

# Rules and Regulations

Federal Register

Vol. 66, No. 9

Friday, January 12, 2001

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## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

#### 7 CFR Parts 271 and 278

[Amdt. 391]

RIN 0584-AB90

#### Food Stamp Program: Revisions to the Retail Food Store Definition and Program Authorization Guidance

**AGENCY:** Food and Nutrition Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule implements provisions of the Food Stamp Program Improvements Act of 1994 to revise the criteria for eligibility of firms to participate in the Food Stamp Program as retail food stores, and to provide for notification to such firms of eligibility criteria for participation in the Food Stamp Program. The intended effect of this rule is to ensure that food stamp recipients continue to have adequate access to retail food stores where they can purchase a wide variety of nutritious food items, intended for home preparation and consumption, that meet their daily food needs, and to clarify procedures and eligibility requirements for authorizing firms to participate in the Food Stamp Program as retail food stores.

This rule also reinserts part of a sentence inadvertently removed from the regulations by an earlier rule, and replaces references to the Secretary of Health and Human Services with references to the Commissioner of the Social Security Administration. In addition, a technical, non-substantive correction is being made to three citations in this final rule.

**DATES:** Provisions in this rule are effective and will be implemented February 12, 2001.

#### FOR FURTHER INFORMATION CONTACT:

Questions regarding this final rule should be addressed to Karen Walker, Chief, Redemption Management Branch, Benefit Redemption Division, Food and Nutrition Service, 3101 Park Center Drive, Alexandria, Virginia 22302-1594, or by telephone to (703) 305-2418. A regulatory impact analysis has been prepared for this rule. You may request a copy of the analysis by contacting us at the above address.

#### SUPPLEMENTARY INFORMATION:

##### Executive Order 12866

This final rule has been determined to be significant and therefore was reviewed by the Office of Management and Budget under Executive Order 12866.

##### Executive Order 12372

The Food Stamp Program is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the final rule and related Notice to 7 CFR part 3015 subpart V (48 FR 29115, June 24, 1983), this Program is excluded from the scope of the Executive Order 12372 which requires inter-governmental consultation with State and local officials.

##### Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601-612). Shirley R. Watkins, the Administrator of the Food and Nutrition Service (FNS), has certified that this rule will not have a significant economic impact on a substantial number of small businesses. Based on FNS data, less than 92,000 of the 157,000 (58%) firms not corporately owned or operated that are participating in the Food Stamp Program are estimated to be small businesses based on the Small Business Administration's (SBA) guidelines. Just over 13,400 (8.5%) are considered to be specialty stores that have self declared annual gross sales of \$5 million or less. Slightly more than 78,000 are grocery stores and convenience stores that have self declared annual gross sales of \$20 million or less. In applying the requisite SBA definition of these small stores, it is apparent that a large number of small businesses will be affected by this regulation. Although a large number of small businesses will be affected, the

agency does not anticipate that the impact will be significant for reasons explained below. Throughout the development of this rule special consideration was given to its impact on small businesses; primarily small and medium grocery stores, convenience type stores, farmers' markets, rolling stores, and specialty stores. A requirement in the proposed rule that a firm have a minimum amount of wholesale purchases was not included in this final rule, because it might have unfairly impacted small rural businesses.

The final rule will allow the vast majority of small businesses interested in participating in the Food Stamp Program (FSP) to do so. It may, however, have a negative impact on a small number of firms that do not effectuate the purposes of the FSP or that do not meet the eligibility requirements. The final rule fully implements the statutory eligibility requirements. Criterion A requires that a firm must offer for sale on a continuous basis a variety of food items in each of four statutorily defined staple food groups, with perishable foods in at least two of those food groups. The rule defines several terms included in the statute—"continuous basis", "perishable" and "variety". The rule defines "continuous basis" as "\* \* \* on any given day of operation". It defines "perishable" as the term was described in the House Report accompanying the statute, except that it allows frozen foods to qualify as a perishable item specifically to help small businesses meet that requirement. And, although FNS initially considered requiring a number greater than three, the final rule defines "variety" as only three different types of food items in each of the four staple food categories. The rule implements Criterion B as the statute defines it.

The law has been in effect since late 1994. Firms may fail to be eligible to participate in the FSP for a variety of reasons. Some firms fail to be reauthorized because they are no longer open for business or have changed the nature of their business; it is not always due to failure to meet one part of the eligibility criteria. FSP authorization data covering Fiscal Years 1994-1998, illustrates that only 2,866 firms of the 168,078 firms evaluated, or 1.7%, failed to be eligible for program participation

under Criterion A or B. During Fiscal Year 2000, only 166 or 0.7% of the 23,088 firms being reauthorized failed to meet either Criterion A or B. Moreover, once the final regulations go into effect, the number of firms that fail to be authorized or reauthorized may decline further since FNS field reviewers may have applied the current standards somewhat inconsistently. That is, some field reviewers may have interpreted the requirements for "variety of foods" in different ways than the regulation proposed here.

Before firms will be denied authorization under this rule for failing to meet the eligibility criteria, they will have the opportunity to provide documentation to prove they are eligible. Firms that are denied authorization by FNS have the right to appeal that determination through an administrative review and a judicial review. Authorized firms are allowed to continue participating in the FSP throughout the appeals process. A new store that is denied authorization by FNS also has the right to appeal, and should the appeals process overturn FNS' eligibility determination, the store is authorized immediately.

#### **Executive Order 12988**

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions, or which would otherwise impede its full implementation. This rule is not intended to have retroactive effect unless so specified in the **EFFECTIVE DATE** paragraph of this preamble. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted. In the FSP, the administrative procedures are as follows: (1) For Program benefit recipients—State administrative procedures issued under to 7 U.S.C. 2020(e)(1) and 7 CFR 273.15; (2) for State agencies—administrative procedures issued pursuant to 7 U.S.C. 2023 set out at 7 CFR 276.7 for rules related to non-quality control (QC) liabilities or 7 CFR part 283 for rules related to QC liabilities; (3) for Program retailers and wholesalers—administrative procedures issued pursuant to 7 U.S.C. 2023 set out at 7 CFR 278.8.

#### **Unfunded Mandate Reform Act of 1995**

Title II of the Unfunded Mandate Reform Act of 1995 (UMRA), Pub.L. 104-4, establishes requirements for

Federal agencies to assess the effects of their regulatory actions on State, local and tribal governments and the private sector. Under section 202 of the UMRA, FNS generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local or tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires FNS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates under the regulatory provision of Title II of the UMRA for State, local and tribal governments or the private sector of \$100 million or more in any one year. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

#### **Executive Order 13132**

FNS has analyzed this final rule in accordance with the principles set forth in Executive Order 13132. As such, FNS has determined that the rule does not contain policies that have federalism implications as defined in the order and, consequently, a federalism summary impact statement is not required.

#### **Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1995, this final rule includes information collection burdens imposed on retailers applying for participation in the FSP.

There are currently 3 forms approved under OMB No. 0584-0008. Together these forms are used by retailers, wholesalers, meal services, certain types of group homes, shelters, and state-contracted restaurants, to apply to FNS for authorization to accept and redeem food stamp benefits. Form FNS-252, Food Stamp application For Stores; Form FNS-252-2, Application to Participate in the Food Stamp Program for Communal Dining Facility/Others; and, Form FNS-252R, Food Stamp Program Application For Stores-Reauthorization. Section 9(c) of the Food Stamp Act of 1977 (FSA), as amended, 7 U.S.C. 2011-2036, provides the necessary authorization(s) to collect the information contained in these forms. (7 U.S.C. 2018(c)).

A provision in § 278.1(b)(1)(ii) of the proposed rule requiring certain stores to have at least \$30,000 in annual staple food wholesale purchases in order to

qualify for participation in the program is not included in the final rule. This requirement was intended to help measure whether or not a store offered a variety of staple foods on a continuous basis, as required by law, and would have been captured through a Yes/No check-box on the application. Under the proposed rule, most applicants would have simply checked the appropriate box which would not have increased burden time. However, a few stores would need to check their records to document sales or wholesale purchase information if their eligibility was not clear, and this would increase the hour burden estimates approved under OMB No. 0584-0008. Even though the \$30,000 wholesale threshold requirement is not included in this final rule, a small number of stores will still need to document their sales or wholesale purchases in order to prove their eligibility. The burden estimates for this that were included in the proposed rule and approved by the Office of Management and Budget under OMB No. 0584-008, have not been changed in the final rule.

An estimated 5% of stores using Form FNS-252 and FNS-252R will incur an additional 10 minutes of completion time if required to provide documentation. Thus, it is estimated that the average completion time for the affected stores using Form FNS-252 will increase from 12 to 12.5 minutes. The average completion time for affected stores using Form FNS-252R will increase from 7 to 7.5 minutes. We estimated that the total burden for this will be an additional 766 hours annually. Interested parties should refer to the preamble of the proposed rule for details on the methodologies used to determine the averages.

The amount of the net decrease as approved by OMB is less than was proposed in the June 30 notice because the June 30 estimates were based on 1997 data. The estimates approved by OMB through June 30, 2002 are based on 1999 data and reflect a net decrease in overall burden hours from 15,777 to 14,812 hours; a decrease of 965 hours annually.

Comments were solicited for 60 days on the proposed decrease in burden hours. No comments were received on the information collection proposal and the estimates were submitted to OMB for approval. The burden estimates as currently approved by OMB under OMB No. 0584-0008 through June 30, 2002 are shown on the following chart:

*Affected Public:* Food Retail and Wholesale Firms, Meal Services Programs, certain types of Group

Homes, Shelters, and state-contracted Restaurants.  
*Estimated Number of Respondents:* 62,621.

*Estimated Number of Responses per respondent:* 1.  
*Estimated Time per Response:* .236536.

*Estimated Total Annual Burden:* 14,812.

Title	Number of respondents	Responses per respondent	Total annual responses	Burden hours per response	Total annual burden hours
Form FNS-252 .....	20,580	1	20,580	.4,583	9,432
Form FNS-252-2 .....	1,673	1	1,673	.2,000	334
Form FNS-252R .....	40,368	1	40,368	.1,250	5,046
Totals .....	62,621	.....	62,621	.....	14,812

## Background

On June 30, 1999, the Department published a proposed rule (64 FR 35082) to implement sections 201 and 202 of the Food Stamp Program Improvements Act of 1994, Pub. L. 103-225, (hereinafter Pub. L. 103-225), enacted on March 25, 1994. We proposed to revise the eligibility requirements in sections 3(k)(1) and (u)(1) of the FSA for retail food store participation in the FSP. (7 U.S.C. 2012(k)(1) and 2012(u)(1)).

Under current regulations found at 7 CFR 271.2, a "retail food store" is defined as having more than 50 percent of its total eligible food sales in staple foods intended for home preparation and consumption. Provisions of Pub. L. 103-225 require that establishments: (1) Sell food intended for home preparation and consumption; and (2) meet one of two eligibility criteria (Criterion A or B) in order to participate in the FSP as a retail food store. A firm that meets the eligibility requirements of Criterion A (assuming compliance with other restrictions) is not required to also meet those of Criterion B, and vice versa.

This rule revises the definition of "retail food store" and "staple foods" to conform to the statutory changes. It also defines three new terms—"continuous basis," "perishable," and "variety of foods," as well as clarifies the meaning of the term "total retail sales volume"—used in the revised statutory definition of a "retail food store."

## Technical Amendments

This rule reinserts language to 278.1(q) that was inadvertently dropped in a regulation published in the **Federal Register** at 61 FR 68119 on December 27, 1996, titled "Revisions in Use and Disclosure Rules Involving the Sharing of Information Provided by Retail and Wholesale Concerns with Other Federal and State Agencies." It also makes technical changes, replacing two references to the Secretary of Health and Human Services in 278.1(q)(3)(iii) with

references to the Commissioner of the Social Security Administration.

In addition, in §278.6, a change is being made to correct a technical error in current regulations that does not result in a substantive program change. The amendment made here corrects two incomplete citations in §278.6(a) and, correspondingly, §278.6(g)(3).

The Department encouraged all interested parties to comment on the provisions set forth in the proposed rule published. Comments were received from two retail trade/interest groups, one State government agency, and one Federal government agency. The major concerns raised by the commentators are discussed below. Revisions in Definitions and Eligibility Criteria Involving Retail Food Stores (7 CFR 271.2 and 7 CFR 278.1)

### *Eligibility Requirements Under Criterion A*

Section 3(k)(1)(A) of the FSA requires that to be eligible to accept food stamp benefits, an establishment or house-to-house trade route must sell food intended for home preparation and consumption and offer for sale on a continuous basis, a variety of staple foods in each of the four staple food categories, as specified in section 3(u)(1) of the FSA, including perishable foods in at least two of the four categories. The four staple food categories are: (1) Meat, poultry, or fish; (2) bread or cereals; (3) vegetables or fruits; and (4) dairy products. To implement this requirement, the proposed rule defined three new terms not defined by statute—"continuous basis," "perishable" and "variety of foods"—that are used in the revised statutory definition of a retail food store under Criterion A. Comments were received on all three of these proposed definitions.

### *Continuous Basis*

The law requires stores authorized to participate in the FSP under Criterion A to offer staple foods in the four required categories on a continuous basis. Because the Department cannot be

expected to visit each authorized store on a regular basis to enforce this provision, an alternative way of measuring this, based on a store's annual wholesale purchases, was developed. The proposed rule established a minimum threshold of \$30,000 in annual wholesale purchases which could be used to determine that a store offered a variety of staple foods on a continuous basis.

Comments were received from all four commentators on this provision, one in support of it, one recommending a much larger minimum requirement, and two in opposition to it. The commentator supporting this provision said the proposed threshold of \$30,000 would ensure that participating stores have a sufficient depth of stock to achieve the goals of the FSP without eliminating legitimate grocers from program participation. However, this commentator did not believe all firms participating or applying to participate in the FSP should be routinely required to document annual wholesale purchases.

Another commentator suggested the threshold be increased to a minimum of \$100,000 in annual wholesale purchases. The Department considered requiring a higher threshold and concluded that increasing the minimum threshold by such a large amount would have a negative impact on some small stores that provide food stamp recipients access to nutritious foods.

Two commentators opposed the proposed definition of "continuous basis." One commentator said recipients might be hurt if stores are forced out of the FSP, and said Congress changed the law to expand the accessibility of food supplies. This commentator also said that "continuous basis" should be defined simply as uninterrupted or constant. The Department agrees that "continuous basis" should mean constant or uninterrupted. Accordingly, we have changed the proposal to require stores to have the required amount of staple foods "on any given day."

The other commentator opposing the new threshold said the Department did

not adequately address the impact of this threshold on small stores in the proposed rule and expressed concern that some small convenience-type stores would not be able to meet this requirement. The Department did analyze the impact of the proposed rule, and referred to the impact in the preamble of the proposed rule.

The law allows store eligibility determinations to be based on a variety of measures, including a review of sales and purchase records when necessary. Determining whether or not a store is able to offer the required foods on a continuous basis can be based on this information as well as on store visits. Meeting a minimum threshold is not an accurate measure of continuous basis. Therefore, the requirement under Criterion A that authorized stores have a minimum of \$30,000 in annual wholesale purchases was removed from the final rule.

#### *Perishable Foods*

The statute requires stores eligible to participate in the FSP under Criterion A to stock perishable foods in at least two defined staple food categories. The Department did not establish a minimum number of perishable foods required. We proposed to define "perishable foods" as frozen, refrigerated or fresh foods that will spoil or deteriorate in quality within two to three weeks. This definition was based on language in H. Rep. No. 103-352, in the section titled "Purpose and Need" that stated "\* \* \* most fresh foods spoil or suffer a significant deterioration in quality within two to three weeks." The Department included frozen foods in its definition of perishable foods, even though they are typically not considered to be fresh, because some small stores with limited customers may not be able to afford to offer fresh or refrigerated foods that will spoil within a few days or weeks.

One comment opposing the definition of "perishable foods" was received by the Department. The commentor generally opposed the definitions of all new statutory terms that were not defined in the statute. The Department believes minimum regulatory standards are necessary to ensure that stores understand the program eligibility requirements and that eligibility determinations are evaluated in a uniform manner throughout the country. The Department believes the definition set forth in the rule is fair and reasonable; therefore, the proposed definition of perishable foods was not changed.

#### *Variety of Foods*

To be eligible to participate in the FSP under Criterion A, the law requires stores to have a variety of food items in each of the four staple food categories. H. Rep. No. 103-352 in the section titled "Purpose and Need" stated that authorized stores should "carry an ample supply of items in each category" to ensure that food stamp recipients can purchase an "ample selection of foods in each of the four (staple food) categories." The rule defines "variety of foods" in such a way that will ensure that stores offer for sale a minimum selection of foods. The definition stipulates that a minimum of three different varieties of foods in each of the four defined staple food categories would be required to meet FSP eligibility guidelines under Criterion A.

One commentor opposed this minimum requirement because the proposed rule did not appear to explain or was unclear with regard to how it was derived. Another commentor opposing this requirement said it was arbitrary and will "\* \* \* lead to bizarre and most likely unintended results." The Department proposed the lowest number that could reasonably be considered to meet the requirement that a "variety" of food items be available to FSP recipients. The Department believes this reflects the intent of the law which is to ensure that food stamp recipients continue to have adequate access to an supply of nutritious foods.

The definition of "variety" also includes two additional clarifications to ensure that food stamp recipients would be able to select from an ample variety of staple foods. One clarification would not allow similar type foods to be counted as different varieties. For example, skim milk, whole milk and chocolate milk would not meet the definition of "variety" under the dairy category; however, milk, cheese and butter would meet the proposed definition of variety. The Department received three comments on this provision, one supporting and two opposing it. The commentor supporting this clarification noted that the proposed rule provides examples of what would not be considered "variety," but did not provide examples of what "variety" would be and suggested the final rule include such examples. The Department agrees with this and has included examples of variety under this provision in the final rule.

The Department received two comments opposing this clarification of "variety." One of the commentors suggested that "variety" should simply

mean "having different forms or types." The Department is concerned that such a definition would not allow FNS to make uniform eligibility determinations throughout the country, and would not provide stores a clear understanding of FSP eligibility requirements. The Department believes this clarification is reasonable and should not be difficult for stores to meet; therefore, the definition was not changed.

The rule also clarifies that different brands and packaging cannot be considered "variety" for the same reasons stated above. The Department received one comment opposing this provision. The Department believes this clarification is necessary because, without it, a store could, for example, meet the fruit or vegetable category requirements with canned peaches, frozen peaches, and fresh peaches, or it could satisfy the dairy category with three different brands of ice cream. The Department believes that judging variety based on packaging and brands could limit the selection of food stamp households to only one type of food item in each category, and that would not constitute an ample variety as envisioned in the law.

The Department proposed to further clarify that processed food items with multi-ingredients cannot qualify in more than one staple food category. Such foods will generally be counted in a staple food category based on their main ingredient. For example, when determining store eligibility, the Department will consider macaroni and cheese to be a pasta and, as such, will be included in the bread or cereals category; it will not be also counted in the dairy category.

One comment opposing this provision was received by the Department, which expressed the view that this clarification was a misinterpretation of the statute. The commentor suggested that it should be possible for a pepperoni pizza to count toward meeting all four staple food categories. The Department believes that without this clarification, a store having only three different food items could qualify under Criterion A, and such a small number of food items would not provide an ample variety as envisioned in the law. Therefore, the proposed clarifications were not changed.

#### **Eligibility Requirements Under Criterion B**

The eligibility requirements under this criterion are found in section 3(k)(1)(B) of the FSA and require a store to sell food for home preparation and consumption and have more than 50 percent of its total sales volume in

staple food sales. This is similar to current rules. However, rather than requiring a firm to have more than 50 percent of its *total eligible food sales* in staple foods, the new statutory provision requires that more than 50 percent of the firm's *total sales* be in staple food sales. The proposed rule made this change clear by defining total sales as "total gross retail sales," which means all retail sales of the firm, including food and non-food merchandise, as well as services such as rental fees and entertainment income.

Two comments were received on this provision. Both commentors opposed the change from "total eligible food sales" to "total gross retail sales." The Department believes the commentors are confused about the total sales requirement under Criterion B. This was a statutory change, not a regulatory change; therefore, this provision in the rule was not changed.

#### List of Subjects

##### 7 CFR Part 271

Administrative practice and procedure, Food stamps, Grant programs—social programs.

##### 7 CFR Part 278

Administrative practice and procedure, Banks, Banking, Claims, Food stamps, Groceries—retail, Groceries, General line—wholesaler, Penalties.

Accordingly, 7 CFR parts 271 and 278 are amended as follows:

1. The authority citation for parts 271 and 278 continues to read as follows:

**Authority:** 7 U.S.C. 2011–2036.

#### PART 271—GENERAL INFORMATION AND DEFINITIONS

2. In § 271.2:

a. Paragraph (1) of the definition of "Retail food store" and the definition of "Staple food" are revised to read as follows:

##### § 271.2 Definitions.

\* \* \* \* \*

*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.

\* \* \* \* \*

*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.

\* \* \* \* \*

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

3. In § 278.1:

a. Paragraphs (b)(1)(i) and (b)(1)(ii) are revised;

b. Paragraph (b)(1)(iii) is redesignated as paragraph (b)(1)(v) and revised;

c. Paragraph (b)(1)(iv) is redesignated as paragraph (b)(1)(vi) and a heading is added;

d. New paragraphs (b)(1)(iii) and (b)(1)(iv) are added;

e. The first sentence of paragraph (q) introductory text is revised and a new sentence is added after the first sentence.

f. Paragraph (q)(3)(iii) is amended by removing the words "Secretary of Health and Human Services" wherever they appear, and adding in their place the words "Commissioner of the Social Security Administration"; and,

g. A new paragraph (t) is added.

The revisions and additions read as follows:

##### § 278.1 Approval of retail food stores and wholesale food concerns.

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \* (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.* \* \* \*

(q) \* \* \* 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. \* \* \*

(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.

#### § 278.6 [Amended]

4. In § 278.6:

a. Paragraph (a) is amended by removing the reference to “\$10,000” and adding in its place the words “an amount specified in § 3.91(b)(3)(i) of this title” and removing the reference to “\$20,000” and adding in its place the words “an amount specified in § 3.91(b)(3)(ii) of this title”; and

b. Paragraph (g)(3) is amended by removing the reference to “\$10,000” in the last sentence and adding in its place the words “an amount specified in § 3.91(b)(3)(i) of this title”.

Dated: January 5, 2001.

**Shirley R. Watkins,**

*Under Secretary, Food, Nutrition and Consumer Services.*

[FR Doc. 01–957 Filed 1–11–01; 8:45 am]

BILLING CODE 3410–30–U

## DEPARTMENT OF AGRICULTURE

### Farm Service Agency

#### 7 CFR Part 760

#### RIN 0560–AG 39

### Dairy Indemnity Payment Program

**AGENCY:** Farm Service Agency, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the authority citation for the Dairy Indemnity Payment Program (DIPP) regulations to cover the expenditure of additional funds appropriated under the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2001. The DIPP indemnifies dairy farmers and manufacturers for losses suffered with respect to milk and milk products, through no fault of their own.

**EFFECTIVE DATE:** January 12, 2001.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Hill, Agricultural Program Specialist, Price Support Division, FSA, USDA, STOP 0512, 1400 Independence Avenue, SW, Washington, DC 20250–0512; telephone (202) 720–9888; e-mail address is Elizabeth\_Hill@wdc.fsa.usda.gov.

#### SUPPLEMENTARY INFORMATION:

##### Executive Order 12866

This rule has been determined to be not significant for purposes of Executive Order 12866 and therefore has not been reviewed by the Office of Management and Budget (OMB).

##### Federal Assistance Program

The title and number of the Federal Assistance Program, as found in the Catalog of Federal Domestic Assistance,