

**DEPARTMENT OF AGRICULTURE****Food and Nutrition Service****7 CFR Parts 271, 273, 275, and 277**

[FNS-2009-0045]

RIN 0584-AD31

**Supplemental Nutrition Assistance Program: Quality Control Provisions of Title IV of Public Law 107-171****AGENCY:** Food and Nutrition Service, USDA.**ACTION:** Final rule.

**SUMMARY:** This rule finalizes provisions of an interim rule entitled “Food Stamp Program: Non-Discretionary Quality Control Provisions of Title IV of Public Law 107-171” published on October 16, 2003, and a proposed rule entitled “Food Stamp Program: Discretionary Quality Control Provisions of Title IV of Public Law 107-171” published on September 23, 2005. The Food Stamp Program is now referred to as the Supplemental Nutrition Assistance Program (SNAP) pursuant to the Food and Nutrition Act of 2008 (Act). This final rule codifies the provisions concerning the Quality Control system in Sections 4118 and 4119 of the Food Stamp Reauthorization Act (FSRA) of 2002. This rule finalizes the liability procedures and the deadlines for completing the quality control review process and announcement of error rates established in the interim rule. It eliminates enhanced administrative funding for low error rates, establishes new time frames for completing individual quality control reviews, establishes procedures for resolving liabilities following appeal decisions, revises the negative case review procedures, and provides procedures for households that separate while subject to the penalty for refusal to cooperate with a quality control review. This rule also adopts several policy changes and technical corrections included in the proposed rule. In addition, this rule affects State agencies’ quality control review operations and alters 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 with cases sampled for quality control review of their cases would be minimally affected by this rule.

**DATES: Effective Date:** This rule is effective July 12, 2010. **Implementation date:** This rule shall be implemented as follows: The provisions in 7 CFR 271.2, 7 CFR 275.11(e)(2)(i), 7 CFR

275.11(e)(2)(ii), 7 CFR 275.13(b), and 7 CFR 275.12(c)(1) concerning negative cases and 7 CFR 273.2(d)(2) concerning consequences to households that refuse to cooperate with quality control (QC) reviews must be implemented no later than October 1, 2011. State agencies may choose to implement these provisions earlier than October 1, 2011. A 120-day hold harmless is provided for implementation of 7 CFR 273.2(d)(2), concerning consequences to households who refuse to cooperate with a QC review. If a State agency implements the provision before October 1, 2011, the 120-day hold harmless period begins on the date of implementation. All other provisions must be implemented August 10, 2010.

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**SUPPLEMENTARY INFORMATION:****I. Additional Information on Electronic Access***Electronic Access*

You may view and download an electronic version of this final rule at <http://www.fns.usda.gov/snap/>. All comments, including names, street addresses, and other contact information of respondents, received in response to the interim and proposed rules are 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 13732*

The Supplemental Nutrition Assistance 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). It has been certified that this rule will not have a significant economic impact on a substantial number of small entities. State welfare agencies will be the most affected to the extent that they administer the Supplemental Nutrition Assistance Program.

*Public Law 104-4*

Title II of the Unfunded Mandates 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, the Food and Nutrition Service (FNS) generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures to State, local, or tribal governments in the aggregate, or to the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires FNS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule. This 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 E.O. 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 rule in accordance with the Department Regulation 4300–4, “Civil Rights Impact Analysis,” to identify and address any major civil rights impacts that 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 intended 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 Supplemental Nutrition Assistance Program. The only provision that has any direct impact on recipients is the conforming change made in 7 CFR 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 QC 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. This rule contains a conforming amendment to extend the time frame of the penalty consistent with the revised time frame for completing the QC review process established in Section 4119 of the Food Stamp Reauthorization Act of 2002 and addressed in this rule 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 classes is not available for these households.

An additional change is also being made to 7 CFR 273.2(d)(2) that requires a State agency to convey the disqualification penalty for refusing to cooperate with a QC reviewer with the non-cooperating household member if the household breaks up and if the State agency can identify the non-cooperating individual. This change ameliorates the

penalty on cooperating household members. It is not intended to have a disproportionate impact on any of the protected classes.

All data available to FNS indicate that protected individuals have the same opportunity to participate in the SNAP as non-protected individuals. The QC system is a systematic method of measuring the validity of the SNAP caseload. A statistically valid sample of active and negative cases is reviewed to determine the extent to which households are receiving the allotments to which they are entitled, and to determine which decisions to deny, suspend, or terminate cases are correct. Protected classes should appear in any given sample to the extent that they are represented in the overall SNAP population. There is no way to determine the percentage of each of the protected classes terminated for refusal to cooperate with a QC review as that data is not collected.

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 (SNAP nondiscrimination policy can be found at 7 CFR 272.6). Discrimination in any aspect of program administration is prohibited by these regulations, the Food and Nutrition Act of 2008, 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 accordance with 7 CFR Part 15.

### Paperwork Reduction Act

This 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 (expiration date November 30, 2009):* 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 that is still found in the regulation. Eliminating from the regulations the requirement to complete the form does not affect the burden as the burden was already adjusted in the burden approval process when the actual use of the form was discontinued. We proposed to eliminate the Form FNS–248. Over time, we have discontinued requiring that the form itself be submitted. However, some of information on that form is still required. State agencies provide the information on the interval and the number of cases selected each month by phone or e-mail. With the elimination of the Form FNS 248, the regulations will permit that this information be submitted in another format. The burden difference from eliminating most of the data collection found on the form has already been accounted for through the burden approval process. Accordingly, elimination of this form will not increase or decrease the approved burden for OMB Number 0584–0034. We received no comments on this proposal; we are adopting it as proposed.

*0584–0074 (Form FNS–380, Worksheet for Supplemental Nutrition Assistance Program Quality Control Reviews) (expiration date February 28, 2010); 0584–0299 (Form FNS–380–1, Quality Control Review Schedule)(expiration January 31, 2010); and 0584–0303 (Food Stamp Program Regulations, Part 275—Quality Control)(expiration date November 30, 2010) (Note the name of 0584–0303 will be changed to Supplemental Nutrition Assistance Program Regulations, Part 275—Quality Control when it is next renewed or a change justification is done.):* 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 (expiration date April 30, 2010):* 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 when a State agency failed to reach the yearly target, when a State agency was not entitled to enhanced funding, and when its negative case error rate exceeded one percent. In an interim rule entitled "Food Stamp Program: 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. This rule finalizes this requirement to conduct corrective action whenever a State's payment error rate equals or exceeds six percent.

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 eliminates 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, the last year enhanced funding was provided to States, there was no State whose error rate was below six percent that did not get enhanced funding. This rule finalizes the proposal 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 from removing the requirement to do corrective action planning whenever a

State agency is not entitled to enhanced funding.

#### *E-Government Act Compliance*

The Food and Nutrition Service is committed to complying with the E-Government Act of 2002, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

#### *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 to the application of its provisions, all applicable administrative procedures must be exhausted. In the Supplemental Nutrition Assistance 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 7 CFR 273.15; (2) for State agencies—administrative procedures issued pursuant to 7 U.S.C. 2023 set out at 7 CFR 276.7 (for rules related to non-quality control (QC) liabilities) or 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.

#### *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 finalizes provisions of the interim rule "Food Stamp Program: Non-Discretionary Quality Control Provisions of Title IV of Public Law 107-171" published on October 16, 2003, and a proposed rule entitled "Food Stamp Program: Discretionary Quality Control Provisions of Title IV of Public Law 107-171" on September 23, 2005.

The interim rule revised the liability procedures and established new deadlines for completing the quality control (QC) review process and announcement of payment error rates. This final rule would amend the Supplemental Nutrition Assistance

Program regulations concerning the 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 time frames for completing individual case reviews and the time frames for penalties for households that refuse to cooperate with a QC review, to revise the negative review procedures, and to make a number of technical policy changes and corrections. This analysis addresses the liability procedures, elimination of enhanced funding, the impact of appeals decisions on the resolution of QC liabilities for high payment error rates, the revised time frames for completing individual case reviews and the entire review process and announcement of the error rates, the time frames for penalties for households that refuse to cooperate with a QC review, negative review procedures, and corrective action planning.

#### *Cost Impact*

Since this action does not directly impact benefit levels or eligibility, we do not anticipate any impact on SNAP benefit costs. The provision extending the time frames for verification of households reapplying for benefits is not expected to have a measurable impact on benefit costs. Fewer States will be identified as having any potential liability, and most such liabilities will be significantly lower than those under the previous system.

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 had remained at their 1998–2002 levels, the annual savings to the Supplemental Nutrition Assistance Program would have been \$50 million and the five-year savings would have been \$250 million. These savings would have been offset by the establishment of high performance bonuses (addressed in the final rule "Food Stamp Program: High Performance Bonuses" published February 7, 2005, at 70 FR 6313).

However, between 2002 and 2008, payment error rates fell from 8.26 percent to 5.01 percent. The number of States that would have qualified for enhanced funding would have risen to 28 by 2008 and the amount of incentive funding received by these States would have totaled nearly \$188 million. The amount of incentive funding for the five

years from 2003–2007 would have totaled \$720 million, of which only \$240 million would have been offset by the new performance bonus, yielding a net savings of \$480 million.

See Table below.

#### Benefit Impact

Elimination of enhanced funding based on payment accuracy did not have a benefit impact on State administering agencies or on program operations if considered in isolation. However, when this provision was 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 was expected to encourage States to assess and improve overall performance.

#### COST IMPACT OF CERTAIN QUALITY CONTROL PROVISIONS OF THE FOOD STAMP REAUTHORIZATION ACT OF 2002 (FEDERAL OUTLAYS)

[In millions of dollars]

	2003	2004	2005	2006	2007	5-Year
Elimination of Enhanced funding .....	-\$95	-\$133	-\$158	-\$160	-\$174	-\$720
High Performance Bonus .....	48	48	48	48	48	240
Net Savings .....	-47	-85	-110	-112	-126	-480

The provisions affecting the time frames for completing individual case reviews, negative 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 QC system. An interim rule entitled “Food Stamp Program: 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 “Food Stamp Program: High Performance Bonuses” was published February 7, 2005, at 70 FR 6313 that implemented Section 4120 of the FSRA. A proposed rulemaking, published September 23, 2005, at 70 FR 55776 addressed the remaining provisions of Sections 4118 and 4119 of the FSRA, negative case review procedures, and several discretionary policy changes, and numerous technical corrections. This rule finalizes both the interim and the proposed rules.

#### A. Enhanced Funding

The current regulations at 7 CFR 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 (now the Food and Nutrition Act of 2008) for giving enhanced funding to State agencies with low payment and negative case error rates, effective fiscal year (FY) 2003, effectively ending enhanced payments. Section 4120 of the FSRA replaced 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, these sections are no longer necessary. We proposed to eliminate paragraphs (b)(1) and (b)(2) of 7 CFR 275.1, to change paragraph (a) of 7 CFR 275.1 into a general introductory paragraph, and to remove 7 CFR 275.23(d). We received two comments on the proposed elimination of enhanced funding. Both commenters supported the proposal. Accordingly, we are adopting as proposed the revisions to 7 CFR 275.1, eliminating paragraphs (b)(1) and (2), changing paragraph (a) into a general introductory paragraph, and removing 7 CFR 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 proposed in 7 CFR 275.3(c) to require that all States' negative error rates be validated by FNS. First, we believe that fair and equitable treatment needs to be ensured when it comes to denying households benefits. 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. We received two comments supporting this proposal. We are adopting the provision mandating FNS validation of all States' negative error rates in 7 CFR 275.3(c).

In addition, we are adopting as proposed the technical changes throughout Part 275 that 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 SNAP. In 7 CFR 277.4, paragraphs (b)(1), (b)(4), (b)(5), and (b)(6) describe the procedures for increasing State administrative funding when State agency QC 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 (now the Food and Nutrition Act of 2008) for 7 CFR 277.4(b)(1)(i) was

removed by the Hunger Prevention Act of 1988 (Public Law 100–435). The authority for 7 CFR 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 QC error rates for fiscal years beginning October 2002 and beyond, thus making 7 CFR 277.4(b)(1)(ii) obsolete for FY 2003 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. No comments were received on these proposed changes. Accordingly, we are removing 7 CFR 277.4(b)(1), (b)(4), (b)(5), and (b)(6). Sections 277.4(b)(2), (b)(3), (b)(7), and (b)(8) are redesignated as 7 CFR 277.4(b)(1), (b)(2), (b)(3), and (b)(4), respectively. In addition, we are also revising the references in redesignated 7 CFR 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 QC 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 7 CFR 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 FNS 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 proposed to revise 7 CFR 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. We received six comments addressing this proposed revision, all supporting the revision to the regulations. This policy has been in effect since October 1998 and benefits State agencies. Accordingly, we are adopting as proposed the revision to 7 CFR

275.12(g)(1)(ii) that requires QC reviewers to attempt to complete cases where a household refuses to cooperate.

#### C. Negative Case Reviews

The Department proposed significant changes to the negative review procedures. In order to fully understand the changes made in this rulemaking to the procedures for reviewing negative cases, readers are referred to the proposed rule located at 70 FR 55776. The proposed rule has a detailed description of the existing requirements and the proposed changes.

First, the Department proposed that the negative universe be selected based only on “action,” eliminating the option to use “effective date.” Second, the Department proposed to delete the requirement that there be a break in participation in order for a negative action to be subject to review. Finally, the Department proposed to limit the use of the expanded review process.

We received 22 comments on one or more aspects of the proposals to revise the negative review procedures. Most commenters opposed all the proposed changes; a few supported all the changes; some addressed only one or two of the proposed changes; and some commenters supported one or more of the proposals while opposing one or more of them. The opposing commenters also believed that these proposed changes reflected a change from “outcome” based reviews to “procedural” reviews.

Specific comments will be addressed during the discussion of each proposed change to the negative review procedures.

Currently, the regulations allow either “action” or “effective date” as the selection criteria for the sampling universe. 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 both the States’ and the national negative error rate. Because multiple actions can occur within a sampling period, States using “effective date” have had to decide which of the several actions to review. This decision process introduces bias into the system. Focusing on the “action” means that each negative action has an equal opportunity to be sampled and reviewed. We proposed to revise 7 CFR 275.11(e)(2)(i) and (e)(2)(ii) accordingly. Sixteen commenters addressed the proposal to eliminate “effective date” for constructing the sample. Ten commenters opposed the proposal; 4 commenters supported the

proposal; and two commenters supported the proposal but said they used “effective date”. We have not categorized these last two commenters as either supporting or opposing the proposals because we believe that, based on how they worded their comments, that these commenters misunderstood the proposal. However, it is possible that they supported the proposal even though these States would be required to change their methods of sample selection.

Commenters did not address the statistical issues that resulted in the decision to propose requiring the use of “action date” and eliminate the use of “effective date.” States did, however, discuss how this has been the process for many years and has apparently worked. It has worked largely because the Department was unaware that not all actions were being included in the universe. The problem only came to our attention when we began universal validation of negatives. The increased attention to negatives has resulted in an awareness of many of the problem addressed. State agencies started asking many questions about how to review negatives, questions that were not raised before validation was universal. The Department became aware of problems surrounding sample construction in two major ways. First, statistical reviews revealed that not all negative actions were being captured in some States that were relying on “effective date” to capture terminations. Further, the Department has been receiving questions about what action should be reviewed when multiple actions occurred during a sample month and the reviewer has not been able to determine what action was sampled.

Commenters were concerned that the proposed change would necessitate major computer changes to change the sample selection process. Such computer changes are costly and time-consuming, according to the commenters. While we understand the commenters’ concerns about computer changes that will be required, we believe that it is necessary that the sampling universe include all possible negative actions. Therefore, the best way to obtain all possible negative actions and to eliminate possible bias in the selection process is to select based on “action” rather than “effective date.” Accordingly, we are adopting as proposed the changes to 7 CFR 275.11(e)(2)(i) and (e)(2)(ii).

We have revised the definition of a “Negative case” in 7 CFR 271.2 to say that a “Negative case means any action to deny, suspend, or terminate a case”. One commenter believed the proposed

definition was not consistent with the proposal to sample based on action taken. We disagree with that commenter. The current definition in 7 CFR 271.2 is not consistent with the proposed change; however, the new definition is. We are adopting the revised definition in 7 CFR 271.2 as proposed.

One commenter requested additional time for implementation if the proposal were to be adopted. We have considered this suggestion and have decided to make the modifications to the negative review procedures effective beginning with the first day of FY 2012, October 1, 2011.

Section 275.11(f)(2)(vi) currently provides that a negative action would only be subject to review if there was a break in participation. The Department proposed to eliminate the requirement in 275.11(f)(2)(vi) that there be a break in participation for a negative action to be subject to review because limiting the focus only to the “action” eliminates a need for determining whether there was a break in participation. A conforming change was also proposed to be made to the definition “Negative case” in 7 CFR 271.2. Twelve commenters opposed this proposal; three commenters supported the proposal. As stated in the preamble to the proposed rule, this proposed change to eliminate the “break in participation” is consistent with the change in focus to review each individual action taken. We are adopting the change to 7 CFR 275.11(f)(2)(iv) as proposed.

Finally, the Department proposed to limit the expanded review in 7 CFR 275.13(b). The expanded review allows the QC reviewer to look beyond the reason given for action taken by the eligibility worker (EW) to deny, terminate, or suspend a household. Under current procedures as provided for in 7 CFR 275.13(b) and expanded in FNS Handbook 310, the QC reviewer may examine the case file for additional reasons to support the denial, suspension, or termination. Section 275.13(b) permits contacting the household or a collateral contact to clarify whether a reason exists that supports a denial, suspension, or termination. The FNS Handbook 310 also permits a field investigation. 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.

Limiting the expanded review is also consistent with a review of “action.”

Under the review procedures as proposed, 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 under review, 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 proposed 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 received 20 comments on this proposal. Eighteen commenters opposed the proposal; two supported it. The commenters opposing the change felt that this change, especially in combination with the other two changes, emphasized procedure rather than outcome. These commenters believed that the purpose of the negative review should be to determine if a household was ineligible for benefits, regardless of what a household may have been told about its eligibility. One commenter even stated that its notices to households were not always as accurate as one might wish them to be. Ten commenters suggested that if the expanded review be limited, it be limited to other information in the case file that would support an alternative reason for a negative action, but prohibit contact with the household or a collateral contact. State agencies pointed out that while wrong reasons may be coded for a specific negative action, the correct reason may be in the case file. The commenters felt that such coding errors were procedural rather than outcome based.

During the period following the publication of the proposed rule, the Department revised the FNS 310 Handbook to conform the procedures in the Handbook to the regulations. By doing so, the Department eliminated the most far-reaching forms of the expanded review in use by some States, *i.e.*, field investigations. The FNS 310 Handbook now requires the State agency to review the case record to determine if there is another reason in the case record that makes the negative action valid and allows the reviewer to contact the household or a collateral contact to verify information in the case record.

The Department has considered the commenters’ concerns about the expanded review. However, the Department has decided the limitations on the scope of the expanded review are

appropriate and consistent with reviews based on “action.” Further, the Department believes that households are impacted by the reasons they are given for their case closures and denials.

Section 273.13(a)(2) requires that the notice of adverse action clearly explain the proposed action, the reason for the proposed action, and the household’s right to appeal. We do not believe that it is purely procedural when a household is given an incorrect reason for the negative action. We do not believe that it is purely procedural when the State agency fails to follow certification policy and provide households with the rights to which they are entitled, such as (but not limited to) Notices of Missed Interview (NOMIs), expedited service, or properly-timed denials. Therefore, we believe that it is in the best interests of program integrity and service to households to adopt the procedure as proposed. Further, with the change to “action” only reviews, we do not believe it necessary or appropriate to seek reasons other than the stated one given for the negative action. Accordingly, the Department is adopting as proposed the limiting of the expanded review in 7 CFR 275.13(b), with minor wording changes of “correct” to “valid” and “incorrect” to “invalid”. The State agency will continue to be allowed to contact the household or a collateral contact to verify the validity of the specific negative action. A conforming change is also being made to 7 CFR 275.13(c)(1).

In summary, the Department has adopted the provisions revising the negative case review process because we believe that to do so is necessary to correct the statistical issues surrounding sampling, that the changes will result in consistent interpretations among the States, and represents a better balance between accuracy and customer service.

One commenter requested a 120-day hold harmless period if the Department adopted the proposed changes. We have considered this request but have determined that it is not appropriate. Section 16(c)(3) of the Act and Section 275.12(d)(2)(vii) of the regulations (as modified by this rule) provide for exclusion of errors resulting in the application of new regulations. However, a change in review procedures does not result in an error; the QC system is a measurement system and review procedures are the mechanism of that measurement. The errors that are measured are errors in the certification process. Changes to the review procedures do not change the certification requirements. The Department has not been able to

determine what the commenter expected to be excluded.

We would like to address at this point the need for States to be consistent, thorough, and accurate in the construction of the sample universe. All actions to deny, terminate, or suspend households need to be included in the universe. While we believe that using the notices of adverse action would be the simplest way to capture the terminations, it may not be the only way. Further, the failure to send a notice is not in and of itself a reason for an action to be not subject to review. For example, if for some reason, the State's computer fails to issue notices of adverse action to a category of households being terminated from the Program those terminations would still be subject to review. The State agency would be responsible for ensuring that that group of negative actions is subject to sampling. Also, if the computer sends notices of adverse action even if the "action" is solely the expiration of the certification period, it should be noted that expired certification periods are not negative actions and such cases should be excluded from the sample. Another category of concern is administrative closures that do not result in adverse action notices to households, such as a case closure and transfer to another number because the worker incorrectly opened the case under the wrong number. The Department does not consider such administrative closures to be negative actions as defined by this rule.

#### 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, 7 CFR 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 (7 CFR 275.16(b)(2)) or when the State agency's negative case error rate exceeds one percent (7 CFR 275.16(b)(3)). We proposed to remove 7 CFR 275.16(b)(2) as no longer necessary because enhanced funding has been eliminated. We also proposed to continue to require State agencies to conduct corrective action planning whenever the negative case error rate exceeds one percent (7 CFR 275.16(b)(3)), (redesignated as 7 CFR 275.16(b)(2) to reflect the deletion of 7 CFR 275.16(b)(2)). We proposed

retaining the requirement to do corrective action planning when the negative error rate exceeds one percent to ensure that households are not being inappropriately denied or terminated. Further, this proposal is consistent with the High Performance Bonuses final rule that provides criteria for rewarding States with very low negative case error rates.

Finally, we proposed to redesignate 7 CFR 275.16(b)(4), (b)(5), and (b)(6) as 7 CFR 275.16(b)(3), (b)(4), and (b)(5), respectively, to reflect the removal of 7 CFR 275.16(b)(2) and redesignation of 7 CFR 275.16(b)(3) as 7 CFR 275.16(b)(2). 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 received 4 comments concerning corrective action plans for negative reviews. Two commenters supported the proposal. Two commenters were concerned about the impact of the proposed changes to the negative review process on the negative error rate and were opposed to the provision as written if the changes to the negative review process were adopted. As discussed above, the Department has adopted the changes to the negative review process. We have considered the comments; however, we are adopting as final the change made in the interim rule to 7 CFR 275.16(b)(1) and the deletion of 7 CFR 275.16(b)(2) and the change in the proposed rule to 7 CFR 275.16(b)(3) (redesignated as 7 CFR 275.16(b)(2)). We believe the 1-percent threshold is appropriate even though some States' error rates may rise.

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 final rule published July 16, 1999, at 64 FR 38287. That rule did not add suspended cases to those deficiencies requiring corrective action at 7 CFR 275.16(b)(6) (redesignated in this rule as 7 CFR 275.16(b)(5)). To correct this oversight, we proposed to revise redesignated 7 CFR 275.16(b)(5) to include deficiencies which result in improper suspensions. One commenter addressed and supported this proposal. We are adopting as proposed the requirement to address deficiencies in the handling of suspended cases through the corrective action planning process.

#### E. Time Frames for Announcing the National Performance Measure and for Completing QC Reviews and Resolving State/Federal Differences

The interim rule published October 16, 2003 at 68 FR 59519 revised the regulations at 7 CFR 275.23(e)(7) to establish the following time frames for completing QC reviews and resolving State/Federal differences and for announcing the national performance measure. The deadline for completing QC 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 time frames are mandated by the Act, and we did not receive any comments addressing these new time frames for completing the review process. Accordingly, we are adopting these time frames established in the interim rule.

These new time frames provide approximately two additional months to complete the case review and arbitration process and to develop and announce the national performance measure. We proposed to use this additional time in the following way: (1) 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; (2) provide State agencies 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; (3) provide State agencies until January 21 after the end of the review year to complete and dispose of all cases; and (4) stipulate 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 also proposed to revise 7 CFR 275.21(b)(4) by replacing "95" with "113"; to revise 7 CFR 275.21(c) by replacing "105" with "123"; and to add a sentence to each of these paragraphs stating that if FNS extends the time frames in 7 CFR 275.21(b)(2), that the time frames in these paragraphs will be extended accordingly. We also proposed to continue to allow States 20 days to request arbitration of individual cases; however, we also requested comments about whether this time was considered adequate.

On January 22, 2003, we waived the deadlines for State agencies to complete

processing cases in 7 CFR 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 for Fiscal Years 2005 and 2006. The waiver was again extended on September 12, 2006, for FY 2007 and FY 2008. In providing comments on this proposal, we requested comments about whether this amount of additional time was useful and/or sufficient. In addition to the extended time frames 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). In the proposed rulemaking, we did not allow this additional 10 days at the end of the review year for checking the c-trails. We did not propose allowing the additional 10 days at the end of the review year because we felt that States had 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 re-review process which in turn impacts FNS's ability to timely and accurately prepare the payment error rates. However, we were interested in receiving comments on this issue.

We received 16 comments addressing the individual case time frames, the 10-day period at the end of the review year to check the c-trails, and the time period to request arbitration. Concerns were also raised about the failure of FNS to establish individual case review times for the Federal validation process and delayed arbitration responses. Six commenters supported the individual case time frames as proposed; six commenters recommended additional time, up to as much as 125 days. Also, six commenters recommended that we eliminate the interim tracking and establish only a final deadline. We have considered the comments and will eliminate the interim tracking and establish only a final date for completion of each month's sample; provide the States 115 days to complete each month's sample; and allow 10 days at the end of the review year to check the c-trails. We also revised 7 CFR 275.21(b)(4) by replacing the two-tiered time frame completion schedule with 115 days; revised 7 CFR 275.21(c) by replacing "105" with "125"; and adopted the proposed addition to each of these paragraphs stating that if FNS extends the time frames in 7 CFR 275.21(b)(2),

that the time frames in these paragraphs will be extended accordingly.

Although we did not provide the States with 125 days to complete individual reviews each month as some State agencies recommended, we did provide the State agencies with 2 days more than proposed to complete individual reviews, *i.e.*, 115 days instead of 113 days. As discussed in the preamble to the proposed rule, when the time to complete reviews and issue error rates was cut back by the Mickey Leland Childhood Hunger Relief Act, Public Law 103–66, FNS absorbed the entire reduction. When the FSRA replaced the 60 days lost under Public Law 103–66, FNS provided the States with a significant amount of that replaced time. We believe that FNS needs the remaining time to complete the individual case reviews. In addition to replacing some of the lost time, FNS's work load has increased with the advent of 100 percent validation of negative cases.

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 time frames for conducting arbitration are in 7 CFR 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. Prior to Public Law 103–66, States had 28 days to request arbitration. As discussed above, originally FNS absorbed the total cut in review time and States lost 8 days to request arbitration. Although we considered the amount of time allowed for requesting arbitration to be adequate, we specifically requested comments, however, about whether affected parties and the public agree that the time frames are adequate. We received 7 comments addressing the time frames for requesting arbitration. Five commenters supported additional time to request arbitration; two commenters supported the existing 20 days. One commenter suggested that the arbitration process be changed to include a State person. This proposal was outside the scope of the proposed rule and has not been addressed.

Two commenters wanted both more time to do reviews and more time to request arbitration. Three other commenters wanted additional time to

request arbitration. In the proposed rule, States were given part of the restored time, and in this rule have been given two more days to perform their reviews, time which has come out of the Department's time to complete the Federal re-reviews, conduct arbitration, and calculate and release the error rates. As we indicated in the proposed rule, if we provided more time to request arbitration, time to conduct reviews by the States may have had to be reduced. States did not address this point; further, States were more concerned about the amount of time available for them to conduct individual reviews than about the time frames to request arbitration. In response to that concern, we provided them more time to conduct individual reviews. That time was taken from time for Federal re-reviews to be conducted.

Three States commented that 20 days was not a sufficient amount of time to request arbitration when multiple cases are received at the same time. 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. Overall, there are very few arbitration cases in any one review year. In FY 2000 there were a total of 75 cases nationwide; in FY 2001 there were 37; in FY 2002, there were 43 cases; in FY 2004, there were 24 cases; in FY 2005, there were 38 cases; in FY 2006, there were 27 cases; in FY 2007, there were 47 cases, and in FY 2008, there were 55 cases. The commenters did not provide a compelling case stating why this work cannot be completed in the 20 days provided for that purpose. The arbitration time frames as currently established appear to be adequate from our perspective. Accordingly, we have decided to make no change to the time frames to request arbitration.

Under the time frames as provided in the January 23, 2003; March 4, 2004; and September 12, 2006 memoranda from FNS headquarters to FNS regional offices, 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. Although we did not request comments on the establishment of Federal review time frames, we received three comments suggesting the

establishment of time frames for completion of Federal reviews. Those comments were outside the scope of the proposed rule. While we understand the concerns expressed by the commenters about delays in receiving Federal review results, we believe that this is an issue that can be addressed on a case-by-case basis.

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. Prior to publication of the proposed rule (published on September 23, 2005, at 70 FR 55776), 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 proposed to revise 7 CFR 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. We received no comments concerning this proposal; we are adopting it as proposed.

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 proposed to remove 7 CFR 275.21(d). We received no comments concerning this proposal; we are adopting it as proposed.

#### *F. Consequences to Households Who Refuse To Cooperate With QC Reviews*

Section 273.2(d)(2) provides procedures for handling the cases of SNAP participants who refuse to cooperate with a QC 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 proposed to

amend this provision to provide that the ineligibility penalty will follow the household member(s) who refused to cooperate. We received 13 comments addressing this proposal. Nine commenters opposed the provision; 4 commenters supported; one commenter pointed out that a tracking mechanism would have to be developed. Commenters opposed to the proposal believed that it would be difficult to accomplish and were concerned about the need for a tracking mechanism to be developed that would involve computer expenses. We recognize these concerns; however, we do not believe households should be prohibited from participating in the program if the person who refused to cooperate with the QC review no longer resides with the remaining household members. Therefore, we are adopting as proposed the requirement that the ineligibility penalty follow the household member(s) who refused to cooperate. If the State agency is unable to identify a particular household member as the refusing person, the State agency may continue to decide what member(s) to disqualify. We recognize that it will take States time to adapt their computer systems to track the refusing individual. Accordingly we are giving the States an extended time to implement the provision, until October 1, 2011. States may opt to implement this provision earlier. A 120-day hold harmless provision applies to implementation of this change.

In this rule, we also proposed to make a conforming change to 7 CFR 273.2(d)(2). Current procedures in 7 CFR 273.2(d)(2) require that a household be terminated for refusal to cooperate with a State or Federal QC reviewer. If a household terminated for refusal to cooperate with a State QC reviewer reappeals 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 reappeals 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 reappeals 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 reappeals 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 proposed to change the dates in 7 CFR 273.2(d)(2) to 123 days and nine months to conform the dates in 7 CFR 273.2(d)(2) to the proposed changes in the dates for completion of the State review process in 7 CFR 275.21(b) and the end of the Federal QC review process in 7 CFR 275.23(e)(7) (renumbered in this proposed rule as 7 CFR 275.23(c)). As we modified the change in dates for completing the QC review process to 125, we are adopting this conforming change, making the appropriate change to 125 days.

We also proposed additional conforming changes to other sections of the regulations that identify these time frames. These conforming amendments are not discussed in this preamble and are adopted with appropriate modifications to reflect the additional time provided to complete the reviews.

#### *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 QC 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 time frames 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 7 CFR 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 7 CFR 275.23. Because several sections require substantive revision and many paragraphs require minor changes or reference changes, we proposed to reorganize the section at the same time as making the necessary changes resulting from the legislation. We have adopted the reorganization to 7 CFR 275.23 in its entirety.

Under this reorganization, 7 CFR 275.23(a) addresses the basic components of FNS determination of a State agency's efficiency and effectiveness (currently 7 CFR 275.23(a) and (b)). A new 7 CFR 275.23(b) addresses the error rates. The existing

methodology for regression in 7 CFR 275.23(e)(6) is incorporated into the new 7 CFR 275.23(b). Section 273.23(c) addresses the time frames for completing case reviews, conducting arbitration, and issuing error rates. Section 273.23(d) addresses State agency liability. Included in this section is the procedure for establishing the national performance measure, the liability amount methodology, appeal rights, and the relationship to the warning process and negligence. Section 275.23(e) addresses liability resolution plans; 7 CFR 275.23(f) addresses good cause; 7 CFR 275.23(g) addresses results of appeals on liability resolution; 7 CFR 275.23(h) addresses new investment (the term “reinvestment” has been changed in this rule to the term “new investment,” consistent with the language used in the FSRA); 7 CFR 275.23(i) addresses payment of the at-risk money; and 7 CFR 275.23(j) addresses interest charges.

Current 7 CFR 275.23(e)(4) (Relationship to warning process and negligence), 7 CFR 275.23(e)(5) (Good cause), and 7 CFR 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 redesignated as 7 CFR 275.23(d)(4), (f), and (b)(2), respectively. These changes are being made as 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. As indicated in the preamble of the proposed rule, comments were not being sought on the substantive content of these sections nor was any consideration going to be given to any comments submitted pertinent to these sections in developing the final rule. The inclusion of these sections in the proposed rule was done solely for purposes of structuring. The restructuring and redesignations described in this paragraph have been adopted as proposed.

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

The interim rule, published October 16, 2003, at 68 FR 59515, revised 7 CFR 275.23(e) to eliminate procedures for establishing liabilities for Fiscal Years 1983 through 1991. We are adopting as final the revisions to 7 CFR 275.23(e) that eliminated procedures for

establishing liabilities for Fiscal Years 1983 through 1991.

Section 275.23(e)(2) provides procedures for establishing liability for excessive payment error rates for FY 2002. We proposed removing 7 CFR 275.23(e)(2) (as part of the overall revision of 7 CFR 275.23) as it no longer is necessary. All liabilities for FY 2002 have already been determined. We are adopting this deletion as proposed.

#### *I. Determination of Payment Error Rates and Potential Liability Amounts*

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. One commenter recommended that the regulations incorporate the formula for calculating that there is a 95 percent confidence that error rate is greater than 105 percent of the national average error rate. We have determined that this is unnecessary. This calculation is basic statistical methodology.

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 new 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.

As discussed in the preamble of the proposed rule, at the same time as the Department advises the State agency of its error rates, 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.

We received two comments on the interim rule provision establishing procedures for addressing the Secretary's authority to resolve the liability amounts for FY 2003 and beyond.

One commenter recommended that liabilities be resolved only through the use of new investment. This would require the Department to waive 50 percent of any potential liability amount that is established. The Department does not believe that this was the intent of the law and is not adopting this proposal.

In the proposed rule, 7 CFR 275.23(c) specified that the Department would issue the potential liability amount settlement proposal at the same time it issues the State's official regressed payment error rate. One comment to the interim rule recommended that the Department delay sending the determination about the disposition of the liability amount until September 30th, and use the time between the issuance of the error rates and the potential liability amount and September 30th to negotiate a proposed liability settlement plan. Under this proposal, the Department would retain the ability to determine amounts to be designated as “at-risk.” The Department has considered the commenter's proposal. However, assuming that the statute allows for the delay, the time constraints built into the process do not allow us to proceed as proposed. If the error rates are issued on June 30, there are only 92 days available to negotiate settlements. The Department's experience has been that it takes all of that time just to address the issues surrounding approval of the settlement agreement for new investment. Therefore, we have not adopted the proposal submitted in response to the interim rule to delay release of the proposed potential liability amount settlement plan until after negotiation with the affected States.

#### *J. Appeals of Liability Determinations*

One commenter, in response to the interim rule, recommended that the regulations should provide that the notification letter sent to the State agency, Governor, and legislature include a notification of the State agency's appeal rights pursuant to Section 16(c)(8)(D). As a general practice, the letters sent by the Department already include this information. We do not believe that it is necessary to incorporate a requirement in the regulations that the Department include this information in the letters.

Section 16(c)(7) of the Food and Nutrition 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 and Nutrition Act, as amended. Thus, only a State agency's second year error rate and related potential 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 proposed at 7 CFR 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, the Department also proposed 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.

We received two comments on the proposal 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. One commenter supported the provision as proposed. The second commenter expressed concern that the proposed rule makes no provision for good cause from the year prior to year one to be considered in determining the status of year 1. As discussed in the preamble to the proposed rule and above, there is no appeal right for a determination of a year 1 status. Appeal rights only exist when a potential liability amount is established in year 2 and only that year's error rate and potential liability amount are appealable.

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. Six percent is the potential liability threshold provided in the FSRA. Thus, if the State's error rate was

below 6 percent, no liability amount would be established. However, if the State's error rate was determined by a 95 percent statistical probability to be 105 percent of the national performance measure, 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 would have two consecutive years of error rates exceeding 105 percent of the national performance measure. The law mandates that a year be considered a year 1 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 year 1 status. We received one comment addressing the relationship between the threshold for establishing a liability amount and the determination of year 1 status. The commenter recommended that a State be considered to be meeting minimum performance standards and that it not be counted as a year 1 whenever a State's error rate fell below 6 percent but there was a 95 percent statistical probability that the State agency's payment error rate exceeded 105 percent of the national performance measure. While we understand the State's viewpoint, these separate measurements are provided by law and the Department has no discretion in this area.

Section 4118 of the FSRA provides that when a State agency appeals its potential liability amount determination, if the State agency began new investment activities prior to an appeal determination, and if the potential 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.

As specified in the interim rule, if the State agency appeals the potential liability amount and wholly prevails and consequently its potential 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 potential liability amount subject to the appeal. 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 published October 16, 2003, at 68 FR 59519 established in 7 CFR

275.23(e)(10) the provisions concerning either the Secretary or the State agency wholly prevailing. These provisions were moved to 7 CFR 275.23(g)(1) in the proposed rule. The provisions of the interim rule, redesignated as 7 CFR 275.23(g)(1) by the proposed rule, are adopted as final.

Section 16(c)(1)(F)(iv) of the Food Stamp Act (as amended by Section 4118 of the FSRA) (now the Food and Nutrition Act of 2008) provides that the Department shall promulgate regulations when neither the Department nor the State agency wholly prevails on appeal. As that section of the Act pertains specifically to liability amounts used for new investment, the Department needed to address a split appeals decision in terms of the amount designated for new investment. The Department believed that the only way to accomplish this and implement the statutory intent was to apply the initial determination percentages to the liability amount newly established through the appeal. For example, if the original liability was \$750,000 and the Department determined to waive 25 percent (\$187,500) of it, require that 25 percent (\$187,500) be newly invested, and require 50 percent (\$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 percent (\$150,000) waived, 25 percent (\$150,000) required to be newly invested, and 50 percent (\$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. The Department received no comments on this proposal. We are adopting the provision as proposed.

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 at the same time that it provides the State agency with notification of its error rates. If the State agency wholly prevails on appeal, the amounts originally designated as

waived, newly invested, 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.

#### *K. 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 approved 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.

We proposed 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 proposed to 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 proposed 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 proposed 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 7 CFR 275.23. In the event that a State agency fails to comply with its new investment plan, we proposed in redesignated 7 CFR 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 proposed that interest shall be charged beginning with the date the State agency received the notice of

failure to newly invest as required. The Department received no comments on these proposals. We are adopting these provisions as proposed.

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

We proposed at 7 CFR 275.23(i) the procedures concerning a State agency's payment of the at-risk money. We proposed that the at-risk money would become 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. Under the proposal, payment would have to 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 was still pending. If the State agency had appealed the liability determination, the State agency would 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 had been completed. Appeal of a subsequent liability amount would not have eliminated the State's requirement to pay the at-risk money when it became due. The appeal of the subsequent year's liability amount would determine whether the liability that year would be reduced and would affect the establishment of a possible additional designation of at-risk money.

We did not receive any comments on this proposal. However, subsequent to the publication of the proposed rule, we have determined that a precise reading of the law requires that payment of the at-risk money be held in abeyance until any appeal for the subsequent year's potential liability is resolved. If the potential liability amount for the subsequent year is reduced to zero, the at-risk money would not be subject to repayment. If the potential liability amount is not reduced to zero, the at-risk money would be required to be repaid. We have revised 7 CFR 275.23(i) accordingly.

If an appeal is not pending, we proposed that interest begin accruing

beginning October 1 following the September 30 due date for payment of any at-risk money. 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 proposed 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 current regulations at 7 CFR 275.23(e)(8) (redesignated as 7 CFR 275.23(j)) for payment of interest on QC liability claims. We also proposed 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 7 CFR 275.23(j). The reference to the Federal Claims Collection Act of 1966 (Pub. L. 89-508, 80 Stat. 308) has been updated to refer to the Debt Collection Improvement Act of 1996, Public Law 104-134, and the Federal Claims Collection Standards, 31 CFR Parts 900-904. The Department received no comments on these proposals and is adopting them as proposed.

#### *M. Demonstration Projects/Social Security Administration (SSA) Processing*

Demonstration project and SSA joint-processed cases (cases processed in accordance with 7 CFR 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 SNAP 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 7 CFR 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. Sections 275.11(g), 7 CFR 275.12(h), 7 CFR 275.13(f), and 7 CFR 275.23(c)(5) (redesignated in this rule as 7 CFR 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 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 proposed to revise 7 CFR 275.11(g) and redesignated 7 CFR 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. The Department received two comments supporting the proposed revisions. We are adopting the revisions as proposed.

#### N. 120-Day Variance Exclusion (7 CFR 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. Paragraph 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 proposed to clarify the language in 7 CFR 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 proposed 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 did not propose 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. The Department received 6 comments on this proposal; 4 commenters supported the proposal as written; one commenter wanted the exclusion to apply to all optional regulatory and legislative provisions; one commenter wanted the exclusion to apply to waivers. We have adopted the provision as proposed.

#### O. Federal Information Exchange (FIX) Errors (7 CFR 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. Paragraph 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 for program management purposes 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. 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 proposed to remove 7 CFR 275.12(f)(3). We received 4 comments supporting this proposed removal, all supporting the change. We are adopting it as proposed.

#### P. Technical Changes

In addition, we proposed in Part 271 Definitions to remove definitions no longer used in the QC system and to add the definition "National performance measure" to reflect current QC policy, and we also proposed to make technical changes throughout Part 275 to remove references to other Federally mandated QC samples, the Worksheet for Integrated AFDC, Supplemental Nutrition Assistance Program, and Medicaid QC Reviews, and the Integrated Review Schedule. With the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law 104-193, the Aid to Families with Dependent Children was eliminated and consequently, the integrated QC review system was eliminated. Therefore, we proposed to change throughout Part 275 the titles of the Work Sheet and Review Schedule to reflect that QC reviews are now Supplemental Nutrition Assistance Program only reviews. We also proposed to remove throughout Part 275 references to integrated QC samples, reviews, and other Federally-mandated QC systems.

Throughout the rule, we proposed 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, benefits are no longer being issued as coupons. Accordingly we proposed to remove references to

coupons in 7 CFR 275.12(c)(2) and 7 CFR 275.13(d).

In addition, we proposed technical changes throughout Part 275 to correct references based on changes proposed to

be made in the proposed rule. Due to the restructuring of 7 CFR 275.23, many sections required renumbering and reference changes throughout 7 CFR

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

#### 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) .....	275.23(c) [1st sentence].
275.23(d)(1) .....	275.23(c)(1) [end of sentence beginning with word "based"].
275.23(d)(2) .....	275.23(c)(4) [end of sentence beginning with word "based"].
275.23(d)(3) .....	275.23(c)(5) revised.
275.23(d)(4) .....	275.23(e)(6).
275.23(e)(1) .....	275.23(e)(7).
275.23(e)(2) .....	275.23(e)(3) [1st three sentences].
275.23(f) .....	275.23(e)(3) [sentences 5 & 6] and paragraphs (i), (ii), and (iii).
275.23(g)(1) .....	275.23(e)(3) [fourth sentence].
275.23(g)(2) .....	275.23(e)(4).
275.23(h)(1) .....	275.23(e)(10) [first sentence].
275.23(h)(2) .....	275.23(e)(10) (second and third sentences).
275.23(h)(3) .....	275.23(e)(9)(iii) [1st sentence].
275.23(h)(4) .....	275.23(e)(5) [introductory text revised].
275.23(h)(5) .....	275.23(e)(10) [fourth sentence].
275.23(j) .....	275.23(e)(10) [last sentence].
	275.23(e)(9)(i).
	275.23(e)(9)(ii).
	275.23(e)(9)(iv) [first sentence].
	275.23(e)(9)(v).
	275.23(e)(9)(vi).
	275.23(e)(8).

#### IV. Implementation

The interim rule was effective December 15, 2003. The proposed rule provided that the changes in that rule would be effective and be implemented 60 days following publication of the

final rule in the **Federal Register**. This rule finalizes both the interim rule and the proposed rule and is effective July 12, 2010. The provisions in 7 CFR 271.2, 7 CFR 275.11(e)(2)(i), 7 CFR 275.11(e)(2)(ii), 7 CFR 275.13(b), and 7 CFR 275.13(c)(1) concerning negative

cases and 7 CFR 273.2(d)(2) concerning consequences to households that refuse to cooperate with QC reviews must be implemented no later than October 1, 2011. State agencies may choose to implement these provisions earlier than October 1, 2011. A 120-day hold

harmless is provided for implementation of 7 CFR 273.2(d)(2), concerning consequences to households who refuse to cooperate with a QC review. If a State agency implements the provision before October 1, 2011, the 120-day hold harmless period begins on the date of implementation. All other provisions must be implemented August 10, 2010.

#### List of Subjects

##### 7 CFR Part 271

Administrative practice and procedure, Supplemental Nutrition Assistance Program, Grant programs—social programs.

##### 7 CFR Part 273

Administrative practice and procedures, Aliens, Claims, Supplemental Nutrition Assistance Program, Fraud, Grant programs—social programs, Penalties, Reporting and recordkeeping requirements, Social Security, Students.

##### 7 CFR Part 275

Administrative practice and procedure, Supplemental Nutrition Assistance Program, Reporting, and recordkeeping requirements.

##### 7 CFR Part 277

Supplemental Nutrition Assistance Program, Government procedure, Grant programs—Social programs, Investigations, Records, Reporting and recordkeeping requirements.

- Accordingly, 7 CFR Parts 271, 273, 275, and 277 are amended to read 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.

\* \* \* \* \*

#### PART 273—CERTIFICATION OF ELIGIBLE HOUSEHOLDS

- 3. In § 273.2, paragraph (d)(2) is amended as follows:
  - a. Revise “§ 273.3(c)(5) or § 275.12(g)(1)(ii),” to read “§ 273.3(c)(5) and 275.12(g)(1)(ii) of this chapter.”;
  - b. Third sentence, revise the number “95” to read “125”;
  - c. End of the third sentence revise “§ 273.2(f)(1)(ix)” to read “paragraph (f)(1)(ix) of this section”;
  - d. Last sentence revise “seven” to read “nine” and revise “§ 273.2(f)(1)(ix)” to read “paragraph (f)(1)(ix) of this section.”;
  - e. Add two new sentences 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 no longer resides with a household terminated for refusal to cooperate, the penalty for refusal to cooperate will attach to household of the person(s) who refused to cooperate. If the State agency is unable to determine which household member(s) refused to cooperate, the State agency shall determine the household to which the penalty shall apply.

\* \* \* \* \*

#### PART 275—PERFORMANCE REPORTING SYSTEM

##### § 275.1 [Amended]

- 4. Section 275.1 is amended by removing the paragraph designation from paragraph (a), and removing paragraph (b).
- 5. In § 275.3:
  - a. The introductory text of § 275.3 is amended by revising the term “scheduling and conduct” to read “scheduling and 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 sentence, by revising the fourth sentence, and by revising “§ 275.23(e)(6)” in the last sentence to read “§ 275.23(d)(4)”.

The revision reads as follows:

##### § 275.3 Federal monitoring.

\* \* \* \* \*

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

\* \* \* \* \*

##### § 275.4 [Amended]

- 6. In § 275.4, paragraph (c) is amended by revising the words “Integrated TANF, Food Stamps and Medicaid Quality Control Reviews” to read “Supplemental Nutrition Assistance Program”, by revising “Integrated Review Schedule” to read “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 revising “standard” to read “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 revising the words “and underissuance error rates” to read “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 revising “§ 275.23(e)(6)” in the third sentence to read “§ 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) **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 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 revising the words "column (5) of the Integrated Worksheet," in the last sentence to read "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. 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 and paragraph (f)(3) is removed.

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

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

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

■ r. 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 or optional 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.

\* \* \* \*

■ 10. In § 275.13 is amended by revising paragraphs (a), (b), and (c)(1), and 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 valid 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 invalid.

\* \* \* \* \*

#### **§ 275.14 [Amended]**

- 11. In § 275.14 is amended in paragraph (c) by revising the words "Integrated Review Worksheet, Form FNS-380," in the first sentence to read "Form FNS-380" and in paragraph (d) by revising the words "Integrated Review Schedule," in the first sentence to read "Integrated Review Worksheet,".
- 12. Section 275.16 is amended by removing paragraph (b)(2) and redesignating paragraphs (b)(3), (b)(4), (b)(5), and (b)(6) as (b)(2), (b)(3), (b)(4), and (b)(5), respectively; and newly redesignated paragraph (b)(5) is revised to read 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 revising the number "95" in the first sentence to read "115" 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 additions read as follows:

#### **§ 275.21 Quality control review reports.**

\* \* \* \* \*

(b) \* \* \*

(2) The State agency shall have at least 115 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 time frames 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 125 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 time frames 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 Supplemental Nutrition Assistance Program by measuring State compliance with the standards contained in the Food and Nutrition 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 determination for each individual project 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 Time frames 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 and Nutrition 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 time frames 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 time frame.

(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 the 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 multiplied by 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 for 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 cannot be appealed.

(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 Supplemental Nutrition Assistance Program 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 Supplemental Nutrition Assistance Program 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 Supplemental Nutrition Assistance Program certification or administrative staff). The amount of the waiver of liability will be determined using the linear equation  $W = I_a/I_b \times [M/12 \text{ or } Mp/18] \times L$ , where  $I_a$  is the issuance for the first full month immediately preceding the unusual event for the county affected;  $I_b$  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 percent of the liability amount; however, no more than 100 percent 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 Supplemental Nutrition Assistance 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 Supplemental Nutrition Assistance Program 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 Supplemental Nutrition Assistance Program 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 Supplemental Nutrition Assistance Program 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 Supplemental Nutrition Assistance Program 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 Supplemental Nutrition Assistance 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 Supplemental Nutrition Assistance 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 percent of the liability amount; however, no more than 100 percent of a State's liability amount will be waived for any one fiscal year.

(4) *Program changes.* A change in the Supplemental Nutrition Assistance Program or other Federal or State program that has a substantial adverse impact on the management of the Supplemental Nutrition Assistance 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 Supplemental Nutrition Assistance Program or other Federal or State programs, the State agency shall provide the following information:

(A) The type of changes(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 Supplemental Nutrition Assistance Program or other Federal and State programs:

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

(2) The proportion of Supplemental Nutrition Assistance Program caseload affected; and/or

(3) The duration of the unusual changes in the Supplemental Nutrition Assistance 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) The State agency shall provide the following information 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 Supplemental Nutrition Assistance Program 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 Supplemental Nutrition Assistance Program 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 and Nutrition 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. The requirement that the State agency pay the at-risk amount for the prior year will be held in abeyance pending the outcome of any pending appeal for the subsequent liability. If the subsequent year's liability is reduced to \$0, the at-risk money from for the prior fiscal year will not be required to be paid. If the subsequent year's liability is not reduced to \$0, the State agency will be required to pay the at-risk money within 30 days of the date of the appeal decision. 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 redesigned paragraph (b)(3) is amended by removing the words “Beginning October 1982,” and by revising “paragraphs (b)(2) and (b)(3)” to read “paragraphs (b)(1) and (b)(2)”.

Dated: May 27, 2010.

**Kevin Concannon,**

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

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