to FNS for approval. In addition to the requirements for a Planning APD specified under § 277.18(d)(1) of this chapter, the State agency shall commit itself to provide the following as part of the project planning activities to FNS for approval:

(i) *Pilot project site and expanded site descriptions*. At a minimum, the proposed pilot project site and expanded site descriptions shall include the geographical boundaries, average number and characteristics of food stamp program participants and households, the number and type of authorized food retailers and authorized retailers bordering the pilot and expanded areas, the food stamp redemption patterns of food retailers, the status of commercial POS deployment and the estimated number of checkout lanes that will require POS equipment; and

(ii) *A description of major contacts*. A description of initial contacts the State agency has made in the proposed pilot area among food retailers, financial institutions and households or their representatives that may be affected by implementation of the EBT system. Written commitments from the retail grocer community (including supermarket chains, independent retailers, and convenience stores) and participating financial institutions in the pilot area shall be provided along with other documentation that demonstrates the willingness to support the proposed EBT system within the pilot area and expanded system area. The State agency shall submit evidence of contacts with recipient organizations and others.

(2) *EBT Implementation APD*. The EBT Implementation APD shall include the completed documents required under § 277.18 of this chapter for Implementation APDs, where appropriate. In addition, EBT Implementation APDs shall include the detailed pilot project site description and expanded site description, as described in this paragraph. Also, the State agency shall commit to completing and submitting the following documents for FNS approval and obtaining such approval prior to issuance of benefits to eligible households in the pilot project area:

(i) A Functional Demonstration Plan. The functional demonstration plan shall include:

(A) The schedule, procedures, and test data for performing the functional requirements prescribed in paragraph (e) of this section in combination with the system components described by the approved System Design;

(B) The procedures for performing the functional demonstration, each participant's responsibility during the demonstration, and procedures for collecting data to evaluate system functionality. The Department reserves the right to participate and conduct independent testing as necessary during the Functional Demonstration.

(ii) *A functional demonstration report.* Upon the completion of the functional requirements demonstration test, the State agency shall submit a Functional Demonstration report. The report shall summarize the activities, describe major problems encountered and proposed solutions, and provide the timetable for completing any system revisions. Resolution of any problems identified during the functional demonstration shall be completed prior to advancing towards the acceptance test.

(iii) *An acceptance test plan.* The Acceptance Test Plan for the pilot project shall describe the methodology to be utilized to verify that the EBT system complies with Food Stamp Program requirements and System Design specifications. At a minimum, the Acceptance Test Plan shall address:

(A) The types of testing to be performed;

(B) The organization of the test team and associated responsibilities, test database generation, test case development, test schedule, and the documentation of test results. Acceptance testing shall include functional requirements testing, error condition handling and destructive testing, security testing, recovery testing, controls testing, stress and throughput performance testing, and regression testing;

(C) A ''what-if'' component shall also be included to permit the opportunity for observers and participants to test possible scenarios in a free-form manner.

(D) The Department reserves the right to participate and conduct independent testing as necessary during the Acceptance testing and appropriate events during system design, development, implementation and operation.

(iv) *An acceptance test report.* The State agency shall provide a separate report after the completion of the acceptance test. The report shall summarize the activities, describe any discrepancies, describe the proposed solutions to discrepancies, and the timetable for their retesting and completion. In addition, the report shall contain the State agency's recommendations regarding implementation of the EBT system in the pilot site.

(v) *A prototype food retailer agreement.* The State agency shall enter an agreement with each food retailer that complies with the requirements of paragraph (g)(6) of this section.

(vi) *A pilot project implementation plan.* The pilot project implementation plan shall include the following:

(A) A description of the tools, procedures, detailed schedules, and resources needed to implement the pilot project;

(B) The equipment acquisition and installation requirements, ordering schedules, and system and component testing;

(C) A phase-in strategy which permits a measured and orderly transition to EBT. In describing this strategy, the plan shall address training schedules that avoid disruption of normal shopping patterns and operations of participating households and food retailers. Training of food stamp households, State agency personnel and retailers and/or their trainers shall be coordinated with the installation of equipment in retail stores;

(D) A description of on-going tasks associated with fine-tuning the system and making any corrective actions necessary to meet contractual requirements. The description shall also address those tasks associated with ongoing training, document updates, equipment maintenance, on-site support and system adjustments, as needed to meet Food Stamp Program requirements; and,

(E) A plan for orderly phase-out of the pilot project if it is demonstrated during the pilot project operations that the system is not acceptable.

(vii) *A contingency plan.* The State agency shall submit a written contingency plan for FNS approval. The contingency plan shall contain information regarding the back-up issuance system that will be activated in the event of an emergency shut-down which results in short-term or extended system inaccessibility, or total discontinuation of EBT system operations. The contingency plan shall be incorporated into the State system security plan after FNS approval as prescribed at § 277.18(p) of this chapter.

(3) *EBT Implementation APD Budget.* The Implementation APD budget shall

be prepared and submitted for FNS approval in accordance with the requirements of paragraph (k) of this section and § 277.18(d)(2) of this chapter.

(4) *Pilot project reporting.* (i) A quarterly report containing the following information delineated by month shall be provided to FNS by the end of the month following each Federal fiscal quarter. The quarterly report shall contain, at a minimum:

(A) A summary, by task, of major completed activities and scheduled activities for the upcoming period.

(B) The number of active cases for each month;

(C) The number and dollar amount of food stamp purchases in total and by store ID;

(D) The number and dollar amount of food stamp reversals, in total and by store ID;

(E) The total number and dollar amount of manual sales authorized;

(F) The total number and dollar amount of issuances posted to EBT accounts during the month, delineated by public assistance Food Stamp households and non-public assistance Food Stamp households;

(G) Total number and dollar amount of grocer credits during settlement (by day of month);

(H) Total number of retailers added to or deleted from the system as defined under part 278 of this chapter;

(I) Number and dollar amount of food stamp benefits converted to coupons;

(J) Total number of Food Stamp Program balance inquiries, by type of device such as Automated Teller Machines, POS terminals or Audio Response Units (ARUs) or hotline telephone numbers;

(K) Total number of rejected transactions, grouped by reasons (e.g., invalid PIN, insufficient funds, invalid transaction type for device, etc.);

(L) The number of access cards issued by the type of case (new, recertification, replacement for loss, damage or theft);

(M) Number of client calls and grocer calls to the ARU or hotline number;

(N) The average number of transactions by type;

(O) Average dollar value of purchases per case-month;

(P) Transactions utilized per day as a percentage of transactions through the system each month;

(Q) Problems encountered, their status, actions taken by the State agency and any support needed from FNS to resolve them; and

(R) Anticipated delays, reasons for the delays, and corrective actions planned or taken that require an amendment to the Project Work Plan. The Project Work Plan shall be updated and submitted with each quarterly report.

(ii) The State agency shall submit APD Updates as prescribed in § 277.18 of this chapter and paragraph (d) of this section.

(5) *Cost analysis.* (i) The State agency shall be responsible for conducting a cost analysis comparing the actual EBT pilot project costs to the costs of the EBT system operations projected in the Implementation APD and the costs of the coupon issuance system being replaced.

(ii) The cost analysis may be conducted by State agency staff or by an independent contractor. The cost analysis shall represent the costs of the pilot as costs per case-month.

(iii) The State agency shall report in the cost analysis all start-up costs that shall be amortized under the issuance cap for the EBT system. At a minimum, the State agency shall identify:

(A) The labor hours and costs by job category for each unit (e.g., the Food Stamp Program Section, the financial assistance section, the EBT project section, etc.) of the State and local agencies and for each vendor;

(B) The direct costs for each agency and vendor. The line items to be included are computer usage (CPU, disk storage, tapes, printing), the equipment amortization/lease and maintenance (excluding POS hardware), telecommunications installations, recurring telecommunications, benefit card stock and equipment, supplies, printing and reproduction, travel, postage, Automated Clearinghouse and wire transfer fees, in addition to other direct costs.

(iv) The State agency shall report the per case-month operating costs of the EBT and the coupon systems. Case-

month costs shall be calculated by determining the average monthly issuance cost per system divided by the average monthly food stamp caseload issued benefits for the most recent four fiscal quarters or the most recent fiscal year. These costs shall be reported by function. The functions include: authorizing access to benefits; delivering benefits; crediting retailers; managing retailer participation; and reconciling and monitoring the issuance system. For each function the State agency shall report the information specified in paragraphs (c)(5)(iii) (A) and (B) of this section.

(v) The State agency shall report benefit loss per case month. For coupon losses the State agency shall utilize data from Form FNS–250 Food Coupon Accountability Report, Form FNS–259 Food Stamp Mail Issuance Report, and Form FNS–46 Issuance Reconciliation Report. Data from actual EBT system losses shall be included as a separate line in the cost analysis report.

(vi) EBT operational costs shall be measured after the EBT pilot project system has operated for a minimum of three months with the full caseload in the pilot area. The cost analysis shall be submitted to FNS after completion of the period of pilot operations with the full caseload.

(vii) The State agency shall measure any residual coupon costs resulting from households within the demonstration site that have not been converted to EBT, households from outside of the site that shop at stores within the pilot project area; and households leaving the pilot project area. If the State agency proposes to operate EBT on less than a statewide basis for an indefinite period of time, costs for the combined coupon and EBT systems shall be reported and compared to the coupon system costs.

(d) *Expansion requirements*. After a minimum of three months of pilot project operation with the full pilot caseload, the State agency may decide to expand the EBT system. If expansion is selected, the State agency shall submit an APD Update to request FNS approval to implement and operate the EBT system in areas beyond the pilot area. The APD Update shall contain the following:

(1) A proposed expansion budget for FNS' review and approval;

(2) An Implementation Plan. At a minimum, the Expansion Implementation Plan shall address:

(i) The requirements of paragraphs (c)(2)(vi) (A) through (D) of this section as applied to the expansion activities; and,

(ii) The names, titles, addresses, and telephone numbers of the persons responsible for coordinating expansion activities;

(3) A description of any necessary system design changes, including software modifications and/or modifications of equipment configurations. The design changes shall be documented within the ADP Update or provided to FNS for approval separately upon completion;

(4) An assessment of the effects the EBT pilot project had, if any, on program participation during the pilot operation; and,

(5) A revised Contingency Plan as required in paragraph (c)(7) of this section to address the expanded scope of the system.

(e) *Cost neutrality*. To receive full Federal reimbursement for food stamp administrative costs, the State agency must operate its EBT system in a cost-neutral manner, whereby the Federal cost of issuing benefits in the State after implementation of the EBT system does not exceed the Federal cost of delivering coupon benefits under the previous coupon issuance system. The issuance cost cap is expressed in terms of a cost per case month derived by dividing the annual total cost of issuance by the total number of households issued food stamp benefits during the year the costs were incurred. In determining its coupon issuance cap, the State agency shall use either: the National Coupon Issuance Cap, as determined by FNS, or calculate a State Coupon Issuance Cap based on the State agency's statewide issuance costs under the coupon issuance system. FNS will not reimburse the State agency for any costs incurred above the approved coupon issuance cap.

(1) The National Coupon Issuance Cap is a case-month issuance amount, as calculated by FNS.

(2) A State Coupon Issuance Cap is a case-month issuance amount, as calculated by the State agency based on guidance provided by FNS. The State agency must provide narrative explanations and satisfactory supporting documentation to clarify each cost item, its relationship to the coupon issuance function, and how it was calculated. All issuance costs included in the State coupon issuance cap must have been charged to the Federal government and are subject to validation by FNS.

(3) The State agency shall submit its State coupon issuance cap or indicate it has opted to use the National Coupon Issuance Cap as part of the Implementation APD process. The State coupon issuance cap must be approved by FNS prior to implementation of the pilot, and shall be effective from the first date benefits are issued to households through the EBT system during the pilot project.

(4) Each State agency's approved State issuance coupon cap and the National Coupon Issuance Cap will be adjusted each Federal fiscal year based on the percentage change in the most recently published Gross Domestic Product Implicit Price Deflator Index (GDP Price Deflator) calculated from the percentage change in the index between the first quarter of the current calendar year and the first quarter of the previous year, as published each June by the Bureau of Economic Analysis.

(5) The determination of cost neutrality will be assessed on a prospective basis; that is, FNS will make a determination whether the EBT system will be cost neutral based on a comparison of the coupon issuance costs to the projected costs of the EBT system. The State agency may choose how they determine coupon issuance costs either according to paragraph (e)(1) or paragraph (e)(2) of this section. After approval of its coupon cost cap, the State agency shall submit to FNS an analysis, completed according to FNS guidance, comparing the coupon issuance costs to the projected EBT costs over the contract period for system operation which defines the life of the system. If the State agency uses the National Coupon Issuance Cap, Statewide cost projections for issuance costs after EBT implementation must include all contract costs and all other direct EBT issuance costs. If the State agency develops their own State issuance cost cap, Statewide cost projections for issuance costs after EBT implementation must include all of the direct EBT costs, and projections for all categories of allocated costs which were included in the coupon cost cap calculation using the same allocation methodology as in the cost cap calculation.

(i) EBT planning costs are to be excluded from the cost neutrality assessment and shall include costs attributed to the preparation of the Planning APD, all activities leading to the development of the EBT implementation plan, and the completion of the documentation contained in the FNS approved Implementation APD.

(ii) The cost neutrality assessment must include pre-issuance costs, which can include system design, development and start-up costs, and operations costs. The operations phase is defined as beginning with the first EBT issuance in the pilot area.

(iii) If the comparison demonstrates the proposed system will cost less than the coupon issuance system, no further measurement will be required for the life of the system unless there is a substantial increase in EBT costs requiring prior approval as described in § 277.18 (c)(2)(ii)(C) of this chapter and the submittal of an Implementation APD Update as outlined in the FNS Handbook 901 (APD Handbook).

(iv) Any State agency that cannot demonstrate cost neutrality prospectively will be required to track EBT costs throughout the life of the system according to FNS guidance, and reimburse FNS for any excess at the end of the defined system life.

(6) The State agency is required to provide an updated cost neutrality assessment for all subsequent EBT systems developed or implemented, incorporating the revised costs of the new system.

(f) *Functional requirements.* The State agency shall ensure that the EBT system is capable of performing the following functional requirements prior to implementation:

(1) *Authorizing household benefits.* (i) Issuing and replacing EBT cards to eligible households;

(ii) Permitting eligible households to select a personal identification number (PINs) at least four digits in length;

(iii) Establishing benefit cards and accounts with the central computer database;

(iv) Maintaining the master household issuance record file data and current authorization information;

(v) Training households and other users in system usage;

(vi) Authorizing benefit delivery;

(vii) Posting benefits to each household's account for regular and supplemental issuances;

(viii) Providing households with access to information on benefit availability;

(ix) Ensuring the privacy of household data and providing benefit and data security;

(x) Inventorying and securing accountable documents; and

(xi) Zeroing out benefit accounts and other account authorization activity.

(2) *Providing food benefits to households.* (i) Verifying the identity of authorized households or authorized household representatives at issuance terminals or POS;

(ii) Verifying the PIN and/or PIN offset, primary account number (PAN), terminal identification number and retailer identification number;

(iii) Determining the sufficiency of the household's account balance in order to debit or credit household benefit accounts at the point-of-sale;

(iv) Sending messages authorizing or rejecting purchases;

(v) Providing back-up purchase procedures when the system is unavailable;

(vi) Ensuring that benefits are available and carried over from month-to-month.

(vii) Converting EBT benefits to coupons in accordance with paragraph (f)(6) of this section; and

(viii) Responding to issuance problems in a timely manner.

(3) *Crediting retailers and financial institutions for redeemed benefits.* (i) Verifying electronic transactions flowing to or from participating retailers' bank accounts;

(ii) Creating and maintaining a file containing the individual records of EBT transactions;

(iii) Totalling all credits accumulated by each retailer;

(iv) Providing balance information to retailers or third party processors from individual POS terminals, as needed;

(v) Providing each retailer information on total deposits in the system on a daily basis;

(vi) Preparing a daily tape in a National Automated Clearinghouse format or other process approved by FNS with information on benefits redeemed for each retailer and in summary;

(vii) Transmitting the automated clearinghouse (ACH) tape to a financial institution for transmission through the ACH or other method approved by FNS;

(viii) Transferring the information on the ACH tape or other process approved by FNS containing daily redemption activity of each retailer to the FNS Minneapolis Computer Support Center at least once weekly. Transmittal may be by tape, disc, remote job entry or other means acceptable to FNS.

(4) *Managing retailer participation.* The State agency shall:

(i) Convey retailer authorization information provided by FNS to the system operator using the Retailer Electronic Benefit Transfer (EBT) Data Exchange (REDE) system. The State agency must access the REDE files to ensure that the FNS retailer files used to authorize valid EBT Food Stamp transactions are updated on a daily basis. Follow-up on actions taken regarding any disqualification or withdrawal by an authorized food retailer from the Food Stamp Program must occur within two business days after receipt;

(ii) Add newly authorized food retail stores or third party processors to the EBT system as prescribed under paragraph (g)(1)(ii) of this section.

(iii) Ensure that only currently authorized retailers can access the system;

(iv) Monitor food retailers to ensure that equipment deployment complies with paragraph (g)(4) of this section;

(v) Ensure that equipment and supplies are maintained in working order for retail stores equipped by the State agency or its contractor. Equipment shall be replaced or repaired within 24 hours;

(vi) Ensure that retail store employees are trained in system operation prior to implementation. Such training shall include the provision of appropriate written and program specific materials;

(vii) Provide a mechanism for compliance investigations which permits authorized invetigators to have access to the system in order to conduct investigations of program abuse and alleged violations.

(g) *Household participation*—(1) *Transaction limits*. No minimum dollar amount per transaction nor maximum limit on the number of transactions shall be established. In addition, no transaction fees shall be imposed on food stamp households utilizing the EBT system to access their benefits.

(2) *Access to balances*. Households shall be permitted to determine their food stamp account balances without making a purchase or standing in a checkout line. The State agency shall ensure that the EBT system is capable of providing a transaction history for a period of up two calendar months to households upon request.

(3) *Transaction receipts*. Households shall be provided printed receipts at the time of transaction. At a minimum this information shall:

(i) State the date, merchant's name and location, transaction type, transaction amount and remaining balance for the food stamp account;

(ii) Comply with the requirements of 12 CFR part 205 (Regulation E) in addition to the requirements of this section; and

(iii) Identify the food stamp household member's account number (the PAN) or a coded transaction number. The household's name shall not appear on the receipt except when a signature is required when utilizing a manual transaction voucher.

(4) *Issuance of benefits*. State agencies shall establish an availability date for household access to their benefits and inform households of this date.

(i) The State agency may make adjustments to benefits posted to household accounts after the posting process is complete but prior to the availability date for household access in the event benefits are erroneously posted.

(ii) A State agency shall make adjustments to an account to correct an auditable, out-of-balance settlement condition that occurs during the redemption process as a result of a system error. A system error is defined as an error resulting from a malfunction at any point in the redemption process: from the system host computer, to the switch, to the third party processors, to a store's host computer or point of sale (POS) device. These adjustments may occur after the availability date and may result in either a debit or credit to the household.

(A) *Client-initiated adjustments*. The State agency must act on all requests for adjustments made by client households within 90 calendar days of the error transaction. The State agency has 10 business days from the date the household notifies it of the error to investigate and reach a decision on an adjustment and move funds into the client account. This timeframe also applies if the State agency or entity other than the household discovers a system error that requires a credit adjustment to the household. Business days are defined as calendar days other than Saturdays, Sundays, and Federal holidays.

(B) *Retailer-initiated adjustments*. The State agency must act upon all adjustments to debit a household's account no later than 10 business days from the date the error occurred, by placing a hold on the adjustment balance in the household's account. If there are insufficient benefits to cover the entire adjustment, a hold shall be placed on any remaining balance that exists, with the difference being subject to availability only in the next future month. The household shall be given, at a minimum, adequate notice in accordance with § 273.13 of this chapter. The notice must be sent at the time the initial hold is attempted on the household's current month's remaining balance, clearly state the full adjustment

amount, and advise the household that any amount still owing is subject to collection from the household's next future month's benefits.

(*1*) The household shall have 90 days from the date of the notice to request a fair hearing.

(*2*) Should the household dispute the adjustment and request a hearing within 10 days of the notice, a provisional credit must be made to the household's account by releasing the hold on the adjustment balance within 48 hours of the request by the household, pending resolution of the fair hearing. If no request for a hearing is made within 10 days of the notice, the hold is released on the adjustment balance, and this amount is credited to the retailer's account. If there are insufficient funds available in the current month to cover the full adjustment amount, the hold may be maintained and settled at one time after the next month's benefits become available.

(iii) The appropriate management controls and procedures for accessing benefit accounts after the posting shall be instituted to ensure that no unauthorized adjustments are made in accordance with paragraph (f)(7)(iii) of this section.

(5) *Issuance and replacement of cards or PINs.* (i) The State agency shall permit food stamp households to select their Personal Identification Number (PIN). PIN assignment procedures shall not be permitted.

(ii) The State agency shall replace EBT cards within two business days following notice by the household to the State agency. The State may request a waiver from the Department to allow a longer replacement time.

(iii) The State agency shall ensure that a duplicate account is not established which would permit households to access more than one account in the system.

(iv) An immediate hold shall be placed on accounts at the time notice is received from a household regarding the need for card or PIN replacement. The State agency shall implement a reporting system which is continually operative. Once a household reports that their EBT card has been lost or stolen, the State agency shall assume liability for benefits subsequently drawn from the account and replace any lost or stolen benefits to the household. The State agency or its agent shall maintain a record showing the date and time of all reports by households that their card is lost or stolen.

(v) The State agency may impose a replacement fee by reducing the monthly allotment of the household receiving the replacement card; however, the fee may not exceed the cost to replace the card. If the State agency intends to collect the fee by reducing the monthly allotment, it must follow FNS reporting procedures for collecting program income. State agencies currently operating EBT systems must inform FNS of their proposed collection operations. State agencies in the process of developing an EBT system must include the procedure for collection of the fee in their system design document. All plans must specify how the State agency intends to account for card replacement fees and include identification of the replacement threshold, frequency, and circumstances in which the fee shall be applicable. State agencies may establish good cause policies that provide exception rules for cases where replacement card fees will not be collected.

(6) *Benefit conversion.* (i) Households leaving an EBT State must be able to use their electronic benefits upon relocation. A State agency must convert these electronic benefits to paper coupons if a household is relocating to a State that is not interoperable and where electronic benefits are not portable from the household's current State of residence. At State agency option, a household entering an EBT area may be required to spend any remaining food coupons prior to utilizing the EBT system to access their benefits. Conversion shall occur within one business day following notice to the State agency by the household when inventories of food coupons are stored at local agency locations. Conversion shall occur within three business days if the State maintains coupon inventories in a central location.

(ii) Requests for conversions to food coupons solely for purposes of shopping outside the pilot area shall be prohibited. However, the State agency may

allow benefits in an EBT account to be converted to coupons for short-term absences from the EBT system area for family emergencies or similar isolated occurrences.

(iii) Splitting food stamp benefits between food coupons and an electronic benefit access card at the time of issuance shall not be permitted.

(iv) At State agency option, a limit may be imposed on the number of conversions per household that may occur annually for the purposes prescribed under paragraph (f)(6)(ii) of this section. A limit on conversions to food coupons shall not be imposed on households moving from the EBT area.

(v) The State agency shall develop procedures for conversion whenever a household has left a State. These procedures shall not conflict with mailing restrictions regarding Authorization to Participate documents or other authorizing documents.

(vi) The State agency shall round EBT benefits remaining in an account down to the nearest dollar amount suitable for coupon issuance. The State agency shall require the household to spend any remaining balance that cannot be converted to food coupons. If a household fails to spend the remaining benefits within one week after conversion occurs, the State agency shall expunge the benefits from the account and report the adjustment to the Department.

(7) *Stale account handling*. Stale benefit accounts are those food stamp benefit accounts which are not accessed for three months or longer.

(i) If EBT accounts are inactive for three months or longer, the State agency may store such benefits off-line.

(A) Benefits stored off-line shall be made available upon reapplication or re-contact by the household;

(B) The State agency shall attempt to notify the household of this action before storage of the benefits off-line and describe the steps necessary to bring the benefits back on-line;

(ii) The State agency shall expunge benefits that have not been accessed by the household after a period of one year. Issuance reports shall reflect the adjustment to the State agency issuance totals to comply with monthly issuance reporting requirements prescribed under § 274.4 of this part.

(iii) Procedures shall be established to permit the appropriate managers to adjust benefits that have already been posted to a benefit account prior to the household accessing the account; or, after an account has become dormant or the household has not used the funds which remain after conversion. The procedures shall also be applicable to removing stale accounts for off-line storage of benefits or when the benefits are expunged. Whenever benefits are expunged or stored off-line, the State agency shall document the date, amount of the benefits and storage location in the household case file.

(8) *Timely benefit availability*. The State agency shall ensure that the EBT system complies with the expedited service benefit delivery standard and the normal application processing standards prescribed by § 273.2 and § 274.2 of this chapter.

(9) *Access to retail stores*. The EBT system shall provide for minimal disruption of access to and service in retail stores by eligible households. The EBT system shall not result in a significant increase in the cost of food or cost of transportation to authorized food retail stores for food stamp households. Checkout lanes equipped with POS devices shall be made available to Food Stamp households during all retail store hours of operation.

(10) *Household training*. The State agency shall provide training to each household prior to implementation and as needed during ongoing operation of the EBT system. Training functions for an EBT system may be incorporated into certification procedures. At a minimum, the household training shall include:

(i) Content which will familiarize each household with the provisions of paragraphs (f)(1) through (f)(9) of this section;

(ii) Hands-on experience for each household in the use of the EBT equipment necessary to access benefits and obtain balance information;

(iii) Notification to the household of the procedures for manual transactions and re-presentation;

(iv) The appropriate utilization and security of the Personal Identification Number;

(v) Each household's responsibilities for reporting loss or damage to the EBT card and who to report them to, both during and outside business hours. Information on a 24 hour hotline telephone number shall be provided to each household during training;

(vi) Written materials and/or other information, including the specific rights to benefits in an EBT system, shall be provided as prescribed under 7 CFR 272.4(b) for bilingual households and for households with disabilities. Written materials shall be prepared at an educational reading level suitable for food stamp households;

(vii) Information on the signs or other appropriate indicators located in checkout lanes that enable the household to identify lanes equipped to accept EBT cards.

(viii) Disclosure information regarding adjustments and a household's rights to notice, fair hearings, and provisional credits. The disclosure must also state where to call to dispute an adjustment and request a fair hearing. State agencies that have already implemented EBT shall have one year in which to grandfather adjustment disclosure into their training materials.

(h) *Retailer participation.* (1) All authorized retailers must be afforded the opportunity to participate in the EBT system. An authorized food retailer shall not be required to participate in an EBT system.

(i) Retailers who do not have immediate access to telephones at the time of purchase shall be accommodated by an alternative system (e.g., manual vouchers with preliminary or delayed telephone verification) for redeeming food sales to eligible food stamp customers. These retailers include stationary food stores which opt to make home deliveries to food stamp households, house-to-house trade routes which operate on standing orders from customers, e.g. milk and bread delivery routes, food buying cooperatives authorized to participate as well as other food retailers authorized under § 278.1 of this chapter. Prior to delivery or upon returning to the store, the retailer shall telephone the EBT central computer or hotline number to log the transaction and obtain an authorization number. If authorization cannot be obtained before or at the time of purchase, the retailer assumes the risk for sufficient benefits being available in the household's account. Any alternate method cannot be burdensome on either the household or the retailer, and it must include acceptable privacy and security features. Such systems shall only be available to retailers that cannot be equipped with a POS terminal at the time of sale.

(ii) Newly authorized retailers shall have access to the EBT system within two weeks after the receipt of the FNS authorization notice. However, whenever a retailer chooses to employ a third party processor to drive its terminals or elects to drive its own terminals, access to the system shall be accomplished within a 30 day period or a mutually agreed upon time to enable the third party interface specifications and any State required functional certification to be performed by the State agency and/or its contractor. The FNS field office shall notify each new retailer at the time of application for authorization that an EBT system is operating in their store location(s). The field office shall also notify the State agency in a timely manner when a retailer is authorized to participate in the Food Stamp Program.

(2) Authorized retailers shall not be required to pay costs essential to and directly attributable to EBT system operations as long as the equipment or services are provided by the State agency or its contractor and are utilized solely for the Food Stamp Program. In addition, if Food Stamp Program equipment is deployed under contract to the State agency, the State agency may, with USDA approval, share appropriate costs with retailers if the equipment is also utilized for commercial purposes.

(3) The State agency shall ensure that a sufficient number of authorized food retailers have agreed to participate throughout the area in which the EBT system will operate to ensure that eligible food stamp households will not suffer a significant reduction in their choice of retail food stores and that a sufficient number of retail food stores

serving minority language populations are participating.

(4) The EBT system shall be implemented and operated in a manner that maintains equal treatment for food stamp households in accordance with § 278.2(b) of this chapter. The following requirements for the equal treatment of food stamp households shall directly apply to EBT systems:

(i) Retailers shall not establish special checkout lanes which are only for food stamp households or welfare customers. If special lanes are designated for the purpose of accepting other electronic debit or credit cards and/or other payment methods such as checks, food stamp customers with EBT cards may also be assigned to such lanes as long as other commercial customers are assigned there as well.

(ii) POS terminals shall be deployed as follows in EBT systems requiring food stamp households to participate:

(A) For an authorized food retail store with food stamp benefit redemption amounting to 15 percent or more of total food sales, all checkout lanes shall be equipped;

(B) For an authorized food retail store with Food Stamp benefit redemptions representing less than 15 percent of total food sales, supermarkets shall, at a minimum, receive one terminal for every $11,000 in monthly redemption activity up to the number of lanes per store. All other food retailers shall receive one terminal for every $8,000 in monthly redemption activity up to the number of lanes per store. However, a State agency may utilize an alternative deployment formula that permits equipment deployment at higher levels than required by this paragraph up to the number of lanes in each store. The State agency shall review terminal deployment on a yearly basis and shall be authorized to remove excess terminals if actual redemption activity warrants a reduction.

(C) For newly authorized food retailers and authorized food retailers bordering the EBT system area, the State agency and food retailer shall negotiate a mutually agreed level of terminal deployment up to the number of lanes per store. The State agency may consult with the appropriate FNS field office in order to determine the previous food stamp redemption activity that could be utilized in determining the initial number of terminals to deploy in newly authorized retailers or border stores. The State agency shall examine household shopping patterns in the EBT operating area in order to establish the needs for border store equipment. The need to deploy equipment outside the State is limited to neighboring States that are not interoperable due to exemptions for technological barriers or temporary waivers. State agencies will also need to make accommodations for border stores in interoperable States that are deemed necessary for client access. To do so, State agencies must ensure that procedures are in place to process manual vouchers in instances when the system is down or for those retailers that do not have POS equipment. Redemption information shall remain confidential.

(D) Any food retailer shall be able to submit further evidence that it warrants additional terminals after the initial POS terminals are deployed. Food stamp households may also submit evidence to the State agency that additional POS terminals are needed.

(5) The State agency shall ensure that the EBT system provides credits to the financial institution holding the accounts for retailers or third party processors within two business days of the daily cut-over period for retailer settlement. The cut-over period is the time of day established by the system in which a transaction day is established for settlement and reconciliation.

(6) The State agency shall enter into an agreement with each authorized food retailer. The retailer agreement shall describe the terms and conditions of participation in the Food Stamp EBT system. At a minimum, the agreement shall:

(i) Describe all terms and conditions with respect to equipment ownership, lease arrangements, handling and maintenance for which the State agency and merchant are liable;

(ii) Describe the agreed upon procedures and policies for participation and withdrawal from the EBT system;

(iii) Comply with all Food Stamp Program regulations with respect to retailer participation in the program

and treatment of Food Stamp Program households. This shall include specific requirements with respect to the deployment of terminals and the identification of checkout lanes for food stamp customers;

(iv) Delineate the liabilities during system downtime and the associated responsibilities of each party with respect to the use of off-line and/or manually entered data, paper vouchers, and re-presented vouchers.

(i) *Performance and technical standards.* The State agency shall ensure that EBT systems comply with Point of Sale (POS) technical standards established by the American National Standards Institute (ANSI) or International Organization for Standardization (ISO) where applicable. This includes the draft EBT ISO 8583 Processor Interface Technical Specifications contained in the ANSI standards, which delineates a standard message format for retailers and third parties. In addition, the State agency shall ensure that the EBT system meets performance and technical standards in the areas of system processing speeds, system availability and reliability, system security, system ease-of-use, minimum card and terminal requirements, performance bonding, and a minimum transaction set. With prior written approval from FNS, the State agency may utilize the prevailing industry performance standards in its region in lieu of those identified in this section. The standards shall be included in all requests for proposals and contracts.

(1) *System processing speeds.* (i) For leased line systems, 98 percent of EBT transactions shall be processed within 10 seconds or less and all EBT transactions shall be processed within 15 seconds. Leased line systems rent telecommunications carriers specifically to connect to the central authorizing computer. For dial-up systems, 95 percent of the EBT transactions shall be processed within 15 seconds or less and all EBT transactions shall be processed within 20 seconds or less. Dial-up systems utilize existing telecommunications lines to dial up and connect to the central computer at the time of the transaction. Processing response time shall be measured at the POS terminal from the time the 'enter' or 'send' key is pressed to the receipt and display of authorization or disapproval information. Third party processors, as defined in paragraph (h)(5) of this section, shall be required by the State agency to comply with the same processing response times required of the primary processor.

(ii) The EBT system shall provide reports, as determined by the State agency, that document transaction processing response time and the number and type of problematic transactions that could not be processed within the standard response time.

(2) *System availability and reliability.* (i) The EBT system central computer shall be available 99.9 percent of scheduled up-time, 24 hours a day, seven days per week. Scheduled up-time shall mean the time the database is available for transactions excluding scheduled downtime for routine maintenance. The total system, including the system's central computer, any network or intermediate processing facilities and cardholder authorization processors, shall be available 98 percent of scheduled up-time, 24 hours per day, 7 days per week. Scheduled downtime for routine maintenance shall occur during non-peak transaction periods. State certification procedures shall determine whether intermediate processing facilities and cardholder authorization processors are capable of complying with system availability standards prescribed herein prior to permitting the interface with the central computer system.

(ii) The system central computer shall permit no more than 2 inaccurate EBT transactions for every 10,000 EBT transactions processed. The transactions to be included in measuring system accuracy shall include all types of food stamp transactions permitted at POS terminals and processed through the host computer, manual transactions entered into the system, credits to household accounts, and funds transfers to retailer accounts.

(iii) Reconciliation reports and other information regarding problematic transactions shall be made available to the State agency by the system operator, individual retailers, households

or financial institutions as appropriate. Reports on problematic transactions, including inaccurate transactions shall be delineated by the source of the problem such as card failure, POS terminal failure, interruption of telecommunications, or other component failure. Errors shall be resolved in a timely manner.

(3) *System security*. As an addition to or component of the Security Program required of Automated Data Processing systems prescribed under § 277.18(p) of this chapter, the State agency shall ensure that the following EBT security requirements are established:

(i) Storage and control measures to control blank unissued EBT cards and PINs, and unused or spare POS devices;

(ii) Measures to ensure communication access control. Communication controls shall include the transmission of transaction data and issuance information from point-of-sale terminals to work-stations and terminals at the data processing center. The following specific security measures shall be included, as appropriate, in the system design documentation, operating procedures or the State agency Security Program:

(A) Computer hardware controls that ensure acceptance of data from authorized terminals only. These controls shall include the use of mechanisms such as retailer identification codes, terminal identifiers and user identification codes, and/or other mechanisms and procedures recognized by the industry;

(B) Software controls, placed at either the terminal or central computer or both, that establish separate control files containing lists of authorized retailers, terminal identifying codes, and user access and identification codes. EBT system software controls shall include separate checks against the control files in order to validate each transaction prior to authorization and limiting the number of unsuccessful PIN attempts that can be made utilizing standard industry practices before the card is deactivated;

(C) Communications network security that utilizes the Data Encryption Standard algorithm to encrypt the PIN, at a minimum, from the point of entry. Other security may include authentication codes and check-sum digits, in combination with data encoded on the magnetic stripe such as the PIN and/or PIN offset, to ensure data security during electronic transmission. Any of the network security measures may be utilized together or separately and may be applied at the terminal or central computer as indicated in the approved system design to ensure communications control;

(D) Manual procedures that provide for secure access to the system with minimal risk to household or retailer accounts. Manual procedures may include the utilization of manager identification codes in obtaining telephonic authorization from the central computer system; requirements for separate entry with audio response unit verification and authorization number; and/or the utilization of 24 hour hotline telephone numbers to authorize transactions.

(iii) Message validation shall include but shall not be limited to:

(A) Message format checks for completeness of the message, correct order of data, existence of control characters, number and size of data fields and appropriate format standards as specified in the approved system design;

(B) Range checks for acceptable date fields, number and valid account numbers, purchase and refund upper limitations in order to prevent and control damage to the system accounts;

(C) Reversals of messages that are not fully processed and recorded.

(iv) Administrative and operational procedures shall ensure that:

(A) Functions affecting an account balance are separated or dually controlled during processing and when requesting Federal reimbursement through a concentrator bank under the provisions of paragraph (i) of this section. These functions may include but are not limited to the set up of accounts, transmittal of funds to and from accounts, access to files to change account records, and transmittal of retailer deposits to the ACH network or other means approved by FNS for crediting retailer bank accounts;

(B) Passwords, identity codes or other security procedures must be utilized by State agency or local personnel and at data processing centers;

(C) Software programming changes shall be dual controlled to the extent possible;

(D) System operations functions shall be segregated from reconciliation duties;

(v) A separate EBT security component shall be incorporated into the State agency Security Program for Automated Data Processing (ADP) systems where appropriate and as prescribed under § 277.18(p) of this chapter. The periodic risk analyses required by the Security Program shall address the following items specific to an EBT system:

(A) EBT system vulnerability to theft and unauthorized use;

(B) Completeness and timeliness of the reconciliation system;

(C) Vulnerability to tampering with or creating household accounts;

(D) Erroneous posting of issuances to household accounts;

(E) Manipulation of retailers' accounts such as creation of false transactions or intrusion by unauthorized computer users;

(F) Capability to monitor systematic abuses at POS terminals such as debits for a complete allotment, excessive manual issuances, and multiple manual transactions at the same time. Such monitoring may be accomplished through the use of exception reporting;

(G) Tampering with information on the ACH tape or similar information utilized in a crediting method approved by FNS; and,

(H) The availability of a complete audit trail. A complete audit trail shall, at a minimum, be able to provide a complete transaction history of each individual system activity that affects an account balance. The audit trail shall include the tracking of issuances from the Master File and Issuance File, network transactions from point-of-sale terminals to EBT central computer database and system file updates.

(vi) The State agency shall incorporate the contingency plan approved by FNS prior to pilot implementation and subsequently updated as part of the Expansion Implementation Plan into the Security Program.

(4) *System ease-of-use.* (i) For all system users, the State agency shall ensure that the system:

(A) Minimizes the number of separate steps required to complete a transaction;

(B) Minimizes the number of codes or commands needed to make use of the system;

(C) Makes available clear and comprehensive account balance information with a minimum number of actions necessary;

(D) Provides training and instructions for all system users especially those persons with disabilities;

(E) Makes available prompts on POS terminals or balance only terminals, where appropriate;

(F) Identifies procedures for problem resolution;

(G) Provides reasonable accommodation for the needs of households with disabilities in keeping with the Americans with Disabilities Act of 1990.

(ii) In addition to the requirements of paragraph (h)(4)(i) of this section, the State agency shall ensure that retailers utilizing the EBT system:

(A) Have available manual backup procedures;

(B) Can obtain timely information on daily credits to their banks;

(C) Have available deposit information in a format readily comparable to information maintained in the store; and

(D) Have available instructions on resolving problems with equipment and retailer accounts.

(5) *Third party processors.* Third party processors are financial institutions, cardholder authorization processors other than the party with which the State agency has contracted for EBT services, and food retailers driving their own terminals that are capable of relaying electronic transactions to a central database computer for authorization. The State agency shall afford retailers the opportunity to use third party processors and shall provide interface specifications and certification standards in order for the third party processor to participate in the EBT system.

(i) In order to participate in a Food Stamp Program EBT system, a third party processor must be able to meet all third party interface specifications and certification standards associated with this section. The State agency shall publish the third party interface specifications prior to implementation of the EBT system to enable third party processors to access the database. Third party processors shall undergo functional and acceptance tests as specified by the State agency;

(ii) Third party processors shall be liable for transactions until the transaction has been electronically accepted by the contracted vendor or an intermediate processing facility;

(iii) The State agency shall ensure that third party processors and food retailers driving their own terminals comply with this section and all applicable Food Stamp Program regulations.

(6) *Minimum card requirements.* (i) The State agency shall ensure that the following information is printed on the card:

(A) The address of the office where a card can be returned if found or no longer in use;

(B) The statement of nondiscrimination which reads as follows: ''This is an equal opportunity program. If you believe that you have been the victim of discrimination in your efforts to receive food stamp benefits because of your race, color, national origin, age, sex, disability, religious belief, or political beliefs, write immediately to the Administrator, Food and Nutrition Service, 3101 Park Center Drive, Alexandria, Virginia 22302.'' In lieu of printing the required information on the EBT card, the State agency shall provide each household a card jacket or sleeve containing the nondiscrimination statement.

(ii) FNS reserves the right to require State agencies to place a Department logo on the EBT card and/or sleeves or jackets.

(iii) EBT cards and/or sleeves or jackets shall not contain the name of any State or local official. EBT informational materials shall not indicate association with any political party or other political affiliation.

(iv) State agencies may require the use of a photograph of one or more household members on the card. If the State agency does require the EBT cards to contain a photo, it must establish procedures to ensure that all appropriate household members or authorized representatives are able to access benefits from the account as necessary.

(7) *POS terminals.* POS terminals shall meet the following requirements:

(i) Balance information shall not be displayed on the screen of the POS terminal except for balance-only inquiry terminals;

(ii) PINs shall not be displayed at the terminal; and

(iii) PIN encryption shall occur from the point of entry in a manner which prevents the unsecured transmission between any point in the system.

(8) *Performance bonding.* The State agency may require a performance bond in accordance with § 277.8 of this chapter or utilize other contractual clauses it deems necessary to enforce the requirements of this section.

(9) *Minimum transaction set.* At a minimum, the State agency shall ensure that the EBT system, including third party processors and retailers driving their own terminals, is capable of providing for authorizing or rejecting purchases, refunds or customer credits, voids or cancellations, key entered transactions, balance inquiries and settlement or close-out transactions. The system must be capable of completing this transaction set across State borders nationwide in accordance with standards specified in paragraph (h)(10) of this section.

(10) *Interoperability.* State agencies must adopt uniform standards to facilitate interoperability and portablilty nationwide. The term ''interoperability'' means the EBT system must enable a coupon issued in the form of an EBT card to be redeemed in any State. The term ''portablity'' means the EBT system must enable a coupon issued in the form of an EBT card to be used in any State by a household to purchase food at a retail food store or a wholesale food concern approved under the Food Stamp Act of 1977. The standards must include the following:

(i) *EBT system connectivity.* State agencies are responsible for establishing telecommunications links, transaction switching facilities and any other arrangements with other State agencies necessary for the routing of interoperable transactions to such other State EBT authorization systems. State agencies are also responsible for facilitating the settlement of such interoperable transactions and the handling of adjustments. These connections need not be direct connections between State authorization systems but may be facilitated through agreements and linkages with other designated agents or third party processors. All State agencies must agree to the timing and disposition of disputes, error resolution, and adjustments in accordance with Department regulations at § 273.13(a), § 273.15(k) and paragraph (f) of this section. State agencies or their designated agents must draw funds from State food stamp accounts for food stamp benefits transacted by that State's food stamp recipients, regardless of where benefits were transacted.

(ii) *Message format.* Each authorization system must use the International Organization for Standards (ISO) 8583 message format, modified for EBT, in a version mutually agreed to between the authorization agent and the party connected for all transactions. Each authorization system must process each financial transaction as a single message financial transaction, except for pre-authorized transactions and reversals, processed as paired transactions.

(iii) *Card Primary Account Number (PAN) Requirements.* Track 2 on each card shall contain the PAN. Each Government entity must obtain an Issuer Identification Number (IIN) from the American Banker's Association (ABA). The IIN should be included as the first six digits of the Primary Account Number. The PAN must comply with International Organization for Standards (ISO) 7812, Identification Cards—Numbering System and Registration Procedures for Issuer Identifiers. Each State agency must be responsible for generating, updating, and distributing IIN files of all States to each retailer, processor, or acquirer that is directly connected to the State's authorization system. Each terminal operator that uses a routing table for routing acquired transactions must, within seven calendar days of receiving an IIN routing table update, modify its routing tables to reflect the updated routing information.

(iv) *Third Party Processor Requirements.* Each Third Party Processor or terminal operator must have primary responsibility and liability for operating the telecommunications and processing system (including software and hardware) through which transactions initiated at POS terminals it owns, operates, controls or for which it has signed an agreement to accept EBT transactions, are processed and routed, directly or indirectly, to the appropriate State authorization system. Each terminal operator must maintain the necessary computer hardware and software to interface either directly with a State authorization system or with a third party service provider to obtain access to one or more State authorization systems. Each terminal operator must establish a direct or indirect telecommunications connection for the routing of transactions to the State authorization system or to a processor directly or indirectly connected to the State authorization system.

(v) *REDE File.* The State agency must ensure that their EBT system verifies FNS retailer numbers for all interstate transactions against the National REDE file of all FNS EBT retailers to validate these transactions.

(11) *Waivers.* The State agency may request a waiver from the Department for a temporary exemption from compliance with the requirements for interoperability and portability, as found in this section, if they can adequately demonstrate that: (1) There are unusual technological barriers to the implementation of interoperability; and (2) it is in the best interest of the FSP to grant the waiver. All waivers must specify a date by which the State agency will achieve interoperability and portability.

(j) *Concentrator bank responsibilities.* The concentrator bank shall be a Federally insured financial institution or other entity acceptable to the Federal

Reserve which has the capability to take retailer credits and/or debits, obtained from the EBT system operator, and transmit them to the ACH network operated by the Federal Reserve or through another process for crediting retailers approved by FNS. Transmittal shall be by tape or on-line in a format suitable for the Automated Clearinghouse (ACH) or as approved by FNS.

(1) The minimum functions of the concentrator bank are:

(i) Preparing a daily ACH tape or other crediting process approved by FNS with information on benefits redeemed and creditable to each retailer;

(ii) Transferring the ACH tape or other crediting process approved by FNS to the Federal Reserve or other entity approved by FNS;

(iii) Initiating and accepting reimbursement from the appropriate U.S. Treasury account via the Payment Management System of the U.S. Department of Health and Human Services (HHS) or other payment process approved by FNS. At the option of FNS, the State agency may designate another entity as the initiator of reimbursement for food stamp redemptions provided the entity is acceptable to FNS and HHS;

(iv) Cooperating in the reconciliation of discrepancies and error resolution when necessary.

(2) With the approval of FNS, another procedure, other than the ACH system, may be utilized to credit retailer accounts and/or debit FNS' account, if it meets the needs of FNS and the EBT system.

(3) The State agency shall be liable for any errors in the creation of the ACH tape or its transmission. The State agency may transfer the liability associated with creation of the ACH tape, its transmission or another crediting process approved by FNS as appropriate to the EBT system operator or the concentrator bank. Appropriate system security administrative and operational procedures shall be instituted in accordance with paragraph (h)(3) of this section.

(k) *Reconciliation, management reporting, examinations and audits.* The EBT system shall provide reports and documentation pertaining to the following:

(1) *Reconciliation.* Reconciliation shall be conducted and records kept as follows:

(i) Reconciliation of benefits posted to household accounts on the central computer against benefits on the Issuance Authorization File;

(ii) Reconciliation of individual household account balances against account activities on a daily basis;

(iii) Reconciliation of each individual retail store's food stamp transactions per POS terminal and in total to deposits on a daily basis;

(iv) Verification of retailer's credits against deposit information entered into the ACH network;

(v) Reconciliation of total funds entered into, exiting from, and remaining in the system each day;

(vi) Maintenance of audit trails that document the full cycle of issuance from benefit allotment posting to the State issuance authorization file through posting to point-of-sale transactions at retailers through settlement of retailer credits.

(2) *Management reports.* The State agency shall require the EBT system to provide reports that enable the State agency to manage the system. The reports shall be available to the State agency or FNS as requested on a timely basis and consist of:

(i) Information on how the system operates relative to its performance standards, the incidence, type and cause of system problems, and utilization patterns.

(ii) Information regarding transactions and other information specified by FNS during system development which is necessary to conduct compliance investigations. At a minimum exception reports shall be able to isolate transaction data by individual retailers and households. Exception reports shall be provided to the appropriate FNS Compliance Branch Area office on a quarterly basis. The Compliance Officer in Charge (COIC) shall be permitted to require that the reports be made available on either a more or less frequent basis.

(3) *Pilot project reports.* The State agency shall provide quarterly reports as described in paragraph (c)(4) of this section during the pilot project.

(4) *Program reporting.* When benefits are initially issued through an EBT system, the State agency shall report as required by FNS in § 274.4 and in accordance with the FNS instructions specific to EBT issuances.

(5) *Examinations and audits.*

(i) The state agency must obtain an examination by an independent auditor of the transaction processing of the State EBT service provider regarding the issuance, redemption, and settlement of Food Stamp Program benefits. The examination must be done at least annually and the report must be completed ninety days after the examination period ends. Subsequent examinations must cover the entire period since the previous examination. Examinations must follow the American Institute of Certified Public Accountants (AICPA) Statement on Auditing Standards No. 70, Service Organizations (SAS No. 70), requirements for reports on controls placed in operation and tests of the operating effectiveness of the controls.

(ii) The examination report must include a list of all States whose systems operate under the same control environment. Auditors conducting the examination must follow EBT guidance contained in the Office of Management and Budget (OMB) Circular A–133 Compliance Supplement to the extent the guidelines refer to FSP benefits. (For availability of OMB Circulars referenced in this section, see 5 CFR 1310.3.)

(iii) The State agency must retain a copy of the SAS No.70 examination report.

(iv) The State agency shall respond to written requests from the Food and Nutrition Service (FNS), USDA Office of the Inspector General (OIG), or the General Accounting Office (GAO) for completed SAS No.70 examination reports by providing the report within thirty days of receipt of the written request.

(v) The State agency shall respond to written requests from FNS, OIG, or GAO to view auditor's workpapers from SAS No. 70 reports by arranging to have workpapers made available within thirty days of receipt of the written request.

(vi) FNS and the USDA OIG shall rely on SAS No. 70 reports on EBT transaction processing services provided by contractors to the State. FNS and USDA OIG reserve the right to conduct other reviews or audits if necessary.

(vii) EBT services provided directly by the State are not subject to SAS No. 70 examination requirements of this section but remain subject to the single audit requirements at 7 CFR 277.7 and the Office of Management and Budget Circular A–133.

(l) *Federal Financial Participation.* (1) The cost of administering statewide benefit issuance after implementation of the EBT system shall be funded at the regular Federal financial participation rate up to the level of the current coupon issuance costs, as prescribed in paragraph (c)(3) of this section.

(2) Enhanced funding for coupon issuance activities that a State agency incurs on Indian Reservations shall be accommodated within the issuance cap.

(3) The State agency shall comply with the provisions set forth under 7 CFR 277.18 and appendix A of 7 CFR 277.18 in determining and claiming allowable costs for the EBT system.

(4) Access to system documentation, including cost records of contractors or subcontractors shall be made available and incorporated into contractual agreements in accordance with § 277.18(k) of this chapter.

(5) The State agency shall adjust the issuance cap, once the cap is approved by FNS, as follows:

(i) The food stamp case load utilized in estimating annual budgetary needs under the cap shall be adjusted quarterly by the number of cases actually issued benefits through the EBT system and the coupon issuance systems operating within the State. Quarterly costs adjusted by the number of food stamp cases actually issued benefits during the quarter shall accumulate by each Federal fiscal quarter until the close of the fiscal period to which it applies;

(ii) The annual issuance cap adjustment shall be based on the percentage change in the Gross National Product Implicit Price Deflator index (GNP price deflator). The index is reported monthly by the U.S. Department of

Commerce, Bureau of Economic Analysis. The percentage change shall be calculated from the percentage change in the index between the first quarter of the current calendar year and the first quarter of the previous year. This data will be made available to State agencies by FNS from the June report published by the Bureau of Economic Analysis. The case-month cap for subsequent Federal fiscal years shall be obtained by revising the previous year's cap based on the most recent inflation information for that period. The State agency shall then multiply the revised issuance cap from the prior year by the percentage change in inflation indicated by the most recent GNP price deflator;

(iii) The yearly amortized cost associated with pre-operational costs (i.e., design, development) shall be determined at the end of the assignment period established in accordance with paragraph (c)(3)(iv) of this section and assigned retroactively to the case-month costs of each prior year of operation. If such assignment puts the State agency over the issuance cap of all prior years of operation, claims shall be made as appropriate.

(m) *Re-presentation*. The State agency shall ensure that a manual purchase system is available for use during times when the EBT system is inaccessible.

(1) Under certain circumstances, when a manual transaction occurs due to the inaccessibility of the host computer and the transaction is rejected because insufficient funds are available in a household's account, the State agency may permit the re-presentation of the transaction during subsequent months. At the State agency's option, re-presentation may be permitted within the EBT system as follows:

(i) Re-presentation of manual vouchers when there are insufficient funds in the EBT account to cover the manual transaction may be permitted only under the following circumstances:

(A) The manual transaction occurred because the host computer was down and authorization was obtained by the retailer for the transaction; or

(B) The manual transaction occurred because telephone lines were down.

(ii) Re-presentation of manual vouchers shall not be permitted when the EBT card, magnetic stripe, PIN pad, card reader, or POS terminal fails and telephone lines are operational. Manual transactions shall not be utilized to extend credit to a household via re-presentation when the household's account balance is insufficient to cover the planned purchase.

(iii) The State agency may debit the benefit allotment of a household following the insufficient funds transaction in either of two ways:

(A) Any amount which equals at least $10 or up to 10% of the transaction. This amount will be deducted monthly until the total balance owed is paid-in-full. State agencies may opt to re-present at a level that is less than the 10% maximum, however, this lesser amount must be applied to all households.

(B) $50 in the first month and the greater of $10 or 10% of the allotment in subsequent months until the total balance owed is paid-in-full. If the monthly allotment is less than $50, the State shall debit the account for $10.

(2) The State agency shall establish procedures for determining the validity of each re-presentation and subsequent procedures authorizing a debit from a household's monthly benefit allotment. The State agency may ask households to voluntarily pay the amount of a represented transaction or arrange for a faster schedule of payment than identified in paragraph (l)(1)(iii) of this section.

(3) The State agency shall ensure that retailers provide notice to households at the time of the manual transaction that re-presentation may occur if there are insufficient benefits in the account to cover the transaction. The statement shall be printed on the paper voucher or on a separate sheet of paper. The State agency shall also provide notice to the household prior to the month when a benefit allotment is reduced when a re-presentation is necessary. Notice shall be provided to the household for each insufficient transaction that is to be re-presented in a future month. The notice shall be provided prior to the month it occurs and shall state the amount of the reduction in the benefit allotment.

(4) The Department shall not accept liability under any circumstances for the overissuance of benefits due to the utilization of manual vouchers, including those situations when the host computer is inaccessible or telecommunications lines are not functioning. However, the State agency, in consultation with authorized retailers and with the mutual agreement of the State agency's vendor, if any, may accept liability for manual purchases within a specified dollar limit. Costs associated with liabilities accepted by the State agency shall not be reimbursable.

(5) The State agency shall be strictly liable for manual transactions that result in excess deductions from a household's account.

(n) *Ownership rights and procurement requirements.* (1) The State agency shall comply with the software and automated data processing equipment ownership rights prescribed under § 277.13 and § 277.18(l) of this chapter.

(2) The State agency shall comply with the procurement standards prescribed under § 277.18(j) of this chapter. Under service agreements, the procurement of equipment and services which will be utilized in a Food Stamp EBT system shall be conducted in accordance with the provisions set forth under § 277.18(f) of this chapter.

[57 FR 11249, Apr. 1, 1992; 57 FR 44791, Sept. 29, 1992; Amdt. 378, 64 FR 48938, Sept. 9, 1999; 65 FR 10678, Feb. 29, 2000; Amdt. 385, 65 FR 33439, May 24, 2000; Amdt. 378, 65 FR 41325, July 5, 2000; Amdt. 384, 65 FR 49724, Aug. 15, 2000; Amdt. 390, 65 FR 59110, Oct. 4, 2000]

PART 275—PERFORMANCE REPORTING SYSTEM

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EDITORIAL NOTE: OMB control numbers relating to this part 275 are contained in § 271.8.

Subpart A—Administration

§ 275.1 General scope and purpose.

(a) Under the Food Stamp Act, each State agency is responsible for the administration of the Food Stamp Program in accordance with the Act, Regulations, and the State agency's plan of operation. To fulfill the requirements of the Act, each State agency shall have a system for monitoring and improving its administration of the program. The State agency is also responsible for reporting on its administration to FNS. These reports shall identify program deficiencies and the specific administrative action proposed to meet the program requirements established by the Secretary. If it is determined, however, that a State has failed without good cause to meet any of the program requirements established by the Secretary, or has failed to carry out the approved State plan of operation, the Department shall suspend and/or disallow from the State

such funds as are determined to be appropriate in accordance with part 276 of this chapter.

(b)(1) The Food Stamp Act authorizes the Secretary to pay each State agency an amount equal to 50 percent of all administrative costs involved in each State agency's operation of the program. The Act further authorizes the Secretary to increase the percentage share if:

(i) The State agency's payment error rate is less than or equal to 5.90 percent, and

(ii) The State agency's negative case error rate is less than the national weighted mean negative case error rate for the prior fiscal year.

(2) If a State agency qualifies for an increased percentage share, the amount of increase will be an additional percentage point for each full tenth of a percentage point by which the payment error rate is less than six percent, up to a maximum of 60 percent of administrative costs. Those State agencies not receiving the increased share of funding shall develop and implement corrective action plans to reduce payment errors. Corrective action shall be completed as required in subpart E of this section.

[Amdt. 160, 45 FR 15898, Mar. 11, 1980, as amended by Amdt. 266, 52 FR 3407, Feb. 4, 1987; Amdt. 328, 56 FR 60051, Nov. 27, 1991]

§ 275.2 State agency responsibilities.

(a) *Establishment of the performance reporting system.* (1) The State agency shall establish a continuing performance reporting system to monitor program administration and program operations. The method for establishing each component of the system is identified and explained in subparts B through F of this part. The components of the State agency's performance reporting system shall be:

(i) Data collection through management evaluation (ME) reviews and quality control (QC) reviews;

(ii) Analysis and evaluation of data from all sources;

(iii) Corrective action planning;

(iv) Corrective action implementation and monitoring; and

(v) Reporting to FNS on program performance.

(2) The State agency must ensure corrective action is effected at the State and project area levels.

(b) *Staffing standards.* The State agency shall employ sufficient State level staff to perform all aspects of the Performance Reporting System as required in this part of the regulations. The staff used to conduct QC reviews shall not have prior knowledge of either the household or the decision under review. Where there is prior knowledge, the reviewer must disqualify her/himself. Prior knowledge is defined as having:

(1) Taken any part in the decision that has been made in the case; (2) any discussion of the case with staff who participated in the decision; or (3) any personal knowledge of or acquaintance with persons in the case itself. To ensure no prior knowledge on the part of QC or ME reviewers, local project area staff shall not be used to conduct QC or ME reviews; exceptions to this requirement concerning local level staff may be granted with prior approval from FNS. However, local personnel shall not, under any circumstances, participate in ME reviews of their own project areas.

[Amdt. 160, 45 FR 15898, Mar. 11, 1980, as amended by Amdt. 266, 52 FR 3407, Feb. 4, 1987]

§ 275.3 Federal monitoring.

The Food and Nutrition Service shall conduct the review described in this section to determine whether a State agency is operating the Food Stamp Program and the Performance Reporting System in accordance with program requirements. The Federal reviewer may consolidate the scheduling and conduct of these reviews to reduce the frequency of entry into the State agency. FNS regional offices will conduct additional reviews to examine State agency and project area operations, as considered necessary to determine compliance with program requirements. FNS shall notify the State agency of any deficiencies detected in program or system operations. Any deficiencies detected in program or system operations which do not necessitate long range analytical and evaluative measures for corrective action

development shall be immediately corrected by the State agency. Within 60 days of receipt of the findings of each review established below, State agencies shall develop corrective action addressing all other deficiencies detected in either program or system operations and shall ensure that the State agency's own corrective action plan is amended and that FNS is provided this information at the time of the next formal semiannual update to the State agency's Corrective Action Plan, as required in § 275.17.

(a) *Reviews of State Agency's Administration/Operation of the Food Stamp Program.* FNS shall conduct an annual review of certain functions performed at the State agency level in the administration/operation of the program. FNS will designate specific areas required to be reviewed each fiscal year.

(b) *Reviews of State Agency's Management Evaluation System.* FNS will review each State agency's management evaluation system on a biennial basis; however, FNS may review a State agency's management evaluation system on a more frequent basis if a regular review reveals serious deficiencies in the ME system. The ME review will include but not be limited to a determination of whether or not the State agency is complying with FNS regulations, an assessment of the State agency's methods and procedures for conducting ME reviews, and an assessment of the data collected by the State agency in conducting the reviews.

(c) *Validation of State Agency error rates.* FNS shall validate each State agency's payment error rate and underissuance error rate, as described in § 275.23(c), during each annual quality control review period. Federal validation reviews shall be conducted by reviewing against the Food Stamp Act and the regulations, taking into account any FNS-authorized waivers to deviate from specific regulatory provisions. FNS must validate the State agency's negative case error rate, as described in § 275.23(d), when the State agency's payment error rate for an annual review period appears to entitle it to an increased share of Federal administrative funding for that period as outlined in § 277.4(b)(2) of this chapter, and its reported negative case error rate for that period is less than two percentage points above the national weighted mean negative case error rate for the prior fiscal year. However, this requirement will not preclude the Federal review of any negative case for other reasons as determined appropriate by FNS. Any deficiencies detected in a State agency's QC system shall be included in the State agency's corrective action plan. The findings of validation reviews shall be used as outlined in § 275.23(e)(8).

(1) *Payment error rate.* The validation review of each State agency's payment error rate shall consist of the following actions:

(i) FNS will select a subsample of a State agency's completed active cases, as follows:

(A) For State agencies that determine their active sample sizes in accordance with § 275.11(b)(1)(ii), the Federal review sample for completed active cases is determined as follows:

Average monthly reviewable caseload (N)	Federal subsample target (n′)
31,489 and over	n′=400
10,001 to 31,488	n′=.011634 N+33.66
10,000 and under	n′=150

(B) For State agencies that determine their active sample sizes in accordance with § 275.11(b)(1)(iii), the Federal review sample for completed active cases is determined as follows:

Average monthly reviewable caseload (N)	Federal subsample target (n′)
60,000 and over	n′=400
10,001 to 59,999	n′=.005 N+100
10,000 and under	n′=150

(C) In the above formula, n' is the minimum number of Federal review sample cases which must be selected when conducting a validation review, except that FNS may select a lower number of sample cases if:

(*1*) The State agency does not report a change in sampling procedures associated with a revision in its required sample size within 10 days of effecting the change; and/or

(*2*) The State agency does not complete the number of case reviews specified in its approved sampling plan.

(D) The reduction in the number of Federal cases selected will be equal to the number of cases that would have

been selected had the Federal sampling interval been applied to the State agency's shortfall in its required sample size. This number may not be exact due to random starts and rounding.

(E) In the above formula, N is the State agency's minimum active case sample size as determined in accordance with § 275.11(b)(1).

(ii) FNS Regional Offices will conduct case record reviews to the extent necessary to determine the accuracy of the State agency's findings using the household's certification records and the State agency's QC records as the basis of determination. The FNS Regional Office may choose to verify any aspects of a State agency's QC findings through telephone interviews with participants or collateral contacts. In addition, the FNS Regional Office may choose to conduct field investigations to the extent necessary.

(iii) Upon the request of a State agency, the appropriate FNS Regional Office will assist the State agency in completing active cases reported as not completed due to household refusal to cooperate.

(iv) FNS will also review the State agency's sampling procedures, estimation procedures, and the State agency's system for data management to ensure compliance with § 275.11 and § 275.12.

(v) FNS validation reviews of the State agency's active sample cases will be conducted on an ongoing basis as the State agency reports the findings for individual cases and supplies the necessary case records. FNS will begin the remainder of each State agency's validation review as soon as possible after the State agency has supplied the necessary information regarding its sample and review activity.

(2) *Underissuance error rate*. The validation review of each State agency's underissuance error rate shall occur as a result of the Federal validation of the State agency's payment error rate as outlined in paragraph (c)(1) of this section.

(3) *Negative case error rate*. The validation review of each State agency's negative case error rate shall consist of the following actions:

(i) FNS will select a subsample of a State agency's completed negative cases, as follows:

Average monthly reviewable negative caseload (N)	Federal subsample target (n′)
5,000 and over	n′=160
501 to 4,999	n′=.0188 N+65.7
Under 500	n′=75

(A) In the above formula, n' is the minimum number of Federal review sample cases which must be selected when conducting a validation review, except that FNS may select a lower number of sample cases if:

(*1*) The State agency does not report a change in sampling procedures associated with a revision in its required sample size within 10 days of effecting the change; and/or

(*2*) The State agency does not complete the number of case reviews specified in its approved sampling plan.

(B) The reduction in the number of Federal cases selected will be equal to the number of cases that would have been selected had the Federal sampling interval been applied to the State agency's shortfall in its required sample size. This number may not be exact due to random starts and rounding.

(C) In the above formula, N is the State agency's minimum negative case sample size as determined in accordance with § 275.11(b)(2).

(ii) FNS Regional Offices will conduct case record reviews to the extent necessary to determine whether the household case record contained sufficient documentation to justify the State agency's QC findings of the correctness of the State agency's decision to deny, suspend or terminate a household's participation.

(iii) FNS will also review each State agency's negative case sampling and review procedures against the provisions of §§ 275.11 and 275.13.

(iv) FNS will begin each State agency's negative sample case validation review as soon as possible after the State agency has supplied the necessary information, including case records and information regarding its sample and review activity.

(4) *Arbitration*. (i) Whenever the State agency disagrees with the FNS regional office concerning individual QC case findings and the appropriateness

of actions taken to dispose of an individual case, the State agency may request that the dispute be arbitrated on a case-by-case basis by an FNS Arbitrator, subject to the following limitations.

(A) The State agency may only request arbitration when the State agency's and FNS regional office's findings or disposition of an individual QC case disagree.

(B) The arbitration review shall be limited to the point(s) within the Federal findings or disposition that the State agency disputes. However, if the arbitrator in the course of the review discovers a mathematical error in the computational sheet, the arbitration shall correct the error while calculating the allotment.

(ii) The FNS Arbitrator(s) shall be an individual or individuals who are not directly involved in the validation effort.

(iii) With the exception of the restrictions contained in paragraph (c)(4)(iii), for an arbitration request to be considered, it must be received by the appropriate FNS regional office within 20 calendar days of the date of receipt by the State agency of the regional office case findings. In the event the last day of this time period falls on a Saturday, Sunday, or Federal or State holiday, the period shall run to the end of the next work day. The State agency shall be restricted in its eligibility to request arbitration of an individual case if that case was not disposed of and the findings reported in accordance with the timeframes specified in § 275.21(b)(2). For each day late that a case was disposed of and the findings reported, the State agency shall have one less day to request arbitration of the case.

(iv) When the State agency requests arbitration, it shall submit all required documentation to the appropriate FNS regional office addressed to the attention of the FNS Arbitrator. The FNS regional office QC staff may submit an explanation of the Federal position regarding a case to the FNS Arbitrator.

(A) A complete request is one that contains all information necessary for the arbitrator to render an accurate, timely decision.

(B) If the State agency's request is not complete the arbitrator shall make a decision based solely on the available documents.

(v) The FNS Arbitrator shall have 20 calendar days from the date of receipt of a State agency's request for arbitration to review the case and make a decision.

(5) *Household cooperation.* Households are required to cooperate with Federal QC reviewers. Refusal to cooperate shall result in termination of the household's eligibility. The Federal reviewer shall follow the procedures in § 275.12(g)(1)(ii) in order to determine whether a household is refusing to cooperate with the Federal QC reviewer. If the Federal reviewer determines that the household has refused to cooperate, as opposed to failed to cooperate, the household shall be reported to the State agency for termination of eligibility.

(d) *Assessment of Corrective Action.* (1) FNS will conduct will conduct a comprehensive annual assessment of a State agency's corrective action process by compiling all information relative to that State agency's corrective action efforts, including the State agency's system for data analysis and evaluation. The purpose of this assessment and review is to determine if: identified deficiencies are analyzed in terms of causes and magnitude and are properly included in either the State or Project Area/Management Unit corrective action plan; the State agency is implementing corrective actions according to the appropriate plan; target completion dates for reduction or elimination of deficiencies are being met; and, corrective actions are effective. In addition, FNS will examine the State agency's corrective action monitoring and evaluative efforts. The assessment of corrective action will be conducted at the State agency, project area, and local level offices, as necessary.

(2) In addition, FNS will conduct onsite reviews of selected corrective actions as frequently as considered necessary to ensure that State agencies are implementing proposed corrective actions within the timeframes specified in the State agency and/or Project

Area/Management Unit corrective action plans and to determine the effectiveness of the corrective action. The on-site reviews will provide State agencies and FNS with a mechanism for early detection of problems in the corrective action process to minimize losses to the program, participants, or potential participants.

[Amdt. 160, 45 FR 15898, Mar. 11, 1980, as amended by Amdt. 237, 47 FR 57669, Dec. 28, 1982; Amdt. 260, 49 FR 6303, Feb. 17, 1984; Amdt. 266, 52 FR 3407, Feb. 4, 1987; 53 FR 1604, Jan. 21, 1988; 54 FR 23951, June 5, 1989; Amdt. 309, 55 FR 1672, Jan. 18, 1990; Amdt. 328, 56 FR 60051, Nov. 27, 1991; Amdt. 366, 62 FR 29658, June 2, 1997; Amdt. 373, 64 FR 38294, July 16, 1999]

§ 275.4 Record retention.

(a) The State agency shall maintain Performance Reporting System records to permit ready access to, and use of, these records. Performance Reporting System records include information used in data analysis and evalution, corrective action plans, corrective action monitoring records in addition to ME review records and QC review records as explained in paragraphs (b) and (c) of this section. To be readily accessible, system records shall be retained and filed in an orderly fashion. Precautions should be taken to ensure that these records are retained without loss or destruction for the 3-year period required by these regulations. Information obtained on individual households for Performance Reporting System purposes shall be safeguarded in accordance with FNS policies on disclosure of information for the Food Stamp Program.

(b) ME review records consist of thorough documentation of review findings, sources from which information was obtained, procedures used to review Food Stamp Program requirements including sampling techniques and lists, and ME review plans. The State agency must submit documented evidence of review findings to the FNS Regional Office upon request for purposes of evaluating State corrective action plans.

(c) QC review records consist of Forms FNS–380, Worksheet for Integrated TANF, Food Stamps and Medicaid Quality Control Reviews, FNS–380–1, Integrated Review Schedule, FNS–245, Negative Quality Control Review Schedule, and Form FNS–248, Status of Sample Selection and Completion; other materials supporting the review decision; sample lists; sampling frames; tabulation sheets; and reports of the results of all quality control reviews during each review period.

[Amdt. 160, 45 FR 15898, Mar. 11, 1980, as amended by Amdt. 260, 49 FR 6304, Feb. 17, 1984; Amdt. 262, 49 FR 50597, Dec. 31, 1984]

Subpart B—Management Evaluation (ME) Reviews

§ 275.5 Scope and purpose.

(a) *Objectives*. Each State agency shall ensure that project areas operate the Food Stamp Program in accordance with the Act, regulations, and FNS-approved State Plan of Operation. To ensure compliance with program requirements, ME reviews shall be conducted to measure compliance with the provisions of FNS regulations. The objectives of an ME review are to:

(1) Provide a systematic method of monitoring and assessing program operations in the project areas;

(2) Provide a basis for project areas to improve and strengthen program operations by identifying and correcting deficiencies; and

(3) Provide a continuing flow of information between the project areas, the States, and FNS, necessary to develop the solutions to problems in program policy and procedures.

(b) *Frequency of review*. (1) State agencies shall conduct a review once every year for large project areas, once every two years for medium project areas, and once every three years for small project areas, unless an alternate schedule is approved by FNS. The most current and accurate information on active monthly caseload available at the time the review schedule is developed shall be used to determine project area size.

(2) A request for an alternate review schedule shall be submitted for approval in writing with a proposed schedule and justification. In any alternate schedule, each project area must be reviewed at least once every three years. Approval of an alternate schedule is dependent upon a State agency's justification that the project

areas that will be reviewed less frequently than required in paragraph (b)(1) of this section are performing adequately and that previous reviews indicate few problems or that known problems have been corrected. FNS retains the authority for approving any alternate schedule and may approve a schedule in whole or in part. Until FNS approval of an alternate schedule is obtained, the State agency shall conduct reviews in accordance with paragraph (b)(1) of this section.

(3) FNS may require the State agency to conduct additional on-site reviews when a serious problem is detected in a project area which could result in a substantial dollar or service loss.

(4) State agencies shall also establish a system for monitoring those project areas' operations which experience a significant influx of migratory workers during such migrations. This requirement may be satisfied by either scheduling ME reviews to coincide with such migrations or by conducting special reviews. As part of the review the State agency shall contact local migrant councils, advocate groups, or other organizations in the project area to ensure that migrants are receiving the required services.

[Amdt. 160, 45 FR 15900, Mar. 11, 1980, as amended by Amdt. 262, 49 FR 50597, Dec. 31, 1984; Amdt. 266, 52 FR 3408, Feb. 4, 1987]

§ 275.6 Management units.

(a) *Establishment of management units.* For the purpose of ME reviews, State agencies may, subject to FNS approval, establish ''management units'' which are different from project areas designated by FNS for participation in the program. For example, State-established welfare districts, regions or other administrative structures within a State may be so designated. Management units can be designated as either large, medium, or small for purposes of frequency of review. However, establishment of management units solely for the purpose of reducing the frequency of review will not be approved by FNS.

(b) *FNS approval of management units.* State agencies shall submit requests for establishment of management units to FNS, which shall have final authority for approval of such units as well as any changes in those previously approved by FNS.

(1) The following minimum criteria must be met prior to requesting FNS approval:

(i) The proposed management unit must correspond with existing State-established welfare districts, regions, or other administrative structures; and

(ii) The unit must have supervisory control over Food Stamp Program operations within that geographic area and have authority for implementation of corrective action.

(2) In submitting the request for FNS approval, the State agency shall include the following information regarding the proposed management unit:

(i) That the proposed management unit meets the minimum criteria described in paragraphs (b)(1) (i) and (ii) of this section;

(ii) Geographic coverage, including the names of the counties/project areas within the unit and the identification (district or region number) and location (city) of the office which has supervisory control over the management unit;

(iii) Food Stamp Program participation, including the number of persons and number of households;

(iv) The number of certification offices;

(v) The number of issuance units;

(vi) The dollar value of allotments issued as reflected in the most recent available data; and

(vii) Any other relevant information.

[Amdt. 160, 45 FR 15900, Mar. 11, 1980; 45 FR 23637, Apr. 8, 1980, as amended by Amdt. 266, 52 FR 3408, Feb. 4, 1987]

§ 275.7 Selection of sub-units for review.

(a) *Definition of sub-units.* Sub-units are the physical locations of organizational entities within project areas responsible for operating various aspects of the Food Stamp Program, exclusive of Post Offices which may issue coupons. Sub-units shall be classified based upon functional responsibility as one or more of the following.

(1) *Certification office*. Any sub-unit which has the responsibility for accepting applications, conducting interviews, determining eligibility, maintaining (or having easy access to) casefiles, and transmitting information to the data management unit shall be designated as a certification office.

(2) *Issuance office*. Any sub-unit which has the responsibility for issuing coupons to participating households and storing coupons shall be designated as an issuance office.

(3) *Data management unit (DMU)*. Any sub-unit which has the responsibility for maintaining the household issuance record (HIR) masterfile shall be designated as a DMU.

(4) *Bulk storage point*. Any sub-unit which has the responsibility for accepting and storing supplies of coupons prior to shipment to issuance sites shall be designated as a bulk storage point.

(5) *Reporting point*. Any sub-unit which has the responsibility for preparation and submittal of Form FNS–250 for more than one issuance unit shall be designated as a reporting point, regardless of whether or not the unit actually issues coupons.

(b) *Reviewing Issuance Offices and Bulk Storage Points*. The issuance office and bulk storage point review required by § 274.1(c)(2) of this chapter may be satisfied through the ME review system.

(c) *Combined responsibilities*. (1) When a sub-unit has more than one of the areas of functional responsibility specified in paragraph (a) of this section, it shall be included in each applicable classification and if selected for review, all functions performed shall be examined. For example, if a sub-unit has an organizational entity which certifies households and also has an entity which regularly issues coupons, the sub-unit shall be designated as both a certification and an issuance office. Thus, in an HIR issuance system, sub-units designated as issuance offices would usually also be designated as DMU's since the HIR masterfile is usually maintained at the issuance site in this system.

(2) Certain sub-units shall not be designated as having combined responsibilities, even though they may perform certain functions related to more than one of the areas. For example, coupon issuers must maintain a level of coupon inventory to ensure that participants' needs are met on a daily basis but do not supply other issuance sites with bulk supplies of coupons. Such a sub-unit would not be classified as a bulk storage point. Certification offices may issue coupons in emergency situations or to meet the requirements of expedited service but do not routinely issue coupons to households under standard certifications. In these and similar situations, the sub-unit would be classified based upon its primary function exclusively. However, when any sub-unit is selected, all program requirements specified in § 275.8 which the sub-unit has responsibility for, shall be reviewed.

(d) *Itinerant issuance and certification points*. Units which certify households and/or issue coupons as satellites of a central sub-unit shall not be classified as independent sub-units. Units may be identified as itinerant when they do not operate on a regular basis, retain certification records, store coupons, transmit information directly to the DMU and/or develop FNS–250 reports independently. Examples of such units include mobile units, short term or seasonal operations, and units which may operate on a regular basis but do not meet the criteria for a sub-unit described in paragraph (a) of this section. However, when a sub-unit is selected for review which acts as a parent unit for itinerant service points, at least one itinerant point per sub-unit shall be reviewed if operational at the time of the review.

(e) *Selection of Sub-units for Review*. State agencies shall select a representative number of sub-units of each category for on-site review in order to determine a project area's compliance with program standards.

[Amdt. 160, 45 FR 15900, Mar. 11, 1980; 45 FR 23638, Apr. 8, 1980; 45 FR 46784, July 11, 1980, as amended by Amdt. 266, 52 FR 3408, Feb. 4, 1987]

§ 275.8 Review coverage.

(a) During each review period, State agencies shall review the national target areas of program operation specified by FNS. FNS will notify State

agencies of the minimum program areas to be reviewed at least 90 days before the beginning of each annual review period, which is the Federal fiscal year. FNS may add additional areas during the review period if deemed necessary. The FNS headquarters office will add national target areas during the review period only for deficiencies of national scope. State agencies have 60 days in which to establish a plan schedule for such reviews.

(b) State agencies shall be responsible for reviewing each national target area or other program requirement based upon the provisions of the regulations governing the Food Stamp Program and the FNS-approved Plan of Operation. If FNS approves a State agency's request for a waiver from a program requirement, any different policy approved by FNS would also be reviewed. When, in the course of a review, a project area is found to be out of compliance with a given program requirement, the State agency shall identify the specifics of the problem including: the extent of the deficiency, the cause of the deficiency, and, as applicable, the specific procedural requirements the project area is misapplying.

[Amdt. 266, 52 FR 3408, Feb. 4, 1987, as amended by Amdt. 356, 59 FR 29713, June 9, 1994]

§ 275.9 Review process.

(a) *Review procedures.* State agencies shall review the program requirements specified for review in § 275.8 of this part using procedures that are adequate to identify problems and the causes of those problems. As each project area's operational structure will differ, State agencies shall review each program requirement applicable to the project area in a manner which will best measure the project area's compliance with each program requirement.

(b) *ME review plan.* (1) State agencies shall develop a review plan prior to each ME review. This review plan shall specify whether each project area is large, medium, or small and shall contain:

(i) Identification of the project area to be reviewed, program areas to be reviewed, the dates the review will be conducted, and the period of time that the review will cover;

(ii) Information secured from the project area regarding its caseload and organization;

(iii) Identification of the certification offices, issuance offices, bulk storage points, reporting points, and data management units selected for review and the techniques used to select them;

(iv) Identification of whether the State agency is using the ME review to monitor coupon issuers and bulk storage points as discussed § 274.1(c)(2). At State agency option it may also indicate whether the State agency is using the ME review process to perform nondiscrimination reviews; and

(v) A description of the review method(s) the State agency plans to use for each program area being reviewed.

(2) ME review plans shall be maintained in an orderly fashion and be made available to FNS upon request.

(c) *Review methods.* (1) State agenices shall determine the method of reviewing the program requirements associated with each program area. For some areas of program operation it may be necessary to use more than one method of review to determine if the project area is in compliance with program requirements. The procedures used shall be adequate to identify any problems and the causes of those problems.

(2) State agencies shall ensure that the method used to review a program requirement does not bias the review findings. Bias can be introduced through leading questions, incomplete reviews, incorrect sampling techniques, etc.

(d) *Review worksheet.* (1) State agencies shall use a review worksheet to record all review findings. For each sub-unit reviewed the State agency shall, on the worksheet, identify:

(i) The sub-unit being reviewed;

(ii) Each program requirement reviewed in the sub-unit;

(iii) The method used to review each program requirement;

(iv) A description of any deficiency detected;

(v) The cause(s) of any deficiency detected, if known;

(vi) The number of casefiles and/or program records selected and examined within the sub-unit, identification of those selected (record case number,

household name, etc.), the proportion which were not subject to review, as well as the method used to select the sample;

(vii) Where applicable, the numerical extent of any deficiency detected through examination of program records; and

(viii) Any pertinent comments concerning the sub-unit's operation.

(2) State agencies shall promptly forward review findings to the appropriate State office for analysis, evaluation, and corrective action planning. Review worksheets shall be retained in an orderly fashion and made available to FNS upon request.

[Amdt. 160, 45 FR 15900, Mar. 11, 1980; 45 FR 25375, Apr. 15, 1980, as amended by Amdt. 266, 52 FR 3409, Feb. 4, 1987; Amdt. 356, 59 FR 29713, June 9, 1994]

Subpart C—Quality Control (QC) Reviews

§ 275.10 Scope and purpose.

(a) As part of the Performance Reporting System, each State agency is responsible for conducting quality control reviews. For food stamp quality control reviews, a sample of households shall be selected from two different categories: Households which are participating in the Food Stamp Program (called active cases) and households for which participation was denied, suspended or terminated (called negative cases). Reviews shall be conducted on active cases to determine if households are eligible and receiving the correct allotment of food stamps. The determination of whether the household received the correct allotment will be made by comparing the eligibility data gathered during the review against the amount authorized on the master issuance file. Reviews of negative cases shall be conducted to determine whether the State agency's decision to deny, suspend or terminate the household, as of the review date, was correct. Quality control reviews measure the validity of food stamp cases at a given time (the review date) by reviewing against the Food Stamp Program standards established in the Food Stamp Act and the Regulations, taking into account any FNS authorized waivers to deviate from specific regulatory provisions. FNS and the State agency shall analyze findings of the reviews to determine the incidence and dollar amounts of errors, which will determine the State agency's liability for payment errors and eligibility for enhanced funding in accordance with the Food Stamp Act of 1977, as amended, and to plan corrective action to reduce excessive levels of errors for any State agency that is not entitled to enhanced funding.

(b) The objectives of quality control reviews are to provide:

(1) A systematic method of measuring the validity of the food stamp caseload;

(2) A basis for determining error rates;

(3) A timely continuous flow of information on which to base corrective action at all levels of administration; and

(4) A basis for establishing State agency liability for errors that exceed the National standard and State agency eligibility for enhanced funding.

(c) The review process is the activity necessary to complete reviews and document findings of all cases selected in the sample for quality control reviews. The review process shall consist of: (1) Case assignment and completion monitoring; (2) case reviews; (3) supervisory review of completed worksheets and schedules; and (4) transmission of completed worksheets and schedules to the State agency for centralized data compilation and analysis.

[Amdt. 149, 44 FR 45893, Aug. 3, 1979, as amended by Amdt. 260, 49 FR 6304, Feb. 17, 1984; 54 FR 7016, Feb. 15, 1989; Amdt. 328, 56 FR 60051, Nov. 27, 1991; Amdt. 373, 64 FR 38294, July 16, 1999]

§ 275.11 Sampling.

(a) *Sampling plan.* Each State agency shall develop a quality control sampling plan which demonstrates the integrity of its sampling procedures.

(1) *Content.* The sampling plan shall include a complete description of the frame, the method of sample selection, and methods for estimating characteristics of the population and their sampling errors. The description of the sample frames shall include: source, availability, accuracy, completeness, components, location, form, frequency

of updates, deletion of cases not subject to review, and structure. The description of the methods of sample selection shall include procedures for: estimating caseload size, overpull, computation of sampling intervals and random starts (if any), stratification or clustering (if any), identifying sample cases, correcting over-or undersampling, and monitoring sample selection and assignment. A time schedule for each step in the sampling procedures shall be included. If appropriate, the sampling plan shall include a description of its relationship, to other Federally-mandated quality control samples (e.g., Temporary Assistance for Needy Families or Medicaid).

(2) *Criteria*. Sampling plans proposing non-proportional integrated sampling, or other alternative designs shall document compliance with the approval criteria in paragraph (b)(4) of this section. All sampling plans shall:

(i) Conform to principles of probability sampling;

(ii) Specify and explain the basis for the sample sizes chosen by the State agency;

(iii) If the State agency has chosen an active sample size as specified in paragraph (b)(1)(iii) of this section, include a statement that, whether or not the sample size is increased to reflect an increase in participation as discussed in paragraph (b)(3) of this section, the State agency will not use the size of the sample chosen as a basis for challenging the resulting error rates.

(iv) If the State agency has chosen a negative sample size as specified in paragraph (b)(2)(ii) of this section, include a statement that, whether or not the sample size is increased to reflect an increase in negative actions as discussed in paragraph (b)(3) of this section, the State agency will not use the size of the sample chosen as a basis for challenging the resulting error rates.

(3) *Design*. FNS generally recommends a systematic sample design for both active and negative samples because of its relative ease to administer, its validity, and because it yields a sample proportional to variations in the caseload over the course of the annual review period. (To obtain a systematic sample, a State agency would select every kth case after a random start between 1 and k. The value of k is dependent upon the estimated size of the universe and the sample size.) A State agency may, however, develop an alternative sampling design better suited for its particular situation. Whatever the design, it must conform to commonly acceptable statistical theory and application (see paragraph (b)(4) of this section).

(4) *FNS review and approval*. The State agency shall submit its sampling plan to FNS for approval as a part of its State Plan of Operation in accordance with § 272.2(e)(4). In addition, all sampling procedures used by the State agency, including frame composition, construction, and content shall be fully documented and available for review by FNS.

(b) *Sample size*. There are two samples for the food stamp quality control review process, an active case sample and a negative case sample. The size of both these samples is based on the State agency's average monthly caseload during the annual review period. Costs associated with a State agency's sample sizes are reimbursable as specified in § 277.4.

(1) *Active cases*. (i) All active cases shall be selected in accordance with standard procedures, and the review findings shall be included in the calculation of the State agency's payment error and underissuance error rates.

(ii) Unless a State agency chooses to select and review a number of active cases determined by the formulas provided in paragraph (b)(1)(iii) of this section and has included in its sampling plan the reliability certification required by paragraph (a)(2)(iii) of this section, the minimum number of active cases to be selected and reviewed by a State agency during each annual review period shall be determined as follows:

Average monthly reviewable caseload (N)	Minimum annual sample size (n)
60,000 and over	n=2400
10,000 to 59,999	n=300+[0.042(N − 10,000)]
Under 10,000	n=300

(iii) A State agency which includes in its sampling plan the statement required by paragraph (a)(2)(iii) of this section may determine the minimum number of active cases to be selected

and reviewed during each annual review period as follows:

Average monthly reviewable caseload (N)	Minimum annual sample size (n)
60,000 and over	n=1020
12,942 to 59,999	n=300+[0.0153(N − 12,941)]
Under 12,942	n=300

(iv) In the formulas in paragraphs (b)(1)(ii) and (iii) of this section n is the required active case sample size. This is the minimum number of active cases subject to review which must be selected each review period. Also in the formulas, N is the average monthly participating caseload subject to quality control review (i.e., households which are included in the active universe defined in paragraph (e)(1) of this section) during the annual review period.

(2) *Negative cases.*

(i) Unless a State agency chooses to select and review a number of negative cases determined by the formulas provided in paragraph (b)(2)(ii) of this section and has included in its sampling plan the reliability certification required by paragraph (a)(2)(iv) of this section, the minimum number of negative cases to be selected and reviewed by a State agency during each annual review period shall be determined as follows:

Average monthly reviewable negative caseload (N)	Minimum annual sample size (n)
5,000 and over	n=800
500 to 4,999	n=150+[0.144(N − 500)]
Under 500	n=150

(ii) A State agency which includes in its sampling plan the statement required by paragraph (a)(2)(iv) of this section may determine the minimum number of negative cases to be selected and reviewed during each annual review period as follows:

Average monthly reviewable negative caseload (N)	Minimum annual sample size (n)
5,000 and over	n=680
684 to 4,999	n=150+[0.1224(N − 683)]
Under 684	n=150

(iii) In the formulas in this paragraph (b)(2), n is the required negative sample size. This is the minimum number of negative cases subject to review which must be selected each review period.

(iv) In the formulas in this paragraph (b)(2), N is the average monthly number of negative cases which are subject to quality control review (i.e., households which are part of the negative universe defined in paragraph (e)(2) of this section) during the annual review period.

(3) *Unanticipated changes.* Since the average monthly caseloads (both active and negative) must be estimated at the beginning of each annual review period, unanticipated changes can result in the need for adjustments to the sample size. FNS shall not penalize a State agency that does not adjust its sample size if the actual caseload during a review period is less than 20 percent larger than the estimated caseload initially used to determine sample size. If the actual caseload is more than 20 percent larger than the estimated caseload, the larger sample size appropriate for the actual caseload will be used in computing the sample completion rate.

(4) *Alternative designs.* The active and negative sample size determinations assume that State agencies will use a systematic or simple random sample design. State agencies able to obtain results of equivalent reliability with smaller samples and appropriate design may use an alternative design with FNS approval. To receive FNS approval, proposals for any type of alternative design must:

(i) Demonstrate that the alternative design provides payment error rate estimates with equal-or-better predicted precision than would be obtained had the State agency reviewed simple random samples of the sizes specified in paragraphs (b)(1) and (b)(2) of this section.

(ii) Describe all weighting, and estimation procedures if the sample design is non-self-weighted, or uses a sampling technique other than systematic sampling.

(iii) Demonstrate that self-weighting is actually achieved in sample designs claimed to be self-weighting.

(c) *Sample selection.* The selection of cases for quality control review shall be made separately for active and negative cases each month during the annual review period. Each month each State agency shall select for review approximately one-twelfth of its required

sample, unless FNS has approved other numbers of cases specified in the sampling plan.

(1) *Substitutions.* Once a household has been identified for inclusion in the sample by a predesigned sampling procedure, substitutions are not acceptable. An active case must be reviewed each time it is selected for the sample. If a household is selected more than once for the negative sample as the result of separate and distinct instances of denial, suspension or termination, it shall be reviewed each time.

(2) *Corrections.* Excessive undersampling must be corrected during the annual review period. Excessive oversampling may be corrected at the State agency's option. Cases which are dropped to compensate for oversampling shall be reported as not subject to review. Because corrections must not bias the sample results, cases which are dropped to compensate for oversampling must comprise a random subsample of all cases selected (including those completed, not completed, and not subject to review). Cases which are added to the sample to compensate for undersampling must be randomly selected from the entire frame in accordance with the procedures specified in paragraphs (b), (c)(1), and (e) of this section. All sample adjustments must be fully documented and available for review by FNS.

(d) *Required sample size.* A State agency's required sample size is the larger of either the number of cases selected which are subject to review or the number of cases chosen for selection and review according to paragraph (b) of this section.

(e) *Sample frame.* The State agency shall select cases for quality control review from a sample frame. The choice of a sampling frame shall depend upon the criteria of timeliness, completeness, accuracy, and administrative burden. Complete coverage of the sample universes, as defined in paragraph (f) of this section, must be assured so that every household subject to quality control review has an equal or known chance of being selected in the sample. Since the food stamp quality control review process requires an active and negative sample, two corresponding sample frames are also required.

(1) *Active cases.* The frame for active cases shall list all households which were: (i) Certified prior to, or during, the sample month; and (ii) issued benefits for the sample month, except for those households excluded from the universe in paragraph (f)(1) of this section. State agencies may elect to use either a list of certified eligible households or a list of households issued an allotment. If the State agency uses a list of certified eligible households, those households which are issued benefits for the sample month after the frame has been compiled shall be included in a supplemental list. If the State agency uses an issuance list, the State agency shall ensure that the list includes those households which do not actually receive an allotment because the entire amount is recovered for repayment of an overissuance in accordance with the allotment reduction procedures in § 273.18.

(2) *Negative cases.* The frame for negative cases shall list:

(i) All households whose applications for food stamp benefits were denied by an action in the sample month or effective for the sample month except those excluded from the universe in paragraph (f)(2) of this section. If a household is subject to more than one denial action in a single sample month, each action shall be listed separately in the sample frame; and

(ii) All households whose food stamp benefits were suspended or terminated by an action in the sample month or effective for the sample month except those excluded from the universe in paragraph (f)(2) of this section.

(3) *Unwanted cases.* A frame may include cases for which information is not desired (e.g., households which have been certified but did not actually participate during the sample month). When such cases cannot be eliminated from the frame beforehand and are selected for the sample, they must be accounted for and reported as being not subject to review in accordance with the provisions in §§ 275.12(g) and 275.13(e).

(f) *Sample universe.* The State agency shall ensure that its active and negative case frames accurately reflect

their sample universes. There are two sample universes for the food stamp quality control review process, an active case universe and a negative case universe. The exceptions noted below for both universes are households not usually amenable to quality control review.

(1) *Active cases.* The universe for active cases shall include all households certified prior to, or during, the sample month and receiving food stamps for the sample month, except for the following:

(i) A household in which all the members had died or had moved out of the State before the review could be undertaken or completed;

(ii) A household receiving food stamps under a disaster certification authorized by FNS;

(iii) A household which is under investigation for intentional Program violation, including a household with a pending administrative disqualification hearing;

(iv) A household appealing an adverse action when the review date falls within the time period covered by continued participation pending the hearing; or

(v) A household receiving restored benefits in accordance with § 273.17 but not participating based upon an approved application. Other households excluded from the active case universe during the review process are identified in § 275.12(g).

(2) *Negative cases.* The universe for negative cases shall include all households whose applications for food stamps were denied or whose food stamp benefits were suspended or terminated by an action in the sample month except the following:

(i) A household which had its case closed due to expiration of the certification period;

(ii) A household denied food stamps under a disaster certification authorized by FNS;

(iii) A household which withdrew an application prior to the agency's determination;

(iv) A household which is under active investigation for Intentional Program Violation;

(v) A household which was denied, but subsequently certified within the normal 30 day processing standard, using the same application form;

(vi) A household which was suspended or terminated but the suspension or termination did not result in a break in participation that is the result of deliberate State agency action. There would be no break in participation if the household is authorized to receive its full allotment in the month for which the suspension or termination was effective other than continuation of benefits pending a fair hearing. Pro rated benefits are not considered to be a full allotment;

(vii) A household which has been sent a notice of pending status but which was not actually denied participation;

(viii) A household which was terminated for failure to file a complete monthly report by the extended filing date, but reinstated when it subsequently filed the complete report before the end of the issuance month;

(ix) Other households excluded from the negative case universe during the review process as identified in § 275.13(e).

(g) *Demonstration projects/SSA processing.* Households correctly classified for participation under the rules of an FNS-authorized demonstration project which FNS determines to significantly modify the rules for determining households' eligibility or allotment level, and households participating based upon an application processed by Social Security Administration personnel shall be included in the selection and review process. They shall be included in the universe for calculating sample sizes and included in the sample frames for sample selection as specified in paragraphs (b) through (e) of this section. In addition, they shall be included in the quality control review reports as specified in § 275.21(e) and included in the calculation of a State agency's completion rate as specified in § 275.25(e)(8). However, all results of reviews of active and negative demonstration project/SSA processed cases shall be excluded from the determination of State agencies' active and negative case error rates, payment error rates, and underissuance error rates as described in § 275.23(c). The review of

these cases shall be conducted in accordance with the provisions specified in §§ 275.12(h) and 275.13(f).

[Amdt. 260, 49 FR 6304, Feb. 17, 1984; 49 FR 14495, Apr. 12, 1984, as amended by Amdt. 262, 49 FR 50598, Dec. 31, 1984; Amdt. 266, 52 FR 3409, Feb. 4, 1987; Amdt. 328, 56 FR 60051, Nov. 27, 1991; Amdt. 366, 62 FR 29658, June 2, 1997; Amdt.373, 64 FR 38295, July 16, 1999]

§ 275.12 Review of active cases.

(a) *General.* A sample of households which were certified prior to, or during, the sample month and issued food stamp benefits for the sample month shall be selected for quality control review. These active cases shall be reviewed to determine if the household is eligible and, if eligible, whether the household is receiving the correct allotment. The determination of a household's eligibility shall be based on an examination and verification of all elements of eligibility (i.e., basic program requirements, resources, income, and deductions). The elements of eligibility are specified in §§ 273.1 and 273.3 through 273.9. The verified circumstances and the resulting benefit level determined by the quality control review shall be compared to the benefits authorized by the State agency as of the review date. When changes in household circumstances occur, the reviewer shall determine whether the changes were reported by the participant and handled by the agency in accordance with the rules set forth in §§ 273.12, 273.13 and 273.21, as appropriate. For active cases, the review date shall always fall within the sample month, either the first day of a calendar or fiscal month or the day of certification, whichever is later. The review of active cases shall include: a household case record review; a field investigation, except as provided in paragraph (b) of this section; the identification of any variances; an error analysis; and the reporting of review findings.

(b) *Household case record review.* The reviewer shall examine the household case record to identify the specific facts relating to the household's eligibility and basis of issuance. If the reviewer is unable to locate the household case record, the reviewer shall identify as many of the pertinent facts as possible from the household issuance record. The case record review shall include all information applicable to the case as of the review month, including the application and worksheet in effect as of the review date. Documentation contained in the case record can be used as verification if it is not subject to change and applies to the sample month. If during the case record review the reviewer can determine and verify the household's ineligibility the review can be terminated at that point, provided that if the determination is based on information not obtained from the household then the correctness of that information must be confirmed as provided in paragraph (c)(2) of this section. The reviewer shall utilize information obtained through the case record review to complete column (2) of the Integrated Worksheet, Form FNS–380, and to tentatively plan the content of the field investigation.

(c) *Field investigation.* A full field investigation shall be conducted for all active cases selected in the sample month except as provided in paragraph (b) of this section. A full field investigation shall include a review of any information pertinent to a particular case which is available through the State Income and Eligibility Verification System (IEVS) as specified in § 272.8. If during the field investigation the reviewer determines and verifies the household's ineligibility, the review can be terminated at that point, provided that if the determination is based on information not obtained from the household then the correctness of that information must be confirmed as provided in paragraph (c)(2) of this section. In Alaska an exception to this requirement can be made in those isolated areas not reachable by regularly scheduled commercial air service, automobile, or other public transportation provided one fully documented attempt to contact the household has been made. Such cases may be completed through casefile review and collateral contact. The field investigation will include interviews with the head of household, spouse, or authorized representative; contact with collateral sources of information; and any other materials and activity pertinent to the review of the

case. The scope of the review shall not extend beyond the examination of household circumstances which directly relate to the determination of household eligibility and basis of issuance status. The reviewer shall utilize information obtained through the field investigation to complete column (3) of the Integrated Worksheet, Form FNS–380.

(1) *Personal interviews.* Personal interviews shall be conducted in a manner that respects the rights, privacy, and dignity of the participants. Prior to conducting the personal interview, the reviewer shall notify the household that it has been selected, as part of an ongoing review process, for review by quality control, and that a personal face-to-face interview will be conducted in the future. The method of notifying the household and the specificity of the notification shall be determined by the State agency, in accordance with applicable State and Federal laws. The personal interview may take place at the participant's home, at an appropriate State agency certification office, or at a mutually agreed upon alternative location. The State agency shall determine the best location for the interview to take place, but would be subject to the same provisions as those regarding certification interviews at §273.2(e)(2) of this chapter. Those regulations provide that an office interview must be waived under certain hardship conditions. Under such hardship conditions the quality control reviewer shall either conduct the personal interview with the participant's authorized representative, if one has been appointed by the household, or with the participant in the participant's home. Except in Alaska, when an exception to the field investigation is made in accordance with this section, the interview with the participant may not be conducted by phone. During the personal interview with the participant, the reviewer shall:

(i) Explore with the head of the household, spouse, authorized representative, or any other responsible household member, household circumstances as they affect each factor of eligibility and basis of issuance;

(ii) Establish the composition of the household;

(iii) Review the documentary evidence in the household's possession and secure information about collateral sources of verification; and

(iv) Elicit from the participant names of collateral contacts. The reviewer shall use, but not be limited to, these designated collateral contacts. If required by the State, the reviewer shall obtain consent from the head of the household to secure collateral information. If the participant refuses to sign the release of information form, the reviewer shall explain fully the consequences of this refusal to cooperate (as contained in paragraph (g)(1)(ii) of this section), and continue the review to the fullest extent possible.

(2) *Collateral contacts.* The reviewer shall obtain verification from collateral contacts in all instances when adequate documentation was not available from the participant. This second party verification shall cover each element of eligibility as it affects the household's eligibility and coupon allotment. The reviewer shall make every effort to use the most reliable second party verification available (for example, banks, payroll listings, etc.), in accordance with FNS guidelines, and shall thoroughly document all verification obtained. If any information obtained by the QC reviewer differs from that given by the participant, then the reviewer shall resolve the differences to determine which information is correct before an error determination is made. The manner in which the conflicting information is resolved shall include recontacting the participant unless the participant cannot be reached. When resolving conflicting information reviewers shall use their best judgement based on the most reliable data available and shall document how the differences were resolved.

(d) *Variance identification.* The reviewer shall identify any element of a basic program requirement or the basis of issuance which varies (i.e., information from review findings which indicates that policy was applied incorrectly and/or information verified as of the review date that differs from that used at the most recent certification action). For each element that varies, the reviewer shall determine whether

the variance was State agency or participant caused. The results of these determinations shall be coded and recorded in column (5) of the Integrated Worksheet, Form FNS–380.

(1) *Variances included in error analysis.* Except for those variances in an element resulting from one of the situations described in paragraph (d)(2) of this section, any variance involving an element of eligibility or basis of issuance shall be included in the error analysis. Such variances shall include but not be limited to those resulting from a State agency's failure to take the disqualification action related to SSN's specified in § 273.6(c), and related to work requirements, specified in § 273.7(g).

(2) *Variances excluded from error analysis.* The following variances shall be excluded from the determination of a household's eligibility and basis of issuance for the sample month:

(i) Any variance resulting from the nonverified portion of a household's gross nonexempt income where there is conclusive documentation (a listing of what attempts were made to verify and why they were unsuccessful) that such income could not be verified at the time of certification because the source of income would not cooperate in providing verification and no other sources of verification were available. If there is no conclusive documentation as explained above, then the reviewer shall not exclude any resulting variance from the error determination. This follows certification policy outlined in § 273.2(f)(1)(i).

(ii) Any variance in cases certified under expedited certification procedures resulting from postponed verification of an element of eligibility as allowed under § 273.2(i)(4)(i). Verification of gross income, deductions, resources, household composition, alien status, or tax dependency may be postponed for cases eligible for expedited certification. However, if a case certified under expedited procedures contains a variance as a result of a residency deficiency, a mistake in the basis of issuance computation, a mistake in participant identification, or incorrect expedited income accounting, the variance shall be included in the error determination. This exclusion shall only apply to those cases which are selected for QC review in the first month of participation under expedited certification.

(iii) Any variance subsequent to certification in an element of eligibility or basis of issuance which was not reported and was not required to have been reported as of the review date. The elements participants are required to report and the time requirements for reporting are specified in §§ 273.12(a) and 273.21(h) and (i), as appropriate. If, however, a change in any element is reported, and the State agency fails to act in accordance with §§ 273.12(c) and 273.21(j), as appropriate, any resulting variance shall be included in the error determination.

(iv) Any variance in deductible expenses which was not provided for in determining a household's benefit level in accordance with § 273.2(f)(3)(i)(B). This provision allows households to have their benefit level determined without providing for a claimed expense when the expense is questionable and obtaining verification may delay certification. If such a household subsequently provides the needed verification for the claimed expense and the State agency does not redetermine the household's benefits in accordance with § 273.12(c), any resulting variance shall be included in the error determination.

(v) Any variance resulting from use by the State agency of information concerning households or individuals from an appropriate Federal source, provided that such information is correctly processed by the State agency. An appropriate Federal source is one which verifies: Income that it provides directly to the household; deductible expenses for which it directly bills the household; or other household circumstances which it is responsible for defining or establishing. To meet the provisions for correct processing, the eligibility worker must have appropriately acted on timely information. In order to be timely, information must be the most current that was available to the State agency at the time of the eligibility worker's action.

(vi) Two variances relating to the Immigration and Naturalization Service's

(INS) Systematic Alien Verification for Entitlements (SAVE) Program.

(A) A variance based on a verification of alien documentation by INS. The reviewer shall exclude such variance only if the State agency properly used SAVE and the State agency provides the reviewer with:

(*1*) The alien's name;

(*2*) The alien's status; and

(*3*) Either the Alien Status Verification Index (ASVI) Query Verification Number or the INS Form G–845, as annotated by INS.

(B) A variance based on the State agency's wait for the response of INS to the State agency's request for official verification of the alien's documentation. The reviewer shall exclude such variance only if the State agency properly used SAVE and the State agency provides the reviewer with either:

(*1*) The date of request, if the State agency was waiting for an automated response; or

(*2*) A copy of the completed Form G–845, if the State agency was waiting for secondary verification from INS.

(vii) Subject to the limitations provided in paragraphs (d)(2)(vii)(A) through (d)(2)(vii)(F) of this section any variance resulting from application of a new Program regulation or implementing memorandum (if one is sent to advise State agencies of a change in Federal law, in lieu of regulations during the first 120 days from the required implementation date.

(A) When a regulation allows a State agency an option to implement prior to the required implementation date, the date on which the State agency chooses to implement may, at the option of the State, be considered to be the required implementation date for purposes of this provision. The exclusion period would be adjusted to begin with this date and end on the 120th day that follows. States choosing to implement prior to the required implementation date must notify the appropriate FNS Regional Office, in writing, prior to implementation that they wish the 120 day variance exclusion to commence with actual implementation. Absent such notification, the exclusionary period will commence with the required implementation date.

(B) A State agency shall not exclude variances which occur prior to the States implementation.

(C) A State agency which did not implement until after the exclusion period shall not exclude variances under this provision.

(D) Regardless of when the State agency actually implemented the regulation, the variance exclusion period shall end on the 120th day following the required implementation date, including the required implementation date defined in paragraph (d)(2)(vii)(A) of this section.

(E) For purposes of this provision, implementation occurs on the effective date of State agency's written statewide notification to its eligibility workers.

(F) This variance exclusion applies to changes occasioned by final regulations or interim regulations. In the case of a final regulation issued following an interim regulation, the exclusion applies only to significant changes made to the earlier interim regulation. A significant change is one which the final regulation requires the State agency to implement on or after publication of a final rule.

(viii) Any variance resulting from incorrect written policy that a State agency acts on that is provided by a Departmental employee authorized to issue Food Stamp Program policy and that the State agency correctly applies. For purposes of this provision, written Federal policy is that which is issued in regulations, notices, handbooks, category three and four Policy Memoranda under the Policy Interpretation Response System, and regional policy memoranda issued pursuant to these. Written Federal policy is also a letter from the Food and Nutrition Service to a State agency which contains comments on the State agency's food stamp manual or instructions.

(ix) Any variance in a child support deduction which was the result of an unreported change subsequent to the most recent certification action shall be excluded from the error determination.

(3) *Other findings.* Findings other than variances made during the review which are pertinent to the food stamp household or the case record may be

acted on at the discretion of the State agency. Examples of such findings are: an incorrect age of a household member which is unrelated to an element of eligibility; an overdue subsequent certification; no current application on file; insufficient documentation; incorrect application of the verification requirements specified in part 273; and deficiencies in work registration procedural requirements. Such deficiencies include: inadequate documentation of each household member's exempt status; work registration form for each nonexempt household member not completed at the time of application and every six months thereafter; and the household not advised of its responsibility to report any changes in the exempt status of any household member.

(e) *Error analysis.* The reviewer shall analyze all appropriate variances in completed cases, in accordance with paragraph (d) of this section, which are based upon verified information and determine whether such cases are either eligible, eligible with a basis of issuance error, or ineligible. The review of an active case determined ineligible shall be considered completed at the point of the ineligibility determination. For households determined eligible, the review shall be completed to the point where the correctness of the basis of issuance is determined, except in the situations outlined in paragraph (g) of this section. In the event that a review is conducted of a household which is receiving restored or retroactive benefits for the sample month, the portion of the allotment which is the restored or retroactive benefit shall be excluded from the determination of the household's eligibility and/or basis of issuance. A food stamp case in which a household member(s) receives public assistance shall be reviewed in the same manner as all other food stamp cases, using income as received. The determination of a household's eligibility and the correctness of the basis of issuance shall be determined based on data entered on the computation sheet as well as other information documented on other portions of the Integrated Worksheet, Form FNS–380, as appropriate.

(f) *Reporting of review findings.* All information verified to be incorrect during the review of an active case shall be reported to the State agency for appropriate action on an individual case basis. This includes information on all variances in elements of eligibility and basis of issuance in both error and nonerror cases. In addition, the reviewer shall report the review findings on the Integrated Review Schedule, Form FNS–380–1, in accordance with the following procedures:

(1) *Eligibility errors.* If the reviewer determines that a case is ineligible, the occurrence and the total allotment issued in the sample month shall be coded and reported. Whenever a case contains a variance in an element which results in an ineligibility determination and there are also variances in elements which would cause a basis of issuance error, the case shall be treated as an eligibility error. The reviewer shall also code and report any variances that directly contributed to the error determination. In addition, if the State agency has chosen to report information on all variances in elements of eligibility and basis of issuance, the reviewer shall code and report any other such variances which were discovered and verified during the course of the review.

(2) *Basis of issuance errors.* If the reviewer determines that food stamp allotments were either overissued or underissued to eligible households in the sample month, in an amount exceeding $25.00, the occurrence and the amount of the error shall be coded and reported. The reviewer shall also code and report any variances that directly contributed to the error determination. In addition, if the State agency has chosen to report information on all variances in elements of eligibility and basis of issuance, the reviewer shall code and report any other such variances which were discovered and verified during the course of the review.

(3) *Automated Federal Information Exchange System Errors.* Variances resulting from the use by the State agency of information received from automated Federal information exchange systems, which are excluded in accordance with

§ 275.12(d)(2)(v), shall be coded and reported as variances. They shall not, however, be used in determining a State's error rates.

(g) *Disposition of case reviews.* Each case selected in the sample of active cases must be accounted for by classifying it as completed, not completed, or not subject to review. These case dispositions shall be coded and recorded on the Integrated Review Schedule, Form FNS–380–1.

(1) *Cases reported as not complete.* Active cases shall be reported as not completed if the household case record cannot be located and the household itself is not subsequently located; if the household case record is located but the household cannot be located unless the reviewer attempts to locate the household as specified in this paragraph; or if the household refuses to cooperate, as discussed in this paragraph. All cases reported as not complete shall be reported to the State agency for appropriate action on an individual case basis. Without FNS approval, no active case shall be reported as not completed solely because the State agency was unable to process the case review in time for it to be reported in accordance with the timeframes specified in § 275.21(b)(2).

(i) If the reviewer is unable to locate the participant either at the address indicated in the case record or in the issuance record and the State agency is not otherwise aware of the participant's current address, the reviewer shall attempt to locate the household by contacting at least two sources which the State agency determines are most likely to be able to inform the reviewer of the household's current address. Such sources include but are not limited to:

(A) The local office of the U.S. Postal Service;

(B) The State Motor Vehicle Department;

(C) The owner or property manager of the residence at the address in the case record; and

(D) Any other appropriate sources based on information contained in the case record, such as public utility companies, telephone company, employers, or relatives. Once the reviewer has attempted to locate the household and has documented the response of each source contacted, if the household still cannot be located and the State agency has documented evidence that the household did actually exist, the State agency shall report the active case as not subject to review. In these situations documented evidence shall be considered adequate if it either documents two different elements of eligibility or basis of issuance, such as a copy of a birth certificate for age and pay status for income; or documents the statement of a collateral contact indicating that the household did exist. FNS Regional Offices will monitor the results of the contacts which State agencies make in attempting to locate households.

(ii) If a household refuses to cooperate with the quality control reviewer and the State agency has taken other administrative steps to obtain that cooperation without obtaining it, the household shall be notified of the penalities for refusing to cooperate with respect to termination and reapplication, and of the possibility that its case will be referred for investigation for willful misrepresentation. If a household refuses to cooperate after such notice, the reviewer may attempt to complete the case and shall report the household's refusal to the State agency for termination of its participation without regard for the outcome of that attempt. For a determination of refusal to be made, the household must be able to cooperate, but clearly demonstrate that it will not take actions that it can take and that are required to complete the quality control review process. In certain circumstances, the household may demonstrate that it is unwilling to cooperate by not taking actions after having been given every reasonable opportunity to do so, even though the household or its members do not state that the household refuses to cooperate. Instances where the household's unwillingness to cooperate in completing a quality control review has the effect of a refusal to cooperate shall include the following:

(A) The household does not respond to a letter from the reviewer sent Certified Mail-Return Receipt Requested within 30 days of the date of receipt;

(B) The household does not attend an agreed upon interview with the reviewer and then does not contact the reviewer within 10 days of the date of the scheduled interview to reschedule the interview; or

(C) The household does not return a signed release of information statement to the reviewer within 10 days of either agreeing to do so or receiving a request from the reviewer sent Certified Mail-Return Receipt Requested. However, in these and other situations, if there is any question as to whether the household has merely failed to cooperate, as opposed to refused to cooperate, the household shall not be reported to the State agency for termination.

(2) *Cases not subject to review*. Active cases which are not subject to review, if they have not been eliminated in the sampling process, shall be eliminated in the review process. In addition to cases listed in § 275.11(f)(1), these shall include:

(i) Death of all members of a household if they died before the review could be undertaken or completed;

(ii) The household moved out of State before the review could be undertaken or completed;

(iii) The household, at the time of the review, is under active investigation for intentional Food Stamp Program violation, including a household with a pending administrative disqualification hearing;

(iv) A household receiving restored benefits in accordance with § 273.17 but not participating based upon an approved application for the sample month;

(v) A household dropped as a result of correction for oversampling;

(vi) A household participating under disaster certification authorized by FNS for a natural disaster;

(vii) A case incorrectly listed in the active frame;

(viii) A household appealing an adverse action when the review date falls within the time period covered by continued participation pending the hearing;

(ix) A household that did not receive benefits for the sample month; or

(x) A household that still cannot be located after the reviewer has attempted to locate it in accordance with paragraph (g)(1)(i) of this section.

(h) *Demonstration projects/SSA processing*. Households correctly classified for participation under the rules of a demonstration project which establishes new FNS-authorized eligibility criteria or modifies the rules for determining households' eligibility or allotment level shall be reviewed following standard procedures provided that FNS does not modify these procedures to reflect modifications in the treatment of elements of eligibility or basis of issuance in the case of a demonstration project. If FNS determines that information obtained from these cases would not be useful, then they may be excluded from review. A household whose most recent application for participation was processed by Social Security Administration personnel shall be reviewed following standard procedures. This includes applications for recertification, provided such an application is processed by the SSA as allowed in § 273.2(k)(2)(ii).

[Amdt. 260, 49 FR 6306, Feb. 17, 1984; 49 FR 14495, Apr. 12, 1984, as amended by Amdt. 264, 51 FR 7207, Feb. 28, 1986; Amdt. 295, 52 FR 29658, Aug. 11, 1987; 53 FR 39443, Oct. 7, 1988; 53 FR 44172, Nov. 2, 1988; Amdt. 324, 55 FR 48834, Nov. 23, 1990; Amdt. 362, 61 FR 54292, Oct. 17, 1996; Amdt. 366, 62 FR 29659, June 2, 1997; Amdt. 373, 64 FR 38296, July 16, 1999]

§ 275.13 Review of negative cases.

(a) *General*. A sample of households whose applications for food stamp benefits were denied or whose food stamp benefits were suspended or terminated by an action in the sample month or effective for the sample month shall be selected for quality control review. These negative cases shall be reviewed to determine whether the State agency's decision to deny, suspend, or terminate the household, as of the review date, was correct. Depending on the characteristics of individual State systems, the review date for negative cases could be the date of the agency's decision to deny, suspend, or terminate program benefits, the date on which the decision is entered into the computer system, the date of the notice to the client, or the date the negative action becomes effective. However, State agencies must consistently apply the

same definition for review date to all sample cases of the same classification. The review of negative cases shall include a household case record review; an error analysis; and the reporting of review findings, including procedural problems with the action regardless of the validity of the decision to deny, suspend or terminate.

(b) *Household case record review.* The reviewer shall examine the household case record and verify through documentation in it whether the reason given for the denial, suspension, or termination is correct or whether the denial, suspension, or termination is correct for any other reason documented in the casefile. When the case record alone does not prove ineligibility, the reviewer may attempt to verify the element(s) of eligibility in question by telephoning either the household and/or a collateral contact(s). Through the review of the household case record, the reviewer shall complete the household case record sections and document the reasons for denial, suspension or termination on the Negative Quality Control Review Schedule, Form FNS–245.

(c) *Error analysis.* (1) A negative case shall be considered correct if the reviewer is able to verify through documentation in the household case record or collateral contact that a household was correctly denied, suspended or terminated from the program. Whenever the reviewer is unable to verify the correctness of the State agency's decision to deny, suspend or terminate a household's participation through such documentation or collateral contact, the negative case shall be considered incorrect.

(2) The reviewer shall exclude a variance when the State agency erroneously denied, suspended or terminated a household's participation based on an erroneous verification of alien documentation by the Immigration and Nationalization Services (INS) Systematic Alien Verification for Entitlements (SAVE) Program. The reviewer shall exclude the variance only if the State agency properly used SAVE, and the State agency provides the reviewer with:

(i) The alien's name;

(ii) The alien's status; and

(iii) Either the Alien Status Verification Index (ASVI) Query Verification Number or the INS Form G–845, as annotated by INS.

(d) *Reporting of review findings.* When a negative case is incorrect, this information shall be reported to the State agency for appropriate action on an individual case basis, such as recomputation of the coupon allotment and restoration of lost benefits. In addition, the reviewer shall code and record the error determination on the Negative Quality Control Review Schedule, Form FNS–245.

(e) *Disposition of case review.* Each case selected in the sample of negative cases must be accounted for by classifying it as completed, not completed, or not subject to review. These case dispositions shall be coded and recorded on the Negative Quality Control Review Schedule, Form FNS–245.

(1) *Cases reported as not complete.* Negative cases shall be reported as not completed if the reviewer, after all reasonable efforts, is unable to locate the case record. In no event, however, shall any negative case be reported as not completed solely because the State agency was unable to process the case review in time for it to be reported in accordance with the timeframes specified in § 275.21(b)(2), without prior FNS approval. This information shall be reported to the State agency for appropriate action on an individual case basis.

(2) *Cases not subject to review.* Negative cases which are not subject to review, if they have not been eliminated in the sampling process, shall be eliminated in the review process. In addition to cases listed in § 275.11(f)(2), these shall include:

(i) A household which was dropped as a result of a correction for oversampling;

(ii) A household which was listed incorrectly in the negative frame.

(f) *Demonstration projects/SSA processing.* A household whose application has been denied or whose participation has been suspended or terminated under the rules of an FNS-authorized demonstration project shall be reviewed following standard procedures

unless FNS provides modified procedures to reflect the rules of the demonstration project. If FNS determines that information obtained from these cases would not be useful, then these cases may be excluded from review. A household whose application has been processed by SSA personnel and is subsequently denied participation shall be reviewed following standard procedures.

[Amdt. 260, 49 FR 6309, Feb. 17, 1984, as amended at 53 FR 39443, Oct. 7, 1988; Amdt. 373, 64 FR 38296, July 16, 1999]

§ 275.14 Review processing.

(a) *General*. Each State agency shall use FNS handbooks, worksheets, and schedules in the quality control review process.

(b) *Handbooks*. The reviewer shall follow the procedures outlined in the Quality Control Review Handbook, FNS Handbook 310, to conduct quality control reviews. In addition, the sample of active and negative cases shall be selected in accordance with the sampling techniques described in the Quality Control Sampling Handbook, FNS Handbook 311.

(c) *Worksheets*. The Integrated Review Worksheet, Form FNS–380, shall be used by the reviewer to record required information from the case record, plan and conduct the field investigation, and record findings which contribute to the determination of eligibility and basis of issuance in the review of active cases. In some instances, reviewers may need to supplement Form FNS–380 with other forms. The State forms for appointments, interoffice communications, release of information, etc., should be used when appropriate.

(d) *Schedules*. Decisions reached by the reviewer in active case reviews shall be coded and recorded on the Integrated Review Schedule, Form FNS–380–1. Such active case review findings must be substantiated by information recorded on the Integrated Review Worksheet, Form FNS–380. In negative case reviews, the review findings shall be coded and recorded on the Negative Quality Control Review Schedule, Form FNS–245, and supplemented as necessary with other documentation substantiating the findings.

[Amdt. 260, 49 FR 6310, Feb. 17, 1984, as amended by Amdt. 262, 49 FR 50598, Dec. 31, 1984]

Subpart D—Data Analysis and Evaluation

§ 275.15 Data management.

(a) *Analysis*. Analysis is the process of classifying data, such as by areas of program requirements or use of error-prone profiles, to provide a basis for studying the data and determining trends including significant characteristics and their relationships.

(b) *Evaluation*. Evaluation is the process of determining the cause(s) of each deficiency, magnitude of the deficiency, and geographic extent of the deficiency, to provide the basis for planning and developing effective corrective action.

(c) Each State agency must analyze and evaluate at the State and project area levels all management information sources available to:

(1) Identify all deficiencies in program operations and systems;

(2) Identify causal factors and their relationships;

(3) Identify magnitude of each deficiency, where appropriate (This is the frequency of each deficiency occurring based on the number of program records reviewed and where applicable, the amount of loss either to the program or participants or potential participants in terms of dollars. The State agency shall include an estimate of the number of participants or potential participants affected by the existence of the deficiency, if applicable);

(4) Determine the geographic extent of each deficiency (e.g., Statewide/individual project area or management unit); and,

(5) Provide a basis for management decisions on planning, implementing, and evaluating corrective action.

(d) In the evaluation of data, situations may arise where the State agency identifies the existence of a deficiency, but after reviewing all available management information sources sufficient information is not available to make a determination of the actual causal factor(s), magnitude, or geographic extent

necessary for the development of appropriate corrective action. In these situations, the State agency shall be responsible for gathering additional data necessary to make these determinations. This action may include, but is not limited to, conducting additional full or partial ME reviews in one or more project areas/management units or discussions with appropriate officials.

(e) Deficiencies identified from all management information sources must be analyzed and evaluated together to determine their causes, magnitude, and geographic extent. Causes indicated and deficiencies identified must be examined to determine if they are attributable to a single cause and can be effectively eliminated by a single action. Deficiencies and causes identified must also be compared to the results of past corrective action efforts to determine if the new problems arise from the causal factors which contributed to the occurrence of previously identified deficiencies.

(f) Data analysis and evaluation must be an ongoing process to facilitate the development of effective and prompt corrective action. The process shall also identify when deficiencies have been eliminated through corrective action efforts, and shall provide for the reevaluation of deficiencies and causes when it is determined that corrective action has not been effective.

(g) *Identification of High Error Project Areas/Counties/Local Offices.* FNS may use quality control information to determine which project areas/counties/local offices have reported payment error rates that are either significantly greater than the State agency average or greater than the national error standard of the Program. When FNS notifies a State agency that a ''high error'' area exists, the State agency shall ensure that corrective action is developed and reported in accordance with the provisions of § 275.17. If FNS identifies a ''high error'' locality which a State agency has previously identified as error-prone and taken appropriate action, no further State agency shall be required. If a State agency's corrective action plan fails to address problems in FNS-identified ''high error'' areas, FNS may require a State agency to implement new or modified cost-effective procedures for the certification of households.

[Amdt. 160, 45 FR 15909, Mar. 11, 1980, as amended by Amdt. 266, 52 FR 3409, Feb. 4, 1987; Amdt. 320, 55 FR 6240, Feb. 22, 1990]

Subpart E—Corrective Action

§ 275.16 Corrective action planning.

(a) Corrective action planning is the process by which State agencies shall determine appropriate actions to reduce substantially or eliminate deficiencies in program operations and provide responsive service to eligible households.

(b) The State agency and project area(s)/management unit(s), as appropriate, shall implement corrective action on all identified deficiencies. Deficiencies requiring action by the State agency or the combined efforts of the State agency and the project area(s)/management unit(s) in the planning, development, and implementation of corrective action are those which:

(1) Result from evaluation of yearly targets (actions to correct errors in individual cases however, shall not be submitted as part of the State agency's corrective action plan);

(2) Are the cause for non-entitlement to enhanced funding for any reporting period (actions to correct errors in individual cases however, shall not be submitted as part of the State agency's corrective action plan);

(3) Are the causes of other errors/deficiencies detected through quality control, including error rates of 1 percent or more in negative cases (actions to correct errors in individual cases, however, shall not be submitted as part of the State agency's corrective action plan);

(4) Are identified by FNS reviews, GAO audits, contract audits, or USDA audits or investigations at the State agency or project area level (except deficiencies in isolated cases as indicated by FNS); and,

(5) Result from 5 percent or more of the State agency's QC sample being coded ''not complete'' as defined in § 275.12(g)(1) of this part. This standard shall apply separately to both active and negative samples.

(6) Result in under issuances, improper denials, or improper terminations of benefits to eligible households where such errors are caused by State agency rules, practices or procedures.

(c) The State agency shall ensure that appropriate corrective action is taken on all deficiencies including each case found to be in error by quality control reviews and those deficiencies requiring corrective action only at the project area level. Moreover, when a substantial number of deficiencies are identified which require State agency level and/or project area/management unit corrective action, the State agency and/or project area/management unit shall establish an order of priority to ensure that the most serious deficiencies are addressed immediately and corrected as soon as possible. Primary factors to be considered when determining the most serious deficiencies are:

(1) Magnitude of the deficiency as defined in § 275.15(c)(3) of this part;

(2) Geographic extent of the deficiency (e.g., Statewide/project area or management unit);

(3) Anticipated results of corrective actions; and

(4) High probability of errors occurring as identified through all management evaluation sources.

(d) In planning corrective action, the State agency shall coordinate actions in the areas of data analysis, policy development, quality control, program evaluation, operations, administrative cost management, civil rights, and training to develop appropriate and effective corrective action measures.

[Amdt. 160, 45 FR 15909, Mar. 11, 1980, as amended by Amdt. 169, 46 FR 7263, Jan. 23, 1981; Amdt. 262, 49 FR 50598, Dec. 31, 1984; Amdt. 266, 52 FR 3409, Feb. 4, 1987; Amdt. 328, 56 FR 60052, Nov. 27, 1991]

§ 275.17 State corrective action plan.

(a) State agencies shall prepare corrective action plans addressing those deficiencies specified in § 275.16(b) requiring action by the State agency or the combined efforts of the State agency and the project area(s)/management unit(s). This corrective action plan is an open-ended plan and shall remain in effect until all deficiencies in program operations have been reduced substantially or eliminated. State agencies shall provide updates to their corrective action plans through regular, semiannual updates. These semiannual updates shall be received by FNS by May 1st and November 1st respectively. Such updates must contain:

(1) Any additional deficiencies identified since the previous corrective action plan update;

(2) Documentation that a deficiency has been corrected and is therefore being removed from the plan; and

(3) Any changes to planned corrective actions for previously reported deficiencies.

(b) *Content.* State corrective action plans shall contain, but not necessarily be limited to, the following, based on the most recent information available:

(1) Specific description and identification of each deficiency;

(2) Source(s) through which the deficiency was detected;

(3) Magnitude of each deficiency, if appropriate, as defined in § 275.15(c)(3) of this part;

(4) Geographic extent of the deficiency (e.g., Statewide/project area or management unit—specific project areas in which the deficiency occurs);

(5) Identification of causal factor(s) contributing to the occurrence of each deficiency;

(6) Identification of any action already completed to eliminate the deficiency;

(7) For each deficiency, an outline of actions to be taken, the expected outcome of each action, the target date for each action, and the date by which each deficiency will have been eliminated; and

(8) For each deficiency, a description of the manner in which the State agency will monitor and evaluate the effectiveness of the corrective action in eliminating the deficiency.

(c) FNS will provide technical assistance in developing corrective action plans when requested by State agencies.

(d) State agencies will be held accountable for the efficient and effective operation of all areas of the program. FNS is not precluded from issuing a warning as specified in part 276 because

a deficiency is included in the State agency's corrective action plan.

[Amdt. 160, 45 FR 15909, Mar. 11, 1980, as amended by Amdt. 266, 52 FR 3409, Feb. 4, 1987]

§ 275.18 Project area/management unit corrective action plan.

(a) The State agency shall ensure that corrective action plans are prepared at the project area/management unit level, addressing those deficiencies not required to be included in the State corrective action plan. State agencies may elect to prepare these plans for or in cooperation with the project area. These project area/management unit corrective action plans shall be open-ended and shall remain in effect until all deficiencies in program operations have been reduced substantially or eliminated. Any deficiencies detected through any source not previously reported to the State agency which require incorporation into the Project Area/Management Unit Corrective Action Plan shall be submitted to the State agency within 60 days of identification. As deficiencies are reduced substantially or eliminated, the project area/management unit shall notify the State agency in writing. The project area/management unit shall be responsible for documenting why each deficiency is being removed from the Plan. The removal of any deficiency from the Plan will be subject to State agency and FNS review and validation.

(b) *Content.* Project area/management unit corrective action plans shall contain all the information necessary to enable the State agency to monitor and evaluate the corrective action properly. Also, State agencies shall establish requirements for project area/management units in planning, implementing and reporting corrective action to assist the State agency's efforts to fulfill its responsibilities for determining which deficiencies must be addressed in the State corrective action plan. States should consider requiring project area/management unit plans to include the following, based on the most recent information available:

(1) Specific description and identification of each deficiency;

(2) Source(s) through which the deficiency was detected;

(3) Magnitude of each deficiency, if appropriate, as defined in § 275.15(c)(3) of this part;

(4) Geographic extent of the deficiency (throughout the project area/management unit or only in specific offices);

(5) Identification of causal factor(s) contributing to the occurrence of each deficiency;

(6) Identification of any action already completed to eliminate the deficiency;

(7) For each deficiency, an outline of actions to be taken, the expected outcome of each action, the target date for each action, the date by which each deficiency will have been eliminated; and

(8) For each deficiency, a description of the manner in which the project area/management unit will monitor and evaluate the effectiveness of the corrective action in eliminating the deficiency.

[Amdt. 160, 45 FR 15909, Mar. 11, 1980]

§ 275.19 Monitoring and evaluation.

(a) The State agency shall establish a system for monitoring and evaluating corrective action at the State and project area levels. Monitoring and evaluation shall be an ongoing process to determine that deficiencies are being substantially reduced or eliminated in an efficient manner and that the program provides responsive service to eligible households.

(b) The State agency shall ensure that corrective action on all deficiencies identified in the State Corrective Action Plan and Project Area/Management Unit Corrective Action Plan is implemented and achieves the anticipated results within the specified time frames. The State agency shall monitor and evaluate corrective action at the State and project levels through a combination of reports, field reviews, and examination of current data available through program management tools and other sources.

(c) In instances where the State agency and/or the project area/management unit determines that the proposed corrective action is not effective in reducing substantially or eliminating deficiencies, the State agency and/or the project area/management

unit shall promptly reevaluate the deficiency, causes, and the corrective action taken, and develop and implement new corrective actions.

[Amdt. 160, 45 FR 15909, Mar. 11, 1980]

Subpart F—Responsibilities for Reporting on Program Performance

§ 275.20 ME review schedules.

(a) Each State agency shall submit its review schedule to the appropriate FNS regional office at least 60 days prior to the beginning of the next year's review period (the Federal fiscal year). These schedules must ensure that all project areas/management units will be reviewed within the required time limits. Each schedule shall identify the project areas/management units in each classification and list each project area to be reviewed by month or by quarter. A State agency may submit a request to use an alternate review schedule at any time. The alternate schedule shall not be effective until approved by FNS in accordance with § 275.5(b)(2).

(b) State agencies shall notify the appropriate FNS regional office of all changes in review schedules.

[Amdt. 266, 52 FR 3410, Feb. 4, 1987]

§ 275.21 Quality control review reports.

(a) *General.* Each State agency shall submit reports on the performance of quality control reviews in accordance with the requirements outlined in this section. These reports are designed to enable FNS to monitor the State agency's compliance with Program requirements relative to the Quality Control Review System. Every case selected for review during the sample month must be accounted for and reflected in the appropriate report(s).

(b) *Individual cases.* The State agency shall report the review findings on each case selected for review during the sample month. For active cases, the State agency shall submit the edited findings of the Integrated Review Schedule, Form FNS–380–1. For negative cases, the State agency shall submit a summary report which is produced from the edited findings on individual cases which are coded on the Negative Quality Control Review Schedule, Form FNS–245. The review findings shall be reported as follows:

(1) The State agency shall input and edit the results of each active and negative case into the FNS supplied computer terminal and transmit the data to the host computer. For State agencies that do not have FNS supplied terminals, the State agency shall submit the results of each QC review in a format specified by FNS. Upon State agency request, FNS will consider approval of a change in the review results after they have been reported to FNS.

(2) The State agency shall dispose of and report the findings of 90 percent of all cases selected in a given sample month so that they are received by FNS within 75 days of the end of the sample month. All cases selected in a sample month shall be disposed of and the findings reported so that they are received by FNS within 95 days of the end of the sample month.

(3) The State agency shall supply the FNS Regional Office with individual household case records and the pertinent information contained in the individual case records, or legible copies of that material, as well as legible hard copies of individual Forms FNS–380, FNS–380–1, and FNS–245 or other FNS-approved report forms, within 10 days of receipt of a request for such information.

(4) For each case that remains pending 95 days after the end of the sample month, the State agency shall immediately submit a report that includes an explanation of why the case has not been disposed of, documentation describing the progress of the review to date, and the date by which it will be completed. If FNS determines that the above report does not sufficiently justify the case's pending status, the case shall be considered overdue. Depending upon the number of overdue cases, FNS may find the State agency's QC system to be inefficient or ineffective and suspend and/or disallow the State agency's Federal share of administrative funds in accordance with the provisions of § 276.4.

(c) *Monthly status.* The State agency shall report the monthly progress of sample selection and completion on the

Form FNS–248, Status of Sample Selection and Completion or other format specified by FNS. This report shall be submitted to FNS so that it is received no later than 105 days after the end of the sample month. Each report shall reflect sampling and review activity for a given sample month.

(d) *Annual results.* The State agency shall annually report the results of all quality control reviews during the review period. For this report, the State agency shall submit the edited results of all QC reviews on the Form FNS–247, Statistical Summary of Sample Distribution or other format specified by FNS. This report shall be submitted to FNS so that it is received no later than 105 days from the end of the annual review period. Every case selected in the active or negative sample must be accounted for and reported to FNS, including cases not subject to review, not completed, and completed.

(e) *Demonstration projects/SSA processing.* The State agency shall identify the monthly status of active and negative demonstration project/SSA processed cases (i.e., those cases described in § 275.11(g)) on the Form FNS–248, described in paragraph (c) of this section. In addition, the State agency shall identify the annual results of such cases on the Form FNS–247, described in paragraph (d) of this section.

[Amdt. 260, 49 FR 6310, Feb. 17, 1984, as amended by Amdt. 262, 49 FR 50598, Dec. 31, 1984; Amdt. 266, 52 FR 3410, Feb. 4, 1987]

§ 275.22 Administrative procedure.

Reports on program performance are intended to provide the State an opportunity to determine compliance with program requirements, identify and resolve emerging problems, and assess the effectiveness of actions that have been taken to correct existing problems. States' reports enable FNS to assess the nationwide status of eligibility and basis of issuance determinations, to ensure State compliance with Federal requirements, to assist States in improving and strengthening their programs, and to develop Federal policies. Reports must be submitted in duplicate to the appropriate FNS Regional Office according to the time frames established in §§ 275.20, 275.21, and 275.22 of this part.

[Amdt. 160, 45 FR 15911, Mar. 11, 1980. Redesignated at 52 FR 3410, Feb. 4, 1987]

Subpart G—Program Performance

§ 275.23 Determination of State agency program performance.

(a) FNS shall determine the efficiency and effectiveness of a State's administration of the Food Stamp Program by measuring:

(1) State compliance with the standards contained in the Food Stamp Act, regulations, and the State Plan of Operation; and

(2) State efforts to improve program operations through corrective action.

(b) This determination shall be made based on:

(1) Reports submitted to FNS by the State;

(2) FNS reviews of State agency operations;

(3) State performance reporting systems and corrective action efforts; and

(4) Other available information such as Federal audits and investigations, civil rights reviews, administrative cost data, complaints, and any pending litigation.

(c) *State agency error rates.* FNS shall estimate each State agency's error rates based on the results of quality control review reports submitted in accordance with the requirements outlined in § 275.21. The State agency's active case error, payment error, underissuance error, and negative case error rates shall be estimated as follows:

(1) *Active case error rate.* The active case error rate shall include the proportion of active sample cases which were reported as ineligible or as receiving an incorrect allotment (as described in § 275.12(e)) based upon certification policy as set forth in part 273.

(2) *Payment error rate.* (i) For fiscal years prior to Fiscal Year 1986, the payment error rate shall include the value of the allotments overissued, including overissuances to ineligible cases, for those cases included in the active error rate.

(ii) For Fiscal Year 1986 and subsequent fiscal years, the payment error

rate shall include the value of the allotments overissued, including those to ineligible cases, and the value of allotments underissued for those cases included in the active error rate.

(3) *Underissuance error rate.* Prior to Fiscal Year 1986, the underissuance error rate shall include the value of the allotments reported as underissued for those cases included in the active case error rate.

(4) *Negative case error rate.* The negative case error rate shall be the proportion of negative sample cases which were reported as having been eligible at the time of denial, suspension or termination (as described in § 275.13(c)) based upon certification policy as set forth in part 273.

(5) *Demonstration projects/SSA processing.* The reported results of reviews of active and negative demonstration project/SSA processed cases, as described in § 275.11(g), shall be excluded from the estimate of the active case error rate, payment error rate, underissuance error rate, and negative case error rate.

(d) *Federal enhanced funding.* (1) Before making enhanced funding available to a State agency, as described in § 277.4(b), FNS will:

(i) Validate the State agency's estimated payment error rate, underissuance error rate, and negative case error rate, as provided for in § 275.3(c);

(ii) Ensure that the sampling techniques used by the State agency are FNS-approved procedures, as established in § 275.11; and

(iii) Validate the State agency's quality control completion rate to ensure that all of the minimum required sample cases, of both active and negative quality control samples, have been completed. This completion standard is applied separately to the active and negative case samples, and the State agency's estimated payment and underissuance error rates will be adjusted separately, if necessary, to account for those required cases not completed, in accordance with the procedures described in paragraph (e)(8)(iii) of this section for adjustment of the payment error rate.

(2) After validation and any necessary adjustment of estimated error rates:

(i) A State agency with a combined payment error rate and underissuance error rate of less than five percent for an annual review period for Fiscal Year 1983 through Fiscal Year 1985, or a payment error rate of less than five percent for an annual review period for Fiscal Year 1986 through Fiscal Year 1988, shall be eligible for a 60 percent Federally funded share of administrative costs, provided that the State agency's negative case error rate for that period is less than the national weighted mean negative case error rate for the prior fiscal year;

(ii) Beginning with Fiscal Year 1989, a State agency with a payment error rate less than or equal to 5.90 percent and with a negative case error rate less than the national weighted mean negative case rate for the prior fiscal year will have its Federally funded share of administrative costs increased by one percentage point to a maximum of 60 percent for each full one-tenth of a percentage point by which the payment error rate is less than six percent.

(3) State agencies entitled to enhanced funding shall receive the additional funding on a retroactive basis only for the review period in which their error rates are less than the levels described in paragraph (d)(2) of this section.

(e) *State agencies' liabilities for payment error rates.* (1) At the end of each fiscal year, each State agency's payment error rate over the entire fiscal year will be computed, as described in paragraph (e)(8) of this section, and evaluated to determine whether the payment error rate goals established in the following paragraphs have been met.

(2) *Establishment of payment error rate goals—Fiscal Year 1983 through Fiscal Year 1985.* (i) Each State agency's payment error rate goal for Fiscal Year 1983 shall be nine percent. Each State agency's payment error rate goal for Fiscal Year 1984 shall be seven percent. Each State agency's payment error rate goal for Fiscal Year 1985 shall be five percent. State agencies' payment error rates for any fiscal year shall be

derived from the review period corresponding to the fiscal year.

(ii) If a State agency fails to achieve a nine percent payment error rate in Fiscal Year 1983 but reduces its payment error rate for Fiscal Year 1983 by 33.3 percent (or more) of the difference between its payment error rate during the period of October 1980 through March 1981 and a five percent payment error rate, the State agency shall bear no fiscal liability for its payment error rate. If a State agency fails to achieve a seven percent payment error rate in Fiscal Year 1984, but reduces its payment error rate for Fiscal Year 1984 by 66.7 percent (or more) of the difference between its payment error rate during the period of October 1980 through March 1981 and a five percent payment error rate, the State agency shall bear no fiscal liability for its payment error rate.

(iii) State agencies' payment error rates shall be rounded to the nearest one hundredth of a percent with .005 and above being rounded up to the next highest one-hundredth and .004 and below being rounded to the next lowest one-hundredth.

(3) *State agencies failing to achieve payment error rate goals—Fiscal Year 1983 through Fiscal Year 1985.* Each State agency which fails to achieve its payment error rate goal during a fiscal year shall be liable as specified in the following paragraphs.

(i) For every percentage point, or fraction thereof, by which a State agency's payment error rate exceeds the goal for a fiscal year, FNS shall reduce the money it pays for the State agency's Food Stamp Program administrative costs by five percent for that fiscal year; provided that for every percentage point, or fraction thereof, by which a State agency's payment error rate exceeds its goal by more than three percentage points, FNS shall reduce the Federally funded share of Food Stamp Program administrative costs by ten percent for the applicable fiscal year. Thus, if a State agency's reported error rate in Fiscal Year 1983 is 10.5 percent, its Federal administrative funding could be reduced by ten percent. A 13.1 percent error rate, or 4.1 percentage points above the goal, would result in a reduction of 5 percent for each of the three first points, 10 percent for the fourth point and another 10 percent for the fraction above 4 percentage points. This would amount to a 35 percent reduction in Federal administrative funds unless the provisions of paragraph (e)(3)(ii) are applicable to the State agency's circumstances.

(ii) If a State agency fails to reach its payment error rate goal but reduces its error rate as explained in paragraph (e)(2)(ii) for a given fiscal year it will bear no liability for its error rates. If, however, a State agency fails to reach the established goal and fails to meet the reduction percentage for Fiscal Year 1983 and/or 1984, its Federally funded share of program administrative costs shall be reduced by five percent for every percentage point, or fraction thereof, (with a 10 percent reduction applied for every percentage point or fraction above 3 percentage points) by which its error rate exceeds the payment error rate it would have achieved had it met the 33.3 or 66.7 percent reduction percentage for the applicable fiscal year. Thus, if a State agency's payment error rate during the October through March 1981 period was 13 percent and its error rate for Fiscal Year 1983 is 11 percent, it will have failed to achieve a 33.3 percent reduction $(13-(13-5)(33.3)=10.34$ percent), i.e., the rate the State agency would have achieved had it met the reduction percentage) and incurred a liability equal to five percent of its Federal administrative funding. If the State agency's payment error rate increased to 13 percent in Fiscal Year 1984, it will have missed a 66.7 percent reduction by 5.34 percentage points $(13-(13-5)(66.7)=7.66$ percent) and incurred a liability equal to 45 percent of its Federal administrative funding. In the latter example, the 45 percent funding reduction results from a 15 percent reduction for the first three percentage points and 30 percent for the additional 2.34 percentage points by which the State agency exceeded a 7.66 percent error rate.

(iii) If a State agency is found liable for an excessive payment error rate, the amount of liability will be calculated by: (A) Multiplying the percent the Federal share is to be reduced by the base Federal reimbursement rate of

50 percent; (B) subtracting the product of (A) from 50 percent; and (C) multiplying the result of (B) by the State agency's costs covered under the base Federal reimbursement rate for the fiscal year in which the State agency incurred the liability. For example, if the total administrative costs (State and Federal) in a State agency are $4,000,000 for the fiscal year, and the State agency's Federal funding is to be reduced by 25 percent, the State agency would be reimbursed at a rate of 37.5 percent (i.e., 50 percent minus 25 percent times 50 percent) or $1,500,000. The State agency's liability would be $500,000 or 12.5 percent of its administative costs.

(iv) A State's federally funded share of administrative costs shall not be reduced by an amount that exceeds the difference between its payment error rate goal (or what its error rate would have been had it met the reduction criteria of paragraph (ii) above) and its actual error rates expressed as a percentage of its total issuance during the fiscal year. Therefore, if the State agency in the above example issued $10,000,000 in food stamps in the fiscal year and exceeded its goal by four percentage points (as demonstrated by a 25 percent reduction in Federal funding), the State agency's liability would be capped at $400,000 ((.04)(10,000,000)), even though the calculation based upon administrative funds would result in a liability of $500,000.

(4) *State agencies' liabilities for payment error—Fiscal Year 1986 through Fiscal Year 1991.* Each State agency that fails to achieve its payment error rate goal during a fiscal year shall be liable as specified in the following paragraphs.

(i) For Fiscal Year 1986 through Fiscal Year 1991, FNS shall announce a national performance measure within nine months following the end of each fiscal year that is the sum of the products of each State agency's payment error rate times that State agency's proportion of the total value of national allotments issued for the fiscal year using the most recent issuance data available at the time the State agency is initially notified of its payment error rate. Once announced, the national performance measure for a given fiscal year will not be subject to change. This national performance measure is used to establish a payment-error tolerance level. The payment-error tolerance level for any fiscal year shall be one percentage point added to the lowest national performance measure ever announced up to and including such fiscal year.

(ii) For any fiscal year in which a State agency's payment error rate exceeds the payment-error tolerance level, the State agency shall pay or have its share of administrative costs reduced by an amount equal to the difference between its payment error rate less such tolerance level as a quantity, multiplied by the total value of the allotments issued in the fiscal year by that State agency.

(5) *State agencies' liabilities for payment error—Fiscal Year 1992 and beyond.* Each State agency that fails to achieve its payment error rate goal during a fiscal year shall be liable as specified in the following paragraphs.

(i) For Fiscal Year 1992 and subsequent years, FNS shall announce a national performance measure within 30 days following the completion of the case review and the arbitration processes for the fiscal year. The national performance measure is the sum of the products of each State agency's payment error rates times that State agency's proportion of the total value of national allotments issued for the fiscal year using the most recent issuance data available at the time the State agency is notified of its payment error rate. Once announced, the national performance measure for a given fiscal year will not be subject to change.

(ii) For any fiscal year in which a State agency's payment error rate exceeds the national performance measure for the fiscal year, the State agency shall pay or have its share of administrative funding reduced by an amount equal to the product of:

(A) The value of all allotments issued by the State agency in the fiscal year; multiplied by

(B) The lesser of—

(*1*) The ratio of the amount by which the payment error rate of the State agency for the fiscal year exceeds the national performance measure for the

fiscal year, to the national performance measure for the fiscal year, or

(*2*) One; multiplied by

(C) The amount by which the payment error rate of the State agency for the fiscal year exceeds the national performance measure for the fiscal year.

(6) *Relationship to warning process and negligence.* (i) States' liability for payment error rates as determined above are not subject to the warning process of § 276.4(d).

(ii) FNS shall not determine negligence (as described in § 276.3) based on the overall payment error rate for issuances to ineligible households and overissuances to eligible households in a State or political subdivision thereof. FNS may only establish a claim under § 276.3 for dollar losses from failure to comply, due to negligence on the part of the State agency (as defined under § 276.3), with specific certification requirements. Thus, FNS will not use the results of States' QC reviews to determine negligence.

(iii) Whenever a State is assessed for an excessive payment error rate, the State shall have the right to request an appeal in accordance with procedures set forth in part 283 of this chapter. While FNS may determine a State to be liable for dollar loss under the provisions of this section and the negligence provisions of § 276.3 of this chapter for the same period of time, FNS shall not bill a State for the same dollar loss under both provisions. If FNS finds a State liable for dollar loss under both the QC liability system and the negligence provisions, FNS shall adjust the billings to ensure that two claims are not made against the State for the same dollar loss.

(7) *Good cause—(i) Events.* When a State agency with otherwise effective administration exceeds the tolerance level for payment errors as described in this section, the State agency may seek relief from liability claims that would otherwise be levied under this section on the basis that the State agency had good cause for not achieving the payment error rate tolerance. State agencies desiring such relief must file an appeal with the Department's Administrative Law Judge (ALJ) in accordance with the procedures established under part 283 of this chapter. The five unusual events described below are considered to have a potential for disputing program operations and increasing error rates to an extent that relief from a resulting liability or increased liability is appropriate. The occurrence of an event(s) does not automatically result in a determination of good cause for an error rate in excess of the national performance measure. The State agency must demonstrate that the event had an adverse and uncontrollable impact on program operations during the relevant period, and the event caused an uncontrollable increase in the error rate. Good cause relief will only be considered for that portion of the error rate/liability attributable to the unusual event. The following are unusual events which State agencies may use as a basis for requesting good cause relief and specific information that must be submitted to justify such requests for relief:

(A) Natural disasters such as those under the authority of the Stafford Act of 1988 (Pub. L. 100–707), which amended the Disaster Relief Act of 1974 (Pub. L. 93–288) or civil disorders that adversely affect program operations.

(*1*) When submitting a request for good cause relief based on this example, the State agency shall provide the following information:

(*i*) The nature of the disaster(s) (e.g. a tornado, hurricane, earthquake, flood, etc.) or civil disorder(s)) and evidence that the President has declared a disaster;

(*ii*) The date(s) of the occurrence;

(*iii*) The date(s) after the occurrence when program operations were affected;

(*iv*) The geographic extent of the occurrence (i.e. the county or counties where the disaster occurred);

(*v*) The proportion of the food stamp caseload whose management was affected;

(*vi*) The reason(s) why the State agency was unable to control the effects of the disaster on program administration and errors;

(*vii*) The identification and explanation of the uncontrollable nature of errors caused by the event (types of errors, geographic location of the errors,

time period during which the errors occurred, etc.).

(*viii*) The percentage of the payment error rate that resulted from the occurrence and how this figure was derived; and

(*ix*) The degree to which the payment error rate exceeded the national performance measure in the subject fiscal year.

(*2*) The following criteria and methodology will be used to assess and evaluate good cause in conjunction with the appeals process, and to determine that portion of the error rate/liability attributable to the uncontrollable effects of a disaster or civil disorder: Geographical impact of the disaster; State efforts to control impact on program operations; the proportion of food stamp caseload affected; and/or the duration of the disaster and its impact on program operations. Adjustments for these factors may result in a waiver of all, part, or none of the error rate liabilities for the applicable period. As appropriate, the waiver amount will be adjusted to reflect States' otherwise effective administration of the program based upon the degree to which the error rate exceeds the national performance measure. For example, a reduction in the amount may be made when a State agency's recent error rate history indicates that even absent the events described, the State agency would have exceeded the national performance measure in the review period.

(*3*) If a State agency has provided insufficient information to determine a waiver amount for the uncontrollable effects of a natural disaster or civil disorder using factual analysis, the waiver amount shall be evaluated using the following formula and methodology which measures both the duration and intensity of the event: Duration will be measured by the number of months the event had an adverse impact on program operations. Intensity will be a proportional measurement of the issuances for the counties affected to the State's total issuance. This ratio will be determined using issuance figures for the first full month immediately preceding the disaster. This figure will not include issuances made to households participating under disaster certification authorized by FNS and already excluded from the error rate calculations under § 275.12(g)(2)(vi). ''Counties affected'' will include counties where the disaster/civil disorder occurred, and any other county that the State agency can demonstrate had program operations adversely impacted due to the event (such as a county that diverted significant numbers of food stamp certification or administrative staff). The amount of the waiver of liability will be determined using the following linear equation: Ia/Ib × [M/12 or Mp/18] × L, where Ia is the issuance for the first full month immediately preceding the unusual event for the county affected; Ib is the State's total issuance for the first full month immediately preceding the unusual event; M/12 is the number of months in the subject fiscal year that the unusual event had an adverse impact on program operations; Mp/18 is the number of months in the last half (April through September) of the prior fiscal year that the unusual event had an adverse impact on program operations; L is the total amount of the liability for the fiscal year. Mathematically this formula could result in a waiver of more than 100% of the liability, however, no more than 100% of a State's liability will be waived for any one fiscal year. Under this approach, unless the State agency can demonstrate a direct uncontrollable impact on the error rate, the effects of disasters or civil disorders that ended prior to the second half of the prior fiscal year will not be considered.

(B) Strikes by State agency staff necessary to determine Food Stamp Program eligibility and process case changes.

(*1*) When submitting a request for good cause relief based on this example, the State agency shall provide the following information:

(*i*) Which workers (i.e. eligibility workers, clerks, data input staff, etc.) and how many (number and percentage of total staff) were on strike or refused to cross picket lines;

(*ii*) The date(s) and nature of the strike (i.e., the issues surrounding the strike);

(*iii*) The date(s) after the occurrence when program operations were affected;

(*iv*) The geographic extent of the strike (i.e. the county or counties where the strike occurred);

(*v*) The proportion of the food stamp caseload whose management was affected;

(*vi*) The reason(s) why the State agency was unable to control the effects of the strike on program administration and errors;

(*vii*) Identification and explanation of the uncontrollable nature of errors caused by the event (types of errors, geographic location of the errors, time period during which the errors occurred, etc.);

(*viii*) The percentage of the payment error rate that resulted from the strike and how this figure was derived; and

(*ix*) The degree to which the payment error rate exceeded the national performance measure in the subject fiscal year.

(*2*) The following criteria shall be used to assess, evaluate and respond to claims by the State agency for a good cause waiver of liability in conjunction with the appeals process, and to determine that portion of the error rate/liability attributable to the uncontrollable effects of the strike: Geographical impact of the strike; State efforts to control impact on program operations; the proportion of food stamp caseload affected; and/or the duration of the strike and its impact on program operations. Adjustments for these factors may result in a waiver of all, part, or none of the error rate liabilities for the applicable period. For example, the amount of the waiver might be reduced for a strike that was limited to a small area of the State. As appropriate, the waiver amount will be adjusted to reflect States' otherwise effective administration of the program upon the degree to which the error rate exceeded the national performance measure.

(*3*) If a State agency has provided insufficient information to determine a waiver amount for the uncontrollable effects of a strike using factual analysis, a waiver amount shall be evaluated by using the formula described in paragraph (e)(7)(i)(A) of this section. Under this approach, unless the State agency can demonstrate a direct uncontrollable impact on the error rate, the effects of strikes that ended prior to the second half of the prior fiscal year will not be considered.

(C) A significant growth in food stamp caseload in a State prior to or during a fiscal year, such as a 15 percent growth in caseload. Caseload growth which historically increases during certain periods of the year will not be considered unusual or beyond the State agency's control.

(*1*) When submitting a request for good cause relief based on this example, the State agency shall provide the following information:

(*i*) The amount of growth (both actual and percentage);

(*ii*) The time the growth occurred (what month(s)/year);

(*iii*) The date(s) after the occurrence when program operations were affected;

(*iv*) The geographic extent of the caseload growth (i.e. Statewide or in which particular counties);

(*v*) The impact of caseload growth;

(*vi*) The reason(s) why the State agency was unable to control the effects of caseload growth on program administration and errors;

(*vii*) The percentage of the payment error rate that resulted from the caseload growth and how this figure was derived; and

(*viii*) The degree to which the error rate exceeded the national performance measure in the subject fiscal year.

(*2*) The following criteria and methodology shall be used to assess and evaluate good cause in conjunction with the appeals process, and to determine that portion of the error rate/liability attributable to the uncontrollable effects of unusual caseload growth: Geographical impact of the caseload growth; State efforts to control impact on program operations; the proportion of food stamp caseload affected; and/or the duration of the caseload growth and its impact on program operations. Adjustments for these factors may result in a waiver of all, part, or none of the error rate liabilities for the applicable period. As appropriate, the waiver amount will be adjusted to reflect States' otherwise effective administration of the program based

upon the degree to which the error rate exceeded the national performance measure. For example, a reduction in the amount may be made when a State agency's recent error rate history indicates that even absent the events described, the State agency would have exceeded the national performance measure in the review period. Under this approach, unless the State agency can demonstrate a direct uncontrollable impact on the error rate, the effects of caseload growth that ended prior to the second half of the prior fiscal year will not be considered.

(*3*) If the State agency has provided insufficient information to determine a waiver amount for the uncontrollable effects of caseload growth using factual analysis, the waiver amount shall be evaluated using the following five-step calculation:

(*i*) Step 1, determine the average number of households certified to participate statewide in the Food Stamp Program for the base period consisting of the twelve consecutive months ending with March of the prior fiscal year;

(*ii*) Step 2, determine the percentage of increase in caseload growth from the base period (Step 1) using the average number of households certified to participate statewide in the Food Stamp Program for any twelve consecutive months in the period beginning with April of the prior fiscal year and ending with June of the current fiscal year;

(*iii*) Step 3, determine the percentage the error rate for the subject fiscal year, as calculated under paragraph (e)(5)(i) of this section, exceeds the national performance measure determined in accordance with paragraph (e)(5)(i) of this section;

(*iv*) Step 4, divide the percentage of caseload growth increase arrived at in step 2 by the percentage the error rate for the subject fiscal year exceeds the national performance measure as determined in step 3; and

(*v*) Step 5, multiply the quotient arrived at in step 4 by the liability amount for the current fiscal year to determine the amount of waiver of liability.

(*4*) Under this methodology, caseload growth of less than 15% and/or occurring in the last three months of the subject fiscal year will not be considered. Mathematically this formula could result in a waiver of more than 100% of the liability however, no more than 100% of a State's liability will be waived for any one fiscal year.

(D) A change in the Food Stamp Program or other Federal or State program that has a substantial adverse impact on the management of the Food Stamp Program of a State. Requests for relief from errors caused by the uncontrollable effects of unusual program changes other than those variances already excluded by § 275.12(d)(2)(vii) will be considered to the extent the program change is not common to all States.

(*1*) When submitting a request for good cause relief based on unusual changes in the Food Stamp or other Federal or State programs, the State agency shall provide the following information:

(*i*) The type of change(s) that occurred;

(*ii*) When the change(s) occurred;

(*iii*) The nature of the adverse effect of the changes on program operations and the State agency's efforts to mitigate these effects;

(*iv*) Reason(s) the State agency was unable to adequately handle the change(s);

(*v*) Identification and explanation of the uncontrollable errors caused by the changes (types of errors, geographic location of the errors, time period during which the errors occurred, etc.);

(*vi*) The percentage of the payment error rate that resulted from the adverse impact of the change(s) and how this figure was derived; and

(*vii*) The degree to which the payment error rate exceeded the national performance measure in the subject fiscal year.

(*2*) The following criteria will be used to assess and evaluate good cause in conjunction with the appeals process, and to determine that portion of the error rate/liability attributable to the uncontrollable effects of unusual changes in the Food Stamp Program or other Federal and State programs; State efforts to control impact on program operations; the proportion of food stamp caseload affected; and/or the duration of the unusual changes in the

Food Stamp Program or other Federal and State programs and the impact on program operations. Adjustments for these factors may result in a waiver of all, part, or none of the error rate liabilities for the applicable period. As appropriate, the waiver amount will be adjusted to reflect States' otherwise effective administrative of the program based upon the degree to which the error rate exceeded the national performance measure.

(E) A significant circumstance beyond the control of the State agency. Requests for relief from errors caused by the uncontrollable effect of the significant circumstance other than those specifically set forth in paragraphs (e)(7)(i)(A) through (e)(7)(i)(D) of this section will be considered to the extent that the circumstance is not common to all States, such as a fire in a certification office.

(*1*) When submitting a request for good cause relief based on significant circumstances, the State agency shall provide the following information:

(*i*) The significant circumstances that the State agency believes uncontrollably and adversely affected the payment error rate for the fiscal year in question;

(*ii*) Why the State agency had no control over the significant circumstances;

(*iii*) How the significant circumstances had an uncontrollable and adverse impact on the State agency's error rate;

(*iv*) Where the significant circumstances existed (i.e. Statewide or in particular counties);

(*v*) When the significant circumstances existed (provide specific dates whenever possible);

(*vi*) The proportion of the food stamp caseload whose management was affected;

(*vii*) Identification and explanation of the uncontrollable errors caused by the event (types of errors, geographic location of the errors, time period during which the errors occurred, etc.);

(*viii*) The percentage of the payment error rate that was caused by the significant circumstances and how this figure was derived; and

(*ix*) The degree to which the payment error rate exceeded the national performance measure in the subject fiscal year.

(*2*) The following criteria shall be used to assess and evaluate good cause in conjunction with the appeals process, and to determine that portion of the error rate/liability attributable to the uncontrollable effects of a significant circumstance beyond the control of the State agency, other than those set forth in paragraph (e)(7)(i)(E) of this section: Geographical impact of the significant circumstances; State efforts to control impact on program operations; the proportion of food stamp caseload affected; and/or the duration of the significant circumstances and the impact on program operations. Adjustments for these factors may result in a waiver of all, part, or none of the error rate liabilities for the applicable period. As appropriate, the waiver amount will be adjusted to reflect States' otherwise effective administration of the program based upon the degree to which the error rate exceeded the national performance measure.

(ii) *Adjustments.* When good cause is found under the criteria in paragraphs (e)(7)(i)(A) through (e)(7)(i)(E) of this section, the waiver amount may be adjusted to reflect States' otherwise effective administration of the program based upon the degree to which the error rate exceeds the national performance measure.

(iii) *Evidence.* When submitting a request to the ALJ for good cause relief, the State agency shall include such data and documentation as is necessary to support and verify the information submitted in accordance with the requirements of paragraph (e)(7) of this section so as to fully explain how a particular significant circumstance(s) uncontrollable affected its payment error rate.

(iv) *Finality.* The initial decision of the ALJ concerning good cause shall constitute the final determination for purposes of judicial review without further proceedings as established under the provisions of § 283.17 and § 283.20 of this chapter.

(8) *Determination of payment error rates.* As specified in § 275.3(c), FNS will validate each State agency's estimated payment error rate through rereviewing the State agency's active

case sample and ensuring that its sampling, estimation, and data management procedures are correct.

(i) Once the Federal case reviews have been completed and all differences with the State agency have been identified, FNS shall calculate regressed error rates using the following linear regression equations.

(A) $y_1'=y_1+b_1(X_1-x_1)$, where y_1' is the average value of allotments overissued to eligible and ineligible households; y_1 is the average value of allotments overissued to eligible and ineligible households in the rereview sample according to the Federal finding, b_1 is the estimate of the regression coefficient regressing the Federal findings of allotments overissued to eligible and ineligible households on the corresponding State agency findings, x_1 is the average value of allotments overissued to eligible and ineligible households in the rereview sample according to State agency findings, and X_1 is the average value of allotments overissued to eligible and ineligible households in the full quality control sample according to State agency's findings. In stratified sample designs Y_1, X_1, and x_1 are weighted averages and b_1 is a combined regression coefficient in which stratum weights sum to 1.0 and are proportional to the estimated stratum caseloads subject to review.

(B) $y_2'=y_2+b_2(X_2-x_2)$, where y_2' is the average value of allotments underissued to households included in the active error rate, y_2 is the average value of allotments underissued to participating households in the rereview sample according to the Federal finding, b_2 is the estimate of the regression coefficient regressing the Federal findings of allotments underissued to participating households on the corresponding State agency findings, x_2 is the average value of allotments underissued to participating households in the rereview sample according to State agency findings, and X_2 is the average value of allotments underissued to participating households in the full quality control sample according to the State agency's findings. In stratified sample designs y_2, X_2, and x_2 are weighted averages and b_1 is a combined regression coefficient in which stratum weights sum to 1.0 and are proportional to the estimated stratum caseloads subject to review.

(C) The regressed error rates are given by $r_1'=y_1'/u$, yielding the regressed overpayment error rate, and $r_2'=y_2'/u$, yielding the regressed underpayment error rate, where u is the average value of allotments issued to participating households in the State agency sample.

(D) After application of the adjustment provisions of paragraph (e)(8)(iii) of this section, the adjusted regressed payment error rate shall be calculated to yield the State agency's payment error rate for use in the reduced and enhanced funding determinations described in paragraphs (d) and (e) of this section. Prior to Fiscal Year 1986, the adjusted regressed payment error rate is given by r_1''. For Fiscal Year 1986 and after, the adjusted regressed payment error rate is given by $r_1''+r_2''$.

(ii) If FNS determines that a State agency has sampled incorrectly, estimated improperly, or has deficiencies in its QC data management system, FNS will correct the State agency's payment error rate based upon a correction to that aspect of the State agency's QC system which is deficient. If FNS cannot accurately correct the State agency's deficiency, FNS will assign the State agency a payment error rate based upon the best information available. After consultation with the State agency, this assigned payment error rate will then be used in the above described liability determination and in determinations for enhanced funding under paragraph (d) of this section. State agencies shall have the right to appeal assignment of an error rate in this situation in accordance with the procedures of part 283.

(iii) Should a State agency fail to complete 98 percent of its required sample size, FNS shall adjust the State agency's regressed error rates using the following equations:

(A) $r_1''=r_1'+2(1-C)S_1$, where r_1'' is the adjusted regressed overpayment error rate, r_1' is the regressed overpayment error rate computed from the formula in paragraph (e)(8)(i)(C) of this section, C is the State agency's rate of completion of its required sample size expressed as a decimal value, and S_1 is

the standard error of the State agency sample overpayment error rate. If a State agency completes all of its required sample size, then $r_1''=r_1'$.

(B) $r_2''=r_2'+2(1-C)S_2$, where r_2'' is the adjusted regressed underpayment error rate, r_2' is the regressed underpayment error rate computed from the formula in paragraph (e)(8)(i)(C) of this section, C is the State agency's rate of completion of its required sample size expressed as a decimal value, and S_2 is the standard error of the State agency sample underpayment error rate. If a State agency completes all of its required sample size, then $r_2''=r_2'$.

(9) *FNS Timeframes.* FNS shall determine and announce the national average payment error rate for the fiscal year within 30 days following the completion of the case review process and all arbitrations of State agency-Federal difference cases for that fiscal year, and at the same time FNS shall notify all State agencies of their individual payment error rates and payment error rate liabilities, if any. The case review process and the arbitration of all difference cases shall be completed not later than 180 days after the end of the fiscal year. FNS shall initiate collection action on each claim for such liabilities before the end of the fiscal year following the reporting period in which the claim arose unless an administrative appeal relating to the claim is pending. Such appeals include requests for good cause waivers and administrative and judicial appeals pursuant to Section 14 of the Food Stamp Act. While the amount of a State's liability may be recovered through offsets to their letter of credit as identified in § 277.16(c) of this chapter, FNS shall also have the option of billing a State directly or using other claims collection mechanisms authorized under the Federal Claims Collection Act, depending upon the amount of the State's liability. FNS is not bound by the timeframes referenced in this subparagraph in cases where a State fails to submit QC data expeditiously to FNS and FNS determines that, as a result, it is unable to calculate a State's payment error rate and payment error rate liability within the prescribed timeframe.

(10) *Interest charges.* (i) To the extent that a State agency does not pay a claim established under § 275.23(e)(5) within 30 days from the date on which the bill for collection (after a determination on any request for a waiver for good cause) is received by the State agency, the State agency shall be liable for interest on any unpaid portion of such claim accruing from the date on which the bill for collection was received by the State agency. This situation applies unless the State agency appeals the claim under part 283 of the regulations. If the State agency agrees to pay the claim through reduction in Federal financial participation for administrative costs, this agreement shall be considered to be paying the claim. If the State agency appeals such claim (in whole or in part), the interest on any unpaid portion of the claim shall accrue from the date of the decision on the administrative appeal, or from a date that is one year after the date the bill is received, whichever is earlier, until the date the unpaid portion of the payment is received.

(ii) If the State agency pays such claim (in whole or in part) and the claim is subsequently overturned through administrative or judicial appeal, any amounts paid by the State agency above what is actually due shall be promptly returned with interest, accruing from the date the payment was received until the date the payment is returned.

(iii) Any interest assessed under this paragraph shall be computed at a rate determined by the Secretary based on the average of the bond equivalent of the weekly 90-day Treasury bill auction rates during the period such interest accrues. The bond equivalent is the discount rate (i.e., the price the bond is actually sold for as opposed to its face value) determined by the weekly auction (i.e., the difference between the discount rate and face value) converted to an annualized figure. The Secretary shall use the investment rate (i.e., the rate for 365 days) compounded in simple interest for the period for which the claim is not paid. Interest billings shall be made quarterly with the initial billing accruing from the date the interest is first due. Because the discount rate for Treasury bills is issued weekly, the

interest rate for State agency claims shall be averaged for the appropriate weeks.

(11) *Suspension and waiver of liabilities for investments in program management activities.* In connection with the settlement of all or a portion of a QC liability for FY 1986 and subsequent QC review periods, the Department may suspend and subsequently waive all or part of a State agency's payment error rate liability claim based on the State agency's offsetting investment in program management activities intended to reduce errors measured by the QC system. A State agency may submit a request to the Department for review of planned investments in program management activities intended to reduce error rates as part of a proposed settlement of all or a portion of a QC liability at any time during the QC liability claim process.

(i) The State agency's investment plan activity or activities must meet the following conditions to be accepted by the Department:

(A) The activity or activities must be directly related to error reduction in the ongoing program, with specific objectives regarding the amount of error reduction, and type of errors that will be reduced. The costs of demonstration, research, or evaluation projects under sections 17 (a) through (c) of the Act will not be accepted. The State agency may direct the investment plan to a specific project area or implement the plan on a statewide basis. In addition, the Department will allow an investment plan to be tested in a limited area, as a pilot project, if the Department determines it to be appropriate. A request by the State agency for a waiver of existing rules will not be acceptable as a component of the investment plan. The State agency must submit any waiver request through the normal channels for approval and receive approval of the request prior to including the waiver in the investment plan. Waivers that have been approved for the State agency's use in the ongoing operation of the program may continue to be used.

(B) The program management activity must represent a new or increased expenditure. The proposed activity must also represent an addition to the minimum program administration required by law for State agency administration including corrective action. Therefore, basic training of eligibility workers or a continuing corrective action from a Corrective Action Plan shall not be acceptable. The State agency may include a previous initiative in its plan; however, the State agency would have to demonstrate that the initiative is entirely funded by State money, represents an increase in spending and there are no remaining Federal funds earmarked for the activity.

(C) Investment activities must be funded in full by the State agency, without any matching Federal funds until the entire investment amount agreed to is spent. Amounts spent in excess of the settlement amount included in the plan may be subject to Federal matching funds.

(ii) The request shall include:

(A) A statement of the amount of money that is a quality control liability claim that is to be offset by investment in program improvements;

(B) A detailed description of the planned program management activity;

(C) Planned expenditures, including time schedule and anticipated cost breakdown;

(D) Anticipated impact of the activity, identifying the types of errors expected to be affected;

(E) Documentation that the funds would not replace expenditures already earmarked for an ongoing effort; and

(F) A statement that the expenditures are not simply a reallocation of resources.

(iii) The State's and the Department's agreement to settle all, part, or none of the QC liability claim under this paragraph is final and not subject to further appeal within the Department. An agreement to settle all or part of a State agency's QC liability claim will result in suspension of the claim for the specified amount, pending the State's satisfactory completion of the initiative or action taken by the Department under the provisions of paragraph (e)(11)(vi) of this section.

(iv) The State agency shall submit modifications to the plan to the Department for approval, prior to implementation. Expenditures made prior to approval by the Department may not be used in offsetting the liability.

(v) Each State agency which has all or part of a claim suspended under this provision shall submit periodic documented reports according to a schedule in its approved investment plan. At a minimum, these reports shall contain:

(A) A detailed description of the expenditure of funds, including the source of funds and the actual goods and services purchased or rented with the funds;

(B) A detailed description of the actual activity; and

(C) An explanation of the activity's effect on errors, including an explanation of any discrepancy between the planned effect and the actual effect.

(vi) Any funds that the State agency's reports do not document as spent as specified in the investment plan may be withdrawn by the Department from the reduction in QC liability. Before the reduction is withdrawn, the State agency will be provided an opportunity to provide the missing documentation.

(vii) If the reduction in QC liability is withdrawn, the Department shall charge interest on the funds not spent according to the plan, in accordance with section 602 of the Hunger Prevention Act of 1988, which amended section 13(a)(1) of the Food Stamp Act of 1977.

(viii) The Department's determination to withdraw a reduction in QC liability is not appealable within the Department.

[Amdt. 160, 45 FR 15912, Mar. 11, 1980, as amended by Amdt. 260, 49 FR 6311, Feb. 17, 1984; Amdt. 262, 49 FR 50598, Dec. 31, 1984. Redesignated and amended at 52 FR 3410, Feb. 4, 1987; Amdt. 295, 52 FR 29659, Aug. 11, 1987; Amdt. 328, 56 FR 60052, Nov. 27, 1991; Amdt. 325, 57 FR 2828, Jan. 24, 1992; Amdt. 327, 57 FR 44486, Sept. 28, 1992; 57 FR 47163, Oct. 14, 1992; Amdt. 348, 59 FR 34561, July 6, 1994; ; Amdt. 366, 62 FR 29659, June 2, 1997; Amdt. 373, 64 FR 38297, July 16, 1999]

PART 276—STATE AGENCY LIABILITIES AND FEDERAL SANCTIONS

Sec.

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EDITORIAL NOTE: OMB control numbers relating to this part 276 are contained in § 271.8.

§ 276.1 Responsibilities and rights.

(a) *Responsibilities.* (1) State agencies shall be responsible for establishing and maintaining secure control over coupons and cash for which the regulations designate them accountable. Except as otherwise provided in these regulations, any shortages or losses of coupons and cash shall strictly be a State agency liability and the State agency shall pay to FNS, upon demand, the amount of the lost or stolen coupons or cash, regardless of the circumstances.

(2) State agencies shall be responsible for preventing losses or shortages of Federal funds in the issuance of benefits to households participating in the Program. FNS shall strictly hold State agencies liable for all losses, thefts and unaccounted shortages that occur during issuance, unless otherwise specified. Issuance functions begin with the State agency's creation of a record-for-issuance to generate each month's issuances from the master issuance file. Shortages or losses which result from any functions that occur prior to the creation of the record-for-issuance are subject to either paragraph (a)(3) of this section or subpart C—Quality Control (QC) Reviews, of part 275—Performance Reporting System.

(3) State agencies shall be responsible for preventing losses of Federal funds in the certification of households for participation in the Program. If FNS makes a determination that there has been negligence or fraud on the part of a State agency in the certification of households for participation in the Program, FNS is authorized to bill the State agency for an amount equal to the amount of coupons issued as a result of the negligence or fraud.

(4) State agencies shall be responsible for efficiently and effectively administering the Program by complying

with the provisions of the Act, the regulations issued pursuant to the Act, and the FNS-approved State Plan of Operation. A determination by FNS that a State agency has failed to comply with any of these provisions may result in FNS seeking injunctive relief to compel compliance and/or a suspension or disallowance of the Federal share of the State agency's administrative funds. FNS has the discretion to determine in each instance of noncompliance, whether to seek injunctive relief or to suspend or disallow administrative funds. FNS may seek injunctive relief *and* suspend or disallow funds simultaneously or in sequence.

(b) *Rights*. State agencies may appeal all claims brought against them by FNS and shall be afforded an administrative review by a designee of the Secretary as provided in § 276.7. State agencies may seek judicial review of any final administrative determination made by the Secretary's designee, as provided in § 276.7(j).

[54 FR 7016, Feb. 15, 1989]

§ 276.2 State agency liabilities.

(a) *General provisions*. Notwithstanding any other provision of this subchapter, State agencies shall be responsible to FNS for any financial losses involved in the acceptance, storage and issuance of coupons. All coupon issuance shall be documented, and the State agency shall make available to the Department all primary documentation (or secondary, if the primary has been inadvertently destroyed) when required to do so. State agencies shall pay to FNS, upon demand, the amount of any such losses.

(b) *Coupon shortages, losses, unauthorized issuances, overissuances and undocumented issuances*. (1) State agencies shall be strictly liable for:

(i) Coupon shortages and losses that occur any time after coupons have been accepted by receiving points within the State and that occur during storage or the movement of coupons between bulk storage point issuers and claims collection points within the State;

(ii) Losses resulting from authorization documents lost in transit from a manufacturer to the State agency and untransacted authorization documents lost in transit from an issuer to the State agency; and

(iii) The value of coupons overissued and coupons issued without authorization, except for those duplicate issuances in the correct amount that are the result of replacement issuances made in accordance with § 274.6. Overissuances and unauthorized issuances for which State agencies are liable include, but are not limited to: Single unmatched issuances, duplicates made that are not in accordance with § 274.6, and transacted authorization documents that are altered, counterfeit, from out-of-State or expired (including those unsigned by the designated household member and/or not date stamped by the issuer).

(2) Coupon shortages and/or losses for which State agencies shall be held strictly liable include, but are not limited to, the following:

(i) Thefts;

(ii) Embezzlements;

(iii) Cashier errors (e.g., errors by the personnel of issuance offices in the counting of coupon books);

(iv) Coupons lost in natural disasters if a State agency cannot provide reasonable evidence that the coupons were destroyed and not redeemed;

(v) Issuances which cannot be supported by the required documentation;

(vi) Issuances made to households not currently certified;

(vii) Issuance loss during an official investigation, unless the investigation was reported *directly* to FNS prior to the loss; and

(viii) Unexplained causes.

(3) State agencies shall submit written reports on significant losses unless those losses were investigated by the Office of the Inspector General, USDA.

(4) A State agency shall be held strictly liable for mail issuance losses that are in excess of the tolerance level that corresponds to the preselected reporting unit. Each State agency shall select one of the three following units annually and report the selection as provided in §§ 272.2(a)(2) and 272.2(d)(1)(iii). Where reporting units issue less than $300,000 in mail issuance in a quarter, the State agency shall be liable for all losses in excess of $1,500 for the quarter.

(i) If a State agency elects to report and have liabilities based on an existing county or project area level of mail issuance, then the State agency shall be strictly liable to FNS for the value of all mail issuance losses in excess of five-tenths (.5) percent of the dollar value of each reporting unit's quarterly mail issuance. This level shall be used if the State agency does not designate one of the three levels herein by May 15, 1989, and by August 15 in years thereafter.

(ii) If a State agency elects to report and have liabilities based on an existing administrative level higher than the county or project area provided in paragraph (b)(4)(i) of this section, but lower than the Statewide level of mail issuance provided in paragraph (b)(4)(iii) of this section, then the State agency shall be strictly liable to FNS for the value of all mail issuance losses in excess of thirty-five hundreths (.35) percent per quarter of the dollar value of each reporting unit's quarterly mail issuance. State agencies shall not create new administrative units for the sole purpose of reporting mail issuance losses.

(iii) If a State agency elects to report and have liabilities based on a State level of mail issuance, then the State agency shall be strictly liable to FNS for the value of all mail issuance losses in excess of thirty hundreths (.30) percent per quarter of the dollar value of each State agency's total quarterly mail issuance.

(iv) FNS reserves the right to make all determinations on reporting requirements and on administrative divisions within the State for the purpose of determining and assessing liability for mail issuance losses. FNS also reserves the right to revise such determinations as necessary. Revisions will be communicated to State agencies by FNS. The liability assessment will be based on the revised reporting requirement for the next full fiscal quarter.

(v) For the purpose of this section, ''mail issuance'' means all original coupon issuances distributed through the mail. ''Mail loss'' means all replacements of mail issuances except for replacements of returned mail issuances.

(vi) The State agency's liability shall be computed using data from Form FNS–259, Food Stamp Mail Issuance Report, or alternative reporting document accepted in advance by FNS and the State agency, which is submitted for the quarter for the particular reporting unit agreed to by FNS and the State agency, as provided in §§ 272.2(a)(2) and 272.2(d)(1)(iii).

(5) State agencies shall be held strictly liable for the following overissuances:

(i) The value of overissued coupons issued as a result of a State agency's failure to comply with a directive issued by FNS in accordance with the provisions of § 271.7, to reduce, suspend or cancel allotments;

(ii) The value of coupons overissued by the State agency as a result of a court order or settlement agreement of a court suit which was not reported to FNS in accordance with the provisions of § 272.4(e); and

(iii) The value of coupons overissued as a result of a State agency entering into an out-of-court settlement of a court suit, the terms of which violate Federal laws or regulations.

(6) Coupon shortages and losses shall be determined from the Form FNS–250, Food Coupon Accountability Report and its supporting documents and from the Form FNS–46, Issuance System Reconciliation Report. Losses of Federal moneys resulting from overissuances shall be determined from sources such as audits, Performance Reporting System Reviews, Federal reviews, investigations and explanatory reports prepared by the State agency.

(7) State agencies shall be held strictly liable for overissuances resulting from Electronic Benefit Transfer system errors and unauthorized account activities. Such overissuances shall include but not be limited to: Overissuances to household accounts that are accessed and used by households, replacement benefits to a household's account due to unauthorized use of the benefits in a household's account, benefits drawn from an EBT account after the household has reported that the EBT card is lost or stolen to the State or its agent, overdraft situations due to the use of manual back-up

procedures approved by the State agency, overcredits to a retailer account and transfer of funds to an illegitimate account.

(c) *Cash Losses.* State agencies are liable to FNS for cash losses when money collected by State agencies from recipient claims has been lost, stolen or otherwise not remitted to FNS in accordance with the provision of § 273.18(h). The amount of such losses shall be determined from the sources outlined in paragraph (6) of this section.

(d) *State agency payment to FNS.* State agencies shall be billed for the exact amount of losses specified in this section. If a State agency fails to pay the billing, FNS shall offset the amount of loss from the State agency's Letter of Credit in accordance with § 277.16(c).

[54 FR 7016, Feb. 15, 1989, as amended at 54 FR 51351, Dec. 15, 1989; 57 FR 11259, Apr. 1, 1992; 57 FR 44791, Sept. 29, 1992; Amdt. 342, 59 FR 2733, Jan. 19, 1994; Amdt. 388, 65 FR 64589, Oct. 30, 2000]

§ 276.3 Negligence or fraud.

(a) *General.* If FNS determines that there has been negligence or fraud on the part of the State agency in the certification of applicant households, the State agency shall, upon demand, pay to FNS a sum equal to the amount of coupons issued as a result of such negligence or fraud.

(b) *Negligence provisions.* (1) FNS may determine that a State agency has been negligent in the certification of applicant households if a State agency disregards Food Stamp Program requirements contained in the Food Stamp Act, the regulations issued pursuant to the Act, the FNS-approved State Plan of Operation and a loss of Federal funds results or a State agency implements procedures which deviate from food stamp requirements contained in the Food Stamp Act, the food stamp regulations, the FNS-approved State Plan of Operation without first obtaining FNS approval, and the implementation of the procedures results in a loss of Federal funds.

(2) In computing amounts of losses of Federal funds due to negligence, FNS may use actual, documented amounts or amounts which have been determined through the use of statistically valid projections. When a statistically valid projection is used, the methodology will include a 95 percent, one-sided confidence level.

(3) FNS will base its determinations of negligence on information drawn from any of a number of sources. These information sources include, but are not limited to, State and Federal Performance Reporting reviews, State and Federal audits and investigations, State corrective action plans and any required reports.

(4) Failure by the State agency to remit payment upon demand, within the specified time period, may result in FNS recovering the lost funds through offsets to the State agency's Letter of Credit, in accordance with § 277.16(c).

(c) *Fraud provisions.* For purposes of this subsection, the term fraud shall mean the wrongful acquisition or issuance of food coupons by the State agency or its officers, employees or agents, including issuance agents, through false representation or concealment of material facts. State agencies shall be liable to FNS for the amount of loss of Federal funds as a result of fraud. Failure by the State agency to remit payment on demand by FNS, within the time period specified, may result in offsets to the Letter of Credit in accordance with § 277.16(c).

[Amdt. 168, 45 FR 77263, Nov. 21, 1980, as amended by Amdt. 262, 49 FR 50598, Dec. 31, 1984; Amdt. 356, 59 FR 29713, June 9, 1994]

§ 276.4 Suspension/disallowance of administrative funds.

(a) *General provisions.* (1) FNS shall make determinations of the efficiency and effectiveness of State agencies' administration of the Food Stamp Program in accordance with the provisions of § 275.25. When making such determinations, FNS shall use all information that is available relating to State agencies' administration of the Program. This information includes, but is not limited to, information received from Performance Reporting System reviews, Federal reviews, audits, investigations, corrective action plans, financial management reviews, and the public.

(2) FNS may determine a State agency's administration of the Program to be inefficient or ineffective if the State

agency fails to comply with the food stamp requirements established by the Food Stamp Act, the regulations issued pursuant to the Act, or the FNS-approved State Plan of Operation.

(3) If FNS determines that a State agency's administration of the Program is inefficient or ineffective, FNS may warn the State agency that a suspension and/or disallowance of administrative funds is being considered. After a State agency receives a warning, FNS may either suspend or disallow administrative funds or take both actions in sequence, depending on the statement in the warning.

(b) *Suspension.* A suspension of funds is an action by FNS to temporarily withhold all or a portion of the Federal share of one or more of the cost categories of a State agency's budget for administration of the Food Stamp Program. Suspensions of funds shall remain in effect until FNS determines that a State agency has taken adequate corrective action to correct the problem causing the suspension, in which event the suspension will be rescinded, or until FNS decides to disallow the suspended funds. FNS shall suspend funds in accordance with § 277.16.

(c) *Disallowance.* (1) A disallowance of funds is an action by FNS in which reimbursement is denied for otherwise reimbursable administrative costs claimed by a State agency in one or more of the cost categories of a State agency's budget for Program administration.

(2) In accordance with § 277.16, FNS has the option of disallowing funds in another cost category, or all or a portion of the entire Letter of Credit if the disallowance is based on a finding that the State agency failed to take a required action. FNS may disallow funds after previously suspending such funds or may disallow funds immediately following the expiration of the formal warning under the conditions specified in paragraph (e) of this section.

(d) *Warning process.* Prior to taking action to suspend or disallow Federal funds, except those funds which are disallowed when a State agency fails to adhere to the cost principles of part 277 and appendix A, FNS shall provide State agencies with written advance notification that such action is being considered. If a State agency does not respond to such an advance notification to the satisfaction of FNS, FNS shall provide the State agency with a formal warning of the possibility of suspension or disallowance action. However, when a State agency fails to meet the objectives in a corrective action plan, FNS may omit the advance notification and immediately issue a formal warning.

(1) *Advance notification.* Immediately upon becoming aware that a deficiency or deficiencies in a State agency's administration of the Program may warrant the suspension and/or disallowance of Federal funds, FNS shall advise the State agency in writing of the deficiency and shall provide a specific period of time for correction of such deficiency or deficiencies. The time period allowed the State agency for corrective action will vary according to the nature of the deficiency.

(2) *Formal warning.* FNS shall issue a formal warning to a State agency if the State fails to correct to the satisfaction of FNS the deficiencies noted in an advance notification within the time specified in the advance notification. FNS may also issue a formal warning to a State agency without first issuing an advance notification if a State agency fails to comply with a corrective action plan.

(i) Formal warnings shall include the following information:

(A) Specific descriptions of the deficiencies, explaining how the State agency is out of compliance with Program requirements;

(B) A Statement as to whether Federal funds will be suspended, disallowed or both, if appropriate;

(C) The amount of Federal funds that will be suspended and/or disallowed or an estimate of the amount if actual cost are unavailable; and

(D) A statement of FNS' willingness to assist State agencies is resolving the deficiencies.

(ii) A State agency shall have 30 days from receipt of a formal warning to submit evidence that it is in compliance or to submit a corrective action proposal, including the date the State agency will be in compliance.

(iii) When the deficiency cannot be corrected within 30 days of receipt of a formal warning but the State agency submits an acceptable plan for correcting the deficiency, FNS shall hold the formal warning in abeyance pending completion of the actions contained in the plan within the time specified in the plan.

(iv) FNS shall cancel a formal warning when the State agency submits evidence that shows, to the satisfaction of FNS, that the deficiency has been eliminated.

(e) *Suspension/disallowance of funds.* The Administrator of FNS shall notify State agencies in writing by certified mail or through personal service that administrative funds are being suspended or disallowed. Such action may occur when any of the following situations arise:

(1) A State agency fails to respond to the deficiencies cited in a formal warning within 30 days of receiving the warning;

(2) The response by a State agency to the deficiencies cited in a formal warning is unsatisfactory to FNS; or

(3) A State agency fails to meet the commitments it made in its corrective action proposal and a formal warning had been held in abeyance pending completion of that corrective action.

(f) *Appeals.* After FNS has taken action to disallow Federal funds the State agency may request an appeal in accordance with the procedures specified in § 276.7.

[Amdt. 168, 45 FR 77263, Nov. 21, 1980, as amended by Amdt. 266, 52 FR 3410, Feb. 4, 1987]

§ 276.5 Injunctive relief.

(a) *General.* If FNS determines that a State agency has failed to comply with the Food Stamp Act, the regulations issued pursuant to the Act, or the FNS-approved State Plan of Operations, the Secretary may seek injunctive relief against the State agency to require compliance. The Secretary may request injunctive relief concurrently with negligence billings and sanctions against State agencies affecting administrative funds.

(b) *Requesting injunctive relief.* Prior to seeking injunctive relief to require compliance, FNS shall notify the State agency of the determination of noncompliance and provide the State agency with a specific period of time to correct the deficiency. The Secretary shall have the discretion to determine the time periods State agencies will have to correct deficiencies. If the State agency does not correct the failure within the specified time period and the Department decides to seek injunctive relief, the Secretary shall refer the matter to the Attorney General with a request that injunctive relief be sought to require compliance.

[Amdt. 168, 45 FR 77263, Nov. 21, 1980]

§ 276.6 Good cause.

(a) When a State agency has failed to comply with provisions of the Act, the regulations issued pursuant to the Act, or the FNS-approved State Plan of Operation, and, thus, is subject to the suspension/disallowance and injunctive relief provisions in §§ 276.4 and 276.5, FNS may determine that the State had good cause for the noncompliance. FNS shall evaluate good cause in these situations on a case-by-case basis, based on any one of the following criteria:

(1) Natural disasters or civil disorders that adversely affect Program operations;

(2) Strikes by State agency staff;

(3) Change in the Food Stamp Program or other Federal or State programs that result in a substantial adverse impact upon a State agency's management of the Program; and

(4) Any other circumstances in which FNS determines good cause to exist.

(b) If FNS determines that food cause existed for a State agency's failure to comply with required provisions and standards, FNS shall not suspend or disallow administrative funds nor seek injunctive relief to compel compliance with the provisions and standards.

[Amdt. 168, 45 FR 77263, Nov. 21, 1980]

§ 276.7 Administrative review process.

(a) *General.* (1) Whenever FNS asserts a claim against a State agency, the State agency may appeal the claim by requesting an administrative review. FNS claims that may be appealed are billings resulting from financial losses involved in the acceptance, storage,

and issuance of coupons (§276.2), billings based on charges of negligence or fraud (§276.3), and disallowances of Federal funds for State agency failures to comply with the Food Stamp Act, regulations, or the FNS-approved State Plan of Operations (§276.4).

(2) A State agency aggrieved by a claim shall have the option of requesting a hearing to present its position in addition to a review of the record and any written submission presented by the State agency. Unless circumstances warrant differently, hearings of appeals of negligence claims and disallowances of Federal funds shall be before an Appeals Board and hearings of appeals of other claims shall be before a single hearing official. In any case, the people reviewing the claim shall be people who were not involved in the decision to file the claim.

(b) *Notice of claim.* FNS shall provide a notice by certified mail or personal service when asserting claims against State agencies.

(c) *Filing an appeal.* A State agency aggrieved by claims asserted against it may file written appeals with the Secretary, U.S. Department of Agriculture, c/o the Executive Secretary, State Food Stamp Appeals Board, Food and Nutrition Service, USDA, Washington, DC 20250, requesting an opportunity to present information in support of its position. The State agency shall attach a copy of the FNS claim to its appeal. Appeals must be filed with the Executive Secretary or postmarked within 10 days of the date of delivery of the notice of claim. If the State agency does not appeal within the prescribed 10-day period, the FNS decision on the claim shall be final. No extension shall be granted in the time allowed for filing an appeal.

(d) *Computation of time.* In computing any period of time prescribed or allowed under these procedures, the day of delivery of any notice of action, acknowledgment, or reply shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday or Federal or State holiday. In that case, the period runs until the end of the next day which is not a Saturday, Sunday or Federal or State holiday.

(e) *Stay of administrative action.* With one exception, the filing of a timely appeal and request for administrative review shall automatically stay the action of FNS to collect the claim asserted against the State agency until a decision is reached on the acceptability of the appeal, and in the case of an acceptable appeal, until a final determination has been issued. The exceptions to this provision are those claims that are asserted against State agencies due to State agency failure to comply with an order to reduce, suspend or cancel benefits in accordance with §271.7. In situations where a State agency does not reduce, suspend or cancel benefits as directed and FNS takes action to disallow administrative funds or bill the State agency, the disallowance and/or billing shall remain in effect during the review process. Should the Appeals Board uphold the State agency, all disallowed funds and/or funds collected as a result of the billing shall be restored to the State agency promptly.

(f) *Acknowledging an appeal.* Upon receipt of an appeal and request for administrative review, the Executive Secretary shall provide the State agency with a written acknowledgment of the appeal, including a statement of whether or not the appeal is timely and can be accepted. A copy of each acknowledgment shall be provided to FNS. The acknowledgment of a timely and acceptable appeal and request for administrative review shall also include a copy of Secretary's Memorandum No. 2003, Revised, ''State Food Stamp Appeals Board,'' and the identity of the Appeals Board member(s) designated by the Secretary to review the claim.

(g) *Submitting additional information.* (1) State agencies shall have 30 days from their request for an appeal to submit five sets of the following information to the Executive Secretary of the Appeals Board:

(i) A clear, concise identification of the issue or issues in dispute;

(ii) The State agency's position with respect to the issue or issues in dispute;

(iii) The pertinent facts and reasons in support of the State agency's position with respect to the issue or issues in dispute;

(iv) All pertinent documents, correspondence and records which the State agency believes are relevant and helpful toward a more thorough understanding of the issue or issues in dispute;

(v) The relief sought by the State agency;

(vi) The identity of the person(s) presenting the State agency's position when a hearing is involved; and

(vii) A list of prospective State agency witnesses when a hearing is involved.

(2) At the request of the Executive Secretary, FNS shall promptly submit five complete sets of all documents, correspondence and records compiled by FNS in support of its claim.

(3) The Executive Secretary shall provide each person hearing an appeal and FNS with a complete set of the State agency information when it is received. The Executive Secretary shall also provide each person hearing an appeal and the State agency with a complete set of the information supplied by FNS when it is received.

(h) *Scheduling and conducting hearings.* When a hearing is afforded, the Appeals Board or hearing official has up to 60 days from receipt of the State agency's information, outlined in paragraph (g) of this section, to schedule and conduct the hearing. The Executive Secretary shall advise the State agency of the time, date and location of the hearing at least 10 days in advance of the hearing. The State agency is solely responsible for ensuring the attendance of all State agency witnesses at the hearing.

(1) A hearing is an informal proceeding designed to permit the State agency an opportunity to present its position before a neutral third party. Because the final determination is subject to judicial review and trial *de novo*, the Appeals Board and hearing official shall not be bound by the rules of civil procedure applicable in the court or by the adjudicatory requirements of the Administrative Procedures Act.

(2) The Appeals Board Chairman, his designee or the hearing official is the presiding officer at the hearing. The presiding officer shall have full authority to ensure a fair and impartial proceeding, avoid delays, maintain order and decorum, receive evidence, examine witnesses, and otherwise regulate the course of the hearing. The State agency may represent itself at the hearing or be represented by counsel.

(3) The Appeals Board or hearing official shall receive into evidence the oral testimony of State agency witnesses and any documents which are relevant and material. Neither the Department nor FNS is required to present witnesses at the hearing. However, the Department and FNS shall make staff available to provide any information or clarification requested by the Appeals Board or hearing official. Under no circumstances shall the Department or FNS introduce new evidence at the hearing. Departmental and FNS staff, as well as State agency witnesses, shall be subject to examination by the Appeals Board or hearing official. Departmental and FNS staff shall not be subject to cross-examination by State agency representative or counsel. Likewise, State agency witnesses shall not be subject to cross-examination by Departmental or FNS staff. Each side shall be permitted to make a closing statement to the Appeals Board or hearing official upon completion of the taking of evidence and testimony.

(4) FNS and the State agency shall have the opportunity to submit additional written information to the Appeals Board or hearing official within 10 days after the close of the hearing. No new factual material may be introduced except as it directly relates to evidence or testimony presented at the hearing. Five complete sets of such information must be filed with the Executive Secretary or postmarked prior to the expiration of the 10-day deadline for it to be considered.

(5) An official verbatim transcript of each hearing shall be kept on file in the Office of the Executive Secretary for public inspection. A copy shall be furnished to FNS and the State agency. Anyone wishing to purchase a copy may make arrangements to do so with the commercial reporting service involved.

(i) *Final determination.* (1) When a hearing is afforded, a final determination shall be made within 30 days of the hearing, and the final determination shall take effect 30 days after delivery of the notice of this final decision to the State agency. When a hearing is not held, a final determination shall be made within 30 days after receipt of the State agency's information. The final determination shall take effect 30 days after delivery of the notice of the final decision to the State agency.

(2) The Appeals Board or hearing official shall either uphold the claim, deny the claim, or adjust the claim downward in such amounts and for such reasons as the Appeals Board or hearing official shall determine and declare. The final determination is not subject to reconsideration.

(j) *Judicial review.* State agencies aggrieved by the final determination may obtain judicial review and trial *de novo* by filing a complaint against the United States within 30 days after the date of delivery of the final determination, requesting the court to set aside the final determination. The final determination shall remain in effect during the period the judicial review or any appeal therefrom is pending unless the court temporarily stays such administrative action after a showing that irreparable injury will occur absent a stay and that the State agency is likely to prevail on the merits of the case.

(k) *Extension of time.* (1) No extension of time shall be permitted a State agency in which to file an initial request for an administrative review. All other requests from the State agency or from FNS for the extension of any deadline contained in § 276.7 of these regulations or imposed by the Appeals Board or hearing official shall be granted only for good cause shown and only when received by the Executive Secretary before the expiration of the particular deadline involved. All requests for an extension shall be in writing. Filing a request for an extension stops the running of the prescribed period of time. When a request for an extension is granted, the requester shall be notified in writing of the amount of additional time granted. When a request is denied for being untimely or for cause, the requester shall be notified and the prescribed period of time shall resume from the date of denial.

(2) The Appeals Board or hearing official may grant itself such additional time as it may reasonably require to complete any of its assigned responsibilities. If the Appeals Board or hearing official does find it necessary to grant itself an extension of time, the Executive Secretary shall notify all parties in writing.

[Amdt. 168, 45 FR 77263, Nov. 21, 1980, as amended by Amdt. 274, 51 FR 18752, May 21, 1986; Amdt. 356, 59 FR 29714, June 9, 1994]

PART 277—PAYMENTS OF CERTAIN ADMINISTRATIVE COSTS OF STATE AGENCIES

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APPENDIX A TO PART 277—PRINCIPLES FOR DETERMINING COSTS APPLICABLE TO ADMINISTRATION OF THE FOOD STAMP PROGRAM BY STATE AGENCIES

AUTHORITY: 7 U.S.C. 2011–2036.

SOURCE: Amdt. 188, 45 FR 85702, Dec. 30, 1980, unless otherwise noted.

EDITORIAL NOTE: OMB control numbers relating to this part 277 are contained in § 271.8.

§ 277.1 General purpose and scope.

(a) *Purpose.* This part establishes uniform requirements for the management of administrative funds provided to State agencies and sets forth principles for claiming costs of activities paid with administrative funds under the

Food Stamp Program, and the Food Distribution Program and Food Stamp Program on Indian Reservations.

(b) *Scope and applicability*. Upon compliance with the provisions of this part, payments to State agencies will be made for cost(s) incurred for administration of the Food Stamp Program and for administration of the Food Distribution Program on Indian Reservations. To ensure maximum practical uniformity, deviation(s) by a State agency from this part may be authorized only when necessary to meet program objectives, to conserve program funds, or when essential to the public interest. However, any deviations from this part must be authorized by the Administrator of FNS.

§ 277.2 Definitions.

For the purpose of this part the term:

Accrued expenditures means the charges incurred by the State agency during a given period for liabilities incurred, benefits received or for goods and services used during this period.

Accrued income means the net value of earnings during a given period resulting from services and goods provided whether or not payment has been realized.

Acquisition cost refers to nonexpendable personal property acquired by purchase and means the net invoice price of the property including any attachments, accessories or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Ancillary charges such as taxes, duty, protection in-transit insurance, freight or installation shall be included in or excluded from acquisition cost in accordance with the State agency's regular accounting practices.

Approval or authorization by FNS means documentation evidencing consent prior to incurring specific costs.

Applicable credits refer to those receipts or reduction of expenditure-type transactions which offset or reduce expense items allocable to programs as direct or indirect costs. Examples of such transactions are: Purchase discounts; rebates or allowances; recoveries or indemnities on losses; sale of publications, equipment, and scrap; income from personal or incidental services; and adjustments of overpayments or erroneous charges.

Disbursements refers to the transfer of funds by the state agency to pay for Program costs resulting from purchased or expired goods and services.

Expendable personal property means all tangible personal property other than nonexpendable property.

Program funds means money, or property provided in lieu of money, paid for or furnished by FNS to a State agency.

Funds available to the State agency may include contributions from third parties including other Federal agencies.

In-kind contributions refers to the value of noncash contributions. Only when authorized by Federal legislation may property purchased with Federal funds be considered as a State agency's in-kind contribution. In-kind contributions may be for the value of real and/or nonexpendable personal property or the value of goods and services provided specifically to the project or program.

Nonexpendable personal property means tangible personal property having a useful life of more than one year and an acquisition cost of more than $300 per unit. A State agency may use its own definition of nonexpendable personal property provided that such definition would at least include all tangible personal property as defined herein.

Obligations are the amounts of orders placed, contracts awarded, services received, and similar transactions during a given period which require payment.

Offset means a method to recover funds due FNS through use of the Letter of Credit system. Recovery is accomplished by accounting adjustments to increase Federal funds on hand or disbursed.

OMB means the Office of Management and Budget.

Personal property means property of any kind except real property. It may be tangible (having physical existence) or intangible (having no physical existence) such as patents, inventions and copyrights.

Program means both the Food Stamp Program and the Food Distribution Program on Indian Reservations.

Program closeout means the process by which FNS determines that all applicable administrative and financial processes have been completed by the State agency and FNS terminates the program in the affected project area or areas.

Project costs are allowable costs as set forth in this part.

Real property means land, land improvements, structure and appurtenances thereto, excluding movable machinery and equipment.

State agency means the organization as defined in 7 CFR 271.1.

State agency costs means the State agency outlays from its funds available for program administration. Unless authorized by Federal legislation, costs charged to other Federal grants or to other Federal contracts may not be considered as State agency costs reimbursable under this authority.

Subagency means the organization or person to which a State agency makes any payment for acquisition of goods, materials or services for use in administering the program and which is accountable to the State agency for the use of funds provided.

Terms and conditions means legal requirements imposed by the Federal Government under statute, regulations, contracts, agreements or otherwise.

Unliquidated obligation represents the amount of obligations not yet paid.

Unobligated balance means the portion of the Federal funds authorized less all allowable costs and unpaid obligations of the State agency.

§277.3 Budgets and budget revision procedures.

The preparation, content, submittal, and revision requirements for the State Food Stamp Program Budget shall be as specified in §272.2. The application for funds and budget requirements for the Food Distribution Program on Indian Reservations shall be as specified in §283.9. State agencies must submit a budget to FNS as part of the State Plan each fiscal year. Upon approval of the budget by FNS, administrative funds will be provided.

§277.4 Funding.

(a) *General*. This section sets allowable cost standards for activities of State agencies in administering the Food Stamp Program and Food Distribution Program on Indian Reservations.

(b) *Federal reimbursement rate*. The base percentage for Federal payment shall be 50 percent of State agencies' allowable Food Stamp Program administrative costs. This rate includes reimbursement for food stamp informational activities but not for recruitment activities. Recruitment activities are those activities designed to persuade an individual who has made an informed choice not to apply for food stamps to change his or her decision and apply.

(1) A State agency's federally funded share of Food Stamp Program administrative costs shall be increased when its error rate, as determined through the quality control process described in part 275, meets certain standards.

(i) For the period beginning October 1, 1982, through September 30, 1988, a State agency with a payment error rate of five percent or less in the corresponding fiscal year shall have its federally funded share of Program administrative costs increased to 60 percent, provided that the State agency's negative case error rate is less than the national weighted mean negative case rate for the fiscal year prior to the period of enhanced funding.

(ii) For the period beginning October 1, 1988, and review periods thereafter, a State agency with a payment error rate less than or equal to 5.90 percent and with a negative case error rate less than the National weighted mean negative case error rate for the prior fiscal year shall have its Federally funded share of Food Stamp Program administrative costs increased by one percentage point to a maximum of 60 percent for each full one-tenth of a percentage point by which the payment error rate is less than six percent.

(2) Funding of demonstration projects approved by FNS will be at a rate agreed to by FNS in accordance with the requirements outlined in part 282.

(3) The reimbursement of administrative costs to State agencies administering the program on Indian reservations shall be in accordance with the requirements of parts 281 and 283.

(4 For the period beginning October 1, 1980, a State agency's federally funded share of Food Stamp Program administrative costs shall be increased to 65 percent when the State agency's cumulative allotment error rate is less than five percent; provided that the State agency's negative case error rate is less than the national weighted mean negative case error rate for the 6-month period of enhanced funding. This provision shall not apply to any period after the April through September 1982 period.

(5) For the period beginning October 1, 1980, a State agency's federally funded share of Food Stamp Program administrative costs shall be increased to 60 percent when the State agency's cumulative allotment error rate is less than eight percent; provided that the State agency's negative case error rate is less than the national weighted mean negative case error rate for the 6-month period of enhanced funding. This provision shall not apply to any period after the April through September 1982 period.

(6) For the 6-month period beginning October 1, 1980, a State agency with a 25 percent or greater reduction in its cumulative allotment error rate from one 6-month period to the comparable period of the next fiscal year shall be entitled to a 55 percent federally funded share of Food Stamp Program administrative costs; provided that, effective with the 6-month period beginning October 1, 1981, the State agency's negative case error rate is less than the national weighted mean negative case error rate for the period of enhanced funding. This provision shall not apply to any period after the April through September 1982 period.

(7) Beginning October 1982, the federally funded share of administrative costs, as identified in paragraph (b) of this section may be decreased based upon its payment error rate as described in § 275.23. The rates of Federal funding for the activities identified in paragraphs (b)(2) and (b)(3) of this section shall not be reduced based upon the agency's payment error rate.

(8) Employment and training program grants, as outlined in § 273.7(f) shall be 100 percent federally-funded.

(c) *Matching costs.* State agency costs for Federal matching funds may consist of:

(1) Charges reported on a cash or accrual basis by the State agency as project costs.

(2) Project costs financed with cash contributed or donated to the State agency by other non-Federal public agencies and institutions.

(3) Project costs represented by services and real or personal property donated by other non-Federal public agencies and institutions.

(d) All cash or in-kind contributions except as provided in paragraph (e) of this section shall be allowable as part of the State agency's share of program costs when such contributions:

(1) Are verifiable;

(2) Are not contributed for another federally-assisted program, unless authorized by Federal legislation;

(3) Are necessary and reasonable for accomplishment of project objectives;

(4) Are charges that would be allowable under this part;

(5) Are not paid by the Federal Government under another assistance agreement unless authorized under the other agreement and its subject laws and regulations; and

(6) Are in the approved budget.

(e) The value of services rendered by volunteers or the value of goods contributed by third parties, exclusive of the State and Federal agencies, are unallowable for reimbursement purposes under the Food Stamp Program. The value of services rendered by volunteers shall be allowable only to meet any matching administrative costs requirements for the Food Distribution Program on Indian Reservations.

(f) The expenses (e.g. travel, lodging, meals) of persons working with volunteer or nonprofit organizations which receive training and assistance pursuant to § 272.4(d)(2) are not allowable.

(g) Investigations of authorized retail or wholesale food concerns when performed in coordination with the USDA Office of Inspector General and FNS

shall be funded at the 50 percent Federal reimbursement rate.

[Amdt. 188, 45 FR 85702, Dec. 30, 1980, as amended by Amdt. 201, 47 FR 25498, June 11, 1982; Amdt. 260, 49 FR 6313, Feb. 17, 1984; Amdt. 281, 51 FR 47397, Dec. 31, 1986; 53 FR 39443, Oct. 7, 1988; Amdt. 316, 54 FR 24531, June 7, 1989; Amdt. 328, 56 FR 60053, Nov. 27, 1991; Amdt. 342, 59 FR 2733, Jan. 19, 1994; Amdt. 316, 59 FR 16096, Apr. 6, 1994; Amdt. 385, 65 FR 33440, May 24, 2000; Amdt. 388, 65 FR 70212, Nov. 21, 2000]

§ 277.5 Methods of payment

(a) This section sets forth FNS methods for authorizing funds for State agencies.

(b) The ''Letter of Credit'' (LOC) (SF–1193A) is the document by which an official of FNS authorizes a State agency to draw funds from the United States Treasury. This shall be the preferred method of payment for State agencies which receive at least $120,000 per year and meet the requirements prescribed in OMB Circular A–102, Attachment J.

(c) State agencies shall request payment(s) by submitting Request for Payment on Letter of Credit and Status of Funds Report (Treasury Form SF–183) to the appropriate United States Treasury Regional Disbursing Office with a copy to FNS.

(d) State agencies not meeting the requirements for the LOC method of payment or failing to meet LOC reporting requirements, including those requiring adjustments to cash balances to liquidate amounts owed to FNS, shall be provided funds by Treasury check in accordance with the provisions of Department of the Treasury Circular 1075.

(e) Payments for proper charges incurred by State agencies will not be withheld unless such payments are suspended or disallowed pursuant to § 277.16. When a payment is withheld, payment adjustments will be made in accordance with § 277.16. When FNS collects an indebtedness, whether due to a disallowance or an offset for amounts which the State agency has been billed but which it has failed to pay without cause acceptable to FNS, FNS shall provide reasonable notice to the State agency, and shall require appropriate accounting adjustment to cash balances for which the State agency is accountable to the Federal government to liquidate the indebtedness.

§ 277.6 Standards for financial management systems.

(a) *General*. This section prescribes standards for financial management systems in administering program funds by the State agency and its subagencies or contractors.

(b) *Responsibilities*. Financial management systems for program funds in the State agency shall provide for:

(1) Accurate, current, and complete disclosure of the financial results of program activities in accordance with Federal reporting requirements.

(2) Records which identify the source and application of funds for FNS or State agency activities supporting the administration of the Program. These records shall show authorizations, obligations, unobligated balances, assets, liabilities, outlays and income of the State agency, its sub- agencies and agents.

(3) Records which identify unallowable costs and offsets resulting from FNS or other determinations as specified in § 277.16 and the disposition of these amounts. Accounting procedures must be in effect to prevent a State agency from claiming these costs under ongoing program administrative cost reports.

(4) Effective control and accountability by the State agency for all program funds, property, and other assets acquired with program funds. State agencies shall adequately safeguard all such assets and shall assure that they are used solely for program authorized purposes unless disposition has been made in accordance with § 277.13.

(5) Controls which minimize the time between the receipt of Federal funds from the United States Treasury and their disbursement for program costs. In the Letter of Credit system, the State agency shall make drawdowns from the U.S. Treasury through a U.S. Treasury Regional Disbursing Office as nearly as possible to the time of making the disbursements.

(6) Procedures to determine the reasonableness, allowability, and allocability of costs in accordance with the applicable provisions prescribed in appendix A to this part.

(7) Support and source documents for costs.

(8) An audit trail including identification of time periods, initial and summary accounts, cost determination and allocation procedures, cost centers or other accounting procedures to support any costs claimed for program administration.

(9) Periodic audits by qualified individuals who are independent of those who maintain Federal program funds as prescribed in § 277.17.

(10) Methods to resolve audit findings and recommendations and to follow up on corrective or preventive actions.

(c) The standards in § 277.6(b) apply to subagencies or contractors involved with program funding.

§ 277.7 Cash depositories.

(a) The term ''cash depositories'' refers to banks or other institutions which maintain accounts where Food Stamp Program funds are deposited and from which withdrawals are made to meet administrative costs of the State agency.

(b) State agencies are encouraged to use minority owned banks to expand opportunities for minority enterprises.

(c) FNS shall not:

(1) Require physical segregation in a cash depository of program funds from other State agency funds.

(2) Establish any eligibility requirements for cash depositories in which program funds are deposited by the State agency.

§ 277.8 Bonding and insurance.

(a) *General.* In administering FNS program funds, State agencies shall observe their regular requirements and practices with respect to bonding and insurance. FNS will not impose additional bonding and insurance requirements, including fidelity bonding, above those normally required by the State agency.

(b) *Loan guarantees.* FNS makes no guarantee of any loan or payment of money borrowed by a State agency for administering the program. State agencies shall not make any assurances to any lender or contractor that FNS will furnish funds for loan payments.

§ 277.9 Administrative costs principles.

(a) This section prescribes specific policies and procedures governing State agencies for funding under this part.

(b) The incremental cost of certifying TANF households for Food Stamp Program benefits are allowable costs for FNS reimbursement.

(c) When costs for administering the program are claimed for reimbursement, the audit trail must identify the specific activities, locations, or time periods as defined in this section.

(1) *Direct cost.* Allowable direct costs may be charged to the Food Stamp Program at the 50 percent or higher funding level as specified in this part.

(2) *Indirect cost.* Allowable indirect costs may also be claimed at the 50 percent or higher reimbursement funding level as specified in this part and appendix A.

(3) Direct and indirect costs claimed for program cost reimbursement must be incurred for the time periods, the activities or for the locations for which the rates are approved by FNS.

(d) All State agency Cost Allocation Plans for determining the costs of administering the program must be approved by the cognizant Federal agency. All Cost Allocation Plans involving program funds shall be submitted to FNS for review.

[Amdt. 188, 45 FR 85702, Dec. 30, 1980, as amended by Amdt. 385, 65 FR 33440, May 24, 2000]

§ 277.10 Program income.

(a) Program income is gross income resulting from activities financed with program funds. Such earnings exclude interest income but include income from service fees, usage or rental fees, sale of assets purchased with program funds, and royalties on patents and copyrights.

(b) Interest earned on advances of program administrative funds shall be remitted to FNS except for interest earned on advances to States or instrumentalities of a State as provided by the Intergovernmental Cooperation Act of 1968 (Pub. L. 90–577) and advances to tribal organizations under the Indian Self-Determination Act (sections 102 through 104).

(c) Income resulting from the sale of real and personal property whose acquisition cost was borne in whole or in part with Program funds shall be remitted to FNS or applied to the Federal share of current program costs in accordance with § 277.13. All other sales proceeds will be handled in accordance with § 277.13.

(d) Unless there is a prior agreement between FNS and the State agency, the State agency shall have no obligation to FNS with respect to royalties received from copyrights or patents produced as a result of activities financed with program administrative funds.

(e) Any other income earned under activities supported by program administrative funds may be retained by the State agency if they are deducted from the gross program administrative costs for the purposes of determining net costs and FNS's share of net cost.

(f) State agencies shall record the receipt and expenditure of revenues such as taxes, special assessments, levies, fines, etc., as a part of program fund transactions when such revenues are specifically earmarked for program fund projects.

§ 277.11 Financial reporting requirements.

(a) *General.* This section prescribes requirements for the State agencies to report financial information to FNS.

(b) *Authorized forms and instructions.* (1) Only forms specified by this part, or other forms authorized by FNS, may be used for obtaining financial information from State agencies for the program.

(2) All instructions for use in connection with the form specified in § 277.11(c) shall be followed. FNS may prescribe supplementary instructions.

(3) State agencies shall submit the original and two copies of forms required by this section unless FNS approves a waiver of this requirement.

(4) The forms and instructions in this part shall be available to the State agency and to the public upon request to FNS Regional Offices as set out in § 271.6(b).

(c) *Financial status report*—(1) *Form.* State agencies shall use the standard Financial Status Report (Form SF–269) to report program costs.

(2) *Freqency.* The report (Form SF–269) shall be required quarterly.

(3) *Exceptions.* Those State agencies that receive payments under the U.S. Treasury check system shall submit to FNS a Quarterly Report of Federal Cash Transactions (Form SF–272).

(4) *Due dates.* Quarterly reports shall be due April 30 (for the period January through March), July 30 (April through June), October 30 (July through September), January 30 (October through December). Final reports are due December 30 for all completed Federal fiscal years (October 1 through September 30) or 90 days after termination of Federal financial support. Requests from State agencies for extension of reporting due dates may be approved, if necessary.

(d) *Time limit for State agencies to file claims.* (1) After the deadline in paragraph (c)(4) of this section for the final SF–269 report, State agencies shall use the form specified by FNS as needed within three years of the end of the Federal fiscal year to amend a prior expenditure report pertaining to such Federal fiscal year. The three-year reporting deadline may be extended by FNS if litigation, an audit, or a claim is unresolved at the end of the three-year period. The reporting form shall be used to amend prior expenditure reports, and to request reimbursement for any additional funding due, or to pay back to FNS any inadvertent prior overclaim. Requests for reimbursement will only be honored if the claim is filed within the timeframe in paragraph (d)(2) of this section. FNS reserves the right to bill State agencies for amounts due FNS resulting from an overclaim, even if no reporting form has been submitted.

(2) Subject to the availability of funds from the appropriation for the year in which the expenditure was incurred, FNS may reimburse State agencies for an allowable expenditure only if the State agency files a claim with FNS for that expenditure within two years after the calendar quarter in which the State agency (or local agency) incurred the cost. FNS will consider non-cash expenditures such as depreciation to have been made in the quarter the expenditure was recorded in the accounting records of the State

agency in accordance with generally accepted accounting principles.

(3) For Automated Data Processing (ADP) expenditures approved under § 277.18(c), subject to the availability of funds and required FNS approval related to the Advance Planning Document, FNS may reimburse State agencies for allowable expenditures at the appropriate rate in effect at the time the equipment or service was received only if the State agency files for a claim with FNS within two years after the calendar quarter in which the cost was incurred. FNS will consider noncash expenditures such as depreciation to have been made in the quarter the expenditure was recorded in the accounting records of the State agency in accordance with generally accepted accounting principles.

(4) States wishing to request an extension of the deadline in paragraphs (d)(2) and (d)(3) of this section must submit the request in writing to FNS prior to the applicable deadline. The State agency's request for an extension must include a specific explanation, justification, and documentation of why the claim will be late and when the claim will be filed.

(5) The time limits in paragraphs (d)(2) and (d)(3) of this section will not apply to any of the following:

(i) Any claim for an adjustment to prior year costs previously claimed under an interim rate concept;

(ii) Any claim arising from an audit exception as defined in this section. An audit exception means a proposed adjustment by the Department to any expenditure claimed by a State agency by virtue of a Federal-or State-initiated audit. The audit must comply with the requirements of § 277.17 and 7 CFR part 3015, and must have been started within 3 years of the date of submission of the final SF–269 of the relevant Federal fiscal year to which it applies.

(iii) Any claim resulting from a court-ordered retroactive payment. However, this provision does not bind FNS to a State or Federal court decision when FNS was not a party to the action;

(iv) Any claim for which FNS determines there was good cause for the State agency's not filing it within the time limit. Good cause is lateness due to circumstances beyond the State agency's control such as Acts of God or documented action or inaction of the Federal Government. It does not include neglect or administrative inadequacy on the part of the State, State agency, legislature, or any of their offices or employees.

[Amdt. 188, 45 FR 85702, Dec. 30, 1980, as amended by Amdt. 385, 65 FR 33440, May 24, 2000]

§ 277.12 Retention and custody of records.

(a) *Retention period.* All financial records, supporting documents, statistical records, negotiated contracts, and all other records pertinent to program funds shall be maintained for three years from the date of submission of the annual financial status report of the relevant fiscal year to which they apply except that:

(1) If any litigation, claim, or audit is started before the expiration of the three-year period, the applicable records shall be retained until these have been resolved.

(2) In the case of a payment by a State agency to a subagency or contractor using program funds, the State agency, USDA, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any book, documents, papers and records of the subagency or contractor which the State agency, USDA, or the Comptroller General of the United States or any of their duly authorized representatives, determine are pertinent to administration of the specific FNS program funds, for the purpose of making audit, examination, excerpts, and transcripts.

(b) *Restrictions on public access.* Unless required by laws, FNS will not place restrictions on State agencies which limit public access to their records or the records of their subagencies or contractors that are pertinent to the administrative funding provided by FNS except when the State agency can demonstrate that such records must be kept confidential and would have been excepted from disclosure pursuant to the Freedom of Information Act (5 U.S.C. 552) if the records had belonged to FNS.

§ 277.13 Property.

(a) *General.* This section prescribes policies and procedures governing title, use, disposition of real and personal property for which acquisition costs were borne, in whole or in part, as a direct charge to FNS funds, and ownership rights or intangible personal property developed, in whole or in part, with FNS funds. State agencies may follow their own property management policies and procedures provided they observe the requirements of this section. With respect to property covered by this section, FNS may not impose on State agencies any requirement (including property reporting requirements) not authorized by this section unless specifically required by Federal laws.

(b) *Nonexpendable personal property*—(1) *Title.* Title to nonexpendable personal property whose acquisition cost is borne, in whole or in part, by FNS shall vest in the State agency upon acquisition, and shall be subject to the restrictions on use and dispositions set forth in this section.

(2) *Use.* (i) The State agency shall use the property in the program as long as there is a need for such property to accomplish the purpose of the program.

(ii) When there is no longer a need for the property to accomplish the purpose of the program, the State agency shall use the property where needed in administration of other programs in the following order of priority:

(A) Other federally-funded programs of FNS.

(B) Other federally-funded programs of USDA.

(C) Other federally-funded programs.

(iii) When the State agency no longer has need for such property in any of its federally financed activities, the property may be used for the State agency's own official activities in accordance with the following standards:

(A) If the property had a total acquisition cost of less than $1,000, the State agency may use the property without reimbursement to FNS.

(B) For all such property not covered under paragraph (b)(2)(iii)(A) of this section, the State agency may retain the property for its own use, provided a fair compensation is made to FNS for the FNS share of the property. The amount of compensation shall be computed by applying the percentage of FNS participation in the cost of the property to the current fair market value of the property.

(3) *Disposition.* If the State agency has no need for the property, disposition of the property shall be made as follows:

(i) If the property had a total acquisition cost of less than $1,000 per unit, the State agency may sell the property and retain the proceeds.

(ii) If the property had an acquisition cost of $1,000 or more per unit, the State agency shall:

(A) If instructed to ship the property elsewhere, the State agency shall be reimbursed with an amount which is computed by applying the percentage of the State agency's participation in the cost of the property to the current fair market value of the property, plus any shipping or interim storage costs incurred.

(B) If instructed to otherwise dispose of the property, the State agency shall be reimbursed by FNS for the cost incurred in such disposition.

(C) If disposition or other instructions are not issued by FNS within 120 days of a request from the State agency, the State agency shall sell the property and reimburse FNS an amount which is computed by applying the percentage of FNS participation in the cost of the property to the sales proceeds. The State agency may, however, deduct and retain from FNS's share $100 or 10 percent of the proceeds, whichever is greater, for the State agency selling and handling expenses.

(c) *Transfer of title to certain property.* (1) Where FNS determines that an item of nonexpendable personal property with an acquisition cost of $1,000 or more which is to be wholly borne by FNS is unique, difficult, or costly to replace, FNS may reserve the right to require the State agency to transfer title of the property to the Federal Government or to a third party named by FNS.

(2) Such reservation shall be subject to the following:

(i) The right to require transfer of title may be reserved only by means of an expressed special condition under

which funds were authorized for acquisition of the property, or, if approval for the acquisition of the property is given after the funds are awarded, by means of a written stipulation at the time such approval is given.

(ii) The property must be sufficiently described to enable the State agency to determine exactly what property is involved.

(3) FNS may not exercise the right to reserve until the State agency no longer needs the property in the activity for which it was acquired. Such need shall be assumed to end with termination of the activity in which the property was used unless the State agency continues to use the property in other program-related activities after the termination date and demonstrates to FNS a continued need for such use in the program.

(4) To exercise the right, FNS must issue disposition instructions to the State agency not later than 120 days after the State agency no longer needs the property in the activity for which it was acquired. If instructions are not issued within that time, FNS's right shall lapse, and the State agency shall act in accordance with the applicable standards in paragraphs (b)(2) and (b)(3) of this section.

(5) The State agency shall be entitled to reimbursement with an amount which is computed by applying the percentages of the State agency's participation in the acquisition cost of the property to the current fair market value of the property, and for any reasonable shipping and interim storage costs it incurs pursuant to FNS's disposition instructions.

(d) *Property management standards.* State agencies' property management standards for nonexpendable personal property covered by this section shall include the following procedural requirements:

(1) Property records shall be maintained accurately and provide for:

(i) A description of the property.

(ii) Manufacturer's serial number or other identification number.

(iii) Acquisition date and cost.

(iv) Source of the property.

(v) Percentage of FNS funds used in the acquisition of the property, or sufficient information to be able to compute the percentage, if and when the property is disposed of.

(vi) Location, use and condition of the property.

(vii) Ultimate disposition data including sales price or the method used to determine current fair market value if the State agency reimburses FNS for its share.

(viii) Trade-in value of any property purchased with Federal funds where their trade-in value reduces the acquisition cost of new property.

(2) A physical inventory of property shall be taken and the results reconciled with the property records at least once every two years to verify the existence, current utilization, and continued need for the property.

(3) A control system shall be in effect to ensure adequate safeguards to prevent loss, damage, or theft to the property. Any loss, damage, or theft of nonexpendable personal property shall be investigated and properly documented.

(4) Adequate maintenance procedures shall be implemented to keep the property in good condition.

(5) Proper sales procedures shall be implemented to keep the property in good condition.

(e) *Expendable personal property*—(1) *Title.* Title to expendable personal property, whose acquisition cost was borne in whole or in part by FNS, shall vest in the State agency.

(2) *Use.* The State agency shall use the property in the program as long as there is a need for such property to accomplish the purpose of the program.

(3) *Disposition.* When there is no longer a need for the property in the program and there is a residual inventory exceeding $1,000 the State agency shall:

(i) Use the property in other federally sponsored projects or programs;

(ii) Retain the property for use on non-federally sponsored activities; or,

(iii) Sell it.

(4) *Compensation.* FNS must be compensated for its share if the alternative in paragraph (e)(3)(i) of this section is not followed. The amount of compensation shall be computed in the same manner as for nonexpendable personal property.

(f) *Patents and inventions.* If any program activity produced patents, patent

rights, processes or inventions in the course of work aided by FNS, such fact shall be promptly and fully reported to FNS. Unless there is prior agreement between the State agency and FNS on disposition of such items, FNS shall determine whether protection on such invention or discovery shall be sought and how the rights in the invention or discovery—including rights under any patent issued thereon—shall be disposed of and administered in order to protect the public interest consistent with ''Government Patent Policy'' (President's Memorandum for Heads of Excecutive Departments and Agencies, August 23, 1971), and State of Government Patent Policy as printed in title 37 CFR, chapters I and II.

(g) *Copyrights*. When a program activity results in a book or other copyrightable materials, the author or State agency is free to copyright the work, but FNS reserves a royalty-free, nonexclusive and irrevocable right to reproduce, publish or otherwise use and to authorize others to use the work for government purposes. This includes copyrights on ADP software as specified in appendix A.

§ 277.14 Procurement standards.

(a) *General*. This section establishes standards and guidelines for the procurement of supplies, equipment, construction and other services whose cost is borne in whole or in part by FNS program funds. These standards ensure that such materials are obtained in an effective and economical manner and in compliance with the provisions of applicable Federal law and Executive orders. No additional procurement standards will be imposed by FNS upon State agencies unless specifically required by Federal law, or Executive orders, or authorized by the Administrator for Federal Procurement Policy, Office of Management and Budget.

(1) These standards do not relieve the State agency of any contractual responsibilities under its contracts. The State agency is responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements entered into in support of the program. These include but are not limited to sources evaluations, protests, disputes and claims. FNS shall not substitute its judgment for that of the State agency unless the matter is primarily a Federal concern. Violations of laws shall be referred to the local, State or Federal authority having jurisdiction.

(2) State agencies shall use their own procurement procedures provided that procurements paid in whole or in part with FNS program funds meet the standards set forth in this part.

(b) *Review of proposed contracts*. State agencies shall submit proposed contracts and related procurement documents to FNS for preaward review and approval when:

(1) The procurement is expected to exceed $10,000 and is to be awarded without competition or only one bid or offer is received in response to solicitation;

(2) The procurement expected to exceed $10,000 specifies a ''brand name'' product; or

(3) FNS has determined that the State agency's procurement procedures or operation fails to comply with one or more significant aspects of this section.

(c) *Code of conduct*. The State agency shall maintain a written code or standards of conduct which shall govern the performance of its officers, employees, or agents engaged in the award and administration of contracts borne in whole or in part with FNS program funds. No employee, officer, or agent of the State agency shall participate in the selection, or in the award or administration of a contract supported in whole or in part by FNS program funds if a conflict of interest, real or apparent, would be involved. Such conflict would arise when:

(1) The employee, officer, or agent;

(2) Any member of his/her immediate family;

(3) His or her partner; or

(4) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The State agency's officers, employees, or agents shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, potential

contractors, or parties to subagreements. State agencies may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards of conduct shall provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the State agency's officers, employees, or agents, or by contractors or their agents.

(d) *Procurement procedures.* The State agency shall establish procurement procedures which provide that proposed procurement actions shall be reviewed by State agency officials to avoid the purchase of unnecessary or duplicative items. Consideration should be given to consolidation or dividing the purchase into smaller units, to obtain a more economical purchase. Where appropriate, an analysis shall be made of lease versus purchase alternatives, and any other appropriate analyses, to determine which approach would be the most economical. To foster greater economy and efficiency, State agencies are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

(e) *Contracting with small and minority firms, women's business enterprises and labor surplus area firms.* (1) It is FNS policy to award a fair share of contracts to small and minority business firms. State agencies must take affirmative steps to assure that small and minority businesses are utilized when possible as sources of supplies, equipment, construction and services. State agency affirmative steps shall include the following:

(i) Including qualified small and minority businesses on solicitation lists.

(ii) Assuring that small and minority businesses are solicited whenever they are potential sources.

(iii) When economically feasible, dividing total requirements into smaller tasks or quantities so as to permit maximum small and minority business participation.

(iv) Where the requirement permits, establishing delivery schedules which will encourage participation by small and minority business.

(v) Using the services and assistance of the Small Business Administration, the Office of Minority Business Enterprise of the Department of Commerce and the Community Services Administration, as appropriate.

(vi) If any subcontracts are to be let, requiring the prime contractor to take the affirmative steps in paragraphs (e)(1) (i) through (v) of this section.

(2) State agencies shall take similar appropriate affirmative action in support of women's business enterprises.

(3) State agencies are encouraged to procure goods and services from labor surplus areas, as defined by the Department of Labor.

(4) FNS shall impose no additional regulations or requirements in the foregoing areas unless specifically mandated by law or Executive order.

(f) *Selection procedures.* All State agency procurement transactions shall be conducted in a manner that provides maximum open and free competition with this section. Procurement procedures shall not contain features which restrict or eliminate competition. The State agency shall have written selection procedures which shall provide, as a minimum, the following procedural requirements:

(1) Solicitation of offers, whether by competitive sealed bid or competitive negotiation, shall contain a clear and accurate description of the technical requirements for the material, product, or service desired. Descriptions shall not, in competitive procurements, contain features which unduly restrict competition. Descriptions may include a statement of the qualitative nature of the material, product or service desired and, when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. When it is impractical or uneconomical to describe clearly and accurately the technical requirements, a ''brand name or equal'' description may be used to define the performance or requirements of the material, product or service desired. The specific features of the named brand which must be met by offerors shall be clearly stated. State agencies shall clearly set forth all requirements which offerors

must fulfill and all other factors to be used in evaluating bids or proposals.

(2) State agencies shall make awards only to responsible contractors that possess the potential ability to perform successfully under the terms and conditions of a proposed procurement. Consideration shall be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(g) *Procurement methods.* State agency procurements made in whole or in part with program funds shall be by one of the following methods:

(1) *Small purchase procedures* are those relatively simple and informal procurement methods that are sound and appropriate for a procurement of services, supplies, or other property, costing in the aggregate not more than $10,000. State agencies shall comply with State or local small purchase dollar limits under $10,000. If small purchase procedures are used for a procurement under the program, price or rate quotations shall be obtained from an adequate number of qualified sources.

(2) In *competitive sealed bids* (formal advertising), sealed bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is lowest in price.

(i) In order for the State agency to use this method of procurement the following conditions, as a minimum, must prevail:

(A) A complete, adequate, and realistic specification or purchase description is available.

(B) Two or more responsible suppliers are willing and able to compete effectively for the State agency's business.

(C) The procurement lends itself to a firm-fixed-price contract, and selection of the successful bidder can appropriately be made principally on the basis of price.

(ii) If formal advertising is used for a procurement under a grant, the following requirements shall apply:

(A) A sufficient time prior to the date set for opening of bids, bids shall be solicited from an adequate number of known suppliers. In addition, the invitation shall be publicly advertised.

(B) The invitation for bids, including specifications and pertinent attachments, shall clearly define the items or services needed in order for the bidders to properly respond to the invitation.

(C) All bids shall be opened publicly at the time and place stated in the invitation for bids.

(D) A firm-fixed-price contract award shall be made by written notice by the State agency to that responsible bidder whose bid, conforming to the invitation for bids, is lowest. Where specified in the bidding documents, factors such as discounts, transportation costs and life cycle costs shall be considered in determining which bid is lowest. Payment discounts may only be used to determine low bid when prior experience of the State agency indicates that such discounts are generally taken.

(E) Any or all bids may be rejected by the State agency when there are sound documented business reasons in the best interest of the program.

(3) In *competitive negotiation*, proposals are requested from a number of sources and the Request for Proposal is publicized, negotiations are normally conducted with more than one of the sources submitting offers, and either a fixed-price or cost-reimbursable type contract is awarded, as appropriate. Competitive negotiation may be used if conditions are appropriate for the use of formal advertising. If competitive negotiation is used for procurement under a grant, the following requirements shall apply:

(i) Proposals shall be solicited from an adequate number of qualified sources to permit reasonable competition consistent with the nature and requirements of the procurement. The Request for Proposals shall be publicized and reasonable requests by other sources to compete shall be honored to the maximum extent practicable.

(ii) The Request for Proposal shall identify all significant evaluation factors, including price or cost where required and their relative importance.

(iii) The State agency shall provide procedures for technical evaluation of the proposals received, determinations of responsible offerors for the purpose

of written or oral discussions, and selection for contract award.

(iv) Award may be made to the responsible offeror whose proposal will be most advantageous to the State agency, price and other factors considered. Unsuccessful offerors should be notified promptly.

(v) State agencies may utilize competitive negotiation procedures for procurement of architectural/engineering professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected subject to negotiation of fair and reasonable compensation.

(4) *Noncompetitive negotiation* is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate. Noncompetitive negotiation may be used when the award of a contract is infeasible under small purchase, competitive bidding (formal advertising) or competitive negotiation procedures. Awards of contracts by noncompetitive negotiation are limited to the following:

(i) The item is available only from a single source;

(ii) Public exigency or emergency when the urgency for the requirement will not permit a delay incident to competitive procurement;

(iii) FNS authorizes noncompetitive procurement; or

(iv) After solicitation of a number of sources, competition is determined inadequate.

(h) *Contract pricing*. The cost plus a percentage of cost and percentage of construction cost method(s) of contracting may not be used by a State agency. State agencies shall perform some form of cost or price analysis in connection with every procurement action including contract modifications. Costs or prices based on estimated costs for contracts, paid in whole or in part by FNS program funds, shall be allowed only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles.

(i) *State agency procurement records*. State agencies shall maintain records sufficient to detail the significant history of a procurement. These records shall include, but are not necessarily limited to, information pertinent to the rationale for the method of procurement, the selection of contract type, the contract selection or rejection, and the basis for the cost or price.

(j) *Contract provisions*. In addition to provisions defining a sound and complete procurement contract, State agencies shall include the following contract provisions or conditions in all procurement contracts and subcontracts as required by this provision, Federal law, or FNS:

(1) Contracts other than small purchases shall contain provisions or conditions which will allow for administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate.

(2) All contracts in excess of $10,000 shall contain suitable provisions for termination by the State agency including the manner by which it will be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

(3) All contracts awarded in excess of $10,000 by State agencies and their contractors or subagencies shall contain a provision requiring compliance with Executive Order 11246, entitled ''Equal Employment Opportunity,'' as amended by Executive Order 11375, and as supplemented in Department of Labor regulations (29 CFR part 60).

(4) All contracts and subcontracts for construction or repair shall include a provision for compliance with the Copeland ''Anti-Kickback'' Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR part 3). This Act provides that each contractor or subagency shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The State agency shall report all suspected or reported violations to FNS.

(5) Where applicable, all contracts awarded by State agencies and subagencies in excess of $2,000 for construction contracts in excess of $2,500 for other contracts which involve the employment of mechanics or laborers shall include a provision for compliance with sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327 through 330) as supplemented by Department of Labor regulations (29 CFR part 5). Under section 103 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of a standard work day of 8 hours and a standard work week of 40 hours. Work in excess of the standard work day or work week is permissible provided that the work is compensated at a rate of not less than 1½ times the basic rate for all hours worked in excess of 8 hours in any calendar day or 40 hours in the work week. Section 107 of the Act is applicable to construction work and provides that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his health and safety as determined under construction, safety, and health standards promulated by the Secretary of Labor. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

(6) The contract shall include notice of FNS requirements and regulations pertaining to reporting and print rights under any contract involving research, developmental, experimental, or demonstration work with respect to any discovery or invention which arises or is developed in the course of or under such contract, and of FNS requirements and regulations pertaining to copyrights and rights to data so derived.

(7) All negotiated contracts (except those awarded by small purchases procedures) awarded by State agencies shall include a provision to the effect that the State agency, FNS, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract, for the purpose of making audit, examination, excerpts, and transcriptions. State agencies shall require contracts to maintain all required records for three years after the State agency makes final payments or all other pending matters are closed, whichever is last.

(8) Contracts, subcontracts, and subgrants of amounts in excess of $100,000 shall contain a provision which requires compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act, section 508 of the Clean Water Act, Executive Order 11738, and Environmental Protection Agency (EPA) regulations, which prohibit the use under nonexempt Federal contract, grants, or loans of facilities included on the EPA List of Violating Facilities. The provision shall require reporting of violations to the FNS and to the USEPA Assistant Administrator for Enforcement.

(9) Contracts shall recognize mandatory standards and policies relating to energy efficiency which are contained in the State energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94–165).

(k) *Contract administration.* State agencies shall maintain a contract administration system insuring that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

§ 277.15 [Reserved]

§ 277.16 Suspension, disallowance and program closeout.

(a) *Suspension.* When a State agency has materially failed to comply with any of the provisions contained in the Act, regulations, or FNS-approved State Plan of Operation, FNS may, after written notification to the State agency, temporarily withhold some or all Federal reimbursements for costs of administration of the Food Stamp Program in accordance with § 276.4. Adjustments will be made either by adjusting the Letter of Credit authorization or

by not allowing the State agency to withdraw funds.

(b) *Disallowance.* (1) FNS may disallow costs in accordance with part 276 and effect nonpayment for some or all costs incurred by a State agency which are normally allowable but are determined by FNS to be nonreimbursable because the State agency has failed to comply with any of the provisions contained in the Act, regulations, or FNS-approved State Plan of Operation.

(2) FNS may also disallow costs and institute recovery of Federal funds when a State agency fails to adhere to the cost principles of this part and appendix A.

(c) *Offsets to the Letter of Credit.* (1) FNS may recover funds when owed by the State agency to FNS through offsets to the Letter of Credit. Offsets shall include:

(i) Costs determined by FNS to be disallowed under the provisions of this part;

(ii) Unallowable costs resulting from audit or investigation findings;

(iii) Amounts owed which have been billed to the State agency and which the State agency has failed to pay without cause acceptable to FNS; or

(iv) Amounts owed to FNS for title IV reimbursements and recipient claims collections which were reported on the FNS–209 and which the State agency has failed to pay.

(2) The amounts recovered through the offset procedure should be in one lump sum. If recovery of funds through the offset procedure is not possible in one lump sum, FNS shall make appropriate adjustments to recover the funds in not more than three fiscal years.

(d) *Program transfer or termination.* (1) When termination or transfer of a State program has been agreed upon by FNS, the following closeout procedure shall be observed:

(i) Upon request, FNS shall make or arrange for prompt payment to the State agency for allowable costs not covered by previous payments.

(ii) The State agency shall immediately refund to FNS any unobligated balance of cash withdrawn by the State agency for the administration of the program in the affected State or Indian reservation.

(iii) The State agency shall submit to FNS within 90 days after the date of termination of the program, all required financial, performance, and other reports. FNS may grant extensions when requested by the State agency.

(iv) FNS shall adjust the amount authorized by the Letter of Credit in order to effect payment of any amounts due the State agency, and if appropriate, shall bill the State agency for any amounts due to FNS. The amounts of such billings shall be promptly remitted to FNS.

(v) In the event a final audit has not been performed prior to the closeout of the program, FNS shall retain the right to disallow costs or recover funds resulting from the final audit findings.

(2) Provisions of § 277.13 apply for any property acquired with program funds or received from the Federal Government in connection with the program and which was in use in the affected project area or areas.

[Amdt. 188, 45 FR 85702, Dec. 30, 1980, as amended by Amdt. 342, 59 FR 2733, Jan. 19, 1994]

§ 277.17 Audit requirements.

(a) *General.* This section sets forth the audit requirements for State agencies that receive FNS program funds. Audits shall be conducted on an organization-wide basis. Such audits are to determine whether:

(1) Financial operations are conducted properly;

(2) The financial statements are presented fairly;

(3) The organization has complied with laws and regulations affecting the expenditure of Federal funds;

(4) Internal procedures have been established to meet the objectives of federally assisted programs; and

(5) Financial reports to the Federal Government contain accurate and reliable information.

Except where required by law, no additional requirements for audit will be imposed by FNS unless approved by the Office of Management and Budget (OMB). The provisions of this section do not limit the authority of FNS to make audits of State agencies, their subdivisions, and subcontracts. However, if independent audits arranged for

by State agencies meet the requirements prescribed herein, FNS shall rely on them, and any additional audit work already done.

(b) *Audit standards.* (1) State agencies shall use their own procedures to arrange for independent audits, and to prescribe the scope of audits, provided that the audits comply with the requirements set forth in this section. Where contracts are awarded for audit services, the contracts shall include a reference to OMB Circular A–102, Attachment P.

(2) Audits shall be made in accordance with the General Accounting Office ''Standards for Audit of Governmental Organizations, Programs, Activities, and Functions, the Guidelines for Financial and Compliance Audits of Federally Assisted Program,'' and any compliance supplements approved by OMB, and generally accepted auditing standards established by the American Institute of Certified Public Accountants.

(c) *Purpose of audit.* Audits will include, at a minimum, an examination of the systems of internal control, systems established to ensure compliance with laws and regulations affecting the expenditure of Federal funds, financial transactions and accounts, and financial statements and reports of State agencies. These examinations are to determine whether:

(1) There is effective control over and proper accounting for revenues expenditures, assets, and liabilities.

(2) The financial statements are presented fairly in accordance with generally accepted accounting principles.

(3) The Federal financial reports (including Financial Status Reports, Cash Reports, and claims for advances and reimbursements) contain accurate and reliable financial data; and are presented in accordance with the terms of applicable agreements, and in accordance with Attachment H of OMB Circular A–102.

(4) Federal funds are being expended in accordance with the terms of applicable agreements and those provisions of Federal law or regulations that could have a material effect on the financial statements or on the awards tested.

(d) *Audit coverage.* A representative number of charges to Federal funds shall be tested. The test shall be representative of:

(1) The universe of Federal funds received, and

(2) All cost categories that materially affect the award. The test is to determine whether the charges:

(i) Are necessary and reasonable for the proper administration of the program;

(ii) Conform to any limitations or exclusions in the award;

(iii) Were given consistent accounting treatments and applied uniformly to both federally assisted and other activities of the State agency;

(iv) Were net of applicable credits;

(v) Did not include costs property chargeable to other federally assisted programs;

(vi) Were properly recorded (i.e., correct amount, date) and supported by source documentation;

(vii) Were approved in advance, if subject to prior approval in accordance with Financial Management Circular 74–4;

(viii) Were incurred in accordance with competitive purchasing procedures, if covered by OMB Circular A–102, Attachment O; and

(ix) Were allocated equitably to benefiting activities, including non-Federal activities.

(3) Audits usually will be made annually, but not less frequently than every two years.

(4) If the auditors become aware of irregularities in the State agency, subagency or subcontractor, the auditor shall promptly notify the cognizant agency and State agency management officials above the level of involvement. Irregularities include such matters as conflict of interest, falsification of records or reports, and misappropriation of funds and other assets.

(e) *Audit report.* The audit report shall include:

(1) Financial statements, including footnotes, of the State agency, subagency, or subcontractor organization.

(2) The auditor's comments on the financial statements which should:

(i) Identify the statements examined and the period covered.

(ii) Identify the various programs under which the organization received Federal funds, and the amounts received for each program.

(iii) State that the audit was done in accordance with paragraph (d) of this section.

(iv) Express an opinion as to whether the financial statements are fairly presented in accordance with generally accepted accounting principles. If an unqualified opinion cannot be expressed, state the nature of the qualification.

(3) The auditor's comments on compliance and internal control which should:

(i) Include comments on weaknesses in and noncompliance with the systems of internal control, separately identifying material weaknesses.

(ii) Identify the nature and impact of any noted instances of noncompliance with the terms of agreements and those provisions of Federal law or regulation that could have a material effect on the financial statements and reports.

(iii) Contain an expression of positive assurance with respect to compliance with requirements for tested items, and negative assurance for untested items.

(4) Comments on the accuracy and completeness of financial reports and claims for advances or reimbursements to Federal agencies.

(5) Comments on corrective action taken or planned by the State agency.

(f) *Record retention.* Work paper and reports shall be retained for a minimum of three years from the date of the audit report unless the auditor is notified in writing by the cognizant agency of the need to extend the retention period. The audit workpapers shall be made available upon request to the cognizant agency or its designees and the General Accounting Office or its designees.

(g) *Cognizant agency responsibilities.* The cognizant agency shall have the following responsibilities:

(1) Obtain or make quality assessment reviews of the work of non-Federal audit organizations, and provide the results to other interested audit agencies. If a non-Federal audit organization is responsible for audits of State agencies that have different cognizant audit agencies, a single quality assessment review will be arranged.

(2) Assure that all audit reports of State agencies that affect federally assisted programs are received, reviewed, and distributed to appropriate Federal audit officials. These officials will be responsible for distributing audit reports to their program officials.

(3) Whenever significant inadequacies in an audit are disclosed, the State agency will be advised and the auditor will be called upon to take corrective action. If corrective action is not taken, the cognizant agency shall notify the State agency and Federal awarding agencies of the facts and its recommendation. Major inadequacies or repetitive substandard performance of independent auditors shall be referred to appropriate professional bodies.

(4) Assure that satisfactory audit coverage is provided in a timely manner and in accordance with the provisions of this section.

(5) Provide technical advice and act as a liaison between Federal agencies, independent auditors and State agencies.

(6) Maintain a followup system on audit findings and investigative matters to assure that audit findings are resolved.

(7) Inform other affected audit agencies of irregularities uncovered. The audit agencies, in turn, shall inform all appropriate officials in their agencies. State or local government law enforcement and prosecuting authorities shall also be informed of irregularities within their jurisdiction.

(8) Recipients shall require subrecipients that are local governments of Indian tribal governments to adopt the requirements in paragraphs (d) through (f) of this section. The recipient shall ensure that the subrecipient audit reports are received as required, and shall submit the reports to the cognizant agency. The cognizant agency will have the responsibility for those reports described in paragraph (g) of this section.

§ 277.18 Establishment of an Automated Data Processing (ADP) and Information Retrieval System.

(a) *Scope and application.* This section establishes conditions for initial and continuing authority to claim Federal financial participation (FFP) for the costs of the planning, development, acquisition, installation and implementation of ADP equipment and services used in the administration of the Food Stamp Program. Due to the nature of the procurement of ADP equipment and services, current State agency approved cost allocation plans for ongoing operational costs shall not apply to ADP system development costs under this section unless documentation required under paragraph (c) of this section is submitted to and approvals are obtained from FNS.

(b) *Definitions:*

Acceptance Documents means written evidence of satisfactory completion of an approved phase of work or contract, and acceptance thereof by the State agency.

Advance Planning Document for Project Implementation or *Implementation APD* means a written plan of action requesting Federal financial participation (FFP) to acquire and implement ADP services and/or equipment.

Advance Planning Document for Project Planning or *Planning APD* means a brief written plan of action that requests FFP to accomplish the planning necessary for a State agency to determine the need for and plan the acquisition of ADP equipment and/or services, and to acquire information necessary to prepare an Implementation APD.

Advance Planning Document Update (APDU) means an annual self-certification by the State agency on the status of project development activities and expenditures in relation to the approved Planning APD or Implementation APD. An APDU may also be submitted as needed to request funding approval for project continuation whenever significant project changes occur or are anticipated.

Automated Data Processing or *ADP* means data processing performed by a system of electronic or electrical machines so interconnected and interacting as to minimize the need for human assistance or intervention.

Automated Data Processing Equipment or *hardware* means:

(1) Electronic digital computers, regardless of size, capacity, or price, that accept data input, store data, perform calculations, and other processing steps, and prepare information;

(2) All peripheral or auxiliary equipment used in support of electronic digital computers whether selected and acquired with the computer or separately;

(3) Data transmission or communications equipment that is selected and acquired solely or primarily for use with a configuration of ADP equipment which includes an electronic digital computer; and

(4) Data input equipment used to enter directly or indirectly into an electronic digital computer, peripheral or auxiliary equipment, or data transmission, or communication equipment.

Automated Data Processing Services means:

(1) Services to operate ADP equipment, either by private sources, or by employees of the State agency, or by State or local organizations other than the State agency; and/or

(2) Services provided by private sources or by employees of the State agency or by State and local organizations other than the State agency to perform such tasks as feasibility studies, system studies, system design efforts, development of system specifications, system analysis, programming and system implementation. This includes system training, systems development, site preparation, data entry, and personal services related to automated systems development and operations that are specifically identified as part of a Planning APD or Implementation APD.

Data Processing means the preparation of source media containing data or basic elements of information and the use of such source media according to precise rules of procedures to accomplish such operations as classifying, sorting, calculating, summarizing, recording, and transmitting.

Emergency situation means a situation where:

(1) The State agency can demonstrate to FNS an immediate need to acquire ADP equipment or services in

order to continue operation of the Food Stamp Program; and

(2) The State agency can clearly document that the need could not have been anticipated or planned for and the need prevents the State from following the prior approval requirements of § 277.18(c).

Feasibility Study means a preliminary study to determine whether it is sufficiently probable that effective and efficient use of ADP equipment or systems would warrant a substantial investment of staff, time, and money being requested, and whether the plan can be accomplished successfully.

Functional Requirements Specification means an initial definition of the proposed system, which documents the goals, objectives, user or programmatic requirements, the operating environment, and the proposed design methodology, e.g., centralized or distributed. This document details what the new system and/or hardware should do, not how it is to do it. The Specification document shall be based upon a clear and accurate description of the functional requirements for the project, and shall not, in competitive procurements, lead to requirements which unduly restrict competition.

General Systems Design means a combination of narrative and diagrams describing the generic architecture of a system as opposed to the detailed architecture of the system. A general systems design may include a systems diagram; narrative identifying overall logic flow and systems functions; a description of equipment needed (including processing, data transmission and storage requirements); a description of other resource requirements which will be necessary to operate the system; a description of system performance requirements; and a description of the environment in which the system will operate, including how the system will function within that environment.

Regular funding or *regular FFP rate* means any Federal reimbursement rate authorized by § 277.4(b).

Request for Proposal or *RFP* means the document used for public solicitations of competitive proposals from qualified sources as outlined in § 277.14(g)(3).

Service Agreement means the document, described in § 277.18(f), signed by the State or local agency and the State or local central data processing facility whenever a central data processing facility provides ADP services to the State or local agency.

Software means a set of computer programs, procedures, and associated documentation used to operate the hardware.

System specifications means information about the new ADP systems, such as: Workload descriptions, input data, information to be maintained and processed, data processing techniques, and output data, which is required to determine the ADP equipment and software necessary to implement the system design.

System study means the examination of existing information flow and operational procedures within an organization. The study consists of three basic phases: Data gathering or investigation of the present system and new information requirements; analysis of the data gathered in the investigation; and synthesis, or refitting, of the parts and relationships uncovered through the analysis into an efficient system.

(c) *General acquisition requirements—(1) Requirement for prior FNS approval.* A State agency shall obtain prior written approval from FNS as specified in paragraph (c)(2) of this section when it plans to acquire ADP equipment or services with proposed FFP that it anticipates will have total acquisition costs of $5 million or more in Federal and State funds. This applies to both competitively bid and sole source acquisitions. A State agency shall also obtain prior written approval from FNS of its justification for a sole source acquisition when it plans to acquire ADP equipment or services noncompetitively from a nongovernmental source which has a total State and Federal acquisition cost of more than $1 million but no more than $5 million. The State agency shall request prior FNS approval by submitting the Planning APD, the Implementation APD or the justification for the sole source acquisition signed by the appropriate State official to the FNS Regional Office. However, a State agency shall obtain prior written approval from FNS for the acquisition of ADP equipment or services to be utilized in an EBT

system regardless of the cost of the acquisition.

(2) *Specific prior approval requirements.* (i) For ADP equipment and services acquisitions which require prior approval as specified in paragraph (c)(1) of this section, the State agency shall obtain the prior written approval of FNS for:

(A) The Planning APD prior to entering into contractual agreements or making any other commitment for acquiring the necessary planning services;

(B) The Implementation APD prior to entering into contractual agreements or making any other commitment for the acquisition of ADP equipment or services.

(ii) For ADP equipment and services acquisitions requiring prior approval as specified in paragraph (c)(1) of this section, prior approval of the following documents associated with such acquisitions is also required:

(A) RFP's; unless specifically exempted by FNS, the State agency shall obtain prior written approval of the RFP before the RFP may be released. However, RFPs costing up to $5 million for competitive procurements and up to $1 million for noncompetitive acquisitions from non-governmental sources and which are an integral part of the approved APD need not be submitted to FNS. States will be required to submit RFPs under this threshold amount on an exception basis or if the procurement strategy is not adequately described and justified in an APD. The State agency shall obtain prior written approval from FNS for Request for Proposals which are associated with an EBT system regardless of the cost.

(B) Contracts; unless specifically exempted by FNS, the State agency shall obtain prior written approval before the contract may be signed by the State agency. However, contracts costing up to $5 million for competitive procurements and up to $1 million for noncompetitive acquisitions from non-governmental sources, and which are an integral part of the approved APD need not be submitted to FNS. States will be required to submit contracts under this threshold amount on an exception basis or if the procurement strategy is not adequately described and justified in an APD. The State agency shall obtain prior written approval from FNS for contracts which are associated with an EBT system regardless of the cost.

(C) Contract amendments; unless specifically exempted by FNS, the State agency shall obtain prior written approval before the contract amendment may be signed by the State agency. However, contract amendments involving cost increases of up to $1 million or time extensions of up to 120 days, and which are an integral part of the approved APD need not be submitted to FNS. States will be required to submit contract amendments under these threshold amounts on an exception basis or if the contract amendment is not adequately described and justified in an APD. Amendments to contracts for EBT systems shall be permitted within the approved funding cap. State agencies shall submit copies of any contract amendments or contract extensions to FNS with an accompanying analysis of the impact the changes would have upon the approved issuance cap.

(iii) The State agency must obtain prior written approval from FNS as specified in paragraphs (c)(2) (i) and (ii) of this section in order to claim and receive reimbursement for the associated costs of the ADP acquisition.

(3) *Approval requirements.* (i) For ADP equipment and service acquisitions requiring prior approval as specified in paragraph (c)(1) of this section, the State agency shall submit the following documents to FNS for approval:

(A) Feasibility studies, when specifically required by FNS as a condition of approving the Planning APD. When required by FNS for approval, the State agency shall submit the feasibility study no later than 90 days after its completion.

(B) APD Updates, as required by paragraph (e) of this section, on an annual or as needed basis.

(ii) The State agency must obtain FNS approval of the documents specified in paragraph (c)(3)(i) of this section in order to claim and receive reimbursement for the associated costs of the ADP acquisition.

(4) *Approval by the State agency.* Approval by the State agency is required

for all documents specified in this regulation prior to submission for FNS approval. In addition, State agency approval is also required for those acquisitions of ADP equipment and services not requiring prior approval by FNS.

(5) *Prompt action on requests for prior approval.* FNS will reply promptly to State requests for prior approval. If FNS has not provided written approval, disapproval or a request for additional information within 60 days of FNS' letter acknowledging receipt of the State's request, the request will be deemed to have provisionally met the prior approval requirement in paragraph (c) of this section. However, provisional approval will not exempt a State from having to meet all other Federal requirements which pertain to the acquisition of ADP equipment and services. Such requirements remain subject to Federal audit and review.

(d) *APD content requirements*—(1) *Planning APD.* The State agency may request FFP for the costs of determining the need for and planning the acquisition of ADP equipment or services through the submission of the Planning APD. The State agency may request FFP for the costs of planning activities beginning with initial project inception through the performance of necessary systems and alternatives analyses, selection and design, including the completion of a general systems design. The Planning APD shall contain the following information:

(i) The State agency's description of the programmatic and organizational needs and/or problems to be addressed by the proposed ADP acquisition and the specific objectives to be accomplished under the Planning APD;

(ii) The State agency's commitment to complete the following, where appropriate, as part of project planning activities: a functional requirements specification document, feasibility study, alternatives analysis, cost-benefit analysis, and a general system design. If an existing ADP system is to be transferred, the State agency may plan to use the general system design of the transferred system.

(iii) The State agency's description of the organization, required State and contractual resources and availability of those resources, and the assignments of roles and responsibilities for project planning activities. The State agency shall include a description of resources to be procured and procurement methods;

(iv) The State agency's schedule of activities and deliverables during project planning, including a description and schedule of procurement activities to be undertaken in support of the planning project; and

(v) A proposed budget which shall identify costs for project planning activities by Federal fiscal year. The budget shall include an estimate of prospective cost distribution to participating Federal agencies and the method for cost allocation. The State agency shall also include an estimate of the total project costs, including both the cost of the planning project and the cost of any eventual ADP equipment and/or services acquisition, which will be used only for determining whether the threshold of §§ 277.18(c)(1) is met. An estimate of total project cost for an EBT system shall not be required to be incorporated into the Planning APD budget.

(2) *Implementation APD.* The State agency may request FFP to acquire ADP equipment and services through the submission of the Implementation APD. The State agency may request FFP for the necessary activities to develop, acquire, install and implement the proposed ADP system or acquisition. The Implementation APD shall contain the following information, where appropriate:

(i) The State agency shall complete and submit a functional requirements specification document;

(ii) The State agency shall submit a feasibility study and associated alternatives analyses, which include the transfer or modification of an existing system from a similar State or jurisdiction in the examination of alternatives. State agencies which reject the transfer or modification of an existing system must provide an analysis describing the barriers to system transfer as part of the feasibility study. The analysis of barriers to system transfer shall include a comparison of the costs of overcoming the problem in transferring an operational

system to the costs of developing a new system;

(iii) The State agency shall submit the new or transferred general systems design and shall also document the intended approaches, plans and techniques to develop or modify specific aspects of the proposed ADP system or acquisition including hardware, software, telecommunications, system testing, and data security;

(iv) The State agency shall describe the anticipated resource requirements for implementation of the ADP project, the resources planned to be available for the project, and plans for augmenting resources to meet resource requirements;

(v) The State agency shall indicate the principal events and schedule of activities, milestones, and deliverables during implementation of the project;

(vi) The State agency shall submit a proposed budget which identifies costs for intended project development and implementation activities by Federal fiscal year and shall include a consideration of all possible Implementation APD activity costs (e.g., system conversion, computer capacity planning, supplies, training, and miscellaneous ADP expenses). The budget shall contain an estimate of prospective cost distribution and methods for allocating costs to participating Federal agencies;

(vii) The State agency shall document the scope, methodology, evaluation criteria and results of cost-benefit analyses for evaluating the selected design and alternatives. The cost-benefit analysis shall include a statement indicating the period of time the State agency intends to use the proposed equipment or system; and

(viii) The State agency shall describe the security and interface requirements to be employed and the backup and contingency procedures available.

(3) *APD Budget*. The proposed budget for both the Planning APD and the Implementation APD shall include cost distribution plans containing the bases for proposed rates, both direct and indirect, for costs associated with system planning, development, acquisition or implementation, as appropriate. The budget proposals accompanying the Implementation APD shall also include proposed cost distribution plans and the bases of proposed rates for the operation of the ADP system. The budget activities shall be presented on a Federal fiscal year basis in a clear fashion to associate costs with each planned activity. The budgets must identify all development costs separately from any ongoing operational costs. Costs must be distinguished by developmental projects and developmental time periods. Actual costs claimed must be reconciliable to projected costs as proposed and approved by FNS in the APD.

(e) *APD Update*—(1) *General submission requirements*. The State agency shall submit an APD Update for FNS approval for all approved Planning and Implementation APD's when total acquisition costs exceed $5 million. The APD Update shall be submitted to the FNS Regional Office within 90 days after the annual anniversary date of the original APD approval, unless the submission date is specifically altered by FNS.

(2) *Content requirements*. The APD Update represents a self-certification by the State agency of project status in relation to the provisions of the approved Planning APD and Implementation APD. The Annually Updated APD shall include:

(i) Project activity status. (A) The status of all major tasks and milestones in the approved Planning APD, Implementation APD or previous APD Update's for the past year. The APD Update shall include all major tasks and milestones completed in the past year and degree of completion for unfinished tasks.

(B) The status of all project deliverables completed in the past year and degree of completion for unfinished products.

(C) Reports of past and/or anticipated problems or delays in meeting target dates in the approved Planning APD, Implementation APD or previous APD Update's for the remainder of the project. The Annually Updated APD shall include an explanation of the need to extend any major project target dates.

(ii) Project expenditures. (A) A detailed accounting for all expenditures for project development over the past year.

(B) An explanation of differences between projected expenses in the approved Planning or Implementation APD, or previous APD Update's, and actual expenditures for the past year. If changes in costs are reported, FNS may require the submission of a revised cost-benefit analysis as a condition for approval of the APD Update.

(C) Changes to the allocation basis in the approved APD's cost allocation methodology.

(iii) Changes to the approved APD.

(A) Revised language for all changes to the approved APD or previous APD Updates shall be submitted as part of the APD Update, unless submitted separately by the State agency as the changes occurred throughout the year.

(B) Changes in project management and/or contractor services.

(3) *Submission as needed.* In addition to the requirement for approval of an APD Update on an annual basis, as specified in paragraph (e)(1) of this section, the State agency may submit an APD Update on a more frequent or as needed basis, in order to obtain a commitment of FFP whenever significant project changes occur. Without such approval, the State agency is at risk for funding of project activities which are not in compliance with the terms and conditions of the approved APD and subsequently approved APD Updates, until such time as approval is specifically granted by FNS. At a minimum, the State agency should consider submission of an APD Update whenever any of the following changes occur or are anticipated:

(i) A significant increase ($1 million or more) in total project costs;

(ii) A significant schedule extension (60 days or more) for major milestones;

(iii) A significant change in procurement approach, and/or scope of procurement activities beyond that approved in the APD;

(iv) A change in system concept, or a change to the scope of the project; or

(v) A change to the approved cost allocation methodology.

(f) *Service agreements.* The State agency shall execute service agreements when data processing services are to be provided by a State central data processing facility or another State or local agency. Service agreements shall be kept on file by the State agency and be available for Federal review, and shall:

(1) Identify the ADP services that will be provided;

(2) Include, preferably as an amendable attachment, a schedule of charges for each identified ADP service, and a certification that these charges apply equally to all users;

(3) Include a description of the method(s) of accounting for the services rendered under the agreement and computing services charges;

(4) Include assurances that services provided will be timely and satisfactory;

(5) Include assurances that information in the computer system as well as access, use and disposal of ADP data will be safeguarded in accordance with provisions of § 272.1(c) and § 277.13;

(6) Require the provider to obtain prior approval pursuant to § 277.18(c)(1) from FNS for ADP equipment and ADP services that are acquired from commercial sources primarily to support the Food Stamp Program and requires the provider to comply with § 277.14 for procurements related to the service agreement. ADP equipment and services are considered to be primarily acquired to support the Food Stamp Program when the Program may reasonably be expected to either be billed for more than 50 percent of the total charges made to all users of the ADP equipment and services during the time period covered by the service agreement, or directly charged for the total cost of the purchase or lease of ADP equipment or services;

(7) Include the beginning and ending dates of the period of time covered by the service agreement; and

(8) Include a schedule of expected total charges to the Program for the period of the service agreement.

(g) *Conditions for receiving FFP.*—(1) A State agency may receive FFP at the 50 percent reimbursement rate for the costs of planning, design, development or installation of ADP and information retrieval systems if the proposed system will:

(i) Assist the State agency in meeting the requirements of the Food Stamp Act;

(ii) Meet the program standards specified in § 272.10(b)(1), (b)(2), and (b)(3) of

this chapter, except for the requirements in § 272.10(b)(2)(vi), (b)(2)(vii), and (b)(3)(ix) of this chapter to eventually transmit data directly to FCS;

(iii) Be likely to provide more efficient and effective administration of the program; and

(iv) Be compatible with such other systems utilized in the administration of State agency plans under the program of Temporary Assistance for Needy Families (TANF).

(2) State agencies seeking FFP for the planning, design, development or installation of automated data processing and information retrieval systems shall develop Statewide systems which are integrated with TANF. In cases where a State agency can demonstrate that a local, dedicated, or single function (issuance or certification only) system will provide for more efficient and effective administration of the program, FNS may grant an exception to the Statewide integrated requirement. These exceptions will be based on an assessment of the proposed system's ability to meet the State agency's need for automation. Systems funded as exceptions to this rule, however, should be capable to the extent necessary, of an automated data exchange with the State agency system used to administer TANF. In no circumstances will funding be available for systems which duplicate other State agency systems, whether presently operational or planned for future development.

(h) *Emergency acquisition requirements.* The State agency may request FFP for the costs of ADP equipment and services acquired to meet emergency situations which preclude the State agency from following the prior approval requirements of § 277.18(c). FNS may provide FFP in emergency situations if the following conditions are met:

(1) The State agency must submit a written request to FNS prior to the acquisition of any ADP equipment or services. The written request must be sent by registered mail and shall include:

(i) A brief description of the ADP equipment and/or services to be acquired and an estimate of their costs;

(ii) A brief description of the circumstances which result in the State agency's need to proceed with the acquisition prior to obtaining formal FNS approval; and

(iii) A description of the adverse impact which would result if the State agency does not immediately acquire the ADP equipment and/or services.

(2) Upon receipt of a written request for emergency acquisition FNS shall provide a written response to the State agency within 14 days. The FNS response shall:

(i) Inform the State agency that the request has been disapproved and the reason for disapproval; or,

(ii) Inform the State agency that FNS recognizes that an emergency situation exists and the State agency must submit a formal request for approval by FNS which includes the information specified at § 277.18(d)(2) within 90 days from the date of the State agency's initial written request.

(iii) If FNS approves the request submitted under paragraph (h)(1) of this section, FFP will be available from the date the State agency acquires the ADP equipment and services.

(i) *Cost determination and claiming costs*—(1) *Cost determination.* Actual costs must be determined in compliance with an FNS approved budget and appendix A to this part, and must be reconcilable with the FNS funding level. There shall be no payments pursuant to this section to the extent that a State agency is reimbursed for such costs pursuant to any other Federal program or uses ADP systems for purposes not connected with the Food Stamp Program. The State agency approved cost allocation plan must be amended to disclose the methods which will be used to identify and classify costs to be claimed. This methodology must be submitted to FNS as part of the request for FNS approval of funding as required in paragraph (d)(3) of this section. Any costs funded pursuant to these regulations shall be excluded in determining the State agency's administrative costs under any other section of this part.

(2) *Cost identification for purposes of FFP claims.* State agencies shall assign and claim the costs incurred under an approved APD in accordance with the following criteria:

(i) *Development costs.* Using its normal departmental accounting system, the State agency shall specifically identify what items of costs constitute development costs, assign these costs to specific project cost centers, and distribute these costs to funding sources based on the specific identification, assignment and distribution outlined in the approved APD. The methods for distributing costs set forth in the APD should provide for assigning identifiable costs, to the extent practicable, directly to program/functions. The State agency shall amend the cost allocation plan required by § 277.9 to include the approved APD methodology for the identification, assignment and distribution of the development costs.

(ii) *Operational costs.* Costs incurred for the operation of an ADP system shall be identified and assigned by the State agency to funding sources in accordance with the approved cost allocation plan required by § 277.9.

(iii) *Service agreement costs.* States that operate a central data processing facility shall use their approved central service cost allocation plan required by OMB Circular A–87 to identify and assign costs incurred under service agreements with the State agency. The State agency shall then distribute these costs to funding sources in accordance with paragraphs (i)(2)(i) and (i)(2)(ii) of this section.

(3) *Capital expenditures.* The State agency shall charge the costs of ADP equipment having unit acquisition costs or total aggregate costs, at the time of acquisition, of more than $25,000 by means of depreciation or use allowance, unless a waiver is specifically granted by FNS. If the equipment acquisition is part of an APD that is subject to the prior approval requirements of paragraph (c)(2) of this section, the State agency may submit the waiver request as part of the APD.

(4) *Claiming costs.* Prior to claiming funding under this section the State agency shall have complied with the requirements for obtaining approval and prior approval of § 277.18(c).

(5) *Budget authority.* FNS approval of requests for funding shall provide notification to the State agency of the budget authority and dollar limitations under which such funding may be claimed. FNS shall provide this amount as a total authorization for such funding which may not be exceeded unless amended by FNS. FNS's determination of the amount of this authorization shall be based on the budget submitted by the State agency. Activities not included in the approved budget, as well as continuation of approved activities beyond scheduled deadlines in the approved plan, shall require FNS approval of an amended State budget for payment. Requests to amend the budget authorization approved by FNS shall be submitted to FNS prior to claiming such expenses.

(j) *Procurement requirements.* (1) Procurements of ADP equipment and services are subject to the procurement standards prescribed by § 277.14 regardless of any conditions for prior approval, except the requirements of § 277.14(b)(1) and (2) regarding review of proposed contracts. Those standards include a requirement for maximum practical open and free competition regardless of whether the procurement is formally advertised or negotiated.

(2) The standards prescribed by § 277.14, as well as the requirement for prior approval, apply to ADP services and equipment acquired by a State or local agency, and the ADP services and equipment acquired by a State or local central data processing facility primarily to support the Food Stamp Program.

(3) The competitive procurement policy prescribed by § 277.14 shall be applicable except for ADP services provided by the agency itself, or by other State or local agencies.

(k) *Access to the system and records.* Access to the system in all aspects, including but not limited to design, development, and operation, including work performed by any source, and including cost records of contractors and subcontractors, shall be made available by the State agency to FNS or its authorized representatives at intervals as are deemed necessary by FNS, in order to determine whether the conditions for approval are being met and to determine the efficiency, economy and effectiveness of the system. Failure to provide full access by appropriate State and Federal representatives to all parts of the system shall result in

suspension and/or termination of Food Stamp Program funds for the costs of the system and its operation.

(l) *Ownership rights*—(1) *Software*(i) The State or local government shall include a clause in all procurement instruments which provides that the State or local government shall have all ownership rights in any software or modifications thereof and associated documentation designed, developed or installed with FFP under this section.

(ii) FNS reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish, or otherwise use and to authorize others to use for Federal Government purposes, such software, modifications, and documentation.

(iii) Proprietary operating/vendor software packages (e.g., ADABAS or TOTAL) which are provided at established catalog or market prices and sold or leased to the general public shall not be subject to the ownership provisions in paragraphs (l)(1)(i) and (l)(1)(ii) of this section. FFP is not available for proprietary applications software developed specifically for the Food Stamp Program.

(2) *Automated data processing equipment*. The policies and procedures governing title, use and disposition of property purchased with Food Stamp Program funds, which appear at 7 CFR 277.13 are applicable to automated data processing equipment.

(m) *Use of ADP systems*. ADP systems designed, developed or installed with FFP shall be used for the period of time specified in the APD, unless FNS determines that a shorter period is justified.

(n) *Basis for continued Federal financial participation*. FNS will continue FFP at the levels approved in the Planning APD and the Implementation APD provided that project development proceeds in accordance with the conditions and terms of the approved APD and that ADP resources are used for the purposes authorized. FNS will use the APD Update to monitor ADP project development. The submission of the report prescribed in § 277.18(e) for the duration of project development is a condition for continued FFP. In addition, periodic onsite reviews of ADP project development and State and local agency ADP operations may be conducted by or for FNS to assure compliance with approved APD's, proper use of ADP resources, and the adequacy of State or local agency ADP operations.

(o) *Disallowance of Federal financial participation*. If FNS finds that any ADP acquisition approved under the provisions of § 277.18(c) fails to comply with the criteria, requirements, and other undertakings described in the approved or modified APD, payment of FFP may be disallowed.

(p) *ADP system security requirements and review process*—(1) *ADP system security requirements*. State and local agencies are responsible for the security of all ADP projects under development, and operational systems involved in the administration of the Food Stamp Program. State and local agencies shall determine appropriate ADP security requirements based on recognized industry standards or standards governing security of Federal ADP systems and information processing.

(2) *ADP security program*. State agencies shall implement and maintain a comprehensive ADP Security Program for ADP systems and installations involved in the administration of the Food Stamp Program. ADP Security Programs shall include the following components.

(i) Determination and implementation of appropriate security requirements as prescribed in paragraph (p)(1) of this section.

(ii) Establishment of a security plan and, as appropriate, policies and procedures to address the following areas of ADP security:

(A) Physical security of ADP resources;

(B) Equipment security to protect equipment from theft and unauthorized use;

(C) Software and data security;

(D) Telecommunications security;

(E) Personnel security;

(F) Contingency plans to meet critical processing needs in the event of short- or long-term interruption of service;

(G) Emergency preparedness; and

(H) Designation of an Agency ADP Security Manager.

(iii) Periodic risk analyses. State agencies shall establish and maintain a

program for conducting periodic risk analyses to ensure that appropriate, cost-effective safeguards are incorporated into new and existing systems. In addition, risk analyses shall be performed whenever significant system changes occur.

(3) *ADP system security reviews.* State agencies shall review the ADP system security of installations involved in the administration of the Food Stamp Program on a biennial basis. At a minimum, the reviews shall include an evaluation of physical and data security, operating procedures, and personnel practices. State agencies shall maintain reports of their biennial ADP system security reviews, together with pertinent supporting documentation, for Federal on-site review.

(4) *Applicability.* The security requirements of this section apply to all ADP systems used by State and local governments to administer the Food Stamp Program.

(5) *Costs.* Costs incurred for complying with the provisions of paragraphs (p)(1) through (p)(3) of this section are considered regular administrative costs which are funded at the regular FFP level.

[Amdt. 319, 55 FR 4355, Feb. 7, 1990, as amended by Amdt. 345, 57 FR 11259, Apr. 1, 1992; Amdt. 342, 59 FR 2733, Jan. 19, 1994; Amdt. 368, 61 FR 33643, June 28, 1996; Amdt. 385, 65 FR 33440, May 24, 2000]

APPENDIX A TO PART 277—PRINCIPLES FOR DETERMINING COSTS APPLICABLE TO ADMINISTRATION OF THE FOOD STAMP PROGRAM BY STATE AGENCIES

This appendix sets forth the procedures implementing uniform requirements for the negotiations and approval of cost allocation plans with State agencies, in accordance with the provisions of Federal Management Circular (FMC) 74–4 and OASC–10, ''Cost Principles and Procedures for Establishing Cost Allocation Plans and Indirect Cost Rates for Grants and Contracts with the Federal Government,'' U.S. Department of Health, Education, and Welfare. This material is adapted substantially from the circular; changes have been made only when necessary in order to conform with legislative constraints.

(A) Purpose and scope.

(1) *Objectives.* This appendix sets forth principles for determining the allowable costs of administering the Food Stamp Program by State agency under FNS-approved State Plans of Operation. The principles are for the purpose of cost determination and are not intended to identify the circumstances or dictate the extent of Federal and State or local participation in the financing of the Program. They are designed to provide that all federally assisted programs bear their fair share of costs recognized under these principles, except where restricted or prohibited by law. No provision for profit or other increment above cost is intended.

(2) *Policy guides.* The application of these principles is based on the fundamental premises that:

(a) State agencies are responsible for the efficient and effective administration of the Food Stamp Program through the application of sound management practice.

(b) The State agency assumes the responsibility for seeing that Food Stamp Program funds have been expended and accounted for consistent with underlying agreements and program objectives.

(c) Each State agency, in recognition of its own unique combination of staff facilities and experience, will have the primary responsibility for employing whatever form of organization and management techniques as may be necessary to assure proper and efficient administration.

(3) *Application.* These principles will be applied by FNS in determining costs incurred by State agencies receiving FNS payments for administering the Food Stamp Program.

(B) Definitions.

Approval or authorization by FNS means documentation evidencing consent prior to incurring specific costs.

Cognizant Federal Agency means the Federal agency recognized by OMB as having the predominate interest in terms of program dollars.

Cost allocation plan means the documentation identifying, accumulating, and distributing allowable costs of program administration together with the allocation methods used.

Cost, as used herein, means cost as determined on a cash, accrual, or other basis acceptable to FNS as a discharge of the State agency's accountability for FNS funds.

Cost center means a pool, summary account, objective or area established for the accumulation of costs. Such areas include objective organizational units, functions, objects or items of expense, as well as ultimate cost objective(s) including specific costs, products, projects, contracts, programs and other operations.

Federal agency means FNS and also any department, agency, commission, or instrumentality in the executive branch of the Federal Government which makes grants to or contracts with State or local governments.

Payments for administrative costs means reimbursement or advances for costs to State agencies pursuant to any agreement whereby FNS provides funds to carry out programs, services, or activities in connection with administration of the Food Stamp Program. The principles and policies stated in this appendix as applicable to program payments in general also apply to any State agency obligations under a cost reimbursement type of agreement performed by a subagency, including contracts and subcontracts.

Food Stamp Program administration means those activities and operations of the State agency which are necessary to carry out the purposes of the Food Stamp Act, including any portion of the Program financed by the State agency.

Local unit means any political subdivision of government below the State level.

Other agencies of the State means departments or agencies of the State or local unit which provide goods, facilities, and services to a State agency.

Subagencies means the organization or person to which a State agency makes any payment for acquisition of goods, materials or services for use in administering the Food Stamp Program and which is accountable to the State agency for the use of the funds provided.

Service, as used herein, means goods and facilities, as well as services.

Supporting services means auxiliary functions necessary to sustain the direct effort of administering the Program. These services may be centralized in the State agency or in some other agency, and include procurement, payroll, personnel functions, maintenance and operation of space, data processing, accounting, budgeting, auditing, mail and messenger service, and the like.

(C) Basic guidelines.

(1) Factors affecting allowability of costs. To be allowable under the Program, costs must meet the following general criteria:

(a) Be necessary and reasonable for proper and efficient administration of the Program, be allocable thereto under these principles, and, except as specifically provided herein, not be a general expense required to carry out the overall responsibilities of State or local governments.

(b) Be authorized or not prohibited under State or local laws or regulations.

(c) Conform to any limitations or exclusions set forth in these principles, Federal Laws, or other governing limitations as to types or amounts of cost items.

(d) Be consistent with policies, regulations, and procedures that apply uniformly to both federally assisted and other activities of the unit of government of which the State agency is a part.

(e) Be accorded consistent treatment through application of generally accepted accounting principles appropriate to the circumstances.

(f) Not be allocable to or included as a cost to any other federally financed program in either the current or a prior period.

(g) Be the net of all applicable credits.

(2) Allocable costs.

(a) A cost allocable to a particular cost objective to the extent of benefits received by such objective.

(b) Any cost allocable to a particular program or cost objective under these principles may not be shifted to other Federal programs to overcome fund deficiencies, avoid restrictions imposed by law or grant agreement, or for other reasons.

(c) Where an allocation of joint cost will ultimately result in charges to the Program, an allocation plan will be required as prescribed in section I of these principles.

(3) Applicable credits.

(a) Applicable credits refer to those receipts or reduction of expenditure-type transactions which offset or reduce expense items allocable to programs as direct or indirect costs. Examples of such transactions are: Purchase discounts; rebates or allowances; recoveries or indemnities on losses; sale of publications, equipment, and scrap; income from personal or incidental services; and adjustments of overpayments or erroneous charges.

(b) Applicable credits may also arise when Federal funds are received or are available from sources other than FNS to finance operations or capital items donated or financed by the Federal Government to fulfill matching requirements under another program. These types of credits should likewise be used to reduce related expenditures in determining the rates or amounts applicable to a given program.

(D) Composition of cost.

(1) *Total cost.* The total cost of a program is comprised of the allowable direct cost incident to its performance, plus its allocable portion of allowable indirect costs, less applicable credit.

(2) *Classification costs.* There is no universal rule for classifying certain costs as either direct or indirect under every accounting system. A cost may be direct with respect to some specific service or function, but indirect with respect to a program or other ultimate cost objective. However, it is essential that each item of cost be treated consistently either as a direct or an indirect cost. Specific guides for determining direct and indirect costs allocable under the Program are provided in the section which follows.

(E) Direct costs.

(1) *General.* Direct costs are those that can be identified specifically with a particular cost objective. These costs may be charged directly to the Program, contracts, or to other programs against which costs are finally lodged. Direct costs may also be

charged to cost objectives used for the accumulation of costs pending distribution in the course to programs and other ultimate costs objectives.

(2) *Application*. Typical direct costs chargeable to the Program are:

(a) Compensation of employees for the time and effort devoted specifically to the administration of the Program.

(b) Cost of materials acquired, consumed, or expended specifically for the purpose of the Program.

(c) Equipment and other approved capital expenditures.

(d) Other items of expense incurred specifically for efficiently and effectively administering the Program.

(e) Service furnished specifically for the Program by other agencies, provided such charges are consistent with criteria outlined in section G of these principles.

(F) Indirect costs.

(1) *General*. Indirect costs are those (a) incurred for a common or joint purpose benefiting more than one cost objective, and (b) not readily assignable to the cost objectives specifically benefited, without effort disproportionate to the result achieved. The term indirect cost as used herein applies to costs of this type originating in the State agency, as well as those incurred by other departments in supplying goods, services, and facilities, to the State agency. To facilitate equitable distribution of indirect expenses to the cost objectives served, it may be necessary to establish a number of pools of indirect costs within a State agency or in other agencies providing services to a State agency. Indirect cost pools should be distributed to benefiting cost objectives on bases which will produce an equitable result in consideration of relative benefits derived.

(2) *State agency indirect costs*. All State agency indirect costs, including the various levels of supervision, are eligible for allocation to the program provided they meet the conditions set forth in their principles. In lieu of determining the actual amount of State agency indirect cost allocable to the program the following methods may be used:

(a) *Predetermined fixed rates for indirect costs*. A predetermined fixed rate for computing indirect costs applicable to program administration may be negotiated annually in situations where the cost experience and other pertinent facts available are deemed sufficient to enable the parties to reach an informed judgment (1) as to the probable level of indirect costs in the State agency during the period to be covered by the negotiated rate, and (2) that the amount allowable under the predetermined rate would not exceed actual indirect costs.

(b) *Negotiated lump sum for overhead*. A negotiated fixed amount in lieu of indirect costs may be appropriate under circumstances where the benefits derived from a State agency's indirect services cannot be readily determined as in the case of a small self-contained or isolated activity. When this method is used, a determination should be made that the amount negotiated will be approximately the same as the actual indirect cost that may be incurred. Such amounts negotiated in lieu of indirect costs will be treated as an offset to total indirect expenses of the State agency before allocation to remaining activities. The base on which such remaining expenses are allocated should be appropriately adjusted.

(3) *Limitation on indirect costs*.

(a) Some Federal programs may be subject to laws that limit the amount of indirect cost that may be allowed. Agencies that sponsor programs of this type will establish procedures which will assure that the amount actually allowed for indirect costs under each such program does not exceed the maximum allowable under the statutory limitation or the amount otherwise allowable under these principles, whichever is the smaller.

(b) When the amount allowable under a statutory limitation is less than the amount otherwise allocable as indirect costs under these principles, the amount not recoverable as indirect costs under a program may not be shifted to another federally sponsored program or contract.

(G) Cost incurred by other agencies of the State.

(1) *General*. The cost of service provided by other agencies may only include allowable direct costs of the service plus a pro rata share of allowable supporting costs and supervision directly required in performing the service, but not supervision of a general nature such as that provided by the head of a department and his staff assistants not directly involved in operations. However, supervision by the head of a department or agency whose sole function is providing the service furnished would be an eligible cost. Supporting costs include those furnished by other units of the supplying department or by other agencies.

(2) *Alternative methods of determining indirect cost*. In lieu of determining actual indirect cost related to a particular service furnished by other agencies of the State, either of the following alternative methods may be used provided only one method is used for a specific service during the fiscal year involved.

(a) *Standard indirect rate*. An amount equal to ten percent of direct labor cost in providing the service performed by other agencies of the State (excluding overtime, shift, or holiday premiums, and fringe benefits) may be allowed in lieu of actual allowable indirect cost for that service.

(b) *Predetermined fixed rate*. A predetermined fixed rate for indirect cost of the unit

or activity providing service may be negotiated as set forth in section F(2)(a) of these principles.

(H) Cost incurred by State agency for others. The principles provided in section G will also be used in determining the cost of services provided by the State agency to another agency.

(I) Cost allocation plan.

(1) A cost allocation will be required to support the distribution of any indirect costs. All costs allocable to the Food Stamp Program under cost allocation plans will be supported by formal accounting records which will substantiate the propriety of eventual charges.

(2) There are two types of cost allocation plans:

(a) Statewide or central service cost allocation plan identifies and distributes the cost of services provided by support organizations to those departments or units participating in Federal programs.

(b) Indirect cost proposals distribute the administrative or joint costs incurred by the State agency and the cost of service allocable to it under the Statewide or central service cost allocation plan in a ratio to all work performed by the State agency. The process involves applying a percentage relationship of indirect cost to direct cost.

(3) *Requirements.* The cost allocation plan of the State agency shall cover all allocated costs of the department as well as costs to be allocated under plans of other agencies or organizational units which are to be included in the costs of federally sponsored programs. The cost allocation plans of all the agencies rendering services to the State agency, to the extent feasible, should be presented in a single document.

(4) *Instructions for preparation of cost allocation plans.* The Department of Health and Human Services, in consultation with the other Federal agencies concerned, will be responsible for developing and issuing the instructions for use by State agencies in preparation of cost allocation plans. This responsibility applies to both central support services at the State and local government level and indirect cost proposals of individual State agencies.

(5) *Submitting plans for approval.*

(a) Responsibility for approving cost allocation plans for individual State agencies has been assigned by the Office of Management and Budget to the cognizant Federal agency.

(b) State cost allocation plans must be submitted to the cognizant Federal agency within six months after the last day of the State's fiscal year. Upon request by the State agency, an extension of time for submittal of the cost allocation plan may be granted by the cognizant Federal agency. It is essential that cost allocation plans be submitted in a timely manner. Failure to submit the plans when required will cause the State agency to become delinquent. In the event a State becomes delinquent, FNS will not provide for the recovery of central service and indirect costs, and such costs already made and claimed against Food Stamp Program funds will be subject to disallowance.

(6) *Negotiation and approval of cost allocation plans for States.* The cognizant Federal agency, in collaboration with Federal agencies concerned, will be responsible for negotiation, approval, and audit of cost allocation plans.

(7) *Negotiation and approval of cost allocation plans for local governments.* Cost allocation plans will be retained at the local government level for audit by the cognizant Federal agency except in those cases where that agency requests that cost allocation plans be submitted to it for negotiation and approval.

(8) A current list of cognizant Federal agencies is maintained by the Office of Management and Budget.

(9) *Resolution of problems.* The Office of Management and Budget will lend assistance in resolving problems encountered by Federal agencies on cost allocation plans.

(10) Approval by FNS. FNS reserves the right to disapprove costs not meeting the general criteria outlined in section C of these principles. FNS shall promptly notify the State agency in writing of the disapproval, the reason for the disapproval and the effective date. Costs incurred by State agencies after disapproval may not be charged to FNS unless if FNS subsequently approves the cost.

Standards for Selected Items of Cost

A. *Allowable cost.* Standards for allowability of costs are established by Federal Management Circular 74–4. These standards will apply regardless of whether a particular item of cost is treated as direct or indirect. Failure to mention a particular item of cost in these standards is not intended to imply that it is either allowable or unallowable. Rather, determination of allowability in each case should be based on the treatment of standards provided for similar or related items of cost. The allowability of the selected items of cost is subject to the general policies and principles as stated in Attachment A to Federal Management Circular 74–4.

(1) *Accounting.* The cost of establishing and maintaining accounting and other information systems required for the management of the Food Stamp Program is allowable. This includes costs incurred by central service agencies of the State government for these purposes. The cost of maintaining central accounting records required for overall State or local government purposes, such as appropriation and fund accounts by the Treasurer,

Comptroller, or similar officials, is considered to be a general expense of government and is not allowable.

(2) *Advertising*. Advertising media includes newspapers, magazines, radio and television programs, direct mail, trade papers, and the like. The advertising costs allowable are those which are solely for:

(a) Recruitment of personnel required for the Program;

(b) Solicitation of bids for the procurement of goods and services required;

(c) Disposal of scrap or surplus materials acquired in the performance of the agreement; and

(d) Other purposes specifically provided for by FNS regulations or approved by FNS in the administration of the Food Stamp Program.

(3) *Advisory councils*. Costs incurred by State advisory councils or committees established to carry out Food Stamp Program goals are allowable. The cost of like organizations is allowable when used to improve the efficiency and effectiveness of the Program.

(4) *Audit service*. The cost of audits necessary for the administration and management of functions related to the Program is allowable.

(5) *Bonding*. Costs of premiums on bonds covering employees who handle Food Stamp Program funds or food coupons are allowable. The amount of allowable coverage shall be limited to the anticipated maximum amount of food stamp funds or food coupons handled at one time by that employee.

(6) *Budgeting*. Costs incurred for the development, preparation, and execution of budgets are allowable. Costs for services of a central budget office are generally not allowable since these are costs of general government. However, where employees of the central budget office actively participate in the State agency's budget process, the cost of services identifiable to the Food Stamp Program are allowable.

(7) *Building lease management*. The administrative cost for lease management which includes review of lease proposals, maintenance of a list of available property for lease, and related activities is allowable.

(8) *Central stores*. The cost of maintaining and operating a central stores organization for supplies, equipment, and materials used either directly or indirectly for the Food Stamp Program is allowable.

(9) *Communications*. Communication costs incurred for telephone calls or service, telegraph, teletype service, wide area telephone service (WATS), centrex, telpak (tie lines), postage, messenger service and similar expenses are allowable.

(10) *Compensation for personal services*.

(a) *General*. Compensation for personal services includes all remuneration, paid currently or accrued, for services rendered during the period of performance in the administration of the program including but not necessarily limited to wages, salaries, and supplementary compensation and benefits as defined in section A.(13) of these principles. The costs of such compensation are allowable to the extent that total compensation for individual employees: is reasonable for the services rendered; follows an appointment made in accordance with State or local government laws and rules and which meets Federal Merit System or other requirements, where applicable; and is determined and supported as provided in section A of these principles. Compensation for employees engaged in federally assisted activities will be considered reasonable to the extent that it is consistent with that paid for similar work in other activities of the State or local government. In cases where the kinds of employees required for the Food Stamp Program activities are not found in the other activities of the State or local government, compensation will be considered reasonable to the extent that it is comparable to that paid for similar work in the labor market in which the employing government competes for the kind of employees involved. Compensation surveys providing data representative of the labor market involved will be an acceptable basis for evaluating reasonableness.

(b) *Payroll and distribution of time*. Amounts charged to the program for personal services, regardless of whether treated as direct or indirect costs, will be based on payrolls documented and approved in accordance with the generally accepted practice of the State or local agency. Payrolls must be supported by time and attendence or equivalent records for individual employees. Distribution of salaries and wages of employees chargeable to more than one program or other cost objective will be supported by appropriate time reports or approved time study methodologies. The method used should be included in the cost allocation plan and should be approved by FNS.

(11) *Depreciation and use allowance*.

(a) State agencies may be compensated for the use of buildings, capital improvements, and equipment through use allowances or depreciation. Use allowances are the means of providing compensation in lieu of depreciation or other equivalent costs. However, a combination of the two methods may not be used in connection with a single class of fixed assets.

(b) The computation of depreciation or use allowances will be based on acquisition cost. Where actual cost records have not been maintained, a reasonable estimate of the original acquisition cost may be used in the computation. The computation will exclude the cost of any portion of the cost of buildings and equipment donated or borne directly or indirectly by the Federal Government through charges to Federal programs

or otherwise, irrespective of where title was originally vested or where it presently resides. In addition, the computation will also exclude the cost of acquisition of land. Depreciation or a use allowance on idle or excess facilities is not allowable, except when specifically authorized by FNS.

(c) Where the depreciation method is followed, adequate property records must be maintained, and any generally accepted method of computing depreciation may be used. However, the method of computing depreciation must be consistently applied for any specific asset or class of assets for all affected federally sponsored programs and must result in equitable charges considering the extent of the use of the assets for the benefit of such programs.

(d) In lieu of depreciation, a use allowance for buildings and improvements may be computed at an annual rate not exceeding two percent of acquisition cost. The use allowance for equipment (excluding items properly capitalized as building cost) will be computed at an annual rate not exceeding six and two-thirds percent of acquisition cost of usable equipment.

(e) No depreciation or use charge may be allowed on any assets that would be considered as fully depreciated, provided, however, that reasonable use charges may be negotiated for any such assets if warranted after taking into consideration the cost of the facility or item involved, the estimated useful life remaining at time of negotiation, the effect of any increased maintenance charges or decreased efficiency due to age, and any other factors pertinent to the utilization of the facility or item for the purpose contemplated.

(12) *Disbursing service*. The cost of disbursing program funds by the State Treasurer or other designated officer is allowable. Disbursing services cover the processing of checks or warrants, from preparation to redemption, including the necessary records of accountability and reconciliation of such records with related cash accounts.

(13) *Employee fringe benefits*. Costs identified are allowable to the extent that total compensation for employees is reasonable as defined in paragraph (10)(a) of these principles.

(a) Employee benefits in the form of regular compensation paid to employees during periods of authorized absences from the job, such as for annual leave, sick leave, court leave, military leave, and the like, if they are provided pursuant to an approved leave system, and the cost thereof is equitably allocated to all related activities, including federally assisted programs.

(b) Employee benefits in the form of employers' contributions or expense for social security, employees' life and health insurance plans, unemployment insurance coverage, workers' compensation insurance, pension plans, severance pay, and the like, provided such benefits are granted under approved plans and are distributed equitably to programs and to other activities.

(14) *Employee morale, health And welfare costs*. The costs of health or first-aid clinics and/or infirmaries, recreational facilities, employees' counseling services, employee information publications, and any related expenses incurred in accordance with general State or local policy, are allowable. Income generated from any of these activities will be offset against expenses.

(15) *Exhibits*. Costs of exhibits relating specifically to the Food Stamp Program are allowable.

(16) *Legal expenses*. The cost of legal expenses required in the administration of the program is allowable. Legal services furnished by the chief legal officer of a State or local government or his staff solely for the purpose of discharging his general responsibilities as legal officer are unallowable. Legal expenses for the prosecution of claims against the Federal Government is unallowable.

(17) *Maintenance and repair*. Costs incurred for necessary maintenance, repair, or upkeep of property which neither add to the permanent value of the property nor appreciably prolong its intended life, but keep it in an efficient operating condition, are allowable.

(18) *Materials and supplies*. The cost of materials and supplies necessary to carry out the program is allowable. Purchases made specifically for the program should be charged thereto at their actual prices after deducting all cash discounts, trade discounts, rebates, and allowances received by the State agency. Withdrawals from general stores or stockrooms should be charged at cost under any recognized method of pricing consistently applied. Incoming transportation charges are a proper part of material cost.

(19) *Memberships, subscriptions and professional activities*.

(a) The *cost of membership* in civic, business, technical, and professional organizations is allowable, provided:

(i) The benefit from the membership is related to the program,

(ii) The expenditure is for agency membership,

(iii) The cost of the membership is reasonably related to the value of the services or benefits received, and

(iv) The expenditure is not for membership in an organization which devotes a substantial part of its activities to influencing legislation.

(b) *Reference material*. The cost of books, and subscriptions to civic, business, professional, and technical periodicals is allowable when related to the program.

(c) *Meetings and conferences*. Costs are allowable when the primary purpose of the

meeting is the dissemination of technical information relating to the program and they are consistent with regular practices followed for other activities of the State agency.

(20) *Motor pools.* The costs of a service organization which provides automobiles to user State agencies at a mileage or fixed rate and/or provides vehicle maintenance, inspection and repair services are allowable.

(21) *Payroll preparation.* The cost of preparing payrolls and maintaining necessary wage records is allowable.

(22) *Personnel administration.* Costs for the recruitment, examination, certification, classification, training, establishment of pay standards, and related activities for the program are allowable.

(23) *Printing and reproduction.* Cost for printing and reproduction services necessary for program administration including but not limited to forms, reports, manuals, and information literature, is allowable. Publication costs of reports or other media relating to program accomplishments or results are allowable.

(24) *Procurement service.* The cost of procurement service, including solicitation of bids, preparation and award of contracts, and all phases of contract administration in providing goods, facilities and services for the program is allowable.

(25) *Prosecution activities.* The costs of investigations and prosecutions of intentional Food Stamp Program violations are allowable. Costs of investigation, prosecution, or claims collection which are performed by agencies other than the State agency shall be based on a formal agreement between the State or local agency and provider agency. These interagency agreements shall meet the requirements of this part in regard to allowable charges. Funding under these interagency agreements shall be provided by the State agency from their funds and funds made available by FNS.

(26) *Taxes.* In general, taxes or payments in lieu of taxes which the State agency is legally required to pay are allowable.

(27) *Training and education.* The cost of in-service training, customarily provided for employee development which directly or indirectly benefits the program is allowable. Out-of-service training involving extended periods of time is allowable only when specifically authorized by FNS.

(28) *Transportation.* Costs incurred for freight, cartage, express, postage, and other transportation costs relating either to goods purchased, delivered, or moved from one location to another are allowable.

(29) *Travel.* Travel costs are allowable for expenses for transportation, lodging, subsistence, and related items incurred by employees who are in travel status on official business incident to the program. Such costs may be charged on an actual basis, on a per diem or mileage basis in lieu of actual costs incurred, or on a combination of the two. The charges must be consistent with those normally allowed in like circumstances in nonfederally sponsored activities. The difference in cost between first-class air accommodations and less-than-first-class air accommodations is unallowable except when less-than-first-class air accommodations are not reasonably available. Notwithstanding the provisions of paragraphs C (7) and (10), travel costs of officials covered by those paragraphs, when specifically related to grant programs, are allowable with the prior approval of a grantor agency.

B. *Costs allowable with approval of FNS.*

(1) *Automated Data Processing.* The costs of acquiring data processing equipment and services used in the administration of the Food Stamp Program are allowable. The costs of ADP equipment and services acquisitions which exceed the prior approval cost thresholds specified in §277.18(c) are allowable upon the prior written approval of FNS. Requests for prior approval of such costs shall be in accordance with the provisions of §277.18.

(2) *Building space and related facilities.* The cost of space in privately or publicly owned buildings used for the benefit of the Program is allowable subject to the following conditions.

(a) The total cost of space, whether in a privately or publicly owned building, may not exceed the rental cost of comparable space and facilities in a privately owned building in the same locality.

(b) The cost of space may not be charged to FNS for periods of nonoccupancy, without authorization of FNS.

(i) *Rental cost.* The rental cost of space in a privately-owned building is allowable.

(ii) *Maintenance and operation.* The cost of utilities, insurance, security, janitorial services, elevator service, upkeep of grounds, normal repairs and alterations and the like, are allowable to the extent they are not otherwise included in rental or other charges for space.

(iii) *Rearrangements and alterations.* Costs incurred for rearrangement and alteration of facilities required specifically for the program or those that materially increase the value or useful life of the facilities (section B(3) of these principles) are allowable when specifically approved by FNS.

(iv) *Depreciation and use allowances on publicly owned buildings.* These costs are allowable as provided in paragraph A(11) of these principles.

(v) *Occupancy of space under rental-purchase or a lease with option-to-purchase agreement.* The cost of space procured under such arrangements is allowable when specifically approved by FNS.

(3) *Capital expenditures.* The cost, net of any credits, of facilities, equipment, other

capital assets, and repairs which materially increase the value or useful life of capital assets, and/or of nonexpendable personal property, having a useful life of more than one year and a net acquisition cost of more than $5,000 per unit after allocation to FNS as projected for one year after purchase, is allowable when such procurement is specifically approved by FNS. No such approval shall be granted unless the State agency shall demonstrate to FNS that such a cost is:

(a) Necessary and reasonable for proper and efficient administration of the program, and allocable thereto under the principles provided herein; and

(b) That procurement of such item or items has been or will be made in accordance with the standards set out in §277.14. In no case shall such a cost become a program charge against FNS prior to approval in writing by FNS of the procurement and the cost. When assets acquired with Food Stamp funds are (i) sold, (ii) no longer available for use in a federally sponsored program, or (iii) used for purposes not authorized by FNS, FNS's equity in the asset will be refunded in the same proportion as Federal participation in its cost. In case any assets are traded on new items, only the net cost of the newly acquired assets is allowable.

(4) *Insurance.*

(a) Cost of insurance to secure the State agency against financial losses involved in the acceptance, storage, and issuance of food coupons and ATP cards is allowable with FNS approval.

(b) Costs of other insurance in connection with the general conduct of activities are allowable subject to the following limitations:

(i) Types and extent and cost of coverage will be in accordance with general State or local government policy and sound business practice.

(ii) Costs of insurance or contributions to any reserve covering the risk of loss of, or damage to, Federal Government property are unallowable except to the extent that FNS approves such cost.

(5) *Management studies.* The cost of management studies to improve the effectiveness and efficiency of program management for the Food Stamp Program is allowable. However, FNS must approve cost in excess of $2,500 for studies performed by outside consultants or agencies other than the State agency.

(6) *Preagreement costs.* Costs incurred prior to the effective date of approval of the amended indirect cost proposal or the revised Statewide cost allocation plan, whether or not they would have been allowable thereunder if incurred after such date, are allowable only when subsequently provided for in the plan or approved indirect cost proposal.

(7) *Professional services.* Cost of professional services rendered by individuals or organizations not a part of the State agency is allowable. Prior authorization must be obtained from FNS for cost exceeding a total of $2,500.

(8) *Proposal costs.* Costs of preparing indirect cost proposals or amendments for allocating, distributing, and implementing provisions for payment of portions of the costs of administering the Food Stamp Program by the State agency are allowable.

(9) *Cost incurred by agencies other than the State.* The cost of services provided by other agencies (including municipal governments) may only include allowable direct costs plus a pro rata share of allowable supporting costs and supervision directly required in performing the service. Allowable supporting costs are those services which may be centralized and includes such functions as procurement, payroll, personnel services, maintenance and operation of space, data processing, accounting, budgeting, auditing, mail and messenger service and the like. Supervision costs will not include supervision of a general nature such as that provided by the head of a department and his staff assistants not directly involved in the operation of the program. In lieu of determining actual indirect cost related to a particular service performed by another agency, either of the following alternative methods may be used during the fiscal year involved and is specifically provided for in the indirect cost proposal:

(a) Standard indirect rate equal to ten percent of direct labor cost in providing the service (excluding overtime, shift or holiday premiums, and fringe benefits) may be allowed in lieu of actual allowable cost.

(b) A predetermined fixed rate for indirect cost of the unit or activity providing service may be negotiated.

C. *Unallowable costs.* The following costs shall not be allowable:

(1) *Costs of determining food stamp eligibility incidental to the determination of TANF eligibility are not chargeable to FNS.*

(2) *Bad debts.* Any losses arising from uncollectable accounts or other claims, and related costs, are unallowable.

(3) *Contingencies.* Contributions to a contingency reserve or any similar provision for unforeseen events are unallowable.

(4) *Contributions and donations.* Unallowable.

(5) *Entertainment.* Costs whose purpose is for amusement, social activities, and incidental costs relating thereto, such as meals, beverages, lodgings, rentals, transportation, and gratuities are unallowable.

(6) *Fines and penalties.* Costs resulting from violations of or failure to comply with Federal, State and local laws and regulations are unallowable.

(7) *Governor's expenses.* The salaries and expenses of the Office of the Governor of a State or the chief executive of a political subdivision are considered a cost of general

State or local government and are unallowable. However, for a federally-recognized Indian tribal government, only that portion of the salaries and expenses of the office of the chief executive that is a cost of general government is unallowable. The portion of salaries and expenses directly attributable to managing and operating programs is allowable.

(8) *Indemnification*. The cost of indemnifying the State against liabilities to third parties and other losses not compensated by insurance is unallowable.

(9) *Interest and other financial costs*. Interest on borrowings, bond discounts, cost of financing and refinancing operations, and legal and professional fees paid in connection therewith, are unallowable.

(10) *Legislative expenses*. Salaries and other expenses of the State legislature or similar local governmental bodies are unallowable.

(11) *Losses*. Losses which could have been covered by permissible insurance are unallowable.

(12) *Underrecovery of cost under agreements*. Any excess of cost over Federal contribution under one agreement is unallowable under another agreement.

(13) The acquisition of land or buildings is an unallowable cost.

[Amdt. 188, 45 FR 85702, Dec. 30, 1980, as amended by Amdt. 207, 47 FR 52338, Nov. 19, 1982; Amdt. 298, 52 FR 36400, Sept. 29, 1987; Amdt. 316, 54 FR 24531, June 7, 1989; Amdt. 319, 55 FR 4361, Feb. 7, 1990; Amdt. 342, 59 FR 2733, Jan. 19, 1994; Amdt. 385, 65 FR 33441, May 24, 2000]

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

Sec.

278.1 Approval of retail food stores and wholesale food concerns.
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EDITORIAL NOTE: OMB control numbers relating to this part 278 are contained in § 271.8.

§ 278.1 Approval of retail food stores and wholesale food concerns.

(a) *Application*. Any firm desiring to participate or continue to be authorized in the program shall file an application as prescribed by FNS. Such an application shall contain information which will permit a determination to be made as to whether such an applicant qualifies, or continues to qualify, for authorization under the provisions of the program. FNS may require that a retail food store or wholesale food concern be visited to confirm eligibility for program participation prior to such store or concern being authorized or reauthorized in the program. Required visits shall be conducted by an authorized employee of the Department, a designee of the Secretary, or an official of the State or local government designated by the Secretary. FNS shall approve or deny the application within 45 days of receipt of a completed application. A completed application means that all information (other than an on-site visit) that FNS deems necessary in order to make a determination on the firm's application has been received. This information includes, but is not limited to, a completed application form, all information and documentation from the applicant, as well as any needed third-party verification and documentation.

(b) *Determination of authorization*. An applicant shall provide sufficient data and information on the nature and scope of the firm's business for FNS to determine whether the applicant's participation will further the purposes of the program. Upon request, an applicant shall provide documentation to FNS to verify information on the application. Such information may include, but is not limited to, State and local business licenses, Social Security cards, drivers' licenses, photographic identification cards, bills of sale, deeds, leases, sales contracts, State certificates of incorporation, sales records, invoice records and business-related tax records. Retail food stores and

wholesale food concerns and other entities eligible for authorization also shall be required to sign a release form which will authorize FNS to verify all relevant business related tax filings with appropriate agencies. In addition, they must obtain corroborating documentation from other sources as deemed necessary to ensure the legitimacy of applicant firms, as well as the accuracy of information provided by the stores and concerns. Failure to comply with any request for information or failure to sign a written release form shall result in denial of the application for authorization or withdrawal of a firm or concern from the program. In determining whether a firm qualifies for authorization, FNS shall consider all of the following:

(1) *The nature and extent of the food business conducted by the applicant.* (i) *Retail food store.* (A) An establishment or house-to-house trade route shall normally be considered to have food business of a nature and extent that will effectuate the purposes of the program if it sells food for home preparation and consumption and meets one of the following criteria: Offer for sale, on a continuous basis, a variety of qualifying foods in each of the four categories of staple foods as defined in §271.2 of this chapter, including perishable foods in at least two of the categories (Criterion A); or have more than 50 percent of the total gross retail sales of the establishment or route in staple foods (Criterion B).

(B) A retail food store must meet eligibility determination factors which may be based on, but not limited to, visual inspection, sales records, purchase records, counting of stockkeeping units, or other inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry. In determining eligibility, such information may be requested for verification purposes, and failure to provide such documentation may result in denial or withdrawal from the program.

(ii) *Application of Criterion A.* In order to qualify under this criterion, firms shall:

(A) Offer for sale and normally display in a public area, qualifying staple food items on a continuous basis, evidenced by having, on any given day of operation, no fewer than three different varieties of food items in each of the four staple food categories. Documentation to determine if a firm stocks a sufficient amount of required staple foods to offer them for sale on a continuous basis may be required in cases where it is not clear that the requirement has been met. Such documentation can be achieved through store visits and/or verifying information when requested. Failure to provide verifying information when requested or to cooperate with store visits shall result in the denial or withdrawal of authorization.

(B) Offer for sale perishable staple food items in at least two staple food categories. Perishable foods are items which are either frozen staple food items or fresh, unrefrigerated or refrigerated staple food items that will spoil or suffer significant deterioration in quality within 2–3 weeks; and

(C) Offer a variety of staple foods which means different types of foods, such as apples, cabbage, tomatoes, and squash in the fruit or vegetable staple food category, or milk, cheese, butter and yogurt in the dairy category. Variety of foods is not to be interpreted as different brands, different nutrient values, different varieties of packaging, or different package sizes. Similar processed food items with varying ingredients such as, but not limited to, sausages, breakfast cereals, milk, sliced breads, and cheeses, and similar unprocessed food items, such as, but not limited to, different varieties of apples, cabbage, tomatoes, or squash shall not each be considered as more than one staple food variety for the purpose of determining variety. Multiple ingredient food items intended for home preparation and consumption, such as, but not limited to, cold pizza, macaroni and cheese, soup, or frozen dinners, shall only be counted as one staple food variety each and will normally be included in the staple food category of the main ingredient as determined by the FNS.

(iii) *Application of Criterion B.* In order to qualify under this criterion, firms must have more than 50 percent of their total gross retail sales in staple food sales. Total gross retail sales

must include all retail sales of a firm, including food and non-food merchandise, as well as services, such as rental fees, professional fees, and entertainment/sports/games income. However, a fee directly connected to the processing of staple foods, such as raw meat, poultry, or fish by the service provider, may be calculated as staple food sales under Criterion B.

(iv) *Ineligible firms.* Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the Food Stamp Program shall not be eligible for program participation. New applicant firms that are found to be ineligible will be denied authorization to participate in the program, and authorized retail food stores found to be ineligible will be withdrawn from program participation. Ineligible firms under this paragraph include, but are not limited to, stores selling only accessory foods, including spices, candy, soft drinks, tea, or coffee; ice cream vendors selling solely ice cream; and specialty doughnut shops or bakeries not selling bread. In addition, firms that are considered to be restaurants, that is, firms that have more than 50 percent of their total gross retail sales in hot and/or cold prepared foods not intended for home preparation and consumption, shall not qualify for participation as retail food stores under Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout. Such firms may qualify, however, under the special restaurant programs that serve the elderly, disabled, and homeless populations, as set forth in paragraph (d) of this section.

(v) *Wholesale food concerns.* Wholesale food concerns, the primary business of which is the sale of eligible food at wholesale, and which meet the staple food requirements in paragraph (b) of this section, shall normally be considered to have adequate food business for the purposes of the program, provided such concerns meet the criteria specified in paragraph (c) of this section.

(vi) *Co-located wholesale food concerns.* No co-located wholesale/retail food concern with 50 percent or less of its total sales in retail food sales may be authorized to redeem food stamps unless it meets the criteria applicable to all retail firms and:

(A) It is a legitimate retail food outlet. Indicators which may establish to FNS that a firm is a legitimate retail food outlet include, but are not limited to, the following:

(*1*) The firm's marketing structure; as may be determined by factors such as, but not limited to:

(*i*) A retail business license;

(*ii*) The existence of sales tax records documenting retail food sales; and/or separate bookkeeping records; and

(*2*) The way the firm holds itself out to the public as evidenced by factors such as, but not limited to:

(*i*) The layout of the retail sales space;

(*ii*) The use of retail advertisements;

(*iii*) The posting of retail prices;

(*iv*) Offering specials to attract retail customers;

(*v*) Hours of operation for retail business;

(*vi*) Parking area for retail customers; and

(B) It has total annual retail food sales of at least $250,000; or

(C) It is a legitimate retail outlet but fails to meet the requirements in paragraph (b)(1)(iv)(B) of this section, and not authorizing such a firm would cause hardship to food stamp households. Hardship would occur in any one of the following circumstances:

(*1*) Program recipients would have difficulty in finding authorized firms to accept their coupons for eligible food;

(*2*) Special ethnic foods would not otherwise be available to recipients; or

(*3*) Recipients would be deprived of an opportunity to take advantage of unusually low prices offered by the firm if no other authorized firm in the area offers the same types of food items at comparable prices.

(2) *The volume of coupon business which FNS may reasonably expect the firm to do.* The FNS officer in charge may consider such factors as the location of a store and previous food sales volumes in evaluating the ability of an applicant firm to attract food stamp business.

(3) *The business integrity and reputation of the applicant.* FNS shall deny the

authorization of any firm from participation in the program for a period of time as specified in paragraph (k) of this section based on consideration of information regarding the business integrity and reputation of the firm as follows:

(i) Conviction of or civil judgment against the owners, officers or managers of the firm for:

(A) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(B) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; or

(C) Violation of Federal, State and/or local consumer protection laws or other laws relating to alcohol, tobacco, firearms, controlled substances, and/or gaming licenses;

(ii) Administrative findings by Federal, State or local officials that do not give rise to a conviction or civil judgment but for which a firm is removed from such a program, or the firm is not removed from the program but FNS determines a pattern exists (3 or more instances) evidencing a lack of business integrity on the part of the owners, officers or managers of the firm;

(iii) Evidence of an attempt by the firm to circumvent a period of disqualification, a civil money penalty or fine imposed for violations of the Food Stamp Act and program regulations;

(iv) Previous Food Stamp Program violations administratively and/or judicially established as having been committed by owners, officers, or managers of the firm for which a sanction had not been previously imposed and satisfied;

(v) Evidence of prior Food Stamp Program violations personally committed by the owner(s) or the officer(s) of the firm at one or more units of a multi-unit firm, or evidence of prior Food Stamp Program violations committed by management at other units of multi-unit firms which would indicate a lack of business integrity on the part of ownership and for which sanctions had not been previously imposed and satisfied; or

(vi) Commission of any other offense indicating a lack of business integrity or business honesty of owners, officers or managers of the firm that seriously and directly affects the present responsibility of a person.

(4) *Bonding for firms with previous sanctions.* (i) If the applicant firm has been sanctioned for violations of this part, by withdrawal or disqualification from program participation, or by a civil money penalty, the FNS officer-in-charge shall, as a condition of future authorization, require the applicant to present a collateral bond which:

(A) Is issued by a bonding agent recognized under the law of the State in which the applicant is conducting business, and which is represented by a negotiable certificate only.

(B) Is payable to the Food and Nutrition Service, U.S. Department of Agriculture;

(C) Cannot be canceled by the bonding agent for non-payment of the premium by the applicant;

(D) Has a face value of $1,000 or an amount equal to ten percent of the average monthly coupon redemption volume of the applicant for the immediate twelve months prior to the effective date of the most recent sanction which necessitated the bond, whichever amount is greater;

(E) Is valid at all times during which the firm is authorized to participate in the program; and

(F) Remains in the custody of the officer-in-charge unless released to the applicant as a result of the withdrawal of the applicant's authorization, without a fiscal claim established against the applicant by FNS.

(ii) Furnishing a collateral bond shall not eliminate or reduce a firm's obligation to pay in full any civil money penalty or previously determined fiscal claim which may have been assessed against the firm by FNS prior to the time the bond was required by FNS, and furnished by the firm. A firm which has been assessed a civil money penalty shall pay FNS as required, any subsequent fiscal claim asserted by FNS. In such cases a collateral bond

shall be furnished to FNS with the payment, or a schedule of intended payments, of the civil money penalty. A buyer or transferee shall not, as a result of the transfer or purchase of a disqualified firm, be required to furnish a bond prior to authorization.

(5) *Taxpayer identification numbers.* At the time of an initial request for authorization as well as reauthorization, an applicant firm must provide its employer identification number and social security numbers as described below:

(i) *Employer Identification Number.* The firm must provide its employer identification number (EIN) if one has been assigned to the firm by the Internal Revenue Service. The authority to request EINs and the guidelines for requesting EINs are set forth in section 6109(f) of the Internal Revenue Code of 1986 and Treas. Reg. § 301.6109–2 (26 CFR 301.6109–2).

(ii) *Social Security Number.* In addition to the EIN, the firm must provide the social security numbers (SSNs) of the following individuals:

(A) The SSN of an owner of a sole proprietorship.

(B) The SSNs of general partners of firms which are partnerships.

(C) The SSNs of up to five of the largest shareholders (owners) of privately owned corporations. (For purposes of this section, a privately owned corporation is one which has shares or stock that are not traded on a stock exchange or available for purchase by the general public.)

(6) *Other factors.* Any other factors which the FNS officer in charge considers pertinent to the application under consideration.

(c) *Wholesalers.* A wholesale food concern may be authorized to accept coupons only from a specified customer or customers if it meets the requirements of paragraphs (a) and (b) of this section, and FNS determines it is required as a redemption outlet:

(1) For one or more specified authorized drug addict or alcoholic treatment programs,

(2) For one or more specified authorized group living arrangements,

(3) For one or more specified authorized shelters for battered women and children,

(4) For one or more specified authorized nonprofit cooperative food-purchasing ventures,

(5) For one or more specified authorized public or private nonprofit homeless meal providers, or

(6) For one or more specified authorized retail food stores which are without access to an insured financial institution which will redeem their coupons.

No firm may be authorized to accept and redeem coupons concurrently as both a retail food store and a wholesale food concern. Authorizations of wholesale food concerns granted prior to January 28, 1982 shall expire on May 31, 1982. Wholesale food concerns desiring to participate in the program after that date must reapply for authorization in accordance with the provisions of this paragraph.

(d) *Meal services.* A meal delivery service or communal dining facility desiring to prepare and serve meals to households eligible to use coupons for those meals in addition to meeting the requirements of paragraphs (a) and (b) of this section, must establish that:

(1) It is recognized as a tax exempt organization by the Internal Revenue Service; or

(2) It is a senior citizens' center or apartment building occupied primarily by elderly persons and SSI recipients, and their spouses; or

(3) It is a restaurant operating under a contract with a State or local agency to prepare and serve (or deliver) low-cost meals to homeless persons, elderly persons and SSI recipients (and in the case of meal delivery services, to elderly persons or handicapped persons) and their spouses. Such a facility must have more than 50 percent of its total sales in food. The contracts of restaurants must specify the approximate prices which will be charged.

(e) *Treatment programs.* Drug addict or alcoholic treatment and rehabilitation programs wishing to redeem through wholesalers food stamps received from or on behalf of their participants shall in addition to meeting the requirements of paragraphs (a), (b) and (d)(1) of this section, be under Part B of Title XIX of the Public Health Service Act (42 U.S.C. 300x et seq.). Approval to participate is automatically withdrawn

once the treatment and rehabilitation program no longer meets the criteria which would make it eligible for funding under part B of Title XIX (in accordance with the definition in *Drug addiction or alcoholic treatment and rehabilitation program* in § 271.2).

(f) *Group living arrangements.* FNS shall authorize as retail food stores those group living arrangements wishing to redeem coupons directly through wholesalers. The group living arrangement must, in addition to meeting requirements of paragraphs (a), (b), and (d)(1) of this section, be certified by the appropriate agency or agencies of the State under regulations issued under section 1616(e) of the Social Security Act or under standards determined by the Secretary to be comparable to standards implemented by appropriate State agencies under section 1616(e) of the Social Security Act. Approval to participate is automatically cancelled at any time that a program loses its certification from the State agency or agencies.

(g) *Shelters for battered women and children.* FNS shall authorize as retail food stores those shelters for battered women and children wishing to redeem coupons directly through wholesalers. The shelter must be public or private nonprofit, as defined in paragraph (d)(1) of this section, and meet the requirements of paragraphs (a) and (b) of this section. Shelters which also serve other groups of individuals must have a portion of the facility set aside on a long-term basis to shelter battered women and children. Also required is that the shelter be a residence which serves meals or provides food to its residents.

(h) *House-to-house trade routes.* FNS shall, in consultation with the Department's Office of Inspector General, determine those locations where the operation of trade routes damages the program's integrity. FNS may limit the authorization of house-to-house trade routes to those trade routes whose services are required by participating households in such areas in order to obtain food. The FNS Officer in Charge, in deciding whether households in such areas require a trade route's services, shall consider the volume of food business the trade route does and the availability of alternate sources of comparable food. An FNS official shall inspect any applicant trade route's vehicle to ensure that the trade route is a retail food store before authorizing it to accept coupons. An FNS official may require, as a condition of continuing authorization, that the trade route vehicle be reinspected semiannually to ensure that it continues to be a retail food store.

(i) *Private homeless meal providers.* FNS may authorize as retail food stores those restaurants which contract with the appropriate State agency to serve meals to homeless persons at ''concessional'' (low or reduced) prices. Restaurants shall be responsible for obtaining contracts with the appropriate State agency as defined in § 272.9 and for providing a copy of the contract to FNS at the time it applies for authorization to accept food stamp benefits. Contracts must specify the approximate prices which will be charged. Examples of reduced prices include, but are not limited to, a percentage reduction, a set dollar amount reduction, a daily special meal, or an offer of a free food item or beverage (excluding alcoholic beverages).

(j) *Authorization.* Upon approval, FNS shall issue a nontransferable authorization card to the firm. The authorization card shall be valid only for the time period for which the firm is authorized to accept and redeem food stamp benefits. The authorization card shall be retained by the firm until such time as the authorization period has ended, authorization in the program is superseded, or the card is surrendered or revoked as provided in this part. All firms will be authorized in the program for a period of 5 years. The specification of an authorization period in no way precludes FNS from periodically requesting information from a firm for purposes of reauthorization in the program or from withdrawing or terminating the authorization of a firm in accordance with this part.

(k) *Denying authorization.* FNS shall deny the application of any firm if it determines that:

(1) The firm does not qualify for participation in the program as specified in paragraph (b), (c), (d), (e), (f), (g) or (h) of this section; or

(2) The firm has failed to meet the eligibility requirements for authorization under Criterion A or Criterion B, as specified in the Food Stamp Act of 1977, as amended; or, for co-located wholesale/retail firms, the firm fails to meet the requirements of paragraph (b)(1)(iv) of this section. Any firm that has been denied authorization on these bases shall not be eligible to submit a new application for authorization in the program for a minimum period of six months from the effective date of the denial;

(3) The firm has been found to lack the necessary business integrity and reputation to further the purposes of the program. Such firms shall be denied authorization in the program for the following period of time:

(i) Firms for which records of criminal conviction or civil judgment exist that reflect on the business integrity of owners, officers, or managers as stipulated in § 278.1(b)(3)(i) shall be denied authorization permanently;

(ii) Firms which have been officially removed from other Federal, State or local government programs through administrative action shall be denied for a period equivalent to the period of removal from any such programs; or, if the firm is not removed from the program, but FNS determines a pattern (3 or more instances) exists evidencing a lack of business integrity on the part of the owners, officers or managers of the firm, such firm shall be denied for a one year period effective from the date of denial;

(iii) Firms for which evidence exists of an attempt to circumvent a period of disqualification, a civil money penalty, or fine imposed for violations of the Food Stamp Act of 1977, as amended, and program regulations shall be denied for a period of three years from the effective date of denial;

(iv) Firms for which evidence exists of prior Food Stamp Program violations by owners, officers, or managers of the firm for which a sanction had not been previously imposed and satisfied shall be denied for a period of time equivalent to the appropriate disqualification period for such previous violations, effective from the date of denial;

(v) Firms for which evidence exists of prior Food Stamp Program violations at other units of multi-unit firms as specified in § 278.1(b)(3)(v) for which a sanction had not been previously imposed and satisfied shall be denied for a period of time equivalent to the appropriate disqualification period for such previous violations, effective from the date of denial;

(vi) Firms for which any other evidence exists which reflects negatively on the business integrity or business honesty of the owners, officers or managers of the firm as specified in § 278.1(b)(3)(vi) shall be denied for a period of one year from the effective date of denial;

(4) The firm has filed an application that contains false or misleading information about a substantive matter, as specified in § 278.6(e). Such firms shall be denied authorization for the periods specified in § 278.6(e)(1) or § 278.6(e)(3);

(5) The firm's participation in the program will not further the purposes of the program;

(6) The firm has been found to be circumventing a period of disqualification or a civil money penalty through a purported transfer of ownership;

(7) The firm has failed to pay in full any fiscal claim assessed against the firm under § 278.7, any fines assessed under §§ 278.6(l) or 278.6(m), or a transfer of ownership civil money penalty assessed under § 278.6(f). The FNS officer in charge shall issue a notice to the firm by certified mail or personal service of any authorization denial and shall advise the firm that it may request review of that determination.

(l) *Withdrawing authorization.* (1) FNS shall withdraw the authorization of any firm authorized to participate in the program for any of the following reasons.

(i) The firm's continued participation in the program will not further the purposes of the program;

(ii) The firm fails to meet the specifications of paragraph (b), (c), (d), (e), (f), (g), or (h) of this section;

(iii) The firm fails to meet the requirements for eligibility under Criterion A or B, as specified in the Food Stamp Act of 1977, as amended, or, for co-located wholesale/retail firms, the firm fails to meet the requirements of paragraph (b)(1)(iv) of this section, for

the time period specified in paragraph (k)(2) of this section;

(iv) The firm fails to maintain the necessary business integrity to further the purposes of the program, as specified in paragraph (b)(3) of this section. Such firms shall be withdrawn for lack of business integrity for periods of time in accordance with those stipulated in paragraph (k)(3) of this section for specific business integrity findings;

(v) The firm has failed to pay in full any fiscal claim assessed against the firm under § 278.7 or any fines assessed under §§ 278.6(l) or 278.6(m) or a transfer of ownership civil money penalty assessed under § 278.6(f); or

(vi) The firm has failed to pay fines assessed under § 278.6(l) or § 278.6(m); or

(vii) The firm is required under State and/or local law to charge tax on eligible food purchased with coupons or to sequence or allocate purchases of eligible foods made with coupons and cash in a manner inconsistent with 272.1 of these regulations.

(2) The FNS officer in charge shall issue a notice to the firm by certified mail or personal service to inform the firm of the determination and of the review procedure. FNS shall remove the firm from the program if the firm does not request review within the period specified in § 279.5.

(m) *Refusal to accept correspondence or to respond to inquiries.* FNS may withdraw or deny the authorization of any firm which:

(1) Refuses to accept correspondence from FNS;

(2) Fails to respond to inquiries from FNS within a reasonable time; or

(3) Cannot be located by FNS with reasonable effort.

(n) *Periodic reauthorization.* At the request of FNS a retail food store or wholesale food concern will be required to undergo a periodic reauthorization determination by updating any or all of the information on the firm's application form. Failure to cooperate in the reauthorization process will result in withdrawal of the firm's approval to participate in the program.

(o) *Applications containing false information.* The filing of any application containing false or misleading information may result in the denial of approval for participation in the program, as specified in paragraph (k) of this section, or disqualification of a firm from participation in the program, as specified in § 278.6, and may subject the firm and persons responsible to civil or criminal action.

(p) *Administrative review.* Any withdrawal or denial of authorization to participate in the program shall be subject to administrative review under § 278.8.

(q) *Use and disclosure of information provided by firms.* With the exception of EINs and SSNs, any information collected from retail food stores and wholesale food concerns, such as ownership information and sales and redemption data, may be disclosed for purposes directly connected with the administration and enforcement of the Food Stamp Act and these regulations, and can be disclosed to and used by State agencies that administer the Special Supplemental Nutrition Program for Women, Infants and Children (WIC). Such information may also be disclosed to and used by Federal and State law enforcement and investigative agencies for the purpose of administering or enforcing other Federal or State law, and the regulations issued under such other law. Such disclosure and use shall also include companies or individuals under contract for the operation by, or on behalf of FNS to accomplish an FNS function. Such purposes include the audit and examination of such information by the Comptroller General of the United States authorized by any other provision of law. Any person who publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by Federal law or regulations any information obtained under this paragraph shall be fined not more than $1,000 or imprisoned not more than 1 year, or both. Safeguards with respect to employee identification numbers (EINs) are contained in paragraph (q)(2) of this section. Safeguards with respect to Social Security numbers (SSNs) are contained in paragraph (q)(3) of this section.

(1) *Criteria for requesting information.* FNS shall determine what information can be disclosed and which government agencies have access to that information based on the following criteria:

(i) Federal and State law enforcement or investigative agencies or instrumentalities administering or enforcing specified Federal and State laws, or regulations issued under those laws, have access to certain information maintained by FNS. Such agencies or instrumentalities must have among their responsibilities the enforcement of law or the investigation of suspected violations of law. However, only certain Federal entities have access to information involving SSNs and EINs in accordance with paragraph (q)(1)(ii) of this section;

(ii) Except for SSNs and EINs, information provided to FNS by applicants and authorized firms participating in the FSP may be disclosed and used by qualifying Federal and State entities in accordance with paragraph (q)(1)(i) of this section. The disclosure of SSNs and EINs is limited only to qualifying Federal agencies or instrumentalities which otherwise have access to SSNs and EINs based on law and routine use. Release of information under this paragraph shall be limited to information relevant to the administration or enforcement of the specified laws and regulations, as determined by FNS;

(iii) Requests for information must be submitted in writing, including electronic communication, and must clearly indicate the specific provision of law or regulations which would be administered or enforced by access to requested information, and the relevance of the information to those purposes. If a formal agreement exists between FNS and another agency or instrumentality, individual written requests may be unnecessary. FNS may request additional information if needed to clarify a request;

(iv) Disclosure by FNS is limited to: Information about applicant stores and concerns with applications on file; information about authorized stores participating in the FSP; and information about unauthorized entities or individuals illegally accepting or redeeming food stamps;

(v) Requests for information disclosure by FNS may involve a specific store or concern, or some or all stores and concerns covered by paragraph (q)(1)(iv) of this section. In addition, FNS may sign agreements allowing certain government entities direct access to appropriate FNS data, with access to EINs and SSNs limited only to other Federal agencies and instrumentalities that otherwise have access to such numbers.

(2) *Employer identification numbers.* (i) The Department may have access to the EINs obtained pursuant to paragraph (b)(5) of this section for the purpose of establishing and maintaining a list of the names and EINs of the stores and concerns for use in determining those applicants who previously have been sanctioned or convicted under sections 12 and 15 of the Food Stamp Act of 1977, as amended, (7 U.S.C. 2021 or 2024). The Department also may share EINs with other Federal agencies and instrumentalities that otherwise have access to EINs if the Department determines that such sharing would assist in verifying and matching such information against information maintained by such other agency or instrumentality. Any such information shared pursuant to this paragraph may be used by the Department or such other agency or instrumentality for the purpose of effective administration and enforcement of the Food Stamp Act of 1977, as amended, or for the purpose of investigating violations of other Federal laws or enforcing such laws. See Treas. Reg. § 301.6109–2 (b) and (c) (26 CFR 301.6109–2 (b) and (c)).

(ii) The only persons permitted access to EINs obtained pursuant to paragraph (b) of this section are officers and employees of the United States, who otherwise have access and whose duties or responsibilities require access to the EINs for the administration or enforcement of the Food Stamp Act of 1977, as amended, or for the purpose of investigating violations of other Federal laws or enforcing such laws. See Treas. Reg. § 301.6109–2(d)(1) (26 CFR 301.6109–2(d)(1)).

(iii) The Department or any agency or instrumentality of the United States shall provide for any additional safeguards that the Secretary of the Treasury determines to be necessary or appropriate to protect the confidentiality of the EINs. The Department may also provide for any additional

safeguards to protect the confidentiality of EINs so long as these safeguards are consistent with any safeguards determined by the Secretary of the Treasury to be necessary or appropriate. See Treas. Reg. §301.6109–2(d)(2) (26 CFR 301.6109–2(d)(2)).

(iv) EINs maintained by the Department or maintained by any agency or instrumentality of the United States pursuant to §278.1(b)(5) are confidential. Except as provided in paragraph (q)(2)(ii) of this section above, no officer or employee of the United States who has or had access to any such EIN may disclose that number in any manner. For purposes of paragraph (q)(2)(iv) of this section the term *officer or employee* includes a former officer or employee. See Treas. Reg. §301.6109–2(e) (26 CFR 301.6109(e)).

(v) Sections 7213(a) (1), (2) and (3) of the Internal Revenue Code of 1986 apply with respect to the unauthorized, willful disclosure to any person of EINs obtained by the Department pursuant to §278.1(b)(5) in the same manner and to the same extent as sections 7213(a) (1), (2) and (3) apply with respect to unauthorized disclosure of returns and return information described in those sections. Section 7213(a)(4) of the Internal Revenue Code of 1986 applies with respect to the willful offer of any item of material value in exchange for any EIN obtained by the Department pursuant to §278.1(b)(5) in the same manner and to the same extent as section 7213(a)(4) applies with respect to offers (in exchange for any return or return information) described in that section. See Treas. Reg. §301.6109–2(f) (26 CFR 301.6109–2(f)).

(3) *Social Security numbers*. (i) The Department may have access to SSNs obtained pursuant to paragraph (b)(5) of this section for the purpose of establishing and maintaining a list of names and SSNs of stores and concerns for use in determining those applicants who previously have been sanctioned or convicted under section 12 or 15 of the Food Stamp Act of 1977, as amended, (7 U.S.C. 2021 or 2024). The Department may use this determination of sanctions and convictions in administering sections 12 and 15 of the Food Stamp Act of 1977, as amended, (7 U.S.C. 2018, 2021). The Department also may share SSNs with other Federal agencies and instrumentalities if the Department determines that such sharing would assist in verifying and matching such information against information maintained by the Department or such other agency or instrumentality. Any such information shared pursuant to this paragraph shall be used for the purpose of effective administration and enforcement of the Food Stamp Act of 1977, as amended, or for the purpose of investigating violations of other Federal laws or enforcing such laws.

(ii) The only persons permitted access to SSNs obtained pursuant to paragraph (b) of this section are officers and employees of the United States, who otherwise have access, and whose duties or responsibilities require access to the SSNs for the administration or enforcement of the Food Stamp Act of 1977, as amended, or for the purpose of investigating violations of other Federal laws or enforcing such laws. Such access shall also include companies or individuals under contract for the operation by, or on behalf of FNS to accomplish an FNS function.

(iii) The Department shall provide for all additional safeguards that the Commissioner of the Social Security Administration determines to be necessary or appropriate to protect the confidentiality of the SSNs. The Department may also provide for any additional safeguards to protect the confidentiality of SSNs so long as these safeguards are consistent with any safeguards determined by the Commissioner of the Social Security Administration to be necessary or appropriate.

(iv) The SSNs and related records that are obtained or maintained by authorized persons are confidential, and no officer or employee shall disclose any such SSN or related record except as authorized. The term ''related record'' means any record, list, or compilation that indicates, directly or indirectly, the identity of any individual with respect to whom a request for a SSN is maintained. For purposes of paragraph (r)(3)(iv) of this section the term ''officer or employee'' includes a former officer or employee.

(v) The sanctions under sections 7213(a) (1), (2) and (3) of the Internal Revenue Code of 1986 will apply with

respect to the unauthorized, willful disclosure to any person of SSNs and related records obtained or maintained in the same manner and to the same extent as sections 7213(a) (1), (2) and (3) apply with respect to unauthorized disclosures of returns and return information described in those sections. The sanction under section 7213(a)(4) of the Internal Revenue Code of 1986 will apply with respect to the willful offer of any item of material value in exchange for any SSN or related record in the same manner and to the same extent as section 7213(a)(4) applies with respect to offers (in exchange for any return or return information) described in that section.

(4) *FNS initiated matches*. Under the restrictions noted in paragraph (r) of this section, FNS will periodically initiate cross matches of retailer data with other Federal and State agencies' files for the purpose of verifying information provided by applicant and participating firms, and for the purposes of administering and enforcing other Federal or State laws. Such matches could involve all firms participating after implementation for the purpose of verifying information such as, but not limited to, SSNs and retail sales data.

(r) *Public and Private Nonprofit Homeless Meal Providers*. FNS shall authorize as retail food stores, those public and private nonprofit homeless meal providers which apply and qualify for authorization to accept food stamps from homless food stamp recipients. Such meal providers must be public or private nonprofit organizations as defined by the Internal Revenue Service (I.R.C. 501(c)(3)), must serve meals that include food purchased by the provider, must meet the requirements of paragraphs (a) and (b) of this section, and must be approved by an appropriate State or local agency, pursuant to § 272.9. Public and private nonprofit homeless meal providers shall be responsible for obtaining approval from an appropriate State or local agency and shall provide written documentation of such approval to FNS prior to approval of the meal provider's application for authorization. (If such approval is subsequently withdrawn, FNS authorization shall be withdrawn). Public and private nonprofit homeless meal providers serving meals which consist wholly of donated foods shall not be eligible for authorization. In an area in which FNS, in consultation with the Department's Office of Inspector General, finds evidence that the authorization of a public and private nonprofit homeless meal provider would damage the Food Stamp Program's integrity, FNS shall limit the participation of that public and private nonprofit homeless meal provider, unless FNS determines that the establishment or shelter is the only one of its kind serving the area.

(s) Each authorized retail food store shall post in a suitable and conspicuous location in the store a sign designed and provided by FNS which provides information on how persons may report abuses they have observed in the operation of the program. Refusal or repeated failure to display such a sign by an authorized retail food store may result in the withdrawal of the firm's approval to participate in the program.

(t) *Periodic notification*. The FNS will issue periodic notification to participating retail stores and wholesale food concerns to clarify program eligibility criteria, including the definitions of ''Retail food store'', ''Staple foods'', ''Eligible foods'', and ''Perishable foods''. At a minimum, such information will be provided to stores at the time of authorization, reauthorization and upon request.

[Amdt. 136, 43 FR 43274, Sept. 22, 1978]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 278.1, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

EFFECTIVE DATE NOTE: At 61 FR 53600, Oct. 15, 1996, in § 278.1, paragraph (i) was redesignated as paragraph (j) and a new paragraph (i) was added. This paragraph contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget. The Food and Nutrition Service will publish a document in the FEDERAL REGISTER announcing the effective date.

§ 278.2 Participation of retail food stores.

(a) *Use of coupons*. Coupons may be accepted by an authorized retail food

store only from eligible households or the households' authorized representative, and only in exchange for eligible food. Coupons may not be accepted in exchange for cash, except when cash is returned as change in a transaction in which coupons were accepted in payment for eligible food under pargraph (d) of this section. Coupons may not be accepted in payment of interest on loans or for any other nonfood use. An authorized retail food store may not accept coupons from another retail food store, except that public or private nonprofit homeless meal providers may redeem coupons for eligible food through authorized retail food stores.

(b) *Equal treatment for coupon customers.* Coupons shall be accepted for eligible foods at the same prices and on the same terms and conditions applicable to cash purchases of the same foods at the same store except that tax shall not be charged on eligible foods purchased with coupons. However, nothing in this part may be construed as authorizing FNS to specify the prices at which retail food stores may sell food. However, public or private nonprofit homeless meal providers may only request *voluntary* use of food stamps from homeless food stamp recipients and may not request such household using food stamps to pay more than the average cost of the food *purchased* by the public or private nonprofit homeless meal provider contained in a meal served to the patrons of the meal service. For purposes of this section, ''average cost'' is determined by averaging food costs over a period of up to one calendar month. Voluntary payments by food stamp recipients in excess of such costs may be accepted by the meal providers. The value of donated foods from any source shall not be considered in determining the amount to be requested from food stamp recipients. All indirect costs, such as those incurred in the acquisition, storage, or preparation of the foods used in meals shall also be excluded. In addition, if others have the option of eating free or making a monetary donation, food stamp recipients must be provided the same option of eating free or making a donation in money or food stamps. No retail food store may single out coupon users for special treatment in any way.

(c) *Accepting coupons.* No authorized retail food store may accept coupons marked ''paid,'' ''canceled,'' or ''specimen.'' Nor may a retail food store accept coupons bearing any cancellation or endorsement, or coupons of other than the 1-dollar denomination which have been detached from the coupon books prior to the time of purchase or delivery of eligible food unless the detached coupons are accompanied by the coupon books which bear the same serial numbers that appear on the detached coupons. However, in the case of public or private nonprofit homeless meal providers, retail food stores may accept detached coupons which have been accepted by the homeless meal provider. It is the right of the household member or the authorized representative to detach the coupons from the book.

(d) *Making change.* An authorized retail food store shall use, for the purpose of making change, uncanceled and unmarked 1-dollar coupons which were previously accepted for eligible foods. If change in an amount of less than 1-dollar is required, the eligible household shall receive the change in cash. However, in the case of public or private nonprofit homeless meal providers, neither cash change nor credit slips shall be provided under any circumstances when food stamps are used to purchase meals. At no time may cash change in excess of 99 cents be returned in a coupon transaction. An authorized retail food store may not engage in a series of coupon transactions the purpose of which is to provide the same food stamp customer an amount of cash change greater than the maximum 99 cents cash change allowed in one transaction.

(e) *Accepting coupons before delivery.* Food retailers may not accept coupons before delivering the food, retain custody of any unspent coupons, or in any way prevent an eligible household from using coupons in making purchases from other authorized firms. However, a nonprofit cooperative food purchasing venture may accept coupons from a member of the cooperative at the time the member places a food order. The food ordered must be made available to the member within 14 days

from the day the cooperative receives the member's coupons.

(f) *Paying credit accounts.* Coupons may not be accepted by an authorized retail food store in payment for any eligible food sold to a household on credit.

(g) *Redeeming coupons.* Authorized retail food stores may exchange coupons accepted in accordance with this part for face value upon presentation through the banking system or through a wholesale food concern authorized to accept coupons from that retailer. Authorized drug addict or alcoholic treatment and rehabilitation programs, group living arrangements, and shelters for battered women and children may present coupons for redemption through authorized wholesale food concerns. A drug addict or alcoholic treatment center, group living arrangement, or shelter for battered women and children may purchase food in authorized retail food stores as the authorized representative of its participating households. Public or private nonprofit homeless meal providers may purchase food in authorized retail food stores and through authorized wholesale food concerns. Authorized drug addict and alcoholic treatment and rehabilitation programs, group living arrangements, shelters for battered women and children, and public or private nonprofit homeless meal providers for homeless food stamp households shall not present coupons directly to an insured financial institution for redemption.

(h) *Identifying coupon users.* Coupons may not knowingly be accepted from persons who have no right to possession of coupons. If a food retailer has any cause to believe that a person presenting coupons has no right to use the coupons, the food retailer should request the person to show the ID card of the household to establish the right of that person to use the coupons. Where photo ID cards are in use, the person presenting the ID card need not be pictured on the card. Public or private nonprofit homeless meal providers redeeming detached coupons through retail food stores shall present their retailer authorization card as proof of their eligibility to redeem coupons through retail food stores.

(i) *Checking meal delivery service recipients.* A nonprofit meal delivery service shall require the recipient of a delivered meal to show the marked ID card establishing the recipient's right to use coupons for that service the first time that the recipient offers coupons in payment for the service, and shall request the marked ID card at any time the nonprofit meal delivery service has cause to question the continued eligibility of the recipient to use coupons for delivered meals.

(j) *Checking hunting and fishing equipment users.* Authorized Alaskan retailers shall require coupon customers wanting to purchase hunting and fishing equipment with coupons to show their ID cards to determine that they live in an area designated by FNS as one in which persons are dependent upon hunting and fishing for subsistence.

(k) *Checking participants in restaurants.* A restaurant operating under a State contract shall require a household purchasing meals to show the marked ID card establishing the household's right to purchase meals with coupons unless the personnel of the restaurant know that the program participant tendering coupons is eligible to use coupons to purchase meals.

(l) *Checking public or private nonprofit homeless meal provider recipients.* Public or private nonprofit homeless meal providers shall establish a food stamp patron's right to purchase meals with coupons.

[Amdt. 136, 43 FR 43274, Sept. 22, 1978, as amended at Amdt. 191, 46 FR 50277, Oct. 9, 1981; Amdt. 205, 46 FR 60167, Dec. 8, 1981; Amdt. 257, 49 FR 32538, Aug. 15, 1984; Amdt. 286, 52 FR 7557, Mar. 11, 1987; 53 FR 31649, Aug. 19, 1988; Amdt. 344, 56 FR 54778, Oct. 23, 1991; Amdt. 356, 59 FR 29714, June 9, 1994; Amdt. 343, 61 FR 53601, Oct. 15, 1996]

§ 278.3 Participation of wholesale food concerns.

(a) *Accepting coupons.* An authorized wholesale food concern may accept endorsed coupons from one or more specified authorized retail food stores, from one or more specified authorized nonprofit cooperative food-purchasing ventures, from one or more specified authorized group living arrangements, from one or more specified authorized

drug addict or alcoholic treatment programs, from one or more specified authorized shelters for battered women and children, or, from one or more specified public or private nonprofit homeless meal providers if the coupons are accompanied by a properly filled-out and signed redemption certificate, and are not marked ''paid,'' ''canceled,'' or ''specimen.'' A wholesaler authorized to accept coupons from an authorized drug addict or alcoholic treatment program, or from an authorized group living arrangement, or from an authorized shelter for battered women and children, or from one or more public or private nonprofit homeless meal providers may accept coupons from that treatment program, or group living arrangement, or shelter for battered women and children, or from one or more public or private nonprofit homeless meal providers, only in exchange for food.

(b) *Accepting legally obtained coupons.* No authorized wholesale food concern may accept coupons if the wholesaler knows or has reasonable cause to believe that the coupons were not legally obtained for eligible food.

(c) *Redeeming coupons.* An authorized wholesale food concern may redeem coupons, properly accepted from retailers, through the banking system, upon presentation of the coupons with:

(1) The authorized retail food store's properly filled-out and signed redemption certificate for the coupons; and

(2) The authorized wholesale food concern's properly filled-out and signed redemption certificate.

(d) *Handling retailer redemption certificates.* No authorized wholesale food concern may alter, prepare, or complete an authorized retail food store's redemption certificate.

[Amdt. 136, 43 FR 43274, Sept. 22, 1978, as amended by Amdt. 173, 46 FR 62810, Dec. 29, 1981; Amdt. 286, 52 FR 7558, Mar. 11, 1987; Amdt. 344, 56 FR 54778, Oct. 23, 1991; Amdt. 343, 61 FR 53601, Oct. 15, 1996]

§ 278.4 Procedure for redeeming coupons.

(a) *Coupons accepted without authorization.* Coupons accepted by a retail food store or a wholesale food concern before the receipt by the firm of an authorization card from FNS may not be presented for redemption unless the FNS officer in charge has approved the redemption under § 278.7(b). Burned or mutilated coupons shall be presented for redemption to the FNS officer in charge as provided in § 278.7(c).

(b) *Endorsing coupons.* Each authorized retail food store or authorized wholesale food concern shall mark its authorization number or name on each coupon before it presents the coupons for redemption.

(c) *Using redemption certificates.* FNS will provide all authorized firms with redemption certificates. Wholesale food concerns and retail food stores, except for drug addict and alcoholic treatment and rehabilitation programs and public or private nonprofit homeless meal providers, shall use the redemption certificates to present coupons to insured financial institutions for credit or for cash. All retail food stores which wish to redeem coupons at wholesale food concerns shall use the redemption certificates for that purpose. An authorized retail firm using redemption certificates to redeem coupons shall fill out the redemption certificate to show the value of the coupons redeemed, the name of the insured financial institution or wholesaler, the date, and the signature and title of the official of the firm redeeming coupons.

[Amdt. 136, 43 FR 43274, Sept. 22, 1978, as amended by Amdt. 286, 52 FR 7558, Mar. 11, 1987; Amdt. 344, 56 FR 54778, Oct. 23, 1991; Amdt. 343, 61 FR 53601, Oct. 15, 1996]

§ 278.5 Participation of insured financial institutions.

(a) *Accepting coupons.* (1) Financial institutions that are insured by the Federal Deposit Insurance Corporation (FDIC) or financial institutions which are insured under the Federal Credit Union Act and which have retail food stores or wholesale food concerns in their field of membership may redeem coupons only from authorized retail food stores, meal services, and wholesale food concerns in accordance with the rules contained in this part and instructions of the Federal Reserve Banks. No financial institution may impose on or collect from a retail food store a fee or other charge for redemption of coupons that are submitted to the financial institution in a manner

consistent with the requirements, except for coupon cancellation, for the presentation of coupons by the financial institution to the Federal Reserve banks. Coupons submitted to insured financial institutions for credit or cash must be properly endorsed in accordance with § 278.4 of this part and shall be accompanied by a properly completed and signed redemption certificate. All verified and encoded redemption certificates accepted by insured financial institutions shall be forwarded with the corresponding coupon deposits to the Federal Reserve Bank along with the accompanying Food Coupon Deposit Document (Form FNS–521). In accordance with Federal Reserve requirements, the coupon deposit value entered on the Food Coupon Deposit Document must be equal to the actual value of coupons being deposited and to the total value of verified amounts encoded on the corresponding redemption certificates.

(2) An insured financial institution shall verify the amount of the coupons being redeemed and record the amount in the designated space on the redemption certificate. In order to conform with Federal Reserve requirements, the verified amount shall be recorded in the appropriate field on the redemption certificate using Magnetic Ink Character Recognition (MICR) encoding. Redemption certificates accepted by insured financial institutions shall be forwarded with the corresponding coupon deposits to the Federal Reserve Bank along with the Food Coupon Deposit Document (Form FNS–521).

(3) Redeemed coupons must be indelibly cancelled on the face of the coupon by the first insured financial institution receiving them. If the cancellation on the coupon face does not show the depositing institution's name or its routing symbol transit number, this identifying information must appear on the straps affixed to each bundle of coupons of like denomination. Deposits not meeting these cancellation requirements may be returned to the depositing institution for reprocessing. Retail food stores may not be required to cancel the coupons by the insured financial institution nor may the insured financial institution charge the retail food stores a fee or other charge for cancellation of coupons. A portion of a coupon consisting of less than three-fifths of a whole coupon may not be redeemed.

(4) Insured financial institutions which are members of the Federal Reserve System, insured nonmember clearing institutions, and insured nonmember institutions which have arranged with a Federal Reserve Bank to deposit coupons for credit to the account of a member institution on the books of a Federal Reserve Bank may forward coupons directly to the Federal Reserve Bank. Other insured financial institutions may forward cancelled coupons through ordinary collection channels.

(b) *Role of Federal Reserve Banks.* Federal Reserve Banks, acting as fiscal agents of the United States, will receive canceled coupons for collection as cash items from armed forces installations, member insured financial institutions of the Federal Reserve System, nonmember clearing insured financial institutions, and nonmember insured financial institutions which have arranged with a Federal Reserve Bank to deposit coupons for credit to the account of a member insured financial institution on the books of the Federal Reserve Bank, and will charge those items to the general account of the Treasurer of the United States.

(c) *FNS liability for losses.* FNS shall not be liable for the value of any coupons lost, stolen, or destroyed while in the custody of an insured financial institution or for the value of coupons lost, stolen, or destroyed while in transit from an insured financial institution to a Federal Reserve Bank.

(d) *FNS use of coupons to detect violations.* Regardless of any other provision in these regulations, coupons may be issued to, purchased by, or redeemed by persons authorized by FNS to use those coupons in examining and inspecting program operations, and for other purposes determined by FNS to be required for proper administration of the program. Coupons which have been so issued and used, as well as any coupons which have been issued under paragraph (g) of this section, or which FNS believes may have been issued, transferred, negotiated, used, or received in violation of this subchapter or of any

applicable statute, shall at the request of FNS and on issuance of a receipt for them be turned over to FNS by the insured financial institution receiving the coupons, or by any other person to whom the request is addressed, together with any certificate(s) of redemption accompanying the coupons. Any coupons so requested shall not be eligible for redemption through Federal Reserve Banks or other collection channels. However, FNS may redeem coupons from any insured financial institution or person by payment of the face amount of the coupons upon determination by FNS that this direct redemption of coupons is warranted. FNS shall determine the proper disposition of any coupons held by FNS on completion of the examination or inspection in which the coupons were used. Claims or demands for unredeemed coupons surrendered to FNS may be mailed to the local FNS field office for the project area involved.

(e) *Selling coupons to stores for internal checks.* FNS may sell coupons at face value to any authorized retail food store which wishes to use coupons to conduct internal checks of coupon transactions. The retail food store must submit a written request to FNS which shall include a certification that the store recognizes that its use of coupons will not affect FNS action to enforce program regulations and that the requested coupons will be used only for internal checks of the store's employees and only to uncover sales of items other than eligible foods. The request shall also include the name of the city or county in which the stores to be checked through the use of the requested coupons are located and the name and address of any outside agency with which the retail food store has or will have a contract to conduct checks of the store's employees using coupons. The request shall be directed to the Benefit Redemption Division, FSP, FNS, U.S. Department of Agriculture, 3101 Park Center Drive, Alexandria, VA 22302, and shall be accompanied by a check or money order made payable to the Food and Nutrition Service to cover the face value cost of the coupons requested. Coupons bought by retail food stores for use in internal checks may be later redeemed for full value in accordance with § 278.4, and in redeeming those coupons, retail food stores are authorized to make the certification required for redemption.

(f) *Continued participation of households under investigation.* Upon the written request of Federal, State, or local government agencies which have authority to investigate, and are investigating, suspected violations of Federal or State statutes concerning the enforcement of the Food Stamp Act or the regulations, the State agency may allow ineligible households to continue program participation. The State agency may allow the households to continue participation in the program until the earlier of (1) expiration of the period of 90 days after the request is received or any longer period which FNS, upon request of the State agency, may approve in a particular case, or (2) receipt of notification from the investigative agency that participation may be terminated or that the investigation has been completed. Regardless of any other provision of these regulations, FNS may not hold the State agency liable for the value of any coupons issued to households under this paragraph.

[Amdt. 136, 43 FR 43274, Sept. 22, 1978, as amended by Amdt. 257, 49 FR 32538, Aug. 15, 1984; Amdt. 267, 51 FR 6514, Feb. 25, 1986; Amdt. 272, 51 FR 12498, Apr. 11, 1986; Amdt. 288, 52 FR 11815, Apr. 13, 1987; Amdt. 272, 52 FR 18198, May 14, 1987; Amdt. 356, 59 FR 29714, June 9, 1994; Amdt. 331, 59 FR 60062, Nov. 22, 1994]

§ 278.6 Disqualification of retail food stores and wholesale food concerns, and imposition of civil money penalties in lieu of disqualifications.

(a) *Authority to disqualify or subject to a civil money penalty.* FNS may disqualify any authorized retail food store or authorized wholesale food concern from further participation in the program if the firm fails to comply with the Food Stamp Act of 1977, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through onsite investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system, or the disqualification of a firm from the

Special Supplemental Nutrition Program for Women, Infants and Children (WIC), as specified in paragraph (e)(8) of this section. Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction; for period of 12 months to 10 years for a firm's second sanction; and disqualification shall be permanent for a disqualification based on paragraph (e)(1) of this section. Any firm which has been disqualified and which wishes to be reinstated at the end of the period of disqualification, or at any later time, shall file a new application under § 278.1 so that FNS may determine whether reauthorization is appropriate. The application may be filed no earlier than 10 days before the end of the period of disqualification. FNS may, in lieu of a disqualification, subject a firm to a civil money penalty of up to an amount specified in § 3.91(b)(3)(i) of this title for each violation if FNS determines that a disqualification would cause hardship to participating households. FNS may impose a civil money penalty of up to an amount specified in §3.91(b)(3)(ii) of this title for each violation in lieu of a permanent disqualification for trafficking, as defined in § 271.2 of this chapter, in accordance with the provisions of paragraphs (i) and (j) of this section.

(b) *Charge letter*—(1) *General provisions*. Any firm considered for disqualification or imposition of a civil money penalty under paragraph (a) of this section or a fine as specified under paragraph (l) or (m) of this section shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination. The FNS regional office shall send the firm a letter of charges before making such determination. The letter shall specify the violations or actions which FNS believes constitute a basis for disqualification or imposition of a civil money penalty or fine. The letter shall specify the violations or actions which FNS believes constitute a basis for disqualification or imposition of a civil money penalty. The letter shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter. The firm's response shall set forth a statement of evidence, information, or explanation concerning the specified violations or acts. The firm shall make its response, if any, to the officer in charge of the FNS field office which has responsibility for the project area in which the firm is located. In the case of a firm for which action is taken in accordance with paragraph (e)(8) of this section, the charge letter shall inform such firm that the disqualification action is not subject to administrative or judicial review, as specified in paragraph (e)(8) of this section.

(2) *Charge letter for trafficking*. (i) The charge letter shall advise a firm being considered for permanent disqualification based on evidence of trafficking as defined in § 271.2 that the firm must notify FNS if the firm desires FNS to consider the sanction of a civil money penalty in lieu of permanent disqualification. The charge letter shall also advise the firm that the permanent disqualification shall be effective immediately upon the date of receipt of the notice of determination, regardless of whether a request for review is filed in accordance with § 279.5 of this chapter. If the disqualification is reversed through administrative or judicial review, the Secretary shall not be liable for the value of any sales lost during the disqualification period. Firms that request and are determined eligible for a civil money penalty in lieu of permanent disqualification for trafficking may continue to participate in the program pending review and shall not be required to pay the civil money penalty pending appeal of the trafficking determination action.

(ii) Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence as specified in § 278.6(i), that establishes the firm's eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1).

(iii) If a firm fails to request consideration for a civil money penalty in

lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified in § 278.6(b)(1), the firm shall not be eligible for such a penalty.

(c) *Review of evidence*. The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination.In the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with § 279.5 of this chapter. If the disqualification is reversed through administrative or judicial review, the Secretary shall not be liable for the value of any sales lost during the disqualification period. Firms that request and are determined eligible to a civil money penalty in lieu of permanent disqualification for trafficking may continue to participate in the program pending review and shall not be required to pay the civil money penalty pending appeal of the trafficking determination action. In the case of a firm for which action is taken in accordance with paragraph (e)(8) of this section, the determination notice shall inform such firm that the disqualification action is not subject to administrative or judicial review, as specified in paragraph (e)(8) of this section.

(d) *Basis for determination*. The FNS regional office making a disqualification or penalty determination shall consider: (1) The nature and scope of the violations committed by personnel of the firm, (2) any prior action taken by FNS to warn the firm about the possibility that violations are occurring, and (3) any other evidence that shows the firm's intent to violate the regulations.

(e) *Penalties*. FNS shall take action as follows against any firm determined to have violated the Act or regulations. For the purposes of assigning a period of disqualification, a warning letter shall not be considered to be a sanction. A civil money penalty and a disqualification shall be considered sanctions for such purposes. The FNS regional office shall:

(1) Disqualify a firm permanently if:

(i) Personnel of the firm have trafficked as defined in § 271.2; or

(ii) Violations such as, but not limited to, the sale of ineligible items occurred and the firm had twice before been sanctioned.

(iii) It is determined that personnel of the firm knowingly submitted information on the application that contains false information of a substantive nature that could affect the eligibility of the firm for authorization in the program, such as, but not limited to, information related to:

(A) Eligibility requirements under § 278.1(b), (c), (d), (e), (f), (g) and (h);

(B) Staple food stock;

(C) Annual gross sales for firms seeking to qualify for authorization under Criterion B as specified in the Food Stamp Act of 1977, as amended;

(D) Annual staple food sales;

(E) Total annual gross retail food sales for firms seeking authorization as co-located wholesale/retail firms;

(F) Ownership of the firm;

(G) Employer Identification Numbers and Social Security Numbers;

(H) Food Stamp Program history, business practices, business ethics, WIC disqualification or authorization status, when the store did (or will) open for business under the current ownership, business, health or other licenses, and whether or not the firm is a retail and wholesale firm operating at the same location; or

(I) Any other information of a substantive nature that could affect the eligibility of a firm.

(2) Disqualify the firm for 5 years if it is to be the firm's first sanction, the firm had been previously advised of the possibility that violations were occurring and of possible consequences of violating the regulations, and the evidence shows that:

(i) It is the firm's practice to sell expensive or conspicuous nonfood items, cartons of cigarettes, or alcoholic beverages in exchange for food coupons; or

(ii) The firm's coupon redemptions for a specified period of time exceed its

food sales for the same period of time; or

(iii) A wholesale food concern's redemptions of coupons for a specified period of time exceed the redemptions of all the specified authorized retail food stores, nonprofit cooperative food-purchasing ventures, group living arrangements, drug addict and alcoholic treatment programs, homeless meal providers, and shelters for battered women and children which the wholesale food concern was authorized to serve during that time; or

(iv) A wholesale food concern's stated redemptions of coupons for a particular retail food store, nonprofit cooperative food-purchasing venture, group living arrangement, drug addict and alcoholic treatment program, homeless meal providers, or shelters for battered women and children exceeded the actual amount of coupons which that firm or organization redeemed through the wholesaler; or

(v) Personnel of the firm knowingly accepted coupons from an unauthorized firm or an individual known not to be legally entitled to possess coupons.

(3) Disqualify the firm for 3 years if it is to be the first sanction for the firm and the evidence shows that:

(i) It is the firm's practice to commit violations such as the sale of common nonfood items in amounts normally found in a shopping basket and the firm was previously advised of the possibility that violations were occurring and of the possible consequences of violating the regulations; or

(ii) Any of the situations described in paragraph (e)(2) of this section occurred and FNS had not previously advised the firm of the possibility that violations were occurring and of the possible consequences of violating the regulations; or

(iii) The firm is an authorized communal dining facility, drug addiction or alcoholic treatment and rehabilitation program, group living arrangement, homeless meal provider, meal delivery service, or shelter for battered women and children and it is the firm's practice to sell meals in exchange for food coupons to persons not eligible to purchase meals with food coupons and the firm has been previously advised of the possibility that violations were occurring and of the possible consequences of violating the regulations; or

(iv) A wholesale food concern accepted coupons from an authorized firm which it was not authorized to serve and the wholesale food concern had been previously advised of the possibility that violations were occurring and of possible consequences of violating the regulations; or

(v) The firm is an authorized retail food store and personnel of the firm have engaged in food coupon transactions with other authorized retail stores, not including treatment programs, group living arrangements, homeless meal providers, or shelters for battered women and children, and the firm had been previously advised of the possibility that violations were occurring and of the possible consequences of violating the regulations.

(vi) Personnel of the firm knowingly submitted information on the application that contained false information of a substantive nature related to the ability of FNS to monitor compliance of the firm with FSP requirements, such as, but not limited to, information related to:

(A) Annual eligible retail food sales;

(B) Store location and store address and mailing address;

(C) Financial institution information; or

(D) Store name, type of ownership, number of cash registers, and non-food inventory and services.

(4) Disqualify the firm for 1 year if it is to be the first sanction for the firm and the ownership or management personnel of the firm have committed violations such as the sale of common nonfood items in amounts normally found in a shopping basket, and FNS had not previously advised the firm of the possibility that violations were occurring and of the possible consequences of violating the regulations.

(5) Disqualify the firm for 6 months if it is to be the first sanction for the firm and the evidence shows that personnel of the firm have committed violations such as but not limited to the sale of common nonfood items due to carelessness or poor supervision by the firm's ownership or management.

(6) Double the appropriate period of disqualification prescribed in paragraphs (e) (2) through (5) of this section as warranted by the evidence of violations if the same firm has once before been assigned a sanction.

(7) Send the firm a warning letter if violations are too limited to warrant a disqualification.

(8) FNS shall disqualify from the Food Stamp Program any firm which is disqualified from the WIC Program:

(i) Based in whole or in part on any act which constitutes a violation of that program's regulation and which is shown to constitute a misdemeanor or felony violation of law, or for any of the following specific program violations:

(A) A pattern of claiming reimbursement for the sale of an amount of a specific food item which exceeds the store's documented inventory of that food item for a specified period of time;

(B) Exchanging WIC food instruments for cash, credit or consideration other than eligible food; or the exchange of firearms, ammunition, explosives or controlled substances, as defined in section 802 of title 21 of the United States Code, for food instruments;

(C) A pattern of receiving, transacting and/or redeeming WIC food instruments outside of authorized channels;

(D) A pattern of exchanging non-food items for a WIC food instrument;

(E) A pattern of charging WIC customers more for food than non-WIC customers or charging WIC customers more than the current shelf price; or

(F) A pattern of charging for food items not received by the WIC customer or for foods provided in excess of those listed on the food instrument.

(ii) FNS shall not disqualify a firm from the Food Stamp Program on the basis of a WIC disqualification unless:

(A) Prior to the time prescribed for securing administrative review of the WIC disqualification action, the firm was provided individual and specific notice that it could be disqualified from the Food Stamp Program based on the WIC violations committed by the firm;

(B) A signed and dated copy of such notice is provided to FNS by the WIC administering agency; and

(C) A determination is made in accordance with paragraph (a) of this section that such action will not cause a hardship for participating Food Stamp households.

(iii) Such a Food Stamp disqualification:

(A) Shall be for the same length of time as the WIC disqualification;

(B) May begin at a later date than the WIC disqualification; and

(C) Shall not be subject to administrative or judicial review under the Food Stamp Program.

(f) *Criteria for civil money penalties for hardship and transfer of ownership.* (1) FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm subject to a disqualification is selling a substantial variety of staple food items, and the firm's disqualification would cause hardship to food stamp households because there is no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices. FNS may disqualify a store which meets the criteria for a civil money penalty if the store had previously been assigned a sanction. A civil money penalty for hardship to food stamp households may not be imposed in lieu of a permanent disqualification.

(2) In the event any retail food store or wholesale food concern which has been disqualified is sold or the ownership thereof is otherwise transferred to a purchaser or transferee, the person or other legal entity who sells or otherwise transfers ownership of the retail food store or wholesale food concern shall be subjected to and liable for a civil money penalty in an amount to reflect that portion of the disqualification period that has not expired, to be calculated using the method found at §278.6(g). If the retail food store or wholesale food concern has been permanently disqualified, the civil money penalty shall be double the penalty for a ten year disqualification period. The disqualification shall continue in effect at the disqualified location for the person or other legal entity who transfers ownership of the retail food store or wholesale food concern notwithstanding the imposition of a civil money penalty under this paragraph.

(3) At any time after a civil money penalty imposed under paragraph (f) (2) of this section has become final under the provisions of part 279, the Food and Consumer Service may request the Attorney General institute a civil action to collect the penalty from the person or persons subject to the penalty in a district court of the United States for any district in which such person or persons are found, reside, or transact business.

(4) A bona fide transferee of a retail food store shall not be required to pay a civil money penalty imposed on the firm prior to its transfer. A buyer or transferee (other than a bona fide buyer or transferee) may not be authorized to accept or redeem coupons and may not accept or redeem coupons until the Secretary receives full payment of any penalty imposed on such store or concern.

(g) *Amount of civil money penalties for hardship and transfer of ownership.* FNS shall determine the amount of the civil money penalty as follows:

(1) Determine the firm's average monthly redemptions of coupons for the 12-month period ending with the month immediately preceding that month during which the firm was charged with violations.

(2) Multiply the average monthly redemption figure by 10 percent.

(3) Multiply the product arrived at in paragraph (g)(2) by the number of months for which the firm would have been disqualified under paragraph (e) of this section. The civil money penalty may not exceed an amount specified in § 3.91(b)(3)(i) of this title for each violation.

(h) *Notifying the firm of civil money penalties for hardship and transfer of ownership.* A firm has 15 days from the date the FNS regional office notifies the firm in writing in which to pay the civil money penalty, or to notify the regional office in writing of its intent to pay in installments as specified by the regional office. The firm must present to FNS a collateral bond as specified in § 278.1(b)(4), within the same 15-day period. The civil money penalty must be paid in full by the end of the period for which the firm would have been disqualified. FNS shall:

(1) Disqualify the firm for the period determined to be appropriate under paragraph (e) of this section if the firm refuses to pay any of the civil money penalty;

(2) Disqualify the firm for a period corresponding to the unpaid part of the civil money penalty if the firm does not pay the civil money penalty in full or in installments as specified by the FNS regional office; or

(3) Disqualify the firm for the prescribed period if the firm does not present a collateral bond within the required 15 days. Any payment on a civil money penalty which have been received by FNS shall be returned to the firm. If the firm presents the required bond during the disqualification period, the civil money penalty may be reinstated for the duration of the disqualification period.

(i) *Criteria for eligibility for a civil money penalty in lieu of permanent disqualification for trafficking.* FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in § 271.2 if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program. Firms assessed a CMP under this paragraph shall be subject to the applicable penalties included in §§ 278.6(e) (2) through (6) for the sale of ineligible items. Only those firms for which a permanent disqualification for trafficking took effect on or after October 1, 1988, are eligible for a civil money penalty in lieu of permanent disqualification for trafficking, except that firms that have been disqualified but are awaiting a judicial review decision are eligible for a civil money penalty in lieu of a permanent disqualification. In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following criteria:

Criterion 1. The firm shall have developed an effective compliance policy as specified in § 278.6(i)(1); and

Criterion 2. The firm shall establish that both its compliance policy and program were

in operation at the location where the violation(s) occurred *prior* to the occurrence of violations cited in the charge letter sent to the firm; and

Criterion 3. The firm had developed and instituted an effective personnel training program as specified in §278.6(i)(2); and

Criterion 4. Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations; or it is only the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations by the firm. Upon the second occasion of trafficking involvement by any member of firm management uncovered during a subsequent investigation, a firm shall not be eligible for a civil money penalty in lieu of permanent disqualification. Notwithstanding the above provision, if trafficking violations consisted of the sale of firearms, ammunition, explosives or controlled substances, as defined in 21 U.S.C. §802, and such trafficking was conducted by the ownership or management of the firm, the firm shall not be eligible for a civil money penalty in lieu of permanent disqualification. For purposes of this section, a person is considered to be part of firm management if that individual has substantial supervisory responsibilities with regard to directing the activities and work assignments of store employees. Such supervisory responsibilities shall include the authority to hire employees for the store or to terminate the employment of individuals working for the store.

(1) *Compliance policy standards.* As specified in Criterion 1 above, in determining whether a firm has established an effective policy to prevent violations, FNS shall consider written and dated statements of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with this part 278 of current FSP regulations and current FSP policy on the proper acceptance and handling of food coupons. As required by Criterion 2, such policy statements shall be considered only if documentation is supplied which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation. In addition, in evaluating the effectiveness of the firm's policy and program to ensure FSP compliance and to prevent FSP violations, FNS may consider the following:

(i) Documentation reflecting the development and/or operation of a policy to terminate the employment of any firm employee found violating FSP regulations;

(ii) Documentation of the development and/or continued operation of firm policy and procedures resulting in appropriate corrective action following complaints of FSP violations or irregularities committed by firm personnel;

(iii) Documentation of the development and/or continued operation of procedures for internal review of firm employees' compliance with FSP regulations;

(iv) The nature and scope of the violations charged against the firm;

(v) Any record of previous firm violations under the same ownership; and

(vi) Any other information the firm may present to FNS for consideration.

(2) *Compliance training program standards.* As prescribed in Criterion 3 above, the firm shall have developed and implemented an effective training program for all managers and employees on the acceptance and handling of food coupons in accordance with this part 278. A firm which seeks a civil money penalty in lieu of a permanent disqualification shall document its training activity by submitting to FNS its dated training curricula and records of dates training sessions were conducted; a record of dates of employment of firm personnel; and contemporaneous documentation of the participation of the violating employee(s) in initial and any follow-up training held prior to the violation(s). FNS shall consider a training program effective if it meets or is otherwise equivalent to the following standards:

(i) Training for all managers and employees whose work brings them into contact with food stamps or who are assigned to a location where food stamps are accepted, handled or processed shall be conducted within one month of the institution of the compliance policy under Criterion 1 above. Employees hired subsequent to the institution of the compliance policy shall be trained within one month of employment. All employees shall be trained periodically thereafter;

(ii) Training shall be designed to establish a level of competence that assures compliance with Program requirements as included in this part 278;

(iii) Written materials, which may include FNS publications and program regulations that are available to all authorized firms, are used in the training program. Training materials shall clearly state that the following acts are prohibited and are in violation of the Food Stamp Act and regulations: the exchange of food coupons, ATP cards or other program access devices for cash; and, in exchange for coupons, the sale of firearms, ammunition, explosives or controlled substances, as the term is defined in section 802 of title 21, United States Code.

(j) *Amount of civil money penalty in lieu of permanent disqualification for trafficking.* A civil money penalty assessed in accordance with § 278.6(i) shall not exceed $20,000 for each violation and shall not exceed $40,000 for all violations occurring during a single investigation. FNS shall determine the amount of the civil money penalty as follows:

(1) Determine the firm's average monthly redemptions for the 12-month period ending with the month immediately preceding the month during which the firm was charged with violations;

(2) Multiply the average monthly redemption figure by 10 percent;

(3) For the first trafficking offense by a firm, multiply the product obtained in § 278.6(j)(2) by 60 if the largest amount of food coupons, ATP cards, or other benefit instruments involved in a single trafficking transaction had a face value of $99 or less. If the face value of coupons, ATP cards or other benefit instruments involved in the largest single trafficking transaction was $100 or more, the amount of the product obtained in this paragraph shall be doubled;

(4) For a second trafficking offense by a firm, multiply the product obtained in § 278.6(j)(2) by 120 if the largest amount of food coupons, ATP cards, or other benefit instruments involved in a single trafficking transaction had a face value of $99 or less and the same firm has once before been sanctioned for trafficking in food coupons, ATP cards, or other benefit instruments. If the face value of food coupons, ATP cards, or other benefit instruments involved in the largest single trafficking transaction was $100 or more, the amount of the product obtained in this paragraph shall be doubled; and

(5) If a third trafficking offense is committed by the firm, the firm shall not be eligible for a civil money penalty in lieu of disqualification.

(k) *Payment of civil money penalty in lieu of a permanent disqualification for trafficking.* Payment of the full amount of the civil money penalty in lieu of permanent disqualification for trafficking shall be made within 30 days of the date the final determination was received by the firm. If payment is not made within the prescribed period, the right to the civil money penalty in lieu of a permanent disqualification is forfeited and disqualification shall become effective immediately.

(l) *Fines for the acceptance of loose coupons.* FNS may impose a fine against any retail food store or wholesale food concern that accepts coupons that are not accompanied by the corresponding book cover, other than the denomination of coupons used for making change as specified in § 278.2(d) or coupons accepted from homeless meal providers as specified in § 278.2(c). The fine to be assessed against a firm found to be accepting loose coupons shall be $500 per investigation *plus* an amount equal to double the face value of each loose coupon accepted, and may be assessed and collected in addition to any fiscal claim established by FNS. The fine shall be paid in full within 30 days of the firm's receipt of FNS' notification to pay the fine. The Attorney General of the United States may institute judicial action in any court of competent jurisdiction against the store or concern to collect the fine. FNS may withdraw the authorization of the store, as well as other authorized locations of a multi-unit firm which are under the same ownership, for failure to pay such a fine as specified under § 278.1(k). FNS may deny the authorization of any firm that has failed to pay such fines as specified under § 278.1(j).

(m) *Fines for unauthorized third parties that accept food stamps.* FNS may impose a fine against any individual, sole proprietorship, partnership, corporation or other legal entity not approved by FNS to accept and redeem food coupons for any violation of the provisions

of the Food Stamp Act or the program regulations, including violations involving the acceptance of coupons. The fine shall be $1,000 for each violation *plus* an amount equal to three times the face value of the illegally accepted food coupons. The fine shall be paid in full within 30 days of the individual's or legal entity's receipt of FNS' notification to pay the fine. The Attorney General of the United States may institute judicial action in any court of competent jurisdiction against the person to collect the fine. FNS may withdraw the authorization of any firm that is under the same ownership as an unauthorized firm that has failed to pay such a fine, as specified under § 278.1(k). FNS may deny authorization to any firm that has failed to pay such a fine, as specified under § 278.1(j).

(n) *Review of determination.* The determination of FNS shall be final and not subject to further administrative or judicial review unless a written request for review is filed within the period stated in § 279.5 of this chapter.

Notwithstanding the above, any FNS determination made on the basis of paragraph (e)(8) of this section shall not be subject to further administrative or judicial review.

(o) *Delivery of notice.* The delivery by certified mail or personal service of any notice required of FNS by this part will constitute notice to the addressee of its contents.

[Amdt. 136, 43 FR 43274, Sept. 22, 1978, as amended by Amdt. 236, 47 FR 56471, Dec. 17, 1982; Amdt. 236, 49 FR 22057, May 25, 1984; Amdt. 258, 49 FR 28393, July 12, 1984; Amdt. 286, 52 FR 7558, Mar. 11, 1987; Amdt. 280, 52 FR 13222, Apr. 22, 1987; Amdt. 311, 54 FR 18645, May 2, 1989; Amdt. 323, 55 FR 31812, Aug. 6, 1990; Amdt. 344, 56 FR 54778, Oct. 23, 1991; Amdt. 334, 57 FR 3912, Feb. 3, 1992; Amdt. 354, 59 FR 27434, May 27, 1994; 62 FR 40928, July 31, 1997; 64 FR 23172, Apr. 30, 1999; Amdt. 391, 66 FR 2800, Jan. 12, 2001]

§ 278.7 Determination and disposition of claims—retail food stores and wholesale food concerns.

(a) *Claims against violators.* FNS may establish and pursue claims against firms or other entities which have accepted or redeemed coupons in violation of the Food Stamp Act or this part regardless of whether the firms or entities are authorized to accept food stamps. If a firm fails to pay a claim, FNS may collect the claim by offsetting against amounts due the firm on redemption of other coupons or by deducting the amounts due from bonds posted by firms in compliance with the provisions of § 278.1(b)(4). FNS shall deny an application for authorization or reauthorization by a firm which has failed to pay a claim.

(b) *Forfeiture of a collateral bond.* If FNS establishes a claim against an authorized firm which has previously been sanctioned, collection of the claim may be through total or partial forfeiture of the collateral bond. If FNS determines that forfeiture is required for collection of the claim, FNS shall take one or more of the following actions, as appropriate.

(1) Determine the amount of the bond to be forfeited on the basis of the loss to the Government through violations of the act, and this part, as detailed in a letter of charges to the firm;

(2) Send written notification by certified mail-return receipt requested to the firm and the bonding agent, of FNS' determination regarding forfeiture of all or a specified part of the collateral bond, and the reasons for the forfeiture;

(3) Advise the firm and the bonding agent of the firm's right to administrative review of the claim determination;

(4) Advise the firm and the bonding agent that if payment of the current claim is not received directly from the firm, FNS shall obtain full payment through forfeiture of the bond;

(5) Proceed with collection on the bond for the amount forfeited if a request for review is not filed by the firm within the period established in § 279.5, or if such review is unsuccessful; and

(6) Upon the expiration of time permitted for the filing of a request for administratve and/or judicial review, deposit the bond in a Federal Reserve Bank account or in the Treasury Account, General. If FNS requires only a portion of the face value of the bond to satisfy a claim, the entire bond will be negotiated, and the remaining amount returned to the firm.

(c) *Coupons accepted without authorization.* (1) The FNS officer in charge may approve the redemption under

§ 278.4 of coupons accepted by firms before the receipt of an authorization card from FNS if the following conditions exist:

(i) The coupons were received in accordance with the requirements of this part governing acceptance of coupons except the requirement that the firm be authorized before acceptance;

(ii) The coupons were accepted by the firm in good faith, and without intent to circumvent this part; and

(iii) The firm receives authorization to participate in the program.

(2) Firms seeking approval to redeem coupons accepted without authorization shall present a written application for approval to the local FNS field office. This application shall be accompanied by a written statement signed by the firm of all the facts about the acceptance of the coupons. The statement shall also include a certification that the coupons were accepted in good faith, and without any intent to circumvent this part.

(d) *Burned or mutilated coupons.* FNS may redeem burned or mutilated coupons only to the extent that the Bureau of Engraving and Printing of the United States Treasury Department can determine the value of the coupons. The firm presenting burned or mutilated coupons for redemption shall submit the coupons to the local FNS field office with a properly filled-out redemption certificate. In the section of the redemption certificate for entering the amount of coupons to be redeemed, an estimate of the value of the burned or mutilated coupons submitted for redemption shall be entered if the exact value of the coupons is unknown. The phrase ''Deputy Administrator for Fiscal Management, FNS, USDA,'' should be entered in the section of the redemption certificate for entering the name and address of the insured financial institution or wholesaler.

(e) *Old series coupons.* FNS may redeem the old series food coupons issued in 50-cent, 2-dollar, and 5-dollar denominations when they are presented for redemption. Firms presenting the coupons for redemption shall submit the coupons to the local FNS field office with a properly completed redemption certificate and a written statement, signed by a representative of the firm, detailing the circumstances of the acceptance of the coupons.

(f) *Denials of claims brought by authorized firms against FNS.* If a claim brought by a firm against FNS under this section is denied in whole or in part, notification of this action shall be sent to the firm by certified mail or personal service. If the firm is aggrieved by this action, it may seek administrative review as provided in § 278.8.

(g) *Lost or stolen coupons.* FNS may not be held liable for claims from retail food stores, meal services, or wholesale food concerns for lost or stolen coupons.

[Amdt. 136, 43 FR 43274, Sept. 22, 1978, as amended by Amdt. 258, 49 FR 28393, July 12, 1984; Amdt. 257, 49 FR 32538, Aug. 15, 1984; Amdt. 262, 49 FR 50598, Dec. 31, 1984]

§ 278.8 Administrative review—retail food stores and wholesale food concerns.

(a) *Requesting review.* A food retailer or wholesale food concern aggrieved by administrative action under §§ 278.1, 278.6 or 278.7 may, within the period stated in § 279.5 of this chapter, file a written request for review of the administrative action with the review officer. However, disqualification actions taken against firms in accordance with § 278.6(e)(8) shall not be subject to administrative or judicial review. On receipt of the request for review, the questioned administrative action shall be stayed pending disposition of the request for review by the review officer, except in the case of a permanent disqualification as specified in § 278.6(e)(1). A disqualification for failure to pay a civil money penalty shall not be subject to administrative review.

(b) *Addressing the request.* The request for review shall be filed with the Director, Administrative Review Division, U.S. Department of Agriculture, Food and Nutrition Service, Room 304, 3101 Park Center Drive, Alexandria, Virginia 22302.

(c) *Review procedure.* The procedure for food stamp reviews in published in part 279 and is available upon request from the Director, Administrative Review Division.

[Amdt. 236, 49 FR 22058, May 25, 1984, as amended at 64 FR 23174, Apr. 30, 1999]

§ 278.9 Implementation of amendments relating to the participation of retail food stores, wholesale food concerns and insured financial institutions.

(a) *Amendment 224*. Retail food stores shall have signs posted as required by this amendment no later than 30 days after distribution of the signs by FNS.

(b) *Amendment 257*. With the exception of the provisions in § 278.5 requiring redeeming financial institutions to verify that coupons are supported by redemption certificates, the revisions to part 278 shall be effective September 14, 1984. Redeeming financial institutions shall begin verifying coupon deposits as required by § 278.5 in accordance with the schedule determined by the Federal Reserve Board. Insured financial institutions shall adhere to preexisting requirements for handling redemption certificates (at 7 CFR 278.5(a)) until their Federal Reserve District implements the procedures contained in this final rule. FNS shall not be liable for any losses of coupons in transit to Federal Reserve Banks or as a result of a burglary or robbery of an insured financial institution which occur after September 14, 1984.

(c) *Amendment 267*. The federally insured credit unions authorized to redeem food stamps under this amendment may begin accepting food stamps for redemption not later than March 27, 1986.

(d) The program changes of *Amendment 272* at § 278.5(a) (1) and (3) are effective upon publication of the amendment. Financial institutions must implement the provisions no later than April 21, 1986.

(e) *Amendment No. 286*. The provisions for part 278 of *Amendment No. 286* were effective March 11, 1987 for purposes of submitting applications for authorization to accept food stamps. For all other purposes, the effective date was April 1, 1987.

(f) *Amendment No. 280*. The provisions for part 271 and §§ 278.1(r) and 278.6(f) of No. 280 are effective retroactively to April 1, 1987. The provision for § 278.1(o) is effective May 22, 1987.

(g) *Amendment No. 304*. The technical amendment for part 278 of *Amendment No. 304* was effective August 1, 1988.

(h) *Amendment No. 323*. The program changes made to § 278.6 by this amendment are retroactively effective October 1, 1988.

(i) *Amendment No. 334*. The program changes made to § 278.1 and § 278.6 by this amendment are effective February 1, 1992. The program changes made to § 271.2 and § 271.5 by this amendment are retroactively effective to November 28, 1990, as specified in Pub. L. No. 101–624.

(j) *Amendment No. 354*. The program changes made to § 271.2 and § 278.6 by this amendment are effective October 1, 1993.

(k) *Amendment No. 331*. The program changes made to §§ 271.2 and 278.5 by this amendment are effective December 22, 1994.

(l) *Amendment No. 335*. Expanded authority to use and disclose information about firms participating in the FSP under CFR 278.1(r) for currently authorized firms is effective and will be implemented beginning February 25, 1997 but not before 60-days after the date of notices to such firms, notifying them of the changes. The only exception to the above is that such disclosure of information shall not apply to firms that are withdrawn or are disqualified from FSP participation prior to implementation, unless such firms participate in the FSP at a future date subsequent to the implementation date.

(m) *Amendment No. 383*. The program changes made to § 278.1 by this amendment are effective September 29, 2000.

[Amdt. 136, 43 FR 43274, Sept. 22, 1978]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 278.9, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 278.10 [Reserved]

PART 279—ADMINISTRATIVE AND JUDICIAL REVIEW—FOOD RETAILERS AND FOOD WHOLESALERS

Subpart A—Administrative Review—General

Sec.

279.1 Scope and purpose.
279.2 Administrative review officer.
279.3 Authority and jurisdiction.
279.4 Rules of procedure.

Subpart B—Rules of Procedure

279.5 Manner of filing requests for review.
279.6 Content of request for review.
279.7 Action upon receipt of a request for review.
279.8 Determination of the administrative review officer.
279.9 Legal advice and extensions of time.

Subpart C—Judicial Review

279.10 Judicial review.
279.11 Implementation of amendments relating to administrative and judicial review.

AUTHORITY: 7 U.S.C. 2011–2036.

SOURCE: Amdt. 136, 43 FR 43279, Sept. 22, 1978, unless otherwise noted.

Subpart A—Administrative Review—General

§ 279.1 Scope and purpose.

Subpart A sets forth the procedure for the designation of the administrative review officers and the authority and jurisdiction of those officers. Subpart B states the rules of procedure to be followed in the filing and disposition of the requests for review provided for in § 278.8. Subpart C concerns the rights of food retailers and food wholesalers to judicial review of the final determinations of the administrative review officer.

[Amdt. 136, 43 FR 43279, Sept. 22, 1978, as amended by Amdt. 356, 59 FR 29714, June 9, 1994]

§ 279.2 Administrative review officer.

(a) *Designation of review officers.* The Administrator, FNS, shall designate one or more persons to act as administrative review officers.

(b) *Assigning cases to review officers.* The officers shall serve for periods which the Administrator, FNS, shall determine. Changes in designations and additional designations may be made from time to time at the discretion of the Administrator, FNS. When more than one administrative review officer has been designated, requests for review will be assigned for handling to individual administrative review officers by a person designated by the Administrator, FNS. The names of the administrative review officers shall be on file in the Office of the Administrator, FNS.

[Amdt. 136, 43 FR 43279, Sept. 22, 1978, as amended by Amdt. 356, 59 FR 29714, June 9, 1994]

§ 279.3 Authority and jurisdiction.

(a) *Jurisdiction.* An administrative review officer shall act for the Department on requests for review filed by firms aggrieved by any of the following actions:

(1) Denial of an application or withdrawal of authorization to participate in the program under § 278.1;

(2) Imposition of a fine under §§ 278.6(l) or 278.6(m) of this chapter or disqualification from participation in the program or imposition of a civil money penalty under § 278.6 of this chapter, except for disqualification actions imposed under § 278.6(e)(8) of this chapter;

(3) Denial of all or part of any claim asserted by a firm against FNS under § 278.7 (c), (d), or (e);

(4) Assertion of a claim under § 278.7(a); or

(5) Forfeiture of part or all of a collateral bond under § 278.1, if the request for review is made by the authorized firm. The administrative review officer shall not accept requests for review made by a bonding company or agent.

(b) *Authority.* The determination of the administrative review officer shall be the final administrative determination of the Department, subject, however, to judicial review under section 14 of the Food Stamp Act and subpart C of this part.

[Amdt. 136, 43 FR 43279, Sept. 22, 1978, as amended by Amdt. 258, 49 FR 28393, July 12, 1984; Amdt. 257, 49 FR 32538, Aug. 15, 1984; Amdt. 262, 49 FR 50598, Dec. 31, 1984; Amdt. 334, 57 FR 3913, Feb. 3, 1992; Amdt. 356, 59 FR 29714, June 9, 1994; Amdt. 364, 61 FR 54320, Oct. 17, 1996; 64 FR 23174, Apr. 30, 1999]

§ 279.4 Rules of procedure.

Rules of procedure for the orderly filing and disposition of requests for review of firms submitted in accordance with § 279.5 are issued in subpart B of this part. The Administrator, FNS, may later issue amendments to any rules of procedure which are appropriate.

Subpart B—Rules of Procedure

§279.5 Manner of filing requests for review.

(a) *Addressing requests for review.* Requests for review submitted by firms shall be mailed to or filed with Director, Administrative Review Division, U.S. Department of Agriculture, Food and Nutrition Service, Room 304, 3101 Park Center Drive, Alexandria, Virginia 22302.

(b) *Content of requests.* Requests for review shall be in writing and shall state the name and business address of the firm involved, and the name, address and position with the firm of the person who signed the request. The request shall be signed by the owner of the firm, an officer or partner of the firm, or by counsel, and need not be under oath.

(c) *Time limit for requesting review.* A request for review shall be filed with the Director, Administrative Review Division, within 10 days of the date of delivery of the notice of the action for which review is requested. For purposes of determining whether a filing date is timely:

(1) The filing date shall be the postmark date of the request, or equivalent if the written request is filed by a means other than mail;

(2) In computing the 10 day period, the day of delivery of the notice of the action for which review is requested may not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday. In that case, the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. As used in this paragraph, ''legal holiday'' includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day designated as a holiday by the President or the Congress of the United States.

[Amdt. 136, 43 FR 43279, Sept. 22, 1978, as amended by Amdt. 236, 49 FR 22058, May 25, 1984]

§279.6 Content of request for review.

(a) *Identifying the request.* Requests for review shall clearly identify the administrative action from which the review is requested. This identification shall include the date of the letter or other written communication notifying the firm of the administrative action, the name and title of the person who signed the letter or other communication, and whether the action under appeal concerns a denial of an application or a withdrawal of authorization to participate, a disqualification from further participation, a civil money penalty, or a denial of all or any part of a claim or a fine.

(b) *Supporting the request.* The request shall include information in support of the request showing the grounds on which review is being sought, or shall state that supporting information will be filed in writing at a later date. In the latter case, the review officer shall notify the firm of the date by which the information must be filed. The firm requesting review may ask for an opportunity to appear before the review officer in person. However, any information submitted in person shall, if directed by the review officer, be put in writing by the firm and filed with the review officer within a period which the review officer shall specify.

[Amdt. 136, 43 FR 43279, Sept. 22, 1978, as amended by Amdt. 236, 49 FR 22058, May 25, 1984; Amdt. 334, 57 FR 3913, Feb. 3, 1992]

§279.7 Action upon receipt of a request for review.

(a) *Holding action.* Upon receipt of a request for review of administrative action, the review officer shall notify the appropriate FNS regional office, in writing, of the action under review, and shall direct that the administrative action be held in abeyance until the review officer has made a determination. However, in cases of permanent disqualification under §278.6(e)(1) of this chapter, the administrative action shall not be held in abeyance pending such a review determination. If the disqualification is reversed through administrative or judicial review, the Secretary shall not be held liable for the value of any sales lost during the disqualification period. If the administrative action in question involves a denial of approval of an application to participate in the program, a denial of a claim brought by a firm

against FNS, or the forfeiture of a collateral bond, the review officer shall direct that the firm not be approved for participation, not be paid any part of the disputed claim, or not be reimbursed for any bond forfeiture, until the review officer has made a determination. In any case, notice to the appropriate FNS office shall be accompanied by a copy of the request filed by the firm.

(b) *Filing supporting information.* If the request filed by the firm includes a request for an opportunity to file written information in support of its position at a later date, the administrative review officer shall promptly notify the firm of the date by which the information shall be filed. If the firm fails to file any information in support of its position by the designated date, the information submitted with the original request shall be considered to be the only information submitted by the firm. In that case, if no information in support of the firm's position was submitted with the original request, the action of the appropriate FNS office shall be final.

(c) *Failure to meet with review officer.* If the firm filing the request for review asks to appear before the administrative review officer in person, the review officer shall promptly notify the firm of the date, time and place set for the appearance. If the firm fails to appear before the administrative review officer as specified, any written information timely submitted in accordance with this section shall be considered to be the only information submitted by the firm.

(d) *Basis for regional office determination.* The administrative review officer shall require the appropriate FNS regional office to promptly submit, in writing, all information which was the basis for the administrative action for which the review has been requested.

[Amdt. 136, 43 FR 43279, Sept. 22, 1978, as amended by Amdt. 236, 49 FR 22059, May 25, 1984; Amdt. 258, 49 FR 28393, July 12, 1984; 49 FR 29769, July 24, 1984; Amdt. 356, 59 FR 29714, June 9, 1994; 64 FR 23174, Apr. 30, 1999]

§ 279.8 Determination of the administrative review officer.

(a) *Basis for review officer determination.* The administrative review officer shall make a determination based upon:

(1) The information submitted by the appropriate FNS office;

(2) Information submitted by the firm in support of its position; and

(3) Any additional information, in writing, obtained by the review officer from any other person having relevant information.

(b) *Review of denial of application or withdrawal of approval.* In the case of a request for review of a denial of an application or withdrawal of approval to participate in the program, the determination of the administrative review officer shall sustain the action under review or shall direct that the firm be approved for participation.

(c) *Review of disqualification or civil money penalty or fine.* In the case of a request for review of action disqualifying a firm from participation in the program or assessing a civil money penalty or fine against the firm, the determination of the administrative review officer shall sustain the action under review or specify a shorter period of disqualification or a reduced civil money penalty or fine, direct that an official warning letter be issued to the firm in lieu of any period of disqualification or civil money penalty or fine, or direct that no administrative action be taken. The administrative review officer may change a disqualification of a firm selling a substantial variety of staple foods to a civil money penalty if the review officer receives information that the disqualification would cause a hardship to participating households because there are no other firms in the area selling as large a variety of staple food items at comparable prices, and this information was not available to the appropriate FNS office when the appropriate FNS office made its determination to disqualify the firm. In such a case, the administrative review officer, before he/she makes a determination, shall provide the information to the appropriate FNS office, which shall report to the administrative review officer whether the new information warrants a civil money penalty in lieu of disqualification. If the administrative review officer determines that a civil money penalty in lieu of a disqualification is warranted,

the review officer shall determine the amount of the penalty in accordance with § 278.6.

(d) *Review of denial of claim.* In the case of a request for review of a denial of all or part of a claim of a firm, the determination of the administrative review officer shall sustain the action under review or shall specify the amount of the claim to be paid by FNS.

(e) *Notice of review officer determination.* The administrative review officer shall notify the firm of the determination by certified mail. The notification shall be sent to the representative of the firm who filed the request for review.

(f) *Notifying the appropriate FNS office.* The administrative review officer shall send a copy of the notification to the firm to the appropriate FNS office, which shall take any action which may be necessary to comply with the determination of the review officer.

(g) *Effective date.* The determination of the administrative review officer shall take effect 30 days after the date of delivery of the determination to the firm.

[Amdt. 136, 43 FR 43279, Sept. 22, 1978, as amended by Amdt. 334, 57 FR 3913, Feb. 3, 1992; Amdt. 356, 59 FR 29714, June 9, 1994]

§ 279.9 Legal advice and extensions of time.

(a) *Advice from Office of the General Counsel.* If any request for review involves any doubtful questions of law, the administrative review officer shall obtain the advice of the Department's Office of the General Counsel.

(b) *Extensions of time.* Upon timely written request to the administrative review officer by the firm requesting the review, the administrative review officer may grant extensions of time if, in the review officer's discretion, additional time is required for the firm to fully present information in support of its position. However, no extensions may be made in the time allowed for the filing of a request for review.

[Amdt. 136, 43 FR 43279, Sept. 22, 1978, as amended by Amdt. 356, 59 FR 29714, June 9, 1994]

Subpart C—Judicial Review

§ 279.10 Judicial review.

(a) *Filing for judicial review.* Except for firms disqualified from the program in accordance with § 278.6(e)(8) of this chapter, a firm aggrieved by the determination of the administrative review officer may obtain judicial review of the determination by filing a complaint against the United States in the U.S. district court for the district in which the owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. The complaint must be filed within 30 days after the date of delivery or service upon the firm of the notice of determination of the administrative review officer in accordance with § 279.8(e); otherwise the determination shall be final.

(b) *Summons and complaint.* Service of the summons and complaint in any such action shall be made in accordance with the rules of civil procedure for the U.S. district courts. The copy of the summons and complaint required by the rules to be served on the officer or agency whose order is being attacked shall be sent by registered or certified mail to the person in charge of the applicable regional office of FNS.

(c) *Trial de novo.* The suit in the U.S. district court or in the State court, as the case may be, shall be a trial de novo by the court in which the court shall determine the validity of the questioned administrative action. If the court determines that the administrative action is invalid, it shall enter a judgment or order which it determines is in accordance with the law and the evidence.

(d) *Stay of action.* During the pendency of any judicial review, or any appeal therefrom, the administrative action under review shall remain in force unless the firm makes a timely application to the court and after hearing thereon, the court stays the administrative action after a showing that irreparable injury will occur absent a stay and that the firm is likely to prevail on the merits of the case. However, permanent disqualification actions taken in accordance with § 278.6(e)(1) of this chapter shall not be subject to

such a stay of administrative action. If the disqualification action is reversed through administrative or judicial review, the Secretary shall not be liable for the value of any sales lost during the disqualification period.

[Amdt. 136, 43 FR 43279, Sept. 22, 1978, as amended by Amdt. 274, 51 FR 18752, May 21, 1986; Amdt. 356, 59 FR 29714, June 9, 1994; 64 FR 23174, Apr. 30, 1999]

§ 279.11 Implementation of amendments relating to administrative and judicial review.

(a) *Amendment No. 257.* The program change to § 279.3(a)(4) shall be effective September 14, 1984.

(b) *Amendment No. 274.* The program change of *Amendment No. 274* at § 279.10(d) is effective retroactively to December 23, 1985.

(c) *Amendment No. 334.* The program changes made to part 279 by this amendment are effective February 1, 1992.

[Amdt. 257, 49 FR 32539, Aug. 15, 1984; Amdt. 262, 49 FR 50598, Dec. 31, 1984, as amended by Amdt. 274, 51 FR 18752, May 21, 1986; Amdt. 334, 57 FR 3913, Feb. 3, 1992]

PART 280—EMERGENCY FOOD ASSISTANCE FOR VICTIMS OF DISASTERS

AUTHORITY: 7 U.S.C. 2011–2036.

SOURCE: Amdt. 192, 46 FR 8922, Jan. 27, 1981, as amended at 56 FR 63617, Dec. 4, 1991.

EDITORIAL NOTE: OMB control numbers relating to this part 280 are contained in § 271.8.

§ 280.1 Interim disaster procedures.

The Secretary shall, after consultation with the official empowered to exercise the authority provided for by section 302(a) of the Disaster Relief Act of 1974, establish temporary emergency standards of eligibility for the duration of the emergency for households who are victims of a disaster which disrupts commercial channels of food distribution, if such households are in need of temporary food assistance and if commercial channels of food distribution have again become available to meet the temporary food needs of such households. Such standards as are prescribed for individual emergencies may be promulgated without regard to section 4(c) of this Act or the procedures set forth in section 553 of Title 5 of the United States Code. In addition to establishing temporary emergency standards of eligibility, the Secretary shall provide for emergency allotments to eligible households to replace food destroyed in a disaster. Such emergency allotments would be equal to the value of the food actually lost in such disaster but not greater than the applicable maximum monthly allotment for the household size.

PART 281—ADMINISTRATION OF THE FOOD STAMP PROGRAM ON INDIAN RESERVATIONS

Sec.
281.1 General purpose and scope.
281.2 Administration.
281.3 Determination of failure.
281.4 Determining Indian tribal organization capability.
281.5 Responsibilities of an Indian tribal organization designated as State agency.
281.6 Liabilities and sanctions.
281.7 Indian tribal organization failure.
281.8 Transfer of program administration.
281.9 Funding.
281.10 Appeals.

AUTHORITY: 7 U.S.C. 2011–2036.

SOURCE: 44 FR 35925, June 19, 1979, unless otherwise noted.

§ 281.1 General purpose and scope.

(a) These regulations govern the operation of the Food Stamp Program on Indian reservations either separately or concurrently with the Food distribution program. In order to assure that the Food Stamp Program is responsive to the needs of Indians on reservations, State agencies are required to consult with Indian tribal organizations about the implementation and operation of the Food Stamp Program on reservations. Also, under certain specified conditions Indian tribal organizations on reservations can administer the Food Stamp Program. The Act authorizes the Secretary to pay such amounts for administrative costs as are determined to be necessary for the effective operation of the Food Stamp Program on Indian reservations.

(b) The operation of the Food Stamp Program on Indian reservations is governed by all of the terms and conditions set forth in the Food Stamp Act

of 1977 as amended and the regulations of this chapter.

(c) Additionally, under no circumstances shall any household participate simultaneously in the Food Stamp Program and the Food Distribution Program. Policy governing this prohibition is found in §283.7(e).

§281.2 Administration.

(a) *Qualification.* (1) The appropriate ITO of an established Indian reservation will qualify for participation under the provisions of this part, when that ITO files an application which demonstrates the status of an area as an established reservation, unless FNS determines that such area(s) does not qualify as a reservation, as that term is defined in these regulations. For purposes of this part, established reservation means the geographically defined area(s) currently recognized and established by Federal or State treaty or by Federal statute whereby such geographically defined area(s) is set aside for the use of Indians. Where such established areas exist, the appropriate ITO is presumed to exercise governmental jurisdiction, unless otherwise determined by FNS:

(2) The appropriate ITO for other areas, in order to qualify as reservations for the provisions of this part, must show to FNS:

(i) That the ITO exercises governmental jurisdiction over a geographic area(s) which enjoys legal recognition from the Federal or a State government and is set aside for the use of Indians.

(ii) A clear and precise description of the boundaries of such geographic area(s).

(3) Otherwise qualified areas for which the responsible ITO has requested operation of the Food Distribution Program alone in accordance with §283.4, rather than concurrent operation with the Food Stamp Program, shall be exempt from the requirements of this part, and shall not be considered food stamp areas for any other purposes of this subchapter. Indian tribal households (households in which at least one adult member is recognized by the appropriate ITO as a tribal member) resident in these areas shall be ineligible for food stamp benefits. However, non-Indian tribal households resident in these areas may apply and be certified for food stamps at the State agency's certification office which would otherwise service the area. Otherwise qualified areas for which the responsible ITO has requested operation of the food distribution Program concurrently with the Food Stamp Program or areas within the reservation where FNS has determined that concurrent operation is necessary in accordance with §283.3(b)(2) shall be subject to all requirements of this part and subchapter.

(b) *State plan.* In addition to the public comment requirements in §272.2, the State agency shall submit for comment its service plans, and all other portions of the State plan that directly pertains to the operation of the Program for residents on the reservation to the responsible ITO for reservations that qualify under paragraph (a) of this section. The ITO shall have 30 days to provide comments in writing to the State agency. The State agency shall, if appropriate and to the extent practicable, incorporate into its plans any suggestions made by the ITO. Additionally, the State agency shall administer the Food Stamp Program in a manner that is responsive to the needs of the Indians on the reservation, as determined by ongoing consultation with the ITO and by other means, regarding such areas of program operation as project area designation, operating procedures, locations and hours of certification and issuance, staffing and corrective action plans. The State agency shall maintain records of consultations on State plans and ongoing consultations held with ITO's for review by FNS. FNS shall study these records as part of reviews in accord with §281.3 and Management Evaluation Reviews of the State agency.

(c) *Project area designation.* (1) An Indian reservation shall be designated as a separate project area or areas for the purpose of improving the accessibility of program services to Indians on the reservation unless:

(i) The State agency demonstrates to FNS that the size or population of the reservation does not warrant such designation;

(ii) The State agency demonstrates to FNS that the tribe can be adequately served by the existing or a planned project area because of the location of certification and issuance offices;

(iii) The State agency demonstrates to FNS that such designation would reduce the availability of certification and issuance offices; or

(iv) The State agency otherwise demonstrates to FNS that such designation would impair its Statewide administration of the Program.

(2) In the case where the Indian reservation boundaries cross State lines, the ITO and the appropriate State agencies may jointly request FNS approval that a single State agency administer the Food Stamp Program on all or part of the Indian reservation. A single agency of the State government would have to administer the Program under the same terms and conditions applied to all other political subdivisions within its jurisdiction. An ITO designated as a State agency pursuant to § 281.4(d) would have to administer the Program under the same terms and conditions on all areas of the reservation.

(d) *Contracts with an Indian tribal organization*. The State agency may contract program functions to an ITO. These functions include, but are not limited to, outreach, preparation of bilingual materials on issuance. The State agency may also use the ITO in prescreening, translations, interpretive services and other noncertification functions. The State agency shall not contract responsibility for certification activities such as interviews or eligibility determinations. In all cases, the State agency shall retain full responsibility for program administration.

[44 FR 35925, June 19, 1979, as amended by Amdt. 207, 47 FR 52338, Nov. 19, 1982]

§ 281.3 Determination of failure.

(a) *Request for determination of State government agency failure*. FNS shall examine State agency adminstration of the Food Stamp Program on all or part of a reservation when requested by the ITO, the State agency or at FNS' discretion. When FNS determines that a deficiency in a State agency operation of the Food Stamp Program on all or part of an Indian reservation may be serious enough to warrant a review, FNS shall advise the State agency and the ITO in writing of the alleged deficiencies and of its plans to conduct the review and document deficiencies, if any are found. Subsequent to October 1, 1979 FNS shall complete these reviews within 90 days from receipt of an ITO's or State agency's request except under unusual circumstances such as the receipt of a large number of simultaneous requests.

(b) *Review*—(1) *Content of the review for State agency performance*. The review shall be designed to determine whether or not the State agency is properly administering the Food Stamp Program on a specific reservation. When an agency of State government is administering the Program on a reservation, FNS shall as a part of the review consult with the ITO about the operation of the Program on the reservation. The review should, depending on the nature of the complaint, include but not be limited to, an analysis of some or all of the following data:

(i) The records of State agency consultation with the ITO required under § 281.2(a);

(ii) The estimated percentage of all eligible Indians on the reservation who are participating the Program;

(iii) The nature and extent of violations, if any, of the 30-day and other processing standards for Indians;

(iv) The percentage of errors made in determining eligibility and/or the amount of benefits overissued or underissued;

(v) Compliance with standards for location and hours of certification and issuance offices as required in § 272.5;

(vi) Compliance with bilingual requirements of this regulation, where appropriate;

(vii) Compliance with nondiscrimination requirements of this regulation;

(viii) Compliance with other significant program requirements;

(ix) Comparison with services provided in all other areas of the State; and

(x) Any other relevant information that becomes available during the

course of reviews including information received through contacts with the Indian tribe.

(2) *Finding of no or of minor deficiencies.* If after the review FNS determines either that deficiencies do not exist or that only minor deficiencies exist, FNS shall issue a report documenting its findings to both the State agency and the ITO and shall work closely with the State agency to achieve corrective action.

(c) *Formal warning.* After the review is completed, if FNS determines that major deficiencies exist, a formal warning shall be issued to the State, with a copy to the ITO. At a minimum, such warning shall indicate the State agency deficiencies and shall detail the basis upon which deficiencies were determined. The State shall have 30 days to respond with evidence that it is in compliance or to submit a corrective action proposal under part 276. If satisfactory compliance is achieved by the State agency on deficiencies cited in a formal warning, FNS shall notify the State, with a copy to the ITO, that the warning for those deficiences is satisfied.

(d) *Determination of failure and sanctions.* If at any time after the formal warning period, or during or after the corrective action period, FNS determines that major deficiencies still exist which the State agency has not satisfactorily addressed or is not satisfactorily addressing, FNS shall determine State failure and may impose appropriate Federal sanctions on the State agency as specified in part 276.

(e) *ITO operations.* If FNS has determined State failure and FNS has also determined that the ITO is capable of administering a Food Stamp Program in accordance with the terms and requirements for participating State agencies as established in the Act and regulations, then the ITO shall assume adminstration of the Food Stamp Program on the reservation. The State agency shall continue to administer the Food Stamp Program on the reservation until an effective termination and transition arrangement has been completed in accordance with § 281.8.

§ 281.4 Determining Indian tribal organization capability.

(a) *Determining capability of ITO.* If the ITO wishes to administer its own Food Stamp Program on the reservation FNS shall determine the ITO's potential capability for administering the Food Stamp Program in accordance with the criteria listed in § 281.4(b). FNS shall begin to evaluate the ITO's capability for all aspects of Food Stamp Program administration, allowing for fulfillment of that potential through necessary training and technical assistance, not later than the date of the issuance of the formal warning to the State agency.

(b) *ITO responsibility.* (1) The ITO must satisfy FNS that it is capable (if provided with any needed training and technical assistance) of administering the Food Stamp Program effectively and efficiently, and of complying with all provisions of the Food Stamp Act of 1977, as amended, and the regulations of this chapter, including provisions governing quality control procedures, fraud determinations, and establishment and collection of claims for both Indian and any non-Indian participants. The ITO shall provide FNS with the following information:

(i) *Operation of government programs.* The ITO shall provide FNS a list of all government programs that the ITO administers and has recently administered. FNS may ask the ITO to provide the names of appropriate officials of the government organizations having jurisdiction over these programs so FNS can obtain all relevant audits, GAO reports, program evaluations and any other documents pertaining to the effectiveness and efficiency of tribal administration of these programs. The ITO shall also provide FNS a list of its recent contractual responsibilities, if any, for the Food Stamp Program under § 281.2(b).

(ii) *Fiscal capabilities.* The ITO shall provide FNS documentation of its bookeeping and accounting procedures, including procedures in use for fiscal accountability under part 277 and for other government programs that the ITO administers.

(iii) *Projected certification and issuance facilities.* The ITO shall provide FNS with a description of the location of

projected certification and issuance facilities.

(iv) *Fraud hearings and claims.* The ITO shall provide FNS with a description of how it will pursue fraud hearings and claims against Indian and non-Indian participants.

(v) *Staffing.* The ITO shall provide FNS with sufficient information to determine that personnel who will be used in the certification process will be employed under standards equivalent to current standards for a Merit System of Personnel Administration or any standards later prescribed by the Office of Personnel Management under section 208 of the Intergovernmental Personnel Act of 1970.

(vi) *Civil rights assurance.* The ITO shall provide FNS an assurance that the ITO shall comply with Title VI of the Civil Rights Act of 1964 (Pub. L. 88–352), the Age Discrimination Act of 1975 (Pub. L. 94–135), the Rehabilitation Act of 1973 (Pub. L. 99–112), section 504), and section 11(c) of the Food Stamp Act of 1977 and all pertinent regulations or directives to the effect that no person in the United States shall, on the grounds of sex, race, color, age, political belief, religion, handicap, or national origin, be denied benefits or otherwise be subject to discrimination under the Food Stamp Program. Where appropriate, FNS shall consider the adequacy of measures taken by the ITO to ensure that there shall be no discrimination.

(2) Prior to the determination of ITO capability, FNS shall consult with other sources such as the Bureau of Indian Affairs (BIA) to obtain any information relevant to the capability determination.

(3) If it is determined by FNS, after consultation with other sources such as the BIA, that the ITO is not capable of operating an efficient and effective Food Stamp Program, the agency of the State government shall continue to operate the Program on the reservation in accordance with § 281.3.

(c) *Training and technical assistance.* Upon determining that the State agency has failed to properly administer the Food Stamp Program and that the ITO is potentially capable of operating an effective and efficient Food Stamp Program, FNS shall determine, based on information provided by the ITO and other sources such as BIA, the training and technical assistance which is necessary to assure efficient and effective program administration. FNS will assure that appropriate training and technical assistance is provided as expeditiously as possible prior to the ITO's assumption of the administration of the Food Stamp Program.

(d) *Assumption of duties.* When FNS is satisfied that the ITO has successfully completed (c) of this section, FNS shall designate the ITO as a State agency, contingent on the following:

(1) *State plans.* The ITO shall prepare and submit to FNS a Plan of Operation as provided in § 272.2. In completing the Plan of Operation the ITO shall affirm that it will comply with the Civil Rights assurances detailed in (b)(1)(vi) of this section.

(2) *Proposed budget.* As part of the Plan of Operation, the ITO shall annually submit to FNS a proposed statement which shall provide a summary of program information and amounts budgeted to carry out the various program functions. This information shall be submitted to FNS for approval prior to the commitment of any Federal funds for administrative costs for that year. FNS shall provide the ITO any technical assistance which is necessary to prepare this information.

(3) *Termination and transition arrangement.* An effective termination and transition arrangement shall be established as required in § 281.8.

§ 281.5 Responsibilities of an Indian tribal organization designated as State agency.

An ITO administering the Food Stamp Program on a reservation shall adhere to the Food Stamp Act of 1977, all subsequent amendments, and all regulations issued pursuant to that law in the same manner as any other State agency. The ITO may contract certain administrative functions to private organizations as provided in parts 274 and 277. The ITO may not, however, contract responsibility for certification activities such as interviews or eligibility determinations. The ITO shall retain full responsibility for program administration.

§ 281.6 Liabilities and sanctions.

An ITO administering the Food Stamp Program on a reservation is subject to the same liabilities and Federal sanctions as is any other State agency. FNS shall monitor administration of the Program and conduct reviews through the Performance Reporting System described in part 275. When necessary, warning procedures and other Federal sanctions prescribed in part 276 will be implemented.

§ 281.7 Indian tribal organization failure.

When Performance Reporting System reviews indicate that continuing deficiencies exist and corrective action proposals (including training and technical assistance to overcome these deficiencies), and/or appropriate sanctions have not, in the opinion of FNS, resulted in a sufficient degree of improvement, FNS will conduct a review to determine if the ITO has failed to properly administer the Food Stamp Program. FNS shall examine the relevant factors specified in § 281.3(b)(1) and shall follow the notification and determination procedures set forth in § 281.3 (c) and (d). If ITO failure is determined, FNS shall require the appropriate agency of the State government to resume administration of the Program on the reservation in accordance with an approved termination and transition arrangement.

§ 281.8 Transfer of program administration.

The transfer of program administration from an agency of the State government to an ITO pursuant to a determination of failure as provided for in § 281.3, or from an ITO to an agency of the State government pursuant to § 281.7, shall be contingent on the establishment of an effective termination and transition arrangement and an approved Plan of Operation from the State agency assuming program administration. Grant closeout procedures shall be followed in accordance with part 277. FNS shall approve the transition plan, monitor its implementation and resolve any issues which may arise during the transition and after the transfer of program administration.

§ 281.9 Funding.

(a) *Agency of State government*. From the funds available to carry out this provision beginning July 1, 1979, FNS may pay to each agency of State government administering a Food Stamp Program on a reservation, 75 percent of all approved administrative costs, such as: Certification, issuance, outreach, fair hearings and quality control, incurred on the reservation for residents of the reservation and approved by FNS to meet standards set by the 1977 Food Stamp Act. FNS may pay each agency of State government administering a Food Stamp Program on a reservation 75 percent of all approved administrative costs incurred off the reservation for activities begun after the effective date of these regulations that are primarily directed at providing better services for Indians on the reservation, such as hiring an interpreter or an Indian outreach worker, or moving a certification or issuance center closer to a reservation. The provisions of part 277 apply to any funds received under this section.

(b) *Indian tribal organization acting as State agency*. From the funds available to carry out the provisions of this part beginning October 1, 1979, FNS is authorized to pay to each ITO acting as a State agency and administering a Food Stamp Program on a reservation 75 percent of all administrative costs approved by FNS as needed for operation of a Food Stamp Program on a reservation. Any approval for payment of funds in excess of 75 percent must be based on compelling justification that such additional amounts are necessary for the effective operation of the Food Stamp Program on the reservation. The provisions of part 277 apply to any funds received under this section.

§ 281.10 Appeals.

(a) *Failure/capability*. (1) Any State agency or ITO may appeal the determination made by FNS on:

(i) Whether or not the reservation definition is met;

(ii) The failure or absence of failure of an agency of State government to properly administer the Food Stamp Program;

(iii) The capability or incapability of an ITO to administer the Food Stamp Program;

(iv) The failure of an ITO to properly administer the Food Stamp Program;

(v) The Federal matching percentage level of administrative funding made available by FNS. To prevail the State agency must show a compelling justification that additional funding is needed for the effective administration of the Program on the reservation.

(2) At the time FNS advises the State agency or ITO of its determination, FNS shall also advise the State agency or ITO of its right to appeal and, except for appeals of funding determinations, shall advise the State agency or ITO of its right to request either a meeting to present its position in person or a review of the record. On appeals of funding determinations, FNS shall advise the State agency or ITO that it may indicate if it wishes a meeting, however, FNS need schedule a meeting only if FNS determines a meeting is warranted to reach a proper adjudication of the matter. Otherwise, FNS shall review supportive information submitted by the State agency or ITO in paragraph (b)(2) of this section.

(b) *Procedures*—(1) *Time limit*. Any State agency or ITO which wants to appeal an initial FNS determination under paragraph (a) of this section must notify the Administrator of FNS, in writing within 15 days from the date of the determination and must advise FNS if it wishes a meeting or a review of the record.

(2) *Acknowledgment*. Within five days of receipt by the Administrator of FNS of a request for review, FNS shall provide the State agency or ITO by certified mail, return receipt requested, with a written acknowledgement of the request. The acknowledgment shall include the name and address of the official designated by the Administrator to review the appeal. The acknowledgment shall also notify the State agency or ITO that within ten day of receipt of the acknowledgment, the State agency or ITO shall submit written information in support of its position.

(3) *Scheduling a meeting*. If the Administrator, FNS, grants a meeting FNS shall advise the State agency or ITO by certified mail, return receipt requested, of the time, date and location of the meeting at least ten days in advance of the meeting. FNS shall schedule and conduct the meeting and make a decision within 60 days of the receipt of the information submitted in response to paragraph (b)(2) of this section.

(4) *Review*. If no meeting is conducted, the official designated by the Administrator, FNS, shall review information presented by a State agency or ITO which requests a review, and shall make a final determination in writing within 45 days of the receipt of the State agency's or ITO's information submitted in response to paragraph (b)(2) of this section setting forth in full the reasons for the determination.

(5) *Final decision*. The official's decision after a meeting or a review shall be final.

(c) *Funding and other sanctions*. Any State agency or ITO that wishes to appeal a funding determination made by FNS other than under (a)(5) of this section, or the application of a Federal sanction, shall follow the Administrative Review Procedures set forth in part 276.

PART 282—DEMONSTRATION, RESEARCH, AND EVALUATION PROJECTS

Sec.
282.1 Legislative authority and notice requirements.
282.2 Funding.

AUTHORITY: 7 U.S.C. 2011–2036.

SOURCE: Amdt. 134, 43 FR 54215, Nov. 21, 1978, unless otherwise noted.

§ 282.1 Legislative authority and notice requirements.

(a) *Legislative authority*. Section 17 of the Act authorizes the Secretary to conduct demonstration, research, and evaluation projects. In conducting such projects, the Secretary may waive all or part of the requirements of the Act and implementing regulations necessary to conduct such projects, except that no project, other than a project involving the payment of the average value of allotments by household size

in the form of cash to eligible households or a project conducted to test improved consistency or coordination between the food stamp employment and training program and the Job Opportunities and Basic Skills program under Title IV of the Social Security Act, may be undertaken which would lower or further restrict the established income and resource standards or benefit levels.

(b) *Notices*. At least 30 days prior to the initiation of a demonstration project, FNS shall publish a General Notice in the FEDERAL REGISTER if the demonstration project will likely have a significant impact on the public. The notice shall set forth the specific operational procedures and shall explain the basis and purpose of the demonstration project. If significant comments are received in response to this General Notice, the Department will take such action as may be appropriate prior to implementing the project. If the operational procedures contained in the General Notice described above are significantly changed because of comments, an amended General Notice will be published in the FEDERAL REGISTER at least 30 days prior to the initiation of the demonstration project, except where good cause exists supporting a shorter effective date. The explanation for the determination of good cause will be published with the amended General Notice. The amended General Notice will also explain the basis and purpose of the change.

[Amdt. 371, 61 FR 60012, Nov. 26, 1996]

§ 282.2 Funding.

Federal financial participation may be made available to demonstration, research, and evaluation projects awarded by FNS through grants and contracts. Funds may not be transferred from one project to another. FNS will pay all costs incurred during the project, up to the level established in the grant, or in the terms and conditions of the contract. FNS may grant time extensions of the project upon approval. Funding for additional costs is subject to existing Federal grant and contract procedures.

[Amdt. 371, 61 FR 60012, Nov. 26, 1996]

PART 283—APPEALS OF QUALITY CONTROL (''QC'') CLAIMS

Subpart A—General

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283.31 Review of the record.
283.32 ALJ's initial decision.

AUTHORITY: 7 U.S.C. 2011–2036.

SOURCE: Amdt. 348, 59 FR 34561, July 6, 1994, unless otherwise noted.

Subpart A—General

§ 283.1 Meaning of words.

As used in this part, words in the singular form shall be deemed to import the plural, and vice versa, as the case may require.

§ 283.2 Scope and applicability.

The rules of practice in this part, shall be applicable to appeals by State agencies of Food and Nutrition Service quality control (QC) claims for Fiscal Year (''FY'') 1986 and subsequent fiscal years pursuant to sections 14(a) and 16(c) of the Food Stamp Act of 1977, as amended, 7 U.S.C. 2023(a) and 2025(c).

§ 283.3 Definitions.

As used in this part, the terms as defined in the Food Stamp Act of 1977, as amended, 7 U.S.C. 2011–2032 (''Act''), and in the regulations, standards, instructions or orders issued thereunder, shall apply with equal force and effect. In addition, and except as may be provided otherwise in this section:

Administrator means the Administrator, Food and Nutrition Service, U.S. Department of Agriculture (''USDA'').

ALJ means any Administrative Law Judge in USDA appointed pursuant to 5 U.S.C. 3105 or detailed to the USDA pursuant to 5 U.S.C. 3344 and assigned to the appeal.

Appeal means the appeal to the ALJ.

Ex parte communication means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include procedural matters.

Filing. A pleading or other document allowed or required to be filed in accordance with this part shall be considered filed when postmarked, if mailed, or when received, if hand delivered.

FNS means the Food and Nutrition Service, USDA.

Hearing means that part of the appeal which involves the submission of evidence before the ALJ for the record in the appeal.

Hearing Clerk means the Hearing Clerk, USDA, Washington, DC 20250.

Judicial Officer means an official of the USDA delegated authority by the Secretary of Agriculture, pursuant to the Act of April 4, 1940 (7 U.S.C. 450c–459g) and Reorganization Plan No. 2 of 1953 (5 U.S.C. 1970 ed., Appendix, P. 550), as amended by Public Law 97–35, title I, sec. 125, 95 Stat. 357, 369 (1981) (7 U.S.C. 2201 note), to perform the adjudicating function involved (7 CFR 2.35(a)), or the Secretary of Agriculture if the authority so delegated is exercised by the Secretary.

OC claim means a claim made pursuant to 7 U.S.C. 2025(c).

Secretary means the Secretary of the USDA.

State agency means:

(1) The agency of State government, including the local offices thereof, which is responsible for the administration of the federally aided public assistance programs within the State, and in those States where such assistance programs are operated on a decentralized basis, it includes the counterpart local agencies which administer such assistance programs for the State agency; and

(2) The Indian tribal organization of any Indian tribe determined by the Secretary to be capable of effectively administering a Food Stamp Program in accordance with the Food Stamp Act of 1977, as amended, 7 U.S.C. 2011–2032.

Subpart B—Appeals of QC Claims of $50,000 or More

§ 283.4 Filing appeals for QC claims of $50,000 or more.

(a) *Time*. A State agency may appeal the bill for collection from FNS for a QC claim of $50,000 or more for a food stamp QC error rate in excess of the tolerance level. A State agency shall file a written notice of appeal, in accordance with this subpart, within 10 days of receipt of the bill for collection from FNS for a QC claim of $50,000 or more. The State agency may request an extension to the 10-day filing requirement in accordance with § 283.22(f). FNS shall issue the bill for collection by certified mail or personal service.

(b) *Exhaustion of administrative remedies*. The State agency must appeal the bill for collection to the ALJ, pursuant to this subpart, and exhaust the

available administrative remedies before filing suit in the Federal District Courts.

(c) *Filing*. The notice of appeal shall be filed with the Hearing Clerk in accordance with § 283.22(b).

(d) *Content of the notice*. (1) A notice of appeal, in order to be considered acceptable, must contain the following information:

(i) A brief and clear statement that it is an appeal from a QC claim of $50,000 or more identifying the period the claim covers, the date and amount of the bill for collection, and the date of receipt of the bill for collection;

(ii) Identification of the State agency as the appellant and FNS as the appellee;

(iii) A statement that the notice of appeal is filed pursuant to section 14(a) of the Food Stamp Act;

(iv) A copy of the bill for collection which constitutes the basis for the filing of the notice of appeal shall be attached to the notice.

(2) Failure to file an acceptable notice of appeal may result in a challenge by FNS to the notice, dismissal of the notice by the ALJ and a waiver of the opportunity for further appeal or review by the Judicial Officer unless the State agency pursues the options as discussed in §§ 283.17(d) and 283.20.

(e) *Receipt of notice of appeal and assignment of docket number*. Upon receipt of a notice of appeal, the Hearing Clerk shall assign the appeal a docket number. The Hearing Clerk shall:

(1) Send the State agency a letter which shall include the following information:

(i) Advice that the notice of appeal has been received and the date of receipt;

(ii) The docket number assigned to the appeal and instructions that all future communications related to the appeal shall reference the docket number, and;

(iii) Advice that the State agency must file and serve its appeal petition, as set forth in § 283.22, not later than 60 days after receiving a notice of the claim. Failure to file a timely appeal petition may result in a waiver of further appeal rights.

(2) Send FNS a copy of the notice of appeal and a copy of the letter to the State agency.

(f) *Stay of collection*. The filing of a timely notice of appeal shall automatically stay the action of FNS to collect the QC claim asserted against the State agency until a decision is reached on the acceptability of the appeal, and in the case of an acceptable appeal, until a final administrative determination has been issued. However, interest will accrue on the outstanding claim amount during the stay as provided in section 13(a)(1) of the Food Stamp Act of 1977, as amended (7 U.S.C. 2022(a)(1)).

(g) *Content of the appeal petition*. The appeal petition shall include:

(1) A brief statement of the allegations of fact and provisions of law that constitute the basis for the appeal including a statement as to whether a factual basis for good cause relief exists;

(2) The nature of the relief sought, and;

(3) A request for an oral hearing, if desired by the State agency. Failure to request an oral hearing will result in a forfeiture of the opportunity for such a hearing, except as provided in § 283.15(a).

(h) *FNS answer*. Upon service of the State agency appeal petition, FNS shall:

(1) File an answer, in accordance with § 283.6, not later than 60 days after the State agency submits its appeal petition and;

(2) Advise the Hearing Clerk if FNS wishes to have an oral hearing.

(i) *Oral hearing not requested*. If no oral hearing has been requested, the appeal shall proceed in accordance with the procedures set forth under subpart C of this part.

§ 283.5 Motion to dismiss.

(a) *Filing of motion to dismiss*. Prior to or at the same time as filing the answer, FNS may file a motion to dismiss. The appeal may be challenged on the basis that the notice of appeal was not filed within 10 days or as that time may have been extended by the ALJ, the appeal petition was not filed in accordance with § 283.4, or that the appeal petition is substantially incomplete

and could not be quickly and easily cured by amendment. The motion must be accompanied by clear and convincing proof of any of these factors alleged as grounds for dismissal.

(b) *Service of motion to dismiss.* FNS shall serve the State agency with a copy of the motion to dismiss. The State agency will have 10 days from date of service to submit objections to the motion.

(c) *Ruling on a motion to dismiss.* The ALJ will rule on the motion to dismiss before any further action proceeds on the basis of the merits of the appeal. The basis of the ruling will be clearly documented and will become part of the official record. If the ALJ denies the motion, FNS shall file its answer in accordance with § 283.6 within 60 days of service of the ALJ's ruling, unless there is a motion for reconsideration filed pursuant to § 283.17(d) or review by the Judicial Officer is sought pursuant to § 283.20.

(d) *Dismissal of appeal.* If the ALJ finds the basis for the motion to have merit, the appeal may be dismissed. The initial decision of the ALJ shall become final and effective 30 days after service in accordance with § 283.17(c)(2) unless either party pursues the options as discussed in §§ 283.17(d) and 283.20.

(e) *Waiver.* Failure to file for dismissal of the appeal by the time the answer is required to be filed will result in waiver of the right to request dismissal.

§ 283.6 Answer.

(a) *Filing and service.* Not later than 60 days after the State agency submits its appeal petition, or within 60 days following service of a ruling in accordance with § 283.5, FNS shall file an answer signed by the FNS Administrator or authorized representative or the attorney of record in the appeal. The attorney may file an appearance of record prior to or simultaneously with the filing of the answer.

(b) *Contents.* The answer shall clearly admit, deny, or explain each of the allegations of the appeal petition and shall:

(1) Clearly set forth any defense asserted by FNS; or

(2) State that FNS admits all the facts alleged in the appeal petition; or

(3) State that FNS admits the jurisdictional allegations of the appeal petition and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(c) *Default.* Failure to file a timely answer shall be deemed, for purposes of the appeal, an admission of the allegations in the appeal petition and failure to deny or otherwise respond to an allegation of the appeal petition shall be deemed for purposes of the appeal, an admission of said allegation, unless FNS and the State agency have agreed to a consent decision pursuant to § 283.10.

§ 283.7 Procedures upon failure to file an answer.

The failure by FNS to file an answer shall constitute a waiver of hearing. Upon such failure to file, the State agency shall file a proposed decision, along with a motion for adoption thereof, both of which shall be served upon FNS by the State agency. Within 10 days after service of such motion and proposed decision, FNS may file objections thereto. If the ALJ finds that meritorious objections have been filed, the State agency's motion shall be denied with supporting reasons. If meritorious objections are not filed, the ALJ shall issue an initial decision without further procedures or hearing. Copies of the initial decision or denial of the State agency's motion shall be served on each of the parties and shall be included as part of the official record. Where the decision as proposed by the State agency is adopted as the ALJ's initial decision, such decision of the ALJ shall become final and effective 30 days after service in accordance with § 283.17(c)(2) unless reconsideration or review by the Judicial Officer is sought as discussed in §§ 283.17(d) and 283.20.

§ 283.8 Rebuttal or amendment of appeal or answer.

(a) Not later than 30 days after FNS submits an answer in accordance with § 283.6, the State agency may submit rebuttal evidence.

(b) At any time prior to the filing of a motion for a hearing pursuant to § 283.15(b), the appeal petition or the

answer may be amended without prior authorization by the ALJ. Thereafter, such an amendment may only be made as authorized by the ALJ upon a showing of cause.

§ 283.9 Withdrawal of appeal.

At any time before the ALJ files an initial decision, the State agency may withdraw its appeal and agree to pay the full amount of the claim. By withdrawing an appeal, the State agency waives all opportunity to appeal or seek further administrative or judicial review on the claim or related matters.

§ 283.10 Consent decision.

At any time before the ALJ files an initial decision, FNS and the State agency may agree to entry of a consent decision. Such decision shall be filed in the form of a decision signed by the parties with appropriate space for signature by the ALJ and shall contain an admission of at least the jurisdictional facts, consent to the issuance of the agreed decision without further procedure and such other admissions or statements as may be agreed between the parties. The ALJ shall enter such decision without further procedures, unless an error is apparent on the face of the document. Such decision shall be final and shall take effect 30 days after the date of the delivery or service of such decision and is not subject to further administrative or judicial.

§ 283.11 Prehearing conference and procedure.

(a) *Time and place*. The ALJ shall direct the parties or their counsel to participate in a prehearing conference at any reasonable time prior to the hearing. The prehearing conference shall be held at the U.S. Department of Agriculture, Washington, DC. Reasonable notice of the time, place of the prehearing conference and if personal attendance will be necessary shall be given. Prehearing conferences may be conducted telephonically. The ALJ shall order each of the parties to furnish at the prehearing conference or at another time prior to the hearing the following:

(1) An outline of the appeal or defense;

(2) The legal theories upon which the party will rely;

(3) Copies of or a list of documents that the party anticipates relying upon at the hearing; and

(4) A list of witnesses who will testify on behalf of the party. At the discretion of the party furnishing such list of witnesses, the names of the witnesses need not be furnished if they are otherwise identified in some meaningful way, such as a short statement of the type of evidence they will offer.

(b) *Procedures*. The ALJ shall not order any of the foregoing procedures that a party can show are inappropriate or unwarranted under the circumstances of the particular appeal.

(c) *Matters to be considered*. At the prehearing conference, the following matters shall be considered:

(1) The simplification of issues;

(2) The necessity of amendments to pleadings;

(3) The possibility of obtaining stipulations of facts and of the authenticity, accuracy, and admissibility of documents, which will avoid unnecessary proof;

(4) The limitation of the number of expert or other witnesses;

(5) Negotiation, compromise, or settlement of issues;

(6) The exchange of copies of proposed exhibits;

(7) The nature of and the date by which discovery, as provided in § 283.12, must be completed;

(8) The identification of documents or matters of which official notice may be requested;

(9) A schedule to be followed by the parties for the completion of the actions decided at the conference; and

(10) Such other matters as may expedite and aid in the disposition of the appeal.

(d) *Reporting*. (1) A prehearing conference will not be stenographically reported unless so directed by the ALJ.

(2) Any party to the appeal may, upon motion, request the ALJ to allow for a stenographic transcript of a prehearing conference. The party requesting the transcript shall bear the transcription cost of producing the transcript and the duplication cost for one transcript provided to the ALJ and to the other parties to the appeal.

(e) *Order*. Actions taken as a result of a conference shall be reduced to an appropriate written order, unless the ALJ concludes that a stenographic report, if available, shall suffice, or, in the event the conference takes place within 7 days of the beginning of the hearing, the ALJ elects to make a statement on the record at the hearing summarizing the actions taken.

§ 283.12 Discovery.

(a) *Dispositions*.—(1) *Motion for taking deposition*. Only upon a finding by the ALJ that a deposition is necessary to preserve testimony as provided in this subparagraph, upon the motion of a party to the appeal, the ALJ may, at any time after the filing of the answer, order the taking of testimony by deposition. The motion shall set forth:

(i) The name and address of the proposed deponent;

(ii) The name and address of the person (referred to hereafter in this section as the ''officer'') qualified under the regulations in this part to take depositions, before whom the proposed examination is to be made;

(iii) The proposed time and place of the examination, which shall be at least 15 days after the date of service of the motion; and

(iv) The reasons why such deposition should be taken, which shall be solely for the purpose of eliciting testimony which otherwise might not be available at the time of the hearing, for use as provided in accordance with paragraph (a)(7) of this section.

(2) *ALJ's order for taking depositions*. If the ALJ finds that the testimony may not otherwise be available at the hearing, the taking of the deposition may be ordered. The order shall be served upon the parties, and shall state:

(i) The time and place of the examination;

(ii) The name of the officer before whom the examination is to be made; and

(iii) The name of the deponent. The officer and the time and place need not be the same as those suggested in the motion.

(3) *Qualifications of officer*. The deposition shall be made before an officer authorized by the law of the United States or by the law of the place of the examination to administer oaths, or before an officer authorized by the Secretary to administer oaths.

(4) *Procedure on examination*. (i) The deponent shall be examined under oath or affirmation and shall be subject to cross-examination. Objections to questions or documents shall be in the short form, stating the grounds of objections relied upon. The questions propounded, together with all objections made (but not including argument or debate), shall be recorded verbatim. In lieu of oral examination, parties may transmit written questions to the officer prior to the examination and the officer shall propound such questions to the deponent.

(ii) The party taking the deposition shall arrange for the examination of the witness either by oral examination, or by written questions upon agreement of the parties or as directed by the ALJ. If the examination is conducted by means of written questions, copies of the questions shall be served upon the other party to the appeal and filed with the officer at least 10 days prior to the date set for the examination unless otherwise agreed, and the other party may serve cross questions and file them with the officer at any time prior to the time of the examination.

(iii) The parties may stipulate in writing or the ALJ may upon motion order that a deposition be taken by telephone. A deposition taken by telephone is to be taken at the place where the deponent is to answer questions propounded to the deponent.

(iv) The parties may stipulate in writing or the ALJ may upon motion order that a deposition be recorded by other than stenographic means. The stipulation or the order shall designate the manner of recording, preserving and filing of the deposition, and may include other provisions to assure that the recorded testimony is accurate and trustworthy.

(5) *Certification by the officer*. The officer shall certify on the deposition that the deponent was duly sworn and that the deposition is a true record of the deponent's testimony. The officer shall then securely seal the deposition, together with one copy thereof (unless there are more than two parties in the

appeal, in which case there should be another copy for each additional party), in an envelope and mail the same by registered or certified mail to the Hearing Clerk.

(6) *Corrections to the transcript.* (i) At any time prior to the hearing, any party may file a motion proposing corrections to the transcript of the deposition.

(ii) Unless a party files such a motion in the manner prescribed, the transcript shall be presumed to be a true, correct, and complete transcript of the testimony given in the deposition proceeding and to contain an accurate description or reference to all exhibits in connection therewith, and shall be deemed to be certified correct without further procedure.

(iii) At any time prior to the use of the deposition in accordance with paragraph (a)(7) of this section and after consideration of any objections filed thereto, the ALJ may issue an order making any corrections in the transcript which the ALJ finds are warranted, and these corrections shall be entered onto the original transcript by the Hearing Clerk (without obscuring the original text).

(7) *Use of depositions.* A deposition ordered and taken in accordance with the provisions of this section may be used in an appeal under these rules if the ALJ finds that the evidence is otherwise admissible and

(i) That the witness is deceased;

(ii) That the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment;

(iii) That the party offering the deposition has endeavored to procure the attendance of the witness by subpoena, but has been unable to do so; or

(iv) That such exceptional circumstances exist as to make it desirable, in the interests of justice, to allow the deposition to be used. If the party upon whose motion the deposition was taken refuses to offer it in evidence, any other party may offer the deposition or any part thereof in evidence. If only part of a deposition is offered in evidence by a party, any other party may require the introduction of any other part which is relevant be considered with the part introduced, and any party may introduce any other parts.

(b) *Interrogatories, requests for admissions and requests for production of documents*—(1) *Interrogatories.* A party may submit written interrogatories to any other party to an appeal. The time for submitting and responding to written interrogatories shall be set by the ALJ at the pre-hearing conference, but in no event shall the time for response be less than 20 days from the date of service or within such time as determined upon motion to the ALJ. The number of interrogatories submitted by each party shall not exceed twenty-five questions including subparts, unless additional interrogatories are authorized by the ALJ. Each interrogatory should be answered separately and fully in writing, unless it is objected to, in which event the reasons for objection should be stated in lieu of an answer. The answers are to be signed under penalty of perjury by the person making them. Objections shall be signed by the attorney of record in the appeal or by the responding party's authorized representative.

(2) *Request for admissions.* A party may submit a written request for admission of the truth of any matters relevant to the appeal to any other party to the appeal. The time for submitting a written request for admission shall be set by the ALJ at the pre-hearing conference. The number of admissions contained in a request submitted by a party shall not exceed twenty-five unless additional admissions are authorized by the ALJ. The matter is admitted unless, within 20 days after service thereof, or within such time as determined upon motion to the ALJ, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter signed by the party, counsel or designated representative. If objection is made, the reasons therefor should be stated. The answer should specifically deny the matter or set forth in detail why the answering party cannot truthfully admit or deny the matter. An answering party may not give lack of information or knowledge as a reason for the failure to admit or deny unless it is stated that reasonable inquiry has been

made and that the information known or readily obtainable is insufficient to enable the party to admit or deny. A party who considers that a matter for which an admission has been requested presents a genuine issue for hearing may not, on that ground alone, object to the request; the party may deny the matter or set forth reasons why the matter cannot be admitted or denied.

(3) *Request for production of documents.* (i) Any party may serve upon any other party to the appeal a request for production of documents which are in the possession or control of the party upon whom the request is served. The time for service and response to such a request shall be set by the ALJ at the pre-hearing conference. Upon payment of fees for search and duplication of documents, any party to the appeal may obtain copies of such documents.

(ii) Parties may request production of any documents regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. Grounds for objection will not exist if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(iii) If such documents include privileged information or information the disclosure of which is proscribed by the Food Stamp Act of 1977, as amended, such documents need not be produced.

(c) *Supplementation of response.* A party who knows or later learns that a response is incorrect is under a duty to correct such response as soon as possible. A party who has responded to a request for discovery with a response that was complete when made is under a duty to supplement the response to include information thereafter acquired. A party is under a duty to supplement responses with respect to any question directly addressed to:

(1) The identity and location of persons having knowledge of discoverable matters, and

(2) The identity of each person expected to be called as an expert witness at the hearing, the subject matter on which such expert(s) is expected to testify, and the substance of the testimony.

(d) *Frequency and use of discovery.* The ALJ shall limit, upon motion of a party, the frequency or extent of discovery if the ALJ determines that:

(1) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(2) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(3) The discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

(e) *Protective orders*—(1) *Request for protective order.* A party served with such a request may file a motion for a protective order before the date on which a response to the discovery request is due, stating why discovery should be limited or should not be required.

(2) *Issuance of protective order.* In issuing a protective order, the ALJ may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense, including one or more of the following:

(i) That discovery not be had;

(ii) That the discovery may be had only through a method of discovery other than that requested;

(iii) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(iv) That discovery be conducted with no one present except persons designated by the ALJ; and

(v) That the contents of discovery or evidence be sealed.

(f) *Failure to respond to discovery*—(1) *Motions to compel.* If a deponent fails to respond or gives an evasive or incomplete answer to a question propounded at a deposition pursuant to paragraph (a) of this section or a party fails to respond or gives evasive or incomplete answers to written interrogatories or admissions, or fails to respond, in full or in part, to a request for production of documents served pursuant to paragraph (b) of this section, the party seeking discovery may apply for an

order compelling an answer by filing and serving a motion on all parties and deponents.

(2) *Filing motion to compel.* (i) Such motion must be filed within 20 days following the service of the unresponsive answer upon deposition or within 20 days after expiration of the period allowed for answers to interrogatories or production of documents.

(ii) On matters related to an oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

(3) *Responding to motion to compel.* A response to the motion may be filed in accordance with § 283.18(d).

(g) *Decision of the ALJ.* (1) The ALJ may grant a motion to compel production or deny a motion for a protective order only if the ALJ finds that the discovery sought is necessary for the expeditious, fair, and reasonable consideration of the issues; it is not unduly costly or burdensome; it will not unduly delay the proceeding; and the information sought is not privileged.

(2) The initial decision of the ALJ regarding the motion to compel the production of privileged documents or the motion for a protective order shall become final and effective 10 days after service unless either party pursues the options as discussed in §§ 283.17(d) and 283.20.

(h) *Failure to comply with an order.* (1) If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by order of the ALJ, such refusal may subject the refusing party to proceedings to compel compliance with the ALJ's order in the appropriate United States district court.

(2) If any party or other person refuses to obey an order made under this section requiring an answer to designated questions or production of documents, the ALJ may order that the matters regarding which questions were asked or the contents of the document or documents or any other designated facts should be taken to be established for the purposes of the proceeding in accordance with the claim of the party obtaining the order.

(i) *Postponements or delays.* No hearing, proceeding or other matter under this part shall be postponed or otherwise delayed pending the response or resolution of issues pertaining to a request for information pursuant to the Freedom of Information Act, 5 U.S.C. 552.

§ 283.13 Subpoenas.

(a) *Issuance of subpoenas.* The attendance and testimony of witnesses and the production of documentary evidence from any place in the United States on behalf of any party to the appeal may be required by subpoena at the designated place of hearing. Except for cause shown, requests for subpoenas shall be filed at least 15 days prior to the date of the hearing. Subpoenas shall be issued by the ALJ, over the facsimile signature of the Secretary, upon a reasonable showing by the applicant of the grounds, necessity and reasonable scope thereof.

(b) *Service of subpoenas.* (1) When the ALJ issues a subpoena under this section, the party who requested such subpoena shall serve all other parties with a copy of the subpoena, notice of the names and addresses of the individuals subpoenaed and specify any documents required to be produced.

(2) Subpoenas may be served:

(i) By a U.S. Marshal or deputy marshal,

(ii) By any other person who is not less than 18 years of age, or

(iii) By registering and mailing a copy of the subpoena addressed to the person to be served at the last known principal place of business or residence.

(3) Proof of service may be made:

(i) By the return of service on the subpoena by the U.S. Marshal or deputy marshal,

(ii) If served by an employee of the Department, by a certificate stating that he personally served the subpoena upon the person named therein,

(iii) If served by another person, by an affidavit of such person stating that he personally served the subpoena upon the person named therein, or

(iv) If service was by registered mail, by an affidavit made by the person mailing the subpoena that it was mailed as provided herein and by the signed return post-office receipt. Where the subpoena is issued on behalf of the Secretary and service is by mail, the

return receipt without an affidavit or certificate of mailing shall be sufficient proof of service.

(4) In making personal service, the person making service shall leave a copy of the subpoena with the person subpoenaed, or, if such person is not immediately available, with any other responsible person authorized to accept service residing or employed at the place of residence or business of the person subpoenaed.

(5) The original of the subpoena, bearing or accompanied by the required proof of service, shall be returned to the official who issued the same. The party at whose request the subpoena is issued shall be responsible for the service thereof.

§ 283.14 Fees of witnesses.

Witnesses summoned under these rules shall be paid the same fees and expenses that are paid witnesses in the courts of the United States. Fees shall be paid by the party at whose request the witness appears. Current Federal, State, or local government employees shall not be eligible to receive witness fees.

§ 283.15 Procedure for hearing.

(a) *Request for hearing.* A party may request a hearing on the facts by including such request in its Appeal Petition or Answer, whichever is appropriate. Failure to request a hearing within the time specified shall constitute a waiver of the opportunity for such a hearing, except as provided for under § 283.4(i). In the event FNS denies any material facts and fails to request a hearing, the matter may be set down for hearing on motion of the State agency or upon the ALJ's own motion.

(b) *Time and place.* If any material issue of fact is joined by the pleadings, the ALJ, upon motion of any party, stating that the matter is ready for hearing, shall set a time for the hearing, as soon as feasible thereafter, with due regard for the public interest and the convenience and necessity of the State agency and FNS. The hearing shall be held at the U.S. Department of Agriculture, Washington, DC. Upon a showing of unusual or extraordinary circumstances, the ALJ may order that the hearing be held at another location. The ALJ shall file a notice stating the time and place of the hearing. If any change in the time of the hearing is made, the ALJ shall file a notice of such change, which notice shall be served upon the parties, unless it is made during the course of an oral hearing and made a part of the transcript or actual notice given to the parties.

(c) *Appearances.* The parties may appear in person or by attorney of record in the appeal or by any other designated representative. Any person who appears as attorney or as a party's designated representative must conform to the standards of ethical conduct required by practitioners before the courts of the United States.

(d) *Exchange of witness and rebuttal witness lists, statements and exhibits.* (1) Witness and rebuttal witness lists, copies of prior statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements or depositions that a party intends to offer in lieu of live testimony in accordance with § 283.12(a)(7), shall be exchanged at least 15 days in advance of the hearing or at such other time as may be set by the ALJ.

(2) A witness whose name does not appear on the witness list shall not be permitted to testify and exhibits which were not provided to the opposing party as provided above shall not be admitted into evidence at the hearing absent a showing of cause and as authorized by the ALJ.

(e) *Deparment of attorney or representative.* (1) Whenever an ALJ finds that a person acting as attorney or designated representative for any party to the appeal is guilty of unethical or contumacious conduct in, or in connection with an appeal, the ALJ may order that such person be precluded from further acting as attorney or representative in the appeal. Review by the Judicial Officer may be taken on any such order, but no appeal of the QC claim shall be delayed or suspended pending disposition of the debarment review by the Judicial Officer. Provided, however, that the ALJ shall suspend the appeal of the QC claim for a reasonable time for the purpose of enabling the party to obtain another attorney or representative.

(2) Whenever it is found, after notice and opportunity for hearing, that a person who is acting or who has acted as attorney or representative for another person in any proceeding before the U.S. Department of Agriculture, is unfit to act as such counsel because of such unethical or contumacious conduct, such person will be precluded from acting as the attorney or representative in any or all proceedings before the Department as found to be appropriate.

(f) *Failure to appear*. (1) If FNS or the State agency, after being duly notified, fails to appear at the hearing without cause, that party shall be deemed to have waived the opportunity for an oral hearing and to have admitted any facts which may be presented at the hearing. Such failure by either party shall also constitute an admission of all the material allegations of fact contained in any pleadings submitted by the other party. The party who appears shall have the option of whether to follow the procedure under § 283.7 or to present evidence, in whole or in part, in the form of declarations or by oral testimony before the ALJ.

(2) Failure to appear at a hearing shall not be deemed to be a waiver of the right to be served with a copy of the ALJ's initial decision, to file a motion for reconsideration pursuant to § 283.17(d) or to seek review by the Judicial Officer in accordance with § 283.20.

(g) *Order of proceeding*. Except as may be decided otherwise by the ALJ, FNS shall proceed first at the hearing. FNS has the burden of proving, by a preponderance of the evidence, the QC claim against the State agency for a QC error rate in excess of the tolerance level. The State agency will proceed second and must prove, by a preponderance of the evidence, the facts upon which it bases its appeal.

(h) *Evidence*. (1) The testimony of witnesses at a hearing shall be on oath or affirmation and subject to cross-examination.

(2) Upon a finding of cause, the ALJ may order that any witness be examined separately and apart from all other witnesses except those who may be parties to the appeal or whose presence is shown by a party to be essential to the presentation of the party's cause.

(3) After a witness called by either party has testified on direct examination, any other party may request and obtain the production of any statement, or part thereof, of such witness in the possession of the opposing party which relates to the subject matter as to which the witness has testified. Such production shall be made according to the procedures and subject to the definitions and limitations prescribed in the Jencks Act (18 U.S.C. 3500).

(4) Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded by order of the ALJ insofar as practicable.

(i) *Inclusion in the record*. At the oral hearing or as ordered by the ALJ, depositions to the extent deemed admissible, written interrogatories, written requests for admission and respective responses may be offered in evidence by the party at whose instance they were taken. If not offered by such party, they may be offered in whole or in part by any other party. If only part of a deposition, written interrogatory, written request for admission or response thereto is offered in evidence by a party, any other party may require that all of it, which is relevant to the part introduced, be offered, and any party may introduce any other parts. Such depositions, written interrogatories, written requests for admission and respective responses thereto shall be admissible in evidence subject to such objections as to relevancy, materiality or competency of the testimony as were noted at the time of their taking or are made at the time they are offered in evidence.

(j) *Objections*. (1) If a party objects to the admission of any evidence or to the limitation of the scope of any examination or cross examination or to any other ruling by the ALJ, the party shall state briefly the grounds of such objection, whereupon an automatic exception will follow if the objection is overruled by the ALJ.

(2) Only objections made before the ALJ may be subsequently relied upon on review by the Judicial Officer.

(k) *Exhibits.* Four copies of each exhibit shall be filed with the ALJ. However, where there are more than two parties in the appeal, an additional copy shall be filed for each additional party. A true copy of an exhibit may be substituted for the original.

(l) *Official records or documents.* An official government record or document or entry therein, if admissible for any purpose, shall be admissible in evidence without the production of the person who made or prepared the same, and shall be prima facie evidence of the relevant facts stated therein. Such record or document shall be evidenced by an official publication thereof or by a copy certified by a person having legal authority to make such certification.

(m) *Official notice.* Official notice shall be taken of such matters as are judicially noticed by the courts of the United States and of any other matter of technical, scientific, or commercial fact of established character. Provided, that the parties shall be given adequate opportunity to show that such facts are erroneously noticed.

(n) *Offer of proof.* Whenever evidence is excluded by the ALJ, the party offering such evidence may make an offer of proof, which shall be included in the transcript. The offer of proof shall consist of a brief statement describing the evidence excluded. If the evidence consists of a brief oral statement, it shall be included in the transcript in toto. If the evidence consists of a document or other exhibit, it shall be marked for identification and inserted in the hearing record. In either event, if the Judicial Officer, upon review, determines that the ALJ's ruling excluding the evidence was erroneous and prejudicial, the evidence shall be considered a part of the transcript and hearing record. If the Judicial Officer determines that the ALJ's ruling excluding the evidence was erroneous and prejudicial, and that it would inappropriate to have such evidence considered a part of the hearing record without reopening the hearing, the Judicial Officer may direct that the hearing be reopened to permit the taking of such evidence or for any other purpose in connection with the excluded evidence.

(o) *Transcript.* Hearings shall be recorded and transcribed verbatim. The party requesting the hearing shall bear the transcription cost of producing the transcript and the duplication cost for one transcript provided to the ALJ and to the other parties to the appeal.

§ 283.16 Consolidation of issues.

Similar issues involved in appeals by two or more State agencies may be consolidated upon motion by the State agencies, FNS, or at the discretion of the ALJ if it is decided that consolidation would help to promote administrative efficiency.

(a) *Disposition of consolidated issues.* If the ALJ orders consolidation, the issues consolidated will be considered first. If a hearing has been requested by any of the parties that have had issues consolidated, arguments on the consolidated issues will be heard before arguments on dissimilar issues. The ALJ will take the information into consideration along with arguments on other issues in preparing initial decisions for QC appeals in which some issues have been consolidated.

(b) *Initial decision.* (1) If the ALJ decides the evidence and arguments by the State agencies on the consolidated issues cannot be overcome by the evidence presented by FNS and are sufficient to grant the relief requested by a State agency or all State agencies in which the issue is involved, the ALJ shall prepare an initial decision as provided in § 283.17(c).

(2) FNS may file a motion for reconsideration pursuant to § 283.17(d) or seek review by the Judicial Officer in accordance with § 283.20.

§ 283.17 Post-hearing procedure.

(a) *Corrections to transcript.* (1) At any time, but not later than the time fixed for filing proposed findings of fact, conclusions of law, order and briefs, any party may file a motion proposing corrections to the transcript.

(2) Unless a party files such a motion in the matter prescribed, the transcript shall be presumed to be a true, correct, and complete transcript of the testimony given at the hearing and to contain an accurate description or reference to all exhibits received in evidence and made part of the hearing

record. The transcript shall be deemed to be certified without further action by the ALJ.

(3) At any time prior to the filing of the ALJ's initial decision and after consideration of any objections filed as to the transcript, the ALJ may issue an order making any corrections in the transcript that the ALJ finds are warranted. Such corrections shall be entered into the original transcript by the Hearing Clerk (without obscuring the original text).

(b) *Proposed findings of fact, conclusions of law, order, and briefs.* The parties may file proposed findings of fact, conclusions of law and orders based solely upon the record and on officially noticed matters, and briefs in support thereof. briefs may be filed at the discretion of the ALJ. The ALJ shall announce at the hearing the time within which these documents may be filed.

(c) *ALJ's initial decision.* (1) The ALJ shall decide the appeal not later than 60 days after receipt of rebuttal evidence submitted by the State agency or, if the State agency does not submit rebuttal evidence, not later than 90 days after the State agency submits the notice of appeal and evidence in support of the appeal. In accordance with § 283.22(f), the ALJ may, upon motion or *sua sponte*, extend this deadline for cause shown.

(2) The ALJ shall prepare, upon the basis of the record and officially noticed matters, and shall file, an initial decision which shall include a decision on a request for good cause relief, a copy of which shall be served upon each of the parties.

(3) Such initial decision shall be considered final for purposes of judicial review without further proceedings, unless there is a motion for reconsideration filed pursuant to § 283.17(d) or review by the Judicial Officer is sought pursuant to § 283.20.

(4) If no motion for reconsideration or review by the Judicial Officer is filed, the initial decision shall constitute the final notice of determination for purposes of judicial review and shall become effective 30 day after service.

(d) *Motion for reconsideration.* (1) Except as provided in paragraph (d)(4) of this section, any party may file a motion for reconsideration of the initial decision within 30 days of service of the initial decision. If served by mail, the time for filing a motion for reconsideration will be 5 days longer in accordance with § 283.22.

(2) Every such motion must set forth the mattes claimed to have been erroneously decided and the basis of the alleged errors. Such motion shall be accompanied by a supporting brief.

(3) Responses to such motions shall be filed in accordance with § 283.18(d).

(4) No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.

(5) The ALJ may dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

(6) If the ALJ denies a motion for reconsideration, the initial decision shall constitute the final notice of determination for purposes of judicial review and shall become effective 30 days after service unless review by the Judicial Officer is sought in accordance with § 283.20.

(7) If the ALJ issues a revised initial decision, that decision shall constitute the final notice of determination for purposes of judicial review and shall become effective 30 days after service unless review by the Judicial Officer is sought in accordance with § 283.20.

§ 283.18 Motions and requests.

(a) *Filing.* All motions and requests shall be filed with the Hearing Clerk, and served upon all the parties by the moving or requesting party, except motions and requests made on the record during the oral hearing. The ALJ assigned to the appeal or the Chief Judge shall rule upon all motions and requests filed or made prior to seeking review of the ALJ's initial decision pursuant to § 283.20, except motions directly relating to such review. Thereafter, the Judicial Officer shall rule on any motions and requests as well as the motions directly relating to the review of the ALJ's initial decision.

(b) *Time for filing.* Any motion or request may be filed at any time, except that:

(1) Motions to dismiss pursuant to § 283.5 must be filed within the time allowed for filing an answer; and

(2) Motions for reconsideration must be filed within 30 days of service of the ALJ's initial decision pursuant to § 283.17(d).

(c) *Contents.* All written motions and requests shall state the particular order, ruling, or action desired and the grounds therefor.

(d) *Response to motions and requests.* Within 10 days after service of any written motion or request or within such shorter or longer period as may be fixed by the ALJ or Judicial Officer, an opposing party may file a response to the motion or request. The moving party shall have no right to reply to the response; however, the ALJ or Judicial Officer may order that a reply be filed.

(e) *Certification to the Judicial Officer.* The submission or certification of any motion, request, objection, or other question to the Judicial Officer prior to the seeking of review pursuant to § 283.20 shall be made by and in the discretion of the ALJ. The ALJ may either rule upon or certify the motion, request, objection, or other question to the Judicial Officer, but not both.

§ 283.19 ALJs.

(a) *Assignment.* No ALJ shall be assigned to serve in any appeal who:

(1) Has any pecuniary interest in any matter or business involved in the appeal,

(2) Is related by blood or marriage to any party in the appeal, or

(3) Has any conflict of interest which might impair the ALJ's objectivity in the appeal.

(b) *Disqualification of ALJ.* (1) Any party to the appeal may, by motion, request that the ALJ withdraw from the appeal on one or more of the grounds set out in paragraph (a) of this section. Such motion shall set forth with particularity the alleged grounds for disqualification. The ALJ may then either rule upon or certify the motion to the Judicial Officer, but not both.

(2) The ALJ may withdraw from any appeal for any reason deemed by the ALJ to be disqualifying.

(c) *Powers.* (1) Subject to review as provided elsewhere in this part, the ALJ, in any assigned appeal, shall have the power to:

(i) Rule upon motions and requests;

(ii) Set the time and place of a prehearing conference and the time of the hearing, adjourn the hearing from time to time, and change the time of the hearing;

(iii) Administer oaths and affirmations;

(iv) Regulate the scope and timing of discovery;

(v) Issue and enforce subpoenas as authorized under 7 U.S.C. 2023(a) and these rules;

(vi) Summon and examine witnesses and receive evidence at the hearing;

(vii) Appoint expert witnesses in accordance with the provisions of Rule 706 of the Federal Rules of Evidence;

(viii) Admit or exclude evidence;

(ix) Hear oral argument on facts or law;

(x) Upon motion of a party, decide cases, in whole or in part, by non-oral hearing procedures under subpart C of this part where there is no disputed material issue of fact;

(xi) Perform all acts and take all measures necessary for the maintenance of order, including the exclusion of contumacious counsel or other persons;

(xii) Take all other actions authorized under the Act and these rules, including the extension of time upon motion of a party or *sua sponte* for cause shown.

(2) The ALJ may not rule upon the validity of Federal statutes or regulations.

(d) *Who may act in the absence of the ALJ.* In case of the absence of the ALJ or the ALJ's inability to act, the powers and duties to be performed by the ALJ under these rules of practice in connection with any assigned appeal may, without abatement of the appeal, unless otherwise directed by the Chief Judge, be assigned to any other ALJ.

§ 283.20 Review by the Judicial Officer.

(a) *Filing of review petition.* (1) Within 30 days after service of the ALJ's initial decision, or any part thereof, any party may seek Judicial Officer review of such decision by filing a review petition with the Hearing Clerk. However, if another party files a motion for reconsideration under § 283.17(d), consideration of the review petition shall be

stayed automatically pending resolution of the motion for reconsideration. If a motion for reconsideration is timely filed, a review petition may be filed within 30 days after the ALJ denies the motion or issues a revised initial decision, whichever applies.

(2) As provided in § 283.15(h), objections made before the ALJ regarding evidence or regarding a limitation on examination or cross-examination or other ruling may be relied upon in a Judicial Officer review.

(3) Each issue set forth in the review petition, and the arguments thereon, shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations or authorities being relied upon in support thereof. A brief in support may be filed simultaneously with the review petition.

(b) *Response to review petition.* Within 30 days after service of a copy of a review petition and any brief in support thereof, any other party to the proceedings may file a response in support of or in opposition to the review petition and in such response any relevant issue, not presented in the review petition, may be raised.

(c) *Transmittal of the record.* (1) Whenever a review petition of an ALJ's initial decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the appeal.

(2) Such record shall include: The pleadings; motions and requests filed and rulings thereon; the transcript of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a prehearing conference; such proposed findings of fact, conclusions of law, orders, and briefs in support thereof, as may have been filed in connection with the appeal; the ALJ's initial decision; the motion for reconsideration of the ALJ's initial decision; the ALJ's initial decision on the motion for reconsideration and the review petition, and such briefs in support thereof and responses thereto as may have been filed.

(d) *Oral argument.* A party filing a review petition may request, within the prescribed time for filing such review petition, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, the responding party may file a request for such oral argument. Failure to make such request to appear before the Judicial Officer, within the prescribed time period, shall be deemed a waiver of the opportunity for oral argument. There is no right to appear personally before the Judicial Officer. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard by the Judicial Officer on review, whether oral or on brief, shall be limited to the issues raised in the review petition to the Judicial Officer or in the response to such petition, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit adequate preparation on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed within a reasonable time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to commence and conclude the argument.

(h) *Submission of briefs.* By agreement of the parties, a review may be submitted for decision on the briefs, but the Judicial Officer may direct that the review be argued orally.

(i) *Additional evidence.* If any party demonstrates to the satisfaction of the Judicial Officer that additional evidence not presented to the ALJ is material, not cumulative, and that there were reasonable grounds for the failure to present such evidence to the ALJ, the Judicial Officer shall remand the matter to the ALJ for consideration of such additional evidence.

(j) *Decision of the Judicial Officer on review.* (1) As soon as practicable after

the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of the record and any matter of which official notice is taken, shall rule on the review.

(2) The Judicial Officer may adopt, reduce, reverse, compromise, remand or approve settlement of any claim initially decided by the ALJ under this part.

(3) The Judicial Officer shall promptly serve each party to the appeal with a copy of the ruling of the Judicial Officer which shall be considered the final determination and contain a statement describing the right to seek judicial review.

(4) Judicial review must be sought within 30 days of service of the final notice of determination by the Judicial Officer pursuant to 7 U.S.C. 2023(a).

§ 283.21 Ex parte communications.

(a) *ALJ; Judicial Officer.* At no time prior to the issuance of the final decision shall the ALJ or Judicial Officer discuss ex parte the merits of the appeal or review with any person who is connected with the appeal or review in an advocative or in an investigative capacity, or with any representative of such person. However, procedural matters shall not be included within this limitation; and furthermore, the ALJ or Judicial Officer may discuss the merits of the case with such a person if all parties to the appeal or review, or their attorneys have been given notice and an opportunity to participate. A memorandum of such discussion shall be included in the record.

(b) *Parties; interested persons.* No party or other interested person shall make or knowingly cause to be made to the ALJ or Judicial Officer an ex parte communication relevant to the merits of the appeal or review.

(c) *Procedure.* If the ALJ or Judicial Officer receives an ex parte communication in violation of this section, the one who receives the communication shall place in the public record of the appeal or review:

(1) All such written communications;

(2) Memoranda stating the substance of all such oral communications; and

(3) Copies of all written responses, and memoranda stating the substance of all oral responses thereto.

(4) Upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this section, the ALJ or Judicial Officer may, to the extent consistent with the interests of justice and the policy of the underlying statute, require the party to show cause why its claim or interest in the appeal or review should not be dismissed, denied, disregarded or otherwise adversely affected on account of such violation.

(d) *Decision.* To the extent consistent with the interests of justice and the policy of the underlying statute, a violation of this section shall be sufficient grounds for a decision adverse to the party who knowingly commits a violation of this section or who knowingly causes such a violation to occur.

§ 283.22 Form; filing; service; proof of service; computation of time; and extensions of time.

(a) *Form.* (1) The original and two copies of all papers in a proceeding conducted under this subpart shall be filed with the Hearing Clerk.

(2) Every pleading and paper filed in the proceeding shall contain a caption setting forth the title of the action, the docket number assigned by the Hearing Clerk, and a descriptive title (e.g., Motion for Extension of Time).

(3) Every pleading and paper shall be signed by and contain the address and telephone number of the representative for the party on whose behalf the paper was filed.

(b) *Filing.* Papers are considered filed when they are postmarked, or, received, if hand delivered. Date of mailing may be established by a certificate from the party or representative or by proof that the document was sent by certified or registered mail.

(c) *Service.* A party filing a document with the ALJ shall, at the time of filing, serve a copy of such document on every other party. Service upon any party of any document shall be made by delivering or mailing a copy to the party's last known address. When a party is represented by an attorney or designated representative, service shall

be made upon such attorney or representative in lieu of the actual party.

(d) *Proof of service.* A certificate of the person serving the document by personal delivery or by mail, setting forth the date, time and manner of service, shall be proof of service.

(e) *Computation of time.* (1) In computing any period of time under this part or in an order issued thereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday or legal holiday observed by the Federal Government, in which event it includes the next business day.

(2) When a document has been served by mail, an additional five days will be added to the time permitted for any response.

(f) *Extensions of time.* Requests for extensions of time shall be submitted to the ALJ, Chief Judge or the Judicial Officer prior to the expiration of the original due date. The time for the filing of any document or paper required or authorized under the rules in this part may be extended by the ALJ, Chief Judge or the Judicial Officer, if, in the judgment of the ALJ, Chief Judge or the Judicial Officer, there is cause for the extension. In instances where the time permits notice of the request for extension, time shall be given to the other party to submit views concerning the request.

§ 283.23 Procedural matters.

(a) *Communications from Hearing Clerk.* In order to expedite the appeal process, the Hearing Clerk may develop form letters and transmittal forms to be used for notices, service of papers, requests for information, and all other communications between the Hearing Clerk's Office and the parties.

(b) *Representation.* All parties may be represented by attorneys or by designated representatives. Attorneys or designated representatives appearing for the parties shall file formal notices of appearances and withdrawals with the Hearing Clerk.

Subpart C—Summary Procedure for Appeals of QC Claims of Less Than $50,000

§ 283.24 Incorporation of procedures by reference.

Except as otherwise provided, the following procedures detailed in subpart B of this part shall apply to appeals of QC claims of less than $50,000: §§ 283.5 *Motion to Dismiss*; 283.6 *Answer*; 283.8 *Rebuttal or Amendment of Appeal or Answer*; 283.9 *Withdrawal of Appeal*; 283.10 *Consent Decision*; 283.18 *Motions and Requests*; 283.19 *ALJ's*; 283.20 *Review by the Judicial Officer*; 283.21 *Ex Parte Communications*; 283.22 *Filings; Service; Extensions of Time; and Computations of Time*; and 283.23 *Procedural Matters*.

§ 283.25 Filing appeals for QC claims of less than $50,000.

(a) *Time.* A State agency may appeal the bill for collection from FNS for a QC claim of less than $50,000 for a food stamp QC error rate in excess of the tolerance level. A State agency must file a written notice of appeal, in accordance with this section, within 10 days of receipt of the bill for collection from FNS for a QC claim of less than $50,000. The State agency may request an extension to the 10-day filing requirement in accordance with § 283.22(f). FNS shall issue the bill for collection by certified mail or personal service.

(b) *Exhaustion of administrative remedies.* The State agency must appeal the bill for collection to the ALJ, pursuant to this subpart, and exhaust the available administrative remedies before filing suit in the Federal District Courts.

(c) *Filing.* The notice of appeal shall be filed with the Hearing Clerk.

(d) *Content of the notice of appeal.* (1) A notice of appeal, in order to be considered acceptable must contain the following information:

(i) A brief and clear statement that it is an appeal from a QC claim of less than $50,000 identifying the period the claim covers, the date and amount of the bill for collection, and the date of receipt of the bill for collection;

(ii) Identification of the State agency as the appellant and FNS as the appellee;

(iii) A statement that the notice of appeal is filed pursuant to section 14(a) of the Food Stamp Act;

(iv) A true copy of the bill for collection which constitutes the basis for the filing of the notice of appeal shall be attached to the notice.

(2) Failure to file an acceptable notice of appeal may result in a challenge by FNS to the notice and dismissal of the notice by the ALJ and a waiver of the opportunity for further appeal or review by the Judicial Officer unless the State agency pursues the options as discussed in §§ 283.17(d) and 283.20.

(e) *Receipt of notice of appeal and assignment of docket number*. Upon receipt of a notice of appeal, the Hearing Clerk shall assign the appeal a docket number. The Hearing Clerk shall:

(1) Send the State agency a letter which shall include the following information:

(i) Advise that the notice of appeal has been received and the date of receipt;

(ii) The docket number assigned to the appeal and instructions that all future communications related to the appeal shall reference the docket number, and;

(iii) That the State agency must file and serve its appeal petition, as set forth in § 283.22 not later than 60 days after receiving a notice of the claim. Failure to file a timely appeal petition may result in a waiver of further appeal rights.

(2) Send FNS a copy of the notice of appeal and a copy of the letter to the State agency.

(f) *Stay of collection*. The filing of a timely notice of appeal shall automatically stay the action of FNS to collect the QC claim asserted against the State agency until a decision is reached on the acceptability of the appeal, and in the case of an acceptable appeal, until a final administrative determination has been issued. However, interest will accrue on the outstanding claim amount during the stay as provided in section 13(a)(1) of the Food Stamp Act of 1977, as amended (7 U.S.C. 2022(a)(1)).

(g) *Content of appeal petition*. The appeal petition shall include:

(1) A brief statement of the allegations of fact and provisions of law that constitute the basis for the appeal including a statement as to whether a factual basis for good cause relief exists, and

(2) The nature of the relief sought.

(h) *FNS answer*. Upon service of the State agency appeal petition, FNS shall file an answer, pursuant to § 283.6, not later than 60 days after the State agency submits its appeal petition.

§ 283.26 Request that appeals be handled under procedures in subpart B for appeals of QC claims of $50,000 or more.

(a) If, after the filing of its appeal petition, the State agency does not believe that the summary procedure provided in this subpart is adequate for handling the appeal and that an oral hearing is necessary, the State agency may file, no later than the date established for the conclusion of any discovery pursuant to § 283.29, a motion that its appeal be handled under the procedures in subpart B of this part.

(b) The motion shall specify why the State agency believes that the summary procedure is inadequate and what harm will result if an oral hearing is not held.

(c) FNS will have 10 days from service of the State agency's motion that the appeal be handled under subpart B of this part to submit arguments either in support of or against the State agency's position.

(d) The ALJ will review the State agency's motion and the information submitted by FNS and decide which procedures shall be used in the appeal.

§ 283.27 Procedures upon failure to file an answer.

The failure by FNS to file an answer shall constitute a waiver of the opportunity to file a cross motion for summary judgment pursuant to § 283.30. Upon such failure to file, the State agency shall file a proposed decision, along with a motion for adoption thereof, both of which shall be served upon FNS by the State agency. Within 10 days after service of such motion and proposed decision, FNS may file

with the Hearing Clerk objections thereto. If the ALJ finds that meritorious objections have been filed, the State agency's motion shall be denied with supporting reasons. If meritorious objections are not filed, the ALJ shall issue an initial decision without further procedures. Copies of the decision or denial of State agency's motion shall be served on each of the parties and shall be included as part of the official record. Where the decision as proposed by the State agency is adopted as the ALJ's initial decision, such decision of the ALJ shall become final and effective 30 days after service unless reconsideration or review by the Judicial Officer is sought as discussed in §§ 283.17(d) and 283.20.

§ 283.28 Discovery.

Upon motion and as ordered by the ALJ, written interrogatories, written requests for admissions and written requests for the production of documents, may be served by any party to the appeal upon any other party and used in accordance with § 283.12(b).

§ 283.29 Scheduling conference.

(a) *Time and place*. The ALJ shall direct the parties or their counsel to attend a scheduling conference following the filing of a notice of appeal pursuant to § 283.25. The scheduling conference shall be held at the U.S. Department of Agriculture, Washington, DC. Reasonable notice of the time and place of the scheduling conference shall be given. The ALJ may order each of the parties to furnish at the scheduling conference the following:

(1) An outline of the appeal or defense;

(2) The legal theories upon which the party will rely;

(3) Copies of or a list of documents that the party anticipates relying upon;

(b) *Procedures*. The ALJ shall not order any of the foregoing procedures that a party can show are inappropriate or unwarranted under the circumstances of the particular appeal.

(c) *Scheduling conference*. At the scheduling conference, the following matters shall be considered:

(1) The simplification of issues;

(2) The necessity of amendments to pleadings;

(3) Stipulations of facts and of the authenticity, accuracy, and admissibility of documents;

(4) Negotiation, compromise, or settlement of issues;

(5) The exchange of copies of proposed exhibits;

(6) The nature of and the date by which discovery, as provided in § 283.28, must be completed;

(7) The identification of documents or matters of which official notice may be requested;

(8) A schedule to be followed by the parties for the filing of cross-motions for summary judgment and completion of other actions decided at the conference; and

(9) Such other matters as may expedite and aid in the disposition of the appeal.

(d) *Reporting*. A scheduling conference will not be stenographically reported unless so directed by the ALJ.

(e) *Attendance at scheduling conference*. In the event the ALJ concludes that personal attendance by the ALJ and the parties or counsel at a scheduling conference is unwarranted or impractical, but decides that a conference would expedite the appeal, the ALJ may conduct such conference by telephone.

(f) *Order*. Actions taken as a result of a conference shall be reduced to an appropriate written order, unless the ALJ concludes that a stenographic report shall suffice.

§ 283.30 Cross motions for summary judgment.

Appeals filed pursuant to this subpart shall be determined upon cross motions for summary judgment unless the matter is heard under subpart B of this part in accordance with § 283.26. Cross motions for summary judgment shall be filed by the parties along with the appeal petition and answer or in accordance with the schedule established by the ALJ pursuant to § 283.29. Motions for summary judgment shall address the issues raised by the pleadings and may be supported by declarations. Motions and accompanying briefs in support of summary judgment

shall not exceed 35 pages excluding exhibits unless otherwise authorized by the ALJ. Reply briefs may be filed by the parties in accordance with the schedule established by the ALJ. Reply briefs may not exceed 15 pages in length, excluding exhibits.

§ 283.31 Review of the record.

(a) The ALJ shall review the cross motions for summary judgment, briefs, reply briefs and supporting materials submitted by both FNS and the State agency.

(b) If the ALJ decides that additional information or briefing is required from a party, a request for such information or briefing shall be submitted to such party with a copy to the other party. The request shall identify the additional information or specific issues to be addressed and shall specify the date(s) by which such information or briefing must be provided. Upon receipt of such additional information or briefing, the ALJ shall provide the other party an opportunity to submit responsive information or briefing.

(c) If the party to whom a request for additional information or briefing is made fails to submit the information or brief the issue(s) as requested, the ALJ may decide the appeal based on the existing record.

(d) If the ALJ decides that oral argument is necessary on legal issues, the ALJ shall set a time for the oral arguments as soon as feasible thereafter, with due regard for the public interest and the convenience and necessity of the State agency and FNS. The oral arguments shall be held at the U.S. Department of Agriculture, Washington, DC. Upon a showing of unusual or extraordinary circumstances, the ALJ may order that the argument be held at another location. The ALJ shall file a notice stating the time and place of the oral arguments. If any change in the time of the oral arguments is made, the ALJ shall file a notice of such change, which notice shall be served upon the parties, unless it is made during the course of the oral arguments and made a part of the transcript or actual notice given to the parties.

(e) Oral argument shall not be transcribed unless so ordered in advance by the ALJ for cause shown upon request of a party or upon the ALJ's own motion.

§ 283.32 ALJ's initial decision.

(a) The ALJ shall decide the appeal not later than 60 days after receipt of rebuttal evidence submitted by the State agency pursuant to § 283.8 or, if the State agency does not submit rebuttal evidence, not later than 90 days after the State agency submits the notice of appeal and evidence in support of the appeal. The ALJ may extend this deadline for cause shown.

(b) The ALJ shall prepare, upon the basis of the record, and shall file an initial decision which shall include a decision on a request for good cause relief, a copy of which shall be served upon each of the parties.

(c) Such initial decision shall constitute the final notice of determination for purposes of judicial review without further proceedings, unless there is a motion for reconsideration filed pursuant to § 283.17(d) or review by the Judicial Officer is sought pursuant to § 283.20.

PART 284—PROVISION OF A NUTRITION ASSISTANCE PROGRAM FOR THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS (CNMI) [RESERVED]

PART 285—PROVISION OF A NUTRITION ASSISTANCE GRANT FOR THE COMMONWEALTH OF PUERTO RICO

Sec.

285.1 General purpose and scope.
285.2 Funding.
285.3 Plan of operation.
285.4 Audits.
285.5 Failure to comply.

AUTHORITY: 7 U.S.C. 2011–2036.

SOURCE: Amdt. 209, 47 FR 32409, July 27, 1982, unless otherwise noted.

§ 285.1 General purpose and scope.

This part describes the general terms and conditions under which grant funds shall be provided by the Food and Nutrition Service (FNS) to the government of the Commonwealth of Puerto Rico for the purpose of designing and

conducting a nutrition assistance program for needy persons. The Commonwealth of Puerto Rico is authorized to establish eligibility and benefit levels for the nutrition assistance program. In addition, with FNS approval, the Commonwealth of Puerto Rico may employ a small proportion of the grant funds to finance projects that the Commonwealth of Puerto Rico believes likely to improve or stimulate agriculture, food production, and food distribution.

§ 285.2 Funding.

(a) FNS shall, consistent with the plan of operation required by § 285.3 of this part, and subject to availability of funds, provide nutrition assistance grant funds to the Commonwealth of Puerto Rico to cover 100 percent of the expenditures related to food assistance provided to needy persons and 50 percent of the administrative expenses related to the food assistance. The amount of the grant funds provided to the Commonwealth of Puerto Rico shall not exceed amounts appropriated for this purpose for each fiscal year.

(b) FNS shall, subject to the provisions in §§ 285.3 and 285.5 in this part, and limited by the provisions of paragraph (a) of this section, pay to the Commonwealth of Puerto Rico for the applicable fiscal year, the amount estimated by the Commonwealth of Puerto Rico pursuant to § 285.3(b)(4). Payments shall be made no less frequently than on a monthly basis prior to the beginning of each month consistent with the Treasury Fiscal Requirement Manual, Volume I, part 6, section 2030; these letters of credit shall be drawn on an as-needed basis. The amount shall be reduced or increased to the extent of any prior overpayment or underpayment which FNS determines has been made and which has not been previoulsy adjusted. The payment(s) received by the Commonwealth of Puerto Rico for a fiscal year shall not exceed the total authorized for the grant, or the total cost for the nutrition assistance program eligible for funding, whichever is less, for that fiscal year.

(c) FNS may recover from the Commonwealth of Puerto Rico, through offsets to funding during any fiscal year, funds previously paid to the Commonwealth of Puerto Rico and later determined by the Secretary to have been overpayments. Funds which may be recovered include, but are not limited to:

(1) Costs not included in the approved plan of operation;

(2) Unallowable costs discovered in audit or investigation findings;

(3) Funds allocated to the Commonwealth of Puerto Rico which exceeded expenditures during the fiscal year for which the funds were authorized; or

(4) Amounts owed to FNS as a result of the nutrition assistance grant which have been billed to the Commonwealth of Puerto Rico and which the Commonwealth of Puerto Rico has failed to pay without cause acceptable to FNS.

(d) Funds for payment of any prior fiscal year expenditures shall be claimed from the funding for that prior year. The payment of funds shall not exceed the authorization for that prior fiscal year.

[Amdt. 209, 47 FR 32409, July 27, 1982, as amended by Amdt. 243, 49 FR 49585, Dec. 21, 1984; Amdt. 274, 51 FR 18752, May 21, 1986; Amdt. 371, 61 FR 60012, Nov. 26, 1996]

§ 285.3 Plan of operation.

(a) To receive payments for any fiscal year the Commonwealth of Puerto Rico shall have a plan of operation for that fiscal year approved by FNS. Each plan of operation shall be sumitted for FNS approval by the July 1 preceding the fiscal year for which the plan of operation is to be effective.

(b) The plan of operation shall include the following information:

(1) Designation of the agency or agencies directly responsible for administration, or supervision of the administration, of the nutrition assistance program.

(2) A description of the needy persons residing in the Commonwealth of Puerto Rico and an assessment of the food and nutrition needs of these persons. The description and assessment shall demonstrate that the nutrition assistance program is directed toward the most needy persons in the Commonwealth of Puerto Rico.

(3) A description of the program for nutrition assistance including:

(i) A general description of the nutrition assistance to be provided the

needy persons who will receive assistance, and any agencies designated to provide such assistance; and

(ii) To the extent grant funds are not used for direct nutrition assistance payments to needy persons, the plan of operation must demonstrate that the grants funds will provide nutrition assistance benefiting needy persons in the Commonwealth of Puerto Rico.

(4) A budget and an estimate of the monthly amounts of expenditures necessary for the provision of the nutrition assistance and related administrative expenses up to the monthly amounts provided for payment in § 285.2.

(5) Other reasonably related information which FNS may request.

(6) An agreement signed by the governor or other appropriate official to conduct the nutrition assistance program in accordance with the FNS-approved plan of operation and in compliance with all pertinent Federal rules and regulations. The Commonwealth of Puerto Rico shall also agree to comply with any changes in Federal law and regulations.

(c) Any amendments to those provisions of the plan of operation specified in paragraph (b) of this section, must be submitted to FNS for approval.

(d) FNS shall approve or disapprove any plan of operation no later than August 1 of the year of its submission. FNS approval of the plan of operation shall be based on an assessment that the nutrition assistance program, as defined in the plan of operation, is:

(1) Sufficient to permit analysis and review;

(2) Reasonably targeted to the most needy persons as defined in the plan of operation;

(3) Supported by an assessment of the food and nutrition needs of needy persons;

(4) Reasonable in terms of the funds requested;

(5) Structured to include safeguards to prevent fraud, waste, and abuse in the use of grant funds; and

(6) Consistent with all applicable Federal laws.

(e) FNS shall approve or disapprove any amendments to those provisions of the plan of operation specified in paragraph (b) of this section. If FNS fails either to approve or deny the amendment, or to request additional information within 30 days, the amendment to the plan of operation is approved. If additional information is requested, the Commonwealth of Puerto Rico shall provide this as soon as possible, and FNS shall approve or deny the amendment to the plan of operation. Payment schedules and other program operations may not be altered until an amendment to the plan of operation is approved. The Commonwealth of Puerto Rico shall, for informational purposes, submit to FNS any amendments to those provisions of the plan of operation not specified in paragraph (b) of this section. Such submittal shall be made at least 30 days prior to the effective date of the amendment. If circumstances warrant a waiver of the 30-day requirement, the Commonwealth of Puerto Rico shall submit a waiver request to FNS for consideration. Should FNS determine that such an amendment relates to the provisions of paragraph (b) of this section, FNS approval as established above will be necessary for the amendment to be implemented.

(f) FNS may approve part of any plan of operation or amendment submitted by the Commonwealth of Puerto Rico contingent on appropriate action by the Commonwealth of Puerto Rico with respect to the problem areas in the plan of operation.

(g) If all or part of the plan of operation is disapproved, FNS shall notify the appropriate agency in the Commonwealth of Puerto Rico of the problem area(s) in the plan of operation and the actions necessary to secure approval.

(h) In accordance with the provisions of § 285.5, funds may be withheld or denied when all or part of a plan of operation is disapproved.

[Amdt. 209, 47 FR 32409, July 27, 1982, as amended by Amdt. 239, 48 FR 23805, May 27, 1983; Amdt. 243, 49 FR 49585, Dec. 21, 1984; Amdt. 274, 51 FR 18752, May 21, 1986; Amdt. 371, 61 FR 60012, Nov. 26, 1996]

§ 285.4 Audits.

(a) The Commonwealth of Puerto Rico shall provide an audit of expenditures in compliance with the requirements in part 3015 of this title at least

once every two years. The findings of such audit shall be reported to FNS no later than 120 days from the end of each fiscal year in which the audit is made.

(b) Within 120 days of the end of each fiscal year, the Commonwealth of Puerto Rico shall provide FNS with a statement of: (1) Whether the grant funds received for that fiscal year exceeded the valid obligations made that year for which payment is authorized, and if so, by how much, and (2) such additional related information as FNS may require.

[Amdt. 209, 47 FR 32409, July 27, 1982. Redesignated by Amdt. 371, 61 FR 60013, Nov. 26, 1996]

§ 285.5 Failure to comply.

(a) Grant funds may be withheld in whole or in part, or denied if there is a substantial failure by the Commonwealth of Puerto Rico to comply with the requirements of § 285.4, or to bring into compliance a plan of operation disapproved by FNS, or to comply with program requirements detailed in the plan of operation approved for that fiscal year. (For example, funds shall be paid to the Commonwealth of Puerto Rico to cover only the costs of the part or parts of the plan of operation receiving FNS approval. Withheld payments shall be paid when the unapproved part(s) of the plan are modified and approved.) FNS shall notify the Commonwealth of Puerto Rico that further payments shall not be made until FNS is satisfied that there will no longer be any such failure to comply.

(b) Upon a finding of a substantial failure to comply with the requirements of § 285.4 or the plan of operation, FNS may, in addition to or in lieu of actions taken in accordance with paragraph (a) of this section, refer the matter to the Attorney General with a request that injunctive relief be sought from the appropriate district court of the United States to require compliance with these regulations by the Commonwealth of Puerto Rico.

[Amdt. 209, 47 FR 32409, July 27, 1982. Redesignated by Amdt. 371, 61 FR 60013, Nov. 26, 1996]

SUBCHAPTER D—GENERAL REGULATIONS

PART 295—AVAILABILITY OF INFORMATION AND RECORDS TO THE PUBLIC

Sec.
295.1 General statement.
295.2 Organizational description.
295.3 Informational and educational publications.
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295.6 Public inspection and copying.
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295.9 Appeals.

AUTHORITY: 5 U.S.C. 301, 552; 7 CFR 1.1–1.23.

SOURCE: 61 FR 39047, July 26, 1996, unless otherwise noted.

§ 295.1 General statement.

This part is issued in accordance with the regulations of the Secretary of Agriculture at 7 CFR 1.1–1.23, and appendix A, implementing the Freedom of Information Act (5 U.S.C. 552). The Secretary's regulations, as implemented by the regulations in this part, govern the availability of records of FNS to the public.

§ 295.2 Organizational description.

The description of the central and field organization of FNS is published as a notice in the FEDERAL REGISTER and may be revised from time to time in like manner. Such description contains a listing of FNS headquarters and field organizational units and their functions.

§ 295.3 Informational and educational publications.

FNS publishes a wide variety of informational and educational periodicals, pamphlets, brochures, leaflets, guides, and educational aids explaining the operation of FNS food assistance programs. For more information concerning FNS publications and how to obtain them, write the Director, Public Information Staff, Food and Nutrition Service, USDA, 3101 Park Center Drive, Alexandria, VA 22302–1500.

§ 295.4 Program evaluation status reports.

FNS also publishes summaries of objectives and findings of completed studies and projects concerning evaluation of FNS food assistance programs. A copy of the current status report on completed studies may be obtained by writing the Director, Office of Analysis and Evaluation, Food and Nutrition Service, USDA, 3101 Park Center Drive, Alexandria, VA 22302–1500.

§ 295.5 Program statistical reports.

Current and historical information on FNS food assistance program size, monetary outlays, geographic distribution, racial and ethnic participation rates, and other data is published throughout the year. Limited supplies are available for public distribution upon request. Write the Director, Program Information Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Alexandria, VA 22302–1500.

§ 295.6 Public inspection and copying.

5 U.S.C. 552(a)(2) requires that certain informational materials be made available for public inspection and copying. Such materials maintained by FNS may be inspected and copied during regular office hours (currently 8:30 a.m. to 5 p.m.). Interested parties may submit requests to the FNS Records Management Officer, Information Technology Division, 3101 Park Center Drive, Alexandria, VA 22302–1500.

§ 295.7 Indexes.

5 U.S.C. 552(a)(2) also requires an index of the materials required to be made available for public inspection and copying be published quarterly. Copies of this Index for FNS materials will be maintained for public inspection and copying during regular office hours in FNS Library, Room 810, 3101 Park Center Drive, Alexandria, Va. 22302–1500. Free copies of the current index may be obtained by writing or visiting any of the FNS offices listed in the local telephone directory or those listed below:

(a) Records Management Officer, Information Technology Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Alexandria, Va. 22302–1500.

(b) Director, Financial Management, Food and Nutrition Service, USDA, 300 Corporate Blvd., Mercer Corporate Park, Robbinsville, NJ 08691–1518.

(c) Director, Financial Management, Food and Nutrition Service, USDA, 77 Forsyth Street, SW, Atlanta, GA 30303–3427.

(d) Director, Financial and Administrative Management, Food and Nutrition Service, USDA, 77 W. Jackson Blvd., Chicago, Illinois 60604–3507.

(e) Director, Financial Management, Food and Nutrition Service, USDA, 1100 Commerce St., Dallas, Texas 75242–9980.

(f) Director, Financial Management, Food and Nutrition Service, USDA, 550 Kearney St., San Francisco, CA 94108–2518.

(g) Director, Financial Management, Food and Nutrition Service, USDA, 10 Causeway Street, Boston, MA 02222–1069.

(h) Director, Financial and Administrative Management, Food and Nutrition Service, USDA, 1244 Speer Blvd., Denver, CO 80204–3581.

§ 295.8 Requests.

(a) Requests for FNS program records under 5 U.S.C. 552(a)(3) shall be made in accordance with USDA Administrative Regulations 7 CFR 1.6 and addressed to the appropriate FNS official listed below:

(1) Food Stamp program records—Requests for Food Stamp information should be addressed to the Director of the appropriate Division (Program Development Division, Benefit Redemption Division, or Program Accountability Division) at the following address: Food and Nutrition Service, USDA, 3101 Park Center Drive, Alexandria, VA, 22302–1500.

(2) Child Nutrition Program records—Director, Child Nutrition Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Alexandria, VA 22302–1500.

(3) Food Distribution Program records—Director, Food Distribution Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Alexandria, VA 22302–1500.

(4) Supplemental Food Program records—Director, Supplemental Food Programs Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Alexandria, VA 22302–1500.

(b) If the requester is unable to determine the official to whom his request should be addressed, he should address it to: Freedom of Information Act Officer, Information Technology Division, 3101 Park Center Drive, Alexandria, VA 22302. The Freedom of Information Act Officer will refer such requests to the appropriate official.

(c) The officials outlined in paragraph (a) are authorized to make determinations in accordance with USDA Administrative Regulations at 7 CFR 1.8.

§ 295.9 Appeals.

(a) Any person whose request for records is denied shall have the right to appeal that denial in accordance with USDA Administrative Regulations 7 CFR 1.13. All appeals shall be addressed to: Administrator, Food and Nutrition Service, USDA, 3101 Park Center Drive, Alexandria, VA 22302–1500.

(b) The following officials are delegated authority to make decisions on Freedom of Information Act appeals at the address above:

(1) Food Stamp program (general)—Deputy Administrator, Food Stamp Program;

(2) Food Stamp program (appeals on names of Food Stamp Investigators and Investigative aids)—Director, Benefit Redemption Division;

(3) Child Nutrition program—Deputy Administrator, Special Nutrition Programs;

(4) Food Distribution program—Deputy Administrator, Special Nutrition Programs;

(5) Supplemental Food program—Deputy Administrator, Special Nutrition Programs;

(6) Management offices—Deputy Administrator, Management;

(7) Financial Management offices—Deputy Administrator, Financial Management;

(8) Appeals not covered above—Associate Administrator, FNS.

PARTS 296–299—[RESERVED]