

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

#### 7 CFR Parts 271, 273, 275, and 277

RIN 0584-AD37

#### Food Stamp Program: Discretionary Quality Control Provisions of Title IV of Public Law 107-171

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

**ACTION:** Proposed rule.

**SUMMARY:** On May 13, 2002, the President signed the Farm Security and Rural Investment Act of 2002. Title IV of that law, the Food Stamp Reauthorization Act of 2002, contains provisions substantively revising the Quality Control system. This rule proposes to amend the Food Stamp Program regulations to implement certain discretionary provisions concerning the Quality Control system in Sections 4118 and 4119 of the Food Stamp Reauthorization Act of 2002. This rule would establish new timeframes for completing individual Quality Control reviews and establish procedures for resolving liabilities following appeal decisions. This rule proposes to revise the negative case review procedures and provides procedures for households that break up while subject to the penalty for refusal to cooperate with a Quality Control review. This rule also proposes several additional policy changes and technical corrections, including deletion of material pertaining to enhanced administrative funding for low error rates, which was ended beginning in Fiscal Year 2003 by the statute. An interim rule published October 16, 2003, addressed certain non-discretionary provisions concerning the Quality Control system in Sections 4118 and 4119 of the Food Stamp Reauthorization Act. The high performance bonuses that replace the administrative enhanced funding are addressed in a separate rule published

February 7, 2005. This rule would affect State agencies' quality control review operations, and it would alter the impact on State agencies of assessment and resolution of potential liabilities for excessive payment error rates and awarding of bonuses for superior performance. Households sampled for quality control review of their cases would be minimally affected by this rule.

**DATES:** Comments on this rulemaking must be received on or before December 22, 2005.

**ADDRESSES:** The Food and Nutrition Service, Department of Agriculture invites interested persons to submit comments on this proposed rule. Comments may be submitted by any of the following methods:

- E-mail: Send comments to [daniel.wilusz@fns.usda.gov](mailto:daniel.wilusz@fns.usda.gov).
- Fax: Submit comments by facsimile transmission to: (703) 305-0928.
- Mail: Send comments to Daniel Wilusz, Quality Control Branch, Program Accountability Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Alexandria, Virginia 22302.
- Hand Delivery or Courier: You may also hand-deliver comments to us on the 8th floor at the above address.
- Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

**FOR FURTHER INFORMATION CONTACT:** Questions regarding this rulemaking should be addressed to Margaret Werts Batko at the above address, by telephone at (703) 305-2516, or via the Internet at [margaret.batko@fns.usda.gov](mailto:margaret.batko@fns.usda.gov).

#### SUPPLEMENTARY INFORMATION:

#### I. Additional Information on Comment Filing/Electronic Access

##### *Electronic Access and Filing Address*

You may view and download an electronic version of this proposed rule at <http://www.fns.usda.gov/fsp/>. You may also comment via the Internet at the same address. Please include "Attention: RIN 0584-AD37" and your name and return address in your Internet message. If you do not receive a confirmation from the system that we have received your message, contact us directly at 703-305-2516.

#### *Written Comments*

Written comments on the proposed rule should be specific, should be confined to issues pertinent to the proposed rule, and should explain the reason for any change you recommend. Where possible, you should reference the specific section or paragraph of the proposed rule you are addressing. We may not consider or include in the Administrative Record for the final rule comments that we receive after the close of the comment period or comments delivered to an address other than those listed above.

We will make all comments, including names, street addresses, and other contact information of respondents, available for public inspection on the 8th floor, 3101 Park Center Drive, Alexandria, Virginia 22302 between 8:30 a.m. and 5 p.m. Eastern time, Monday through Friday, excluding Federal holidays.

#### II. Procedural Matters

##### *Executive Order 12866*

This rule has been determined to be significant under E.O. 12866 and has, therefore, been reviewed by the Office of Management and Budget.

##### *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 in 7 CFR Part 3015, Subpart V and related Notice (48 FR 29115, June 24, 1983), this Program is excluded from the scope of Executive Order 12372 that requires intergovernmental consultation with State and local officials.

##### *Regulatory Flexibility Act*

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (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. State and local welfare agencies will be the most affected to the extent that they administer the Program.

##### *Public Law 104-4*

Title II of the Unfunded Mandate Reform Act of 1995 (UMRA) 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 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. This rule is, therefore, not subject to the requirements of sections 202 and 205 of the UMRA.

#### *Federalism Summary Impact Statement*

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under section (6)(b)(2)(B) of Executive Order 13132. The Food and Nutrition Service has considered this rule's impact on State and local agencies and has determined that it does not have Federalism implications under E.O. 13132.

#### *Civil Rights Impact Analysis*

FNS has reviewed this proposed rule in accordance with the Department Regulation 4300-4, "Civil Rights Impact Analysis," to identify and address any major civil rights impacts the rule might have on minorities, women, and persons with disabilities. After a careful review of the rule's intent and provisions, FNS has determined that this rule has no impact on any of the protected classes. These changes primarily affect the quality control (QC) review system and not individual recipients' eligibility for or participation in the Food Stamp Program. The only provision that has any direct impact on recipients is the conforming change made in § 273.2(d)(2). This section provides that a recipient who refuses to cooperate with a QC review of his or her case will be terminated from further participation in the Program; that if the household

reapplies during the annual review period, it cannot be determined eligible until it cooperates with the QC review; and if it reapplies following the end of the quality control review period, the household is required to provide full verification of its eligibility factors before it can be certified. The purpose of the requirement is to encourage household cooperation with the QC review of its case. In this rule we are proposing a conforming amendment to extend the timeframe of the penalty consistent with the revised timeframe for completing the QC review process established in Section 4119 of the Food Stamp Reauthorization Act of 2002 and addressed in this proposed regulation at § 275.23. Significant protection exists within the regulations to ensure that a household is terminated solely for refusal, and not inability, to cooperate. A household so terminated also has the right to request a fair hearing. Further, the household has the ability to reverse its termination by cooperating with the QC review during the QC review period. There were 56,954 active case households subject to a QC review, and 2,101 households who refused to cooperate with a QC review during Fiscal Year 2002, the last year information on non-cooperating households was collected. Information on protected class is not available for these households.

All data available to FNS indicate that protected individuals have the same opportunity to participate in the Food Stamp Program as non-protected individuals. FNS specifically prohibits the State and local government agencies that administer the Program from engaging in actions that discriminate against any applicant or participant in any aspect of program administration, including, but not limited to, the certification of households, the issuance of coupons, the conduct of fair hearings, or the conduct of any other program service for reasons of age, race, color, sex, handicap, religious creed, national origin, or political beliefs (Food Stamp Program nondiscrimination policy can be found at § 272.6). Discrimination in any aspect of program administration is prohibited by these regulations, the Food Stamp Act, the Age Discrimination Act of 1975 (Pub. L. 94-135), the Rehabilitation Act of 1973 (Pub. L. 93-112, section 504), and title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d). Enforcement action may be brought under any applicable Federal law. Title VI complaints shall be processed in accord with 7 CFR part 15."

#### *Paperwork Reduction Act*

This proposed rule contains reporting or recordkeeping requirements that have been approved by the Office of Management and Budget (OMB) under several separate information collections under the Paperwork Reduction Act of 1995. The collections are:

*0584-0034, Negative Quality Control Review Schedule; Status of Sample Selection and Completion, Form FNS-245, and FNS-248:* This rule does not affect the negative review schedule, Form FNS-245. In the most recent approval of OMB Number 0584-0034, the form FNS-247 (Statistical Summary of Sample Distribution) was eliminated. FNS has stopped requesting that this form be completed and the information be submitted. This rule removes the requirement to submit the report from the regulations. The elimination does not affect the burden, as the burden has already been adjusted for removal of this form. In this rule we are proposing to eliminate the Form FNS-248. However, the information required to be submitted on that form is still required. The regulations currently permit that this information be submitted in another format. Accordingly, elimination of this form will not affect the approved burden on OMB Number 0584-0034.

*0584-0074 (Form FNS-380, Worksheet for Food Stamp Program Quality Control Reviews); 0584-0299 (Form FNS-380-1, Quality Control Review Schedule); and 0584-0303 (Sampling Plan, Arbitration, and Good Cause):* This rule does not affect these information collections. This rule does not change the requirements for development and submittal of the States' sampling plans. This rule does not change the requirements for submitting cases for arbitration nor will it impact the number of cases anticipated to be submitted. This rule does include the provisions for good cause; however, those provisions are unchanged except for redesignation. Therefore, this rule will not impact the burden currently approved for good cause either.

*OMB Number 0584-0010, Performance Reporting System, Management Evaluation, Data Analysis and Corrective Action:* Corrective action planning is included under this information collection package. Regulations prior to passage of the Food Stamp Reauthorization Act of 2002 required corrective action planning whenever a State agency failed to reach the yearly target, whenever a State agency was not entitled to enhanced funding, and when its negative case error rate exceeded one percent. In an

interim rule entitled “Non-Discretionary Quality Control Provisions of Title IV of Public Law 107–171” published on October 16, 2003 at 68 FR 59519, the regulations were changed to reflect the provision in Section 4118 of the Food Stamp Reauthorization Act of 2002 that requires corrective action planning whenever a State agency’s payment error rate equals or exceeds six percent. This requirement replaced the requirement for corrective action planning whenever a State agency failed to reach the yearly target. In the regulations as modified by the interim rule, State agencies continued to be required to do corrective action whenever they were not entitled to enhanced funding or when the negative case error rate exceeded one percent. A State agency was entitled to enhanced funding when its payment error rate was less than or equal to 5.90 percent and its negative case error rate was less than the national weighted mean negative case error rate for the prior fiscal year. This rule proposes to eliminate the requirement that State agencies conduct corrective action planning whenever a State agency is not entitled to enhanced funding because enhanced funding has been eliminated by Section 4118 of the Food Stamp Reauthorization Act of 2002. Elimination of this requirement will not have a significant impact on States’ requirements to do corrective action planning because of the requirement in the regulation to do corrective action planning whenever the State’s error rate exceeds six percent. The change from 5.9 percent to six is minimal. In Fiscal Year 2002, no State below six percent did not get enhanced funding. Further, in this rule we are proposing to continue to require that State agencies do corrective action planning whenever a State’s negative case error rate exceeds one percent. Therefore, there is essentially no impact resulting from removing the requirement to do corrective action planning whenever a State agency is not entitled to enhanced funding.

#### *Government Paperwork Elimination Act*

In compliance with the Government Paperwork Elimination Act, the Food and Nutrition Service is committed to providing electronic submission as an alternative for information collections associated with this rule. The Food and Nutrition Service has made every effort to streamline and automate these processes. However, we are not able to make the entire process electronic at this time.

Part of the process allows electronic submission. The Quality Control review schedule (approved under OMB #0584–

0299) serves as both the data summary entry form that the reviewer completes during each review, and subsequently, as the data input document for direct data entry into the automated national Food Stamp Quality Control System (FSQCS) at the Kansas City Computer Center. While the data are manually collected on a paper form from information extracted from a case file, it is electronically submitted to the FSQCS for tabulation and analysis. Some States have developed and begun to use computerized versions of the worksheet (OMB number 0584–0074), which provides information collected on the review schedule. In addition, FNS has developed a computerized version of the worksheet. States are being given the option to continue to use their own systems, the new computerized version provided by FNS or the paper version. When FNS computerized versions of the worksheet are used, the information is linked to and creates the review schedule.

Under OMB number 0584–0034, the burden for collecting and reporting information related to the review of negative cases and the status of sample selection and completion is approved. The FNS–245 serves as both the data summary entry form that the reviewer completes during each negative case review, and subsequently as the data input document for direct data entry into the FSQCS. Therefore, while data is manually collected, it is electronically submitted to the FSQCS for tabulation and analysis. The FNS–248 (Status of Sample Selection and Completion) collects information on the status of State reviews. The FNS–248 contains necessary information not produced by the automated system. However, much of the form contains information that can be obtained in other ways. The regulations already provide that the information can be submitted in another format than the Form FNS–248. In this rule, we are proposing to eliminate the form and to require the States to submit the necessary information as requested by the appropriate regional offices. States may submit this data electronically.

The burden under OMB number 0584–0303 encompasses the sampling plan, arbitration, and good cause. At this time, these areas are not substantively electronic submittals. To the extent possible, States may submit documents or portions of documents electronically.

#### *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 that conflict with its provisions or that would otherwise impede its full implementation. This rule is not intended to have retroactive effect unless so specified in the “Effective Date” paragraph of the final rule. 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 Food Stamp Program the administrative procedures are as follows: (1) For Program benefit recipients—State administrative procedures issued pursuant to 7 U.S.C. 2020(e)(10) and § 273.15; (2) for State agencies—administrative procedures issued pursuant to 7 U.S.C. 2023 set out at § 276.7 (for rules related to non-quality control (QC) liabilities) or Part 283 (for rules related to QC liabilities); (3) for retailers and wholesalers—administrative procedures issued pursuant to 7 U.S.C. 2023 set out at 7 CFR Part 279.

#### **Regulatory Impact Analysis**

##### *Need for Action*

This action is needed to implement certain provisions of Sections 4118 and 4119 of Title IV, the Food Stamp Reauthorization Act of 2002, Public Law 107–171, which was enacted on May 13, 2002. This rule proposes to amend the Food Stamp Program regulations concerning the Quality Control (QC) system to eliminate enhanced funding, to address the impact of appeals decisions on the resolution of QC liabilities for high payment error rates, to revise the timeframes for completing individual case reviews and the timeframes for penalties for households that refuse to cooperate with a QC review, and to make a number of technical policy changes and corrections. This analysis addresses the elimination of enhanced funding, the impact of appeals decisions on the resolution of QC liabilities for high payment error rates, the revised timeframes for completing individual case reviews, the timeframes for penalties for households that refuse to cooperate with a QC review, validation of the negative case error rate, and corrective action planning. An interim rule, published October 16, 2003, at 68 FR 59519, addressed the new liability system established by Section 4118 of the Food Stamp Reauthorization Act of 2002. The impact of the new liability system was addressed in the impact analysis for that rule. For greater understanding of the impact of the

changes to the liability system, the reader is referred to the interim rule.

**Cost Impact**

This action does not directly impact benefit levels or eligibility, so we do not anticipate any impact on food stamp benefit costs. The provision extending the timeframes for verification of households reapplying for benefits is not expected to have a measurable impact on benefit costs. Elimination of enhanced funding will result in a savings of administrative matching funds. In 2002, the Agency paid \$77.3 million in enhanced funding incentives to 13 States. Over the five years between 1998 and 2002, the Agency paid \$250

million in enhanced funding, for an annual average of \$50 million during this period.

If State payment error rates remained at their 1998–2002 levels, the annual savings to the Food Stamp Program would be \$50 million and the five-year savings would be \$250 million. However, this savings will be largely offset by the establishment of the high performance bonuses (addressed in the final rule “High Performance Bonuses” published February 7, 2005, at 70 FR 6313). See Table below.

**Benefit Impact**

Elimination of enhanced funding based on payment accuracy would not

have a benefit impact on State administrating agencies or on program operations if considered in isolation. However, when this provision is combined with the new performance bonus system in another rulemaking that proposes to change performance criteria from a narrow focus on payment accuracy to a broader measure that incorporates client service criteria in addition to payment accuracy, the new performance bonus system is expected to encourage States to assess and improve overall performance. Since the new bonus system is capped at \$48 million annually the impact of the two rules will offset each other.

**COST IMPACT OF CERTAIN QUALITY CONTROL PROVISIONS OF THE FOOD STAMP REAUTHORIZATION ACT OF 2002 (FEDERAL OUTLAYS)**  
[In millions of dollars]

	2005	2006	2007	2008	2009	5-year
Elimination of Enhanced Funding .....	-50	-50	-50	-50	-50	-250

The provisions affecting the timeframes for completing individual case reviews, procedures for appeals for the resolution of QC liabilities, and the procedures for treating households that refuse to cooperate with QC reviews are not expected to have any measurable impact on program costs.

**III. Background**

On May 13, 2002, the President signed Public Law 107–171, the Farm Security and Rural Investment Act of 2002. Title IV of Public Law 107–171, the Food Stamp Reauthorization Act of 2002 (FSRA), significantly revised the sanction, liability, and enhanced funding provisions of the Quality Control (QC) system. An interim rule entitled “Non-Discretionary Quality Control Provisions of Title IV of Public Law 107–171” was published October 16, 2003, at 68 FR 59519 that addressed certain provisions of Sections 4118 and 4119. A final rule entitled “High Performance Bonuses” was published February 7, 2005, at 70 FR 6313 that implemented Section 4120 of the Food Stamp Reauthorization Act. This rulemaking addresses the remaining provisions of Sections 4118 and 4119 of the Food Stamp Reauthorization Act. In addition, it includes several discretionary policy changes and numerous technical corrections.

**A. Enhanced Funding**

The current regulations at § 275.1(b) provide that the Department shall pay a State agency enhanced administrative funding if its payment error rate is less

than or equal to 5.90 percent and the negative case error rate is less than the national weighted mean negative case error rate for the prior fiscal year. Section 4118 of FSRA removed the provision in the Food Stamp Act of 1977 for giving enhanced funding to State agencies with low payment and negative case error rates, effective fiscal year (FY) 2003, effectively ending enhanced payments. As a technical detail, we are proposing to eliminate § 275.1(b)(1) and (b)(2) and to revise § 275.1(a) into a general introductory paragraph, removing the “(a)” paragraph designation. Section 4120 of the FSRA replaces these enhanced funding provisions with high performance bonuses. Regulations addressing high performance bonuses have been published separately (proposed rule published December 17, 2003, at 68 FR 70193; final rule published February 7, 2005, at 70 FR 6313).

Section 275.23(d) establishes procedures for providing enhanced funding. In accordance with the elimination of enhanced funding, this section is no longer necessary. Therefore, we are proposing to remove § 275.23(d).

Section 275.3(c) requires that FNS validate the negative case error rate when a State agency’s payment error rate for an annual review period appears to entitle it to an increased share of Federal administrative funding and its reported negative case error rate for that period is less than two percentage points above the national weighted mean negative case error rate for the

prior fiscal year. That section also provides that FNS may review any negative case for other reasons. Validation of the negative case error rate is no longer necessary for purposes of establishing eligibility for enhanced funding. However, we are proposing in § 275.3(c) to require that all States’ negative case error rates be validated by FNS. We are proposing to require universal validation of negatives for two reasons. First, we believe that fair and equitable treatment in terms of denying households needs to be ensured. Second, the negative error rate is one of the measurements of high performance. We believe that it is necessary to ensure the accuracy of those error rates if awards will be driven by these rates.

In addition, we are proposing to make technical changes throughout Part 275 to remove references to enhanced funding. These deletions are not discussed in this preamble.

Part 277, Payments of Certain Administrative Costs of State Agencies, establishes the rules for paying State agency administrative costs for operating the Food Stamp Program. In § 277.4, paragraphs (b)(1), (b)(4), (b)(5), and (b)(6) describe the procedures for increasing State administrative funding when State agency quality control error rates meet certain standards. Each paragraph provides the authority for different fiscal year periods beginning with Fiscal Year 1980. Sections 277.4(b)(1)(i), (b)(4), (b)(5), and (b)(6) cover fiscal year periods beginning October 1, 1980, through September 30, 1988. Section 277.4(b)(1)(ii) provides

the authority for the period beginning October 1988 and forward. The authority in the Food Stamp Act for § 277.4(b)(1)(i) was removed by the Hunger Prevention Act of 1988 (Public Law 100-435). The authority for § 277.4(b)(4), (b)(5), and (b)(6) was removed by the Omnibus Budget Reconciliation Act of 1982 (Public Law 97-253). Section 4118 of the FSRA eliminated enhanced funding based on quality control error rates for fiscal years beginning October 2002 and beyond, thus making § 277.4(b)(1)(ii) obsolete for FY2003 and beyond. All enhanced funding for Fiscal Years 1980 through 2002 paid under any of these authorities has already been made. Therefore, these paragraphs are no longer necessary. Accordingly, we are proposing to remove § 277.4(b)(1), (b)(4), (b)(5), and (b)(6). Sections 277.4(b)(2), (b)(3), (b)(7), and (b)(8) are proposed to be redesignated as § 277.4(b)(1), (b)(2), (b)(3), and (b)(4), respectively. In addition, we are proposing to correct the references in redesignated § 277.4(b)(3) to reflect these changes.

#### *B. Disposition of Cases Where the Household Refuses To Cooperate*

Section 275.12(g) establishes procedures for disposition of active quality control cases. Section 275.12(g)(1)(ii) provides procedures for handling cases when the household refuses to cooperate in the review. Under these procedures, the State agency is required to notify the household of the penalties for refusing to cooperate with the review. In § 275.12(g)(1)(ii), regulations currently provide that a reviewer may attempt to complete the case if this notice has been sent. This policy was revised by memorandum on September 1, 1998, in "Change 1 to the September 1997 version of FNS Handbook 310," to require the State agency reviewer to attempt to complete the review. The change was effective October 1, 1998. The revised policy has been retained in subsequent revisions of FNS Handbook 310. The Department requires such completion because incomplete reviews introduce bias into the system. Consistent with this change in policy, we are proposing to revise § 275.12(g)(1)(ii) to say that the reviewer must attempt to complete the case. As provided for in the FNS Handbook 310, the reviewer will attempt to determine all of the necessary information to the point where either ineligibility or the appropriate benefit allotment is determined, verified, and documented.

#### *C. Negative Case Reviews*

In order to understand the parameters of the changes being proposed in this rulemaking for the review of negative cases, the readers need to understand the basic framework of the negative case review process. A negative case is a case where a household's application for food stamp benefits was denied or where a household's food stamp benefits were suspended or terminated. The negative universe includes all negative actions that occur during the review period. Under current rules, State agencies may randomly select negative cases for review by either "action" or by "effective date." "Action" is a specific decision to deny, suspend, or terminate a case. Each action results in a notice to the household advising the household of the action. "Effective date" measures the result of a negative action, that is, that following the negative action, the household does not receive benefits. It measures the non-receipt of benefits against the prior receipt of benefits. In order for a case to be subject to review as a negative case under the current rules, there has to be a break in participation, that is, a household cannot receive uninterrupted benefits for two full consecutive months. Between the negative action and the next date of participation, there must be at least one day for which no benefits are received. A negative case review consists of a case file review. An expanded review of items addressed in the case is permitted if the case file does not support the negative action under review. Contact with the household and/or collateral contacts should occur only to clarify information in the case record if the case record does not support the negative action under review. Contact with the household and/or collateral contacts should occur only to clarify information in the case record if the case record does not support the negative action under review. This proposal would significantly modify the process described above in order to make the process uniform among the States and to eliminate inappropriate, excessive, and unnecessary household contacts. Although not currently required, the Department has validated all State agencies' negative case error rates for the past several years. As discussed elsewhere in this rule, we are proposing that the Department will validate all State agencies' negative case error rates annually. In the process of performing these validations, it has become apparent that various State agencies have interpreted the regulatory

provisions and Handbook review provisions differently. Further, it has become apparent that allowing the use of two different measuring points, by "action" or by "effective" date, has contributed to the differences among State agencies. Secondly, use of "effective date" has resulted in confusion when multiple negative actions have occurred within the sample month. This is particularly important in determining the awarding of the high performance bonus awards for low negative case error rates. Finally, the Department has become concerned that some State QC workers, when they find that the basis of a negative case action is invalid, in an effort to find any reason that the negative action might have been valid, continue to review a household's case until any reason can be found to support the negative action result. This can result in multiple household and/or collateral contacts. The Department considers such contacts potentially intimidating and believes it is necessary to curtail their use. The Department believes that it is important that all States conduct negative reviews interpreting the regulatory and Handbook provisions the same way to ensure that review results are comparable.

First, the Department is proposing that the negative universe be based on "action," eliminating the option to use "effective date." Use of the two different selection criteria, "action" and "effective date," has resulted in differences in the sampling universes among the States and inconsistent reviews. These sampling differences are of statistical concern in calculating a national negative case error rate. Further, because multiple actions can occur within a sampling period, but only resulting in one denial, suspension, or termination, States using "effective date" have to decide which of the several actions to review. This selection process can introduce bias into the system. Focusing on "action" means that each negative action would have an equal opportunity to be sampled and reviewed. Finally, negative reviews are not measuring program losses, but service to clients. Using "action" means the review is based on the reason given the household for the negative action. We are proposing to revise § 275.11(e)(2)(i) and (e)(2)(ii) accordingly.

Further, we are proposing to delete the requirement that there be a break in participation in order for a case to be subject to review. Section 275.11(f)(2)(vi) provides that a negative action would not be subject to review if there were no break in participation.

Changing the focus to the action eliminates a need for measuring whether there was a break in participation. The break in participation measures the effectiveness of the negative action, the denial or end of a households receipt of benefits. Elimination of "break in participation" is consistent with the change in focus to "action" only reviews. A conforming change is also being made to the definition "Negative case" in § 271.2.

Finally, the Department is proposing to eliminate the expanded review in § 275.13(b). As described above, the expanded review allows the QC reviewer to look beyond the reason given for action taken by the EW to deny, terminate, or suspend a household. The QC reviewer may examine the case file for additional reasons to support the denial, suspension, or termination. It also permits contacting the household or a collateral contact to clarify a reason for the denial, suspension, or termination. During the validation process, it has become apparent that the expanded review has become an opportunity to search for information to eliminate an invalid negative decision, making the decision correct, rather than determining the validity of the action the EW took. The Department considers this an inappropriate use of the review process that needs to be curtailed. Elimination of the expanded review is also consistent with a review of "action." The QC review would be focused solely on the action taken, not on other possible negative actions that could have been taken. Under this proposal, an action could only be determined "valid" if the case record supported the negative action, as it was presented to the household. If documentation is missing in the case file to support and verify the reason for the specific denial action, the Department is proposing to continue to allow the QC reviewer to contact the household or a collateral contact to verify the validity of the specific negative action. The Department believes that this is necessary to curtail reviews that are focused on eliminating the error, rather than on determining the validity of the action, and result in excessive collateral contacts, negatively impacting customer service. A conforming change is also being made to § 275.13(c)(1).

We recognize that by evolving State interpretations of the regulatory and Handbook provisions to be the same, these proposed revisions may change the proportion of valid determinations. However, the Department believes that the consistent interpretations among the

States will yield information that more accurately reflects actual negative actions, and represents a better balance between accuracy and customer service.

#### D. Corrective Action Planning

Section 4118 of the FSRA requires a State agency to do corrective action planning whenever its payment error rate is six percent or greater. In the interim rule published October 16, 2003 at 68 FR 59519, § 275.16(b)(1) was revised to require corrective action planning whenever a State agency's error rate equals or exceeds six percent. Current regulations provide that corrective action planning shall also be done by a State agency when the State agency is not entitled to enhanced funding (§ 275.16(b)(2)) or when the State agency's negative case error rate exceeds one percent (§ 275.16(b)(3)). We are proposing to remove § 275.16(b)(2) as no longer necessary because enhanced funding has been eliminated. In practical terms, this change will have little impact on the number of State agencies required to do corrective action planning. In FY 2002, the last year of enhanced funding, no State that had a payment error rate of less than six percent failed to qualify for enhanced funding. We are proposing to continue to require State agencies to conduct corrective action planning whenever the negative case error rate exceeds one percent (§ 275.16(b)(3)), but are proposing to redesignate § 275.16(b)(3) as § 275.16(b)(2) to reflect the deletion of § 275.16(b)(2). We believe that retaining the requirement to do corrective action planning when the negative error rate exceeds one percent is necessary to ensure that households are not being inappropriately denied or terminated in an effort to reduce payment error rates. Also, this is consistent with the High Performance Bonuses final rule that provides criteria for rewarding States with very low negative case error rates. Finally, we are proposing to redesignate § 275.16(b)(4), (b)(5), and (b)(6) as § 275.16(b)(3), (b)(4), and (b)(5), respectively, to reflect the deletion of § 275.16(b)(2) and redesignation of § 275.16(b)(3) as § 275.16(b)(2).

Section 275.13 requires State agencies to review suspended cases as part of the negative case sample. Suspended cases were added to the negative universe in a rule published July 16, 1999, at 64 FR 38287. That rule did not add suspended cases to those deficiencies requiring corrective action at § 275.16(b)(6) (redesignated in this rule as § 275.16(b)(5)). To correct this oversight, we are proposing to revise redesignated

§ 275.16(b)(5) to include deficiencies which result in improper suspensions.

#### E. Timeframes for Announcing the National Performance Measure and for Completing Quality Control Reviews and Resolving State/Federal Differences

The interim rule published October 16, 2003, at 68 FR 59519 revised the regulations at § 275.23(e)(7) to establish the following timeframes for completing quality control reviews and resolving State/Federal differences and for announcing the national performance measure. The deadline for completing quality control reviews and resolving State/Federal differences is May 31 of the following year. The deadline for announcing the national performance measure is June 30 following the end of the fiscal year review period. These new timeframes provide approximately two additional months to complete the case review and arbitration process and to develop and announce the national performance measure. In this rule, we are proposing to use this additional time in the following way.

Currently, as provided for in § 275.21(b)(2), State agencies are required to complete and transmit to FNS 90 percent of all cases selected for a sample month within 75 days of the end of that sample month. State agencies are required to complete and transmit to FNS 100 percent of all cases selected for a sample month within 95 days of the end of the month. Section 273.21(d) requires that all cases sampled for the annual review period be completed or otherwise accounted for and reported to FNS no later than 105 days from the end of the review period.

In order to fully understand this proposal, it is helpful to understand the background of the current timeframes. Section 13951 of the Mickey Leland Childhood Hunger Relief Act of 1993, Public Law 103-66, required that all case reviews and arbitration be completed within 180 days of the end of the review period. On June 23, 1995, the Department proposed changes to the regulations to implement the 180-day requirement to complete all case reviews and arbitration (60 FR 32615). In that rule, we proposed to reduce the amount of time to complete each monthly sample by requiring that 100 percent of the cases selected for review be completed within 90 days of the end of the sample month. However, in the final rule published June 2, 1997 (62 FR 29652), we left the timeframes as they were originally, *i.e.*, that 90 percent of all cases be completed within 75 days and all cases be disposed of within 95 days of the end of the sample month. In that final rule, we reduced the amount

of time FNS regional offices had to complete validation from 95 days to 43 days and modified the arbitration system in order to reduce the amount of time necessary to complete the case review and arbitration process within the allotted 180 days. Thus FNS absorbed all the reduction in time for completing the annual QC review process.

We believe that the best uses of the additional two months of time between the end of March and May 30 are to provide States with more time to complete the individual case review process, to provide the FNS regional offices with more time to complete their reviews of the subsample cases, and to provide some additional time at the end of the review process for the Department to ensure the accuracy of the error rates, liabilities, and any adjustments to the liabilities.

Accordingly, in § 275.21(b)(2), we are proposing to provide State agencies at least 100 days from the end of the sample month to complete and transmit to FNS 90 percent of all cases and that State agencies shall have at least 113 days from the end of the sample month to complete and transmit to FNS 100 percent of all cases selected for the sample month. We are proposing that State agencies have at least 123 days from the end of the annual review period to complete or otherwise account for all cases selected for review during the annual review period and to report to FNS the results of all the reviews. This gives the State agency an additional 25 days to act on 90 percent of the cases selected each sample month and an additional 18 days to complete all the cases selected each sample month. We are proposing that State agencies have at least until January 21 after the end of the review year to complete and dispose of all cases. We are also proposing that FNS may grant additional time as warranted upon request by a State agency for cause shown beyond these dates to complete and dispose of all cases. We are also proposing to revise § 275.21(b)(4) by replacing "95" with "113"; to revise § 275.21(c) by replacing "105" with "123"; and to add a sentence to each of these paragraphs stating that if FNS extends the timeframes in § 275.21(b)(2), that the timeframes in these paragraphs will be extended accordingly.

On January 22, 2003, we waived the deadlines for State agencies to complete processing cases in § 273.21(b) for FY 2003 and provided States with 113 days to complete each sample month's cases. This waiver was extended on March 4, 2004. In providing comments on this proposal, we would be interested in

hearing whether this amount of additional time was useful and/or sufficient. In addition to the extended timeframes for completion of individual cases, that waiver provides State agencies an additional 10 days at the end of the review period, *i.e.*, January 22 through January 31, to perform checks on the individual data transmitted by State agencies (c-trails). That additional 10 days is an expansion of current policy allowing additional time to check the c-trails during the review period. In this rulemaking, we are not proposing to allow this additional 10 days at the end of the review year for checking the c-trails. We are not proposing to allow the additional 10 days in this rulemaking because we feel that States have already received a significant additional amount of time to perform and complete all work related to the individual case reviews. Delaying completion of the State work until January 31 delays the completion of the Federal rereview process which in turn impacts FNS's ability to timely and accurately prepare the payment error rates. However, we are interested in receiving comments on this issue.

Under the timeframes as provided in the January 23, 2003, memorandum, FNS regional offices were given until March 31 to complete their subsample review process in order for all arbitration to be completed timely and to provide some additional time to ensure the accuracy of the error rates, liabilities, and adjustments to the liabilities. If FNS opts to extend the State agencies' timeframes, FNS will adjust the amount of time provided to the regions for validation and/or adjust the time provided to the Department to ensure the accuracy of the error rates, liabilities, and adjustments to the liabilities.

Section 275.21(c) provides that State agencies report the monthly progress of sample selection and completion on the Form FNS-248, Status of Sample Selection and Completion or other format specified by FNS. In response to a notice published at 68 FR 10437 on March 5, 2003, the Department received two comments suggesting elimination of the form. Federal statisticians use the information on the FNS-248 to track the status of case completions and identify when timely generation of an error rate is jeopardized. Most of the information on the FNS-248 is available elsewhere. Further, the form itself is not necessary for State agencies to provide the necessary information, and the regulation currently provides that States may submit this information other than on the form. Therefore, we are proposing to revise § 275.21(c) to

eliminate the form. State agencies will still be required to submit the information on a monthly basis as directed by the appropriate regional office.

Section 275.21(d) requires State agencies to submit an FNS-247, Statistical Summary of Sample Distribution, annually. Although the requirement is still in the regulations, FNS no longer requires State agencies to submit this form. Accordingly, we are proposing to remove § 275.21(d).

Currently, there is one level of arbitration. Quality control arbitration is the resolution of disagreements between the FNS regional office and the State agency concerning individual QC case findings and the appropriateness of actions taken to dispose of an individual case. The timeframes for conducting arbitration are in § 275.3(c)(4). Under these rules, a State agency is required to submit its request for arbitration within 20 calendar days of the date of receipt by the State agency of the regional office case findings. The FNS arbitrator has 20 calendar days from receipt of the State agency request to review and make a decision on the case. The arbitration timeframes as currently established appear to be adequate from our perspective. We believe that 20 days is an adequate amount of time for a State agency to prepare its case for arbitration. This time period is intended primarily for the State agency to prepare its letter addressing what issue or issues it is appealing, assemble the case file, and transmit the request. This time period is not intended for State agencies to conduct additional review activities. Our recent experience with the arbitration process indicates that, except for a small number of cases where the State submitted an incomplete case, 20 days has been sufficient to review and reach a decision. Accordingly, we are not proposing to make any changes in the timeframes for requesting and conducting arbitration. We are seeking comments, however, about whether affected parties and the public agree that the timeframes are adequate. If additional time is required for arbitration, the amount of time given to State agencies for completing individual case reviews may need to be reduced from that proposed in this rule.

#### *F. Consequences To Households Who Refuse To Cooperate With Quality Control Reviews*

Section 273.2(d)(2) provides procedures for handling the cases of food stamp participants who refuse to cooperate with a quality control review of their case. Currently, a household is determined ineligible if it refuses to

cooperate with a QC review. Questions have arisen about what happens when one or more household members leave a household subject to this penalty. Because the regulations do not provide an answer to the question, it has been left to State agencies to determine which household members continue to be subject to the penalty. We are proposing to amend this provision to provide that the ineligibility penalty will follow the household member(s) who refused to cooperate.

In this rule, we are also proposing to make a conforming change to § 273.2(d)(2). Current procedures in § 273.2(d)(2) require that a household be terminated for refusal to cooperate with a State or Federal quality control reviewer. If a household terminated for refusal to cooperate with a State QC reviewer reapplies within 95 days of the end of the annual review period, the household cannot be determined eligible until it cooperates with the State QC reviewer. If the household terminated for refusal to cooperate with a State QC reviewer reapplies more than 95 days after the end of the review period, the household is required to provide verification of all eligibility factors before it can be certified. If a household terminated for refusal to cooperate with a Federal QC reviewer reapplies within 7 months of the end of the annual review period, the household cannot be determined eligible until it cooperates with the Federal QC reviewer. If the household terminated for refusal to cooperate with a Federal reviewer reapplies more than seven months after the end of the review period, the household is required to provide verification of all eligibility factors before it can be certified. We are proposing to change the dates in § 273.2(d)(2) to 123 days and nine months to conform the dates in § 273.2(d)(2) to the proposed changes in the dates for completion of the State review process in § 275.21(b) and the end of the Federal QC review process in § 275.23(e)(7) (renumbered in this proposed rule as § 275.23(c)).

We are also proposing additional conforming changes to other sections of the regulations that identify these timeframes. These conforming amendments are not discussed in this preamble.

#### *G. Section 275.23—Determination of State Agency Program Performance*

Section 275.23 establishes the procedures to be used to evaluate a State agency's performance through the quality control review system. This section includes the error rates to be established, the methodology used to

establish those error rates (including regression), the thresholds for establishing potential liabilities for excessive error rates, the relationship of the sanction system to the warning process and negligence, the timeframes for announcing error rates, the procedures for resolving liabilities, the procedures for reducing liabilities based on good cause on appeal, the policy on charging interest on liabilities, and the procedures for new investment activities to reduce liabilities.

Over time, as the authority for determining the error rates and the sanction system has been changed by legislation, changes have been made throughout § 275.23. Those changes were made within the existing structure of the section. The changes to the sanction system made by the FSRA impact much of § 275.23. Because several sections require substantive revision and many paragraphs require minor changes or reference changes, we have decided to take the opportunity to reorganize the section at the same time as making the necessary changes resulting from the legislation. Accordingly, we are proposing to revise and reorganize § 275.23 in its entirety.

Under this proposed reorganization, § 275.23(a) will address the basic components of FNS determination of a State agency's efficiency and effectiveness (currently § 275.23(a) and (b)). A new § 275.23(b) will address error rates. The existing methodology for regression in § 275.23(e)(6) is proposed to be incorporated into the new § 275.23(b). Section 273.23(c) will address the timeframes for completing case reviews, conducting arbitration, and issuing error rates. Section 273.23(d) will address State agency liability. Included in this paragraph will be the procedure for establishing the national performance measure, the liability methodology, appeal rights, and the relationship to the warning process and negligence. Section 275.23(e) will address liability resolution plans; § 275.23(f) will address good cause; § 275.23(g) will address results of appeals on liability resolution; § 275.23(h) will address new investment (the rules currently refer to such investment as "reinvestment"; in this rule, we are proposing to change the term to "new investment," consistent with the language used in the FSRA); § 275.23(i) will address payment of the at-risk money; and § 275.23(j) will address interest charges.

Current § 275.23(e)(4) (Relationship to warning process and negligence), § 275.23(e)(5) (Good cause), and § 275.23(e)(6) (Determination of payment error rates) are unchanged

except for minor editing, renumbering, or reference changes. Sections 275.23(e)(4), (e)(5), and (e)(6) are proposed to be redesignated as § 275.23(d)(4), (f), and (b)(2), respectively. These changes are part of the restructuring for purposes of clarity. Necessary reference changes and language changes resulting from the elimination of enhanced funding have also been made. Such changes are technical in nature and do not impact the procedures themselves. These sections include the regression methodology and the criteria for good cause. Although these sections have been included in their entirety, their substantive content has not been changed, and comments are not being sought on these procedures. Because comments are not being sought on the substantive content of these sections, any comments received on the substantive content will not be taken into consideration in developing the final rule.

#### *H. Elimination of Pre-Fiscal Year 2003 Liability Establishment Procedures*

The interim rule, published October 16, 2003, at 68 FR 59515, revised § 275.23(e) to eliminate procedures for establishing liabilities for Fiscal Years 1983 through 1991. Section 275.23(e)(2) now provides procedures for establishing liability for excessive payment error rates for FY 2002. Section 275.23(e)(3) provides procedures for establishing liability amounts for FY 2003 and beyond, putting in place the provisions of Section 4118 of the FSRA. The provisions of Section 4118 give the Department the authority to waive any portion of the established liability amount, to require a State agency to invest up to 50 percent of any established liability amount in program administration activities, to establish up to 50 percent of the established liability amount as being "at-risk" for repayment if a liability amount is established for the subsequent fiscal year, or any combination of the three. Readers should refer to the interim rule for more information concerning the new liability system. Comments received in response to the interim rule and to this proposed rule will be considered in developing the final rule on liability resolution. The final rule will merge the interim rule and this proposed rule.

We are proposing to remove § 275.23(e)(2) (as part of the overall revision of § 275.23) as it no longer necessary. All liabilities for FY 2002 have already been determined.



### *I. Appeals of Liability Determinations*

Section 16(c)(7) of the Food Stamp Act, as amended, provides that a State agency is entitled to appeal the amount of a liability only for a fiscal year in which a liability amount is established. That means that excessive payment error rates in the first year of the new 2-year liability system are not subject to appeal. Nor is the national performance measure subject to appeal, in accordance with Section 16(c)(6)(D) of the Food Stamp Act, as amended. Thus, only a State agency's second year error rate and related liability determination are appealable. The Department recognizes that good cause may exist for an excessive error rate in year 2 that could be the result of events in year 1. The Department has proposed at § 275.23(d)(3) to limit appeals to the determination of a State's payment error rate, or a determination of whether the payment error rate exceeds 105 percent of the national performance measure and the liability amount for any year for which a liability is established. To address the limitations on the appealability of year 1 and the possibility of causes extending back into that year, we are also proposing to allow a State agency to address areas of good cause in the prior fiscal year that may have impacted the fiscal year 2 for which a liability amount has been established.

The recent significant drop in the national performance measure and individual State error rates has raised questions about the effect on this new liability system if the error rates continue to fall lower. Specifically questions have arisen about what happens if a State agency's error rate is below six percent but there is a 95 percent statistical probability that the State's payment error rate exceeds 105 percent of the national performance measure. There are two significant points to be addressed. First, since six percent is the potential liability threshold provided in the FSRA no liability amount would be established. However, the year would be a year of poor performance under the new liability system and would be considered a year 1 in determining whether a State agency had two consecutive years of error rates exceeding 105 percent of the national performance measure. The law mandates that a year be considered a year of poor performance whenever there is a 95 percent statistical probability that a State agency's payment error rate exceeds 105 percent of the national performance measure. The six percent threshold for a liability

amount determination is not relevant to the determination of poor performance. Second, questions have also arisen about whether the determination of whether a year for which no liability was established because the State's error rate was above the national performance measure but was below six percent was a year 1 is appealable. Under FSRA, this determination is not appealable. However, in the event a State agency incurs a potential liability in a subsequent year, a State agency would be able to address areas of good cause in prior fiscal year 1 that may have impacted the fiscal year 2 for which a liability amount has been established.

Section 4118 of the FSRA provides that when a State agency appeals its liability amount determination, if the State agency began required new investment activities prior to an appeal determination, and if the liability amount is reduced to \$0 through the appeal, the Secretary shall pay to the State agency an amount equal to 50 percent of the new investment amount that was included in the liability amount subject to appeal. If the Secretary wholly prevails on a State agency's appeal, Section 4118 provides that the Secretary will require the State agency to invest all or a portion of the amount designated for new investment to be invested or paid to the Federal government. Section 4118 further specifies that the Department will issue regulations addressing how the remaining new investment amount will be treated if neither party wholly prevails. The interim rule published October 16, 2003 at 68 FR 59519 established in § 275.23(e)(10) the provisions concerning either the Secretary or the State agency wholly prevailing. In accordance with Section 4118 of the FSRA, we are proposing procedures in this rule for use when neither party wholly prevails on appeal.

Under the FSRA, liability is established based on two consecutive fiscal years of poor performance. Whenever there is a 95 percent statistical probability that a State's payment error rate exceeds 105 percent of the national performance measure in each of two consecutive review years, the Department will issue, for the second consecutive fiscal year, a statement of potential liability amount to the State agency at the same time that the Department issues the State agency's official regressed payment error rate. The Department will also advise the State agency of the Department's determination of the portions of the liability amount (expressed as percentages) designated as waived, for new investment, and at-risk. If the State

agency wishes to appeal the liability amount through the process in Part 283 of the regulations, the State agency may do so.

As specified in the interim rule, if the State agency appeals the liability amount and wholly prevails and consequently its liability amount is reduced to \$0 through the appeal, and the State agency began new investment activities prior to the appeal determination, FNS shall pay to the State agency an amount equal to 50 percent of the new investment amount expended that was included in the liability amount subject to the appeal. This provision has been moved to § 275.23(g)(1). The interim rule also provided that if FNS wholly prevails on a State agency's appeal, FNS will require the State agency to invest all or a portion of the amount designated for new investment to be invested or paid to the Federal government.

The interim rule, however, did not address either the money designated as waived or as at-risk in the original determination with respect to either party wholly prevailing on appeal. As indicated above, the Department intends to identify the portions of the liability amount to be waived, newly invested, or at-risk as percentages of the liability amount. If the State agency wholly prevails on appeal, the amounts originally designated was waived or at-risk would be reduced to \$0 (percentage designated multiplied by \$0 liability amount). If FNS wholly prevails on appeal, the original liability amount determinations (expressed as percentages) and designated as waived, newly invested, or at-risk, would remain unchanged.

If the State agency appeals the liability amount and the appeal decision results in neither FNS nor the State agency wholly prevailing, a decision needs to be made as to how the newly established liability amount will be treated. The Department believes that the only way to accomplish this and implement the statutory intent is to apply the initial determination percentages to the newly established liability amount. For example, if the original liability was \$750,000 and the Department determined to waive 25% (\$187,500) of it, require that 25% (\$187,500) be newly invested, and require 50% (\$375,000) remain at-risk and if the appeal resulted in reducing the liability amount to \$600,000, the determination under this option would be 25% (\$150,000) waived, 25% (\$150,000) required to be newly invested, and 50% (\$300,000) placed at-risk. Using the original percentages, immediate action can be taken by both

parties to process the results of the appeal decision.

#### *J. New Investment*

The State agency may choose to begin new investment of any amount of the liability so designated while the appeal is proceeding, based on an approvable new investment plan. The interim rule established procedures for adjusting reimbursement and collection procedures if a State began new investment during the appeal process and subsequently wholly prevailed in its appeal or if the Department wholly prevailed on appeal.

In this rule we are proposing procedures for addressing the Department's responsibility if a State agency began investment prior to completion of an appeal and neither agency wholly prevailed.

If a State begins new investment prior to an appeal decision, and the amount already invested is less than the originally designated percentage multiplied by the new liability amount, the Department will require that the State agency continue to invest up to the newly calculated investment requirement. In the instances where a State agency has expended more than the originally designated percentage multiplied by the new liability amount, we are proposing that the Department will match the amount of funds expended in excess of that amount. This is consistent with the requirement in Section 4118 for when the State agency wholly prevails on appeal.

The regulations currently detail the requirements for reinvestment. We are proposing that these procedures remain essentially the same but for the above mentioned change of wording to new investment. Under the proposed reorganization, the procedures on new investment would be in new paragraph (h) in § 275.23. In the event that a State agency fails to comply with its new investment plan, we are proposing in redesignated § 275.23(h) that the State agency shall be required to remit to the Department the amount of funds that the State agency failed to invest. Those funds shall be remitted to the Department within 30 days of the date the State agency is notified of its failure to comply with its new investment plan. Further, we are proposing that interest shall be charged beginning with the date the State agency received the notice of failure to newly invest as required.

#### *K. Payment of At-Risk Money*

We are proposing at § 275.23(i) the procedures concerning a State agency's payment of the at-risk money. At-risk money becomes due if, in the year

subsequent to the establishment of the money being at-risk, the State agency is again potentially liable for a sanction. Payment shall be made before the end of the fiscal year following the reporting period in which the at-risk money became due (that is September 30 of the year that the subsequent liability notification is issued), unless an administrative appeal relating to liability is pending. For example, if, in FY 2003, a State agency's error rate exceeds the performance goal, and again its error rate is excessive in FY 2004 based on its announced error rate, FNS would send the notification of the FY 2004 liability amount by June 30, 2005. If the State agency's error rate in FY 2005 is excessive, any money designated as at-risk for the FY 2004 liability would be due by September 30, 2006, unless an appeal for the FY 2004 liability is still pending. If the State agency has appealed the liability determination, the State agency will not be required to remit to FNS any at-risk money until any administrative and judicial appeals concerning the liability determination that the at-risk money was based upon have been completed. Appeal of a subsequent liability amount does not eliminate the State's requirement to pay the at-risk money when it becomes due. The appeal of the subsequent year's liability amount will determine whether the liability that year will be reduced and would affect the establishment of a possible additional designation of at-risk money.

We are proposing that interest begin accruing beginning October 1 following the September 30 due date for payment of any at-risk money, unless an appeal is pending. Section 4118 of the FSRA provides that interest shall not accrue on the at-risk amount during a reasonable period following the resolution of any administrative or judicial appeals. Therefore, if an appeal is pending on September 30, we are proposing that interest will begin to accrue beginning 30 calendar days after the completion of the appeals process and notification to the State agency of the final amount of the at-risk money determined to be required to be repaid. This is consistent with the requirement currently in the regulations at § 275.23(e)(8) (redesignated as § 275.23(j)) for payment of interest on quality control liability claims. We are also proposing that FNS will continue to have the authority to recover a State's liability for at-risk money through offsets to the letter of credit, billing a State directly, or using other authorized claims collection mechanisms, in accordance with redesignated

§ 275.23(j). The reference to the Federal Claims Collection Act (Pub. L. 89-508, 80 Stat. 308) has been updated to refer to the Debt Collection Improvement Act of 1996, Pub. L. 104-134, and the Federal Claims Collection Standards, 31 CFR Parts 900-904.

#### *L. Demonstration Projects/SSA Processing*

Demonstration project and SSA joint-processed cases (cases processed in accordance with § 273.2(k) of the regulations) are subject to special consideration in terms of the QC review process. Demonstration project cases and SSA joint-processed cases are included in the sampling universe, sampled, reviewed, and in the calculation of completion rates. Demonstration project cases that significantly modify food stamp eligibility and benefit calculations and SSA joint-processed are excluded from the error rate calculations. The determination of whether the modification is significant enough to exclude the demonstration project cases is made on a project-by-project basis. SSA joint-processed cases are excluded under the current regulations in all instances. Because of recent demonstration project cases processed by SSA separately from the procedures in § 273.2(k), questions have arisen about how to handle these cases for QC purposes. These cases would under normal procedures have been excluded from the error rate calculations. However, as demonstration projects, they have been determined to be more appropriately included in the error rate calculations. State agencies have initiated demonstration projects for many reasons, including program simplification and error reduction. In some instances State agencies want such cases included in the error rates because they perceive that the inclusion would result in improved error rates. Section 275.11(g), § 275.12(h), § 275.13(f), and § 275.23(c)(5) (redesignated in this rule as § 275.23(b)(1)) provide the procedures for sampling, reviewing, and reporting the results of demonstration project cases that significantly modify the rules for determining households' eligibility or allotment level and Social Security Administration (SSA) processed cases. The language in these sections has been interpreted variously by different parties and has been determined to be unclear. In order to clarify the procedures and make it clear that SSA processed demonstration projects may be included in the error rates, we are proposing to revise § 275.11(g) and redesignated § 275.23(b)(1) to provide that

demonstration project cases and SSA processed demonstration project cases may be included in error rate calculations, as determined on a project-by-project basis by the Department.

*M. 120-Day Variance Exclusion (§ 275.12(d)(2)(vii))*

A variance is the incorrect application of policy and/or deviation between the information that was used to authorize the sample month issuance and the verified information that should have been used to calculate the sample month issuance. Section 275.12(d)(2)(vii) provides for exclusion of variances resulting from application of new regulations or implementing memoranda of Federal law changes. Originally the provision applied only to mandatory implementation of legislative and regulatory provisions and only during the 120 days of the exclusion. Over time, the extent of the variance exclusion has been expanded to reflect a change in viewpoint of the intent of this hold harmless period. The variance exclusion was expanded to provide that the variance exclusion covered errors made during the 120-day period until the case was next acted upon. Further, in response to passage of the FSRA, the Department applied this variance exclusion to optional provisions of the law. Throughout this expansion, numerous questions have been raised about what the variance exclusion actually means. We are proposing in this rule to clarify the language in § 275.12(d)(2)(vii) to provide that all variances that occur during the variance exclusion period that stem directly from the provision being implemented are excluded until the household's case is next recertified or otherwise acted upon. Further, we are proposing to modify the provision to indicate that the variance exclusion may be authorized on a case-by-case basis in the instance of optional legislative or regulatory changes, not just mandatory changes. However, we are not proposing to provide the exclusion for waivers. The legislative provision authorizing the variance exclusion is specific in applying it to regulatory implementation. The Department's extension of that to implementation of legislative provisions is driven by the fact that many

legislative provisions are effective immediately, prior to any regulation being published.

*N. FIX Errors (§ 275.12(f)(3))*

As discussed above, a variance is the incorrect application of policy and/or deviation between the information that was used to authorize the sample month issuance and the verified information that should have been used to calculate the sample month issuance. Section 275.12(f)(3) requires that all variances resulting from use by the State agency of information received from automated Federal information exchange systems (FIX errors) be coded and reported as variances, although they are excluded in determining a State agency's error rates. Data subject to the FIX exclusion are limited to Federal sources that verify income provided by the Federal source providing the data, Federal sources that provide the deduction for which the Federal source directly bills the household, and the Federal source that defines the disability. Information provided by Federal sources that are comprised of data provided to the Federal source by other entities is not information subject to the FIX variance exclusion. This requirement was established in an interim rule published November 2, 1988, at 53 FR 44171 and again addressed in the final rule published November 23, 1990, at 55 FR 48831. The requirement was established for program management purposes. After fifteen years of having the requirement in place to report such variance, the Department has not found the information to serve any program management purpose. While State agencies would still be required to correct any identified variances in individual cases, as they are for any other identified variance, we feel there is no reason to continue to require States to report this information to FNS. There have been few reported variances. Further, there has been no identified corrective action necessary at a national level during the period this requirement has been in place. Therefore, we are proposing to remove § 275.12(f)(3) in this rule.

*O. Technical Changes*

In addition, we are proposing in Part 271 Definitions to remove definitions no

longer used in the quality control system and to add the definition "National performance measure" to reflect current quality control policy, and we are proposing to make technical changes throughout Part 275 to remove references to other Federally mandated quality control samples, the Worksheet for Integrated AFDC, Food Stamps, and Medicaid Quality Control Reviews, and the Integrated Review Schedule. With the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, the Aid to Families with Dependent Children was eliminated and consequently, the integrated quality control review system was eliminated. Therefore, we are proposing to change throughout Part 275 the titles of the Work Sheet and Review Schedule to reflect that quality control reviews are now food stamp only reviews. We are also proposing to remove throughout Part 275 references to integrated quality control samples, reviews, and other Federally mandated quality control systems.

Throughout the rule, we are proposing to remove references to the "underissuance error rate" wherever payment error rate and underissuance error rate are used. The definition of payment error rate includes both the overissuance error rate and the underissuance error rate, making the separate reference to the underissuance error rate redundant. This does not mean that FNS will not calculate the underissuance error rate.

With full implementation of electronic benefit transfer systems of issuance, food stamp benefits are no longer being issued as coupons. Accordingly we are proposing to remove references to coupons in § 275.12(c)(2) and § 275.13(d).

In addition, we are proposing technical changes throughout Part 275 to correct references based on changes proposed to be made in this rule. Due to the restructuring of § 275.23, many sections required renumbering and reference changes throughout § 275. These reference changes are not discussed in this preamble. Any substantive changes are discussed in the preamble.

DISTRIBUTION TABLE

Old section	New section
275.23(a) .....	275.23(a)
275.23(b) .....	275.23(a)
275.23(c) .....	275.23(c)
275.23(c)(1) .....	Removed
275.23(c)(2) .....	Removed

DISTRIBUTION TABLE—Continued

Old section	New section
275.23(c)(3) .....	Removed
275.23(c)(4) .....	Removed
275.23(c)(5) .....	275.23(b)(1)
275.23(d) .....	Removed
275.23(e)(1) .....	275.23(d) introductory text
275.23(e)(2) .....	Removed
275.23(e)(3) [1st and 3rd sentences] .....	275.23(d)(1)
275.23(e)(3) [2nd sentence] .....	271.2 Definition of “National Performance Measure”
275.23(e)(3) [4th sentence] .....	275.23(d)(3)
275.23(e)(3) [last sentence and (i), (ii), and (iii)] .....	275.23(d)(2)
275.23(e)(4) .....	275.23(d)(4)
275.23(e)(5) .....	275.23(f)
275.23(e)(6) .....	275.23(b)(2)
275.23(e)(7) .....	275.23(c)
275.23(e)(8) .....	275.23(j)
275.23(e)(9)(i) .....	275.23(h)(1)
275.23(e)(9)(ii) .....	275.23(h)(2)
275.23(e)(9)(iii) .....	275.23(h)(3)
275.23(e)(10) .....	275.23(e)

DERIVATION TABLE

New section	Old section
271.2 Definition of National Performance Measure .....	275.23(e)(3) second sentence
275.23(a) .....	275.23(a), 275.23(b)
275.23(b) .....	275.23(c) [1st sentence]
	275.23(c)(1) [end of sentence beginning with word “based”]
	275.23(c)(4) [end of sentence beginning with word “based”]
273.23(b)(1) .....	275.23(c)(5) revised
273.23(b)(2) .....	275.23(e)(6)
275.23(c) .....	275.23(e)(7)
275.23(d)(1) .....	275.23(e)(3) [1st three sentences]
275.23(d)(2) .....	275.23(e)(3) [sentences 5 & 6] and paragraphs (i), (ii), and (iii)
275.23(d)(3) .....	275.23(e)(3) [fourth sentence]
275.23(d)(4) .....	275.23(e)(4)
275.23(e)(1) .....	275.23(e)(10) [first sentence]
275.23(e)(2) .....	275.23(e)(10) [second and third sentences]
	275.23(e)(9)(iii) [1st sentence]
275.23(f) .....	275.23(e)(5) [introductory text revised]
275.23(g)(1) .....	275.23(e)(10) [fourth sentence]
275.23(g)(2) .....	275.23(e)(10) [last sentence]
275.23(h)(1) .....	275.23(e)(9)(i)
275.23(h)(2) .....	275.23(e)(9)(ii)
275.23(h)(3) .....	275.23(e)(9)(iv) [first sentence]
275.23(h)(4) .....	275.23(e)(9)(v)
275.23(h)(5) .....	275.23(e)(9)(vi)
275.23(j) .....	275.23(e)(8)

IV. Implementation

The Department is proposing that the changes in this rule be effective and be implemented 60 days following publication of the final rule in the **Federal Register**. Section 4118 of the FSRA eliminated enhanced funding, effective October 1, 2002, for FY 2003. This rule would codify that elimination.

List of Subjects

7 CFR Part 271

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

7 CFR Part 273

Administrative practice and procedures, Aliens, Claims, Food stamps, Fraud, Grant programs—social programs, Penalties, Reporting and recordkeeping requirements, Social Security, Students.

7 CFR Part 275

Administrative practice and procedure, Food stamps, Reporting, and recordkeeping requirements.

7 CFR Part 277

Food stamps, Government procedure, Grant programs—Social programs, Investigations, Records, Reporting and recordkeeping requirements.

Accordingly, 7 CFR Parts 271, 273, 275, and 277 are proposed to be amended as follows:

1. The authority citation for Parts 271, 273, 275, and 277 continues to read as follows:

Authority: 7 U.S.C. 2011–2036.

**PART 271—GENERAL INFORMATION AND DEFINITIONS**

2. In § 271.2:

- a. Remove the definition “Base period”.
- b. Remove the definition “National standard payment error rate”.

c. Add the definition "National performance measure" in alphabetical order.

d. Revise the definition "Negative case".

The addition and revision read as follows:

§ 271.2 Definitions.

\* \* \* \* \*

National performance measure means the sum of the products of each State agency's payment error rate times that State agency's proportion of the total value of the national allotments issued for the fiscal year using the most recent issuance data available at the time the State agency is notified of its performance error rate.

Negative case means any action taken to deny, suspend, or terminate a case in the sample month.

\* \* \* \* \*

PART 273—CERTIFICATION OF ELIGIBLE HOUSEHOLDS

3. In § 273.2, paragraph (d)(2) is amended by:

a. Removing the reference "§ 275.3(c)(5) or § 275.12(g)(1)(ii)," and adding in its place the reference "§§ 275.3(c)(5) and 275.12(g)(1)(ii) of this chapter,";

b. Removing the number "95" in the third sentence and adding in its place the number "123";

c. Removing the reference "§ 273.2(f)(1)(ix)" at the end of the third sentence and adding in its place the reference "paragraph (f)(1)(ix) of this section";

d. Removing the word "seven" in the last sentence and adding in its place the word "nine";

e. Removing the reference "§ 273.2(f)(1)(ix)" at the end of the last sentence and adding in its place the reference "paragraph (f)(1)(ix) of this section.";

f. Adding a new sentence at the end of the paragraph to read as follows:

§ 273.2 Office operations and application processing.

\* \* \* \* \*

(d) \* \* \*

(2) \* \* \* In the event that one or more household members leave a household terminated for refusal to cooperate, the penalty for refusal to cooperate will attach to the person(s) who refused to cooperate.

\* \* \* \* \*

PART 275—PERFORMANCE REPORTING SYSTEM

§ 275.1 [Amended]

4. In § 275.1:

a. Paragraph (a) is amended by removing the paragraph designation; and

b. Paragraph (b) is removed.

5. In § 275.3:

a. The introductory text of § 275.3 is amended by removing the word "conduct" in the second sentence and adding in its place the word "conduction".

b. The introductory text of paragraph (c) is amended by removing the words "and underissuance error rate" in the first sentence, by removing the third and fourth sentences and adding a new sentence in their place, and by removing the reference to "§ 275.23(e)(6)" in the last sentence and adding in its place a reference to "§ 275.23(d)(4)".

The addition reads as follows:

§ 275.3 Federal monitoring.

\* \* \* \* \*

(c) \* \* \* FNS shall validate each State agency's reported negative case error rate. \* \* \*

\* \* \* \* \*

§ 275.4 [Amended]

6. In § 275.4, paragraph (c) is amended by removing the words "Integrated TANF, Food Stamps and Medicaid" and by adding in their place the words "Food Stamp Program", by removing the words "Integrated Review Schedule" and by adding in their place the words "Quality Control Review Schedule", and by removing the words "and Form FNS-248, Status of Sample Selection and Completion".

§ 275.10 [Amended]

7. In § 275.10:

a. Paragraph (a) is amended by removing the words "and eligibility for enhanced funding" and the words "that is not entitled to enhanced funding" in the last sentence.

b. Paragraph (b)(4) is amended by removing the word "standard" and adding in its place the words "performance measure" and by removing the words "and State agency eligibility for enhanced funding".

8. In § 275.11:

a. Paragraph (a)(1) is amended by removing the last sentence.

b. Paragraph (a)(2) introductory text is amended by removing the words "integrated sampling."

c. Paragraph (b)(1)(i) is amended by removing the words "and underissuance error rates" and adding in their place the word "rate".

d. Paragraph (e)(2)(i) is revised.

e. Paragraph (e)(2)(ii) is revised.

f. Paragraph (f)(2) introductory text is revised.

g. Paragraph (f)(2)(v) and (f)(2)(vi) are removed and paragraphs (f)(2)(vii),

(f)(2)(viii), and (f)(2)(ix) are redesignated as (f)(2)(v), (f)(2)(vi), and (f)(2)(vii), respectively.

h. Paragraph (g) is amended by removing the reference "§ 275.23(e)(6)" in the third sentence and by adding in its place the reference "§ 275.23(b)(2)"; by removing the fourth sentence; and by adding three new sentences at the end of the paragraph.

The revisions and addition read as follows:

§ 275.11 Sampling.

\* \* \* \* \*

(e) \* \* \*

(2) \* \* \*

(i) All actions to deny an application in the sample month except those excluded from the universe in paragraph (f)(2) of this section. If a household is subject to more than one denial action in a single sample month, each action shall be listed separately in the sample frame; and

(ii) All actions to suspend or terminate a household in the sample month except those excluded from the universe in paragraph (f)(2) of this section. Each action to suspend or terminate a household in the sample month shall be listed separately in the sample frame.

\* \* \* \* \*

(f) \* \* \*

(2) Negative cases. The universe for negative cases shall include all actions taken to deny, suspend or terminate a household in the sample month except the following:

\* \* \* \* \*

(g) \* \* \* FNS shall establish on an individual demonstration project basis whether the results of the reviews of active and negative demonstration project cases shall be included or excluded from the determination of State agencies' error rates as described in § 275.23(b). Cases processed by SSA in accordance with § 273.2(k) of this chapter, except for demonstration project cases, shall be excluded from the determination of State agencies' error rates. FNS shall establish on an individual project basis whether demonstration project cases processed by SSA shall be included or excluded from the determination of State agencies' error rates.

9. In § 275.12:

a. Paragraph (a) is amended by adding the words "of this chapter" after the reference "273.9" at the end of the fourth sentence and by adding the words "of this chapter" after the reference "273.21" in the sixth sentence.

b. Paragraph (b) is amended by removing the words "Integrated Worksheet," in the last sentence.

c. The introductory text of paragraph (c) is amended by adding the words "of this chapter" after the reference "§ 272.8" at the end of the second sentence and by removing the words "Integrated Worksheet," in the last sentence.

d. Paragraph (c)(2) is amended by removing the word "coupon" in the second sentence.

e. The introductory text of paragraph (d) is amended by removing the words "column (5) of the Integrated Worksheet," in the last sentence, and by adding in their place the words "column (4) of the".

f. Paragraph (d)(1) is amended by adding the words "of this chapter" after the references "§ 273.6(c)" and "§ 273.7(f)" in the last sentence.

g. Paragraph (d)(2)(i) is amended by adding the words "of this chapter" after the reference "§ 273.2(f)(1)(i)" in the last sentence.

h. Paragraph (d)(2)(ii) is amended by adding the words "of this chapter" after the reference "§ 273.2(i)(4)(i)" in the first sentence.

i. Paragraph (d)(2)(iii) is amended by adding the words "of this chapter" after the reference "§§ 273.12(a) and 273.21(h) and (i)" in the second sentence and after the reference "§§ 273.12(c) and 273.21(j)" in the last sentence.

j. Paragraph (d)(2)(iv) is amended by adding the words "of this chapter" after the reference "§ 273.2(f)(3)(i)(B)" in the first sentence and after the reference "§ 273.12(c)" in the last sentence.

k. The introductory text of paragraph (d)(2)(vii) is revised.

l. Paragraph (d)(3) is amended by adding the words "of this chapter" after the words "part 273" in the second sentence.

m. Paragraph (e) is amended by removing the words "Integrated Worksheet," in the last sentence.

n. The introductory text of paragraph (f) is amended by removing the words "Integrated Review Schedule," in the last sentence.

o. Paragraph (f)(3) is removed.

p. The introductory text of paragraph (g) is amended by removing the words "Integrated Review Schedule," in the last sentence.

q. Paragraph (g)(1)(ii) introductory text is amended by removing the word "may" in the second sentence and adding in its place the word "must".

r. Paragraph (g)(2)(iv) is amended by adding the words "of this chapter" after the reference "§ 273.17".

s. Paragraph (h) is amended by adding the words "of this chapter" after the

reference "§ 273.2(k)(2)(ii)" in the last sentence.

The revision reads as follows:

**§ 275.12 Review of active cases.**

\* \* \* \* \*

(d) \* \* \*

(2) \* \* \*

(vii) Subject to the limitations provided in paragraphs (d)(2)(vii)(A) through (d)(2)(vii)(F) of this section, any variance resulting from application of a new Program regulation or implementing memorandum of a mandatory change in Federal law that occurs during the first 120 days from the required implementation date. The variance exclusion shall apply to any action taken on a case directly related to implementation of a covered provision during the 120-day exclusionary period until the case is required to be recertified or acted upon for some other reason. FNS may choose to apply this variance exclusion to optional regulatory or legislative provisions.

\* \* \* \* \*

10. In § 275.13:

a. Paragraphs (a), (b), and (c)(1) are revised.

b. Paragraph (d) is amended by removing the word "coupon" in the first sentence.

The revisions read as follows:

**§ 275.13 Review of negative cases.**

(a) *General.* A sample of actions to deny applications, or suspend or terminate a household in the sample month shall be selected for quality control review. These negative actions shall be reviewed to determine whether the State agency's decision to deny, suspend, or terminate the household, as of the review date, was correct. Depending on the characteristics of individual State systems, the review date for negative cases could be the date of the agency's decision to deny, suspend, or terminate program benefits, the date on which the decision is entered into the computer system, or the date of the notice to the client. State agencies must consistently apply the same definition for review date to all sample cases of the same classification. The review of negative cases shall include a household case record review; an error analysis; and the reporting of review findings, including procedural problems with the action regardless of the validity of the decision to deny, suspend or terminate. In certain instances, contact with the household or a collateral contact may be permitted.

(b) *Household case record review.* The reviewer shall examine the household case record and verify through documentation in it whether the reason

given for the denial, suspension, or termination is correct. Through the review of the household case record, the reviewer shall complete the household case record sections and document the reasons for denial, suspension or termination on the Negative Quality Control Review Schedule, Form FNS-245.

(c) \* \* \*

(1) A negative case shall be considered correct if the reviewer is able to verify through documentation in the household case record that a household was correctly denied, suspended, or terminated from the program in accordance with the reason for the action given by the State agency in the notice. Whenever the reviewer is unable to verify the correctness of the State agency's decision to deny, suspend, or terminate a household's participation through such documentation, the QC reviewer may contact the household or a collateral contact to verify the correctness of the specific negative action under review. If the reviewer is unable to verify the correctness of the State agency's decision to deny, suspend, or terminate the case for the specific reason given for the action, the negative case shall be considered incorrect.

\* \* \* \* \*

**§ 275.14 [Amended]**

11. In § 275.14:

a. Paragraph (c) is amended by removing the words "Integrated Review Worksheet, Form FNS-380," in the first sentence and by adding in their place the words "Form FNS-380".

b. Paragraph (d) is amended by removing the words "Integrated Review Schedule," in the first sentence and by removing the words "Integrated Review Worksheet," in the second sentence.

12. In § 275.16:

a. Paragraph (b)(2) is removed and paragraphs (b)(3), (b)(4), (b)(5), and (b)(6) are redesignated as (b)(2), (b)(3), (b)(4), and (b)(5), respectively.

b. Newly-redesignated paragraph (b)(5) is revised.

The revision reads as follows:

**§ 275.16 Corrective action planning.**

\* \* \* \* \*

(b) \* \* \*

(5) Result in underissuances, improper denials, improper suspensions, improper termination, or improper systemic suspension of benefits to eligible households where such errors are caused by State agency rules, practices, or procedures.

\* \* \* \* \*

13. In § 275.21:

a. The introductory text of paragraph (b) is amended by removing the words "Integrated Review Schedule," in the second sentence.

b. Paragraph (b)(2) is revised.

c. Paragraph (b)(4) is amended by removing the number "95" in the first sentence and adding in its place the number "113" and adding a new sentence after the first sentence.

d. Paragraph (c) is revised.

e. Paragraph (d) is removed and paragraph (e) is redesignated as paragraph (d).

f. Newly-redesignated paragraph (d) is revised.

The revisions and addition read as follows:

**§ 275.21 Quality control review reports.**

\* \* \* \* \*

(b) \* \* \*

(2) The State agency shall have at least 100 days from the end of the sample month to dispose of and report the findings of 90 percent of all selected cases in a given sample month. The State agency shall have at least 113 days from the end of the sample month to dispose of and report the findings of all cases selected in a sample month. FNS may grant additional time as warranted upon request by a State agency for cause shown to complete and dispose of individual cases.

\* \* \* \* \*

(4) \* \* \* If FNS extends the timeframes in paragraph (b)(2) of this section, this date will be extended accordingly. \* \* \*

(c) *Monthly status.* The State agency shall report in a manner directed by the regional office the monthly progress of sample selection and completion within 123 days after the end of the sample month. Each report shall reflect sampling and review activity for a given sample month. If FNS extends the timeframes in paragraph (b)(2) of this section, this date will be extended accordingly.

(d) *Demonstration projects/SSA processing.* The State agency shall identify the monthly status of active and negative demonstration project/SSA processed cases (*i.e.*, those cases described in § 275.11(g)) in accordance with paragraph (c) of this section.

14. Section 275.23 is revised to read as follows:

**§ 275.23 Determination of State agency program performance.**

(a) *Determination of efficiency and effectiveness.* FNS shall determine the efficiency and effectiveness of a State's administration of the Food Stamp Program by measuring State compliance with the standards contained in the

Food Stamp Act, regulations, and the State Plan of Operation and State efforts to improve program operations through corrective action. This determination shall be made based on:

(1) Reports submitted to FNS by the State;

(2) FNS reviews of State agency operations;

(3) State performance reporting systems and corrective action efforts; and

(4) Other available information such as Federal audits and investigations, civil rights reviews, administrative cost data, complaints, and any pending litigation.

(b) *State agency error rates.* FNS shall estimate each State agency's active case, payment, and negative case error rate based on the results of quality control review reports submitted in accordance with the requirements outlined in § 275.21. The determination of the correctness of the case shall be based on certification policy as set forth in part 273 of this chapter.

(1) *Demonstration projects/SSA processing.* FNS shall make a project by project determination whether the reported results of reviews of active and negative demonstration project cases shall be included or excluded from the estimate of the active case error rate, payment error rate, and negative case error rate. The reported results of reviews of cases processed by SSA in accordance with § 273.2(k) of this chapter shall be excluded from the estimate of the active case error rate, payment error rate, and negative case error rate. FNS shall make a project by project determination whether the reported results of reviews of active and negative demonstration project cases processed by SSA shall be included or excluded from the estimate of the active case error rate, payment error rate, and negative case error rate.

(2) *Determination of payment error rates.* As specified in § 275.3(c), FNS will validate each State agency's estimated payment error rate by rereviewing the State agency's active case sample and ensuring that its sampling, estimation, and data management procedures are correct.

(i) Once the Federal case reviews have been completed and all differences with the State agency have been identified, FNS shall calculate regressed error rates using the following linear regression equations.

(A)  $y_1' = y_1 + b_1(X_1 - x_1)$ , where  $y_1'$  is the average value of allotments overissued to eligible and ineligible households;  $y_1$  is the average value of allotments overissued to eligible and ineligible households in the rereview

sample according to the Federal finding,  $b_1$  is the estimate of the regression coefficient regressing the Federal findings of allotments overissued to eligible and ineligible households on the corresponding State agency findings,  $x_1$  is the average value of allotments overissued to eligible and ineligible households in the rereview sample according to State agency findings, and  $X_1$  is the average value of allotments overissued to eligible and ineligible households in the full quality control sample according to State agency's findings. In stratified sample designs  $Y_1$ ,  $X_1$ , and  $x_1$  are weighted averages and  $b_1$  is a combined regression coefficient in which stratum weights sum to 1.0 and are proportional to the estimated stratum caseloads subject to review.

(B)  $y_2' = y_2 + b_2(X_2 - x_2)$ , where  $y_2'$  is the average value of allotments underissued to households included in the active error rate,  $y_2$  is the average value of allotments underissued to participating households in the rereview sample according to the Federal finding,  $b_2$  is the estimate of the regression coefficient regressing the Federal findings of allotments underissued to participating households on the corresponding State agency findings,  $x_2$  is the average value of allotments underissued to participating households in the rereview sample according to State agency findings, and  $X_2$  is the average value of allotments underissued to participating households in the full quality control sample according to the State agency's findings. In stratified sample designs  $y_2$ ,  $X_2$ , and  $x_2$  are weighted averages and  $b_2$  is a combined regression coefficient in which stratum weights sum to 1.0 and are proportional to the estimated stratum caseloads subject to review.

(C) The regressed error rates are given by  $r_1 = y_1/u$ , yielding the regressed overpayment error rate, and  $r_2' = y_2'/u$ , yielding the regressed underpayment error rate, where  $u$  is the average value of allotments issued to participating households in the State agency sample.

(D) After application of the adjustment provisions of paragraph (b)(2)(iii) of this section, the adjusted regressed payment error rate shall be calculated to yield the State agency's payment error rate. The adjusted regressed payment error rate is given by  $r_1'' + r_2''$ .

(ii) If FNS determines that a State agency has sampled incorrectly, estimated improperly, or has deficiencies in its QC data management system, FNS will correct the State agency's payment and negative case error rates based upon a correction to that aspect of the State agency's QC

system which is deficient. If FNS cannot accurately correct the State agency's deficiency, FNS will assign the State agency a payment error rate or negative case error rate based upon the best information available. After consultation with the State agency, the assigned payment error rate will then be used in the liability determination. After consultation with the State agency, the assigned negative case error rate will be the official State negative case error rate for any purpose. State agencies shall have the right to appeal assessment of an error rate in this situation in accordance with the procedures of Part 283 of this chapter.

(iii) Should a State agency fail to complete 98 percent of its required sample size, FNS shall adjust the State agency's regressed error rates using the following equations:

(A)  $r_1'' = r_1' + 2(1 - C)S_1$ , where  $r_1''$  is the adjusted regressed overpayment error rate,  $r_1'$  is the regressed overpayment error rate computed from the formula in paragraph (b)(2)(i)(C) of this section, C is the State agency's rate of completion of its required sample size expressed as a decimal value, and  $S_1$  is the standard error of the State agency sample overpayment error rate. If a State agency completes all of its required sample size, then  $r_1'' = r_1'$ .

(B)  $r_2'' = r_2' + 2(1 - C)S_2$ , where  $r_2''$  is the adjusted regressed underpayment error rate,  $r_2'$  is the regressed underpayment error rate computed from the formula in paragraph (b)(2)(i)(C) of this section, C is the State agency's rate of completion of its required sample size expressed as a decimal value, and  $S_2$  is the standard error of the State agency sample underpayment error rate. If a State agency completes all of its required sample size, then  $r_2'' = r_2'$ .

(c) *FNS Timeframes for completing case review process, arbitration, and issuing error rates.* The case review process and the arbitration of all difference cases shall be completed by May 31 following the end of the fiscal year. FNS shall determine and announce the national average payment and negative case error rates for the fiscal year by June 30 following the end of the fiscal year. At the same time FNS shall notify all State agencies of their individual payment and negative case error rates and payment error rate liabilities, if any. FNS shall provide a copy of each State agency's notice of potential liability to its respective chief executive officer and legislature. FNS shall initiate collection action on each claim for such liabilities before the end of the fiscal year following the reporting period in which the claim arose unless an appeal relating to the claim is

pending. Such appeals include administrative and judicial appeals pursuant to Section 14 of the Food Stamp Act. While the amount of a State's liability may be recovered through offsets to their letter of credit as identified in § 277.16(c) of this chapter, FNS shall also have the option of billing a State directly or using other claims collection mechanisms authorized under the Debt Collection Improvement Act of 1996 (Pub. L. 104-134) and the Federal Claims Collection Standards (31 CFR Parts 900-904), depending upon the amount of the State's liability. FNS is not bound by the timeframes referenced in paragraph (c) of this section in cases where a State fails to submit QC data expeditiously to FNS and FNS determines that, as a result, it is unable to calculate the State's payment error rate and payment error rate liability within the prescribed timeframe.

(d) *State agencies' liabilities for payment error rates.* At the end of each fiscal year, each State agency's payment error rate over the entire fiscal year will be computed and evaluated to determine whether the payment error rate goal (national performance measure) established in paragraph (d)(1) of this section has been met. Each State agency that fails to achieve its payment error rate goal during a fiscal year shall be liable as specified in paragraph (d)(2) of this section.

(1) *National performance measure.* FNS shall announce a national performance measure not later than June 30 after the end of the fiscal year. The national performance measure is the sum of the products of each State agency's error rate times that State agency's proportion of the total value of national allotments issued for the fiscal year using the most recent issuance data available at the time the State agency is notified of its payment error rate. Once announced, the national performance measure for a given fiscal year will not be subject to administrative or judicial appeal.

(2) *Liability.* For fiscal year 2003 and subsequent years, liability for payment shall be established whenever there is a 95 percent statistical probability that, for the second or subsequent consecutive fiscal year, a State agency's payment error rate exceeds 105 percent of the national performance measure. The amount of the liability shall be equal to the product of the value of all allotments issued by the State agency in the second (or subsequent consecutive) fiscal year; multiplied by the difference between the State agency's payment error rate and 6 percent; multiplied by 10 percent.

(3) *Right to appeal payment error rate liability.* Determination of a State agency's payment error rate or whether that payment error rate exceeds 105 percent of the national performance measure shall be subject to administrative or judicial review only if a liability amount is established for that fiscal year. Procedures for good cause appeals of excessive payment error rates are addressed in paragraph (f) of this section. The established national performance measure is not subject to administrative or judicial appeal, nor is any prior fiscal year payment error rate subject to appeal as part of the appeal of a later fiscal year's liability amount. However, State agencies may address matters related to good cause in an immediately prior fiscal year that impacted the fiscal year for which a liability amount has been established. The State agency will need to address how year 2 was impacted by the event(s) in the prior year.

(4) *Relationship to warning process and negligence.*

(i) States' liability for payment error rates as determined above in paragraphs (d)(1) through (d)(3) of this section are not subject to the warning process of § 276.4(d) of this chapter.

(ii) FNS shall not determine negligence (as described in § 276.3 of this chapter) based on the overall payment error rate for issuances to ineligible households and overissuances to eligible households in a State or political subdivision thereof. FNS may only establish a claim under § 276.3 of this chapter for dollar losses from failure to comply, due to negligence on the part of the State agency (as defined in § 276.3 of this chapter), with specific certification requirements. Thus, FNS will not use the result of States' QC reviews to determine negligence.

(iii) Whenever a State is assessed a liability amount for an excessive payment error rate, the State shall have the right to request an appeal in accordance with procedures set forth in part 283 of this chapter. While FNS may determine a State to be liable for dollar loss under the provisions of this section and the negligence provisions of § 276.3 of this chapter for the same period of time, FNS shall not bill a State for the same dollar loss under both provisions. If FNS finds a State liable for dollar loss under both the QC liability system and the negligence provisions, FNS shall adjust the billings to ensure that two claims are not made against the State for the same dollar loss.

(e) *Liability Amount Determinations.*

(1) FNS shall provide each State agency whose payment error rate subjects it to a liability amount the following



determinations each expressed as a percentage of the total liability amount. FNS shall:

- (i) Waive all or a portion of the liability;
- (ii) Require the State agency to invest up to 50 percent of the liability in activities to improve program administration (new investment money shall not be matched by Federal funds);
- (iii) Designate up to 50 percent of the liability as "at-risk" for repayment if a liability is established based on the State agency's payment error rate for the subsequent fiscal year; or
- (iv) Choose any combination of these options.

(2) Once FNS determines the percentages in accordance with paragraphs (e)(1)(i) through (e)(1)(iv) of this section, the amount assigned as at-risk is not subject to settlement negotiation between FNS and the State agency and may not be reduced unless an appeal decision revises the total dollar liability. FNS and the State agency shall settle any waiver percentage amount or new investment percentage amount before the end of the fiscal year in which the liability amount is determined. The determination of percentages for waiver, new investment and/or at-risk amounts by the Department is not appealable. Likewise, a settlement of the waiver and new investment amounts is unappealable.

(f) *Good cause.* When a State agency with otherwise effective administration exceeds the tolerance level for payment errors as described in this section, the State agency may seek relief from liability claims that would otherwise be levied under this section on the basis that the State agency had good cause for not achieving the payment error rate tolerance. State agencies desiring such relief must file an appeal with the Department's Administrative Law Judge (ALJ) in accordance with the procedures established under part 283 of this chapter. Paragraphs (f)(1) through (f)(5) of this section describe the unusual events that are considered to have a potential for disrupting program operations and increasing error rates to an extent that relief from a resulting liability amount or increased liability amount is appropriate. The occurrence of an event(s) does not automatically result in a determination of good cause for an error rate in excess of the national performance measure. The State agency must demonstrate that the event had an adverse and uncontrollable impact on program operations during the relevant period, and the event caused an uncontrollable increase in the error rate. Good cause relief will only be considered for that portion of the error

rate/liability amount attributable to the unusual event. The following are unusual events which State agencies may use as a basis for requesting good cause relief and specific information that must be submitted to justify such requests for relief:

(1) *Natural disasters and civil disorders.* Natural disasters such as those under the authority of The Disaster Relief and Emergency Assistance Amendments of 1988 (Pub. L. 100-707), which amended The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Pub. L. 93-288), or civil disorders that adversely affect program operations.

(i) When submitting a request for good cause relief based on this example, the State agency shall provide the following information:

(A) The nature of the disaster(s) (e.g. a tornado, hurricane, earthquake, flood, etc.) or civil disorder(s) and evidence that the President has declared a disaster;

(B) The date(s) of the occurrence;

(C) The date(s) after the occurrence when program operations were affected;

(D) The geographic extent of the occurrence (i.e. the county or counties where the disaster occurred);

(E) The proportion of the food stamp caseload whose management was affected;

(F) The reason(s) why the State agency was unable to control the effects of the disaster on program administration and errors.

(G) The identification and explanation of the uncontrollable nature of errors caused by the event (types of errors, geographic location of the errors, time period during which the errors occurred, etc.).

(H) The percentage of the payment error rate that resulted from the occurrence and how this figure was derived; and

(I) The degree to which the payment error rate exceeded the national performance measure in the subject fiscal year.

(ii) (A) The following criteria and methodology will be used to assess and evaluate good cause in conjunction with the appeals process, and to determine that portion of the error rate/liability amount attributable to the uncontrollable effects of a disaster or civil disorder:

(1) Geographical impact of the disaster;

(2) State efforts to control impact on program operations;

(3) The proportion of food stamp caseload affected; and/or

(4) The duration of the disaster and its impact on program operations.

(B) Adjustments for these factors may result in a waiver of all, part, or none of the liability amount for the applicable period. As appropriate, the waiver amount will be adjusted to reflect States' otherwise effective administration of the program based upon the degree to which the error rate exceeds the national performance measure. For example, a reduction in the waiver amount may be made when a State agency's recent error rate history indicates that even absent the events described, the State agency would have exceeded the national performance measure in the review period.

(iii) If a State agency has provided insufficient information to determine a waiver amount for the uncontrollable effects of a natural disaster or civil disorder using factual analysis, the waiver amount shall be evaluated using the following formula and methodology which measures both the duration and intensity of the event. Duration will be measured by the number of months the event had an adverse impact on program operations. Intensity will be a proportional measurement of the issuances for the counties affected to the State's total issuance. This ratio will be determined using issuance figures for the first full month immediately preceding the disaster. This figure will not include issuances made to households participating under disaster certification authorized by FNS and already excluded from the error rate calculations under § 275.12(g)(2)(vi). The counties considered affected will include counties where the disaster/civil disorder occurred, and any other county that the State agency can demonstrate had program operations adversely impacted due to the event (such as a county that diverted significant numbers of food stamp certification or administrative staff). The amount of the waiver of liability will be determined using the linear equation  $W = Ia/Ib \times [M/12 \text{ or } Mp/18] \times L$ , where Ia is the issuance for the first full month immediately preceding the unusual event for the county affected; Ib is the State's total issuance for the first full month immediately preceding the unusual event; M/12 is the number of months in the subject fiscal year that the unusual event had an adverse impact on program operations; Mp/18 is the number of months in the last half (April through September) of the prior fiscal year that the unusual event had an adverse impact on program operations; L is the total amount of the liability for the fiscal year. Mathematically this formula could result in a waiver of more than 100% of the liability amount;

however, no more than 100% of a State's liability amount will be waived for any one fiscal year. Under this approach, unless the State agency can demonstrate a direct uncontrollable impact on the error rate, the effects of disasters or civil disorders that ended prior to the second half of the prior fiscal year will not be considered.

(2) *Strikes.* Strikes by State agency staff necessary to determine Food Stamp Program eligibility and process case changes.

(i) When submitting a request for good cause relief based on this example, the State agency shall provide the following information:

(A) Which workers (*i.e.* eligibility workers, clerks, data input staff, etc.) and how many (number and percentage of total staff) were on strike or refused to cross picket lines;

(B) The date(s) and nature of the strike (*i.e.*, the issues surrounding the strike);

(C) The date(s) after the occurrence when program operations were affected;

(D) The geographic extent of the strike (*i.e.* the county or counties where the strike occurred);

(E) The proportion of the food stamp caseload whose management was affected;

(F) The reason(s) why the State agency was unable to control the effects of the strike on program administration and errors;

(G) Identification and explanation of the uncontrollable nature of errors caused by the event (types of errors, geographic location of the errors, time period during which the errors occurred, etc.);

(H) The percentage of the payment error rate that resulted from the strike and how this figure was derived; and

(I) The degree to which the payment error rate exceeded the national performance measure in the subject fiscal year.

(ii) (A) The following criteria shall be used to assess, evaluate and respond to claims by the State agency for a good cause waiver of a liability amount in conjunction with the appeals process, and to determine that portion of the error rate/liability amount attributable to the uncontrollable effects of the strike:

(1) Geographical impact of the strike;

(2) State efforts to control impact on program operations;

(3) The proportion of food stamp caseload affected; and/or

(4) The duration of the strike and its impact on program operations.

(B) Adjustments for these factors may result in a waiver of all, part, or none of the liability amount for the applicable period. For example, the amount of the

waiver might be reduced for a strike that was limited to a small area of the State. As appropriate, the waiver amount will be adjusted to reflect States' otherwise effective administration of the program based upon the degree to which the error rate exceeded the national performance measure.

(iii) If a State agency has provided insufficient information to determine a waiver amount for the uncontrollable effects of a strike using factual analysis, a waiver amount shall be evaluated by using the formula described in paragraph (f)(1) of this section. Under this approach, unless the State agency can demonstrate a direct uncontrollable impact on the error rate, the effects of strikes that ended prior to the second half of the prior fiscal year will not be considered.

(3) *Caseload growth.* A significant growth in food stamp caseload in a State prior to or during a fiscal year, such as a 15 percent growth in caseload. Caseload growth which historically increases during certain periods of the year will not be considered unusual or beyond the State agency's control.

(i) When submitting a request for good cause relief based on this example, the State agency shall provide the following information:

(A) The amount of growth (both actual and percentage);

(B) The time the growth occurred (what month(s)/year);

(C) The date(s) after the occurrence when program operations were affected;

(D) The geographic extent of the caseload growth (*i.e.* Statewide or in which particular counties);

(E) The impact of caseload growth;

(F) The reason(s) why the State agency was unable to control the effects of caseload growth on program administration and errors;

(G) The percentage of the payment error rate that resulted from the caseload growth and how this figure was derived; and

(H) The degree to which the error rate exceeded the national performance measure in the subject fiscal year.

(ii)(A) The following criteria and methodology shall be used to assess and evaluate good cause in conjunction with the appeals process, and to determine that portion of the error rate/liability amount attributable to the uncontrollable effects of unusual caseload growth:

(1) Geographical impact of the caseload growth;

(2) State efforts to control impact on program operations;

(3) The proportion of food stamp caseload affected; and/or

(4) The duration of the caseload growth and its impact on program operations.

(B) Adjustments for these factors may result in a waiver of all, part, or none of the liability amount for the applicable period. As appropriate, the waiver amount will be adjusted to reflect States' otherwise effective administration of the program based upon the degree to which the error rate exceeded the national performance measure. For example, a reduction in the waiver amount may be made when a State agency's recent error rate history indicates that even absent the events described, the State agency would have exceeded the national performance measure in the review period. Under this approach, unless the State agency can demonstrate a direct uncontrollable impact on the error rate, the effects of caseload growth that ended prior to the second half of the prior fiscal year will not be considered.

(iii) If the State agency has provided insufficient information to determine a waiver amount for the uncontrollable effects of caseload growth using factual analysis, the waiver amount shall be evaluated using the following five-step calculation:

(A) Step 1, determine the average number of households certified to participate Statewide in the Food Stamp program for the base period consisting of twelve consecutive months ending with March of the prior fiscal year;

(B) Step 2, determine the percentage of increase in caseload growth from the base period (Step 1) using the average number of households certified to participate Statewide in the Food Stamp Program for any twelve consecutive months in the period beginning with April of the prior fiscal year and ending with June of the current year;

(C) Step 3, determine the percentage the error rate for the subject fiscal year, as calculated under paragraph (b)(2) of this section, exceeds the national performance measure determined in accordance with paragraph (d)(1) of this section;

(D) Step 4, divide the percentage of caseload growth increase arrived at in step 2 by the percentage the error rate for the subject fiscal year exceeds the national performance measure as determined in step 3; and

(E) Step 5, multiply the quotient arrived at in step 4 by the liability amount for the current fiscal year to determine the amount of waiver of liability.

(iv) Under this methodology, caseload growth of less than 15% and/or occurring in the last three months of the subject fiscal year will not be

considered. Mathematically this formula could result in a waiver of more than 100% of the liability amount; however, no more than 100% of a State's liability amount will be waived for any one fiscal year.

(4) *Program changes.* A change in the Food Stamp Program or other Federal or State program that has a substantial adverse impact on the management of the Food Stamp Program of a State. Requests for relief from errors caused by the uncontrollable effects of unusual program changes other than those variances already excluded by § 275.12(d)(2)(vii) will be considered to the extent the program change is not common to all States.

(i) When submitting a request for good cause relief based on unusual changes in the Food Stamp or other Federal or State programs, the State agency shall provide the following information:

(A) The type of change(s) that occurred;

(B) When the change(s) occurred;

(C) The nature of the adverse effect of the changes on program operations and the State agency's efforts to mitigate these effects;

(D) Reason(s) the State agency was unable to adequately handle the change(s);

(E) Identification and explanation of the uncontrollable errors caused by the changes (types of errors, geographic location of the errors, time period during which the errors occurred, etc.);

(F) The percentage of the payment error rate that resulted from the adverse impact of the change(s) and how this figure was derived; and

(G) The degree to which the payment error rate exceeded the national performance measure in the subject fiscal year.

(ii)(A) The following criteria will be used to assess and evaluate good cause in conjunction with the appeals process and to determine that portion of the error rate/liability amount attributable to the uncontrollable effects of unusual changes in the Food Stamp Program or other Federal and State programs:

(1) State efforts to control impact on program operations;

(2) The proportion of food stamp caseload affected; and/or

(3) The duration of the unusual changes in the Food Stamp Program or other Federal and State programs and the impact on program operations.

(B) Adjustments for these factors may result in a waiver of all, part, or none of the liability amount for the applicable period. As appropriate, the waiver amount will be adjusted to reflect States' otherwise effective administration of the program based

upon the degree to which the error rate exceeded the national performance measure.

(5) *Significant circumstances beyond the control of a State agency.* Requests for relief from errors caused by the uncontrollable effect of a significant circumstance other than those specifically set forth in paragraphs (f)(1) through (f)(4) of this section will be considered to the extent that the circumstance is not common to all States, such as a fire in a certification office.

(i) When submitting a request for good cause relief based on significant circumstances, the State agency shall provide the following information:

(A) The significant circumstances that the State agency believes uncontrollably and adversely affected the payment error rate for the fiscal year in question;

(B) Why the State agency had no control over the significant circumstances;

(C) How the significant circumstances had an uncontrollable and adverse impact on the State agency's error rate;

(D) Where the significant circumstances existed (*i.e.* Statewide or in particular counties);

(E) When the significant circumstances existed (provide specific dates whenever possible);

(F) The proportion of the food stamp caseload whose management was affected;

(G) Identification and explanation of the uncontrollable errors caused by the event (types of errors, geographic location of the errors, time period during which the errors occurred, etc.);

(H) The percentage of the payment error rate that was caused by the significant circumstances and how this figure was derived; and

(I) The degree to which the payment error rate exceeded the national performance measure in the subject fiscal year.

(ii)(A) The following criteria shall be used to assess and evaluate good cause in conjunction with the appeals process, and to determine that portion of the error rate/liability amount attributable to the uncontrollable effects of a significant circumstance beyond the control of the State agency, other than those set forth in paragraph (f)(5) of this section:

(1) Geographical impact of the significant circumstances;

(2) State efforts to control impact on program operations;

(3) The proportion of food stamp caseload affected; and/or

(4) The duration of the significant circumstances and the impact on program operations.

(B) Adjustments for these factors may result in a waiver of all, part, or none of the liability amount for the applicable period. As appropriate, the waiver amount will be adjusted to reflect States' otherwise effective administration of the program based upon the degree to which the error rate exceeded the national performance measure.

(6) *Adjustments.* When good cause is found under the criteria in paragraphs (f)(1) through (f)(5) of this section, the waiver amount may be adjusted to reflect States' otherwise effective administration of the program based upon the degree to which the error rate exceeds the national performance measure.

(7) *Evidence.* When submitting a request to the ALJ for good cause relief, the State agency shall include such data and documentation as is necessary to support and verify the information submitted in accordance with the requirements of paragraph (f) of this section so as to fully explain how a particular significant circumstance(s) uncontrollably affected its payment error rate.

(8) *Finality.* The initial decision of the ALJ concerning good cause shall constitute the final determination for purposes of judicial review as established under the provisions of § 283.17 and § 283.20 of this chapter.

(g) *Results of appeals on liability amount determinations.*

(1) If a State agency wholly prevails on appeal and, consequently, its liability amount is reduced to \$0 through the appeal, and if the State agency began new investment activities prior to the appeal determination, FNS shall pay to the State agency an amount equal to 50 percent of the new investment amount that was expended by the State agency.

(2) If FNS wholly prevails on a State agency's appeal, FNS will require the State agency to invest all or a portion of the amount designated for new investment to be invested or to be paid to the Federal government.

(3) If neither the State agency nor FNS wholly prevails on a State agency's appeal, FNS shall apply the original waiver, new investment, and at-risk percentage determinations to the liability amount established through the appeal. If the State agency began new investment prior to the appeal decision and has already expended more than the amount produced for new investment as a result of the appeal decision, the Department will match the amount of funds expended in excess of the amount now required by the Department for new investment.

(h) *New investment requirements.* Once FNS has determined the percentage of a liability amount to be invested or following an appeal and recalculation by FNS of an amount to be invested, a State agency shall submit a plan of offsetting investments in program administration activities intended to reduce error rates.

(1) The State agency's investment plan activity or activities must meet the following conditions to be accepted by the Department:

(i) The activity or activities must be directly related to error reduction in the ongoing program, with specific objectives regarding the amount of error reduction, and type of errors that will be reduced. The costs of demonstration, research, or evaluation projects under sections 17(a) through (c) of the Act will not be accepted. The State agency may direct the investment plan to a specific project area or implement the plan on a Statewide basis. In addition, the Department will allow an investment plan to be tested in a limited area, as a pilot project, if the Department determines it to be appropriate. A request by the State agency for a waiver of existing rules will not be acceptable as a component of the investment plan. The State agency must submit any waiver request through the normal channels for approval and receive approval of the request prior to including the waiver in the investment plan. Waivers that have been approved for the State agency's use in the ongoing operation of the program may continue to be used.

(ii) The program administration activity must represent a new or increased expenditure. The proposed activity must also represent an addition to the minimum program administration required by law for State agency administration including corrective action. Therefore, basic training of eligibility workers or a continuing correction action from a Corrective Action Plan shall not be acceptable. The State agency may include a previous initiative in its plan; however, the State agency would have to demonstrate that the initiative is entirely funded by State money, represents an increase in spending and there are no remaining Federal funds earmarked for the activity.

(iii) Investment activities must be funded in full by the State agency, without any matching Federal funds until the entire amount agreed to is spent. Amounts spent in excess of the settlement amount included in the plan may be subject to Federal matching funds.

(2) The request shall include:

(i) A statement of the amount of money that is a quality control liability claim that is to be offset by investment in program improvements;

(ii) A detailed description of the planned program administration activity;

(iii) Planned expenditures, including time schedule and anticipated cost breakdown;

(iv) Anticipated impact of the activity, identifying the types of error expected to be affected;

(v) Documentation that the funds would not replace expenditures already earmarked for an ongoing effort; and

(vi) A statement that the expenditures are not simply a reallocation of resources.

(3) A State agency may choose to begin expending State funds for any amount of the liability designated as "new investment" in the liability amount determination prior to any appeal. FNS reserves the right to approve whether the expenditure meets the requirements for new investment. Expenditures made prior to approval by the Department will be subject to approval before they are accepted. Once a new investment plan is approved, the State agency shall submit plan modifications to the Department for approval, prior to implementation.

(4) Each State agency which has part of a liability designated for new investment shall submit periodic documented reports according to a schedule in its approved investment plan. At a minimum, these reports shall contain:

(i) A detailed description of the expenditure of funds, including the source of funds and the actual goods and services purchased or rented with the funds;

(ii) A detailed description of the actual activity; and

(iii) An explanation of the activity's effect on errors, including an explanation of any discrepancy between the planned effect and the actual effect.

(5) Any funds that the State agency's reports do not document as spent as specified in the new investment plan may be recovered by the Department. Before the funds are withdrawn, the State agency will be provided an opportunity to provide the missing documentation.

(6) If the funds are recovered, the Department shall charge interest on the funds not spent according to the plan in accordance with paragraph (j) of this section.

(i) *At-risk money.* If appropriate, FNS shall initiate collection action on each claim for such liabilities before the end of the fiscal year following the reporting

period in which the claim arose unless an administrative appeal relating to the claim is pending. Such appeals include administrative and judicial appeals pursuant to Section 14 of the Food Stamp Act. If a State agency, in the subsequent year, is again subject to a liability amount based on the national performance measure and the error rate issued to the State agency, the State agency will be required to remit to FNS any money designated as at-risk for the prior fiscal year in accordance with either the original liability amount or a revised liability amount arising from an appeal, as appropriate, within 30 days of the date of the final billing. Appeals of the subsequent liability amount will not affect the requirement that the State agency pay the at-risk amount for the prior year. The amount of a State's at-risk money may be recovered through offsets to the State agency's letter of credit as identified in § 277.16(c) of this chapter. FNS shall also have the option of billing a State directly or using other claims collection mechanisms authorized under the Debt Collection Improvement Act of 1996 (Pub. L. 104-134) and the Federal Claims Collection Standards (31 CFR Parts 900-904), depending upon the amount of the State's liability.

(j) *Interest charges.*

(1) To the extent that a State agency does not pay an at-risk amount within 30 days from the date on which the bill for collection is received by the State agency, the State agency shall be liable for interest on any unpaid portion of such claim accruing from the date on which the bill for collection was received by the State agency. If the State agency is notified that it failed to invest funds in accordance with an approved new investment plan, the State agency has 30 days from the date of receipt of notification of non-expenditure of new investment funds to pay the Department the amount of funds not so invested. If the State agency does not pay the Department the amount of funds not invested within 30 days from the date of receipt of the notification of non-expenditure, the State agency shall be liable for interest on the non-expended funds from the date on which the notification was received by the State agency. If the State agency agrees to pay the claim through reduction in Federal financial participation for administrative costs, this agreement shall be considered to be paying the claim. If the State agency appeals such claim (in whole or in part), the interest on any unpaid portion of the claim shall accrue from the date of the decision on the administrative appeal, or from a date that is one year after the date the bill is

received, whichever is earlier, until the date the unpaid portion of the payment is received.

(2) A State agency may choose to pay the amount designated as at-risk prior to resolution of any appeals. If the State agency pays such claim (in whole or in part) and the claim is subsequently overturned or adjusted through administrative or judicial appeal, any amounts paid by the State agency above what is actually due shall be promptly returned with interest, accruing from the date the payment was received until the date the payment is returned.

(3) Any interest assessed under paragraph (j)(1) of this section shall be computed at a rate determined by the Secretary based on the average of the bond equivalent of the weekly 90-day Treasury bill auction rates during the period such interest accrues. The bond equivalent is the discount rate (*i.e.*, the price the bond is actually sold for as opposed to its face value) determined by the weekly auction (*i.e.*, the difference between the discount rate and face value) converted to an annualized figure. The Secretary shall use the investment rate (*i.e.*, the rate for 365 days) compounded in simple interest for the period for which the claim is not paid. Interest billings shall be made quarterly with the initial billing accruing from the date the interest is first due. Because the discount rate for Treasury bills is issued weekly, the interest rate for State agency claims shall be averaged for the appropriate weeks.

## PART 277—PAYMENTS OF CERTAIN ADMINISTRATIVE COSTS OF STATE AGENCIES

### § 277.4 [Amended]

15. In § 277.4:

a. Paragraph (b) is amended by removing paragraphs (b)(1), (b)(4), (b)(5), and (b)(6) and by redesignating paragraphs (b)(2), (b)(3), (b)(7), and (b)(8) as paragraphs (b)(1), (b)(2), (b)(3), and (b)(4), respectively.

b. Newly redesignated paragraph (b)(3) is amended by removing the words “Beginning October 1982,” and by removing the reference “paragraphs (b)(2) and (b)(3)” and adding in its place the reference “paragraphs (b)(1) and (b)(2)”.

Dated: September 12, 2005.

**Eric M. Bost,**

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

[FR Doc. 05–19020 Filed 9–22–05; 8:45 am]

BILLING CODE 3410–30–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### 18 CFR Chapter I

[Docket No. RM05–25–000]

#### Preventing Undue Discrimination and Preference in Transmission Services

September 16, 2005.

**AGENCY:** Federal Energy Regulatory Commission, (DOE).

**ACTION:** Notice of inquiry (NOI).

**SUMMARY:** The Federal Energy Regulatory Commission (Commission) is inviting comments on whether reforms are needed to the Order No. 888 pro forma open access transmission tariff (OATT) and the OATTs of public utilities to ensure that services thereunder are just, reasonable and not unduly discriminatory or preferential. The Commission is also inviting comments on the implementation of the newly established section 211A of the Federal Power Act (concerning the provision of open access transmission service by unregulated transmitting utilities). Finally, the Commission is inviting comments on section 1233 of the Energy Policy Act of 2005, which defines native load service obligation. **DATES:** Comments on this NOI are due on November 22, 2005.

**ADDRESSES:** Comments may be filed electronically via the eFiling link on the Commission's Web site at <http://www.ferc.gov>. Commenters unable to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, NE., Washington, DC 20426. Refer to the Procedure for Comments section of the preamble for additional information on how to file comments.

**FOR FURTHER INFORMATION CONTACT:** Daniel Hedberg (Technical Information), Office of Markets, Tariffs & Rates, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6243.

David Withnell (Legal Information), Office of General Counsel—Markets, Tariffs & Rates, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8421.

#### SUPPLEMENTARY INFORMATION:

##### Introduction

1. The Federal Energy Regulatory Commission (Commission) has a mandate under sections 205 and 206 of

the Federal Power Act (FPA)<sup>1</sup> to ensure that, with respect to any transmission in interstate commerce or any sale of electric energy for resale in interstate commerce by a public utility, no person is subject to any undue prejudice or disadvantage. Under these sections, the Commission must determine whether any rule, regulation, practice, or contract affecting rates for such transmission or sale for resale is unduly discriminatory or preferential, and we must disapprove any of the foregoing that do not meet this standard. Pursuant to that mandate, in 1996, the Commission issued Order No. 888<sup>2</sup> to remedy undue discrimination or preference in access to the monopoly owned transmission wires that control whether and to whom electricity can be transported in interstate commerce.<sup>3</sup>

2. The Commission is issuing this Notice of Inquiry to seek comments on whether reforms are needed to the Order No. 888 pro forma open access transmission tariff (OATT) and to the OATTs of public utilities to prevent undue discrimination and preference in the provision of transmission services. The Commission's preliminary view is that the pro forma OATT and public utilities' OATTs should be reformed to reflect lessons learned during nearly a decade of the electric utility industry's and the Commission's experience with open access transmission. In addition, the Commission is concerned that public utility transmission providers have come to different interpretations of

<sup>1</sup> 16 U.S.C. 824d–824e (2000). Section 205(b) states that “[n]o public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue preference or disadvantage. \* \* \* In addition, section 206(a) states that “[w]henver the Commission \* \* \* shall find that any rate, charge, or classification demanded, observed, charged or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice or contract to be thereafter observed and in force, and shall fix the same by order.”

<sup>2</sup> *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 FR 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888–A, 62 FR 12,274 (March 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888–B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888–C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

<sup>3</sup> Order No. 888 at 31,669.