

**DEPARTMENT OF AGRICULTURE****Food and Nutrition Service****7 CFR Parts 210, 215, 220, 225, and 226**

RIN 0584-AE72

**Streamlining Program Requirements and Improving Integrity in the Summer Food Service Program (SFSP)****AGENCY:** Food and Nutrition Service (FNS), USDA.**ACTION:** Final rule.

**SUMMARY:** This rulemaking amends the Summer Food Service Program (SFSP) regulations to strengthen program integrity by clarifying, simplifying, and streamlining program administration to facilitate compliance with program requirements. Through this final rule, USDA is codifying changes to the regulations that will streamline requirements among Child Nutrition Programs, simplify the application process, enhance monitoring requirements, offer more clarity on existing requirements, and provide more discretion at the State agency level to manage program operations.

*Effective date:* This rule is effective October 1, 2022.

*Compliance date:* Compliance with the provisions of this rule must begin May 1, 2023.

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**I. Background**

The Summer Food Service Program (SFSP) is authorized under section 13 of the Richard B. Russell National School Lunch Act (NSLA), 42 U.S.C. 1761. Its primary purpose is to provide free, nutritious meals to children from low-income areas during periods when schools are not in session.

USDA published the proposed rule *Streamlining Program Requirements and Improving Integrity in the Summer Food Service Program (SFSP)* on January 23, 2020 (85 FR 4064) in order to streamline requirements for program operators and enhance the customer experience for participating children and their families. Although this final rule primarily affects the SFSP, it also makes changes to the regulations related to waiver authority for the National School Lunch Program (NSLP), School Breakfast Program (SBP), Special Milk Program, Fresh Fruit and Vegetable Program, and the Child and Adult Care Food Program (CACFP). This rulemaking is the culmination of many years of stakeholder and community engagement, which informed the development of these policies.

Many of the provisions codified through this final rule are currently allowed as program flexibilities and have been shown to improve program administration and enhance service delivery for participating children and their families. These flexibilities were previously indicated through policy memoranda and will now have the full force and effect of law. In addition, this rule will codify key aspects of four nationwide waivers that were available in the past but have been rescinded in response to an audit by the USDA Office of the Inspector General (OIG), entitled “*FNS Controls Over the Summer Food Service Program*” (27601-0004-41). This report led USDA to determine that offering waivers under 42 U.S.C. 1760(l) on a nationwide basis is not supported

by the statute. However, beginning in 2019, USDA allowed States and sponsors to request, on an individual basis, four of the rescinded waivers: first week site visits, meal service times, offer versus serve, and eligibility for closed enrolled sites. Such individual waivers are authorized under section 12(l) of the NSLA, which provides USDA authority to waive certain provisions of the Child Nutrition Programs if a waiver would facilitate the ability of the State or eligible service provider to carry out the purpose of the affected program while also meeting public notice and federal cost requirements. States and eligible service providers were approved for more than 230 individual section 12(l) waivers under this authority for summer 2019, related primarily to the four rescinded waivers. In March 2020, Congress passed the Families First Coronavirus Response Act (FFCRA) (Pub. L. 116-127), which authorized USDA to establish nationwide waivers for all States for the purposes of providing meals under the Child Nutrition Programs with appropriate safety measures with respect to the novel coronavirus (COVID-19) pandemic. Under section 2202(a) of this authority, USDA issued nationwide waivers for first week site visits, meal service times, offer versus serve, and eligibility for closed enrolled sites. Therefore, States and eligible service providers did not need to request these same waivers under section 12(l) of the NSLP on an individual basis in summers 2020 or 2021. Prior to issuance of the nationwide waivers under section 2202(a) of FFCRA, USDA received 189 requests for individual waivers under section 12(l) of the NSLP related to the four rescinded waivers for summer 2020. The large number of individual waiver requests received from States and sponsors related to the rescinded waivers demonstrates the value of the policies allowed through the waivers, and the benefit of codifying key aspects of the waivers so that these policies are available to all States and sponsors without the need to request a waiver. Through the process of evaluating waiver requests and outcomes for summer 2019, USDA gained valuable insight into challenges and best practices of using the waivers, which informed changes in this final rule to provisions impacted by the waivers. As a result, this final rule codifies, with modifications that will promote better program integrity, the four most requested SFSP waivers.

Codifying existing flexibilities and key aspects of the four rescinded nationwide waivers will facilitate sponsor and site participation, decrease paperwork burdens on State agencies and sponsors, and provide certainty that these options will continue to be available. The following table, entitled *FNS Policy Memoranda Addressed in*

*This Rule*, details USDA policy memoranda that are discussed in this rule, the specific provision(s) from each memorandum that is discussed, the status of the impacted waiver or flexibility, and the section of the rule in which it is addressed.

This final rule also codifies additional provisions to streamline program

administration, enhance monitoring requirements, and provide needed clarity on existing provisions. In their totality, these changes will improve the customer experience, and facilitate the ability of States and sponsors to implement the program with fidelity.

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<b>FNS Policy Memoranda Addressed in This Rule</b>			
<b>Policy Memorandum</b>	<b>Provision Addressed in Rule</b>	<b>Provision Status</b>	<b>Section of Rule</b>
<i>Summer Food Service Program (SFSP) Waiver for Closed Enrolled Sites, November 17, 2002<sup>1</sup></i>	Determining Eligibility for Closed Enrolled Sites	Rescinded in SFSP 01-2019	II. F. i.
<i>Field Trips in the Summer Food Service Program (SFSP) February 3, 2003<sup>2</sup> &amp; FNS Instruction 788-13: Sub-Sites in the Summer Food Service Program</i>	Reimbursement Claims for Meals Served Away from Approved Locations	Active	II. E. i.
<i>SFSP 12-2011, Waiver of Site Monitoring Requirements in the Summer Food Service Program, April 5, 2011<sup>1</sup></i>	First Week Site Visits for Returning Sites	Rescinded in SFSP 01-2019	II. C. i.
<i>SFSP 05-2012, Simplifying Application Procedures in the Summer Food Service Program, October 31, 2011<sup>3</sup></i>	Application Procedures for New CACFP Sponsors	Active	II. B. i.
	Demonstration of Financial and Administrative Capability for CACFP Institutions	Active	II. B. ii.
<i>SFSP 04-2013, Summer Feeding Options for School Food Authorities, November 23, 2012<sup>4</sup></i>	Application Procedures for New SFA Sponsors	Active	II. B. i.
	Demonstration of Financial and Administrative Capability for SFAs	Active	II. B. ii.
	First Week Site Visits for SFA Sponsors	Rescinded in SFSP 01-2019	II. C. i.
<i>SFSP 06-2014, Available Flexibilities for CACFP At-Risk Sponsors and Centers Transitioning to SFSP, November 12, 2013<sup>5</sup></i>	First Week Site Visits for CACFP or SFA sponsors	Rescinded in SFSP 01-2019	II. C. i.
<i>SFSP 07-2014, Expanding Awareness and Access to Summer Meals, November 12, 2013<sup>6</sup></i>	Requirements for Media Release	Active	II. E. iii.
<i>SFSP 16-2015, Site Caps in the Summer Food Service Program – Revised, April 21, 2015<sup>7</sup></i>	Establishing the Initial Maximum Approved Level of Meals for Vended Sponsors	Active	II. C. ii.
<i>SFSP 04-2017, Automatic Revocation of Tax-Exempt Status – Revised, December 1, 2016<sup>8</sup></i>	Annual Verification of Tax-Exempt Status	Active	II. E. iv.
<i>SFSP 06-2017, Meal Service Requirements in the Summer Meal Programs, with Questions and Answers – Revised, December 05, 2016<sup>9</sup></i>	Meal Service Times	Rescinded in SFSP 01-2019	II. D. i.
	Off-site Consumption of Food Items	Active	II. D. ii.
	Offer versus Serve	Rescinded in SFSP 01-2019	II. D. iii.
<i>SFSP 05-2018, Child Nutrition Program Waiver Request Guidance and Protocol – Revised, May 24, 2018<sup>10</sup></i>	Overview of Statutory Waiver Authority Request Process	Active	II. G. i.

**Endnotes:**

- <sup>1</sup> No longer available
- <sup>2</sup> <https://www.fns.usda.gov/sfsp-020303>
- <sup>3</sup> <https://www.fns.usda.gov/simplifying-application-procedures-summer-food-service-program>
- <sup>4</sup> <https://www.fns.usda.gov/summer-feeding-options-school-food-authorities>
- <sup>5</sup> <https://www.fns.usda.gov/available-flexibilities-cacfp-risk-sponsors-and-centers-transitioning-summer-food-service-program>
- <sup>6</sup> <https://www.fns.usda.gov/expanding-awareness-and-access-summer-meals>
- <sup>7</sup> <https://www.fns.usda.gov/site-caps-summer-food-service-program-revised>
- <sup>8</sup> <https://www.fns.usda.gov/sfsp/automatic-revocation-tax-exempt-status%E2%80%93revised>
- <sup>9</sup> <https://www.fns.usda.gov/meal-service-requirements-summer-meal-programs-questions-and-answers-%E2%80%93revised>
- <sup>10</sup> <https://www.fns.usda.gov/child-nutrition-program-waiver-request-guidance-and-protocol-revised>

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**II. Public Comments**

USDA received 163 comments during a 90-day comment period, which was originally 60-days, then extended another 30 days to April 22, 2020. Commenters were generally representative of SFSP stakeholders and offered a diversity of viewpoints. Of the comments received, 16 responses were associated with five form letter campaigns, 16 responses were non-germane or duplicates, and 131 responses were unique. One hundred of the 131 unique comments were substantive and supported by detailed reasoning and explanations for the commenters' positions.

These comments represented 59 individuals and commenters who remained anonymous, 29 State agencies (47 total comments), 12 advocacy or nonprofit organizations, nine sponsoring organizations, seven food banks, six school districts, three nutritionists, two professional associations, and one Federal elected official. A few State agencies submitted multiple comments, some of which were unique and are counted as

individual submissions, and some of which were the same or virtually the same and are considered to be form letters for the purpose of this comment analysis. FNS received comments from four additional form letter campaigns comprised of 12 total comments from sponsors, food banks, and general advocacy or nonprofit organizations. Comments associated with these four campaigns were detailed and provided explanations for their responses and recommendations.

Nearly two-thirds of all comments were generally supportive of this rulemaking and many commenters offered substantive and detailed recommendations. The provisions that garnered the most comments were: first week site visits (67), off-site consumption of food items (63), offer versus serve (62), eligibility for closed enrolled sites (52), meal service times (47), and clarifying performance standards for evaluating sponsor viability, capability, and accountability (40).

Except for a small number of non-germane responses, the comments are posted at <http://www.regulations.gov> under docket ID FNS-2019-0034-0001,

*Streamlining Program Requirements and Improving Integrity in the Summer Food Service Program.*

**III. Section-by-Section Discussion of the Regulatory Provisions**

*A. Reorganization of Section 225.6*

USDA proposed to reorganize and streamline § 225.6. This proposal would not change any existing requirements; rather, it would more clearly present current requirements for sponsor and site applications by reorganizing § 225.6(c), *Content of sponsor application*. The provisions found in current § 225.6(c)(2) would move to a new paragraph (g) and the provisions in current § 225.6(c)(4) would move to a new paragraph (f). In addition, § 225.6(d) through (i) would be reordered to make space for a new paragraph (d), related to performance standards for determining financial and administrative capability, and a new paragraph (e), related to sponsor submission of a management plan. These new sections are described in more detail in the next section of this preamble. The table below provides an outline of the proposed revisions:

Current outline	Proposed outline
a. General Responsibilities .....	a. General responsibilities.
b. Approval of sponsor applications .....	b. Approval of sponsor applications.
c. Content of sponsor application .....	c. Content of sponsor application.
1. Application forms .....	1. Application form.
2. Requirements for new sponsors, new sites, and, as determined by the State agency, sponsors and sites which have experienced significant operational problems in the prior year.	2. Application requirements for new sponsors and sponsors that have experienced significant operational problems in the prior year.
3. Requirements for experienced sponsors and experienced sites	3. Application requirements for experienced sponsors.
	4. Application requirements for school food authorities and Child and Adult Care Food Program institutions.
	d. Performance standards.
	1. Performance standard 1.
	2. Performance standard 2.
	3. Performance standard 3.
	e. Management plan.
4. Free meal policy statement .....	f. Free meal policy statement.
5. Hearing procedures statement .....	1. Nondiscrimination statement.
	2. Hearing procedures statement.

Current outline	Proposed outline
d. Approval of sites ..... e. State-sponsor agreement ..... f. Special account ..... g. Food service management company registration ..... h. Monitoring of food service management company procurements ..... i. Meal pattern exceptions .....	g. Site information sheets. 1. New sites. 2. Experienced sites. h. Approval of sites. i. State-sponsor agreement. j. Special account. k. Food service management company registration. l. Monitoring of food service management company procurements. m. Meal pattern exceptions.

**Public Comments**

USDA received one comment on this provision. The commenter expressed support for the proposed changes and suggested that USDA further divide the information in § 225.6 into shorter sections that are easier to use.

**USDA Response**

USDA appreciates the comment and agrees that various portions of § 225.6 could benefit from further reorganization. However, USDA prefers to propose any additional significant organizational changes to the regulations through notice and comment rule making and receive public comments before finalizing such changes. For that reason, USDA will codify this provision as proposed.

**B. Streamlining Program Requirements**

**i. Application Procedures for New Sponsors**

All sponsors are required to submit an annual application to participate in the SFSP. In accordance with current § 225.6(c), new applicants and sponsors that have experienced significant operational problems in the previous year must submit detailed information sufficient to demonstrate their ability to successfully operate the SFSP in compliance with program requirements and with integrity. This includes, but is not limited to, information on sites, arrangements for meeting health and safety standards, and a program budget. Experienced sponsors that have operated the SFSP in a prior year without significant operation problems may use a streamlined application process described in current § 225.6(c)(3). To reduce duplicative work, these sponsors submit updates on the types of information that are most likely to change from year to year.

Sponsors that have successfully operated other Child Nutrition Programs are likely to perform well in the operation of the SFSP. For example, school food authorities (SFA), which are the governing bodies that have the legal authority to operate the school meal programs in one or more schools, and

CACFP institutions, which have agreements with a State agency to assume final administrative and financial responsibility for CACFP operations, have already demonstrated their ability to operate a food service and comply with State and Federal nutrition program requirements. In order to encourage participation of sponsors with Child Nutrition Program experience, USDA extended flexibilities through policy memoranda which allow SFAs operating the NSLP or SBP, and CACFP institutions in good standing to use the application procedures for experienced sponsors in certain circumstances (SFSP 05–2012, *Simplifying Application Procedures in the Summer Food Service Program*, October 31, 2011 and SFSP 04–2013, *Summer Feeding Options for School Food Authorities*, November 23, 2012).

The aforementioned flexibilities apply to SFAs and CACFP institutions in good standing that are applying for the SFSP for the first time and will serve meals at the same sites where they provide meal services through the NSLP, SBP, or CACFP during the school year. Such institutions are allowed to follow the application requirements for experienced sponsors found in current § 225.6(c)(3). The institution must also provide site information that is necessary for the State agency to evaluate each proposed site, including whether it is rural or non-rural, self-preparation or vended, and certification from a migrant organization if it will primarily serve the children of migrant families.

In accordance with these memoranda, an SFA or CACFP institution may be considered ‘in good standing’ if it has been reviewed by the State agency in the last 12 months and had no major findings or program violations, or completed and implemented all corrective actions from the last compliance review. In addition, an SFA or CACFP institution may be considered in good standing if it has not been found to be seriously deficient by the State agency in the past two years and has never been terminated from another Child Nutrition Program.

USDA proposed to codify the flexibilities currently extended through policy guidance and proposed to allow State agencies the discretion to determine whether or not to implement this streamlined application process.

**Public Comments**

USDA received 31 comments about application procedures for new sponsors, including three form letter copies. Of these, 24 were supportive, three offered partial support, none were opposed, and four were mixed. Proponents of this provision included all types of commenters, many of whom stated that offering the streamlined process is a proven strategy to reduce administrative burden and encourage participation among operators of other Child Nutrition Programs. Two State agencies and a general advocacy organization noted the importance of maintaining State agency discretion to request additional documentation if the State has reason to conduct a more thorough review of an application. A few other State agencies had suggestions or questions related to making a determination of ‘good standing’ for an applicant. These commenters suggested additional criteria to consider when making this determination, such as debts owed to the State agency, contractual arrangements for purchasing meals, and where the sponsor is in the serious deficiency process for the CACFP. One State agency pointed out that sponsors are not reviewed annually and so they may not have major findings or program violations recorded in the last 12 months as the proposed rule recommended. A State agency noted that this flexibility is only for sites at which the sponsor offers meal service during the school year and stated that this arrangement is often not the case. Another commenter stated that it would be burdensome for some States to make changes to their current automated application system.

**USDA Response**

This final rule codifies as proposed the flexibility for SFAs operating the NSLP or SBP and CACFP institutions in

good standing applying to the SFSP as new sponsors to use the application procedures for experienced sponsors in certain circumstances. However, USDA recognizes that States are in the best position to determine how and when to implement this flexibility. Therefore, States are encouraged to request additional evidence of administrative capability or require submission of a new sponsor application if they have reason to believe that a new SFA or CACFP sponsor may have difficulty operating the SFSP. States may also consider additional factors when determining if a sponsor applicant is 'in good standing.' The rule allows the State agency the latitude to use its discretion in this way.

With regard to determining if an applicant is in good standing in the NSLP, SBP, or CACFP, the proposed rule included standards found in existing policy guidance. However, USDA agrees with the commenter who pointed out that not all sponsors are reviewed annually, and it is not appropriate to say that they should, within the last 12 months, have no major findings or program violations. Instead, USDA suggests that an SFA or CACFP institution is considered to be in 'good standing' if it has been reviewed by the State agency and had no major program violations or has completed and implemented all corrective actions from the last compliance review. The same commenters asked for clarification on determining good standing for an applicant that has been found seriously deficient in the CACFP. A CACFP institution applicant in good standing should have completed and implemented all corrective actions outlined in its serious deficiency corrective action plan, if applicable. In addition, State agencies should carefully consider the capabilities of any sponsor that has been found seriously deficient when reviewing application materials. USDA understands that providing further clarification to determine good standing for program operators across all Child Nutrition Programs would benefit States and program operators. The Department intends to address this issue through a separate rulemaking that will allow the public to comment specifically on proposals related to determining good standing for Child Nutrition Program operators.

This flexibility has long been limited to SFAs and CACFP institutions applying to operate the SFSP at the same sites where they provide meal services during the school year. A commenter noted that this is not the arrangement in all cases, which USDA interprets to mean that some SFAs and

CACFP institutions operate the SFSP at sites where they do not provide a meal service during the school year. Although SFAs and CACFP institutions may serve additional sites during the summer, this provision is limited to existing sites for which a new SFA or CACFP sponsor has demonstrated that they have the resources and capability to provide a meal service. After a year of operating the SFSP at their existing sites, an SFA or CACFP sponsor will be considered 'experienced' and can apply using the experienced application procedures for all of its sites, including those at which they will only offer a summer meal service through the SFSP. Alternatively, the new SFA or CACFP institution could apply to serve additional sites using the application process for new sponsors.

Accordingly, USDA will codify as proposed in § 225.6(c)(4) the flexibilities extended through policy guidance for NSLP and SBP SFAs and CACFP institutions to use application procedures for experienced sponsors.

#### ii. Demonstration of Financial and Administrative Capability

SFSP sponsors must have the financial and administrative capability to support program operations and be able to accept full financial responsibility for all of their meal sites. The ability to meet these requirements is assessed through the application process, during which the State agency may consider budget submissions, financial records, documentation of organizational structure, menu planning, or other indicators of financial and administrative capability.

NSLP and SBP SFAs and CACFP institutions already undergo a rigorous application process to participate in the NSLP, SBP, and the CACFP, and have demonstrated that they have the financial and organizational viability, capability, and accountability necessary to operate a Child Nutrition Program. USDA extended several flexibilities to these sponsors when they participate in the SFSP through policy memoranda (SFSP 05–2012, *Simplifying Application Procedures in the Summer Food Service Program*, October 31, 2011, and SFSP 04–2013, *Summer Feeding Options for School Food Authorities*, November 23, 2012). This guidance provided that SFAs and CACFP institutions in good standing applying to participate in the SFSP are not required to submit further evidence of financial and administrative capability, as required in § 225.14(c)(1). However, if the State agency has reason to believe that operation of the SFSP would pose significant challenges for an SFA or CACFP institution, the State

agency may request additional evidence of financial and administrative capacity sufficient to ensure that the sponsor has the ability and resources for successful administration of the SFSP. USDA proposed to codify these flexibilities in a revised § 225.14(c)(1).

In some States, the SFSP, school meals programs, and the CACFP are operated by different State agencies. USDA proposed that, in these situations, State agencies must develop an information sharing process so that information on the financial and administrative capability of sponsors will be shared across State agencies to protect the integrity of the SFSP. State agencies would be required to share relevant sponsor information, including, but not limited to:

- Demonstration of fiscal resources and financial history;
- Budget documents;
- Demonstration of appropriate and effective management practices; and
- Demonstration of adequate internal controls and other management systems in effect to ensure fiscal accountability.

USDA requested specific comments on the proposed information sharing requirement, including:

- Would the sharing of information help improve the integrity of the program?
- Would developing an information sharing process create undue burden on State agencies?
- What are the potential costs of developing an information sharing process?

#### Public Comments

USDA received 34 comments on this provision, including three form letter copies. Commenters were primarily State agencies, but also included a general advocacy organization, industry associations, sponsors, and individuals. Of those who commented on the proposal to not require additional evidence of financial and administrative capability for certain sponsors, 19 commenters were supportive, none were opposed, and 15 were mixed, including those who commented only on the specific requests for comment. Of those who commented on State agency information sharing requirements, six were supportive, two were opposed, and five were mixed. Eleven commenters, including three form letter copies, also provided information in response to the request for specific comments.

With regard to not requiring additional evidence of financial and administrative capability for certain sponsors, proponents and those with mixed feedback voiced that this provision would reduce administrative

burden and improve efficiency without compromising program integrity. It would also encourage participation by sponsors that have a proven track record of successfully operating other Child Nutrition Programs. However, some State agencies said that States should have the discretion to apply this flexibility as they deem most appropriate. For example, requesting additional documentation if needed to determine a sponsor's capability to operate the Program, or applying additional scrutiny based on sponsor characteristics, such as their method of procuring meals. One State agency commenter worried that it would not be able to accept the good standing determination of another State agency unless their protocols were aligned. A State agency also raised similar issues regarding determining good standing as were addressed in section III. B. i. of this final rule. Another commenter wanted to know how this provision would fit with the proposal to require submission of a management plan demonstrating sponsor viability, capability, and accountability found in section III. B. iii. of this final rule.

With regard to a State agency information sharing requirement, proponents said that the proposal would reduce burden at the State agency and sponsor level, and would spur States to improve existing informal information sharing relationships. Opponents expressed concern that establishing an information sharing process could be burdensome, costly, or unnecessary in States where the various Child Nutrition agencies already communicate effectively.

Eight State agencies responded to the requests for specific comments. In general, these State agencies said sharing information across agencies would improve integrity, although developing an information sharing process could be costly or burdensome depending on the requirements. Many of those who expressed concern about the costs cited development or modification of State information technology (IT) systems as a driver of the costs.

#### USDA Response

This final rule codifies as proposed the flexibility outlined in guidance that SFAs and CACFP institutions in good standing applying to operate the SFSP do not have to provide further evidence of financial and administrative capabilities. The final rule will also clarify that these sponsor applicants are not required to submit a management plan unless requested by the State agency. In addition, the final rule will

codify as proposed the requirement that State agencies develop an information sharing process if programs are administered by separate agencies within the State.

USDA appreciates the comment that inquired about how this provision would fit with the requirement found in section III. B. iii. of this rule for sponsors to submit a management plan demonstrating financial and administrative capability. It was not intended that NSLP and SBP SFAs and CACFP institutions in good standing would be required to submit a management plan because they have already demonstrated the qualifications to be addressed in the management plan through their operation of another Child Nutrition Program. Accordingly, this final rule will revise the regulations to clarify that submission of a management plan is not required for these applicants unless requested by the State agency. Although SFAs and CACFP institutions have already demonstrated their financial and administrative capability through successful operation of another Child Nutrition Program, USDA agrees with commenters who expressed that States should have the discretion to require more documentation, including a management plan, if needed to evaluate an applicant's ability and resources to operate the Program if the State agency has reason to believe that this would pose significant challenges for the applicant.

Similar to the response provided in section III. B. i. of this final rule, USDA suggests that an SFA or CACFP institution is considered to be in 'good standing' if it has been reviewed by the State agency and had no major program violations, or has completed and implemented all corrective actions from the last compliance review, including actions outlined in its serious deficiency corrective action plan, if applicable. State agencies should carefully consider the capabilities of any applicant that has been found seriously deficient when reviewing application materials. As previously noted, USDA recognizes the benefit of providing more clarity to determine good standing for Child Nutrition Program operators and will solicit public comments on this specific issue in a separate rulemaking.

USDA will codify as proposed the requirement for States to share information on the financial and administrative capability of sponsors. USDA does not intend for this provision to require States to invest in new IT systems or modify existing IT systems. Information can be shared through any method that is mutually agreed upon by the participating agencies. For example,

the SFSP State agency may have an agreement with a school meals or CACFP State agency to share the outcome of reviews, corrective actions, or other monitoring activities upon request. In developing this information sharing process, State agencies can clarify what information each agency uses to determine good standing and how it can best be applied for this purpose. This type of arrangement would require no more investment than establishing a contact with partnering State agencies.

Accordingly, this final rule amends regulations found at § 225.14(c)(1) to include the flexibility outlined in guidance that SFAs and CACFP institutions in good standing applying to operate the SFSP do not have to provide further evidence of financial and administrative capabilities. This rule also amends the regulations to clarify that SFAs and CACFP institutions are not required to submit a management plan unless requested by the State agency. In addition, this final rule adds a requirement that State agencies develop an information sharing process if programs are administered by separate agencies within the State.

#### iii. Clarifying Performance Standards for Evaluating Sponsor Viability, Capability, and Accountability

Current regulations at § 225.14(c)(1) require any organization applying to be an SFSP sponsor to demonstrate financial and administrative capability for program operations and accept final financial and administrative responsibility for total program operations at all sites at which it proposes to conduct a food service. However, the regulations do not provide metrics or methods for evaluating an applicant's potential to be viable, capable, and accountable for operating the SFSP with program integrity. USDA has provided technical assistance to States to aid in this process and has received requests from State agencies to provide additional clarity on the requirements in § 225.14(c)(1).

USDA proposed to add a new § 225.6(d) with performance standards for organizations applying to participate as SFSP sponsors that correspond to standards currently in place at § 226.6 for organizations applying to participate as CACFP sponsors. These standards are not new requirements; they are intended to clarify existing SFSP requirements and provide support and guidance to State agencies when evaluating sponsor applications.

Although this proposal would require some State agencies to modify their process for evaluating applications, the

intended effect of these changes is to provide clarity sought by States, streamline requirements across programs, and increase program integrity by supporting the ability of State agencies to more efficiently and consistently evaluate an applicant sponsor's financial and administrative capability. While there are operational and monitoring differences between the SFSP and the CACFP, the standards set forth in § 226.6 are intended to help State agencies identify whether an organization is able to meet the basic requirements for operating a Child Nutrition Program. In addition, the rule proposed that sponsors must demonstrate compliance with these performance standards as part of their management plan (§ 225.6(c)(2)(i) and new § 225.6(e)).

The proposed standards addressed: (1) financial viability and financial management, (2) administrative capability, and (3) internal controls and management systems that ensure program accountability. The proposed regulations included criteria for assessing each performance standard.

Finally, USDA proposed to amend § 225.14(a) and (c)(1) and (4) to reference application requirements, performance standards, and the management plan, respectively, in the reorganized § 225.6.

#### Public Comments

USDA received 40 comments on this provision, including 10 form letter copies. Of those who commented on the proposed performance standard, 19 were supportive, two offered partial support, three opposed, and 15 shared mixed feedback. Of those who commented on the proposed requirement for submission of a management plan demonstrating compliance with the performance standards, three were supportive and one comment was mixed.

Proponents and those who offered partial support for the performance standards were State agencies and one individual. These commenters appreciated that this change would create consistency across Child Nutrition Programs and provide State agencies and sponsors with objective standards for assessing a sponsor's potential to be viable, capable, and accountable for operating the SFSP with program integrity. Some commenters said that this would strengthen program integrity and result in more capable sponsors that stick with the Program over the long term. A few State agencies indicated that they already use the proposed standards or suggested that the proposal be strengthened. One State

agency recommended that USDA further align SFSP requirements with other integrity measures used in the CACFP such as disqualification of individuals and organizations.

Opponents and several commenters with mixed feedback included State agencies and general advocacy organizations, a few sponsors, and an industry association. These commenters suggested that the SFSP is sufficiently different from the CACFP that USDA should develop unique performance standards for the SFSP. However, commenters did not provide specific suggestions for performance standards that would be suited for the SFSP. These commenters noted that the SFSP operates in a short timeframe and sponsors include small organizations with less administrative capacity than CACFP sponsors, such as faith-based organizations and local youth program providers. Some commenters expressed concern that increasing administrative burden would deter smaller organizations and private nonprofits from participating as sponsors, and would require additional paperwork and systems changes for State agencies.

Several commenters suggested that the requirements in this provision be waived or streamlined in certain circumstances, such as for SFAs and CACFP institutions, or experienced sponsors in good standing. A few commenters inquired about the frequency with which management plans must be submitted or updated, and some suggested that the State should have the discretion to determine how often to re-verify information provided in a sponsor's management plan.

Several commenters requested training and technical support from USDA to aid in implementation, and a few suggested allowing at least two years between publication of this rule and the effective date for this requirement. One State agency noted that they would need to make changes to their IT systems to accommodate this change.

#### USDA Response

This final rule codifies the performance standards as proposed and provides a streamlined option for experienced sponsors to comply with this requirement.

USDA understands the concerns of commenters who suggested that the proposed performance standards could be a deterrent to smaller sponsors. The addition of specific performance standards will improve program integrity by providing a consistent benchmark for determining financial

and administrative capability; for this reason, the standards will be codified as proposed. However, USDA has determined that the process for sponsors to demonstrate financial and administrative capability can be streamlined without negatively impacting program integrity. Therefore, the final rule will allow experienced sponsors that have not demonstrated significant operational problems in the prior year to submit a simplified management plan. The simplified plan must include a certification that any information previously submitted to the State as part of a sponsor's management plan is current, or that the sponsor has submitted any changes or updates to the State. This certification must be submitted annually with the sponsor's application and must address all required elements of each performance standard. However, a full management plan must be submitted at least once every three years to ensure that State agencies periodically conduct a full review and assessment of a sponsor's financial and administrative capability. The State agency may require submission of a full plan more frequently if it determines that more information is needed to evaluate the sponsor's capabilities. New sponsors and those that have experienced significant operational problems in the prior year must submit a full management plan that thoroughly addresses all three performance standards.

In addition, another group of sponsors is largely exempt from the requirements in this provision. As discussed in section III. B. ii., under this final rule, SFAs and CACFP institutions in good standing applying to operate the SFSP do not have to provide further evidence of financial and administrative capabilities and are not required to submit a management plan unless requested by the State agency. These sponsors have already demonstrated their financial and administrative capability through operation of another Child Nutrition Program, and it is not necessary for them to duplicate that effort in order to participate in the SFSP.

USDA sees the value of finding more options to streamline requirements across Child Nutrition Programs, as suggested by a State agency that recommended the SFSP adopt more CACFP requirements related to disqualification of individuals and organizations. However, adding such requirements to the SFSP is beyond the scope of this rulemaking. In response to commenters who requested a year or more to implement these provisions,

this final rule will go into effect on October 1, 2022, which should provide sufficient time to update current systems in advance of May 1, 2023, when compliance with the provisions of this rule is required. As previously noted, this rulemaking is clarifying existing SFSP requirements, so States should already have systems in place to evaluate an applicant's potential to be viable, capable, and accountable for operating the SFSP. In addition, SFAs and CACFP institutions in good standing are not required to submit management plans, which will limit the number of plans that States must review.

Accordingly, this rule adds performance standards for determining sponsor financial viability, administrative capability, and program accountability in a new § 225.6(d) against which State agencies must evaluate an applicant sponsor's financial and administrative capabilities and clarifies the circumstances under which a full or simplified plan is required. This rule also requires in § 225.6(c)(2)(i) and (c)(3)(i) and the new § 225.6(e) the submission of a management plan demonstrating compliance with the performance standards in the new § 225.6(d) and describes the requirements for the full and simplified plans. Finally, this rule amends § 225.14(a) and (c)(1) and (4) to reference application requirements, performance standards, and the management plan, respectively, in the reorganized § 225.6.

### C. Facilitating Compliance With Program Monitoring Requirements

#### i. First Week Site Visits

Section 225.15(d)(2) of the current regulations requires sponsors to visit each of their sites at least once during the first week of program operation. However, in response to consistent feedback from State agencies and sponsors that some sponsors lack sufficient resources to conduct monitoring visits during the first week of operation at all site locations, USDA issued policy guidance to waive the requirement in its entirety for:

- Sponsors in good standing in the NSLP or CACFP (SFSP 04–2013, *Summer Feeding Options for School Food Authorities*, November 23, 2012, and SFSP 06–2014, *Available Flexibilities for CACFP At-Risk Sponsors and Centers Transitioning to SFSP*, November 12, 2013, respectively); and
- Sites that had operated successfully the previous summer (or other most recent period of operation) and had no serious deficiency findings (SFSP 12–

2011, *Waiver of Site Monitoring Requirements in the Summer Food Service Program*, April 5, 2011).

However, the nationwide waivers noted above were rescinded in 2018, as discussed in the background section of this final rule. Beginning in summer 2019, State agencies and sponsors were permitted to request a waiver of these regulations on an individual basis. Between 2019 and 2020, 38 States requested individual waivers related to first week site visits. Through implementation of these individual waivers and waivers provided on a nationwide basis through policy memoranda prior to 2019, USDA learned that waiving the first week site visit requirement eased the burden for the sponsors and sites that met the requirements of the waiver. However, USDA also determined that site visits during the first weeks of operation are an important monitoring tool that can help ensure effective and compliant program operations. Therefore, USDA proposed amending current requirements to provide flexibility in the timeframe during which first monitoring visits must take place for larger sponsors while still requiring an early visit for all sites. The proposed rule:

- Creates a tiered framework in which sponsors responsible for the management of 10 or fewer sites are required to conduct the first site monitoring visit within the first week of operations, and sponsors responsible for the management of more than 10 sites are required to conduct the first site monitoring visit within the first two weeks of program operations.
- Requires that, if a site operates for one week or less, the site visit will be conducted during the period of operation.
- Allows sponsors to conduct a first monitoring visit and a food service review at the same time.

#### Public Comments

In total, USDA received 67 comments on the proposed changes to first week site visit requirements. The summary below discusses these commenters' responses to the proposed tiered framework, proposed changes to the timing of first monitoring visits, including the food service review, and the specific requests for comment, respectively.

#### Tiered Framework for the First Monitoring Visit

USDA received 66 comments addressing the proposed tiered framework for the first monitoring visit requirement. Of these, nine were

supportive, six were opposed, and six were mixed. The remaining 45 comments, including 10 form letters, supported amending current regulations, but voiced concerns over the tiered framework's ability to alleviate the problems it was designed to address. Multiple respondents suggested alternative formulations to the tiered framework; however, the majority of those comments requested a return to the flexibilities provided under the rescinded nationwide waivers. Commenters in support of reinstating previous policy guidance cited it as an effective monitoring approach that was responsive to the challenges that many sponsors faced in meeting the first week site visit requirement. Commenters also wrote that the previous policy guidance allowed sponsors to better target their monitoring resources to sites in greatest need of the monitoring.

In general, respondents who expressed concerns with or opposition to the tiered framework maintained that sponsors will still struggle to meet the requirements under the proposed rule. Multiple commenters wrote that the number of sites a sponsor manages is not always an indicator of their ability to administer the program, and that both small and large sponsors have similar difficulties in fulfilling these requirements. The logistical and administrative challenges commenters listed to visiting all sites in the given timeframe included: insufficient staff, time, and resources to conduct site visits; the inability to visit multiple sites with meal services occurring at the same time; sites operating fewer than seven days per week; and large distances between sites, particularly in rural areas. Several commenters wrote that sponsors may choose to support fewer sites if they cannot meet the proposed monitoring requirements.

Proponents of the tiered framework were appreciative of the flexibility in the timeframe afforded to larger sponsors, stating that the additional time to conduct the visit recognizes the administrative difficulties for larger sponsors, and allows larger sponsors greater flexibility in ensuring compliance and managing their resources.

#### Concurrent First Monitoring Visit and Food Service Review

USDA received 38 comments about the proposed change to allow the food service review to occur at the same time as the first monitoring visit. Of these, 18 were supportive, 12 provided partial support, six were opposed, and two were mixed. The 12 comments (including form letters) that provided

partial support expressed concern over the time constraints for first monitoring visits if sponsors are required to visit all sites. The commenters stated that the proposed change was a positive step for program administration; however, the timeframe for the first monitoring visit may not provide sponsors an adequate amount of time to conduct a full review early in operations if required to visit all sites.

Opponents of the proposed change wrote that it would increase the program's administrative burden without providing any benefit to oversight of operations, stating it is only a duplication of paperwork and recordkeeping. However, proponents of the proposal stated that it would provide more flexibility for sponsors to manage resources.

Finally, USDA received four comments specifically addressing the provision, which requires that, if a site operates for a week or less, the site visit must be conducted during the period of operation. One comment was in support, and the remaining comments were mixed. Two of the mixed comments requested that the first monitoring visit be eliminated for sites that operate for a week or less. One commenter wrote that the food service review is sufficient to ensure program integrity, while another commenter reasoned there is no opportunity for follow up and technical assistance given the short period of operation, particularly those sites that operate for only one day.

#### Specific Requests for Comments

USDA asked respondents to the proposed rule to address how the tiers would affect sponsors of different sizes and that operate under varying conditions. Specifically, USDA requested comments on the:

- Number of sites that sponsors manage;
- Number of staff available to conduct site visits;
- Logistics of conducting site visits;
- Time and resources necessary, as well as any other factors, that impact the ability of sponsors to fulfill this requirement;
- Proposed tiers and whether they provide sufficient flexibilities for sponsors; and
- Benefits of requiring first monitoring visits at all sites versus those sites that are new to the program or experienced operational or administrative difficulties in the past.

Eight State agencies provided specific feedback on all or some of the request for comments. The feedback to these specific comments varied among

respondents. Overall, comments indicated there is a large variation in the number of sites a sponsor manages, and the number of staff available to conduct site visits. One State agency wrote that a sponsor may have up to 64 sites, while another said a sponsor may have up to 250 sites. Likewise, the average number of sites that sponsors have also varied. Several commenters wrote that typically one or two monitoring staff conduct site visits, but numbers as high as ten were also cited. Another State agency wrote that the number of staff available to conduct site visits is proportional to the number of sites the sponsor manages.

Respondents agreed that conducting a site visit takes a significant amount of time, taking into consideration that site visits also include travel, follow up, and technical assistance. Limited time, in addition to minimal staff, funding, and resources, were all given as factors that impact the ability of sponsors to conduct site visits and fulfill these monitoring requirements within the given timeframe. Commenters also wrote that sponsors often resort to rushing through site visits or staggering their sites' dates of operation to meet these requirements.

Commenters cited multiple benefits to requiring site visits for all sites. Requiring sponsors to monitor their sites helps ensure that sites are following program requirements, allows sponsors to identify and correct site issues early, and fosters open communication between sponsors and sites. A State agency wrote that visiting all sites would ensure that a well-run site continues to maintain standards, but added that the monitoring resources would be better spent on sites with operational issues.

Submissions were generally split on whether the tiered framework provided sufficient flexibility for sponsors. A State agency wrote that the tiered framework does not provide an adequate amount of flexibility and will remove the sponsor's ability to address sites with the most risk. Two State agencies wrote that there are sites that have successfully operated the program for years, and few, if any, of these sites, or sites managed by experienced sponsors, have any findings in the first week site visit. A State agency wrote that new sites or sites that experience operational or administrative difficulties require more technical assistance and training. Requiring site visits for only those sites empowers sponsors to determine where to focus monitoring resources.

#### USDA Response

This final rule revises the changes to first week site visit requirements in response to the comments received on the proposed rule. As a result, this final rule requires that sponsors must conduct a site visit in the first two weeks of operation for all new sites and sites that had operational problems in the prior year. State agencies may require a site visit during the first two weeks of program operations for any or all other sites in the State, at their discretion. In addition, each State agency must establish criteria for what constitutes operational problems in order to help sponsors determine which of their returning sites are required to receive a site visit during first two weeks of program operations. Operational problems may include, but are not limited to, deficiencies related to:

- Meal preparation;
- Meal service (components);
- Food safety issues; and
- Verification of meal counts at point of service.

Through the process of requesting individual waivers authorized under section 12(l) of the NSLA for summers 2019 and 2020, many State agencies expressed the need for significant flexibilities related to first week site visit requirements, which was echoed in a majority of the comments received for this rulemaking. In developing this final rule, USDA revised its initial proposal in a way that balances program integrity and administrative flexibilities. USDA recognizes the concerns of State agencies, sponsors, and other respondents about whether the proposed changes would provide a manageable monitoring schedule that ensures compliance with program requirements for all sponsors and sites. The proposed tiered framework was based on currently available data from studies conducted by USDA, which showed that over 80 percent of sponsors operate 10 sites or fewer. However, given the number of varying conditions under which sponsors operate the program, USDA agrees with respondents that the number of sites a sponsor manages is not always indicative of its ability to fulfill this requirement. The changes under the proposed rule only provided flexibility in the timeframe for larger sponsors and were not sufficiently responsive to the needs of smaller sponsors that face logistical challenges with completing monitoring requirements within the first week of operations. In response, the final rule extends the flexibility in the timeframe to conduct site visits to all sponsors in

an effort to alleviate the logistical challenges and other factors that impact the ability of sponsors to meet this requirement.

USDA learned through many years of implementing the nationwide waiver of first week site visit requirements that this flexibility eased the burden for sponsors in good standing in the NSLP, SBP, or CACFP, and sites that had operated successfully the previous summer. While experienced multi-program sponsors in good standing have demonstrated that they can operate Child Nutrition Programs successfully and with integrity, site visits facilitate good sponsor management and ensure that site supervisors and staff are receiving the technical assistance needed to operate the SFSP in compliance with all program requirements, particularly among new sites and sites with prior operational problems. Therefore, this final rulemaking codifies a risk-based approach that incorporates a modification to the flexibilities previously provided by the nationwide waiver. This approach allows sponsors to prioritize monitoring resources and technical assistance to sites most at risk of operational issues while reducing the administrative burden of operating the SFSP.

Furthermore, in an effort to be responsive to the need for significant flexibilities without compromising program integrity, this final rulemaking codifies the State agency's discretion to require a site visit during the first two weeks of program operations for any or all sites under any sponsor the State agency deems necessary. The rule also requires that sponsors must follow criteria established by the State agency to identify sites with operational problems that require a site visit during the first two weeks of operation. Commenters emphasized concerns about the administrative burden associated with visiting all sites and noted that monitoring resources would be better spent on sites at higher risk of operational problems. Accordingly, USDA believes that establishing criteria in advance will reduce this concern and improve regulatory certainty by providing sponsors notice of relevant criteria for determining which of their returning sites are required to receive a site visit so that they can plan how best to use their monitoring resources. In addition, these changes empower State agencies to set the appropriate level of monitoring that balances administrative flexibility with consideration of sponsor operations and capability. For example, State agencies may require a site visit for sites that have significant staff

turnover, had findings on prior monitoring reviews, are under a sponsor that has had significant issues, or exhibit anything else of concern to the State agency. By permitting State agencies to set a responsive and manageable monitoring schedule in the State, sponsors may be encouraged to take on additional sites, thereby increasing program access without compromising integrity.

Sponsors are still required to conduct a full review of food service operations at each site within the first four weeks of operation, and thereafter, maintain a reasonable level of site monitoring. Consistent with the proposed rule, this final rule allows the food service review to occur at the same time as the site visit during the first two weeks of operation. This option provides sponsors with the opportunity to manage their resources in a way that best suits their program operations. Combining reviews allows sponsors to focus resources on site reviews where more aspects of the site and meal service can be assessed. In addition, given the nature of the program and the short duration under which many sites operate, a full review earlier in the start of program operations would be most effective at identifying and promptly addressing all operational issues that may arise, thereby protecting program integrity. A few comments point to concerns that combining reviews only results in a duplication of paperwork and recordkeeping. While § 225.15(d)(3) requires that sponsors complete a monitoring form developed by the State agency during the conduct of these reviews, this rulemaking gives State agencies the discretion to use their resources in the most efficient way, and State agencies have the option to streamline systems and documentation as they deem appropriate.

Under this final rule, in cases where the site operates for seven calendar days or fewer, the site visit must be conducted during the period of operation, as applicable. USDA acknowledges the challenges of conducting site visits for sites that operate for a short duration. However, monitoring is an effective tool for program management, and direct observation of certain operational activities is necessary to ensure compliance with program requirements.

With this final rule, USDA establishes minimum monitoring requirements while empowering State agencies to determine the appropriate level of monitoring that balances administrative flexibility and program integrity. If follow up is required, additional visits may be necessary to verify whether corrective action has been implemented.

Even for sites that are not required to receive a site visit during the first two weeks of program operations under this final rule, as a best practice, USDA encourages sponsors to maintain a partnership that fosters open communication with all sites in order to identify and correct issues early and share best practices from sites that are operating successfully and within program requirements.

Accordingly, this rule amends § 225.15(d)(2) of the regulations to require a site visit during the first two weeks of program operations for all new sites, sites with operational problems in the prior year, and any site for which the State agency determines a visit is needed. In addition, this rule adds a new § 225.7(o) which provides that State agencies must establish criteria for sponsors to use in determining which sites with operational problems noted in the prior year are required to receive a site visit during the first two weeks of program operations. This rule also amends § 225.15(d)(3) to allow sponsors to conduct the site visit and a food service review at the same time.

#### ii. Establishing the Initial Maximum Approved Level of Meals for Sites of Vended Sponsors

Current regulations at § 225.6(d) require that each site must have an approved level for the maximum number of children's meals which may be served under the Program. This limit, which is commonly known as a 'site cap' is intended to encourage sponsors and State agencies to work closely together to develop reasonable estimates of anticipated site attendance. Site caps for sites that prepare their own meals may be no more than the number of children for which its facilities are adequate. Sponsors of vended sites determine the site cap using historical attendance, or another procedure developed by the State agency if no accurate record from prior years is available.

The process of determining the site caps provides State agencies and sponsors the opportunity to work together to assess a site's capacity and the needs of the community. Effective site caps prevent sites from purchasing or producing more meals than the site will serve or has the capacity to handle, and are an important tool for State agencies to monitor program management and determine if there is need for technical assistance or corrective action to ensure program integrity. In some cases, the capability of a site or the full needs of a community may be difficult to accurately assess before operations

begin, historical data needed to accurately forecast participation levels may be unavailable, or participation may change over the summer. If necessary, site caps can be adjusted based upon information collected during site reviews or other evidence presented to the State agency by the site's sponsor. Current requirements at § 225.11(e)(3) provide that State agencies must disallow payment on any meals served over the site cap at vended sites.

In recognition of the fact that site caps are sometimes revised to respond to conditions at the site, USDA issued policy guidance clarifying that sponsors may request an increase to an existing site cap at any time prior to the submission of the meal claim for reimbursement that includes meals served in excess of the site cap (SFSP 16–2015, *Site Caps in the Summer Food Service Program—Revised*, April 21, 2015). Under this guidance, State agencies have the discretion to approve such a request.

USDA proposed to amend § 225.6(h)(2)(iii) of the regulations, as redesignated through this rule, to clarify that sponsors of vended sites may request an adjustment to the maximum approved level of meal service at any time prior to submitting a claim for reimbursement. USDA also proposed to amend § 225.6(h)(2)(i), as redesignated through this rule, to clarify that State agencies may consider participation at other similar sites located in the area, documentation of programming taking place at the site, or statistics on the number of children residing in the area when determining the site cap.

#### Public Comments

USDA received 24 comments on this provision, including three form letter copies. Of those who commented specifically on the timing of a sponsor's request to adjust a site cap, 18 were supportive and two were opposed. Of those who commented specifically on the proposed guidance for determining the site cap for sites lacking accurate historic records, all six were supportive, one of whom offered additional recommendations.

Proponents of the proposal to allow an adjustment to the site cap at any time prior to submitting a claim for reimbursement were largely State agencies who appreciated that the change would allow sponsors to be responsive to the needs of their communities. Some offered suggestions to improve the process, such as providing advance notice of special events that could temporarily increase participation.

Two State agencies opposed this provision, saying that adjustments to the site cap should be approved by the State agency because site caps are an important tool for the State agency to monitor program integrity. One of these opponents said that sponsors should be aware of their site operations and able to update their site cap during the same month that the adjustment is needed. Four State agencies also questioned why self-prep sites are not subject to the same site cap rules as vended sites.

Proponents of the proposal to provide guidance for determining the site cap for sites lacking accurate records from prior years appreciated this guidance and said that it would be helpful because making such determinations can be difficult. One State agency requested the flexibility to allow the sponsor to initially self-certify their site cap and revise the caps after operations begin based on meal counts from the first week of meal service.

#### USDA Response

This final rule codifies the proposed changes with one clarification. This rulemaking adds criteria for establishing the site cap for sites with no accurate historical information in order to aid State agencies and sponsors in determining appropriate site caps. However, USDA did not intend for the criteria provided to be finite. The regulations are revised to make clear that States may consider other relevant information when determining the site cap for sites lacking accurate historical information.

The site cap should be based on the State agency and the sponsor's mutual understanding of the true capacity and capability of its sites, while allowing for potential participation growth. When done correctly, a site cap is a key tool to prevent sponsors and sites from purchasing or producing meals outside the capability of the site and the need of the community. This type of early planning is especially important for vended sites, which may enter into contracts to purchase meals before program operations begin. There is nothing to prevent a sponsor from requesting an adjustment to a site cap after operations begin. However, an initial site cap must still be established at the time that the sponsor's application is approved, in accordance with § 225.6(h)(2) of the regulations, as redesignated through this rule.

USDA agrees that State agencies should have discretion whether to approve a sponsor's request to adjust an established site cap; the current regulations and the policy memoranda that initially allowed this flexibility are

clear on this point. This final regulation provides that sponsors may *request* a revision to a site cap, which requires approval, as opposed to notifying the State agency, which would not require approval.

With regard to site caps for self-preparation sites, current regulations require site caps for these sites to be based on the capacity of the site to prepare and distribute meals, and on the number of children for which their facilities are adequate. It is possible that the site's capacity to prepare meals and accommodate a meal service could change during the summer, but this is less likely to occur and poses less of a risk to program integrity than with a vended site. A self-preparation site should have a stronger basis for establishing a site cap—its own capacity—and should be able to correct production to meet demand in real time, as opposed to a vended sponsor that may already have contracted for food. As such, holding self-preparation sites to these requirements would be burdensome and would not have a significant impact on program integrity.

USDA understands the concerns of the commenter who said that sponsors should be required to request an adjustment to a site cap within the same month as the claim for which the cap must be adjusted. This final rule allows the flexibility for requests to be approved up until a claim is submitted for the impacted reimbursement period. However, the State agency may determine that it is in the best interest of the Program to require a sponsor to submit a request during the impacted month if, for example, the State has concerns about the sponsor's operations.

Accordingly, this final rule amends § 225.6(h)(2)(iii) of the regulations, as redesignated through this rule, to clarify that sponsors of vended sites may request an adjustment to the maximum approved level of meal service at any time prior to submitting a claim for reimbursement. This rule would also amend § 225.6(h)(2)(i), as redesignated through this rule, to include further guidance for determining the maximum approved level of meal service for sites lacking accurate records from prior years.

#### iii. Statistical Monitoring Procedures, Site Selection, and Meal Claim Validation for Site Reviews

Current regulations in § 225.7(d) provide requirements for how State agencies review sponsors to ensure their compliance with program requirements. This section includes the requirement that States conducting a sponsor review must review at least 10 percent of the

sponsor's sites or one site, whichever number is greater (current § 225.7(d)(2)(ii)(E)). Further, USDA guidance instructs State agencies to validate 100 percent of all meal claims from all sites under a sponsor that is being reviewed. USDA proposed three changes to these requirements, which are related to site selection criteria, the method for conducting meal claim validations, and the option for statistical monitoring. In addition, USDA proposed to renumber and rephrase portions of § 225.7 to make the regulations easier to understand.

Section 225.7(d)(8) allows State agencies the option to use statistical monitoring procedures in lieu of the site monitoring requirements found in § 225.7(d)(2). USDA is not aware of any States that currently use this option and has determined through research and feedback from State agencies that it is not possible to create standard statistical monitoring procedures that will meet the needs of the Program. Accordingly, USDA proposed to remove the provision in § 225.7(d)(8) that allows the use of statistical monitoring for site reviews.

USDA also proposed to provide guidance in § 225.7(e)(5), as redesignated in this rule, to assist State agencies and sponsors in selecting a sample of sites to review that will be generally reflective of the variety of all a sponsor's sites. Site characteristics that will be reflected in a sponsor's sample include:

- The maximum number of meals approved to serve under §§ 225.6(h)(1)(iii) and 225.6(h)(2), as redesignated through this rule;
- Method of obtaining meals (*i.e.*, self-preparation, vended meal service);
- Time since last review by the State agency;
- Site type (*i.e.*, open, closed enrolled, camp);
- Type of physical location (*e.g.*, school, outdoor area, community center);
- Rural designation (*i.e.*, rural, as defined in § 225.2, non-rural);
- Affiliation with the sponsor, as defined in § 225.2; and
- Additional criteria that the State agency finds relevant including, but not limited to: recommendations from the sponsoring organization, findings of other audits or reviews, or any indicators of potential error in daily meal counts (*e.g.*, identical or very similar claiming patterns, or large changes in meal counts).

Finally, USDA proposed a new, incremental approach for conducting meal claim validations as a part of the sponsor review in § 225.7(e)(6). This approach is intended to use State

agency resources more efficiently and provide State agencies with a more targeted method for review. USDA requested specific comments on this process, including the anticipated impact on State agencies and burden, the accuracy of claim validations under this process, and the stepped increases and the percentage expanded at each step.

Rather than requiring that State agencies validate 100 percent of meal claims for all sites under the sponsor being reviewed, which may be burdensome for some State agencies, USDA proposed a multi-step approach to site-based meal claim validation. State agencies would initially validate a small sample of claims and would only be required to validate additional claims if they detect errors over the threshold. Included as part of the approach, USDA explained how State agencies should calculate the error percentage which would trigger the expanded validation sample.

#### Public Comments

USDA received 34 comments on these proposals. Of these comments, 13 were generally supportive, three offered partial or conditional support, three were opposed, and 15 had mixed opinions. Specific comments are addressed in the respective sections below.

#### Statistical Monitoring

USDA received 15 comments, including three form letter copies that addressed statistical monitoring procedures in lieu of site monitoring requirements. Of these comments, nine were supportive and six, including three form letters, were opposed.

Overall, proponents wholly supported the elimination of this provision and stated that they were not aware of the provision being used by State agencies. A commenter wrote that their agency had opted to review a minimum of 10% of each sponsor's sites or one site, whichever number is greater instead of using the statistical monitoring option.

Opponents of this provision included three unique comments and one form letter, all from one State agency. Commenters opposed these changes, writing that their State has used statistical monitoring for over 10 years and removing these requirements would hinder State agencies' ability to review sponsors in good standing through statistical monitoring. They further suggested that USDA provide guidance for how to develop and implement statistical monitoring procedures to provide State agencies this monitoring option.

#### Site Selection

USDA received 21 comments, including three form letter copies about site selection criteria. Of these, 16 were supportive of the proposal, two offered partial support, one was opposed, and two were mixed. Proponents supported the addition of site selection criteria as proposed to assist State agencies in selecting a sample of sites that would be reflective of the variety of a sponsor's sites when completing sponsor reviews. Two States offered partial support, agreeing in part to the characteristics put forth, but stated that some of the characteristics such as rural designation and sponsor affiliation are not as important as other indicators when selecting a site for review. These commenters stated that the proposed list of site selection criteria was a good-faith effort to compel States to incorporate diversity into their site review selection decisions. However, they further added that the most effective way to identify fraud would be to incorporate a review of questionable site claiming patterns, previous findings, and other irregularities in site claiming. These commenters also stated that it is a good idea to allow States the discretion to use additional site characteristics in their site selection decisions.

One commenter was opposed to this provision and stated that the provision would cause an additional burden on the State agency by creating additional labor and technology expenses. The commenter further stated that the site characteristics proposed are not information that State agencies are required to collect and are insignificant as indicators of risk to the Program. In addition, while neither expressing support nor opposition to the site selection criteria as proposed, one commenter stated that they were currently using a similar set of characteristics to determine which sites are selected for review. Another commenter stated that the list of site characteristics could be viewed as targeting certain sponsors or sites.

#### Meal Claim Validation

USDA received 33 comments, including three form letter copies, about the proposed meal claim validation methodology. Of these, 18 were supportive, three provided partial support, six were mixed or other, and six were in opposition. Overall, proponents supported the meal claim validation method, but requested training materials and tools to support the implementation of a new process.

Proponents that supported the meal claim validation methodology cited the

decrease in administrative burden in comparison to validating 100 percent of a sponsor's claim. Two States offered partial support, agreeing in part to the validation of meals based on reviewing a sample of sites as opposed to all sites, but stated the desire to add an additional step of validation all claims for 75 percent of the sponsor's sites.

Of the six commenters with mixed support or other comments, one commenter stated that the proposed methodology would not add additional burden as the State already completes a similar process during the sponsor review. One commenter stated that if minimal errors are initially identified in the process, the proposed methodology would provide accuracy for the review. A commenter also noted the desire to address errors discovered in the review without validating additional sites. In addition, one commenter noted that the error rate of five percent was too low and use of the step increases should be at the State's discretion. An additional comment stated that the stepped increases and percentages were appropriate.

Of the six commenters in opposition, three opposed the sampling approach and instead supported continuing to validate 100 percent of a sponsor's claim during the sponsor review. Two commenters in opposition stated that the multistep approach was complicated and unnecessary to determine integrity of a sponsor. The commenters were also opposed continuing to validate 100 percent of a sponsor's sites if issues were observed. One State agency noted that the proposed methodology would create additional labor and technology costs. One State agency referenced aligning the reviews in the SFSP to characteristics in the NSLP in order to reduce burden.

#### USDA Response

##### Statistical Monitoring

This final rule codifies as proposed the removal of the option for statistical monitoring in lieu of site monitoring requirements. Commenters overwhelmingly supported the removal of this option and USDA found through feedback from States agencies that this option is not being used by any State agency. USDA determined that the State agency opposed to the option's removal because they were using this method, was not in fact using statistical monitoring as outlined in § 225.7(d)(8).

Accordingly, this final rule removes the option at § 225.7(d)(8) for statistical monitoring in lieu of site monitoring requirements.

##### Site Selection

This final rule codifies the proposed site selection criteria with one change to specify that State agencies must develop criteria for site selection. USDA recognizes that State agencies are in the best position to identify which sponsors' sites to review based on a wide variety of characteristics. Although one State agency was opposed to this provision due to concerns over burden and costs, creating criteria for site selection will increase program integrity by ensuring States select a variety of sites to review. Therefore, USDA codifies the proposed approach to site selection which emphasizes identifying a variety of sites to be reviewed. In order to promote diversity among sites that are reviewed, States must create criteria for site selection using the site characteristics suggested by USDA as a guide. Additionally, State agencies may, in selecting sites for review, use additional criteria including, but not limited to, findings of other audits or reviews, or any indicators of potential error in daily meal counts (e.g., identical, questionable, or very similar claiming patterns, or large changes in meal counts).

Accordingly, § 225.7(e)(5), as redesignated in this rule, includes site selection criteria.

##### Meal Claim Validation

This final rule codifies the proposed changes to meal claim validation requirements, and adds additional clarifications to confirm that State agencies have the discretion to exceed the minimum number of required claim validations, and to provide a chart to aid State agencies in complying with this provision.

Most commenters affirmed that USDA's proposal to initially validate a small sample of claims and expand the validation sample if errors over the threshold are detected would decrease administrative burden in comparison to requiring that State agencies validate 100 percent of meal claims for all sites under the sponsor being reviewed. While some State agencies stated that the proposed approach would increase their administrative burden when deficiencies are found, USDA believes it is in the best interest of program integrity to provide a standardized method to complete meal claim validations and decrease administrative burden for a majority of sponsor reviews.

Based on comments on the proposed rule, USDA is providing several clarifications. First, if the meal claim validation sample is expanded, it does

not require the State agency to complete an additional review of the sites included in the expanded validation sample. The State agency may complete a more thorough review at their discretion.

Second, when expanding the sample size, the State agency is only required to validate the claims of the additional number of sites to reach 25, 50, and 100 percent of the sponsor's sites, and can count the sites reviewed in the initial sample toward the number of sites needed to be reviewed in the expanded sample. For example: A sponsor has 35 sites. The State agency is required by § 225.7(e)(4)(v) to review 10 percent of the sponsor's sites. The State agency calculates the sample size required for the initial validation by multiplying the total number of sites (35) by 10 percent (.10), which equates to 3.5; after rounding up, the number of sites required to be reviewed is 4. Step 1 of the meal claim validation process requires that the State agency validate all meals served by these 4 sites during the month of review. After step 1 of validation, it is determined that the percentage of error is over 5 percent. The State agency must now validate 25 percent of the sponsor's total sites. In order to satisfy this requirement, the State agency only needs to review the additional number of sites in the expanded sample. To determine the sample size required in the next step of validation, the State agency multiplies 35 by .25, which equates to 8.75. After rounding up, the number of sites to be reviewed is 9. To reach 25 percent of the total number of sites, or 9 sites, the State agency would only need to validate 5 additional sites (9 minus the 4 sites validated in step 1).

Third, the percentage of error is not a rolling average and is calculated based on the sample of sites included in each step of the validation. To ensure clarity, USDA has revised the explanation of how to calculate percentage error included in the proposed rule. USDA has also provided additional formulas to clarify how to calculate: the total meals claimed for the validation sample in each step, the individual meal count validation discrepancies for each site, total meal count validation discrepancy for the validation sample in each step, and the percentage of error. The clarifications below are meant to ensure all discrepancies in meal counting and claiming, whether an overclaim or underclaim, are equally accounted for in the percentage of error as both are signs of potential problems in the operation and administration of the Program.

To calculate the percentage error for each step, first determine the meal

counting and claiming discrepancy for each site validated by subtracting the total meals validated from the total meals claimed by the sponsor for each reviewed site. Then, determine the absolute value of each discrepancy. By using the absolute value, the numbers will be expressed as positive numbers.

Add together all discrepancies from each site to calculate the total discrepancies for sites reviewed in the given step. Divide the total discrepancies by the total meals claimed by the sponsor for all reviewed sites within the validation sample for the given step and multiply by 100 to

calculate the percentage of error in the given step. In determining the percentage of error, fractions must be rounded up ( $\geq 0.5$ ) or down ( $< 0.5$ ) to the nearest whole number. Refer to the equations below for clarification.

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**Percentage Error Formula after Totals****(a) Calculating discrepancies for each site validated**

$$M_D = |\text{meals claimed}_{site X} - \text{meals validated}_{site X}|$$

**(b) Calculating the percent error for each step**

$$M_{TD} = M_D(\text{site 1}) + M_D(\text{site 2}) + M_D(\text{site 3}) \dots$$

$$M_C = \text{meals claimed}_{site 1} + \text{meals claimed}_{site 2} + \text{meals claimed}_{site 3} \dots$$

$$\text{Percentage error} = \frac{M_{TD}}{M_C} * 100$$

$M_D$  = meal counting and claiming discrepancy for each site validated

$M_{TD}$  = total discrepancies for the sites in the validation sample

$M_C$  = total meals claimed for the sites in the validation sample

USDA codifies the meal claim validation method as shown in the table below.

Steps	Outcome	Result
Step 1: The State agency must complete an initial validation of the sites under review to satisfy the requirements outlined in paragraph (e)(4)(v) of this section. The State agency must validate all meals served by these sites for the review period. Then, calculate the percentage of error of the sites in this step as described in (v) of this section.	Validation of sites in step 1 yields less than a five percent error.	The review of meal claims for this sponsor is complete.  If necessary, the State agency must disallow any portion of a claim for reimbursement and recover any payment to a sponsor not properly payable in accordance with § 225.12.
	Validation of sites in step 1 yields a five percent error or more.	The State agency must move to step 2.
Step 2: Expand the validation of meal claims to 25 percent of the sponsor's total sites. The State agency must validate all meals served by these sites for the review period. Then, calculate the	Validation of sites in step 2 yields less than a five percent error.	The review of meal claims for this sponsor is complete.  If necessary, the State agency must disallow any portion of a claim for reimbursement and recover any

Steps	Outcome	Result
percentage of error of the sites in this step as described in (v) of this section.		payment to a sponsor not properly payable in accordance with § 225.12.
	Validation of sites in step 2 yields a five percent error or more.	The State agency must move to step 3.
Step 3: Expand the validation of meal claims to 50 percent of the sponsor's total sites. The State agency must validate all meals served by these sites for the review period. Then, calculate the percentage of error of the sites in this step as described in (v) of this section.	Validation of sites in step 3 yields less than a five percent error.	The review of meal claims for this sponsor is complete.  If necessary, the State agency must disallow any portion of a claim for reimbursement and recover any payment to a sponsor not properly payable in accordance with § 225.12.
	Validation of sites in step 3 yields a five percent error or more.	The State agency must move to step 4.
Step 4: Expand the validation of meal claims to 100 percent of the sponsor's total sites. The State agency must validate all meals served by these sites for the review period.	The review of meal claims for this sponsor is complete. If necessary, the State agency must disallow any portion of a claim for reimbursement and recover any payment to a sponsor not properly payable in accordance with § 225.12.	

**BILLING CODE 3410-30-C**

Finally, USDA recognizes that States agencies have their own best practices to ensure integrity during the sponsor review and has included in this final rule that the codified methodology is the minimum requirement and that sampling steps can be forgone at any point to reach 100 percent validation of the sponsor's claim. This provides the flexibility requested by commenters to use the step increases or to continue validating the entirety of a sponsor's claim for reimbursement without utilizing a sampling methodology.

Accordingly, USDA is codifying in section 225.7(e)(6), as redesignated in this rule, a method for conducting meal claim validations along with a chart to explain the validation process. In addition, this final rule rennumbers and rephrases portions of § 225.7 to make the regulations easier to understand.

*D. Providing a Customer-Service Friendly Meal Service*

i. Meal Service Times

Section 225.16(c) of the current regulations sets forth restrictions on when meals can be served in the SFSP.

Three hours are required to elapse between the beginning of one meal service, including snacks, and the beginning of another, with the exception that four hours must elapse between the service of a lunch and supper when no snack is served between lunch and supper. Further, the regulations state that the service of supper cannot begin later than 7 p.m., unless the State agency has granted a waiver of this requirement due to extenuating circumstances; however, in no case may the service of supper extend beyond 8 p.m. The duration of the meal service is limited to two hours for lunch or supper

and one hour for all other meals. These restrictions do not apply to residential camps.

These strict requirements did not provide sufficient control at the State agency and sponsor level to allow for planned meal services that meet the needs of the community. Dating as far back as 1998, USDA has issued guidance that waives these requirements at certain sites where the requirements proved to create significant barriers to efficient program operations and good customer service for the communities served. USDA heard consistent feedback from stakeholders that the restrictions presented challenges to aligning meal services with access to public transportation and community services. Therefore, in 2011, USDA published guidance that waived the meal service time restrictions for all SFSP sites while still requiring sponsors to submit meal service times to the State agency for approval (originating guidance has since been superseded and incorporated into SFSP 06–2017, *Meal Service Requirements in the Summer Meal Programs, with Questions and Answers—Revised*, December 05, 2016). These waivers were rescinded in 2018, as discussed in the background section of this final rule. Between 2019 and 2020, 51 States requested an individual waiver under section 12(l) of the NSLA of meal time restrictions to allow them to continue implementation of what had previously been in effect through guidance. Of those that applied in 2019, 39 asserted that the waiver would result in improved program operations and, therefore, efficient use of resources. Because increased flexibility in setting meal times proved to be a useful tool for program operations, USDA proposed to remove existing meal service time restrictions, and add a requirement that a minimum of one hour must elapse between the end of a meal service and the beginning of another.

Sponsors have also expressed the need for flexibilities to conduct meal services in the event of an unforeseen circumstance, such as a delayed delivery. Therefore, USDA also proposed allowing a State agency to approve for reimbursement meals served outside of the approved meal service time if an unanticipated event, outside of the sponsor's control, occurs. The State agency may request documentation to support approval of meals claimed when unanticipated events occur.

In recent years, it has come to USDA's attention that some sponsors have served a meal, which meets the meal pattern requirements for breakfast, in the afternoon after a lunch service was

provided and claimed this meal as a reimbursable "breakfast." The SFSP is statutorily designed to support "programs providing food service similar to food service made available to children during the school year" under the NSLP and SBP (42 U.S.C. 1761(a)(1)(D)). Currently, regulations governing the SBP define breakfast as a meal which is served to children in the morning hours and must be served "at or close to the beginning of the child's day at school" (7 CFR 220.2). As such, the service of a reimbursable, three component meal, or "breakfast," in the afternoon following the service of lunch is not supported by the statute. Therefore, USDA proposed that a meal otherwise meeting the requirements for a breakfast meal is not eligible for reimbursement as a breakfast if it is served after any lunch or supper has been served and claimed for reimbursement.

Finally, USDA proposed to amend § 225.16(c) to make it easier for users to locate and understand key information. Section 225.16(c)(1) will consolidate meal service time requirements currently referenced in other sections of part 225. This would specify that meal service times must be established by the sponsor for each site, be included in the sponsor's application, and be approved by the State agency. Current regulations at § 225.16(c)(6), which specifies that a sponsor may claim for reimbursement only the type(s) of meals for which it is approved to serve, will move to § 225.16(b). In addition, a reference to approved meal service times will be added to the State-sponsor agreement information in redesignated § 225.6(i)(7)(iv).

#### Public Comments

USDA received 47 comments about meal service times, including three form letter copies. Of these, 31 were supportive, 10 expressed partial support, and six comments had mixed or neutral opinions regarding the proposal.

Proponents stated that a one-hour time gap would support sponsors in providing meal services at times that better align with community needs, as opposed to four hours. Additionally, proponents asserted that the proposed change in meal service time requirements would help SFSP meal services to mirror NSLP meal service times, so that children eat at similar intervals throughout the year. These commenters also expressed support for the reimbursement of meals served outside of the approved meal times, and disapproval of serving a reimbursable breakfast after lunch has been served.

Proponents who partially supported the provision stated that a one-hour limit between a lunch and supper when no snack is served was still too restrictive. These commenters asserted that a time limit of 30 minutes or less would grant more flexibility to sponsors that offer a variety of summer activity programs during similar hours. Additionally, commenters requested clarification on what circumstances would constitute an "unanticipated event" for the purposes of serving meals outside of the approved meal service time. Further, one comment from a sponsor organization stated that USDA's clarifications on breakfast meal services would create limitations on their ability to serve meals because their site opens in the afternoon.

Mixed comments on the proposal expressed an opinion that was unclear based on a common reading of the language used in the comment. For example, some of these comments expressed disagreement with the rule, but requested actions that the provision proposed as a remedy. Other comments requested clarification on the meaning of "unanticipated event" and whether the requirement for one-hour to elapse between meals will apply to camps.

#### USDA Response

This final rule codifies changes to meal service times as proposed. The waiver of meal time restrictions has helped decrease administrative burden and provided more local level control to sponsors to plan the most effective meal services, thereby improving program operations and better serving the community. USDA seeks to balance these benefits with the maintenance of program purpose and integrity. The purpose of the SFSP is to provide children with meal services when school is not in session. Further, to uphold program integrity, meal services should be clearly distinguishable from each other to enable accurate claiming and recordkeeping. USDA has determined that it would be beneficial to SFSP participants and sponsors for the timing of meals that students have when school is not in session to more closely align with the meal service that students have when school is in session. USDA recognizes that some sponsors have found it useful to serve breakfast at unconventional hours. However, having summer meal services that mirror those held during the school year, such as holding breakfast service before lunch, reduces confusion in program operations and provides program participants with a consistent meal service experience year-round.

USDA also recognizes that State agencies would benefit from further examples of what may constitute an unanticipated event for the purposes of providing meals outside of the approved meal time. Examples of such events include, but are not limited to: delayed meal deliveries, inclement weather that delays the start of the meal service, delayed public transportation utilized by participants, and other incidents as deemed appropriate by the State agency.

Additionally, comments requested clarification on whether the one-hour requirement between meals will apply to camps. This rulemaking will not modify the exemption at § 225.16(b)(1)(ii) which excludes residential camps from meal service time restrictions.

Accordingly, this final rule modifies § 225.16(c) to remove existing meal service requirements, and codifies the requirement that all sites, except residential camps, must allow a minimum of at least one hour to elapse between the end of one meal and the beginning of another. Additionally, this final rule allows a State agency to approve for reimbursement meals served outside of the approved meal service time if an unanticipated event occurs. This rule will also clarify that meals claimed as a breakfast must be served at or close to the beginning of a child's day, and prohibit a three component meal from being claimed for reimbursement as a breakfast if it is served after a lunch or supper is served. Finally, this rule will reorganize § 224.16(c) to improve the clarity of the regulations.

#### ii. Off-Site Consumption of Food Items

Providing a meal service for children in a group setting, a concept known as "congregate feeding," has been a part of the SFSP since its inception. Congregate feeding has many benefits, including providing an opportunity for children to socialize, creating time for sites to offer activities, and allowing adults to monitor food safety and encourage healthy eating practices. Current SFSP regulations provide that sponsors must agree to "maintain children on site while meals are consumed" (§ 225.6(e)(15)).

However, over the years, USDA has heard from stakeholders that, because the SFSP operates in a wide variety of settings, including sites that do not offer activities or programming separate from the meal service, keeping children on site for consumption of the entire meal offered is sometimes challenging. Some children, particularly those who are younger, are unable to eat all of the meal components in one sitting, which

sponsors note can result in children not receiving vital nutrition and contributes to plate waste. Thus, USDA proposed to amend § 225.16 to codify the previously granted flexibility to allow participants to take one item (*i.e.*, either a fruit, vegetable or grain item) off-site for later consumption.

#### Public Comments

USDA received 63 comments regarding the codification of the flexibility to allow off-site consumption of certain food items, including nine form letter copies. There were 41 comments in support of the proposal, six comments in partial support of the proposal, 16 comments with mixed or neutral opinions, and zero comments opposing the proposal.

USDA also received responses to specific questions posed in the proposed rule. Ten comments addressed State agencies' ability to monitor the effective implementation of the provision, and 12 comments addressed whether States agencies would prohibit certain sponsors from utilizing the option.

Proponents of the proposal stated that allowing participants to take food off-site increased State agencies' and sponsors' ability to administer and operate the SFSP more effectively, and would increase program access. Several sponsors also asserted that the proposal would minimize food waste, and support children eating portions that are appropriate for their appetite at meal services. Sponsors further noted that taking food off-site would allow children to derive the health benefits from being able to eat the entire meal, rather than needing to throw a portion away. Supportive comments from State agencies highlighted that training and technical assistance for successfully implementing this provision is available to eligible sponsors in their State. State agency comments further noted that sponsors need to ensure that they have adequate staffing available to monitor the provision.

Proponents who partially supported the provision expressed a desire for all shelf-stable milk options to be permitted to be taken off-site, or suggested that participants be permitted to take multiple items off-site. A State agency commenter requested the authority to prohibit a sponsor from utilizing this option if the State agency finds that the sponsor is incapable of adequately monitoring its implementation.

Opponents of the provision requested removal of the congregate feeding requirement due to a belief that it hinders program access. Other comments expressed concerns regarding

the ability of State agencies and sponsors to effectively monitor the implementation of the provision. These comments noted that the provision may be difficult to monitor, particularly in rural areas with transportation limitations. However, other State agencies stated that they had successfully monitored the use of the flexibility in the past, and found that sponsors were implementing it correctly.

State agency comments on whether they would prohibit certain sponsors from allowing an item to be taken off-site centered on if the State agency anticipated patterns of non-compliance from a sponsor, and if a sponsor was in good standing. State agencies that had observed patterns of non-compliance from a particular sponsor would prohibit that sponsor from utilizing the provision. Other State agencies noted that they would not prohibit sponsors from using the flexibility, but would assign corrective action to sponsors as needed if the provision was not implemented correctly. A commenter requested a delay in implementation to update training and resources necessary to successfully utilize this provision.

#### USDA Response

This final rule codifies, as proposed, the flexibility for off-site consumption of food items. USDA appreciates the attention to program integrity provided by comments on the feasibility of monitoring this provision. It is important for program integrity and the safety of children that site staff appropriately monitor this flexibility to ensure that children only bring home the correct types and quantities of food items, and that such items are not at risk of spoiling before they can be consumed. Previously published USDA guidance on the implementation of this flexibility permitted State agencies to approve sponsors to use this provision on a case-by-case basis, and also provided State agencies with a non-appealable decision-making authority to prohibit sponsors from using this option when there are concerns about adequate site monitoring. This final rule does not change that authority; therefore, State agencies retain the discretion to prohibit sponsors from using this flexibility if the State finds that the provision cannot be adequately monitored. However, USDA encourages State agencies to explore options for successfully implementing this provision including updating training, procedures, and relevant systems.

USDA seeks to ensure that program meals are accessible to even the youngest of the SFSP demographic,

while still ensuring that participants can enjoy their meals in a safe, supervised setting in accordance with program requirements. USDA appreciates that some commenters would like children to be permitted to take multiple items off-site for later consumption. However, taking a single item off-site is the amount already allowed through policy memoranda for the SFSP and the at-risk afterschool component of the CACFP, in part because it is straightforward for a site to monitor children taking home a single non-perishable item, and more complex to oversee children taking other combinations of items off-site. In addition, this rulemaking proposed to allow children to take a single item off-site for later consumption, and solicited comments specifically on this programmatic option. Therefore, suggestions to allow more food items or entire meals to be consumed off-site are outside the scope of this rulemaking.

Accordingly, this final rule codifies the flexibility for sponsors to allow children to take a single fruit, vegetable, or grain item off-site for later consumption by amending § 225.6(i)(15), as redesignated through this rule, and adding a new § 225.16(h).

### iii. Offer Versus Serve

Current regulations in § 225.16(f)(1)(ii) allow SFAs that are program sponsors to “permit a child to refuse one or more items that the child does not intend to eat.” This provision is known as “Offer versus Serve” (OVS). The regulations also require that an SFA using the OVS option must follow the meal pattern requirements for the NSLP, as set out in § 210.10. Finally, the regulations state that the sponsor’s reimbursement must not be reduced if children do not take all required food components of the meal that is offered.

The goals of OVS are to simplify program administration and reduce food waste and costs while maintaining the nutritional integrity of the SFSP meal that is served. The use of OVS was first extended to SFSP operations through the Personal Responsibility and Work Opportunity Act of 1996 (Pub. L. 104–193), which permitted SFAs sponsoring the SFSP to use OVS on school grounds. Because the option is regularly implemented during the school year, it was thought that these sponsors could successfully implement the option during the summer. Recognizing that OVS was a useful tool to reduce food waste and food costs, the William F. Goodling Child Nutrition Reauthorization Act of 1998 (Pub. L. 105–336) extended the use of OVS to all SFSP sites sponsored by SFAs. In the

years since, OVS has proved to be a useful tool for program operators.

After observing SFA sponsors successfully utilizing the option for many years and receiving significant feedback from stakeholders, including Congressional testimony about the positive effects of OVS on reducing food waste and containing program costs, USDA extended the option to use OVS to non-SFA sponsors through policy guidance in 2011 (SFSP 11–2011, Waiver of Meal Time Restrictions and Unitized Meal Requirements in the Summer Food Service Program, October 31, 2011). USDA continued to clarify policies surrounding OVS, including guidelines for required meal service components under the SFSP meal pattern (SFSP 08–2014, Meal Service Requirements, November 12, 2013) and extending the use of the SFSP OVS meal pattern guidelines to SFA sponsors that had previously been required to follow the OVS requirements for the NSLP (SFSP 05–2015 (v.2), Summer Meal Programs Meal Service Requirements Q&As—Revised, January 12, 2015). This guidance highlighted the distinguishing aspects of the SFSP and NSLP, including variations in settings and resources, and adjusted the OVS requirements for use in the SFSP accordingly.

As mentioned in the background of this rule, these waivers of statutory and regulatory requirements pertaining to OVS were rescinded in 2018. Between 2019 and 2020, 39 States requested individual waivers of program requirements through section 12(l) of the NSLA to allow them to continue utilizing OVS as had previously been permitted through guidance. FNS granted these requests to provide continuity to States and sponsors while the agency completed this rulemaking.

The proposed rule sought to retain the regulatory requirement that only SFA sponsors may utilize the OVS option. In addition, the rule proposed to allow SFA sponsors electing to use the SFSP meal pattern to use SFSP OVS guidelines. This would align the regulations with the NSLA, which only authorizes SFA sponsors to use OVS. Through on-site reviews, USDA has also observed meal pattern violations tied to the improper use of the OVS guidelines specifically at sites sponsored by non-SFAs. In light of these observations, maintaining OVS for the types of sponsors that are most likely to implement it correctly would promote program integrity while also operating the program in accordance with statutory intent.

Finally, the proposed rule sought the following specific comments on OVS:

- What level of training do non-SFA sponsors receive in order to be able to properly implement OVS?
- Do non-SFA sponsors have the resources needed to properly implement OVS?
- What level of technical assistance do non-SFA sponsors receive?
- How would non-SFA sponsors be impacted if OVS were no longer an available option?
- What are the specific benefits to sponsors that use OVS?

### Public Comments

USDA received 62 comments regarding OVS, including nine form letter copies. Of the 62 comments, seven supported the proposal as written, 49 expressed support for OVS as an option and for the use of the SFSP meal pattern, while also expressing concerns with the overall proposal, six held a mixed opinion, and zero opposed it entirely. Thirteen stakeholders also submitted comments directly responding to all or some of the specific questions posed in the proposed rule.

Proponents of this provision included State agencies that have observed improper implementation of OVS from non-SFAs, or otherwise believed that SFAs are better equipped with the knowledge and resources to correctly utilize OVS. Additionally, these comments supported allowing SFA sponsors that elect to use OVS during SFSP operations to follow the SFSP meal pattern.

The majority of commenters supported continuing the flexibility for SFAs, but requested that this meal service option also be extended to non-SFA sponsors, including those that operate the CACFP and use OVS during the school year in their At-Risk Afterschool Meals programs. These comments highlighted that OVS benefits sponsors through decreased operation and administrative costs and reduced food waste. Commenters noted that training and technical assistance are generally offered to all SFSP sponsors that wished to use OVS and some stated that they have not witnessed implementation errors from non-SFA sponsors. Multiple State agencies said that not all non-SFA sites are equipped to successfully use OVS, and thus recommended it should be limited to those sponsors that have adequate resources or on a case-by-case basis. Other commenters echoed the suggestion that the use of OVS by non-SFA sponsors could be limited to those that are capable of using it correctly.

Mixed comments largely offered general support for OVS or focused on answering the specific questions posed

in the proposed rule. In response to USDA's questions about the level of OVS training and technical assistance that non-SFA sponsors receive and whether non-SFA sponsors have the resources needed to properly implement OVS, State agencies said that OVS is included in their regular training regimen, with non-SFAs receiving as much training as SFA sponsors. These commenters also expressed that sponsors presently have the resources needed to properly implement OVS, and are provided technical assistance by request or when needs are identified by State agency representatives. In response to USDA's questions about the benefits of OVS and the impact of it no longer being available for non-SFA sponsors, commenters said that OVS decreases program waste and cost, while providing more food choices to program participants. Non-SFA sponsors who previously implemented OVS would not realize these benefits and would need to retrain staff if OVS is no longer available to them. A few indicated that this change could have a negative impact on sponsor participation. These commenters included State agencies, sponsor organizations, and school districts.

#### USDA Response

This final rule codifies the proposed changes to OVS regulations. USDA understands that OVS has been a popular flexibility among SFSP sponsors and, for many years, sponsors of all types have used OVS to increase cost efficiency and provide more food choice for children during meal services. However, section 13(f)(7) of the NSLA only authorizes SFAs to use OVS. The flexibilities that allowed non-SFAs to utilize OVS were pursuant to policy guidance that was rescinded in 2018, or COVID-19-related waiver authority which was not permanent and was intended to aid program operators during the public health emergency and as they transition back to normal operations. As previously discussed in the background section of this rule, a 2018 OIG report led USDA to determine that offering waivers under 42 U.S.C. 1760(l) on a nationwide basis is not supported by the statute. As such, the use of nationwide waivers is no longer a viable option to address OVS. USDA exercised its discretion in 2019 to issue individual waivers under section 12(l) of the NSLA for 37 State agencies in order to bridge the gap between when the nationwide waiver was rescinded and this rulemaking was completed. As discussed in the proposed rule, the operation of OVS by non-SFA sponsors has also raised some program integrity

concerns. Information obtained from site visits, and some State agency comments have indicated improper OVS implementation among non-SFA sponsors. Therefore, limiting OVS to only SFA sponsors, which generally have experience with OVS in the NSLP, will ensure that program regulations and operations remain in agreement with the statute and promote program integrity. As a result, this final rule continues the current regulatory requirement that only SFA sponsors may utilize the OVS option, while revising the regulations to allow the use of the SFSP meal pattern with OVS.

USDA does not expect a significant impact on program participation as OVS is an optional flexibility that functions to modify meal component offerings at meal services; SFA and non-SFA sponsors alike may operate meal services without OVS. USDA stands ready to provide technical assistance, as needed, to support this transition. Further, FNS data indicate that a relatively small share of all sponsors will be affected; fewer than 10% of SFSP sponsors are non-SFAs that used OVS under the waivers.<sup>1</sup> With regard to food waste, section D ii of this rule codifies the option for participants to take one fruit, vegetable, or grain item off-site for later consumption. Similarly, the use of share tables, where children may return whole food or beverage items they choose not to eat for other children to take, is also an option for sponsors to reduce food waste.

Accordingly, this final rule retains the requirement at § 225.16(f)(1)(ii) that only SFA sponsors may utilize the OVS option. Further, this rule allows SFA sponsors electing to use the SFSP meal pattern to use SFSP OVS guidelines.

#### E. Clarification of Program Requirements

##### i. Reimbursement Claims for Meals Served Away From Approved Locations

Under current regulations, meals are reimbursable only when served at sites approved by the State agency. As defined in § 225.2, a site is "a physical location at which a sponsor provides a food service for children and at which children consume meals in a supervised setting." Site approval applies only to the specific location approved, not to

<sup>1</sup> According to the most recently available USDA administrative data, approximately 60% of sites were SFA sites in July 2021. According to the Summer Meals Study (Report Volume 3, page 3–15), only 24% of non-SFA sites used OVS in 2018. This gives a total of 9.6% of all sites who will need to transition to meal service without the use of OVS as a result of this rule (40% × 24% = 9.6%). The Summer Meals Study is available online at <https://www.fns.usda.gov/cn/usda-summer-meals-study>.

meals removed from that site for service at another location that has not been approved. The State agency must approve any changes in site service time or location after the initial site approval. However, USDA granted State agencies the flexibility to approve exceptions to this requirement for the operation of field trips under USDA Instruction 788–13: *Sub-Sites in the Summer Food Service Program* and policy guidance, *Field Trips in the Summer Food Service Program (SFSP)*, February 3, 2003.

USDA proposed codifying the flexibility to allow sponsors the option to receive reimbursement for meals served away from the approved site without requiring formal approval from the State agency, and establishing conditions that must be met in order for sponsors to receive reimbursement for these meals. The proposed rule:

- Requires sponsors to notify the State agency in advance that meals will be served away from the site.
- Permits State agencies to set time limits for how far in advance of the field trip sponsors would send notification to the administering agency.
- Requires sponsors of open sites to continue operating at the approved open site location while the field trip occurs, if feasible, or notify the community of the change in meal service and provide information about alternative open sites where community children can receive free summer meals.

Under these proposed changes, sponsors must be capable of meeting program requirements and local health, safety, and sanitation standards during the field trip, and meals are required to be served at the approved meal service times.

#### Public Comments

USDA received 29 comments addressing the proposal to allow reimbursement claims for meals served away from approved locations, including three form letter copies. Of these comments, 27 were supportive, and two were mixed. None of the comments USDA received for this provision were opposed. Thirteen of the comments received specifically addressed the condition that sponsors of open sites continue operating during field trips, or alert the public where children can access meals during those times. Of those, one was opposed, one was mixed, and the remaining were supportive of the condition as proposed.

Proponents wrote that the proposed changes would simplify the process for State agencies and local program operators. A few respondents in support also provided recommendations for different aspects of the provision for

USDA to consider. An advocacy group wrote that proposed changes should not put undue burden on sites or allow State agencies to set unreasonable limits. Another commenter requested that USDA set time limits for notice and notification to the community.

Several proponents also voiced concerns over the condition that sponsors of open sites should remain open. These commenters expressed concern for children who frequent open sites and rely on the availability of meals at these sites, while also acknowledging the burden on sponsors, particularly small sponsors, of maintaining a meal service at the site while administering a field trip. One of the commenters opposed the condition as written, stating that allowing sponsors to close sites during field trips would limit access for children who lack transportation to alternative sites. A State agency suggested that USDA consider a limitation that sites can close for field trips for no more than half of their weekly operation. Another respondent wrote that sponsors should be able to make the determination as to whether a site will remain open while field trips occur. A State agency requested clarification on several aspects of this proposal, including the appropriate amount of advanced notice, allowable circumstances for an open site to close, parameters for selecting alternative sites, State agency responsibility in monitoring sponsor compliance with this provision, and the requirement for advanced notification without formal approval.

USDA also received two comments that provided suggestions that were out of scope for this proposal. One commenter recommended USDA consider expanding the definition of site to include a vehicle in order to assist in the expansion of the SFSP to rural sites. Another respondent wrote that it would be helpful for staff of smaller sites if SFSP staff did not necessarily have to attend a field trip to administer a meal.

#### USDA Response

Consistent with the proposed rule, this final rule codifies the flexibility to allow sponsors the option to receive reimbursement for meals served away from the approved site. However, the final rule adjusts the requirements for maintaining a meal service at the site during a field trip and provides points of clarification in response to comments received.

Sponsors must notify the State agency in advance that meals will be served away from the site, but formal approval of the alternative meal service is not required. If the State agency is not

notified prior to the SFSP field trip, meals served may be considered “consumed off-site” and the State agency has the discretion to not reimburse those meals. This procedure is similar to the notification requirements for field trips in the CACFP, where providers must notify either their sponsoring organization or the State agency in advance of a planned field trip. However, while obtaining formal approval of the off-site meal service for a field trip is not a requirement in order for the sponsor to receive reimbursement under this final rulemaking, the State agency has the discretion to require formal approval if deemed necessary.

In addition, this final rule gives State agencies the discretion to set time limits for how far in advance of the field trip sponsors would send notification to the administering agency, as proposed. Though comments pointed to concerns over the time limit for advanced notification, including one commenter who requested that USDA set the limit for the amount of advanced notice needed, USDA prefers to allow State agencies to determine their individual notification deadlines in this instance.

This final rule modifies a condition that must be met in order for sponsors of open sites to receive reimbursement for meals served away from approved locations. This rule requires sponsors of open sites to continue operating at the approved open site location while a field trip occurs. If this is not possible (for example, if there is limited staff coverage), the State agency may permit the sponsor to close the open site. In this case, the sponsor must notify the community of the change in meal service and provide information about alternative open sites that are likely to be accessible to community children so that they have continued access to free summer meals.

In response to comments, USDA modified the condition to allow State agencies the discretion to permit sponsors of open sites to close operations at the approved location while the field trip occurs. USDA acknowledges that field trips are widely supported at sites and by sponsors as they are a fun, educational tool for children. On the other hand, open sites are intended to serve the community at large and closing open sites due to circumstances related to a field trip could prevent children in the community from receiving meals. USDA understands the importance of this flexibility for the occasional field trip, but emphasizes that this flexibility should not be used in a manner that habitually impacts operations at the

approved open site location. While USDA recognizes the additional burden this stipulation may place on some sponsors, sponsors enter into a written agreement with State agencies that attests they are capable of operating the Program, and the site type they oversee. In consideration of this change, administering agencies should work closely with sponsors electing to operate a field trip and exercise special care to ensure that the sponsors of open sites have developed adequate procedures to resolve any potential issues. When it is not possible to continue operating at the approved site location, sponsors should have plans to ensure that children in the community are provided ample notification of changes in meal service and are directed to appropriate alternate sites to obtain a meal. In accordance with 7 CFR 225.7(g) and FNS Instruction 113–1, State agencies should take reasonable steps to assure meaningful access to the program, including providing notification of alternate site location in the languages of the individuals in the community that the site serves and in alternative formats for persons with disabilities. Furthermore, State agencies should consider site type during application to make sure sites are correctly classified and serving the community as intended.

Finally, consistent with the proposed rule, in order to operate field trips in the SFSP, the sponsor must be capable of successfully operating the Program during an outing. When considering if sponsors are eligible to receive reimbursement for meals served away from approved sites, State agencies must determine that all program requirements, including all applicable State and local health, safety, and sanitation standards will be met while traveling and at the field trip meal service location.

Accordingly, the final rule addresses meals served away from the approved site location during a field trip at redesignated § 225.6(i)(7)(v) and in a new § 225.16(g).

#### ii. Timeline for Reimbursements to Sponsors

Current regulations in § 225.9(d)(4) require that State agencies must forward reimbursements to sponsors within 45 calendar days of receiving a valid claim. The regulations also require that if a sponsor submits a claim for reimbursement that is incomplete or invalid, the State agency must return the claim to the sponsor within 30 calendar days with an explanation of the reason for disapproval. If the sponsor submits a complete revised claim, the State agency must take final action within 45

calendar days of receipt. These requirements are necessary to ensure that sponsors receive reimbursement for meals served in a timely manner.

However, in recent years, USDA has received numerous inquiries and waiver requests to extend the timeline for taking final action on a claim for reimbursement beyond 45 calendar days of receiving a revised claim, due to concerns that the sponsor may have engaged in unlawful acts such as fraud. State agencies have stated that the 45 calendar day timeline to complete a final action is not sufficient to conduct a thorough review of all the sponsor's records and make a determination that the claim is valid.

While § 225.9(d)(10) of the regulations provides State agencies with the ability to use evidence found in audits, reviews, or investigations as the basis for nonpayment of a claim for reimbursement, the State agency may not be able to make this determination within the given timeframe. Therefore, the proposed rule exempted the State agency from requirements in § 225.9(d)(4) to take final action on a claim within 45 calendar days of receipt of a revised claim if the State agency has reason to believe that the sponsor has engaged in unlawful acts that would necessitate an expanded review. In addition, the proposed rule clarified that even if a State agency determines, in accordance with § 225.9(d)(10), that there is reason to believe the sponsor has engaged in unlawful acts, the State agency must still return the claim to the sponsor within 30 calendar days with an explanation of the reason for disapproval.

#### Public Comments

USDA received 21 comments on the proposed changes to the timeline for reimbursement to sponsors, including three form letter copies. Of these, 18 were supportive, and three were mixed. Proponents stated that the exemption would allow State agencies the flexibility to further investigate questionable sponsor claims, particularly in instances requiring thorough and complex reviews.

Several of the respondents provided comments on specific aspects of the provision. One commenter expressed concern about the 30 calendar day timeline to disapprove a sponsor's claim, stating that it may lead States to deny claims that may be valid and as a result increase appeals. Another commenter wrote that the 30 calendar day timeline would put State agencies in the position of processing a claim they are concerned is invalid to meet a regulatory timeframe. One respondent

suggested that the State agency be given 45 days from receipt of the original claim to approve or deny the claim, rather than 30 days. The commenter also suggested that the disapproval be included in the exemption as well.

Two State agencies supported the proposal, but requested clarification on the process for requesting an exemption. Another State agency asked if State agencies must take final action within the 30 days of receipt, and if appeal rights must be issued within the 30 day timeframe as well even when the State agency elects to conduct an expanded review.

#### USDA Response

This final rule codifies the proposed changes to the timeline for reimbursement to sponsors and adds additional clarity on providing notification to the sponsor and to USDA. Consistent with the proposed rule, the final rule exempts the State agency from requirements in § 225.9(d)(4) to take final action on a claim within 45 calendar days of receipt of a revised claim if the State agency has reason to believe that the sponsor has engaged in unlawful acts that would necessitate an expanded review. In addition, the final rule clarifies that even if a State agency determines, in accordance with § 225.9(d)(10), that there is reason to believe the sponsor has engaged in unlawful acts, the State agency must still return the claim to the sponsor within 30 calendar days with an explanation of the reason for disapproval, and allow the sponsor to submit a revised claim as allowed by § 225.9(d)(4). The State agency must complete final action on the revised claim once the review has concluded. Once final action is taken, the final rule specifies that the State agency must advise the sponsor of its rights to appeal consistent with the due process provided by the regulations in § 225.13(a).

In addition, the final rule provides more clarity on the process for a State agency to request an exemption provided under this provision. Consistent with current guidance on other one-time exceptions for claims, State agencies must notify the appropriate FNS Regional Office (FNSRO) that they suspect fraud and will be taking the exemption to the 45 day timeline to conduct an expanded review by submitting to the FNSRO a copy of the claim disapproval at the same time as it is provided to the sponsor.

Some comments expressed concerns that the 30 calendar day timeframe forces State agencies to incorrectly

process a claim. However, it appears that these commenters misunderstood the proposal. The proposed rule did not seek to make changes to the current regulations seen at § 225.4(d)(4), but rather to clarify the responsibility of the State agency in this process, even when they suspect fraud. While USDA understands the commenters concerns, the process is consistent with other Child Nutrition Programs where the administering agency has a period of time in which they must notify the institution of an incomplete or incorrect claim that must be revised for payment. The purpose of this timeframe is to prevent withholding of a claim without notifying the sponsor that the claim is invalid or allowing the sponsor to submit a revised claim in a timely manner. After notifying the sponsor of disapproval of the claim within 30 calendar days of receipt, the State agency can extend the review and meal claims validations to determine if it is incomplete or invalid, and if the claim should be denied, in order to prevent the potential payment of a suspected unlawful claim. To aid sponsors whose claims are initially disapproved, this final rule adds additional language to clarify that, when returning the claim to the sponsor with an explanation of the reason for disapproval, the State agency must indicate how the claim must be revised in order for it to be payable.

Accordingly, this rule amends regulations found in § 225.9(d)(4) to indicate that if a claim is determined to be potentially unlawful based on § 225.9(d)(10), the State agency must still disapprove the claim within 30 calendar days with an explanation of the reason for disapproval and how the claim must be revised for payment. Additional changes to § 225.9(d)(4) specify that the State agency notify the sponsor of its right under § 225.13(a) to appeal a denied claim. This rule also amends § 225.9(d)(10) to clarify that State agencies may be exempt from the 45 calendar day timeframe for final action in § 225.9(d)(4) if more time is needed to complete a thorough examination of the sponsor's claim. In addition, this rule clarifies in § 225.9(d)(10) that a State agency must provide notification to the FNSRO that it is taking the exemption to the 45 calendar day timeframe at the same time as the sponsor's claim is disapproved.

#### iii. Requirements for Media Release

Current regulations at § 225.15(e) require all sponsors operating the SFSP, including sponsors of open sites, camps, and closed enrolled sites, to annually announce the availability of free meals in the media serving the area from

which the sponsor draws its attendance. The regulations specify that media releases issued by sponsors of camps or closed enrolled sites must include income eligibility standards, a statement about automatic eligibility to receive free meal benefits at eligible program sites, and a civil rights statement. However, USDA received questions from State agencies and analyzed data from management evaluations that show the current requirements are difficult to understand and implement correctly, leaving some State agencies and sponsors to make inadvertent errors in fulfilling the requirements. To assist sponsors, USDA issued guidance and resources encouraging State agencies to complete this requirement on behalf of all sponsors of open sites in their State through an all-inclusive Statewide media release (SFSP 07–2014, *Expanding Awareness and Access to Summer Meals*, November 12, 2013).

USDA proposed codifying current guidance allowing State agencies the discretion to issue a media release on behalf of all sponsors operating SFSP sites, including camps, in the State. The proposed rule clarifies that, in the absence of a Statewide notification, sponsors of camps and other sites not eligible under § 225.2, sub-sections (a) through (c), in the definition of “areas in which poor economic conditions exist,” are only required to notify participants or enrolled children of the availability of free meals and do not need to issue a media release to the public at large. Finally, the proposed rule renames the section, “Notification to the Community,” to more accurately describe the types of activities required of sponsors.

#### Public Comments

USDA received 28 comments addressing the proposed changes to requirements for media release, including three form letter copies. Of these, 21 were supportive, and two were mixed. The remaining five comments supported the proposed changes, but expressed concerns with certain aspects of the provision.

Proponents stated that the proposed changes would relieve administrative burden for State agencies and sponsors. Proponents also agreed that sponsors of camps and other sites not eligible under the definition of “areas in which poor economic conditions exist” must only notify participants or enrolled children of the availability of free meals. One respondent wrote that restructuring the language to clearly identify that sponsors of closed enrolled and camp sites only need to notify participants or enrolled children of the availability of

free meals would help alleviate some of the current confusion around the media release requirement for these types of sites. However, several comments expressed concern about aspects of the proposed changes for sponsors of closed enrolled sites. One commenter wrote that the stipulation should be required for sponsors of all closed enrolled sites and not just those that are not eligible under § 225.2, sub-sections (a) through (c), in the definition of “areas in which poor economic conditions exist.” Several commenters supported the statewide media release, but requested that State agencies be able to use a statewide media release without being required to include closed enrolled sites and camps since the release is for the public at large.

Several respondents voiced concerns over the public receiving the correct information if site information is released at the state level. Two State agencies wrote that a media release should still be required for open sites in some format. One State agency reasoned that State agencies do not have knowledge of local media outlets needed for a successful media release campaign. Another State agency supported the proposed provision, but would want to train sponsors on the benefit of submitting individual media releases to assist with local level promotion efforts.

#### USDA Response

In accordance with the proposed rule, this final rule codifies current guidance allowing State agencies the discretion to issue a media release on behalf of all sponsors operating SFSP sites in the State, including camps and closed enrolled sites. In addition, this final rule modifies the proposed language to make clear that closed enrolled sites are only required to notify participants or enrolled children of the availability of free meals and if a free meal application is needed. Finally, this final rule renames this section, “Notification to the Community,” to more accurately describe the types of activities required of sponsors.

This final rule requires State agencies using the option to issue a statewide media release to ensure that all notification requirements for camps and closed enrolled sites are met. USDA acknowledges commenters’ concerns regarding State agencies’ ability to effectively communicate information for particular site types in a statewide media release, and emphasizes that this is an optional flexibility. State agencies have the discretion to require sponsors to follow the requirements for notification to the community if deemed

appropriate. As a best practice, USDA encourages sponsors to maintain promotion and outreach efforts at the local level, even when the State agency elects to issue a statewide notification. In all cases, State agencies and sponsors have a responsibility to take reasonable steps to ensure meaningful access to their programs and activities by people with limited English proficiency and those with disabilities, in accordance with 7 CFR 225.7(g) and FNS Instruction 113–1. This includes providing notification in the languages of the individuals in the community that a site will serve, and in alternative formats for persons with disabilities.

USDA understands the concerns of commenters who said that it would be confusing to require closed enrolled sites that are eligible under § 225.2, sub-sections (a) through (c), in the definition of “areas in which poor economic conditions exist,” (*i.e.*, those that use community data to determine area eligibility) to provide notification to the public at large in the same manner as an open site. Such notifications would not benefit the public because the advertised meal service at these sites is not open to the public. The final rule clarifies that, in the absence of a Statewide notification, sponsors of camps and all closed enrolled sites are only required to notify participants or enrolled children of the availability of free meals and do not need to issue a media release to the public at large. However, closed enrolled sites must also notify participants or enrolled children if a free meal application is needed so that the participants or their families know if they are expected to submit a free meal application. These modifications limit the sponsor’s responsibility to notify only those who could potentially receive meals at the site.

A State agency suggested modifying the press release that State agencies are required to submit prior to February 1st each year (7 CFR 225.6(a)(2)) to fulfill the requirement in § 225.15(e) to announce the availability of free meals in the media serving the area from which the sponsor draws its attendance. While USDA appreciates the suggestion, the two releases serve different, but equally important purposes, and therefore, it is necessary to issue these releases separately. The February 1st press release is used to actively seek eligible applicant sponsors to serve priority outreach areas. The notification to the community alerts the community about the availability of meals, and may provide information about sites that is generally unavailable or unknown prior to the February 1st press release.

Finally, the final rule renames this section, “Notification to the Community,” to more accurately describe the types of activities required of sponsors, including sponsors of camps and closed enrolled sites that will no longer be required to issue a media release.

Accordingly, this rule amends § 225.15(e) by renaming the subsection “Notification to the Community,” specifying that State agencies may issue a media release on behalf of all sponsors operating open SFSP sites in the State, and clarifying that sponsors of camps and closed enrolled sites must only notify participants or enrolled children of the availability of free meals.

#### iv. Annual Verification of Tax-Exempt Status

In order to be eligible to participate in the SFSP, sponsors must maintain their nonprofit status (§§ 225.2 and 225.14(b)(5)). In 2011, the Internal Revenue Service (IRS) changed its filing requirements for some tax-exempt organizations. Failure to comply with these requirements could result in the automatic revocation of an organization’s tax-exempt status. Due to this change, USDA released guidance for confirming sponsors’ tax-exempt status, which requires that State agencies annually review a sponsor’s tax-exempt status (SFSP 04–2017, *Automatic Revocation of Tax-Exempt Status—Revised*, December 1, 2016).

To ensure compliance with the filing requirements, the proposed rule amends § 225.14(b)(5) to codify the requirement for annual confirmation of tax-exempt status at the time of application.

#### Public Comments

USDA received 18 comments addressing the annual verification of sponsors’ tax-exempt status including three form letter comments. All of the comments were supportive of the proposal. One respondent supported the proposed provision, but suggested that USDA work with the IRS to streamline the process for State agencies to determine an applicant’s nonprofit status.

#### USDA Response

All comment submissions expressed support for the proposal without opposition. Thus, this final rule makes no changes from the proposed rule. USDA acknowledges that annually verifying the tax-exempt status of nonprofit organizations may be time consuming for State agencies, however, modifying filing requirements is outside the scope of USDA’s authority. State agencies are responsible for approving

and overseeing sponsors to operate the SFSP, and thus play an integral part in maintaining program integrity. This requirement is necessary to ensure program compliance, protection of Federal funds, and fiscal responsibility. Accordingly, this rule codifies the requirement for annual confirmation of tax-exempt status at the time of application by amending § 225.14(b)(5).

#### F. Important Definitions in the SFSP

##### i. Self-Preparation Versus Vended Sites

Current regulations in § 225.2 define the terms “self-preparation sponsor” and “vended sponsor.” These definitions are critical to the proper administration of the SFSP because reimbursement rates are determined, in part, by the sponsor’s classification as either self-preparation or vended. Per statutory requirements, reimbursement rates are calculated using operating and administrative costs (42 U.S.C. 1761(b)(1) and 42 U.S.C. 1761(b)(3)) to determine a reimbursement rate for each meal served. Rates are higher for sponsors of sites located in rural areas and for “self-preparation” sponsors that prepare their own meals at sites or at a central facility instead of purchasing from vendors. This is due to the higher administrative costs associated with program operation in rural areas and preparing meals rather than contracting with a food service management company. Therefore, correct classification of self-preparation or vended sponsors is necessary for proper program management and maintaining the fiscal integrity of the Program when site-based claiming is not feasible.

Advances in technology have allowed State agencies and sponsors to develop increasingly sophisticated reporting systems that are capable of collecting detailed information on the number and type of meals being served. Many State agencies have developed the ability to classify individual sites as self-preparation or vended, rather than classifying a sponsor and all of its sites as one type or the other. USDA is aware that some State agencies that have these capabilities also provide reimbursements based on the classification of the individual sites. This is significant because providing reimbursements to sponsors that operate a mix of sites based on the individual site classification is more accurate and helps protect the integrity of the SFSP.

In recognition of the advances being made at the State agency and local level, USDA proposed to add definitions for “self-preparation site” and “vended site,” and to require that sponsors and sites include information about how

meals will be obtained for each site in their application to participate in the SFSP.

Further, to better understand the current state of claiming systems nationwide and the implications for policy development, including potential changes to regulatory requirements, USDA requested specific comments on the following questions:

- How many State agencies have systems that are capable of receiving claims at the site level? Are any State agencies currently receiving claims at the site level and providing reimbursement based on the individual site classification?
- What are the costs and benefits of implementing systems that can receive claims at the site level?
- How common or uncommon is it for a site to use two different methods of obtaining meals (e.g., offering a self-prepared breakfast and a vended lunch)?
- Do any State agencies have systems that are able to account for different methods of obtaining meals within the same site?
- What would be the impact on claiming and monitoring of collecting and paying claims at the site level?

#### Public Comments

USDA received 29 comments regarding the addition of these definitions, including three form letter copies. Of these comments, 11 were supportive, two were partially supportive, and 16 comments had mixed or neutral opinions regarding the proposal.

Stakeholders also submitted comments responding to specific questions posed in the proposed rule. USDA received:

- 22 comments regarding how many State agencies have systems that are capable of receiving claims at the site level, and whether any State agencies are currently receiving claims at the site level and providing reimbursement based on the individual site classification.
- 12 comments regarding the costs and benefits of implementing systems that can receive claims at the site level.
- 17 comments regarding how common or uncommon is it for a site to use two different methods of obtaining meals (e.g., offering a self-prepared breakfast and a vended lunch).
- 17 comments regarding whether any State agencies have systems that are able to account for different methods of obtaining meals within the same site.
- 13 comments regarding the potential the impact on claiming and monitoring of collecting and paying claims at the site level.

Proponents of these definitions included an advocacy group and State agencies, who stated that their systems are already equipped to process reimbursement for site-level claims.

Proponents that partially supported the definitions voiced concerns about some of the terminology used. Specifically, these commenters highlighted that use of the term “food service management company” could generate confusion because it is used in other Child Nutrition Programs where the meaning is slightly different. A State agency also believed that the proposed definition overlooked instances in which a self-preparation site received meals that were prepared at a sponsor organization’s central kitchen.

State agencies also submitted mixed or neutral opinions on the definitions. While some of these comments echoed concerns about the use of the term “food service management company,” other comments centered on the specific requests for comments presented in the proposed rule. Most of the responses indicated that State agency systems already include mechanisms to receive reimbursement claims at the site level. Few State agencies provided information on the cost to upgrade systems because many State agencies noted that there would be zero cost as their systems can currently collect site-level claims. However, others estimated that it could be costly, but that actual expenses would ultimately be determined by whether the system is developed in-house or by an external entity. Responses also indicated that it was not common for sites to utilize two different methods of attaining meals, and thus very few State agencies reported having systems capable of making this sort of distinction. Finally, State agencies noted that they did not anticipate an impact on claiming and monitoring from collecting and paying claims at the site level because these State agencies already had site-level claiming mechanisms. A State agency also expressed that the impact would be positive because collecting and paying claims at the site level would increase integrity. However, two State agencies wrote that site-level claiming posed a significant administrative burden as the agencies would need to update their systems and increase monitoring. These comments further noted that there may be an increase in claim processing costs due to the increase in entities that would need to be paid directly.

#### USDA Response

This final rule codifies the definitions of self-preparation and vended sites with revisions to provide additional

clarity, and codifies as proposed the requirement that sponsors provide a summary of how meals will be obtained at each site when applying to participate in the SFSP.

USDA seeks to increase program integrity through this rulemaking. To satisfy this goal, any added definitions must be as clear as possible. In order to avoid the potential terminology confusion cited by the comments, USDA re-examined the proposed definitions and has modified the language to better reflect the types of arrangements found in SFSP operations. While the term “food service management company” is still used in the definitions, the revised language clarifies its applicability. Likewise, the definition of a self-prep site has been amended to indicate that these sites may receive meals prepared at their sponsor’s central kitchen. Establishing clear definitions of self-prep and vended sites will help ensure that site-based claims are accurate for States that provide reimbursements based on the classification of the individual sites.

Commenters and USDA’s own monitoring activities have indicated that all but several State agencies have systems that are equipped with site-level claiming mechanisms. USDA appreciates the efforts that State agencies have made to employ technological advances to modernize agency systems. Comments also indicated that there would be no impact on program operations in most States to implement site-level claiming because of this. However, among several State agencies with systems that are not currently configured for site-level claiming, State agencies noted a belief that implementation would result in increased costs due to additional monitoring and system requirements.

Collecting information about how sites will obtain their meals as part of the sponsor’s application will aid State agencies to ensure proper accounting during claims processing. States that process claims at the site level need this information to determine the rate at which meals will be reimbursed for each site. For States that process claims at the sponsor level, information on the sponsor’s sites is critical to determining whether the sponsor should be deemed self-prep or vended. Thus, although USDA is not requiring State agencies to collect site-level claims at this time, sponsors will be required to submit a summary of how meals will be obtained by a site as part of their application for program participation.

Finally, USDA is aware that most States are currently able to process site-based claims for SFSP sponsors, which

makes the classification of sponsors as being either self-prep or vended no longer relevant for those States. However, sponsor classifications are still needed for State agencies that are not yet able to process claims at the site level. Therefore, although this rule establishes definitions for self-prep and vended sites, USDA is retaining the sponsor level definitions, which apply for States that are claiming at the sponsor level. However, because site-level claiming is a more accurate and efficient means of determining reimbursements, USDA encourages all State agencies to work toward adopting that method. USDA has created these site definitions to complement existing site-level claiming processes and ensure that State agencies categorize sites accurately and consistently.

Accordingly, this rule adds definitions to § 225.2 for “self-preparation site” and “vended site.” In addition, this rule amends §§ 225.6(c)(2)(viii) and 225.6(c)(3)(vi) to require a summary of how meals will be obtained at each site as part of the sponsor application.

#### ii. Eligibility for Closed Enrolled Sites

The current definition of closed enrolled sites included in § 225.2 requires that at least 50 percent of the enrolled children at the site are eligible for free or reduced-price meals under the NSLP and the SBP, as determined by approval of applications in accordance with § 225.15(f). This provision outlines the requirement to use income eligibility forms to “determine the eligibility of children attending camps and the eligibility of sites that are not open sites as defined in paragraph (a) of the definition of ‘areas in which poor economic conditions exist’ in § 225.2”. To reduce administrative burden on sponsors, USDA published guidance in 2002 that permitted closed enrolled sites to establish eligibility based on data of children eligible for free and reduced-priced meals in the area where the site was located (*Summer Food Service Program (SFSP) Waiver for Closed Enrolled Sites*, November 17, 2002). During the 15 years in which this nationwide waiver was active, this flexibility was shown to reduce administrative burden on sponsors of closed enrolled sites and eliminate barriers to participation for children and families enrolled at these sites.

The waiver noted above was rescinded in 2018, as discussed in the background section of this final rule. Beginning in summer, 2019 State agencies and program operators were allowed to request a waiver on an individual basis. Between summers

2019 and 2020, 43 States requested waivers for area eligibility for closed enrolled sites. Feedback received during the waiver process confirms that a reduction in administrative burden and elimination of barriers to participation remain the principal benefits of permitting closed enrolled sites to rely on area eligibility rather than applications. Requests from 36 out of 40 State agencies that requested waivers in 2019 noted that the reduction in administrative costs can be more productively invested in technical assistance and oversight to improve the quality of services provided to participants. Further, the Healthy, Hunger-Free Kids Act of 2010, Public Law 111–296, amended the definition of “areas in which poor economic conditions exist” in the NSLA. This revised definition allows for enrolled sites to demonstrate eligibility through “other means approved by the Secretary.” As a result, USDA proposed to codify the flexibility allowing use of area eligibility to determine eligibility for closed enrolled sites.

#### Public Comments

USDA received 52 comments on this provision, including nine form letter copies. Of these, 45 were in support, three expressed partial support, three were in opposition, and one expressed a mixed opinion.

Proponents of the provision cited the benefits to program participants and administrators, including reduced administrative burden and increased program access. Commenters who partially supported the provision requested that the 50 percent threshold required in the definition of “area in which poor economic conditions exist” be decreased to 40 percent. A commenter also stated that the proposed description of closed enrolled sites in subpart (d) of the definition of “areas in which poor economic conditions exist” could be confusing because closed enrolled sites do not need to be located in such an area.

Opponents voiced concerns that the provision could increase incidence of sites that would otherwise have operated as an open site, electing to operate as a closed enrolled site, thereby decreasing program access for children who live in the community but are not enrolled at the site. The commenters also expressed apprehension that the reference population used to qualify for closed enrolled status would not be the population that is ultimately served by the site.

#### USDA Response

This final rule codifies, as proposed, changes allowing closed enrolled sites to use area eligibility to determine site eligibility. This rule also includes additional changes which require State agencies to have criteria for approving closed enrolled sites to ensure operation of a site as closed enrolled does not limit access to the community at large.

USDA strives to streamline and reduce administrative burden where possible. Codifying guidance permitting closed enrolled sites to establish eligibility based on data of local children eligible for free and reduced-price meals supports that goal.

In response to commenters who suggested lowering the threshold for area eligibility to 40 percent, changes to how area eligibility is determined are beyond the scope of this rulemaking. Further, the 50 percent threshold outlined in the definition of “areas where poor economic conditions exist” is a statutory limit found at 42 U.S.C. 1761(a)(1)(i). USDA is not permitted to regulate against the authority delegated to the Department through statute. USDA is obligated to observe this threshold and cannot lower it. Therefore, this rule codifies previous guidance with no further modifications.

USDA also understands the concerns associated with the correlation between potential increases in closed enrolled site locations and decreases in program access. However, in approving sponsor applications for SFSP participation, State agencies play a central role in safeguarding program access. State agencies should closely examine each closed enrolled site application, and assess the effect that approving the application could have on program access in the area the site is located. Operating as an open site should be encouraged where possible, thus State agencies should discuss with the respective sponsoring organization whether a closed enrolled designation for a potential site is absolutely necessary. As such, USDA is requiring that State agencies establish criteria for approving closed enrolled sites to ensure operation of a site as closed enrolled does not limit program access to the community at large.

Accordingly, this final rule amends the definitions of “areas in which poor economic conditions exist” and “closed enrolled site” in § 225.2 to clarify eligibility requirements and include eligibility determination based on area data of children eligible for free and reduced-price meals. This final rule also updates redesignated §§ 225.6(g)(1)(ix) and 225.6(g)(2)(iii) to establish the

frequency at which the site must re-establish eligibility, if based on area data as described in section III. G. ii of this final rule. Further, this rule makes a technical correction to § 225.15(f) to reflect changes made to the definition of “areas in which poor economic conditions exist.” Finally, this rule amends § 225.6(a)(2) to require State agencies to establish criteria for closed enrolled sites.

#### iii. Roles and Responsibilities of Site Supervisors

The site supervisor plays a critical role in managing and maintaining quality at an SFSP site. Although USDA has provided technical assistance to aid site supervisors to perform their jobs, regulations did not include a definition of site supervisor that clearly addresses their core responsibilities, including the requirement that the site supervisor is on site during the meal service. Providing such a definition would help sponsors and sites comply with program requirements and improve program integrity. Therefore, USDA proposed to add a definition of “site supervisor” to clarify this role and its relationship to program operations.

#### Public Comments

USDA received 19 comments on this provision, including three form letter copies. Of these, 14 were in support, four expressed partial support, and one was in opposition.

Proponents expressed that the addition of this definition would provide clarity for State agencies and sponsors. Comments that partially supported the provision stated that the proposed definition presumed that one person undertakes all activities listed for the site supervisor, which may not be the case at some sites. Specifically, commenters noticed that the definition requires site supervisors to order meals, and noted that, in some instances, meal counts are handled by the sponsor or the sponsor’s central kitchen. Another commenter recommended adding a reference to the term “site supervisor” in § 225.14 of the regulations to prevent relevant parties from failing to notice the addition of the definition.

A State agency opposed the provision citing their belief that the requirement that the site supervisor remain on site for the duration of the meal service is burdensome. A State agency also expressed concern that the definition precluded the site supervisor’s ability to delegate functions as needed, and asserted that supervisors may be in charge of multiple sites with similar meal times that require their attention.

## USDA Response

This final rule codifies the definition of site supervisor as proposed, with a minor change added to the regulations to support the definition's inclusion.

USDA agrees that the roles and responsibilities of sponsor and site staff vary across different sites. However, in all cases, the site supervisor plays an integral role in supporting the SFSP, and provides front-line assistance in maintaining program integrity and efficient operations. USDA recognizes that the duties that are included in the definition of site supervisor may need to be performed by more than one staff member at the site. The site supervisor is the individual ultimately responsible for overseeing operations at the site and must be on site for the duration of every meal service. However, the site supervisor may delegate tasks to another staff member so long as that staff member is overseen by the site supervisor and has appropriate training for the role that the individual is expected to fill. It is at the State agency's discretion whether the sponsor must inform that State agency when a site supervisor delegates their duties to another staff member.

Additionally, USDA understands that the site supervisor may not be the individual responsible for ordering meals, and has revised the definition to more accurately reflect the site supervisor's duties including maintaining documentation of meal deliveries, ensuring that all meals served are safe, and maintaining accurate point of service meal counts.

USDA also recognizes the usefulness of having a reference to the term "site supervisor" in a portion of the regulation that is likely to be reviewed by relevant parties. Therefore, USDA had added such a reference to *Requirements for sponsor participation* at § 225.14(c)(4).

Accordingly, this final rule adds a definition of "site supervisor" at § 225.2 and adds a reference to "site supervisor" at § 225.14(c)(4).

### iv. Unaffiliated Sites

SFSP sponsors often have a legal affiliation with their sites, such as a Department of Parks and Recreation sponsoring the SFSP at one of its recreation centers. However, a sponsor may have no legal affiliation with a site that it is sponsoring other than an agreement to conduct a meal service at the site. For example, a Department of Parks and Recreation sponsoring the SFSP at a church. Section III. C. iii. of this final rule codifies new site selection criteria for State agencies to use during

sponsor reviews, and includes affiliation with the sponsor as a characteristic that will be reflected in a sponsor's sample of sites. The regulations lacked a definition of an unaffiliated site, and so USDA proposed to add a definition that an "unaffiliated site" means a site that is legally distinct from the sponsor.

### Public Comments

USDA received 29 comments on this provision, including 10 form letter copies. Of these, 13 were supportive, one was opposed, and 15 were mixed. Proponents, all of whom were State agencies, appreciated the clarification provided by defining an unaffiliated site. Opponents included sponsoring organizations, general advocacy groups, and a few State agencies. These commenters expressed concern that the proposal would change the way that unaffiliated sites are approved or monitored, making it more difficult for sponsors to serve them. Some cited challenges for unaffiliated centers to participate in the CACFP, and expressed concerns that unaffiliated sites in the SFSP may face similar challenges. Commenters noted that the SFSP has many small sites which are not capable of administering the Program on their own, but can offer a vital service to their communities with the help of sponsors with which they have no legal affiliation. A few commenters asked for more information about the relationship between unaffiliated sites and their sponsors, and how to distinguish unaffiliated sites. One State agency that opposed the provision expressed concern about USDA adding this definition before publishing a final Child Nutrition Program Integrity rule, since the proposed rule included provisions related to unaffiliated centers in the CACFP.

### USDA Response

This final rule codifies the definition of "unaffiliated site" as proposed. The purpose of adding this definition is simply to provide a name for a type of business arrangement that currently exists in the SFSP. The addition of this definition does not change anything about how unaffiliated sites may participate in the SFSP or how they are monitored. There are many different ways that a sponsor and the unaffiliated sites that it sponsors may structure their relationship, none of which will change with the addition of this definition. In response to the commenters who asked for guidance on identifying an unaffiliated site, in general, affiliated sites are part of the same legal entity as the sponsoring organization, while an

unaffiliated site is not generally part of the same legal entity as its sponsoring organization.

Although the term 'unaffiliated site' is used in the CACFP to describe a similar type of business arrangement, the CACFP has different program requirements that affect a sponsor's relationship with its centers. As a result, it does not follow that unaffiliated SFSP sites will have the same challenges as unaffiliated centers in the CACFP, nor it is necessary for USDA to wait for publication of a final Child Nutrition Integrity rule to codify this definition.

Accordingly, this rule codifies the following definition in § 225.2 for "unaffiliated site:" a site that is legally distinct from the sponsor.

### v. Unanticipated School Closure

The primary purpose of the SFSP is to maintain meal service for children during the summer months when school is not in session. However, the SFSP also plays an important role in serving children during the school year in times of emergency or unexpected incidents that disrupt school meals programs. The NSLA permits service institutions to provide meal services to children who are not in school for a period during the months of October through April due to a natural disaster, building repair, court order, or similar cause. The statute further requires that the meal service must take place at non-school sites. While the regulations provided requirements for approving sponsors to serve during unanticipated school closures, there was not a specific regulatory definition of unanticipated school closure. USDA proposed adding a definition of "unanticipated school closure" that aligns with statutory requirements outlined in section 13(c)(1) of the NSLA, 42 U.S.C. 1761(c)(1), and existing regulatory provisions related to unanticipated school closures. Including this definition would also allow regulatory text to be streamlined and remove duplicative and repetitive references throughout the regulations. It is important to note that the proposed rule was published in January 2020, before the COVID-19 public health emergency triggered school closures nationwide, causing schools to serve SFSP meals during unanticipated school closures, in conjunction with Families First Coronavirus Response Act (FFCRA) Nationwide Waiver authority, on a scale and for a duration that was without precedent. However, the COVID-19 public health emergency was declared at the beginning of the comment period, so some commenters discussed the

impacts of COVID-19 in their submissions.

#### Public Comments

USDA received 22 comments on this provision, including four form letter copies. Of these, five were in support, 15 expressed partial support, and two held a mixed or unclear position.

Proponents, all of whom were State agencies, expressed a belief that the definition aligns with existing policy and would provide clarity for program operators and administrators.

Commenters who partially supported the definition included State agencies, sponsors, general advocacy groups, individuals, and a Federal elected official. These commenters and a State agency whose comment was mixed voiced a desire for schools to be permitted to operate as sites during unanticipated school closures. The commenters placed particular emphasis on sites sponsored by SFAs in good standing, and schools that were not affected by the cause of the school closure. Additionally, these commenters suggested that, in recognition of the ongoing pandemic and the potential for similar events to occur in the future, the definition be modified to include public health emergencies, and State-level disasters or emergencies as justification for SFSP use.

One commenter whose feedback was mixed suggested that USDA reconsider the proposed definition because it is ill suited for the circumstances, without offering specific recommendations for improvements.

#### USDA Response

This final rule codifies the definition of “unanticipated school closure” as proposed.

USDA understands why some commenters requested that sponsors be able to serve meals at school sites during unanticipated school closures. In some situations, the school site is safe for a meal service and would be an efficient place for children to receive a meal. However, the NSLA clearly limits meal service locations during an unanticipated school closure to “non-school sites.” USDA has, at times, allowed implementation practices that are contrary to the statute. When such practices are discovered, USDA revises program guidance and provides training and technical assistance to ensure that State agencies and program operators implement the Program in accordance with the law. In the past, USDA issued guidance permitting SFA sites to serve meals during unanticipated school closures, which was inconsistent with the law; this guidance has since been

corrected. Due to the exceptional circumstances of the COVID-19 pandemic, USDA used the authority provided by the Families First Coronavirus Response Act (FFCRA), as amended, to allow meal service during unanticipated school closures at schools. Likewise, USDA has the ability to issue similar waivers on an individual basis through its waiver authority in section 12(l) of the NSLA (42 U.S.C. 1760(l)). However, USDA intends for SFSP regulations to remain in agreement with the statute and will not codify a rule allowing meal service at school sites during unanticipated school closures because this practice is not supported by the NSLA.

Some commenters suggested that the definition of “unanticipated school closure” should be revised to reference public health emergencies and State-level disasters or emergencies. USDA does not find this specificity is needed as the “similar cause” clause of the proposed definition provides State agencies the discretion to approve program operators to serve SFSP meals during unanticipated school closures in circumstances including public health emergencies and State-level disasters or emergencies. Therefore, these references are not necessary for continued use of the SFSP in this manner. Further, FNS did not propose substantive changes to the regulatory requirements for meal service during unanticipated school closures in this rulemaking. Given the public’s strong interest in meal service options during school closures after the COVID-19 public health emergency caused nationwide school disruptions, USDA has determined that it would not be appropriate to make changes to policies on meal service during unanticipated school closures without first proposing and soliciting comments on such changes. For this reason, USDA is codifying the proposed changes, which add a new definition, but otherwise maintaining current policy for meal service during unanticipated school closures. State agencies and program operators may refer to current guidance on meal service during unanticipated school closures (SFSP 04-2020, *Meal Service During Unanticipated School Closures*, November 5, 2019) and on the process for requesting a waiver of these requirements as discussed in section G.i of this rule. Accordingly, this rule adds to § 225.2 a definition of “unanticipated school closure.” In addition, this final rule revises all references to unanticipated school closures in § 225.

vi. Nonprofit Food Service, Nonprofit Food Service Account, Net Cash Resources

The proposed rule included definitions of “nonprofit food service,” “nonprofit food service account,” and “net cash resources.” Proper administration of a nonprofit food service and appropriate management of program funds are critical to the integrity of the SFSP. Therefore, providing clear and consistent definitions for these terms will promote program integrity. To create consistency across Child Nutrition Programs, the proposed definitions also align with the terms already defined under the NSLP in 7 CFR 210.2.

#### Public Comments

USDA received 16 comments on this provision, including three form letter copies. Of these, 15 were supportive, one was opposed, and none were mixed. Proponents said that State agencies and sponsors will benefit from the addition of consistent definitions. However, one State Agency asked for additional resources to train sponsors on these concepts.

Several commenters, including one who was opposed, expressed concern that the addition of these definitions would impact existing requirements related to excess funds and allowable levels of net cash resources. One commenter wrote that the proposed definition for net cash resources implies that only zero net cash resources are allowable and asked USDA to retain the current requirements for net cash resources limits.

One commenter pointed out an inconsistency with the proposed definitions: the definition of “nonprofit food service” references “schoolchildren,” while the definition of “nonprofit food service account” references “children.”

#### USDA Response

This final rule codifies the definitions of “nonprofit food service account” and “net cash resources” as proposed. The definition of “nonprofit food service” is codified with a technical correction.

USDA appreciates the commenter who pointed out that the definition of “nonprofit food service account” references “schoolchildren.” This definition should reference “children” since the SFSP is not available to children when they are in school. This final rule corrects the definition.

The addition of these definitions does not change the requirement for a sponsor to maintain a nonprofit food service in accordance with redesignated

§ 225.6(i)(1), nor does it change the requirement in § 225.15(a)(4) that a sponsor may not exceed one month's average expenditures for sponsors operating only during the summer months and three months' average expenditures for sponsors operating Child Nutrition Programs throughout the year. Likewise, the requirements in § 225.9(c)(6) related to excess advanced payments remain unchanged.

Accordingly, this final rule amends regulations found at § 225.2 to add definitions for "nonprofit food service," "nonprofit food service account," and "net cash resources."

#### G. Miscellaneous

##### i. Authority To Waive Statute and Regulations

Section 12(l) of the NSLA (42 U.S.C. 1760(l)) provides the Secretary with the authority to waive program requirements for States or eligible service providers if it is determined that the waiver would facilitate the ability of the States or eligible service provider to carry out the purpose of the Program, and the waiver will not increase the overall cost of the Program to the Federal Government. This waiver authority applies to statutory requirements under the NSLA or the Child Nutrition Act of 1966 (CNA) (42 U.S.C. 1771 *et seq.*) and any regulations issued under either Act. The Secretary does not have the authority to waive certain requirements including, but not limited to, the nutritional content of the meals served, Federal reimbursement rates, or the enforcement of any statutory right of any individual. In addition, the Secretary may not waive program requirements that originate in other laws such as the Civil Rights Act of 1964. It is important to note that, although this rule primarily affects the SFSP, the Secretary's waiver authority applies to all Child Nutrition Programs including the SFSP, NSLP, SBP, Special Milk Program, Fresh Fruit and Vegetable Program, and the CACFP. Although regulations are not needed to continue implementing waivers, adding waiver authority to the regulations provides clarity for States and program operators.

The State is responsible for the overall administration of Child Nutrition Programs and is in the best position to understand the needs of its service providers and communities with regard to the need for a waiver of statutory or regulatory requirements. In addition, the State is responsible for monitoring program implementation and determining when programmatic changes or corrective actions are needed to ensure the Child Nutrition Programs

are operated with high levels of integrity. As such, the State agency plays a critical role in requesting and overseeing implementation of a waiver. USDA has long relied on State agencies to determine when and how waiver authority can best be applied to improve program operations, and if a waiver can be implemented with integrity. The responsibilities of the State agency were outlined in technical assistance issued in 1996, and again in 2018 guidance on the process for requesting a waiver and data reporting requirements for approved waivers (SFSP 05–2018, *Child Nutrition Program Waiver Request Guidance and Protocol—Revised*, May 24, 2018).

Under current guidance, State agencies are responsible for requesting waivers for the State and submitting waiver requests on behalf of eligible service providers. State agencies do not have the discretion to deny or approve waivers submitted on behalf of eligible service providers but are expected to recommend a course of action to USDA. The Department does not have a direct relationship with eligible service providers and does not have a reliable means to make final determinations on waiver requests absent the input of the State agency. As a practical matter, USDA denies waiver requests from eligible service providers when the State agency determines that the request does not meet the requirements for a waiver or cannot be implemented effectively. Therefore, USDA proposed to grant the States the maximum administrative discretion possible regarding waiver requests from eligible service providers. The proposed rule stated that the State agency should review waiver requests from eligible service providers and make its own determination as to whether a request meets the requirements for a waiver as described in section 12(l) of the NSLA, can be implemented with a high level of integrity, can be effectively monitored, and will provide data on the impacts of the waiver. Concurring requests must be forwarded to the FNSRO with a rationale supporting the request for USDA to consider when making the final determination.

USDA also proposed to provide the State agency the discretion to deny a waiver submitted by an eligible service provider. In some instances, a waiver request may not meet the requirements outlined in section 12(l) of the NSLA. In these cases, the State agency must deny the request, and should work with the eligible service provider and the FNSRO, if necessary, to improve the request, or identify other options to meet their programmatic needs without

the use of a waiver. In other instances, the State agency may deny a waiver request if it determines that the waiver could not be properly implemented or monitored, or if other measures could be taken to meet the needs of the Program without the use of a waiver. USDA relies on State agencies to recommend whether a waiver meets statutory requirements and can be implemented effectively. If the State determines that a request does not meet this standard, there is no reason for USDA to review it.

To ensure the waiver process is efficient and adheres to the statutory requirements for a waiver, USDA specifically requested comments on the process of requesting a waiver, monitoring implementation of the waiver, and reporting data on waivers issued through this authority.

Accordingly, USDA proposed to add the following new paragraphs to codify USDA's authority to waive statutory and regulatory requirements for all Child Nutrition Programs:

- § 210.3(d);
- § 215.3(e);
- § 220.3(d);
- § 225.3(d); and
- § 226.3(e).

##### Public Comments

USDA received 35 comments on this provision, including nine form letter copies. Of these, 11 offered support, six partially supported the proposal, 10 opposed, and eight were mixed. Proponents, who were all State agencies, supported the inclusion of USDA's waiver authority in the regulations, and several voiced specific support for providing State agencies the discretion to deny a waiver request from an eligible service provider. These commenters said that State agencies are in the best position to assess a service provider's ability to properly implement a waiver and provide necessary program data, as well as the State's own ability to monitor program operations under a waiver. One proponent requested that USDA specify that waiver authority is limited to requirements under the NSLA and CNA, and not to other laws affecting the Child Nutrition Programs.

Commenters who offered partial support included a State agency, sponsors, a general advocacy organization, and an individual. These commenters were pleased to see waiver authority added to the regulations and generally supported the role of State agencies in monitoring and reporting on waivers. However, most expressed opposition to providing State agencies the authority to deny waiver requests from eligible service providers.

Opponents were primarily sponsor and general advocacy organizations, and expressed concern about the ability of State agencies to deny a waiver request from an eligible service provider. Some worried that State agencies could interpret the regulations differently, leading to inconsistent implementation within and across States. Commenters suggested that the regulations should include additional guidelines and specific criteria for States to use when evaluating waiver requests, a timeline for State agency reviews, and the requirement that States provide objective evidence to support a waiver denial. Some requested an appeal process that is decided or reviewed by USDA. One commenter objected to providing States the discretion to deny a waiver, stating that this authority is not found in the statute.

In response to USDA's request for specific comments, several State agencies also remarked on the process of requesting and reporting on a waiver. Some of these commenters said that the process for requesting a waiver is straightforward and appreciated the template USDA has provided, while others found the process to be burdensome and time consuming, especially when multiple waivers are being requested. Those who commented on monitoring of waivers stated that monitoring is conducted during the Administrative Review, technical assistance visits, and at the time of data collection. Several commenters said that completing data reporting requirements is burdensome and difficult. Some requested that USDA simplify reporting requirements and provide templates ahead of time to facilitate compliance. One commenter suggested that waivers should be renewable for multiple year to reduce burden.

#### USDA Response

The final rule codifies USDA's waiver authority for Child Nutrition Programs with several revisions. In response to a commenter who suggested that USDA specify that waiver authority only applies to requirements under the NSLA and CNA, the regulations are amended to clarify that waivers issued pursuant to these regulations must be consistent with current 12(l) requirements, which includes a prohibition on waivers relating to the Civil Rights Act of 1964. In addition, program requirements that derive from other statutes or regulations may not be waived under this authority. For example, USDA may not waive standards for financial and program management that are required in 2 CFR part 200. With regard to a commenter who requested that States provide

objective evidence to support a waiver denial, this final rule is revised to require that, when States provide written notice to an eligible service provider that a waiver is denied, they must include the reason for denying the request. USDA is also adding language clarifying that the Department may only approve requests for a waiver that are submitted by a State agency and comply with the requirements at section 12(l)(1) and the limitations at section 12(l)(4), including that USDA may not grant a waiver that increases Federal costs. Finally, other minor revisions will ensure continuity with section 12(l).

As discussed in the background section of this rule, in 2018, USDA rescinded several nationwide waivers in response to an audit by the USDA OIG. Following that action, USDA approved more than 230 individual requests in 2019 from States and eligible service providers for waivers primarily related to first week site visits, meal service times, OVS, and eligibility for closed enrolled sites. Through this process, USDA gained critical insight into the use of these waivers and the ability of individual States and eligible service providers to comply with waiver requirements. USDA developed the proposed rule based on these lessons learned, including the importance of State agency input on the viability of waiver requests from eligible service providers.

Historically, waivers approved through section 12(l) of the NSLA have been rare. The statute and regulations are intended to govern all Child Nutrition Program operators in a consistent manner. Exceptions to the statute and regulations should be limited to exceptional circumstances that were not contemplated during development of the statute and regulations and for which a timely remedy is needed. USDA has approved a large number of waivers of SFSP requirements over the last few years to support States and SFSP sponsors that had previously used the nationwide waivers that were rescinded in 2018 to administer their programs. The four most commonly requested of these waivers are being addressed through this rulemaking. Once this rule is finalized, the majority of Child Nutrition Program waivers requested in the last few years related to typical program operations will no longer be needed. USDA anticipates that waivers of statute and regulations will again become a rare occurrence.

USDA understands the concerns of commenters who said that State agencies could apply 12(l) waiver regulations inconsistently and without

recourse for program operators. Many of these commenters requested additional guidelines for State agencies and an appeals process decided at the Departmental level. State agencies play a critical role in vetting requests from eligible service providers and USDA relies on their input to determine if a request could be properly implemented and appropriately monitored. State agencies are solely responsible for approving and monitoring eligible service providers such as SFAs, CACFP institutions, and SFSP sponsors. USDA has no direct connection with these program operators except through the State agency and is not in a position to assess the appropriateness of an eligible service provider's waiver request without input from the State agency. Because the Department lacks a relationship with, or firsthand information about, the service provider, it would be unproductive for USDA to review applications that the State does not support. If a State agency concludes that a waiver should not be approved, USDA typically would not have a basis for determining otherwise, and as such, will honor the State's determination. State agencies are required to forward concurring requests to the FNSRO with a rationale supporting the request, at which point USDA will make the final determination on the request. Although the USDA has determined that this approach will best enable the Department to fulfill the requirements of the statute, we recognize that we must remain actively involved with program implementation to ensure the regulations are carried out as intended and consistent with the regulations. When used appropriately, section 12(l) is a tool that allows States and service providers to respond to local conditions and meet the needs of the communities they serve. For this reason, it is important that States and service providers have access to waivers through a transparent and consistent waiver request process. USDA is responsible for providing technical assistance to, and monitoring of, the State agencies. FNSROs are in regular contact with the States to provide support and oversight and are generally aware of trends in program implementation at the State level. As with other regulatory requirements, FNSROs will work with the State agency to correct any misapplication of this provision and support correct and consistent implementation of these waiver requirements.

As stated above, the number of waiver requests is anticipated to reduce substantially once this rule goes into

effect and flexibilities that were previously made available through individual section 12(l) waivers are codified. With fewer waiver requests from eligible service providers, State agencies should be able to provide more technical assistance to the requester to help them improve their request or determine alternative approaches to meet the needs of the programs without the use of a waiver; technical assistance of this type is a core requirement of State agencies. USDA already provides a waiver request template and instructions that include the type of information USDA needs in order to approve a request. State agencies may choose to use that as a guide when reviewing waiver requests from eligible service providers. As stated above, waivers are intended to provide exemptions from statute and regulations in limited circumstances; State agencies and eligible service providers are not entitled to waivers of program requirements. Therefore, State agencies are not entitled to appeal a waiver denial by USDA, nor are eligible service providers entitled to appeal a waiver denial by the State agency. In response to commenters who requested timelines for States to review waiver requests, the proposed regulatory text already includes the requirement that States must forward a waiver request from an eligible service provider to USDA within 15 calendar days of receipt, or notify the requesting eligible service provider in writing within 30 calendar days of receipt of the request if the request is denied.

USDA agrees that improving the process for requesting and reporting on waivers will reduce burden at all levels and support proper program administration. Processing a high volume of waiver requests and collecting data on approved waivers in 2019 highlighted the need to refine the waiver process. USDA is using the lessons learned since 2019 to inform ongoing efforts to streamline the waiver process.

Neither the regulatory text nor section 12(l) of the NSLA place limits on the duration of waivers, meaning that USDA has the authority to approve multiyear waivers or extend a waiver if the waiver continues to meet all necessary requirements, as requested by one commenter.

Accordingly, USDA will add the following new paragraphs to codify USDA's authority to waive statutory and regulatory requirements for all Child Nutrition Programs:

- § 210.3(e);
- § 215.3(e);
- § 220.3(f);

- § 225.3(d); and
- § 226.3(e).

#### ii. Duration of Eligibility

Statutory requirements found in the NSLA at 42 U.S.C. 1761(a)(1)(A)(i)(I–II) authorize the use of school data and census data to establish area eligibility in the SFSP. The NSLA also establishes that area eligibility determinations made using school or census data must be redetermined every five years.

Regulations at 7 CFR 225.6(c)(3)(i)(B) have required that documentation supporting the eligibility of each site as serving an area in which poor economic conditions exist be submitted every three years for open sites and restricted open sites. Therefore, the proposed rule amended the duration of eligibility for open sites and restricted open sites based on school and census data from three years to five years, in accordance with the NSLA. The proposed rule also extended this requirement for closed enrolled sites contingent on the proposed changes to eligibility of closed enrolled sites described in section III. H. ii. of this final rule.

#### Public Comments

USDA received 21 comments, including three form letter copies, addressing the proposed changes to duration of eligibility, the majority of which were from State agencies. All comment submissions were in favor of the proposed changes. Proponents noted that these changes minimize administrative burden, align with other eligibility determinations, and are consistent with CACFP requirements. One commenter underscored that the final rule should extend the changes to duration of eligibility to closed enrolled sites if sponsors are able to establish area eligibility for closed enrolled sites under this rule.

#### USDA Response

All comment submissions expressed support for the proposal without concern or opposition. Thus, this final rule makes no changes to the proposed amendment. Accordingly, this rule changes the regulations in redesignated § 225.6(g)(1)(viii) and (g)(2)(ii) for open and restricted open sites and § 225.6(g)(1)(ix) and (g)(2)(iii) for closed enrolled sites to require submission of eligibility documentation every five years.

#### iii. Methods of Providing Training

Current regulations at § 225.7(a) require State agencies to make training available at convenient locations. As technology has advanced, sponsors and State agencies have the capability to

provide mandatory trainings via the internet. Since 2011, USDA has encouraged State agencies to provide multiple options for training, including online or by video conference or webinars, in order to accommodate varying sponsor needs, while at the same time minimizing the time and expense incurred by the State agency (SFSP 14–2011, *Existing Flexibilities in the Summer Food Service Program*, May 9, 2011). Therefore, USDA took the opportunity with the proposed rule to update the regulations at § 225.7(a) to include the flexibility for training to be conducted via the internet.

#### Public Comments

USDA received 26 comments, including three form letter copies, addressing the methods of providing training. Of these, 25 were supportive, and one was mixed. Proponents, who were primarily State agencies and included two general advocacy organizations, a sponsor and an individual, supported the option for training to be conducted via the internet, writing that it provides clarity for State agencies and sponsors, accommodates sponsors' needs, and minimizes time and expenses to State agencies in providing trainings. A State agency added that online training software is more cost-effective, readily available, and easy to implement and use. However, the State agency requested USDA further clarify whether training must be conducted in “real time” with live webinars or if trainings could be prerecorded. Another State agency asked whether the intent of the provision is to replace in-person training.

#### USDA Response

This final rule makes no changes from the proposed rule. USDA agrees with commenters that having a variety of training opportunities and formats can accommodate varying sponsor needs, while at the same time minimizing the time and expense incurred by the State agency. This amendment is intended to update regulations with the advancement of technology by codifying flexibilities for training in current guidance (SFSP 14–2011, *Existing Flexibilities in the Summer Food Service Program*, May 9, 2011). It is not intended to replace in-person or face-to-face trainings. State agencies that elect to use this option have the discretion to offer online training in any format that best suits sponsors' needs provided that it is made available through accessible electronic means, is provided in the languages of those for whom the training is intended and in alternative

formats for persons with disabilities in accordance with 7 CFR 225.7(g) and FNS Instruction 113–1, and it delivers proper and comprehensive training to operate the SFSP.

Accordingly, this final rule amends regulations in § 225.7(a) to include the option for training to be conducted via the internet.

#### iv. Meal Preparation Facility Reviews

Current regulations require that as part of any vended sponsor review, State agencies must inspect the facilities of any food service management company (FSMC) with which a vended sponsor contracts for the preparation of meals. The proposed rule renamed the section title from “Food Service Management Company Visits” in current regulations at § 225.7(d)(6) to “Meal Quality Facility Review” in redesignated § 225.7(i), and clarified that each facility should be reviewed at least one time during the program year.

#### Public Comments

USDA received 18 comments, including three form letter copies, addressing the proposed changes to FSMC facility visits, of which, eight were supportive, two provided partial support, one was opposed, and seven were mixed.

The majority of proponents provided general support for the proposed changes. Several proponents specified that they supported renaming the section in order to better clarify the purpose of the provision. One commenter supported the proposal but recommended amending the section name to read “Meal Preparation Facility Review.”

A respondent pointed out that the proposed regulatory language does not tie this requirement to a sponsor review, which could result in State agencies reviewing these facilities every program year. Other commenters pointed out this concern as well. One commenter agreed with the proposal but wrote that an annual visit may increase the burden to State agencies. A commenter in opposition to the proposed changes agreed, writing that an annual visit would place an undue administrative burden on State agencies.

Commenters who provided mixed positions also expressed concerns over requirements of this provision, and requested further clarification from USDA. Several respondents wrote that the proposed rule is unclear as to who is responsible for the facility reviews. One commenter wrote that it is the responsibility of state and local health agencies to review food safety, so SFSP administering agencies should not be

responsible for this review. Another commenter asked if funding provided for health inspections could be utilized to complete this requirement. One respondent asked for clarification on when a facility review is necessary as many facilities in their State are inspected regularly. Another respondent asked if the facilities are to be reviewed at least once per year, could facility reviews in other Child Nutrition Programs satisfy these review requirements.

#### USDA Response

The final rule addresses oversight in the proposed rule by modifying the proposed language to clarify who is required to receive a review under this requirement, the purpose of these reviews, how often these reviews are required to take place, and who is responsible to conduct these reviews. In addition, the final rule renames this section to better describe the purpose of this visit.

Through management evaluations and technical assistance, USDA learned that requirements for the FSMC facility visits are unclear and place undue burden on State agencies. In an effort to provide clarity to this provision, USDA proposed to revise the regulation; however, it appears the proposed changes did not adequately address ambiguity around the regulation, and perhaps introduced more confusion. Therefore, this final rule addresses oversights in the proposed rule.

The final rule clarifies that, as part of the review of any vended sponsor that purchases unitized meals, with or without milk, to be served at a SFSP site, the State agency must review the facilities and meal production documentation of any FSMC from which the sponsor purchases meals. If the sponsor does not purchase meals but does purchase management services within the restrictions specified in § 225.15, the State agency is not required to conduct a facility review. In the SFSP, an FSMC is any entity from which a vended sponsor procures unitized meals, through either a formal agreement or contract, regardless of the type of entity (public agencies including SFAs, private, nonprofit organizations; or private, for-profit companies). The purpose of the review is to verify that meals being served are prepared, stored, and transported in such a manner that complies with local health and safety standards, and with SFSP requirements. A facility review can include, but is not limited to:

- Observation of unitized meal preparation

- Review of menu planning and meal pattern
- Method of meal packaging
- General health and sanitation practices

- Delivery to SFSP meal sites
- Recordkeeping

One commenter suggested that USDA rename the section, “Meal Preparation Facility Review,” to better describe the purpose of this visit. USDA agrees, and thus, this final rule renames the section, “Meal Preparation Facility Review.”

In addition, this final rule also clarifies how often the reviews are required to take place, particularly, when multiple vended sponsors use the same FSMC. As several commenters pointed out, the proposed changes mistakenly removed this requirement as part of a vended sponsor review, and instead, clarified that the facility should be reviewed at least one time during program year. USDA did not intend to change current requirements with this rulemaking. Therefore, this final rule clarifies that the facility review must be conducted at least one time within the appropriate review cycle for each vended sponsor. If multiple vended sponsors use the same FSMC and are being reviewed in the same review cycle, a single facility review will fulfill the review requirements for those vended sponsors.

Furthermore, comments pointed to concerns over who is responsible for these reviews, and questioned why these reviews are required if they are already frequently inspected by local health departments. As stated above, the purpose of the facility review is to view the FSMC’s practices of preparing meals for the SFSP. A facility review differs from health inspections as the primary purpose of a facility review is to ensure that the FSMC facilities are operating at a capacity to adequately produce, store, supply, and deliver meals in accordance with program requirements. Therefore, State agencies are responsible for these reviews and are required to complete the facility review as a part of the vended sponsor review. This final rule clarifies that the State agency can use funds provided in § 225.5(f) to conduct these reviews, however, if the State agency chooses to contract with State or local health authorities to complete the facility reviews, the State agency must provide adequate training for these individuals as required by § 225.7(a).

Accordingly, this rule renames the section title from “Food Service Management Company Visits” in current § 225.7(d)(6) to “Meal Preparation Facility Review,” and clarifies the review requirements in redesignated § 225.7(i).

#### v. Technical Changes

In this final rule, USDA is including several technical changes to update proper program and publication names, and to revise regulatory language to provide consistency.

Current regulations at § 225.2 include a definition of “Areas in which poor economic conditions exist,” and this definition is referenced in numerous places throughout Part 225. The designation of subparagraphs in this definition is changed from (a)–(d) to (1)–(4) to comply with current paragraph structure requirements for the Code of Federal Regulations. Accordingly, the definition of “Areas in which poor economic conditions exist” is corrected in § 225.2 and wherever else it is referenced in Part 225.

Current regulations in § 225.2 reference the “Secretary’s Guidelines for Determining Eligibility for Reduced Price School Meals” in the definition “needy children.” The official title of this annual publication is the “Child Nutrition Programs: Income Eligibility Guidelines.” Accordingly, the definition of “needy child” is amended to reference the correct title of this publication.

Current regulations at § 225.2 include a definition of the “State Children’s Health Insurance Program (SCHIP),” and this program is referenced in numerous places throughout part 225. As a result of the Children’s Health Insurance Program Reauthorization Act of 2009 (CHIPRA) (Pub. L. 111–3), the official name of SCHIP was revised to the “Children’s Health Insurance Program (CHIP).” Accordingly, the title of this program is corrected in § 225.2 and wherever else it appears in part 225.

Section 225.6(h)(2)(xvi) references bonding requirements, and states that the requirements can be found at § 225.15(h)(6) through (8). This citation is inaccurate, as bond requirements are found at § 225.15(m)(5) through (7). Additionally, this rulemaking redesignated § 225.6(h) as § 225.6(l). Accordingly, the reference has been updated to reflect the correct citation at newly designated § 225.6(l)(2)(xvi).

Section 225.7(n)(2), as redesignated in this rule, references “handicap discrimination.” This text is changed to “disability discrimination” to be consistent with other references in § 225.

Section 225.16(d) references “boys and girls.” This text is changed to “children” to be consistent with other references in § 225.

The terms “shall” and “must” are used interchangeably in § 225 to indicate that compliance with a

provision is required. In the interest of consistency and using plain language, this final rule makes a non-substantive technical change from “shall” to “must” where it appears in the subsections of § 225 that are amended by this rule.

#### IV. Procedural Matters

##### Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits, including potential economic, environmental, public health and safety effects, distributive impacts, and equity. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This final rule was determined to be significant and was reviewed by the Office of Management and Budget (OMB).

##### Regulatory Impact Analysis

Economic Summary for “Streamlining Program Requirements and Improving Integrity in the Summer Food Service Program” Final Rule

##### Public Comments on the Economic Summary for the Proposed Rule

USDA did not receive any public comments on the economic summary for the proposed rule.

As described in the preamble to the final rule, changes made by the final rule “streamline requirements among Child Nutrition Programs, simplify the application process, enhance monitoring requirements, offer more clarity on existing requirements, and provide more discretion at the State agency level to manage program operations.”

We estimate no costs, savings, participation, or program impacts beyond the decrease in burden hours outlined in the Paperwork Reduction Act (PRA) analysis of this rule and in the associated ICR. This rule is estimated to save the affected parties at least \$0.5–\$1 million annually, or at least \$2.7–\$5.2 million over the next five years. A detailed cost estimate is available in table 1 below. (A table with all of the burden changes is provided in the PRA analysis of this rule and in the associated ICR.)

The final rule codifies in regulations several operational options that have been available through waivers and policy guidance and that streamline program requirements. The final rule also includes provisions and flexibilities

to strengthen SFSP program integrity or clarify existing program requirements.

Although not in regulations prior to the publication of this final rule, many of the changes made by the final rule have already been implemented in the operation of the SFSP through policy guidance, so they will remain available to program operators without interruption. Other changes were previously implemented through policy guidance but were rescinded in October 2018. These rescinded policies are currently in effect through approved individual waivers or nationwide waivers authorized in legislation responding to COVID–19. Other changes are new and have not been implemented in program operations through policy guidance or waivers, as described below. Each provision includes a description of the expected impact to the program.

#### 1. Streamlining Program Requirements

##### a. Application Procedures for New Sponsors

i. *Program Impact*: This provision codifies flexibilities currently outlined in several policy memoranda for NSLP and CACFP sponsors in good standing (SFSP 05–2012, *Simplifying Application Procedures in the Summer Food Service Program*, October 31, 2011 and SFSP 04–2013, *Summer Feeding Options for School Food Authorities*, November 23, 2012). Specifically, it codifies flexibilities for school food authorities (SFAs) administering the NSLP or SBP and CACFP institutions in good standing that are applying to serve SFSP meals at the same sites where they provide meal services through the NSLP, SBP, or CACFP during the school year. These institutions will be permitted to follow the application requirements for experienced SFSP sponsors currently found in § 225.6(c)(3) instead of the application requirements for new sponsors and sites currently found in § 225.6(c)(2).

ii. *Cost Impact*: This flexibility is currently implemented in policy guidance, and therefore we do not estimate that this provision will affect participation or program costs since it is already in force in the program. We do not estimate any savings or costs associated with this provision, beyond the burden hour savings as detailed in the table in the PRA analysis on p. 161–174. This provision reduces the burden on sponsors already participating in other CN programs who also want to participate in CACFP; since these sponsors are likely to perform well in the operation of the SFSP, this provision reduces burden on these experienced

CN sponsors without compromising program integrity.

b. Demonstration of Financial and Administrative Capability

i. *Program Impact:* In order to streamline Child Nutrition Program requirements and encourage participation, this provision codifies previously-issued policy guidance that provided that NSLP and SBP SFAs and CACFP institutions in good standing applying to participate in the SFSP are not required to submit further evidence of financial and administrative capability, as required in § 225.14(c)(1) (SFSP 05–2012, *Simplifying Application Procedures in the Summer Food Service Program*, October 31, 2011 and SFSP 04–2013, *Summer Feeding Options for School Food Authorities*, November 23, 2012). NSLP and SBP SFAs and CACFP institutions already undergo a rigorous application process in order to participate in the NSLP, SBP, and CACFP, and have demonstrated that they have the financial and organizational viability, capability, and accountability necessary to operate a Child Nutrition Program; therefore, they have the capacity to operate the SFSP as well. The final rule clarifies that these sponsors are not required to submit a management plan unless requested by the State agency. The final rule also codifies as proposed a requirement that State agencies develop an information sharing process if programs are administered by separate agencies within the State.

ii. *Cost Impact:* Most of this provision has already been implemented through policy guidance, so we do not estimate any participation or cost impacts as a result of this provision. The information sharing process requirement is new, but USDA does not intend for this provision to require States to invest in new information technology systems or modify existing IT systems. Information can be shared through any method that is mutually agreed upon by the participating agencies, which could include a method as non-burdensome as agreeing to share the outcome of reviews, corrective actions, or other monitoring activities upon request, so we do not estimate additional costs as a result of this provision.

c. Clarifying Performance Standards for Evaluating Sponsor Viability, Capability, and Accountability

i. *Program Impact:* This rule adds performance standards for organizations applying to participate as SFSP sponsors that correspond to standards currently in place at § 226.6 for organizations applying to participate as

CACFP sponsoring organizations. These standards are provided in response to State agency requests to provide additional clarity on application requirements, and in an effort to streamline requirements across programs. These detailed performance standards under § 225.6(d) must be addressed in a management plan, which will assist State agencies in assessing an applicant's financial viability and financial management, administrative capability, and accountability. Experienced sponsors that have not demonstrated significant operational problems in the prior year may submit a simplified management plan instead of a full management plan. However, a full management plan must be submitted at least once every three years to ensure that State agencies periodically conduct a full review and assessment of a sponsor's financial and administrative capability. The State agency may require submission of a full plan more frequently if it determines that more information is needed to evaluate the sponsor's capabilities. It is possible that this requirement could incentive SFAs and CACFP operators to start a summer program, but the potential effects on participation are too speculative to estimate. We note that some commenters expressed concern that meeting these detailed performance standards will be challenging, particularly for small sponsors. According to an internal USDA study of sponsors in 2015, approximately 45% of SFSP sponsors were SFAs and 23% of SFSP sponsors reported participating in the CACFP, so those sponsors are already meeting these requirements and are not required to submit a management plan unless requested by the State agency, as discussed in section III. B. ii. of this final rule. We are not certain of the exact number of sponsors to which this provision applies, but many sponsors either already meet this requirement or are certain to be able to meet it with minimum additional effort. Finally, as of 2015, the average sponsor has participated in SFSP for 9 summers, and the median sponsor for 6 summers, so the average sponsor has significant experience with the SFSP already, and could submit a simplified management plan most years.

ii. *Cost Impact:* USDA recognizes that including these detailed performance standards in the management plan may require some State agencies and sponsors to modify current practices. Although USDA prioritizes flexibility for stakeholders to the greatest extent possible, these changes will bolster program integrity by supporting the

ability of State agencies to more efficiently and consistently evaluate an applicant sponsor's financial and administrative capability. However, we do not estimate any cost or participation effects. It is possible that adopting these performance standards could generate program efficiencies and potential savings in the long-term, as applicants to sponsor the Program must demonstrate their ability to meet the performance standards for financial viability, administrative capability, and Program accountability to be able to operate the program. Cost impacts are difficult to quantify because any savings directly tied to the performance standards would be challenging to isolate.

2. Facilitating Compliance With Program Monitoring Requirements

a. First Week Site Visits

i. *Program Impact:* Existing regulations at § 225.15(d)(2) state that sponsors are required to visit each of their sites at least once during the first week of operation under the program and must promptly take such actions as are necessary to correct any deficiencies. Although USDA had previously waived this requirement on a nationwide basis for sponsors in good standing in the NSLP or CACFP, and sites that had operated successfully the previous year, these waivers were rescinded in 2018. USDA has also used COVID–19-related authority to waive first week site visit requirements nationwide, but this authority is not permanent and is intended to aid program operators during the public health emergency and as they transition back to normal operations. This final rule increases flexibility by requiring a site visit during the first two weeks of program operations for new sites, sites with operational problems in the prior year, and any site where the State agency determines a visit is needed. In addition, each State agency must establish criteria for what constitutes operational problems in order to help sponsors determine which of their returning sites are required to receive a site visit during first two weeks of program operations.

ii. *Cost Impact:* We estimate minimal changes in costs due to this provision. It provides additional flexibility to sponsors; therefore, this provision may create cost savings for sponsors, though we are not able to estimate any possible savings. While we are providing more flexibility to sponsors, which may appear to relax program integrity, this provision is adopting a risk-based approach to identifying sites to review,

an approach that has been recommended by recent research in the school meal programs to better target resources.<sup>2</sup>

b. Establishing the Initial Maximum Approved Level of Meals for Sites of Vended Sponsors

i. *Program Impact:* In order to allow sponsors of vended sites to make timely adjustments to program operations, USDA previously issued policy guidance clarifying that sponsors may request an increase to existing site caps at any time prior to the submission of the meal claim forms for reimbursement that includes meals served in excess of the site cap (SFSP 16–2015, *Site Caps in the Summer Food Service Program—Revised*, April 21, 2015). This rule codifies this flexibility in regulation, though State Agencies have the discretion to approve or deny the request.

ii. *Cost Impact:* This provision has already been implemented through policy guidance, so we do not estimate any participation or cost impacts as a result of this provision.

c. Statistical Monitoring Procedures, Site Selection, and Meal Claim Validation for Site Reviews

i. *Program Impact:* In order to provide flexibility to State agencies conducting sponsor and site reviews, current regulations at § 225.7(d)(8) provide State agencies with the flexibility to use statistical monitoring procedures in lieu of the site monitoring requirements found in § 225.7(d)(2). After significant research and feedback from State agencies obtained through various workgroups, USDA has determined that it is not feasible to develop a measure or formula that would be statistically significant and thus provide adequate monitoring of site meal claim forms. Accordingly, USDA is removing the provision at § 225.7(d)(8) allowing the use of statistical monitoring during site reviews and validation of meal claims. This rule also codifies the requirement that State agencies must create criteria for site selection using the site characteristics suggested by USDA as a guide. State agencies may, in selecting sites for review, use additional criteria including, but not limited to, findings of other audits or reviews, or any indicators of potential error in daily meal counts (e.g., identical, questionable, or very similar claiming patterns, or large changes in meal

counts). Further, the Department recognizes that the guidance for conducting 100 percent meal claim validations may be burdensome for some State agencies. Therefore, this rule recommends a stepped increase for meal claim validations (e.g., if the State agency reviews 10 percent of a sponsor's sites and finds a 5 percent or greater error rate, the State agency must take fiscal action and expand the meal validation review to 25 percent of the sponsor's sites; if a 5 percent or greater error rate is found, the State agency must then review 50 percent of the sponsor's sites; and if a 5 percent or greater rate continues to be found, then the State agency must review 100 percent of a sponsor's sites). This incremental approach will use State agency resources more efficiently, will provide State agencies a more targeted method for review, and will serve as the baseline for the minimum method of meal claim validation required; however, States have the flexibility to complete stricter validations as determined necessary, without approval as an additional State agency requirement.

ii. *Cost Impact:* These changes remove an unused option for site monitoring (statistical monitoring procedures) and increase State flexibility in how to conduct meal validation reviews. This provision impacts sponsors with more than one site (in 2015, 57 percent of sponsors had one site, while 43 percent of sponsors had more than one site).<sup>3</sup> The impact of the meal claim validation process will depend on the average error rate, which determines how many claims the State will ultimately review. USDA does not know the distribution of meal claim error rates in SFSP and cannot estimate how many fewer claims will be reviewed under this final rule and any corresponding administrative savings for the States. We note that there is some small potential for increased error in meal claims since this change leads to fewer meals being validated by the State agencies that might otherwise have chosen to validate all claims; however, this more targeted approach is an attempt to reduce burden on State agencies and sponsors while still identifying potential systemic issues and maintaining program integrity.

3. Providing a Customer-Service Friendly Meal Service

a. Meal Service Times

i. *Program Impact:* Section 225.16(c) of the regulations sets forth restrictions on when meals can be served in the

SFSP. Dating as far back as 1998, USDA has issued guidance that waived these requirements at certain sites where the requirements proved to create significant barriers to efficient program operations and good customer service for the communities served. The waiver of meal time restrictions helped decrease administrative burden and provided more local level control to sponsors to plan the most effective meal services, thereby improving program operations. In 2011, USDA published guidance that waived the meal service time restrictions for all SFSP sites while still requiring sponsors to submit meal service times to the State agency for approval (originating guidance has since been superseded and incorporated into SFSP 06–2017, *Meal Service Requirements in the Summer Meal Programs, with Questions and Answers—Revised*, December 05, 2016). These waivers were rescinded in 2018, as discussed in the background section of this final rule. In 2019, 42 State agencies requested a waiver of meal time restrictions to allow them to continue implementation of what had previously been in effect through guidance. Similar to the other rescinded waivers, USDA has used COVID–19-related authority to waive meal service time requirements nationwide during the public health emergency and as sponsors transition back to normal operations. This final rule amends § 225.16(c) to codify the previously available guidance into regulations, specifically to remove meal service time restrictions; add a requirement that a minimum of one hour elapse between the end of one meal service and the beginning of another (except for residential camps); allow a State agency to approve for reimbursement meals served outside of the approved meal service time if an unanticipated event occurs; and clarify that meals claimed as a breakfast must be served at or close to the beginning of a child's day, and prohibit a three component meal from being claimed for reimbursement as a breakfast if it is served after a lunch or supper is served.

ii. *Cost Impact:* This provision has already been implemented through waivers, so we do not estimate any participation or cost impacts as a result of this provision. When originally implemented, there did not appear to be major increases in service, but these waivers made operations smoother and decreased burden on program sponsors and sites.

b. Off-Site Consumption of Food Items

i. *Program Impact:* Regulations require that sponsors must agree to

<sup>2</sup> Rothstein, Melissa et al., *Assessment of the Administrative Review Process in School Meal Programs*, 2020, available online at <https://www.fns.usda.gov/cn/assessment-administrative-review-process-school-meal-programs>.

<sup>3</sup> 2015 USDA internal SFSP study.

“maintain children on site while meals are consumed” (§ 225.6(e)(15)). USDA has heard from stakeholders that, in some cases, the congregate feeding requirement poses a barrier to participation and compliance with program requirements. USDA initially issued guidance in 1998 that provided flexibilities for a fruit or vegetable item of the meal to be taken off-site for later consumption, with State agency approval, for sponsors with adequate staffing to administer this option (originating guidance has since been superseded and incorporated into SFSP 06–2017—*Meal Service Requirements in the Summer Meal Programs, with Questions and Answers—Revised*, December 5, 2016), which is still in effect. USDA subsequently amended this flexibility in response to stakeholder feedback that it could be implemented in a way that maintained health and safety requirements. This final rule codifies the flexibility for sponsors to allow children to take a single fruit, vegetable, or grain item off-site for later consumption, subject to State Agency approval.

ii. *Cost Impact:* This provision has already been implemented through policy guidance, so we do not estimate any participation or cost impacts as a result of this provision. This guidance (and now this provision) has almost certainly decreased food waste and provided flexibility for parents of young children participating in the program, though we are not able to estimate the value of food saved by this provision.

#### a. Offer Versus Serve

i. *Program Impact:* Current regulations in § 225.16(f)(1)(ii) allow SFAs that are program sponsors to “permit a child to refuse one or more items that the child does not intend to eat.” This concept is known as “offer versus serve” (OVS). The regulations also require that an SFA using the OVS option must follow the requirements for the NSLP set out in § 210.10. After observing SFA sponsors successfully utilizing the option for many years and receiving significant feedback from stakeholders, including Congressional testimony about the positive effects of OVS on reducing food waste and containing program costs, USDA extended the option to use OVS to non-SFA sponsors (SFSP 11–2011, *Waiver of Meal Time Restrictions and Unitized Meal Requirements in the Summer Food Service Program*, October 31, 2011). USDA continued to clarify policies surrounding OVS, including guidelines for required meal service components under the SFSP meal pattern (SFSP 08–2014, *Meal Service Requirements*,

November 12, 2013) and extending the use of the SFSP OVS meal pattern guidelines to SFA sponsors that had previously been required to follow the OVS requirements for the NSLP (SFSP 05–2015 (v.2), *Summer Meal Programs Meal Service Requirements Q&As—Revised*, January 12, 2015). These waivers and extensions of statutory and regulatory requirements pertaining to OVS were rescinded in 2018. In 2019, 37 State agencies requested a waiver of programs requirements to allow them to continue utilizing OVS as had previously been permitted through guidance. Nationwide waivers issued pursuant to COVID–19-related authorities have also been used to allow the continued use of these OVS options. However, section 13(f)(7) of the NSLA only authorizes SFAs to use OVS. The Department also has some concerns about the effective implementation of OVS by non-SFA sponsors based on on-site reviews and comments received. In light of these findings, and in order to ensure that program regulations remain in agreement with statute, this rule retains the requirement that only SFA sponsors may utilize the OVS option. This rule also allows SFA sponsors electing to use the SFSP meal pattern to use SFSP OVS guidelines.

ii. *Cost Impact:* It is possible that this provision has resulted in a small decrease in reimbursements for ineligible meals (which would have decreased improper payments to sponsors, resulting in a cost savings to the Federal Government), though we are unable to estimate this potential cost savings. Furthermore, it is possible that expanded use of OVS would decrease food waste in the SFSP, as recent research has found that the use of OVS in the NSLP is associated with decreased food waste in elementary schools.<sup>4</sup> However, no research exists that explicitly links the use of OVS to decreased costs, nor does any existent research show a link between the use of OVS and participation by students in NSLP. Therefore, we do not include any cost or participation effects associated with this provision. It is also possible that some SFA sponsors who would otherwise operate the SSO may switch to the SFSP to receive a higher reimbursement rate after this provision

<sup>4</sup> See U.S. Department of Agriculture, Food and Nutrition Service, Office of Policy Support, *School Nutrition and Meal Cost Study, Final Report Volume 4: Student Participation, Satisfaction, Plate Waste, and Dietary Intakes* by Mary Kay Fox, Elizabeth Gearan, Charlotte Cabili, Dallas Dotter, Katherine Niland, Liana Washburn, Nora Paxton, Lauren Olsho, Lindsay LeClair, and Vinh Tran, Project Officer: John Endahl, Alexandria, VA: 2019, p. 78.

is codified, but since this provision has already been implemented via waivers, we assume that most sponsors who would want to switch to the SFSP have already done so. We do note that a small percentage of total sites (9.6% of all sites) who were previously using OVS will no longer be eligible to use OVS, though we are not certain of the cost impacts on these sites, as we do not have any evidence on the cost impacts of OVS on program operators.<sup>5</sup>

#### 4. Clarification of Program Requirements

##### a. Reimbursement Claims for Meals Served Away From Approved Locations

i. *Program Impact:* SFSP meals are reimbursable only at approved sites. Via policy guidance, USDA granted State agencies the flexibility to approve exceptions to this requirement for the operation of field trips. This rule clarifies the regulatory requirements that if an SFSP sponsor wishes to serve a meal away from the approved site location, they are required to notify the State agency, but formal approval of the alternative meal service is not a federal requirement; however, the States have the discretion to require formal approval. The final rule grants State Agencies discretion on the condition for open sites. For example, if the State Agency permits an open site to close, the sponsor would still be required to notify the community of the change in meal service and provide information about alternative open sites. While USDA recognizes the additional burden this stipulation may place on some sponsors, sponsors enter into a written agreement with State agencies that attests they are capable of operating the program, and the site type they oversee. In consideration of this change, administering agencies should work closely with sponsors electing to operate a field trip and exercise special care to ensure that the sponsors of open sites have developed adequate procedures to resolve any potential issues. When it is not possible to continue operating at the approved site location, sponsors should have plans to ensure that children in the community are provided ample notification of changes in meal service and are directed to alternate sites to obtain a meal. Furthermore, State

<sup>5</sup> According to the most recently available USDA administrative data, approximately 60% of sites were SFA sites in July 2021. According to the Summer Meals Study (Report Volume 3, page 3–15), only 24% of non-SFA sites used OVS in 2018. This gives a total of 9.6% of all sites who will need to transition to meal service without the use OVS as a result of this rule ( $40\% \times 24\% = 9.6\%$ ). The Summer Meals Study is available online at <https://www.fns.usda.gov/cn/usda-summer-meals-study>.

agencies should consider site type during application to make sure sites are correctly classified and serving the community as intended.

ii. *Cost Impact:* This provision may reduce the burden on both State agencies and sponsors, if State agencies had interpreted previous guidance to mean that State agencies had to formally approve field trips, instead of simply receiving notification of the field trip. According to an internal USDA analysis, 76 percent of sponsors and 63 percent of sites reported serving program meals during off-site field trips at some point in time during the summer.<sup>6</sup> However, estimating any potential burden reduction is difficult because prior policy guidance on State approval for serving meals at an alternate location may have varied. As a result, this provision will provide a minimal reduction in burden for some States (*i.e.*, States that currently allow for service of field trip meals with just a notice to the State agency) and a larger impact for States that move from using a formal approval process to a notification-only process. This final rule codifies the flexibility to allow sponsors the option to receive reimbursement for meals served away from the approved site, and provides clarity on the requirement currently provided through policy guidance.

#### b. Timeline for Reimbursements to Sponsors

i. *Program Impact:* This provision clarifies a point of confusion for State agencies not addressed in existing regulations. The final rule states that if a sponsor's claim is determined to be potentially unlawful based on § 225.9(d)(10), the State agency must still disapprove the claim within 30 calendar days with an explanation of the reason for disapproval. This rule also amends regulations in § 225.9(d)(10) to clarify that State agencies may be exempt from the 45 calendar day timeframe for final action in § 225.9(d)(4) if more time is needed to complete a thorough examination of the sponsor's claim. Consistent with current guidance on other one-time exceptions for claims, State agencies must notify the appropriate FNS Regional Office (FNSRO) that they suspect fraud and will be taking the exemption to the 45 day timeline to conduct an expanded review by submitting to the FNSRO a copy of the

claim disapproval at the same time as it is provided to the sponsor.

ii. *Cost Impact:* We estimate no change in cost associated with this provision, as it merely allows States more time to investigate claims, which may increase program integrity.

#### c. Requirements for Media Release

i. *Program Impact:* Current regulations at § 225.15(e) outline the requirement for each sponsor operating the SFSP to annually announce the availability of free meals in the media serving the area from which it draws its attendance. However, USDA received questions from State agencies and analyzed data from management evaluations that show the current requirements are difficult to understand and implement correctly, leaving some State agencies and sponsors to make inadvertent errors in fulfilling the requirements. In accordance with the proposed rule, this final rule codifies current guidance allowing State agencies the discretion to issue a media release on behalf of all sponsors operating SFSP sites in the State, including camps and closed enrolled sites. In addition, this final rule modifies the proposed language to make clear that closed enrolled sites are only required to notify participants or enrolled children of the availability of free meals and if a free meal application is needed.

ii. *Cost Impact:* We estimate no change in cost associated with this provision. It should be noted that this requirement will likely result in a burden reduction, especially for sponsors of closed sites, such as camps, and potentially on all sponsors in a State, if the State agency issues a compliant statewide notification.

#### d. Annual Verification of Tax-Exempt Status

i. *Program Impact:* In order to be eligible to participate in the SFSP, sponsors must maintain their nonprofit status (§§ 225.2 and 225.14(b)(5)). In 2011, the Internal Revenue Service changed its filing requirements for some tax-exempt organizations. Failure to comply with these requirements could result in the automatic revocation of an organization's tax-exempt status. Due to this change, USDA released guidance for confirming sponsors' tax-exempt status, which requires that State agencies annually review a sponsor's tax-exempt status (SFSP 04–2017, *Automatic Revocation of Tax-Exempt Status—Revised*, December 1, 2016). Accordingly, this rule codifies the requirement for annual confirmation of

tax-exempt status at the time of application by amending § 225.14(b)(5).

ii. *Cost Impact:* This provision has already been implemented through policy guidance, so we do not estimate any participation or cost impacts as a result of this provision.

#### 4. Important Definitions in the SFSP

##### a. Self-Preparation Versus Vended Sites

i. *Program Impact:* As sponsor sophistication and technology have developed, the operation of SFSP has shifted. Most State agencies have systems that allow for site-based claiming, which provides more granular information about the number and types of meals being served at individual sites, rather than aggregating this information at the sponsor level. Additionally, as sponsors have grown, many used a mixed model of sponsorship, with some sites self-preparing meals and others utilizing a vendor contract to receive meals. In light of these changes, many State agencies have developed the ability to classify individual sites as self-preparation or vended, rather than classifying a sponsor and all of its sites as one type or the other. USDA is aware that some State agencies that have these capabilities also provide reimbursements based on the classification of the individual sites. This is important because providing reimbursements to sponsors that operate a mix of sites based on the individual site classification is more accurate and helps protect the integrity of the SFSP. As such, the regulations require updates that reflect the current nature of program operations. Accordingly, this rule adds definitions to § 225.2 for “self-preparation site” and “vended site”. Additionally, this rule clarifies requirements at § 225.6(c)(2) to require a summary of how meals will be obtained at each site as part of the sponsor application.

ii. *Cost Impact:* We estimate no change in cost associated with this provision. This change merely updates program definitions to align with the current nature of program operations. Commenters and USDA's own monitoring activities have indicated that all but several State agencies have systems that are equipped with site-level claiming mechanisms. USDA appreciates the efforts that State agencies have made to employ technological advances to modernize agency systems. Comments also indicated that there would be no impact on program operations in most States to implement site-level claiming because of this. However, among several State

<sup>6</sup> 2015 USDA internal SFSP study. (In 2015, USDA collected information about SFSP operations, sponsors, and sites through a nationally representative survey administered to State agencies, SFSP sponsors, and SFSP sites.)

agencies with systems that are not currently configured for site-level claiming. State agencies noted a belief that that implementation would result in increased costs due to additional monitoring and system requirements. However, sponsor classifications are still needed for State agencies that are not yet able to process claims at the site level. Therefore, although this rule establishes definitions for self-prep and vended sites, USDA is retaining the sponsor level definitions, which apply for States that are claiming at the sponsor level.

#### b. Eligibility for Closed Enrolled Sites

i. *Program Impact:* The definition of closed enrolled sites included in § 225.2 requires that at least 50 percent of the enrolled children at the site are eligible for free or reduced-price meals under the NSLP and the SBP, as determined by approval of applications in accordance with § 225.15(f). To reduce administrative burden on sponsors, USDA published guidance in 2002 that permitted closed enrolled sites nationwide to establish eligibility based on data of children eligible for free and reduced priced meals in the area where the site was located (*Summer Food Service Program (SFSP) Waiver for Closed Enrolled Sites*, November 17, 2002). This nationwide waiver was rescinded in 2018, as discussed in the background section of this final rule. After over 15 years of implementing this waiver, this flexibility has been shown to reduce administrative burden on sponsors of closed enrolled sites and eliminate barriers to participation for children and families enrolled at these sites. State agency requests for individual waivers for Program year 2019 confirm that these remain the principal benefits of permitting closed enrolled sites to rely on area eligibility rather than applications. Nationwide waivers issued pursuant to COVID-19-related authorities have also been used to allow the continued use of these policy options. Accordingly, this rule amends the definitions of “areas in which poor economic conditions exist” and “closed enrolled site” in § 225.2 to clarify eligibility requirements and include eligibility determination based on area data of children eligible for free and reduced-price meals. This rule also includes additional changes which require State agencies to have criteria for approving closed enrolled sites to ensure operation of a site as closed enrolled does not limit access to the community at large.

ii. *Cost Impact:* This definition has already been implemented through waivers, so we do not estimate any

participation or cost impacts as a result of this provision. The addition of the provision requiring States to ensure community access to meals during the approval of a closed site will ensure that program access will not be impacted if this provision results in an increase in closed sites; indeed, this requirement may lead to slightly more sites operating overall, though we are not able to estimate this potential effect.

#### c. Roles and Responsibilities of Site Supervisors

i. *Program Impact:* SFSP regulations did not have a singular definition outlining the roles and responsibilities of site supervisors. However, USDA does publish guidance specifically for site supervisors as a tool to facilitate program operations that are in compliance with regulations. The role of the site supervisor is critically important to proper management of the SFSP. Using a variety of methods (including nationwide studies conducted by the department), USDA has received the feedback that clearly defining the role of the site supervisor, including requiring that the site supervisor must be on site during the meal service, would greatly facilitate sponsors’ ability to comply with requirements and improve program integrity. However, the site supervisor may delegate tasks to another staff member so long as that staff member is overseen by the site supervisor and has appropriate training for the role that the individual is expected to fill. It is at the State agency’s discretion whether the sponsor must inform that State agency when a site supervisor delegates their duties to another staff member. Accordingly, this rule adds a definition at § 225.2 for site supervisor, which outlines the role and responsibilities required of a site supervisor.

ii. *Cost Impact:* We estimate no change in cost associated with this provision. This change merely adds a definition to align with the current nature of program operations.

#### d. Unaffiliated Sites

i. *Program Impact:* In the SFSP, many sponsors operate sites with which they have a legal affiliation. However, there are instances when a sponsor will provide meals to a site with which it has no legal affiliation other than an agreement to conduct a meal service. Section IV. C of this rule includes this type of situation as a characteristic that should be taken into consideration when determining which sites a State agency should choose to review during a sponsor review in order to fulfill requirements set forth in

§ 225.7(e)(4)(v). The regulations under § 225.2 did not include a definition for unaffiliated site. Therefore, this rule adds a definition for unaffiliated site (*i.e.*, a site that is legally distinct from the sponsor) to help State agencies determine which sites should be selected for review when conducting a sponsor review.

ii. *Cost Impact:* We estimate no change in cost associated with this provision. As stated in the rule, this definition is added to clarify existing program requirements, not to change program requirements.

#### e. Unanticipated School Closure

i. *Program Impact:* The NSLA allows service institutions to provide meal services to children who are not in school for a period during the months of October through April due to a natural disaster, building repair, court order, or similar cause. The statute further requires that the meal service must take place at non-school sites. While the regulations currently provide requirements for approving sponsors to serve during unanticipated school closures, there is not a specific regulatory definition of unanticipated school closure. This rule adds a definition of “unanticipated school closure” that aligns with statutory requirements outlined in section 13(c)(1) of the NSLA, 42 U.S.C. 1761(c)(1), and existing regulatory provisions related to unanticipated school closures.

ii. *Cost Impact:* We estimate no change in cost associated with this provision. As stated in the rule, this is a change in definition to clarify existing program requirements, not to change program requirements.

#### f. Nonprofit Food Service, Nonprofit Food Service Account, Net Cash Resources

i. *Program Impact:* Financial management in the SFSP is critical to the success of the program, especially considering the short duration during which most summer programs operate. As such, it is important that key terms related to financial management are clearly defined. To create consistency across Child Nutrition Programs, this rule includes definitions of nonprofit food service, nonprofit food service account, and net cash resources that align with the terms already defined under the National School Lunch Program in part 210.

ii. *Cost Impact:* We estimate no change in cost associated with this provision, as this provision is not changing the program requirements.

Providing these definitions ensures consistency across the SFSP and NSLP.

#### 5. Miscellaneous

##### a. Authority To Waive Statute and Regulations

i. *Program Impact:* Section 12(l) of the NSLA, (42 U.S.C 1760(l)), provides the Secretary with the authority to waive statutory requirements under the NSLA or the Child Nutrition Act of 1966 (42 U.S.C. 1771 *et seq.*), and any regulations issued under either Act for State agencies and eligible service providers if certain conditions are met. Although regulations are not needed to continue implementing waivers, this final rule adds waiver authority to the regulations to provide clarity for States and program operators. USDA routinely works with State agencies to determine when and how waiver authority can best be applied to improve program operations, and State agencies are responsible for monitoring sponsor activities, including the implementation of waivers. Under the changes in this rule, the State agency will also have the discretion to deny a waiver submitted by an eligible service provider—for example, if statutory requirements are not met, if the State agency does not have confidence that the sponsor has the capability to implement the waiver while maintaining a high level of program integrity, or if the State agency or the sponsor does not have the resources to properly implement, monitor, and evaluate the impacts of the waiver.

ii. *Cost Impact:* We estimate no change in cost associated with this provision. As stated in the rule, waiver authority already exists in the statute and adding it to the regulations does little to change how this process operates.

##### b. Duration of Eligibility

i. *Program Impact:* Statutory requirements found in the NSLA at 42 U.S.C. 1761(a)(1)(A)(i)(I–II) authorize the use of school data and census data to establish area eligibility in the SFSP. The NSLA also establishes that area eligibility determinations made using school or census data must be redetermined every five years. This rule amends the duration of eligibility for open sites and restricted open sites for school and census data from three years to five years, in accordance with the NSLA. Accordingly, this rule changes the regulations in redesignated

§§ 225.6(g)(1)(ix) and 225.6(g)(2)(iii) to require submission of eligibility documentation every five years.

ii. *Cost Impact:* We estimate no change in cost associated with this provision. The change will decrease the burden on sponsors using school or census data for area eligibility determinations of sites. We are not able to estimate any potential participation effects, but we note that there is very little annual variation in the census data, so any participation or eligibility effects are likely to be minimal.

##### c. Methods of Providing Training

i. *Program Impact:* As technology has advanced, sponsors and State agencies have the capability to provide mandatory trainings via the internet. Accordingly, this rule updates regulations at § 225.7(a) to include the option for training to be conducted via the internet.

ii. *Cost Impact:* The change may decrease training costs for State agencies and sponsors who switch from in-person trainings to online trainings, though we are not able to estimate this potential savings.

##### d. Meal Preparation Facility Review

i. *Program Impact:* Current regulations require that part of any review of a vended sponsor must include a food service management company facility visit. In order to clarify review requirements, this rule renames the section titled ‘Food Service Management Company Visits’ in current § 225.7(d)(6) to ‘Meal Preparation Facility Review.’ This rule also reorganizes the requirements in a more logical manner, amends this provision to clarify that each facility should be reviewed at least one time within the appropriate review cycle for each vended sponsor, and redesignate it as § 225.7(i). The final rule addresses oversight in the proposed rule by modifying the proposed language to clarify who is required to receive a review under this requirement, the purpose of these reviews, how often these reviews are required to take place, and who is responsible to conduct these reviews. The final rule clarifies that as part of the review of any vended sponsor that purchases unitized meals, with or without milk, to be served at a SFSP site, the State agency must review the facilities and meal production documentation of any food service management company from which the

sponsor purchases meals. If the sponsor does not purchase meals but does purchase management services within the restrictions specified in § 225.15, the State agency is not required to conduct a facility review. The final rule clarifies that State agencies are responsible for these reviews and are required to complete the facility review as a part of the vended sponsor review.

ii. *Cost Impact:* We estimate no change in cost associated with this provision. The change clarifies current requirements; it makes no changes to current requirements.

For the reasons stated above, we estimate that these new changes will not measurably impact participation, meal costs, or costs to State agencies, sponsors, or sites, beyond accounting for the decreased burden needed to fulfill program requirements under the changes, as the changes streamline and/or decrease administrative requirements, increase flexibilities for State agencies and/or sponsors, and/or provide clarity where current program requirements are unclear.

More generally, this action streamlines SFSP operations for both State agencies and program operators. It codifies policies that have proven effective in improving efficiencies in the operation of the SFSP. These flexibilities have provided significant relief from some program administrative burdens and have reduced paperwork for those sponsors experienced in other Child Nutrition Programs that wish to be SFSP operators. We estimate that there are no measurable increased costs to State agencies or SFSP operators and no Federal costs associated with implementation of this rule.

There may be some savings associated with this rule due to the reduction in burden associated with streamlining operations and reducing SFSP paperwork for experienced sponsors. Depending on the position of the staff person submitting the paperwork, this action is estimated to save approximately \$0.5 million annually if performed by an administrative-level position, or about \$1 million annually if performed by a director-level position. This will result in approximately \$2.7 million to \$5.2 million in savings over five years, depending on the position level of the person submitting the paperwork.<sup>7</sup> See the following tables for the detailed savings streams.

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Table 1: Estimated Savings from Reduced Reporting and Recordkeeping Costs

	Fiscal Year (\$ millions, nominal savings)					
	2023	2024	2025	2026	2027	Total
<b>Estimated Savings from Reduced Reporting and Recordkeeping Costs</b>						
High Estimate (director-level position)	-\$1.0	-\$1.0	-\$1.0	-\$1.1	-\$1.1	<b>-\$5.2</b>
Low Estimate (administrative assistant-level position)	-\$0.5	-\$0.5	-\$0.5	-\$0.6	-\$0.6	<b>-\$2.7</b>

Table 2: Discounted Savings Streams

	Fiscal Year (\$ millions, 2022 dollars)					
	2023	2024	2025	2026	2027	Total
Discounted savings stream						
Low Estimate (administrative assistant-level position)						
3 percent	-\$0.5	-\$0.5	-\$0.5	-\$0.5	-\$0.5	-\$2.5
7 percent	-\$0.5	-\$0.5	-\$0.4	-\$0.4	-\$0.4	-\$2.2
High Estimate (director-level position)						
3 percent	-\$1.0	-\$1.0	-\$1.0	-\$1.0	-\$1.0	-\$4.8
7 percent	-\$0.9	-\$0.9	-\$0.9	-\$0.8	-\$0.8	-\$4.3

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*Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601–612) requires Agencies to analyze the impact of rulemaking on small entities and consider alternatives that would minimize any significant

<sup>7</sup> These ranges were calculated by taking the hourly total compensation from BLS for FY2021 (for all State and Local workers for the director-level position estimate, and for a private administrative

impacts on a substantial number of small entities. Pursuant to that review, the Secretary certifies that this rule will not have a significant impact on a substantial number of small entities. The totality of the changes made by the final rule aim to decrease overall burden on the affected parties, which include

assistant for the administrative-level estimate) and inflating that hourly total compensation figure according to the CPI-W increase in OMB's economic assumptions for the FY2023 President's

the small entities covered by the final rule (i.e., small sponsors and sites). However, the majority of the rule's provisions are currently in effect via policy guidance or State waivers. In addition, changes that will affect burden primarily impact State agencies and larger sponsors, such as the requirement

Budget for years FY2023–FY2027. That hourly compensation figure was then multiplied by the decrease in burden hours as estimated in the ICR to generate the yearly and 5-year savings estimate.

that State agencies share information and the multi-step approach for States conducting claim validations.

#### **Unfunded Mandates Reform Act**

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local and tribal governments and the private sector. Under section 202 of the UMRA, USDA generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures by State, local or tribal governments, in the aggregate, or the private sector, of \$146 million or more (when adjusted for inflation; GDP deflator source: Table 1.1.9 at <http://www.bea.gov/iTable>) in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires USDA to identify and consider a reasonable number of regulatory alternatives and adopt the most cost-effective or least burdensome alternative that achieves the objectives of the rule. This final rule does not contain Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local and tribal governments or the private sector of \$146 million or more in any one year. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

#### **Executive Order 12372**

SFSP is listed in the Assistance Listings under the Catalog of Federal Domestic Assistance Number 10.559 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials (see 2 CFR chapter IV). Since SFSP is State-administered, USDA has formal and informal discussions with State and local officials, including representatives of Indian tribal organizations, on an ongoing basis regarding program requirements and operations. This provides USDA with the opportunity to receive regular input from State administrators and local program operators, which contributes to the development of feasible requirements.

#### **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 and either impose substantial direct compliance costs on State and local governments or preempt State law, agencies are directed to provide a statement for inclusion in

the preamble to the regulations describing the agency’s considerations in terms of the three categories called for under section 6(b)(2)(B) of Executive Order 13132. USDA has determined that this rule does not have Federalism implications. This rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, nor does it impose substantial or direct compliance costs on State and local governments. Therefore, under section 6(b) of the Executive Order, a Federalism summary impact statement is not required.

#### **Executive Order 12988**

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full and timely implementation. This rule is not intended to have retroactive effect. Prior to any judicial challenge to the application of the provisions of this rule, all applicable administrative procedures must be exhausted.

#### **Civil Rights Impact Analysis**

FNS has reviewed the final rule, in accordance with the Department Regulation 4300–004, “Civil Rights Impact Analysis” to identify and address any major civil rights impacts the final rule might have on participants on the basis of age, race, color, national origin, sex, or disability. Due to the unavailability of data, USDA is unable to determine whether this rule will have an adverse or disproportionate impact on protected classes among entities that administer and participate in the Child Nutrition Programs. However, FNS Civil Rights Division finds that the current mitigation and outreach strategies outlined in the regulation and this CRIA are intended to minimize the impacts on Child Nutrition program participants if implemented. If deemed necessary, the FNS Civil Rights Division will propose further mitigation to alleviate impacts that may result from the implementation of the final rule.

#### **Executive Order 13175**

This proposed rule has been reviewed in accordance with the requirements of Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a

government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

Food and Nutrition Service hosted a listening session to inform Tribal Nations about this rulemaking. When considering the promulgation of this rule to impact State authority in Tribal issues, the fulfillment of tribal treaty rights on the provision of food, and the relinquishment of USDA’s authority to review tribal waivers as directed by Executive Order 13175, Sec. 6, USDA has determined that this rule does have substantial direct effects on one or more Tribes. FNS will work with the USDA Office of Tribal Relations to ensure that meaningful consultation occurs.

#### **Paperwork Reduction Act**

The Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35; see 5 CFR part 1320) requires the Office of Management and Budget (OMB) to approve all collections of information by a Federal agency before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number.

In accordance with the Paperwork Reduction Act of 1995, this final rule will create information collection requirements and revise existing information collection burdens for OMB Control Number 0584–0280 7 CFR part 225, Summer Food Service Program, that are subject to review and approval by OMB. In connection with the proposed rule, “Streamlining Program Requirements and Improving Integrity in the Summer Food Service Program”, published in the **Federal Register** on January 23, 2020 (85 FR 4064), USDA submitted an Information Collection Request (ICR) discussing the information requirements impacted by the rule to OMB for review. The final rule codifies into regulations many of the provisions incorporated under the proposed rule, as well as modifies some to ensure compliance by State agencies and program operators. It also adds additional integrity safeguards that were not incorporated under the proposed rule. The majority of the information collection requirements and associated burdens will remain the same as previously proposed; however, there are a few changes in the requirements and

burden, which are outlined below and in the associated ICR.

*Explanatory Note on Existing Information Collection Requirements Without OMB Approval and Rounding Revisions (OMB#0584–0280)*

USDA published a 60-day **Federal Register** Notice (FRN) on July 23, 2021 (86 FR 38974) for public comment on the proposed revision to include existing information collection requirements in use without OMB approval into OMB control number 0584–0280. In addition, FNS took the opportunity provided by this proposed revision to correct for rounding errors in the total estimated burden hours currently approved for the collection. The 60-day FRN (86 FR 38974) outlines the previous reporting burden being used without OMB approval, and the estimated changes in burden to the collection under the revision request. The public comment period for the 60-

day FRN ended on September 21, 2021. USDA is submitting the revision request to OMB for review and approval. Once approved, the revision request will establish the baseline burden for this final rule ICR, and as such, this PRA summary and associated ICR assume approval for the revisions under the standalone revision request.

In addition, this final rule is expected to reduce the reporting burden associated with one of the information collection requirements being incorporated under the revision request. Under current regulations, sponsors are required to visit each of their sites at least once during the first week of operation under the Program (7 CFR 225.15(d)(2)). The burden associated with this existing monitoring requirement was overlooked in the previous approval of 0584–0280. A revised 0584–0280 package will be submitted that will include the burden for the existing monitoring requirement.

As a result of the program changes and adjustments discussed in the aforementioned 60 day FRN, due to the addition of previously omitted reporting requirements and the administrative adjustment for rounding errors, the revised burden for the collection increased to a total of 462,699 hours and 391,795 responses. These figures are included in the section below entitled “Summary of OMB Approval Prior to Rule and Impact of Final Rule.”

For transparency and to provide clarity regarding the impact of the changes in this rulemaking, the table below shows the impact that the final rule will have once the estimated burden changes in the revision request are reviewed by OMB and are incorporated into the new baseline estimates for OMB control number 0584–0280.

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<b>Estimated Changes to the Estimated Baseline in Reporting Burden under OMB# 0584-0280 as a Result of the Final Rule</b>								
Description of activities	Regulation citation	Estimated number of respondents	Frequency of response	Total annual responses	Average burden hours per response	Estimated total annual burden hours	Hours currently approved	Estimated change in burden hours due to rulemaking
State/Local/Tribal Government Level (sponsors)								
Sponsors must visit each of their sites, as specified, at least once during the first two weeks of operation under the program.	225.15(d)(2)	3,314	5	16,570	0.5	8,285	14,913	-6,628
Businesses or Other For Profit, or Not for Profit (sponsors)								
Sponsors must visit each of their sites, as specified, at least once during the first two weeks of operation under the program.	225.15(d)(2)	2,210	5	11,050	0.5	5,525	9,945	-4,420
Total reporting burden for 225.15(d)(2) under the final rule		5,524	5	27,620	0.5	13,810		

Total reporting burden for 225.15(d)(2) under revision request to 0584-0280*		5,524	9	49,716	0.5	24,858		
Total change in reporting burden due to the rule				-22,096		-11,048		-11,048

\* the standalone revision request estimates that incorporation of the first week site visit requirements will add 29,826 responses for local and tribal government sponsors and 19,890 responses for business sponsors, for a total of 49,716 responses.

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Relative to these corrected burden estimates for the site visit requirements under 7 CFR 225.15(d)(2) specifically, USDA estimates that this final rule will decrease the reporting burden by 11,048 hours ((8,285–14,913) + (5,525–9,945)) and 22,096 responses ((16,570–29,826) + (11,050–19,890)) from the estimated reporting burden shown in the baseline revision to OMB control number 0584–0280.

The final rule makes other changes to reporting requirements that result in increases in burden hours and responses; however, in total, the changes codified through this rulemaking will result in a total reduction in burden. Under the proposed rule ICR, USDA estimated the changes would reduce the burden by 6,590 hours and 21,298 responses. With the additional changes under the final rule, USDA estimates the rulemaking will reduce the total burden by 17,166 hours and 37,814 responses. Specific changes to the existing burdens above are explained in the summary table for 0584–0280 below, and in the associated ICR.

Thus, in accordance with the Paperwork Reduction Act of 1995, the information collection requirements associated with this final rule, which were filed under OMB control number 0584–0280, have been (or will be) submitted for approval to OMB. When OMB notifies USDA of its decision, USDA will publish a notice in the **Federal Register** of the action.

*Title:* 7 CFR part 225, Summer Food Service Program.

*OMB Control Number:* 0584–0280.

*Expiration Date:* 12/31/2022.

*Type of Request:* Revision.

*Abstract:* This is a revision of existing information collection requirements under OMB Control Number 0584–0280 that are being impacted by this final rulemaking as well as new information collection requirements. This final rule

impacts information reporting burdens for State agencies and sponsors in SFSP by codifying into regulations changes that have been tested through policy guidance to streamline program requirements and facilitate program compliance, and by adding additional safeguards to ensure program integrity. Some of the provisions modify current regulations, resulting in revisions to existing requirement burdens, while other provisions are new and result in new mandatory reporting burdens.

First, at 7 CFR 225.15(d)(2), this final rule amends current regulations which require sponsors to visit each of their sites at least once during the first week of operation in the program. USDA proposed to amend this requirement to provide flexibility in the timeframe during which these site visits took place for larger sponsors. However, in response to comments on the proposed changes, USDA revised its initial proposal in a way that balances program integrity and administrative flexibilities. Under this final rule, sponsors must conduct a site visit in the first two weeks of operation for all new sites, sites that had operational problems in the prior year, and any or all sites the State agency determines need a visit. Under the proposed rule, the changes were not anticipated to result in a change in burden; therefore, the burden associated with this requirement was not included in the proposed rule ICR. USDA expects this final rule action to decrease the reporting burden for SFSP sponsors.

In addition, this final rule adds the new requirement that each State agency must establish criteria for sponsors to follow when determining which of their returning sites with operational problems noted in the prior year are required to receive a site visit during the first two weeks of program operations in a new § 225.7(o). This requirement is

expected to result in an increase in reporting burden for State agencies.

Second, this final rule codifies new requirements at § 225.6(i)(7)(v), and adds a new § 225.16(g) to allow sponsors the option to receive reimbursement for meals served away from the approved site. Consistent with the proposed rule, sponsors are required to notify the State agency in advance that meals will be served away from the site, but formal approval of the alternative meal service is not a requirement. However, the burden associated with the requirement for advanced notification was not accounted for in the proposed rule ICR. Therefore, USDA is adding this burden in the final rule ICR as a new reporting burden for sponsors. The requirement is expected to increase the reporting burden for sponsors.

And third, at § 225.9(d)(10), this final rule will codify that, in cases where the State agency needs to complete an extended review of a claim submitted for reimbursement due to concerns of unlawful acts, the State agency may be exempt from the 45 calendar day timeframe to forward reimbursement to sponsors specified in § 225.9(d)(4). In such cases, under the final rule, the State agency is required to send notification to the FNS Regional Office (FNSRO) that they suspect fraud and will be taking the exemption to the timeline to conduct an expanded review. This is a change from the proposed rule ICR in response to public comments received, and is expected to result in an increase in reporting burden for approximately four State agencies annually.

The final rule codifies the proposed changes that streamline application requirements for experienced SFSP sponsors, and school food authorities and Child and Adult Care Food Program institutions in good standing applying to participate in SFSP, which will

eliminate duplicative documentation and paperwork and decrease the time needed to apply to participate and enter into a written agreement with the State. The streamlined application process includes the proposed changes to the submission of site information and demonstration of financial and administrative capability (§§ 225.6(c)(1)-(4), 225.6(i), 225.14(a), and 225.14(c)). In addition, the rule codifies a modification to the proposed meal claim validation method that reduces the portion of meal claims that need to be validated as part of the sponsor review (based on the amount of error detected) (§ 225.7(e)(6)). The impact of these changes are expected to be consistent with the proposed rule ICR burden estimates, and thus, these burden estimates have not changed from the proposed rule ICR. However, the proposed rule burden chart incorrectly reported an estimated average of one hour per response for new and experienced business sponsors to submit site information (§ 225.6(c)(2)-(3)). The changes under the final rule are expected to decrease the time to submit site information from one hour to approximately 53 minutes (0.89 hours), as it was proposed and correctly reported for local and tribal government sponsors in the proposed rule PRA summary and ICR. The estimates for these requirements are presented along

with the changes due to the final rulemaking in the summary tables below, and in the associated ICR.

Furthermore, under this rule, USDA is codifying current guidance allowing State agencies the discretion to issue a media release on behalf of all sponsors operating SFSP sites, including camps, in the State. This burden is reflected in OMB control number 0584–0280. As with the proposed rule, USDA does not expect the provisions outlined in this rule to have any impact on the burden related to the media releases; therefore, as with the proposed rule, they are not included as part of rulemaking submission for PRA approval.

Finally, as noted in the explanatory note above, the standalone revision request corrected rounding errors to the baseline burden for the collection. Also, some of the estimates presented in the summary table of the proposed rule PRA were rounded. Therefore, the totals in the summary table below and in the associated ICR may differ slightly from those presented in the proposed rule PRA summary and ICR tables.

#### **Summary of OMB Approval Prior to Rule and Impact of Final Rule**

OMB control number 0584–0280 is currently approved with 63,942 respondents, 391,795 responses, and 462,699 burden hours. USDA estimates that the final rule will decrease the

reporting burden by 17,166 hours and 37,814 responses, resulting in a total revised burden of 445,533 hours and 353,981 responses for OMB control number 0584–0280. The total burden inventory for this final rule is 233,537 hours. The average burden per response and the annual burden hours are explained below and summarized in the charts which follow.

#### **Estimated Annual Burden Change as a Result of Rule**

*Affected Public:* State, Local, or Tribal Government and Businesses or Other For Profit, or Not for Profit. Respondent groups identified include State Agencies and local, tribal, and business sponsors.

*Estimated Number of Respondents:* 5,577, which includes 53 State Agencies and 5,524 sponsors (3,314 Local and Tribal Government sponsors and 2,210 business sponsors).

*Estimated Number of Responses per Respondent:* 8.65.

*Estimated Total Annual Responses:* 48,267.14.

*Estimated Time per Response:* 4.84.

*Estimated Burden Hours:* 233,537.23.

*Estimated Total Annual Burden on Respondents:* 445,533.

*Current OMB Inventory:* 462,699.

*Difference (Burden Revisions Requested):* – 17,166.

**BILLING CODE 3410–30–P**

Estimated Annual Reporting Burden for 0584-0280 as a Result of the Rule								
Regulation citation	Description of activities	Estimated number of respondents	Frequency of responses	Total annual responses	Average burden hours per response	Estimated total annual burden hours	Hours currently approved under OMB #0584-0280	Estimated change in burden hours due to rulemaking
<b>Reporting</b>								
<b>State/Local/Tribal Government</b>								
<u>State Agencies</u>								
225.7(e)(6)	State agencies utilize a multi-step process for meal claim validation based on amount of error detected.	53	65.38	3,465.14	.083	287.61	2,055.39	-1767.78
225.7(o)	State agencies establish criteria for sponsors to use when determining which sites with operational problems in the prior year are required to receive a site visit within the first two weeks of operation.	53	1.00	53	0.25	13.25	0	13.25
225.9(d)(10)	State agency notify FNSRO of taking exemption to 45 day calendar day timeframe for final action on a claim to conduct expanded	4	1	4	0.083	0.33	0	0.33

	review of suspected fraud.							
<u>Local and Tribal Governments</u>								
225.6(c)(1) and (4), 225.14(a), 225.14(c)	Sponsors submit written application to State agencies for participation in SFSP.	3,314	1	3,314	38.74	128,384.36	130,903.00	-2,518.64
225.6(c)(2) and (3)	Sponsors submit site information for each site where a food service operation is proposed.	640	1	640	0.89	569.60	640	-70.40
225.6(c)(2) and (3)	Experienced Sponsors submit site information for each site where a food service operation is proposed.	2,675	1	2,675	0.89	2,380.75	2,675	-294.25
225.6(i), 225.14(e)(7)	Sponsors approved for participation in SFSP enter into written agreements with State agencies to operate program in accordance with regulatory requirements.	332	1	332	0.093	30.88	40.84	-9.96
225.15(d)(2)	Sponsors must conduct a site visit during the first two weeks of operation for new sites, sites with operational problems, and any site	3,314	5	16,570	0.50	8,285	14,913	-6,628

	where the State agency deems a visit is necessary.							
225.16(g)	Sponsor must provide advanced notification to State agency about meals served away from approved locations.	3,314	1	3,314	0.083	275.06	0	275.06
State/ Local/ Tribal Govt. Change		3,367	9.02	30,367.14	4.62	140,226.84	151,227.23	-11,000.39
<b>Businesses or Other For Profit, or Not for Profit</b>								
<u>Sponsors (Non-profit institutions and camps)</u>								
225.6(c)(1) and (4), 225.14(a), 225.14(c)	Sponsors submit written application to State agencies for participation in SFSP.	2,210	1	2,210	38.74	85,615.40	87,295.00	-1,679.60
225.6(c)(2) and (3)	Sponsors submit site information for each site where a food service operation is proposed.	426	1	426	0.89	379.14	426	-46.86
225.6(c)(2) and (3)	Experienced Sponsors submit site information for each site where a food service operation is proposed.	1,783	1	1,783	0.89	1,586.87	1,783	-196.13
225.6(i), 225.14(c)(7)	Sponsors approved for participation in SFSP enter into written agreements with State agencies to operate program in	221	1	221	0.093	20.55	27.18	-6.63

	accordance with regulatory requirements.							
225.15(d)(2)	Sponsors must conduct a site visit during the first two weeks of operation for new sites, sites with operational problems, and any site where the State agency deems a visit is necessary.	2,210	5	11,050	0.50	5,525	9,945	-4,420
225.16(g)	Sponsor must provide advanced notification to State agency about meals served away from approved locations.	2,210	1	2,210	0.083	183.43	0	183.43
Business Change		2,210	8.10	17,900	5.21	93,310.39	99,476.18	- 6,165.79
Total Reporting		5,577	8.65	48,267.14	4.84	233,537.23	250,703.41	-17,166.18

\*Totals may differ due to rounding

SUMMARY OF BURDEN (OMB #0584-0280)	
TOTAL NO. RESPONDENTS	63,942
AVERAGE NO. RESPONSES PER RESPONDENT	5.54
TOTAL ANNUAL RESPONSES	353,981
AVERAGE HOURS PER RESPONSE	1.26
TOTAL ANNUAL BURDEN HOURS REQUESTED	445,533
CURRENT OMB INVENTORY	462,699
DIFFERENCE	-17,166

BILLING CODE 3410-30-C

**E-Government Act Compliance**

USDA is committed to complying with the E-Government Act, 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.

**List of Subjects**

7 CFR Part 210

Grant programs—education, Grant programs—health, Infants and children, Nutrition, Penalties, Reporting and

recordkeeping requirements, School breakfast and lunch programs, Surplus agricultural commodities.

7 CFR Part 215

Food assistance programs, Grant programs—education, Grant program—health, Infants and children, Milk,

Reporting and recordkeeping requirements.

7 CFR Part 220

Grant programs—education, Grant programs—health, Infants and children, Nutrition, Reporting and recordkeeping requirements, School breakfast and lunch programs.

7 CFR Part 225

Food assistance programs, Grant programs—health, Infants and children, Labeling, Reporting and recordkeeping requirements.

7 CFR Part 226

Accounting, Aged, Day care, Food assistance programs, Grant programs, Grant programs—health, American Indians, Individuals with disabilities, Infants and children, Intergovernmental relations, Loan programs, Reporting and recordkeeping requirements, Surplus agricultural commodities.

Accordingly, 7 CFR parts 210, 220, 215, 225, and 226 are amended as follows:

PART 210—NATIONAL SCHOOL LUNCH PROGRAM

■ 1. The authority citation for part 210 continues to read as follows:

Authority: 42 U.S.C. 1751–1760, 1779.

■ 2. In § 210.3, add paragraph (e) to read as follows:

§ 210.3 Administration.

\* \* \* \* \*

(e) Authority to waive statute and regulations. (1) As authorized under section 12(l) of the Richard B. Russell National School Lunch Act, FNS may waive provisions of such Act or the Child Nutrition Act of 1966, as amended, and the provisions of this part with respect to a State agency or eligible service provider. The provisions of this part required by other statutes may not be waived under this authority. FNS may only approve requests for a waiver that are submitted by a State agency and comply with the requirements at section 12(l)(1) and the limitations at section 12(l)(4), including that FNS may not grant a waiver that increases Federal costs.

(2)(i) A State agency may submit a request for a waiver under paragraph (e)(1) of this section in accordance with section 12(l)(2) and the provisions of this part.

(ii) A State agency may submit a request to waive specific statutory or regulatory requirements on behalf of eligible service providers that operate in the State. Any waiver where the State

concurr must be submitted to the appropriate FNSRO.

(3)(i) An eligible service provider may submit a request for a waiver under paragraph (e)(1) of this section in accordance with section 12(l) and the provisions of this part. Any waiver request submitted by an eligible service provider must be submitted to the State agency for review. A State agency must act promptly on such a waiver request and must deny or concur with a request submitted by an eligible service provider.

(ii) If a State agency concurs with a request from an eligible service provider, the State agency must promptly forward to the appropriate FNSRO the request and a rationale, consistent with section 12(l)(2), supporting the request. By forwarding the request to the FNSRO, the State agency affirms:

(A) The request meets all requirements for waiver submissions; and,

(B) The State agency will conduct all monitoring requirements related to regular Program operations and the implementation of the waiver.

(iii) If the State agency denies the request, the State agency must notify the requesting eligible service provider and state the reason for denying the request in writing within 30 calendar days of the State agency’s receipt of the request. The State agency response is final and may not be appealed to FNS.

PART 215—SPECIAL MILK PROGRAM FOR CHILDREN

■ 3. The authority citation for part 215 continues to read as follows:

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

■ 4. In § 215.3, add paragraph (e) to read as follows:

§ 215.3 Administration.

\* \* \* \* \*

(e) Authority to waive statute and regulations. (1) As authorized under section 12(l) of the Richard B. Russell National School Lunch Act, FNS may waive provisions of such Act or the Child Nutrition Act of 1966, as amended, and the provisions of this part with respect to a State agency or eligible service provider. The provisions of this part required by other statutes may not be waived under this authority. FNS may only approve requests for a waiver that are submitted by a State agency and comply with the requirements at section 12(l)(1) and the limitations at section 12(l)(4), including that FNS may not grant a waiver that increases Federal costs.

(2)(i) A State agency may submit a request for a waiver under paragraph (e)(1) of this section in accordance with section 12(l)(2) and the provisions of this part.

(ii) A State agency may submit a request to waive specific statutory or regulatory requirements on behalf of eligible service providers that operate in the State. Any waiver where the State concurs must be submitted to the appropriate FNSRO.

(3)(i) An eligible service provider may submit a request for a waiver under paragraph (e)(1) of this section in accordance with section 12(l) and the provisions of this part. Any waiver request submitted by an eligible service provider must be submitted to the State agency for review. A State agency must act promptly on such a waiver request and must deny or concur with a request submitted by an eligible service provider.

(ii) If a State agency concurs with a request from an eligible service provider, the State agency must promptly forward to the appropriate FNSRO the request and a rationale, consistent with section 12(l)(2), supporting the request. By forwarding the request to the FNSRO, the State agency affirms:

(A) The request meets all requirements for waiver submissions; and,

(B) The State agency will conduct all monitoring requirements related to regular Program operations and the implementation of the waiver.

(iii) If the State agency denies the request, the State agency must notify the requesting eligible service provider and state the reason for denying the request in writing within 30 calendar days of the State agency’s receipt of the request. The State agency response is final and may not be appealed to FNS.

PART 220—SCHOOL BREAKFAST PROGRAM

■ 5. The authority citation for part 220 continues to read as follows:

Authority: 42 U.S.C. 1773, 1779, unless otherwise noted.

■ 6. In § 220.3, add paragraph (f) to read as follows:

§ 220.3 Administration.

\* \* \* \* \*

(f) Authority to waive statute and regulations. (1) As authorized under section 12(l) of the Richard B. Russell National School Lunch Act, FNS may waive provisions of such Act or the Child Nutrition Act of 1966, as amended, and the provisions of this part with respect to a State agency or eligible

service provider. The provisions of this part required by other statutes may not be waived under this authority. FNS may only approve requests for a waiver that are submitted by a State agency and comply with the requirements at section 12(l)(1) and the limitations at section 12(l)(4), including that FNS may not grant a waiver that increases Federal costs.

(2)(i) A State agency may submit a request for a waiver under paragraph (f)(1) of this section in accordance with section 12(l)(2) and the provisions of this part.

(ii) A State agency may submit a request to waive specific statutory or regulatory requirements on behalf of eligible service providers that operate in the State. Any waiver where the State concurs must be submitted to the appropriate FNSRO.

(3)(i) An eligible service provider may submit a request for a waiver under paragraph (e)(1) of this section in accordance with section 12(l) and the provisions of this part. Any waiver request submitted by an eligible service provider must be submitted to the State agency for review. A State agency must act promptly on such a waiver request and must deny or concur with a request submitted by an eligible service provider.

(ii) If a State agency concurs with a request from an eligible service provider, the State agency must promptly forward to the appropriate FNSRO the request and a rationale, consistent with section 12(l)(2), supporting the request. By forwarding the request to the FNSRO, the State agency affirms:

(A) The request meets all requirements for waiver submissions; and,

(B) The State agency will conduct all monitoring requirements related to regular Program operations and the implementation of the waiver.

(iii) If the State agency denies the request, the State agency must notify the requesting eligible service provider and state the reason for denying the request in writing within 30 calendar days of the State agency's receipt of the request. The State agency response is final and may not be appealed to FNS.

**PART 225—SUMMER FOOD SERVICE PROGRAM**

■ 7. The authority citation for part 225 continues to read as follows:

**Authority:** Secs. 9, 13 and 14, Richard B. Russell National School Lunch Act, as amended (42 U.S.C. 1758, 1761 and 1762a).

■ 8. In part 225, revise all references to "State Children's Health Insurance

Program" and "SCHIP" to read "Children's Health Insurance Program" and "CHIP", respectively.

■ 9. In § 225.2:

■ a. Revise the definitions of "Areas in which poor economic conditions exist" and "Closed enrolled site", ;

■ b. In the definition of "Documentation", redesignate paragraphs (a)(1) through (4) as paragraphs (1)(i) through (iv), respectively, and redesignate paragraphs (b)(1) and (2) as paragraphs (2)(i) and (ii), respectively;

■ c. Revise the definition of "Needy children";

■ d. Add in alphabetical order definitions for "Net cash resources", "Nonprofit food service", and "Nonprofit food service account"; and

■ e. Revise the definitions of "Open site" and "Restricted open site";

■ f. Add in alphabetical order definitions for "Self-preparation site", "Site supervisor", "Unaffiliated site", "Unanticipated school closure", and "Vended site".

The revisions and additions read as follows:

**§ 225.2 Definitions.**

\* \* \* \* \*

*Areas in which poor economic conditions exist* means:

(1) The attendance area of a school in which at least 50 percent of the enrolled children have been determined eligible for free or reduced-price school meals under the National School Lunch Program and the School Breakfast Program;

(2) A geographic area where, based on the most recent census data available or information provided from a department of welfare or zoning commission, at least 50 percent of the children residing in that area are eligible for free or reduced-price school meals under the National School Lunch Program and the School Breakfast Program;

(3) A geographic area where a site demonstrates, based on other approved sources, that at least 50 percent of the children enrolled at the site are eligible for free or reduced-price school meals under the National School Lunch Program and the School Breakfast Program; or

(4) A closed enrolled site in which at least 50 percent of the enrolled children at the site are eligible for free or reduced-price school meals under the National School Lunch Program and the School Breakfast Program, as determined by approval of applications in accordance with § 225.15(f).

\* \* \* \* \*

*Closed enrolled site* means a site which is open only to enrolled children,

as opposed to the community at large, and in which at least 50 percent of the enrolled children at the site are eligible for free or reduced-price school meals under the National School Lunch Program and the School Breakfast Program, as determined by approval of applications in accordance with § 225.15(f), or on the basis of documentation that the site meets paragraph (1), (2), or (3) of the definition of "Areas in which poor economic conditions exist" as provided in this section.

\* \* \* \* \*

*Needy children* means children from families whose incomes are equal to or below the Secretary's published Child Nutrition Programs: Income Eligibility Guidelines.

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

\* \* \* \* \*

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

*Nonprofit food service account* means the restricted account in which all of the revenue from all food service operations conducted by the sponsor principally for the benefit of children is retained and used only for the operation or improvement of the nonprofit food service. This account must include, as appropriate, non-Federal funds used to support program operations, and proceeds from non-program foods.

\* \* \* \* \*

*Open site* means a site at which meals are made available to all children in the area and which is located in an area in which at least 50 percent of the children are from households that would be eligible for free or reduced price school meals under the National School Lunch Program and the School Breakfast Program, as determined in accordance with paragraph (1), (2), or (3) of the definition of "Areas in which poor economic conditions exist."

\* \* \* \* \*

*Restricted open site* means a site which is initially open to broad community participation, but at which the sponsor restricts or limits attendance for reasons of security, safety

or control. Site eligibility for a restricted open site shall be documented in accordance with paragraph (1), (2), or (3) of the definition of “Areas in which poor economic conditions exist.”

\* \* \* \* \*

*Self-preparation site* means a site that prepares the majority of meals that will be served at its site or receives meals that are prepared at its sponsor’s central kitchen. The site does not contract with a food service management company for unitized meals, with or without milk, or for management services.

\* \* \* \* \*

*Site supervisor* means the individual on site for the duration of the meal service, who has been trained by the sponsor, and is responsible for all administrative and management activities at the site, including, but not limited to: maintaining documentation of meal deliveries, ensuring that all meals served are safe, and maintaining accurate point of service meal counts.

\* \* \* \* \*

*Unaffiliated site* means a site that is legally distinct from the sponsor.

\* \* \* \* \*

*Unanticipated school closure* means any period from October through April (or any time of the year in an area with a continuous school calendar) during which children who are not in school due to a natural disaster, building repair, court order, labor-management disputes, or, when approved by the State agency, similar cause, may be served meals at non-school sites through the Summer Food Service Program.

\* \* \* \* \*

*Vended site* means a site that serves unitized meals, with or without milk, that are procured through a formal agreement or contract with:

- (1) Public agencies or entities, such as a school food authority;
- (2) Private, nonprofit organizations;
- (3) Private, for-profit companies, such as a commercial food distributor or food service management company.

\* \* \* \* \*

■ 10. In § 225.3, add paragraph (d) to read as follows:

**§ 225.3 Administration.**

\* \* \* \* \*

(d) *Authority to waive statute and regulations.* (1) As authorized under section 12(l) of the Richard B. Russell National School Lunch Act, FNS may waive provisions of such Act or the Child Nutrition Act of 1966, as amended, and the provisions of this part with respect to a State agency or eligible service provider. The provisions of this part required by other statutes may not

be waived under this authority. FNS may only approve requests for a waiver that are submitted by a State agency and comply with the requirements at section 12(l)(1) and the limitations at section 12(l)(4), including that FNS may not grant a waiver that increases Federal costs.

(2)(i) A State agency may submit a request for a waiver under paragraph (d)(1) of this section in accordance with section 12(l)(2) and the provisions of this part.

(ii) A State agency may submit a request to waive specific statutory or regulatory requirements on behalf of eligible service providers that operate in the State. Any waiver where the State concurs must be submitted to the appropriate FNSRO.

(3)(i) An eligible service provider may submit a request for a waiver under paragraph (e)(1) of this section in accordance with section 12(l) and the provisions of this part. Any waiver request submitted by an eligible service provider must be submitted to the State agency for review. A State agency must act promptly on such a waiver request and must deny or concur with a request submitted by an eligible service provider.

(ii) If a State agency concurs with a request from an eligible service provider, the State agency must promptly forward to the appropriate FNSRO the request and a rationale, consistent with section 12(l)(2), supporting the request. By forwarding the request to the FNSRO, the State agency affirms:

(A) The request meets all requirements for waiver submissions; and,

(B) The State agency will conduct all monitoring requirements related to regular Program operations and the implementation of the waiver.

(iii) If the State agency denies the request, the State agency must notify the requesting eligible service provider and state the reason for denying the request in writing within 30 calendar days of the State agency’s receipt of the request. The State agency response is final and may not be appealed to FNS.

**§ 225.4 [Amended]**

■ 11. In § 225.4, amend paragraph (d)(7) by removing the term “§ 225.6(h)” and adding in its place the term “§ 225.6(l)”.

■ 12. In § 225.6:

■ a. Revise the last sentence of paragraph (a)(2);

■ b. In paragraphs (b)(1) and (4), remove the words “during the period from October through April (or at any time of the year in an area with a continuous school calendar)”;

■ c. Revise paragraph (c);

■ d. Redesignate paragraphs (d) through (i) as paragraphs (h) through (m), respectively, and add new paragraphs (d) through (g);

■ e. Revise newly redesignated paragraphs (h)(2)(i) and (iii);

■ f. Revise newly redesignated paragraphs (i)(7) and (15);

■ g. In newly designated paragraph (l)(2)(i), remove the term “(h)(3)” and add in its place the term “(l)(3)”;

■ h. In newly designated paragraph (l)(2)(iii), remove the term “§ 225.6(d)(2)” and add in its place the term “§ 225.6(h)(2)”;

■ i. In newly designated paragraph (l)(2)(xiv), remove the term “§ 225.6(f)” and add in its place the term “§ 225.6(j)”;

■ j. In newly designated paragraph (l)(2)(xvi), remove the phrase “§ 225.15(h)(6) through (h)(8)” and add in its place the phrase “§ 225.15(m)(5) through (7)”.

The revisions and additions read as follows:

**§ 225.6 State agency responsibilities.**

(a) \* \* \*

(2) \* \* \* State agencies must have established criteria for approving closed enrolled sites to ensure that operation of a site as closed enrolled does not limit Program access in the area that the site is located.

\* \* \* \* \*

(c) *Content of sponsor application—*  
(1) *Application form.* (i) The sponsor must submit a written application to the State agency for participation in the Program. The State agency may use the application form developed by FNS, or develop its own application form. Application to sponsor the Program must be made on a timely basis within the deadlines established under paragraph (b)(1) of this section.

(ii) At the discretion of the State agency, sponsors proposing to serve an area affected by an unanticipated school closure may be exempt from submitting a new application if they have participated in the Program at any time during the current year or in either of the prior two calendar years.

(iii) Requirements for new sponsors and sponsors that have experienced significant operational problems in the prior year, as determined by the State agency, are found under paragraph (c)(2) of this section.

(iv) Requirements for experienced sponsors are found under paragraph (c)(3) of this section.

(2) *Application requirements for new sponsors and sponsors that have experienced significant operational problems in the prior year.* New

sponsors and sponsors that have experienced significant operational problems in the prior year, as determined by the State agency, must include the following information in their applications:

- (i) A full management plan, as described in paragraph (e) of this section;
  - (ii) A free meal policy statement, as described in paragraph (f) of this section;
  - (iii) A site information sheet for each site where a food service operation is proposed, as described in paragraph (g)(1) of this section;
  - (iv) Information in sufficient detail to enable the State agency to determine that the sponsor meets the criteria for participation in the Program, as described in § 225.14;
  - (v) Information on the extent of Program payments needed, including a request for advance payments and start-up payments, if applicable;
  - (vi) A staffing and monitoring plan;
  - (vii) A complete administrative budget for State agency review and approval, which includes:
    - (A) The projected administrative expenses that the sponsor expects to incur during the operation of the Program, and
    - (B) Information in sufficient detail to enable the State agency to assess the sponsor's ability to operate the Program within its estimated reimbursement;
  - (viii) A summary of how meals will be obtained at each site (e.g., self-prepared at each site, self-prepared and distributed from a central kitchen, purchased from a school food authority, competitively procured from a food service management company);
  - (ix) If an invitation for bid is required under § 225.15(m), a schedule for bid dates and a copy of the invitation for bid; and
  - (x) For each sponsor which seeks approval as a unit of local, municipal, county or State government under § 225.14(b)(3) or as a private nonprofit organization under § 225.14(b)(5), certification that the sponsor has administrative oversight, as required under § 225.14(d)(3).
- (3) *Application requirements for experienced sponsors.* The following information must be included in the applications of experienced sponsors:
- (i) A simplified or full management plan, as described in paragraph (e) of this section;
  - (ii) A site information sheet for each site where a food service operation is proposed, as described under paragraph (g)(2) of this section;
  - (iii) Information on the extent of Program payments needed, including a

request for advance payments and start-up payments, if it is applicable;

- (iv) A staffing and monitoring plan;
  - (v) A complete administrative budget for State agency review and approval, which includes:
    - (A) The projected administrative expenses which a sponsor expects to incur during the operation of the Program; and
    - (B) Information in sufficient detail to enable the State agency to assess the sponsor's ability to operate the Program within its estimated reimbursement.
  - (vi) If the method of obtaining meals is changed, a summary of how meals will be obtained at each site (e.g., self-prepared at each site, self-prepared and distributed from a central kitchen, purchased from a school food authority, competitively procured from a food service management company); and
  - (vii) If an invitation for bid is required under § 225.15(m), a schedule for bid dates, and a copy of the invitation for bid, if it is changed from the previous year.
- (4) *Applications for school food authorities and Child and Adult Care Food Program institutions.* At the discretion of the State agency, school food authorities in good standing in the National School Lunch Program or School Breakfast Program, as applicable, and institutions in good standing in the Child and Adult Care Food Program may apply to operate the Summer Food Service Program at the same sites where they provide meals through the aforementioned Programs by following the procedures for experienced sponsors outlined in paragraph (c)(3) of this section.
- (d) *Performance standards.* The State agency may only approve the applications of those sponsors that meet the three performance standards outlined in this section: financial viability, administrative capability, and Program accountability. The State agency must deny applications that do not meet all of these standards. The State agency must consider past performance in the SFSP or another Child Nutrition Program, and any other factors it deems relevant when determining whether the sponsor's application meets the following standards:
- (1) *Performance standard 1.* The sponsor must be financially viable. The sponsor must expend and account for Program funds, consistent with this part; FNS Instruction 796-4, Financial Management in the Summer Food Service Program; 2 CFR part 200, subpart D; and USDA regulations 2 CFR parts 400 and 415. To demonstrate financial viability and financial

management, the sponsor's management plan must:

- (i) Describe the community's need for summer meals and the sponsor's recruitment strategy:
    - (A) Explain how the sponsor's participation will help ensure the delivery of Program benefits to otherwise unserved sites or children; and
    - (B) Describe how the sponsor will recruit sites, consistent with any State agency requirements.
  - (ii) Describe the sponsor's financial resources and financial history:
    - (A) Show that the sponsor has adequate sources of funds available to operate the Program, pay employees and suppliers during periods of temporary interruptions in Program payments, and pay debts if fiscal claims are assessed against the sponsor; and
    - (B) Provide audit documents, financial statements, and other documentation that demonstrate financial viability.
  - (iii) Ensure that all costs in the sponsor's budget are necessary, reasonable, allowable, and appropriately documented.
- (2) *Performance standard 2.* The sponsor must be administratively capable. Appropriate and effective management practices must be in effect to ensure that Program operations meet the requirements of this part. To demonstrate administrative capability, the sponsor must:
- (i) Have an adequate number and type of qualified staff to ensure the operation of the Program, consistent with this part; and
  - (ii) Have written policies and procedures that assign Program responsibilities and duties and ensure compliance with civil rights requirements.
- (3) *Performance standard 3.* The sponsor must have internal controls and other management systems in place to ensure fiscal accountability and operation of the Program, consistent with this part. To demonstrate Program accountability, the sponsor must:
- (i) Demonstrate that the sponsor has a financial system with management controls specified in written operational policies that will ensure that:
    - (A) All funds and property received are handled with fiscal integrity and accountability;
    - (B) All expenses are incurred with integrity and accountability;
    - (C) Claims will be processed accurately, and in a timely manner;
    - (D) Funds and property are properly safeguarded and used, and expenses incurred, for authorized Program purposes; and

(E) A system of safeguards and controls is in place to prevent and detect improper financial activities by employees.

(ii) Maintain appropriate records to document compliance with Program requirements, including budgets, approved budget amendments, accounting records, management plans, and site operations.

(e) *Management plan*—(1) *Compliance.* The State agency must require the submission of a management plan to determine compliance with performance standards established under paragraph (d) of this section.

(i) Requirements for new sponsors and sponsors that have experienced significant operational problems in the prior year, as determined by the State agency, are found under paragraph (e)(2) of this section.

(ii) Requirements for experienced sponsors are found under paragraph (e)(3) of this section.

(iii) Requirements for school food authorities in good standing in the National School Lunch Program or School Breakfast Program, as applicable, or institutions in good standing in the Child and Adult Care Food Program are found under paragraph (e)(4) of this section.

(2) *Requirements for new sponsors and sponsors that have experienced significant operational problems in the prior year.* Sponsors must submit a complete management plan that includes:

(i) Detailed information on the sponsor's management and administrative structure, including information that demonstrates the sponsor's financial viability and financial management described under paragraph (d)(1) of this section;

(ii) Information that demonstrates compliance with each of the performance standards outlined under paragraph (d) of this section;

(iii) A list or description of the staff assigned to perform Program monitoring required under § 225.15(d)(2) and (3); and

(iv) For each sponsor which submits an application under paragraph (c)(1) of this section, information in sufficient detail to demonstrate that the sponsor will:

(A) Provide adequate and not less than annual training of sponsor's staff and sponsored sites, as required under § 225.15(d)(1);

(B) Perform monitoring consistent with § 225.15(d)(2) and (3), to ensure that all site operations are accountable and appropriate;

(C) Accurately classify sites consistent with paragraphs (g)(1) and (2) of this section;

(D) Demonstrate the sponsor's compliance with meal service, recordkeeping, and other operational requirements of this part;

(E) Provide meals that meet the meal patterns set forth in § 225.16;

(F) Have a food service that complies with applicable State and local health and sanitation requirements;

(G) Comply with civil rights requirements;

(H) Maintain complete and appropriate records on file; and

(I) Claim reimbursement only for eligible meals.

(3) *Requirements for experienced sponsors.* Experienced sponsors must submit a management plan. At the discretion of the State agency, experienced sponsors may submit a full management plan or a simplified management plan. A full management plan must be submitted at least once every 3 years. The simplified management plan must include a certification that any information previously submitted to the State to satisfy the eligibility requirements, set forth in paragraph (d) of this section, for the sponsor, its sites, and all of its current principals is current, or that the sponsor has submitted any changes or updates to the State. This certification must address all required elements of each performance standard.

(4) *Requirements for school food authorities in good standing in the National School Lunch Program or School Breakfast Program, as applicable, or institutions in good standing in the Child and Adult Care Food Program.* These sponsors are not required to submit a management plan unless requested by the State agency. The State agency may request additional evidence of financial and administrative capability sufficient to ensure that the school food authority or institution has the ability and resources to operate the Program if the State agency has reason to believe that this would pose significant challenges for the applicant.

(f) *Free meal policy statement*—(1) *Nondiscrimination statement.* (i) Each sponsor must submit a nondiscrimination statement of its policy for serving meals to children. The statement must consist of:

(A) An assurance that all children are served the same meals and that there is no discrimination in the course of the food service; and

(B) Except for camps, a statement that the meals served are free at all sites.

(ii) A school sponsor must submit the policy statement only once, with the

initial application to participate as a sponsor. However, if there is a substantive change in the school's free and reduced-price policy, a revised policy statement must be provided at the State agency's request.

(iii) In addition to the information described in paragraph (i) of this section, the policy statement of all camps that charge separately for meals must also include:

(A) A statement that the eligibility standards conform to the Secretary's family size and income standards for reduced-price school meals;

(B) A description of the method to be used in accepting applications from families for Program meals that ensures that households are permitted to apply on behalf of children who are members of households receiving SNAP, FDPIR, or TANF benefits using the categorical eligibility procedures described in § 225.15(f);

(C) A description of the method to be used by camps for collecting payments from children who pay the full price of the meal while preventing the overt identification of children receiving a free meal;

(D) An assurance that the camp will establish hearing procedures for families requesting to appeal a denial of an application for free meals. These procedures must meet the requirements set forth in paragraph (f)(2) of this section;

(E) An assurance that, if a family requests a hearing, the child will continue to receive free meals until a decision is rendered; and

(F) An assurance that there will be no overt identification of free meal recipients and no discrimination against any child on the basis of race, color, national origin, sex, age, or disability.

(2) *Hearing procedures statement.* Each camp must submit a copy of its hearing procedures with its application. At a minimum, the camp's procedures must provide that:

(i) A simple, publicly announced method will be used for a family to make an oral or written request for a hearing;

(ii) The family will have the opportunity to be assisted or represented by an attorney or other person (designated representative);

(iii) The family or designated representative will have an opportunity to examine the documents and records supporting the decision being appealed, both before and during the hearing;

(iv) The hearing will be reasonably prompt and convenient for the family or designated representative;

(v) Adequate notice will be given to the family or designated representative of the time and place of the hearing;

(vi) The family or designated representative will have an opportunity to present oral or documented evidence and arguments supporting its position;

(vii) The family or designated representative will have an opportunity to question or refute any testimony or other evidence and to confront and cross-examine any adverse witnesses;

(viii) The hearing will be conducted and the decision made by a hearing official who did not participate in the action being appealed;

(ix) The decision will be based on the oral and documentary evidence presented at the hearing and made a part of the record;

(x) The family or designated representative will be notified in writing of the decision;

(xi) A written record will be prepared for each hearing, which includes the action being appealed, any documentary evidence and a summary of oral testimony presented at the hearing, the decision and the reasons for the decision, and a copy of the notice sent to the family or designated representative; and

(xii) The written record will be maintained for a period of three years following the conclusion of the hearing and will be available for examination by the family or designated representative at any reasonable time and place.

(g) *Site information sheet.* The State agency must develop a site information sheet for sponsors.

(1) *New sites.* The application submitted by sponsors must include a site information sheet for each site where a food service operation is proposed. At a minimum, the site information sheet must demonstrate or describe the following:

(i) An organized and supervised system for serving meals to children who come to the site;

(ii) The estimated number of meals to be served, types of meals to be served, and meal service times;

(iii) Whether the site is rural, as defined in § 225.2, or non-rural;

(iv) Whether the site's food service will be self-prepared or vended, as defined in § 225.2;

(v) Arrangements for delivery and holding of meals until meal service times and storing and refrigerating any leftover meals until the next day, within standards prescribed by State or local health authorities;

(vi) Access to a means of communication to make necessary adjustments in the number of meals delivered, based on changes in the

number of children in attendance at each site;

(vii) Arrangements for food service during periods of inclement weather; and

(viii) For open sites and restricted open sites:

(A) Documentation supporting the eligibility of each site as serving an area in which poor economic conditions exist;

(B) When school data are used, new documentation is required every five years;

(C) When census data are used, new documentation is required every five years, or earlier, if the State agency believes that an area's socioeconomic status has changed significantly since the last census; and

(D) At the discretion of the State agency, sponsors proposing to serve an area affected by an unanticipated school closure may be exempt from submitting new site documentation if the sponsor has participated in the Program at any time during the current year or in either of the prior 2 calendar years.

(ix) For closed enrolled sites:

(A) The projected number of children enrolled and the projected number of children eligible for free and reduced-price school meals for each of these sites; or documentation supporting the eligibility of each site as serving an area in which poor economic conditions exist;

(B) When school data are used, new documentation is required every five years;

(C) When census data are used, new documentation is required every five years, or earlier, if the State agency believes that an area's socioeconomic status has changed significantly since the last census.

(x) For NYSP sites, certification from the sponsor that all of the children who will receive Program meals are enrolled participants in the NYSP.

(xi) For camps, the number of children enrolled in each session who meet the Program's income standards. If such information is not available at the time of application, this information must be submitted as soon as possible thereafter, and in no case later than the filing of the camp's claim for reimbursement for each session;

(xii) For sites that will serve children of migrant workers:

(A) Certification from a migrant organization, which attests that the site serves children of migrant workers; and

(B) Certification from the sponsor that the site primarily serves children of migrant workers, if non-migrant children are also served.

(2) *Experienced sites.* The application submitted by sponsors must include a

site information sheet for each site where a food service operation is proposed. The State agency may require sponsors of experienced sites to provide information described in paragraph (g)(1) of this section. At a minimum, the site information sheet must demonstrate or describe the following:

(i) The estimated number of meals, types of meals to be served, and meal service times; and

(ii) For open sites and restricted open sites:

(A) Documentation supporting the eligibility of each site as serving an area in which poor economic conditions exist;

(B) When school data are used, new documentation is required every 5 years;

(C) When census data are used, new documentation is required every 5 years, or earlier, if the State agency believes that an area's socioeconomic status has changed significantly since the last census; and

(D) Any site that a sponsor proposes to serve during an unanticipated school closure, which has participated in the Program at any time during the current year or in either of the prior 2 calendar years, is considered eligible without new documentation.

(iii) For closed enrolled sites:

(A) The projected number of children enrolled and the projected number of children eligible for free and reduced-price school meals for each of these sites; or documentation supporting the eligibility of each site as serving an area in which poor economic conditions exist;

(B) When school data are used, new documentation is required every 5 years;

(C) When census data are used, new documentation is required every 5 years, or earlier, if the State agency believes that an area's socioeconomic status has changed significantly since the last census.

(iv) For NYSP sites, certification from the sponsor that all of the children who will receive Program meals are enrolled participants in the NYSP.

(v) For camps, the number of children enrolled in each session who meet the Program's income standards. If such information is not available at the time of application, this information must be submitted as soon as possible thereafter, and in no case later than the filing of the camp's claim for reimbursement for each session.

\* \* \* \* \*

(h) \* \* \*

(2) \* \* \*

(i) The initial maximum approved level must be based upon the historical

record of attendance at the site if such a record has been established in prior years and the State agency determines that it is accurate. The State agency must develop a procedure for establishing initial maximum approved levels for sites when no accurate record from prior years is available. The State agency may consider participation at other similar sites located in the area, documentation of programming taking place at the site, statistics on the number of children residing in the area, and other relevant information.

\* \* \* \* \*

(iii) The sponsor may seek an upward adjustment in the approved level for its sites by requesting a site review or by providing the State agency with evidence that attendance exceeds the sites' approved levels. The sponsor may request an upward adjustment at any point prior to submitting the claim for the impacted reimbursement period.

\* \* \* \* \*

(i) \* \* \*

(7) Claim reimbursement only for the types of meals specified in the agreement that are served:

- (i) Without charge to children at approved sites, except camps, during the approved meal service time;
- (ii) Without charge to children who meet the Program's income standards in camps;
- (iii) Within the approved level for the maximum number of children's meals that may be served, if a maximum approved level is required under paragraph (h)(2) of this section;
- (iv) At the approved meal service time, unless a change is approved by the State agency, as required under § 225.16(c); and
- (v) At the approved site, unless the requirements in § 225.16(g) are met.

\* \* \* \* \*

(15) Maintain children on site while meals are consumed. Sponsors may allow a child to take one fruit, vegetable, or grain item off-site for later consumption if the requirements in § 225.16(h) are met; and

\* \* \* \* \*

- 13. In § 225.7:
- a. Revise the last two sentences of paragraph (a);
- b. Revise paragraph (d);
- c. Redesignate paragraphs (e), (f), and (g) as paragraphs (l), (m), and (n), respectively;
- d. Add new paragraphs (e) through (k) and paragraph (o); and
- e. Revise newly designated paragraphs (l), (m), and (n).

The revisions and additions read as follows:

**§ 225.7 Program monitoring and assistance.**

(a) \* \* \* Training should be made available at convenient locations or via the internet. State agencies are not required to conduct this training for sponsors operating the Program during unanticipated school closures.

\* \* \* \* \*

(d) *Pre-approval visits.* The State agency must conduct pre-approval visits of sponsors and sites, as specified below, to assess the applicant sponsor's or site's potential for successful Program operations and to verify information provided in the application. The State agency must visit prior to approval:

(1) All applicant sponsors that did not participate in the program in the prior year. However, if a sponsor is a school food authority, was reviewed by the State agency under the National School Lunch Program during the preceding 12 months, and had no significant deficiencies noted in that review, a pre-approval visit may be conducted at the discretion of the State agency. In addition, pre-approval visits of sponsors proposing to operate the Program during unanticipated school closures may be conducted at the discretion of the State agency;

(2) All applicant sponsors that had operational problems noted in the prior year; and

(3) All sites that the State agency has determined need a pre-approval visit.

(e) *Sponsor and site reviews—(1) Purpose.* The State agency must review sponsors and sites to ensure compliance with Program regulations, the Department's non-discrimination regulations (7 CFR part 15), and any other applicable instructions issued by the Department.

(2) *Sample selection.* In determining which sponsors and sites to review, the State agency must, at a minimum, consider the sponsors and sites' previous participation in the Program, their current and previous Program performance, and the results of previous reviews.

(3) *School food authorities.* When the same school food authority personnel administer this Program as well as the National School Lunch Program (7 CFR part 210), the State agency is not required to conduct a sponsor or site review in the same year in which the National School Lunch Program operations have been reviewed and determined to be satisfactory.

(4) *Frequency and number of required reviews.* State agencies must:

(i) Conduct a review of every new sponsor at least once during the first year of operation;

(ii) Annually review a number of sponsors whose program reimbursements, in the aggregate, accounted for at least one-half of the total program meal reimbursements in the State in the prior year;

(iii) Annually review every sponsor that experienced significant operational problems in the prior year;

(iv) Review each sponsor at least once every three years; and

(v) As part of each sponsor review, conduct reviews of at least 10 percent of each reviewed sponsor's sites, or one site, whichever number is greater.

(5) *Site selection criteria.* (i) State agencies must develop criteria for site selection when selecting sites to meet the minimum number of sites required under paragraph (e)(4)(v) of this section. State agencies should, to the maximum extent possible, select sites that reflect the sponsor's entire population of sites. Characteristics that should be reflected in the sites selected for review include:

(A) The maximum number of meals approved to serve under § 225.6(h)(1) and (2);

(B) Method of obtaining meals (*i.e.*, self-preparation or vended meal service);

(C) Time since last site review by State agency;

(D) Type of site (*e.g.*, open, closed enrolled, camp);

(E) Type of physical location (*e.g.*, school, outdoor area, community center);

(F) Rural designation (*i.e.*, rural, as defined in § 225.2, or non-rural); and

(G) Affiliation with the sponsor, as defined in § 225.2.

(ii) The State agency may use additional criteria to select sites including, but not limited to: recommendations from the sponsor; findings from other audits or reviews; or any indicators of potential error in daily meal counts (*e.g.*, identical or very similar claiming patterns, large changes in free meal counts).

(6) *Meal claim validation.* As part of every sponsor review under paragraph (e)(4) of this section, the State agency must validate the sponsor's meal claim utilizing a record review process.

(i) The State agency must develop a record review process. This process must include, at a minimum, reconciliation of delivery receipts, daily meal counts from sites, and the comparison of the sponsor's claim consolidation spreadsheet with the meals claimed for reimbursement by the sponsor for the period under review.

(ii) For the purposes of this paragraph (e)(6), the percent error includes both overclaims and underclaims. Claims against sponsors as a result of meal

claim validation should be assessed after the conclusion of the meal claim validation process in accordance with § 225.12.

(iii) In determining the sample size for each step of this process, fractions must be rounded up ( $\geq 0.5$ ) or down ( $< 0.5$ ) to the nearest whole number.

(iv) State agencies must at a minimum follow the process to conduct the meal claim validation as described in table 1.  
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**Table 1 to Paragraph (e)(6)(iv)**

Steps	Outcome	Result
<p>Step 1: The State agency must complete an initial validation of the sites under review to satisfy the requirements outlined in paragraph (e)(4)(v) of this section. The State agency must validate all meals served by these sites for the review period. Then, calculate the percentage of error of the sites in this step as described in (v) of this section.</p>	<p>Validation of sites in step 1 yields less than a five percent error.</p>	<p>The review of meal claims for this sponsor is complete.</p> <p>If necessary, the State agency must disallow any portion of a claim for reimbursement and recover any payment to a sponsor not properly payable in accordance with § 225.12.</p>
	<p>Validation of sites in step 1 yields a five percent error or more.</p>	<p>The State agency must move to step 2.</p>
<p>Step 2: Expand the validation of meal claims to 25 percent of the sponsor's total sites. The State agency must validate all meals served by these sites for the review period. Then, calculate the percentage of error of the sites in this step as described in (v) of this section.</p>	<p>Validation of sites in step 2 yields less than a five percent error.</p>	<p>The review of meal claims for this sponsor is complete.</p> <p>If necessary, the State agency must disallow any portion of a claim for reimbursement and recover any payment to a sponsor not properly payable in accordance with § 225.12.</p>
	<p>Validation of sites in step 2 of this section</p>	<p>The State agency must move to step 3.</p>

Steps	Outcome	Result
	yields a five percent error or more.	
Step 3: Expand the validation of meal claims to 50 percent of the sponsor's total sites. The State agency must validate all meals served by these sites for the review period. Then, calculate the percentage of error of the sites in this step as described in (v) of this section.	Validation of sites in step 3 yields less than a five percent error.	The review of meal claims for this sponsor is complete.  If necessary, the State agency must disallow any portion of a claim for reimbursement and recover any payment to a sponsor not properly payable in accordance with § 225.12.
	Validation of sites in step 3 yields a five percent error or more.	The State agency must move to step 4.
Step 4: Expand the validation of meal claims to 100 percent of the sponsor's total sites. The State agency must validate all meals served by these sites for the review period.	The review of meal claims for this sponsor is complete. If necessary, the State agency must disallow any portion of a claim for reimbursement and recover any payment to a sponsor not properly payable in accordance with § 225.12.	

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(v) In determining the percentage of error, under paragraphs (e)(6)(i) through (iv) of this section, fractions must be rounded up ( $\geq 0.5$ ) or down ( $< 0.5$ ) to the nearest whole number. Percentage of error is calculated for each step as follows:

(A) *Determining the meal counting and claiming discrepancy for each site validated.* Subtract the total meals validated from the total meals claimed by the sponsor for each validated site. Take the absolute value of each discrepancy. By applying the absolute value, the numbers will be expressed as positive valued numbers.

(B) *Calculating total discrepancy.* Add together all discrepancies from each site as determined in paragraph (e)(6)(v)(A) of this section to calculate the total

discrepancies for sites validated in the given step.

(C) *Calculating percent error.* Divide the total discrepancies as determined in paragraph (e)(6)(v)(B) of this section by the total meals claimed by the sponsor for all reviewed sites within the validation sample for the given step. Multiply by 100 to calculate the percentage of error.

(vi) The State agency may expand the validation of meal claims beyond the review period or to include additional sites if the State agency has reason to believe that the sponsor has engaged in unlawful acts in connection with Program operations.

(vii) In lieu of the meal claim validation process described in table 1 to paragraph (e)(6)(iv) of this section, the State agency may complete a validation which includes all meals

served on all operating days for all sites under a sponsor for the review period.

(7) *Review of sponsor operations.* State agencies should determine if:

(i) Expenditures are allowable and consistent with FNS Instructions and guidance and all funds accruing to the food service are properly identified and recorded as food service revenue;

(ii) Expenditures are consistent with budgeted costs, and the previous year's expenditures taking into consideration any changes in circumstances;

(iii) Reimbursements have not resulted in accumulation of net cash resources as defined in paragraph (m) of this section; and

(iv) The level of administrative spending is reasonable and does not affect the sponsor's ability to operate a nonprofit food service and provide a quality meal service.

(f) *Follow-up reviews.* The State agency must conduct follow-up reviews of sponsors and sites as necessary.

(g) *Monitoring system.* Each State agency must develop and implement a monitoring system to ensure that sponsors, including site personnel, and the sponsor's food service management company, if applicable, immediately receive a copy of any review reports which indicate Program violations and which could result in a Program disallowance.

(h) *Records.* Documentation of Program assistance and the results of such assistance must be maintained on file by the State agency 3 years after submission in accordance with § 225.8(a).

(i) *Meal preparation facility reviews.* As part of the review of any vended sponsor that purchases unitized meals, with or without milk, to be served at a SFSP site, the State agency must review the meal production facility and meal production documentation of any food service management company from which the sponsor purchases meals for compliance with program requirements. If the sponsor does not purchase meals but does purchase management services within the restrictions specified in § 225.15, the State agency is not required to conduct a meal preparation facility review.

(1) Each State agency must establish an order of priority for visiting facilities at which food is prepared for the Program. The facility review must be conducted at least one time within the appropriate review cycle for each vended sponsor. If multiple vended sponsors use the same food service management company and are being reviewed in the same review cycle, a single facility review will fulfill the review requirements for those vended sponsors.

(2) The State agency must respond promptly to complaints concerning facilities. If the food service management company fails to correct violations noted by the State agency during a review, the State agency must notify the sponsor and the food service management company that reimbursement must not be paid for meals prepared by the food service management company after a date specified in the notification.

(3) Funds provided in § 225.5(f) may be used for conducting meal preparation facility reviews.

(j) *Forms for reviews by sponsors.* Each State agency must develop and provide monitor review forms to all approved sponsors. These forms must be completed by sponsor monitors. The monitor review form must include, but

not be limited to, the time of the reviewer's arrival and departure, the site supervisor's printed name and signature, a certification statement to be signed by the monitor, the number of meals prepared or delivered, the number of meals served to children, the deficiencies noted, the corrective actions taken by the sponsor, and the date of such actions.

(k) *Corrective actions.* Corrective actions which the State agency may take when Program violations are observed during the conduct of a review are discussed in § 225.11. The State agency must conduct follow-up reviews as appropriate when corrective actions are required.

(l) *Other facility inspections and meal quality tests.* In addition to those inspections required by paragraph (i) of this section, the State agency may also conduct, or arrange to have conducted: inspections of self-preparation and vended sponsors' food preparation facilities; inspections of food service sites; and meal quality tests. The procedures for carrying out these inspections and tests must be consistent with procedures used by local health authorities. For inspections of food service management companies' facilities not conducted by State agency personnel, copies of the results must be provided to the State agency. The company and the sponsor must also immediately receive a copy of the results of these inspections when corrective action is required. If a food service management company fails to correct violations noted by the State agency during a review, the State agency must notify the sponsor and the food service management company that reimbursement must not be paid for meals prepared by the food service management company after a date specified in the notification. Funds provided for in § 225.5(f) may be used for conducting these inspections and tests.

(m) *Financial management.* Each State agency must establish a financial management system, in accordance with 2 CFR part 200, subparts D and E, and USDA implementing regulations 2 CFR parts 400 and 415, as applicable, and FNS guidance, to identify allowable Program costs and to establish standards for sponsor recordkeeping and reporting. The State agency must provide guidance on these financial management standards to each sponsor. Additionally, each State agency must establish a system for monitoring and reviewing sponsors' nonprofit food service to ensure that all Program reimbursement funds are used solely for the conduct of the food service

operation. State agencies must review the net cash resources of the nonprofit food service of each sponsor participating in the Program and ensure that the net cash resources do not exceed one month's average expenditures for sponsors operating only during the summer months and three month's average expenditure for sponsors operating Child Nutrition Programs throughout the year. State agency approval must be required for net cash resources in excess of requirements set forth in this paragraph (m). Based on this monitoring, the State agency may provide technical assistance to the sponsor to improve meal service quality or take other action designed to improve the nonprofit meal service quality under the following conditions, including but not limited to:

(1) The sponsor's net cash resources exceed the limits included in this paragraph (m) for the sponsor's nonprofit food service or such other amount as may be approved in accordance with this paragraph;

(2) The ratio of administrative to operating costs (as defined in § 225.2) is high;

(3) There is significant use of alternative funding for food and/or other costs; or

(4) A significant portion of the food served is privately donated or purchased at a very low price.

(n) *Nondiscrimination.* (1) Each State agency must comply with all requirements of title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and the Department's regulations concerning nondiscrimination (7 CFR parts 15, 15a, and 15b), including requirements for racial and ethnic participation data collection, public notification of the nondiscrimination policy, and reviews to assure compliance with such policy, to the end that no person must, on the grounds of race, color, national origin, sex, age, or disability, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under, the Program.

(2) Complaints of discrimination filed by applicants or participants must be referred to FNS or the Secretary of Agriculture, Washington, DC 20250. A State agency which has an established grievance or complaint handling procedure may resolve sex and disability discrimination complaints before referring a report to FNS.

(o) *Sponsor site visit.* Each State agency must establish criteria that sponsors will use to determine which sites with operational problems in the

prior year are required to receive a site visit during the first two weeks of program operations in accordance with § 225.15(d)(2).

\* \* \* \* \*

■ 14. In § 225.9:

■ a. Revise paragraphs (d)(4) and (10); and

■ b. Amend paragraph (f), by removing the term “§ 225.6(d)(2)” and adding in its place the term “§ 225.6(h)(2)”.

The revisions read as follows:

**§ 225.9 Program assistance to sponsors.**

\* \* \* \* \*

(d) \* \* \*

(4) The State agency must forward reimbursements within 45 calendar days of receiving valid claims. If a claim is incomplete, invalid, or potentially unlawful per paragraph (d)(10) of this section, the State agency must return the claim to the sponsor within 30 calendar days with an explanation of the reason for disapproval and how such claim must be revised for payment. If the sponsor submits a revised claim, final action must be completed within 45 calendar days of receipt unless the State agency has reason to believe the claim is unlawful per paragraph (d)(10) in this section. If the State agency disallows partial or full payment for a claim for reimbursement, it must notify the sponsor which submitted the claim of its right to appeal under § 225.13(a).

\* \* \* \* \*

(10) If a State agency has reason to believe that a sponsor or food service management company has engaged in unlawful acts in connection with Program operations, evidence found in audits, reviews, or investigations must be a basis for nonpayment of the applicable sponsor’s claims for reimbursement. The State agency may be exempt from the requirement stated in paragraph (d)(4) of this section that final action on a claim must be complete within 45 calendar days of receipt of a revised claim if the State agency determines that a thorough examination of potentially unlawful acts would not be possible in the required timeframe. The State agency must notify the appropriate FNSRO of its election to take the exemption from the requirement stated in paragraph (d)(4) of this section by submitting to the FNSRO a copy of the claim disapproval at the same time as it is provided to the sponsor.

\* \* \* \* \*

**§ 225.11 [Amended]**

■ 15. In § 225.11, amend paragraph (e)(3) by removing the term

“§ 225.6(d)(2)” and adding in its place the term “§ 225.6(h)(2)”.

**§ 225.13 [Amended]**

■ 16. In § 225.13, amend paragraph (c) by removing the term “§ 225.6(g)” and adding in its place the term “§ 225.6(k)”.

■ 17. In § 225.14:

■ a. Revise paragraphs (a), (b)(5), and (c)(1) and (4); and

■ b. Amend paragraph (c)(7), by removing the term “§ 225.6(e)” and adding in its place the term “§ 225.6(i)”.

The revisions read as follows:

**§ 225.14 Requirements for sponsor participation.**

(a) *Applications.* Sponsors must make written application to the State agency to participate in the Program which must include all content required under § 225.6(c). Such application must be made on a timely basis in accordance with the requirements of § 225.6(b)(1). Sponsors proposing to operate a site during an unanticipated school closure may be exempt, at the discretion of the State agency, from submitting a new application if they have participated in the program at any time during the current year or in either of the prior 2 calendar years.

\* \* \* \* \*

(b) \* \* \*

(5) Private nonprofit organizations as defined in § 225.2, as determined annually.

(c) \* \* \*

(1) Demonstrates financial and administrative capability for Program operations and accepts final financial and administrative responsibility for total Program operations at all sites at which it proposes to conduct a food service in accordance with the performance standards described under § 225.6(d) of this part.

(i) In general, an applicant sponsor which is a school food authority in good standing in the National School Lunch Program or an institution in good standing in the Child and Adult Care Food Program applying to operate the Program at the same sites where they provide meals through the aforementioned Programs, is not required to submit a management plan as described under § 225.6(e) or further demonstrate financial and administrative capability for Program operations.

(ii) If the State agency has reason to believe that financial or administrative capability would pose significant challenges for an applicant sponsor which is a school food authority in the National School Lunch Program or School Breakfast Program, as applicable,

or an institution in the Child and Adult Care Food Program, the State agency may request a Management plan or additional evidence of financial and administrative capability sufficient to ensure that the school food authority or institution has the ability and resources to operate the Program.

(iii) If the State agency approving the application for the Program is not responsible for the administration of the National School Lunch Program or the Child and Adult Care Food Program, the State agency must develop a process for sharing information with the agency responsible for approving these programs in order to receive documentation of the applicant sponsor’s financial and administrative capability.

\* \* \* \* \*

(4) Has adequate supervisory and operational personnel for overall monitoring and management of each site, including a site supervisor, and adequate personnel to conduct the visits and reviews required in § 225.15(d)(2) and (3), as demonstrated in the management plan submitted with the program application described under § 225.6(e);

\* \* \* \* \*

■ 18. In § 225.15:

■ a. Amend paragraphs (b)(2) and (3) by removing the term “§ 225.6(d)(2)” and adding in its place the term “§ 225.6(h)(2)”;

■ b. Revise paragraphs (d), (e), and (f)(1); and

■ c. Amend paragraph (m)(2) by removing the term “§ 225.6(h)(3)” and adding in its place the term “§ 225.6(l)(3)”.

The revisions read as follows:

**§ 225.15 Management responsibilities of sponsors.**

\* \* \* \* \*

(d) *Training and monitoring.* (1) Each sponsor must hold Program training sessions for its administrative and site personnel and must not allow a site to operate until personnel have attended at least one of these training sessions. The State agency may waive these training requirements for operation of the Program during unanticipated school closures. Training of site personnel must, at a minimum, include: the purpose of the Program; site eligibility; recordkeeping; site operations; meal pattern requirements; and the duties of a monitor. Each sponsor must ensure that its administrative personnel attend State agency training provided to sponsors, and sponsors must provide training throughout the summer to ensure that administrative personnel are

thoroughly knowledgeable in all required areas of Program administration and operation and are provided with sufficient information to enable them to carry out their Program responsibilities. Each site must have present at each meal service at least one person who has received this training.

(2) Sponsors must visit each of their sites, as specified below, at least once during the first two weeks of program operations and must promptly take such actions as are necessary to correct any deficiencies. In cases where the site operates for seven calendar days or fewer, the visit must be conducted during the period of operation. Sponsors must conduct these visits for:

(i) All new sites;  
 (ii) All sites that have been determined by the sponsor to need a visit based on criteria established by the State agency pertaining to operational problems noted in the prior year, as set forth in § 225.7(o); and  
 (iii) Any other sites that the State agency has determined need a visit.

(3) Sponsors must conduct a full review of food service operations at each site at least once during the first four weeks of Program operations, and thereafter must maintain a reasonable level of site monitoring. Sponsors must complete a monitoring form developed by the State agency during the conduct of these reviews. Sponsors may conduct a full review of food service operations at the same time they are conducting a site visit required under (d)(2) in this section.

(e) *Notification to the community.* Each sponsor must annually announce in the media serving the area from which it draws its attendance the availability of free meals. Sponsors of camps and closed enrolled sites must notify participants of the availability of free meals and if a free meal application is needed, as outlined in paragraph (f) of this section. For sites that use free meal applications to determine individual eligibility, notification to enrolled children must include: the Secretary's family-size and income standards for reduced price school meals labeled "SFSP Income Eligibility Standards;" a statement that a foster child and children who are members of households receiving SNAP, FDPIR, or TANF benefits are automatically eligible to receive free meal benefits at eligible program sites; and a statement that meals are available without regard to race, color, national origin, sex, age, or disability. State agencies may issue a media release for all sponsors operating SFSP sites in the State as long as the notification meets the requirements in this section.

(f) *Application for free Program meals—(1) Purpose of application form.* The application is used to determine the eligibility of children attending camps and the eligibility of sites that do not meet the requirements in paragraphs (1) through (3) of the definition of "areas in which poor economic conditions exist" in § 225.2.

\* \* \* \* \*

■ 19. In § 225.16, revise paragraphs (b) introductory text, (c), (d), and (f)(1)(ii) and add paragraphs (g) and (h) to read as follows.

**§ 225.16 Meal service requirements.**

\* \* \* \* \*

(b) *Meal services.* The meals which may be served under the Program are breakfast, lunch, supper, and supplements, referred to from this point as "snacks." No sponsor may be approved to provide more than two snacks per day. A sponsor may claim reimbursement only for the types of meals for which it is approved under its agreement with the State agency. A sponsor may only be reimbursed for meals served in accordance with this section.

\* \* \* \* \*

(c) *Meal service times.* (1) Meal service times must be:

- (i) Established by sponsors for each site;
  - (ii) Included in the sponsor's application; and
  - (iii) Approved by the State agency.
- (2) Breakfast meals must be served at or close to the beginning of a child's day. Three component meals served after a lunch or supper meal service are not eligible for reimbursement as a breakfast.

(3) At all sites except residential camps, meal services must start at least one hour after the end of the previous meal or snack.

(4) Meals served outside the approved meal service time:

- (i) Are not eligible for reimbursement; and
  - (ii) May be approved for reimbursement by the State agency only if an unanticipated event, outside of the sponsor's control, occurs. The State agency may request documentation to support approval of meals claimed when an unanticipated event occurs.
- (5) The State agency must approve any permanent or planned changes in meal service time.

(6) If meals are not prepared on site:

- (i) Meal deliveries must arrive before the approved meal service time; and
- (ii) Meals must be delivered within one hour of the start of the meal service if the site does not have adequate

storage to hold hot or cold meals at the temperatures required by State or local health regulations.

(d) *Meal patterns.* The meal requirements for the Program are designed to provide nutritious and well-balanced meals to each child. Sponsors must ensure that meals served meet all of the requirements. Except as otherwise provided in this section, the following tables present the minimum requirements for meals served to children in the Program. Children age 12 and up may be served larger portions based on the greater food needs of older children.

\* \* \* \* \*

- (f) \* \* \*
- (1) \* \* \*

(ii) *Offer versus serve.* School food authorities that are Program sponsors may permit a child to refuse one or more items that the child does not intend to eat. The reimbursements to school food authorities for Program meals served under this "offer versus serve" option must not be reduced because children choose not to take all components of the meals that are offered. The school food authority may elect to use the following options:

(A) Provide meal service consistent with the National School Lunch Program, as described in part 210 of this chapter.

(B) Provide breakfast meals by offering four items from all three components specified in the meal pattern in paragraph (d)(1) of this section. Children may be permitted to decline one item.

(C) Provide lunch or supper meals by offering five food items from all four components specified in the meal pattern in paragraph (d)(2) of this section. Children may be permitted to decline two components.

\* \* \* \* \*

(g) *Meals served away from approved locations.* (1) Sponsors may be reimbursed for meals served away from the approved site location when the following conditions are met:

- (i) The sponsor notifies the State agency in advance that meals will be served away from the approved site;
- (ii) The State agency has determined that all Program requirements in this part will be met, including applicable State and local health, safety, and sanitation standards;
- (iii) The meals are served at the approved meal service time, unless a change is approved by the State agency, as required under paragraph (c) of this section; and
- (iv) Sponsors of open sites continue operating at the approved location. If

not possible, the State agency may permit an open site to close, in which case the sponsor must notify the community of the change in meal service and provide information about alternative open sites.

(2) The State agency may determine that meals served away from the approved site location are not reimbursable if the sponsor did not provide notification in advance of the meal service. The State agency may establish guidelines for the amount of advance notice needed.

(h) *Off-site consumption of food items.* Sponsors may allow a child to take one fruit, vegetable, or grain item off-site for later consumption without prior State agency approval provided that all applicable State and local health, safety, and sanitation standards will be met. Sponsors should only allow an item to be taken off-site if the site has adequate staffing to properly administer and monitor the site. A State agency may prohibit individual sponsors on a case-by-case basis from using this option if the State agency determines that the sponsor's ability to provide adequate oversight is in question. The State agency's decision to prohibit a sponsor from utilizing this option is not an appealable action.

**PART 226—CHILD AND ADULT CARE FOOD PROGRAM**

■ 20. The authority citation for part 226 continues to read as follows:

**Authority:** Secs. 9, 11, 14, 16, and 17, Richard B. Russell National School Lunch Act, as amended (42 U.S.C. 1758, 1759a, 1762a, 1765 and 1766).

■ 21. In § 226.3, add paragraph (e) to read as follows:

**§ 226.3 Administration.**

\* \* \* \* \*

(e)(1) As authorized under section 12(l) of the Richard B. Russell National School Lunch Act, FNS may waive provisions of such Act or the Child Nutrition Act of 1966, as amended, and the provisions of this part with respect to a State agency or eligible service provider. The provisions of this part required by other statutes may not be waived under this authority. FNS may only approve requests for a waiver that are submitted by a State agency and comply with the requirements at section 12(l)(1) and the limitations at section 12(l)(4), including that FNS may not grant a waiver that increases Federal costs.

(2)(i) A State agency may submit a request for a waiver under paragraph (e)(1) of this section in accordance with section 12(l)(2) and the provisions of this part.

(ii) A State agency may submit a request to waive specific statutory or regulatory requirements on behalf of eligible service providers that operate in the State. Any waiver where the State concurs must be submitted to the appropriate FNSRO.

(3)(i) An eligible service provider may submit a request for a waiver under paragraph (e)(1) of this section in

accordance with section 12(l) and the provisions of this part. Any waiver request submitted by an eligible service provider must be submitted to the State agency for review. A State agency must act promptly on such a waiver request and must deny or concur with a request submitted by an eligible service provider.

(ii) If a State agency concurs with a request from an eligible service provider, the State agency must promptly forward to the appropriate FNSRO the request and a rationale, consistent with section 12(l)(2), supporting the request. By forwarding the request to the FNSRO, the State agency affirms:

(A) The request meets all requirements for waiver submissions; and,

(B) The State agency will conduct all monitoring requirements related to regular Program operations and the implementation of the waiver.

(iii) If the State agency denies the request, the State agency must notify the requesting eligible service provider and state the reason for denying the request in writing within 30 calendar days of the State agency's receipt of the request. The State agency response is final and may not be appealed to FNS.

\* \* \* \* \*

**Cynthia Long,**

*Administrator, Food and Nutrition Service.*

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