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DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 245

RIN 0584-AC25

National School Lunch Program and School Breakfast Program: Alternatives to Standard Application and Meal Counting Procedures

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule amends the regulations governing the procedures for determining eligibility for free and reduced price meals in the National School Lunch Program and the School Breakfast Program. Regulations provide school food authorities with two alternatives to the standard requirements for the annual determinations of eligibility for free and reduced price school meals and daily meal counts by type, commonly termed "Provision 1" and "Provision 2". This final rule allows for an extension of Provision 2 procedures and provides a new alternative, "Provision 3". For schools choosing to participate in one of the alternate eligibility determination and meal counting procedures, this final rule codifies the alternate counting and claiming provisions of Public Law 103-448 which have been implemented, and revisions to the counting and claiming provisions authorized by Public Laws 104-193 and 105-336. This final rule streamlines program operations for program administrators and participants. State agency and school food authority recordkeeping burdens are expected to decrease because the determinations of eligibility for free and reduced price meals will not be made as frequently. In addition, for those schools electing to participate, this final rule may increase participation in nutritious

school meal programs, thereby helping students develop lifelong healthy eating habits. A primary reason for the expected increase in participation is that schools under Provision 2 and Provision 3 would be offering meals at no charge to all enrolled students.

EFFECTIVE DATE: October 22, 2001.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: On February 7, 2000, The U.S. Department of Agriculture (the Department or "we") published a proposed rule at 65 FR 5791 to amend 7 CFR part 245 to include changes and additions to the alternatives to standard eligibility determination and meal counting procedures. The February 7, 2000 rule proposed changes to Provision 2, which is codified in 7 CFR part 245, and proposed to codify Provision 3. These changes were necessitated by Public Law 103-448, Public Law 104-193 and Public Law 105-336. For further information on these statutory changes, refer to the proposed rule referenced above.

We received 12 comments on the proposed rule during the 60-day comment period. The majority of commenters approved of the proposed changes, while many also suggested changes or requested clarification in the final rule. Comments were received from local school food authorities, State agencies, advocacy associations and the general public. Several of the commenters addressed issues and concerns that affect both Provision 2 and Provision 3. The remainder of this preamble discusses the changes and clarifications which are being made in the final rule as a result of the comments.

To the extent that a comment generated revisions to both provisions, we address those revisions to the proposed rule under a single paragraph. For example, commenters suggested changes to the proposed streamlined base year. Therefore, in the preamble we provide information regarding changes to the streamlined base year for both Provision 2 and Provision 3 and reference the respective paragraph citations. Other revisions that affect

only one of the provisions will be discussed under the heading of the respective provision.

Readers will note that this preamble addresses changes to Provision 2 and Provision 3 as they were proposed. To the extent that no changes were made to the proposed regulatory text, the final rule adopts the provisions as proposed.

Section 245.9 Special Assistance Certification and Reimbursement Alternatives

General Comments and Clarifications

Throughout the proposal, we referenced meal counts at the point of service. For both provisions, point of service meal counts were referenced during the conduct of the base year and as part of the procedures required during non-base years. One commenter questioned whether the reference to "point of service" throughout the proposed rule was intended to preclude approved alternates to meal counts taken at the point of service. We did not intend to preclude approved alternates to point of service meal counts, therefore when referencing meal counts, this final rule clarifies that alternate point of service counts as authorized by 7 CFR part 210 are acceptable.

In accordance with section 11 of the Richard B. Russell National School Lunch Act (NSLA) (42 U.S.C. 1759a), the proposed rule set forth a Provision 2 and Provision 3 cycle which, while similar, are not identical. The cycle is 4 years in duration for both provisions. However, the base year for Provision 2 was included as part of the 4-year cycle while the base year for Provision 3 immediately preceded the 4-year cycle. Three commenters recommended that the Provision 2 and Provision 3 cycles be revised so that the base years are treated in a similar manner. Because the basis for the difference between the Provision 2 and Provision 3 base years is statutory, the Department is unable to make the provisions identical regarding the base year and subsequent cycle. Thus, the final rule retains the difference between the Provision 2 and Provision 3 base year as it relates to the 4-year cycle.

Specific Provisions

Proposed § 245.9(b) Provision 2, restated the introductory language for the Provision 2 requirements in current regulations and added a definition of

“base year” which did not specify when a school must begin a base year. However, proposed paragraph (b)(3)(ii) Annual percentages, would have required a base year to be a full school year, or the equivalent number of months if a school started the provision at a point in time other than the beginning of a school year. Taken together, these two sections of the proposed rule would have permitted a base year to be initiated at any time during the school year, provided that the base year encompassed the equivalent number of months as a full school year. The Department originally allowed schools to begin a mid-year implementation in order to accommodate statutory changes. This flexibility allowed schools time to learn about the changes and implement them during the same school year.

Several commenters objected to a base year covering more than one school year and suggested that the option to implement Provision 2 and Provision 3 must be exercised at the beginning of the school year.

In recognition of commenter concerns, this final rule requires the base year to begin at the start of the school year. However, in recognition of the difficulty in securing completed applications, this final rule would permit, at State agency discretion, a delayed implementation of the Provision 2 base year not to exceed the first claiming period of the school year in which the base year is established. Delayed implementation would permit schools to charge participating students for reduced price and paid meals in the first claiming period of the base year. Such schools would convert the meal counts, by type, for the remaining months of operation in the Provision 2 base year, when all meals were served at no charge, into annual claiming percentages. These claiming percentages would be applied to the first claiming period for all non-base years of the cycle plus any extensions. To accommodate these changes, a new paragraph (b)(6) was added and the description of base year proposed in paragraph (b) was moved to paragraph (b)(6) of this final rule.

Section 245.9(b)(1) for Provision 2 and § 245.9(d)(1) for Provision 3, Free meals, of the proposed rule stipulated that Provision 2 and Provision 3 schools must serve reimbursable meals, as determined by a point of service observation, to all students at no charge. Two commenters expressed concern that using the term “Free meals” in the heading could cause people to confuse meals served under Provision 2 or Provision 3 with free meals served to

eligible students and the subsequent higher level of Federal reimbursement provided for such meals. The Department agrees with commenters that the potential for confusion exists, therefore, this final rule adopts paragraph (b)(1) as proposed, but the title “Free meals” is replaced with the title, “Meals at no charge”.

Proposed § 245.9(b)(3)(i), Monthly percentages and § 245.9(b)(3)(ii), Annual percentages, included a description of the procedures to calculate monthly claiming percentages and added a description of a new option to allow annual claiming percentages for Provision 2 schools. Eight commenters supported the option of annual claiming percentages for schools operating under Provision 2. One commenter suggested clarifying that only reimbursable student meals may be included in the calculation. This final rule adopts the monthly and optional annual claiming percentages as proposed, with minor editorial changes, and clarifies that only reimbursable student meals are included in the calculation of monthly and annual claiming percentages.

Two commenters suggested allowing school food authority-wide claiming percentages for Provision 2 when all schools in a school food authority operate under the Provision. We fully considered this option. However, the blending of data to establish school food authority-wide claiming percentages would not properly allocate Federal funds. By blending the data from two or more Provision 2 sites, each sites’ numbers would be weighted for their contribution toward the claiming percentages. For example, if two Provision 2 schools were to blend their data with one school serving 800 meals a day and one school serving 200 meals a day, the data from the school which served 800 meals a day would be given more weight than the school serving 200 meals a day. During the non-base years as each of these schools experience changes in the enrollment and participation, the weighting of the base year data would no longer reflect each schools’ contribution to the single claiming percentage resulting in an inappropriate loss or gain of Federal reimbursement during non-base years. Therefore, this final rule does not include a provision for school food authority-wide claiming percentages.

As a result of questions raised by commenters, two new paragraphs appear under paragraph (b) Provision 2 and paragraph (d) Provision 3 of this final rule. Newly added paragraphs (b)(4) and (d)(6) address the claims review process and newly added

paragraphs (b)(5) and (d)(7) address verification.

One commenter questioned whether edit checks were required in non-base years and, further, suggested that edit checks are not relevant during non-base years. We believe that a system of internal controls is critical to the integrity of the programs. Currently, § 210.8(a)(2) requires school food authorities to review lunch count data for each school under its jurisdiction to ensure the accuracy of the monthly Claim for Reimbursement. Specifically, § 210.8(a)(2) permits any school food authority that was found, during its most recent administrative review, to have no meal counting and claiming violations to develop internal controls that ensure accurate meal counts. School food authorities found to have meal count problems are required to follow specific edit check procedures. We agree with the commenter to the degree that edit checks *by type* (free, reduced price and paid) are not relevant during the non-base years of Provision 2 or Provision 3. However, a simplified system of editing total daily meal counts remains a prudent management tool critical to the integrity of the programs. Therefore, the final rule adds new paragraphs clarifying edit check activity under Provision 2 and Provision 3.

Under new paragraph (b)(4), School food authority claims review process, school food authorities are required to review the lunch count data for each Provision 2 school under its jurisdiction in accordance with § 210.8(a)(2) during the base year. However, during non-base years and streamlined base years, school food authorities must conduct a simplified edit check of Provision 2 schools’ total daily meal counts as compared to the school’s total enrollment, adjusted by an attendance factor.

A similar requirement for Provision 3 schools is found at new paragraph (d)(6), School food authority claims review process. Under this paragraph, school food authorities are required to review lunch count data for each Provision 3 school under its jurisdiction in accordance with § 210.8(a)(2) during the base year. However, during the 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. Both paragraphs (b)(4) and (d)(6) require school food authorities to promptly follow up as specified in § 210.8(a)(4) when the claims review process suggests the likelihood of lunch count problems.

These provisions affect schools that elect to operate Provision 2 or Provision 3 in the National School Lunch Program. If a school elects to operate Provision 2 or 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) for the National School Lunch Program.

We are also taking this opportunity to clarify the procedures for conducting verification during the base year and non-base years for schools operating under Provision 2 and Provision 3. In accordance with § 245.6a, schools operating under Provision 2 or Provision 3 are subject to the school food authority's verification activity, except as otherwise specified in § 245.6a(a)(5). Section 245.6a(a)(5) states that 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.

This final rule further clarifies the verification requirements during non-base years as they pertain to Provision 2 in newly added paragraph (b)(5), Verification and Provision 3 in newly added paragraph (d)(7), Verification. When a school elects to participate under Provision 2 or Provision 3 for all of the meal programs in which it participates (breakfast and/or lunch), during the non-base years, the applications from that school are excluded from the verification requirements and are not included when the school food authority determines its required verification sample size. However, if a school operates the School Breakfast Program under Provision 2 or Provision 3 and operates the National School Lunch Program under standard application, counting and claiming procedures, the applications from this school are included in the school food authority's calculation of its required sample size and are subject to verification during non-base years.

Consistent with sections 11(a)(1)(D) and (E) of the NSLA (42 U.S.C. 1759a(1)(D) and 1759a(1)(E)), the proposed rule, (§ 245.9(c) for Provision 2 and § 245.9(e) for Provision 3), would permit extension of Provision 2 or Provision 3 if 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. The proposed rule defined "Negligible improvement" to mean 5% 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. Five commenters supported the proposal in general. Of the five commenters, one commenter requested that the percentage be increased in schools with a high percentage of needy students. Another commenter suggested increasing the percentage in schools with small populations. We considered these comments and determined that a standard criteria for granting extensions provides for the most consistent implementation of the provisions. Therefore, the final rule retains the definition of negligible improvement as proposed.

Proposed § 245.9(c)(2)(iii) for Provision 2 and § 245.9(e)(2)(iii) for Provision 3, Establish a streamlined base year, would have allowed an enrollment based streamlined base year for those schools that did not receive an extension. Three commenters opposed the option of a streamlined base year for schools that do not receive an extension. The commenters expressed concerns that current data problems with overcertification may be exacerbated through statistical determinations of eligibility. The Department does not anticipate that the use of statistical sampling methodology will have a material effect on the overcertification data problem. However, to address commenter concern, this final rule clarifies that school food authorities must obtain State agency approval prior to conducting a streamlined base year. Two commenters supported the option of conducting an enrollment based, streamlined base year but expressed concern that the proposed method would establish claiming percentages based on enrollment rather than participation. These two commenters recommended adding an additional option, i.e., participation based claiming percentages. We considered these comments and concluded that one of the barriers to a school's participation in Provision 2 or Provision 3 has been the requirement to take free and reduced price applications at the end of each cycle. To make the provisions more accessible, the final rule retains the option to conduct an enrollment based streamlined base year as proposed. In addition, as a result of the information learned from the Department's Paperwork Reduction Pilot Projects and the comments received, paragraph (c)(2)(iii) for Provision 2 and paragraph (e)(2)(iii) for Provision 3, Establish a streamlined base year, has been

expanded to allow a participation based streamlined base year.

Under new paragraph (c)(2)(iii)(B) for Provision 2 and paragraph (e)(2)(iii)(B) for Provision 3, Participation based percentages, participation based claiming percentages are allowed in schools operating under Provision 2 or Provision 3 that did not receive an extension. To employ participation based claiming percentages, all meals must be provided at no charge to all participating children. Eligibility for free and reduced price meals is based on household size and income information, and direct certification if applicable, for a statistically valid proportion of participating children. The sample of participating students must be drawn over multiple operating days as defined by guidance.

Proposed § 245.9(d), Provision 3, would have permitted Provision 3 schools to serve all meals at no charge in the base year or charge students eligible for reduced price and paid benefits for their meals. The final rule adopts this provision as proposed, although it limits this option to those base years which are not conducted as a streamlined base year. In schools electing to conduct a streamlined base year in accordance with paragraph (c)(2)(iii) for Provision 2 and paragraph (e)(2)(iii) for Provision 3, all participating students must be provided meals at no charge.

Proposed § 245.9(d)(3), Meal Counts, would have required Provision 3 schools to take daily meal counts of reimbursable meals at the point of service during the non-base years of operation. Unlike the standard meal counting system and Provision 2, these meal counts would not provide the basis for financial assistance under Provision 3. Rather, these meal counts would establish whether participation is declining significantly and, if so, to allow the school food authority or the State agency to intervene and provide technical assistance. We received eight comments regarding the proposed meal counts under Provision 3. Seven of the commenters supported the collection of meal counts. Most commenters agreed that collecting meal counts is a good management tool. One commenter opposed meal counts and expressed concern that schools may have diverted meal counting staff to other duties. The final rule retains the requirement to obtain total daily meal counts for schools operating under Provision 3 as proposed.

The proposal would have permitted State agencies to exempt residential child care institutions from obtaining total daily meal counts during non-base

years in those cases where enrollment, participation and meal counts do not vary and there is an approved mechanism in place to ensure that students will receive reimbursable meals. Two commenters supported this provision as outlined in the proposed rule, therefore, paragraph (d)(3) is finalized as proposed.

Proposed § 245.9(d)(5) Reporting requirements, would have required the State agency to submit to the Department on the monthly FNS-10, the Report of School Program Operations, the number of meals, by type as an adjustment to enrollment and, if applicable, operating days. As an option, States could construct the number of meals, by type, to reflect the adjusted level of cash assistance. Four comments were received regarding Provision 3 reporting requirements. One of the four commenters felt that the proposed wording was confusing and requested clarification. One commented that changes to the FNS-10 form should be approved by the Education Information Advisory Committee. A third commenter felt that any changes to the FNS-10 form would result in significant programming changes for their automated data reporting system. The fourth commenter noted that adjustments for operating days and enrollment would need to be made manually. Based on these comments we have clarified the wording and at this time no changes are made to the FNS-10 form. In addition, no changes were made to § 210.5(d)(1) which requires State agencies to report to FNS the total number of children approved for free and reduced price meals, and other data, as of the last day of operation in October for all schools, including those participating in Provision 2 and Provision 3. In response to the comments and to simplify the process, paragraph (d)(5) of the final rule includes minor changes intended to clarify the reporting procedures.

Section 245.11 Action by State Agencies and FNSROs

Proposed § 245.11(h)(1), Notification, would have required State agencies to provide notification by February 15 of the fourth year to those school food authorities of schools operating under Provision 2 or Provision 3. The notification would inform school food authorities that they must either return to standard eligibility determination and meal counting procedures or apply for an extension. One commenter expressed concern that February 15 was too early to notify school food authorities and requested a change that would allow State agencies to determine the dates.

As a result, paragraph (h)(1) is modified to allow State agencies the option of establishing a date other than February 15, during the fourth year, to notify school food authorities of the requirements.

Proposed § 245.11(h)(2), Return to standard procedures, would have required that schools operating under Provision 2 or Provision 3 return to standard eligibility determination and meal counting procedures if the State agency determined that records were not maintained. One commenter suggested that States also have the authority to determine and assess fiscal action for overclaims, if applicable. Therefore paragraph (h)(2) of this final rule restates the provision as proposed and expands the provision to require State agencies to determine any fiscal action as authorized under § 210.19(c).

Under proposed § 245.11(h)(3), Technical assistance, paragraph (h)(3)(ii) would have required the State agency to provide technical assistance when the State agency determined that, among other things, meal quality declined as a result of the implementation of Provision 2 or Provision 3. Two commenters suggested that criteria should be established for determining whether meal quality has declined as a result of the provisions. After consideration of these comments, we continue to believe that the assessment of meal quality, and the extent to which a decline can be attributed to the implementation of a provision, is best left to the discretion of the State agency. Because an evaluation of meal quality and the factors leading to any decline tend to be site-specific, the final rule restates the provision as proposed without imposing criteria for determining meal quality.

Proposed paragraph (h)(3)(iv) would have required the State agency to provide technical assistance when the State agency determined that, among other things, the school food authority incorrectly conducted eligibility determinations. The final rule expands the provision as proposed to clarify that, in addition to the eligibility determination process, State agencies must provide technical assistance when it is determined that the school food authority conducted the verification process incorrectly.

Proposed § 245.11(h)(4), State agency recordkeeping, would have required State agencies to maintain records of the types of pre-approved socioeconomic data used to grant extensions of Provision 2 and Provision 3. We received four comments expressing concern with the burdens associated with maintaining such records. We

acknowledge the concerns. However, this level of operational experience and data are necessary to establish the efficacy of the changes made in this final rule. The Department intends to re-evaluate the recordkeeping burden at a future date and make changes, such as reducing recordkeeping, as appropriate.

As a result of inquiries and operational experiences at the State agency level, we have taken this opportunity to clarify the State agency responsibilities regarding the approval of school food authorities wishing to participate under Provision 2 and Provision 3. Current program requirements establish that State agencies require school food authorities to comply with the applicable provisions of 7 CFR parts 210 and 220. It has been the Department's position that State agencies only approve for participation under Provision 2 or Provision 3 those schools that are operating the programs in accordance with applicable requirements. To clarify State agency responsibilities for approving schools to participate under Provision 2 and Provision 3, the final rule adds a new paragraph (h)(5), State agency approval, which clarifies that prior to approval for participation under Provision 2 or Provision 3, State agencies shall ensure school food authority program compliance as required under 7 CFR 210.19(a)(4) and 220.13(k).

Technical Amendments

Subsequent to the publication of the proposed rule, we determined that a technical amendment to 7 CFR part 245 is necessary to provide clarification regarding the reference to direct certification and the Food Distribution Program on Indian Reservations (FDPIR). Currently part 245 makes a reference to "FDPIR case number or other identifier". The Department intended that the "other identifier" be limited to an FDPIR identifier. For this reason, the words "FDPIR case number or other FDPIR identifier" replace the words "FDPIR case number or other identifier" in § 245.5(a)(1)(vi), § 245.6(a), § 245.6(a)(1), § 245.6(a), § 245.6(a)(2)(i) and § 245.6(a)(3).

Additionally, this final rule corrects an error in § 245.5(a) which occurred in the final rule entitled, School Nutrition Programs: Nondiscretionary Technical Amendments (64 FR 50735). That rule intended to remove an obsolete reference to § 210.2(o)(2). In so doing, it created an unintended error in regulatory text. This final rule corrects that error by restating the intent of the original regulatory text by clarifying that residential child care institutions, as

defined under 7 CFR 210.2, are not required to provide a public announcement notification requirements under certain conditions.

Executive Order 12866

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

Executive Order 13132

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

Prior Consultation With State Officials

Prior to drafting this final rule, we received input from State and local agencies at various times. Since the Child Nutrition Programs are State administered, federally funded programs, our regional offices have informal and formal discussions with State and local officials on an ongoing basis regarding program implementation and performance. This arrangement allows State and local agencies to provide feedback that forms the basis for any discretionary decisions in this and other Child Nutrition Program rules. Additionally, the Department issued a proposed rule, found at 65 FR 5791, which solicited public comment. The Department has also discussed the provisions of the proposal in numerous forums. Discussions with State agencies took place at the Biennial State Directors' Meeting held in 1999 and at multiple State agency meetings held at various times throughout 1999 and 2000. Discussions with school food service personnel took place at a meeting sponsored by the American School Food Service Association and in a variety of other small group meetings.

Nature of Concerns and the Need To Issue This Rule

State and local agencies were generally supportive of the provisions in the proposed rule. There were no overwhelming concerns; rather, concerns were expressed about numerous operational issues related to the administrative ease and program integrity. The issuance of a regulation is required to implement statutory changes brought about by Public Laws 103-448, 104-193 and 105-336.

Extent to Which We Meet These Concerns

We have considered all comments received on the proposed rule. Since commenters addressed numerous operational issues, we made every effort to incorporate commenter concerns, particularly those related to administrative ease, within the constraints of statutory authority and concerns for program integrity.

Public Law 104-4

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, the Food and Nutrition Service (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 final rule contains no Federal mandates (under regulatory provisions of Title II of the UMRA) for State, local, and tribal governments or the private sector of \$100 million or more in any one year. Thus, this final rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Regulatory Flexibility Act

This final rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601-612). Eric M. Bost, Under Secretary for Food, Nutrition, and Consumer Services has certified that this rule will not have a significant economic impact on a substantial number of small entities. This final rule reduces school food authority administrative burdens, streamlines program operations and enhances access to the programs by needy children. The Department does not anticipate any significant fiscal impact would result from implementation of this final rulemaking.

Executive Order 12372

The National School Lunch Program and the School Breakfast Program, which are listed in the Catalog of

Federal Domestic Assistance under Nos. 10.555 and 10.556, respectively, are subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V, and final rule related notice published at 48 FR 29114, June 24, 1983.)

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This final rule, is intended to have a preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which otherwise impede its full implementation. This final rule does not have retroactive effect unless so specified in the **EFFECTIVE DATE** section of this preamble. Prior to any judicial challenge to the provisions of this final rule or the application of the provisions, all applicable administrative procedures must be exhausted. In the National School Lunch Program and the School Breakfast Program, the administrative procedures are set forth under the following regulations (1) School food authority appeals of State agency findings as a result of an administrative review must follow State agency hearing procedures as established pursuant to 7 CFR 210.18(q) and 220.14(e); (2) School food authority appeals of FNS findings as a result of an administrative review must follow FNS hearing procedures as established pursuant to 7 CFR 210.30(d)(3) and 220.14(g); and (3) State agency appeals of State Administrative Expense fund sanctions (7 CFR 235.11(b)) must follow the FNS administrative review process as established pursuant to 7 CFR 235.11(f).

Regulatory Impact Analysis

A regulatory impact analysis of the rule identified that it would offer significant benefits for households and school food authorities. The analysis indicates households will benefit from Provision 2 and 3 since they no longer submit applications to their children's schools. In addition, households with reduced price and paid students will no longer have to purchase school lunches for their children (saving them between \$40 and \$280 per year per student). Students will benefit from the availability of meals at no charge: more students will likely participate in the meal programs and receive well-balanced lunches and breakfasts.

During non-base years, school food authorities of schools operating under Provisions 2 and 3 would experience a significant reduction of administrative

burdens. For example, a hypothetical school food authority with 5 schools offering the School Breakfast Program and National School Lunch Program, and operating only the School Breakfast Program as Provision 2, could realize savings of between \$350,000 and \$440,000 over ten years compared to standard National School Lunch Program and School Breakfast Program operations. As another example, a hypothetical school food authority with 5 schools offering the National School Lunch Program and School Breakfast Program and using Provision 3 in its National School Lunch Program and School Breakfast Program operations could save between \$1.1 million and \$1.2 million over ten years compared to standard National School Lunch Program and School Breakfast Program operations. These savings would be realized by no longer counting school meals by reimbursement category (free, reduced-price, and paid) and eliminating the associated student classification records system and by no longer collecting applications from households annually. The analysis also indicates that a hypothetical 5-school school food authority using Provision 2 only in its School Breakfast Program operations would need to obtain about \$10,800 of non-federal funds a year to make up for the loss experienced under Provision 2.

The analysis also finds that State agencies would experience some additional burden through this rule due to the responsibility of making extension determinations and reporting information on usage of Provision 2 and Provision 3 and possibly having to report information on extension determinations. The analysis asserts that once State agencies and school food authorities are accustomed with Provisions 2 and 3, the extension determination burden on State agencies would be minimal and the reporting burdens would be noticeable, but not significant. However, the significant reduction in burdens by eliminating eligibility determinations, meal counts by type, verification and a payment system for reduced price and full price meals offsets the insignificant increase in burdens associated with extension determinations.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the information reporting and recordkeeping requirements included in §§ 245.9(f), 245.9(g), 245.9(h) and 245.11(h) of this final rule were reviewed by OMB. OMB approved these requirements for 7 CFR part 245 under

control number 0584-0026. This final rule codifies Provision 2 and Provision 3 as outlined in the proposed rule. There are no changes in the annual burden hours (ABH) from those identified in the proposed rule. The rule makes nine changes that affect the recordkeeping burden hours as follows: Eliminates the need for school food authorities to develop a notice to parents containing eligibility criteria and maintain documentation (- 125 ABH); Requires school food authority recordkeeping of eligibility and meal count documentation (+2,000 ABH); requires updates to policy statements (+238 ABH); eliminates the need for school food authorities to develop and distribute a public release similar to parent letter (- 125 ABH); eliminates the need for school food authorities to develop and distribute forms to households (- 500 ABH); requires State agencies to keep records of Provision 2 and 3 (+648 ABH); requires State agencies to maintain information on schools participating and extensions (+162 ABH); eliminates schools' need to distribute applications (- 1,000 ABH); eliminates schools' review of applications and the process of making eligibility determinations (- 8,528 ABH). The rule makes two changes that affect the reporting burden hours as follows: requires school food authorities to submit extension data and documentation to State agencies (+125 ABH); requires State agencies submit extension data and documentation to FNS (+216 ABH). These changes result in a reduction of 7,230 hours in the annual recordkeeping burden and an increase of 341 hours in the reporting burden.

List of Subjects in 7 CFR Part 245

Food assistance programs, Grant programs-education, Civil rights, Food and Nutrition Service, Grant Programs-health, Infants and children, Milk, Reporting and recordkeeping requirements, School breakfast and lunch programs.

Accordingly, 7 CFR part 245 is amended as follows:

PART 245—DETERMINING ELIGIBILITY FOR FREE AND REDUCED PRICE MEALS AND FREE MILK IN SCHOOLS

1. The authority citation is revised to read as follows:

Authority: 42 U.S.C. 1752, 1758, 1759a, 1772, 1773, and 1779.

2. In part 245, the words "FDPIR case number or other identifier" are removed wherever they appear and the words

"FDPIR case number or other FDPIR identifier" are added in their place in the following places:

- a. § 245.5(a)(1)(vi);
- b. § 245.6(a);
- c. § 245.6a(a);
- d. § 245.6a(a)(2)(i).

3. In part 245, the words "FDPIR case numbers or other identifiers" are removed wherever they appear in § 245.6a(a)(3) and the words "FDPIR case numbers or other FDPIR identifiers" are added in their place.

4. In § 245.2:

- a. Paragraph (f-3) is added; and
- b. Paragraph (j) is amended by removing the word "two" and adding, in its place, the word "three".

The addition reads as follows:

§ 245.2 Definitions.

* * * * *

(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.

* * * * *

5. In § 245.5 revise the first sentence of paragraph (a) to read as follows:

§ 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. * * *

* * * * *

6. In § 245.9:

- a. A heading is added to paragraph (a) to read "*Provision 1.*", and
- b. Paragraphs (b) through (g) are removed and paragraphs (b) through (k) are added in their place.

The additions read as follows:

§ 245.9 Special assistance certification and reimbursement alternatives.

(a) *Provision 1.* * * *

(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.

7. In § 245.11, a new paragraph (h) is added to read as follows:

§ 245.11 Action by State agencies and FNSROs.

* * * * *

(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.

Dated: September 11, 2001.

Eric M. Bost,

Under Secretary, Food, Nutrition, and Consumer Services.

[FR Doc. 01-23350 Filed 9-19-01; 8:45 am]

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DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Part 287

[INS No. 2171-01]

RIN 1115-AG40

Custody Procedures

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Interim rule with request for comment.

SUMMARY: This rule amends the Immigration and Naturalization Service (Service) regulations on the period of time after an alien's arrest within which the Service must make a determination whether the alien will be continued in custody or released on bond or recognizance and whether to issue a notice to appear and warrant of arrest. This rule provides that unless voluntary departure has been granted, the Service must make such determinations within 48 hours of arrest, except in the event of emergency or other extraordinary circumstance in which case the Service

must make such determinations within an additional reasonable period of time.

DATES: *Effective date:* September 17, 2001.

Comment date: Written comments must be submitted on or before November 19, 2001.

ADDRESSES: Please submit written comments to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street, NW., Room 4034, Washington, DC 20536. To ensure proper handling please reference INS No. 2171-01 on your correspondence. You may also submit comments electronically to the Service at insregs@usdoj.gov. When submitting comments electronically please include INS No. 2171-01 in the subject box. Comments are available for public inspection at the above address by calling (202) 514-3048 to arrange for an appointment.

FOR FURTHER INFORMATION CONTACT: Cristina Hamilton, Office of the General Counsel, Immigration and Naturalization Service, 425 I Street, NW., Room 6100, Washington, DC 20536, telephone (202) 514-2895.

SUPPLEMENTARY INFORMATION:

Background

What Is the Basis for the Interim Rule?

The current rule provides that unless voluntary departure is granted, the Service must make determinations within 24 hours of an alien's arrest whether to continue the alien in custody or to release the alien on bond or recognizance and whether to issue a notice to appear and a warrant of arrest. However, this 24-hour period is not mandated by constitutional requirements. The interim rule provides the Service 48 hours to make these determinations, except in the event of emergency or other extraordinary circumstance in which case the Service must make such determinations within an additional reasonable period of time.

Explanation of Changes

The interim rule amends § 287.3(d), "Custody procedures." The current language of that section provides that unless voluntary departure has been granted pursuant to subpart C of 8 CFR part 240, the Service has a period of 24 hours following the arrest of an alien in which it must determine whether the alien will be continued in custody or released on bond or recognizance and whether to issue a notice to appear and warrant of arrest as prescribed in 8 CFR parts 236 and 239.

Inasmuch as the 24-hour determination period is not mandated

by constitutional principles, the Service is amending the rule to provide that unless voluntary departure has been granted pursuant to subpart C of 8 CFR part 240, the Service generally must make the determinations as to custody or release of the alien and as to the issuance of the notice to appear and warrant of arrest within 48 hours of arrest. The Service may often require this additional time in order to establish an alien's true identity; to check domestic, foreign, or international databases and records systems for relevant information regarding the alien; and to liaise with appropriate law enforcement agencies in the United States and abroad.

In situations involving an emergency or other extraordinary circumstance, the Service may require additional time beyond 48 hours to process cases, to arrange for additional personnel or resources, and to coordinate with other law enforcement agencies. Therefore, the interim rule provides an exception to the 48-hour general rule for any case arising during or in connection with an emergency or other extraordinary circumstance, in which case the Service must make the determinations as to custody or release and as to the issuance of the notice to appear and warrant of arrest within an additional reasonable period of time.

Administrative Procedure Act 5 U.S.C. 553

The Service's implementation of this rule as an interim rule, with provision for post-promulgation public comment, is based on the foreign affairs exception, 5 U.S.C. 553(a)(1), and upon findings of good cause pursuant to 5 U.S.C. 553(b)(B) and (d).

The immediate implementation of this interim rule without public comment is necessary to ensure that the Service has sufficient time, personnel, and resources to process cases—including establishing true identities and communicating with other law enforcement agencies—that arise in connection with the emergency posed by the recent terrorist activities perpetrated on United States soil. This rule does not alter the standards for issuing charging documents or determining the issue of custody or release, but simply extends the period by which the Service must make such determinations. For this reason, the Service has determined that there is good cause to publish this interim rule and to make it effective immediately, because the delays inherent in the regular notice and comment process would be "impracticable, unnecessary and contrary to the public interest."