

# Proposed Rules

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

## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

#### 7 CFR Parts 273 and 276

RIN 0584-AD98

#### Supplemental Nutrition Assistance Program: Major System Failures

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

**ACTION:** Proposed rule.

**SUMMARY:** This rule proposes to amend Supplemental Nutrition Assistance Program (SNAP—formerly the Food Stamp Program) regulations to implement the Food, Conservation, and Energy Act of 2008, (“FCEA”). Section 4133, The “Major System Failures” section of the FCEA, amends the Food and Nutrition Act of 2008 (“the Act”) to require the United States Department of Agriculture (USDA) to determine when a systemic State error is resulting in the overissuance of benefits to a substantial number of SNAP households and the actions the Department may take if such a determination were made. This rule proposes criteria for determining if a State experienced a systemic error that resulted in the overissuance of benefits to a substantial number of households and specifies the steps that the Department may take to collect data, instruct the State to terminate claims collection from the affected households, and issue a bill to the State for the value of the over-issuances. It also identifies the review and appeal process for any such billing.

**DATES:** Comments must be received on or before October 17, 2011.

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

- *Federal eRulemaking Portal:* Preferred method. Go to <http://www.regulations.gov>; follow the online instructions for submitting comments on Docket FNS-2009-0025.

- *Fax:* Submit comments by facsimile transmission to (703) 305-2486, attention: Lizbeth Silbermann.

- *Mail:* Send comments to Lizbeth Silbermann, Director, Program Development Division, Food and Nutrition Service, 3101 Park Center Drive, Room 810, Alexandria, Virginia 22302, (703) 305-2494.

- *Hand delivery or Courier:* Deliver comments to Lizbeth Silbermann at the above address. All comments on this proposed rule will be included in the record and will be made available to the public. Please be advised that the substance of the comments and the identity of the individuals or entities submitting the comments will be subject to public disclosure. FNS will make the comments publicly available on the Internet via <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** For further information concerning this proposed rule, you may contact Moira Johnston, Program Development Division, Supplemental Nutrition Assistance Program, 3101 Park Center Drive, Room 800, Alexandria, Virginia 22302 or via the Internet at [moira.johnston@fns.usda.gov](mailto:moira.johnston@fns.usda.gov).

**SUPPLEMENTARY INFORMATION:** *Additional electronic filing information:* You may download a copy of this rule from <http://www.fns.usda.gov/SNAP>. You may also comment via the Internet at the same address. Please include ATTENTION RIN 0548-AD98 in the subject line and your name and address in the message. If you do not receive a confirmation that we have received your comment please call 703-305-2515.

*Written Comments:* Written comments on this rule should be specific, confined to issues pertinent to the rule, and should explain the reason for any change you recommend. Where possible, you should reference the specific section or paragraph of the rule you are addressing. We may not consider or include in the Administrative Record for the final rulemaking comments that we receive after the close of the comment period or comments delivered to an address other than that listed above. We will make available all comments for public inspection, including, name, address and other contact information of respondents. If you wish to request that we consider withholding your name, address, or other contact information from public review or from disclosure

under the Freedom of Information Act, you must state this prominently at the beginning of your comment. We will honor requests for confidentiality on a case-by-case basis to the extent allowed by law. We will make available for public inspection in their entirety all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses.

#### Executive Order 12866

This rule has been determined to be not significant and was reviewed by the Office Management and Budget in conformance with Executive Order (E.O.) 12866.

#### Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601-612). It has been certified that this rule will not have a significant economic impact on a substantial number of small entities. State agencies that administer SNAP will be affected to the extent they implement major changes in program operations.

#### 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, the Department generally must prepare a written statement, including a cost/benefit analysis, for proposed and final rules with Federal mandates that may result in expenditures to State, local, or tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule.

This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) that impose costs on State, local, or tribal governments or to the private sector of \$100 million or more in any one year. This rule is, therefore, not subject to the

requirements of sections 202 and 205 of the UMRA.

#### **Executive Order 12372**

The SNAP is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the final rule in 7 CFR part 3015, Subpart V and related document published June 24, 1983 (48 FR 29114 for SNP; 48 FR 29115 for FSP), this Program is excluded from the scope of E.O. 12372, which requires intergovernmental consultation with State and local officials.

#### *Federalism Impact Statement*

E.O. 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under section 6(b)(2)(B) of E.O. 13132. FNS has considered the impact of this rule on State and local governments and has determined that this rule does not have Federalism implications. This rule does not impose substantial or direct compliance costs on State and local governments. Therefore, under Section 6(b) of the E.O., a federalism summary impact statement is not required.

#### *Prior Consultation With State Officials*

After the FCEA was enacted on June 18, 2008, FNS held a series of conference calls with State agencies and FNS regional offices to explain the SNAP provisions included in the public law and to answer questions that State agencies had about implementing the changes to the program. On July 3, 2008, FNS issued an implementation memorandum that described each SNAP-related provision in the FCEA and provided basic information to assist State agencies in meeting statutorily-mandated implementation timeframes. FNS responded to additional questions that State agencies submitted and posted the answers on the FNS Web site. Another forum for consultation with State officials on implementation of the FCEA provisions included various conferences hosted by FNS regional offices, State agency professional organizations, and program advocacy organizations. During these conferences, held in the latter part of 2008 and early months of 2009, FNS officials responded to a range of questions posed by State agency officials related to implementation of FCEA provisions.

#### **Executive Order 12988**

This rule has been reviewed under E.O. 12988, "Civil Justice Reform." This rule, when published final, is not intended to have preemptive effect with respect to any State or local laws, regulations, or policies that conflict with its provisions or that would otherwise impede its full implementation. This rule is not intended to have retroactive effect unless so specified in the "Effective Date" paragraph of the final rule. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted. In SNAP, the administrative procedures are as follows: For program benefit recipients—State administrative procedures issued pursuant to 7 U.S.C. 2020(e)(10) of the Food and Nutrition Act of 2008 and regulations at § 273.15; for State agencies—administrative procedures issued pursuant to 7 U.S.C. 2023 of the Act and regulations at § 276.7 (for rules related to non-Quality Control liabilities) or 7 CFR part 283 (for rules related to Quality Control liabilities); or Program retailers and wholesalers—administrative procedures issued pursuant to 7 U.S.C. 2023 and 7 CFR part 279.

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

FNS has reviewed this rule in accordance with the Department Regulation 4300-4, "Civil Rights Impact Analysis," to identify and address any major civil rights impacts the rule might have on minorities, women, and persons with disabilities. After a careful review of the rule's intent and provisions, and the characteristics of SNAP households and individual participants, FNS has determined that an important impact of this rule will be to help relieve the adverse effects of errors in program operations on recipients, including protected classes. All data available to FNS indicate that protected individuals have the same opportunity to participate in SNAP as non-protected individuals. FNS specifically prohibits State and local government agencies that administer the Program from engaging in actions that discriminate based on race, color, national origin, gender, age, disability, marital or family status. SNAP non-discrimination policy can be found at 7 CFR 272.6(a). Where State agencies have options, and they choose to implement a certain provision, they must implement it in such a way that it complies with 7 CFR 272.6.

#### **Executive Order 13175—Consultation and Coordination With Indian Tribal Governments**

E.O. 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. We are unaware of any current Tribal laws that could be in conflict with the proposed rule. We request that commenters address any concerns in this regard in their responses.

#### **Paperwork Reduction Act**

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR part 1320) requires that the Office of Management and Budget (OMB) approve all collections of information by a Federal agency from the public 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. This proposed rule contains information collections that are subject to review and approval by OMB; therefore, FNS is submitting for public comment the changes in the information collection burden that would result from adoption of the proposals in the rule. Comments on this proposed rule must be received by October 17, 2011.

Send comments to Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for FNS, Washington, DC 20503. Please also send a copy of your comments to Lizbeth Silbermann, Director Program Development Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Alexandria, VA 22302. For further information, or for copies of the information collection package, please contact Moira Johnston at the above address or via the Internet at [Moira.Johnston@fns.usda.gov](mailto:Moira.Johnston@fns.usda.gov).

*Comments are invited on:* (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and

clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record. For further information, or for copies of the information collection requirements, please contact Moira Johnston at the address indicated above.

*Title:* Major System Failures.

*OMB Number:* 0584–New.

*Expiration Date:* Not yet determined.

*Type of Request:* New Collection.

*Abstract:* Section 4133 of the FCEA, Major System Failures, amended the Act to require the United States Department of Agriculture (USDA) to determine when a systemic State error is resulting in the overissuance of SNAP benefits to a substantial number of SNAP households and the actions the Department may take if such a determination were made. To make this determination, the Department may require that States with potential Systemic Error situations to collect specific data concerning the systemic error. Such data may be obtained from the State’s Information Management System or it may be necessary for the State to select and review a statistical (random) sample of cases and report the results to the Department.

*Respondents:* The 53 state agencies that administer SNAP.

*Estimated Number of Annual Responses per Respondent:* Based on experience from the past twenty years (1990–2010) and considering the need for replacement of legacy systems in many States, out of the 53 State Agencies FNS estimates that one state agency will experience one systemic error every other year. If this provision had been in effect (using the proposed definition for a systemic error and States’ history of overissuance in SNAP), there were two or three

instances between 1990 and 2010 in which the Department may have required States to provide additional data following implementation of a new information management system. While there is no hard data that would indicate an increase in the frequency of such situations, the implementation of new systems with new technology may introduce additional risk. FNS’ estimate represents the highest number of systemic error situations that can be expected.

*Estimated Total Annual Responses:* One required response every year. Based upon the above estimate of one systemic error situation every other year, an individual State might be expected to be required to provide additional data under the authority of 7 CFR 273.19 about once every 53 years.

*Estimated Total Annual Reporting Burden on Respondents:* Proposed Section 273.19 requires States to provide the data specified by FNS when a systemic error that affects a substantial number of households occurs. Such data is expected to either be available from a State’s Information Management System (IMS) or the State will be required to collect the information from reviewing a sample of its case files for the systemic error. As noted above it is expected that there would be one respondent once every year. The average number of staff days required per systemic error occurrence is expected to be 255 so the total annual burden would be 2040 hours.

The above estimate is based upon the following assumptions and calculations:

- *IMS data*—Production of a data file containing case level information and/or summary reports that would provide the necessary information concerning a systemic error should not require more than 80 hours given the growing sophistication of States’ systems.
- *Sample of cases*—FNS believes that the number of sample cases required for Quality Control (QC) each year would be sufficient to measure the cost of a systemic error but would be needed for a 6-month period rather than annually.

While this rule does not specify the number of cases a State will select for review, the maximum FNS would require based upon this rulemaking would be 500 over a 6-month period. Since the number required for a large State’s QC sample is about 1,000 cases annually, FNS and the State would have 500 cases available from QC to measure a systemic error in a 6-month period and would need an additional 500 cases in a 6-month period to reach a sample size comparable to the QC sample. In the smaller States (14–16 States) the number would be between 300 and 400 additional cases. The QC reporting burdens have already been approved by OMB as shown in the following chart.

OMB Approval No.	Expiration date
OMB 0584–0303 .....	12/31/2013
OMB 0584–0034 .....	12/31/2012
OMB 0584–0074 .....	4/30/2013
OMB 0584–0299 .....	3/31/2013

It is estimated that it would take a State about 10 staff days to construct a sample frame, and select and assign the sample. An additional 20 staff days would be necessary to develop the review guidance and forms. Since desk reviews of case files together with some phone interviews with households and collateral contacts should provide sufficient information, each case review should require no more than one staff day to complete (for example, given an average of 450 case reviews, the average burden to complete the case reviews would be 450 staff days). Another 20 staff days would be needed to compile and report the results of the sample including examination of the cases originally selected for QC review. Based upon the above, the average requirement would be the 500 staff days when a sample of cases is required.

Averaging the 80 hours (10 staff days) with the 500 staff days yields 255 days per systemic error if the frequency of using IMS data and reviews of case samples were equal (there is no information to suggest otherwise).

**ATTACHMENT A: MAJOR SYSTEM FAILURES**

[Affected Public: State and Local Agencies (including Indian Tribal Organizations and U.S. Territories)]

Regulation section	Title	Number of potential respondents	Estimated annual report/ record filed	Total annual responses	Estimated hours per response	Estimated total burden hours
<b>Reporting Burden Estimates</b>						
272.19 .....	States’ State agencies .....	53	.019	1	2040	2040
Subtotal—Reporting .....		53	.019	1	2040	2040

ATTACHMENT A: MAJOR SYSTEM FAILURES—Continued

[Affected Public: State and Local Agencies (including Indian Tribal Organizations and U.S. Territories)]

Regulation section	Title	Number of potential respondents	Estimated annual report/ record filed	Total annual responses	Estimated hours per response	Estimated total burden hours
<b>Recordkeeping Burden Estimates</b>						
		0	0	0	0	0
<b>Grand Total</b> .....		53	.019	1	2040	2040

**E-Government Act Compliance**

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

**Background**

Section 4133 of the FCEA amends Section 13 of the Act to provide the Secretary with the authority to define and determine when a State has overissued SNAP benefits to a substantial number of households in a fiscal year as a result of a major systemic error. If the Secretary made such a determination, the State agency could be prohibited from collecting these overissuances from some or all of the affected households and a claim would be established against the State for the value of the overissuances caused by the systemic error. States are required to provide the Secretary with information on which to base such a determination. The State has the right to appeal such a claim under the provisions of Section 14 of the Act. With many State's automated systems aging and the growing potential for replacement of those systems over the next several years, this provision provides a protection to households from claims collections if errors in the new system designs or their implementation result in systemic over-issuances to a substantial number of households.

*What acronyms or abbreviations are used in this supplementary discussion of the proposed provisions?*

In the discussion of the proposed provisions in this rule, we use the following acronyms or abbreviations to stand in for certain words or phrases:

Phrase	Acronym, abbreviation, or symbol
Code of Federal Regulations	CFR
<b>Federal Register</b> .....	FR
Federal Fiscal Year .....	FY

Phrase	Acronym, abbreviation, or symbol
Food and Nutrition Act of 2008.	the Act
Food and Nutrition Service ... Food, Conservation, and Energy Act of 2008.	FNS FCEA
Quality Control .....	QC
U.S. Department of Agriculture.	the Department

*What does the Food and Nutrition Act of 2008 say about State liability for major systemic errors?*

The legislative language includes the following:

- The Secretary will define what constitutes a major systemic error that affects a substantial number of households.
- State agencies shall provide all information requested by the Secretary concerning the issuance of benefits to households by the State agency in the applicable fiscal year.
- The Secretary will make a final determination after reviewing relevant information provided by a State agency.
- The final determination will include whether the State agency overissued benefits to a substantial number of households as a result of a systemic error and the amount of the overissuance in the applicable fiscal year.
- The Secretary shall establish a claim against the State agency equal to the value of the overissuance caused by the systemic error.
- Administrative and judicial review, as provided in Section 14 of the Act, shall apply to the final determinations by the Secretary once the claim is established.
- The State agency shall, as soon as practical, remit to the Secretary the dollar amount specified in the claim if the determination of the Secretary is not appealed.
- When the determination of the Secretary is appealed, and after completion of the administrative or judicial review there is a finding of liability on the part of the State, it shall

remit to the Secretary the dollar amount of the liability found in the administrative or judicial review. The payment shall be made by the State to the Secretary as soon as practical.

- The Secretary may reduce any amount due to the State agency under any other provision of the Act by the amount due if a State agency fails to make a payment within a reasonable period of time determined by the Secretary.

The FCEA language does not specifically define what constitutes a substantial number of households being overissued benefits or a major systemic error. The language is not specific to "systems failures," and could be interpreted to include errors resulting from a variety of causes. Given the other authorities the Act provides to deal with error situations, the Department believes the intent of this provision is to focus on errors associated with automated eligibility systems and the effects of their implementation.

*What is a major systemic error?*

States have experienced technological and operational failures in the past when major systems were implemented before they were fully tested and staff fully trained in their use. The Department is proposing that a major systemic error be defined as an error resulting from a State's implementation of a new SNAP automated eligibility (data processing) system, reprogramming of an existing system, or adding new programming to an older system. While the legislative language does not limit the term systemic to "systems" errors, given the other authorities and remedies in the Act, the Department believes this is the most reasonable interpretation of this new authority (there is no practical utility relative to this proposed rulemaking in defining what might constitute a "minor" systemic error). The second criterion for use of the subject authority is that the systemic error affects a substantial number of households as discussed below.

*What constitutes a "substantial" number of households?*

The Department is particularly interested in comments on this aspect of the proposal. Clearly, defining "substantial" in the context of this rule is problematic. The Department considered using a specific number of households, but with the vast differences in States' caseload sizes, a single number could not be equitable between States. The better alternative is use of a percentage of States' caseloads that experience overissuances to define substantial. Since the national average case error rate has been around seven percent for several years and this number represents all of the errors made in the certification of households, it is reasonable to view this rate as "substantial." Therefore, the Department proposes that when an average of 8 percent or more of a State's caseload receives overissuances due to a systemic error over a 6-month period, this would be considered a substantial number of households. The reason for specifying a minimum of 6 months is that if a systemic error that affected 8 percent of the caseload lasted less than 6 months, it could affect less than 4 percent of the State's case load on an annual basis.

*Will States have the opportunity to take corrective action regarding the systemic error and avoid suspension of claims collection and the resulting liability?*

States are required to take corrective action immediately when they are become aware of a potential systemic error and, if the action were effective, could prevent the error affecting 8 percent of its households over the 6-month period, thus avoiding liability under these provisions. However, once the systemic error has affected 8 percent of the caseload over the 6-month period, the Act does not provide for any consideration of a State's corrective action efforts. Even if a major systemic error was determined to exist, timely corrective action could reduce the State's exposure to additional months of liability.

*Will FNS take the amount of the individual overissuances into account in determining the percentage of households affected by the systemic error?*

The Department is proposing that the amount of the error be at least \$21 per month for a case to be included in the calculation of a "substantial" number of households. The primary purpose of this proposed provision is to relieve households from payment of claims

resulting from systemic errors. Since States have the option of establishing claims of less than \$125 against those households that are no longer on the Program, households overissued less than \$21 per month over a 6-month period would not reach \$125 and may not be required to pay a claim even in the absence of this provision. Therefore, including cases with monthly losses of less than \$21 in the count of households would not contribute to the purpose of this provision.

*What authorities does USDA currently have when errors are made in a State's administration of SNAP?*

This proposal does not represent a significant departure from the Department's policy in dealing with State error and compliance issues. FNS has long focused on working in partnership with States to prevent errors or develop strong corrective action measures through technical assistance and identifying promising State practices. While most States already test new automated eligibility systems extensively, this provision should help encourage all States to implement new systems using sound testing. The Act has four other primary authorities for billing States for the loss of Federal funds and non-compliance with Federal law and regulations. Each is based on a different set of concepts, but there is potential for overlap, depending on the nature of the error or compliance issue. None of these other authorities allow for prohibition of claims collection against households for overissuances.

**Suspension/Disallowance of Administrative Funding**

Section 11(g) of the Act, 7 CFR 276.4, specifies that if FNS determines that a State agency's administration of the Program is inefficient or ineffective, FNS may warn the State agency that a suspension and/or disallowance of administrative funds is being considered. After a State agency receives a warning, FNS may either suspend or disallow administrative funds if the problem is not corrected. Since this authority deals with administrative funds and the systemic error authority deals with overissued benefits, there can be no direct overlap between the claim amounts. In addition, while FNS could use the two authorities sequentially or simultaneously in dealing with a severe compliance issue, the suspension/disallowance authority is generally viewed as more appropriate to issues of non-compliance that affect program access or application processing.

**Negligence**

Section 11(h) of the Act, 7 CFR 276.3 specifies that FNS may determine that a State agency has been negligent in the certification of applicant households if a State agency disregards SNAP requirements or implements procedures that deviate from the Act, the regulations, or the FNS-approved State Plan of Operation without first obtaining FNS approval, and the result is a loss of Federal funds. In computing amounts of losses of Federal funds due to negligence, FNS may use actual, documented amounts or amounts which have been determined through the use of statistically valid projections. When a statistically valid projection is used, the methodology will include a 95 percent, one-sided confidence level.

If FNS makes a determination that there has been negligence or fraud on the part of a State agency in the certification of households for participation in the Program, FNS is authorized to bill the State agency for an amount equal to the amount of benefits issued as a result of the negligence or fraud.

While there are some structural similarities in terms of benefit loss and claim calculation, the systemic error authority does not require the State to "disregard" or "deviate from" a policy. There is potential for overlap in the use of the two authorities and to the extent that a State actually pays the Federal government for either a negligence billing or a systemic error billing under this authority, the second collection amount would be reduced.

**Direct Liability**

In accordance with Section 7(e) of the Act, 7 CFR 276.1(a)(2), FNS holds State agencies strictly liable for all losses that occur during issuance. This authority can only be used in cases of issuance errors. Since errors that fall outside of QC data are difficult to identify without review of States' issuance and certification files, FNS has employed data mining as necessary to determine if losses are occurring in the process of issuing benefits. It is possible that the systemic error in a States' operation could be in the issuance process so there is potential for overlap in the use of the two authorities and to the extent that a State actually pays the Federal government for both a strict liability billing and for a systemic error billing under this authority, the second collection amount would be reduced.

**QC Sanctions**

States' payment error rates are measured annually based on an in-

depth review of a sample of cases receiving SNAP benefits each month of the year. The review determines the amount of benefits cases should have been issued based on correct policy and verified household information relative to the amount that they were issued. The differences in the two amounts (over a threshold) constitute the error dollars that are divided by the total amount issued to the sample cases to calculate States' payment error rates. Because the sample is random and State-wide, these error rates represent the States' actual error rates. For a complete description of the QC process see Section 16(c) of the Act, 7 CFR 275.12, and QC Handbook 310 (may be found on the FNS Web site at <http://www.fns.usda.gov/snap/qc/default.htm>). Section 16(c)(1) of the Act specifies the process for determining when a State's payment error rate is excessive and State funds are subject to a liability. See § 275.23 for a complete description of the QC sanction provisions.

The key differences between the QC sanction and this authority is that the QC error rate is an index made up of errors with many different causes (potentially including certain systemic errors), QC liability amounts are not dollar-for-dollar relative to the over-issuances measured, and QC liability amounts are not necessarily repaid to the Federal government. To the extent that a State is billed by the Federal government for both a QC based liability and for a systemic error under this authority, the second collection amount would be reduced.

*Could the Department invoke more than one of these authorities for the same error or compliance issue?*

Yes. In certain situations the Department could use the systemic error authority and another authority to address different aspects of an issue in a State. However, any collections based on the same overissuance or direct liability loss would be offset in the second collection amount.

*What is the relationship of this rule to the "FCEA Testing Requirements Rule?"*

Section 16(g) of the Act requires States designing new automated eligibility systems to thoroughly test and pilot such systems prior to full implementation. Through the advanced planning document process (7 CFR 277.18), FNS strives to work closely with States in their planning, and later, in their implementation of new systems. While it is not unusual for such potential errors to be present in the early stages of new software

development and application, it is the purpose of the testing and piloting process to identify and correct such errors. A cautious and measured roll-out of new systems within a State also allows for identification and correction of any errors before they can affect the entire caseload. If a State complies with the required testing and piloting provisions of the Act and resulting regulations, deals effectively with issues identified in this process prior to rolling the new system out, and implements effectively in terms of case conversion and worker training, the potential for a systemic error that affects a substantial number of households is minimal.

However unlikely, it is possible that a State could experience a systemic error situation even if all precautions have been taken. While FNS would be reluctant to use the systemic error authority in this situation, the intent of the subject provision of the FCEA is to relieve the burden of reduced benefits by prohibiting claims collection for systemic overissuances to households. While the FCEA does give the Department discretion regarding the prohibition of collecting claims against households when a major systemic error occurs, it does not allow discretion regarding a State's liability for such an error; even when the State has been prudent in its planning and implementation. While such a situation would preclude a negligence billing, the Department would prohibit individual household claims collection and establish a liability against the State under this proposal.

*Could the Department prohibit claims collection, but not bill the State for a systemic error?*

No, the FCEA is clear that the determination that a systemic error has occurred will result in a claim against the State for the amount of the systemic error. This rule links the determination to prohibit claims collection for resulting overissuances to the mandate to bill the State. However, the Department has general discretionary authority under Section 13 of the Act to waive part or all of a claim against a State. If a State has adhered to the planning, testing, and piloting requirements of the Act and regulations, FNS would strongly consider recommending reduction or elimination of any claim against the State for a systemic error.

*Will this authority only be used relative to computer programming problems that result in systemic errors?*

No, the implementation of a new system or significant system changes

may also require worker training, case conversion, sufficient server capacity, proper equipment and changes to the States' business processes in the local offices. If systemic errors arose from factors related to implementation, the Department could prohibit claims collection for the error and pursue a claim against the State.

*How will the Department become aware of system problems that may result in the use of the systemic error authority?*

The Department monitors States' implementation of new systems and their impact on program performance through on-site reviews and standard reports such as QC and participation reports. In addition, recipients, advocate groups and the media can provide indications of problems that FNS follows up on with inquires to the State, requests for additional data, and/or additional reviews of States operations. FNS can go further by using data mining techniques on States' data or analyzing QC data for error patterns that may have a systemic cause. Therefore, except in the most extreme circumstances, the process of identifying a systemic error would typically require a series of steps, within each of which FNS would be seeking to work with the State to correct the problem. If, upon State-wide implementation of a system, the systemic error was pervasive and readily identified, the process for using this authority to prohibit claims collection could be more immediate.

*What data will States be required to provide to FNS?*

FNS' data needs will be determined by the nature and timing of the systemic error. While the FCEA and this proposal requires States to provide all information requested by the Department, FNS will negotiate with the State on the data request to ensure that only the information needed to make a determination and calculate the proper amount of a claim would be required from the State. For example, FNS could use the authority of the FCEA to require States to conduct additional reviews of a sample of cases (similar to a QC review) to determine the extent of a potential systemic error, but would negotiate with the State on the extent of the review process, the timing of reviews and the size of the sample. States could also be required to provide data from their automated eligibility system. FNS will base its determination on whether there has been a systemic error that affected a substantial number of households on the data it gathers from the State. FNS would base its determination on the point estimate of

the sample data when sample data is used.

*How will the Department notify States of the potential for prohibiting claims collection?*

FNS will be in communication with any State that may be subject to this authority, but will notify the State that the State will have 10 days from the date of notification to stop claims collection against households affected by the systemic error.

*How long will States have to provide required information to FNS?*

Unless otherwise specified by FNS, States shall provide required information to FNS within 3 months of being notified of the data requirements.

*How long will States have to implement the prohibition of recipient claims collection for overissuances based upon systemic errors?*

States will have 10 business days after notification from FNS to stop claims collection against households affected by the systemic error.

*Will States be required to return any claims resulting from the systemic error that are collected prior to the FNS notification prohibiting their collection?*

Yes, claims resulting from the systemic error that are collected must be restored to households' Electronic Benefit Transfer (EBT) accounts.

*When this authority is invoked, will claims be prohibited for all households?*

No, claims establishment and collection would only be prohibited for the claims resulting from the systemic error(s) identified by FNS. States would be expected to continue to pursue claims against households that are overissued benefits in accordance with the Act, except those affected by the systemic error.

*How long will recipient claims collection be prohibited under this provision?*

Once FNS notifies a State that claims collection is to be prohibited for a systemic error, all claims in process and any claims that could be pursued for that error would be prohibited until the systemic error is determined by FNS to have been substantially corrected. For example, a State implements a major system change on March 1, and on August 1, FNS notifies the State to prohibit claims collection due to a systemic error in the certification process arising from that system change. The State takes corrective action to address the problem on October 1 and

the State is notified on December 1 that FNS has determined that the systemic error has been eliminated. All claims against cases arising from systemic errors made between March 1st and December 1st would be prohibited, including benefits issued to such cases after December 1st until they are recertified. However, no claims resulting from an error occurring after December 1st could have claim collection prohibited.

*What information will States be required to report on the prohibited claims collection?*

While the State will be required to document the cases where overissuances are caused by the systemic error and claims are not being pursued, no additional reporting will be required.

*How will FNS determine the claim amount against a State following prohibition of recipient claims collection?*

FNS will use information from its standard reports together with the data it obtains from the State under the authority of this provision of the FCEA. QC data alone may be used or it may be used in conjunction with an additional sample of cases. Data mining techniques may be employed when QC data cannot provide the necessary information on the error. When FNS uses sample data, it will apply a 95 percent one-sided confidence level to determine the amount of a claim. The example of how this calculation will be made is provided in § 273.19(c)(5) as: the sample estimate of the major systemic error is 8 percent over a 6 month period, but based on a 95 percent confidence interval of 2 percentage points, the rate used would be 6 percent. Therefore the claim would be 6 percent of value of the State's total issuance over the 6 months.

*What are the appeal procedures for claims against states?*

The administrative appeal process for claims asserted under this authority is specified in § 276.7 and permits States to request an administrative review within 10 days of the date of delivery of the notice of claim. This proposed rule adds reference to billings based upon systemic errors into § 276.7(a)(1).

*Can a State appeal the Department's decision to prohibit claims collection against households affected by a systemic error?*

FNS' decision on prohibiting collection of recipient claims resulting from systemic error cannot be appealed.

Only the related, but separate, claim against the State can be appealed.

*If a State disagrees with the ruling of the SNAP appeals board, can it seek judicial review?*

As specified in § 276.7(j), "State agencies aggrieved by the final determination may obtain judicial review and trial de novo by filing a complaint against the United States within 30 days after the date of delivery of the final determination, requesting the court to set aside the final determination."

*If the State does not appeal the billing or there is a remaining liability amount after the administrative and or judicial review process, what are the next steps in the process?*

As soon as practicable, the State would remit the claim amount as specified in the FNS billing. If a State agency fails to make a payment within a reasonable period of time, FNS would reduce the administrative funding due to the State agency by the amount of the claim.

#### **List of Subjects**

##### *7 CFR Part 273*

Administrative practice and procedure, Aliens, Claims, Employment, Grant programs—social programs, Income taxes, Reporting and recordkeeping requirements, Students, Supplemental Security Income.

##### *7 CFR Part 276*

State agency liabilities, Negligence or fraud, Suspension/disallowance of administrative funds, Injunctive relief, Good cause, Administrative review process.

Accordingly, 7 CFR parts 273 and 276 are proposed to be amended as follows:

#### **PART 273—CERTIFICATION OF ELIGIBLE HOUSEHOLDS**

1. The authority citation for part 273 and continues to read as follows:

**Authority:** 7 U.S.C. 2011–2036.

2. Add § 273.19 to read as follows.

##### **§ 273.19 Recipient claims resulting from major systemic errors.**

(a) *Major systemic errors.* (1) Major systemic errors are overissuance errors that effect eight percent or more of a State's caseload over a 6 month period that result from the State's implementation of a new SNAP automated eligibility (data processing) system, reprogramming of an existing system, or adding new programming to an existing system.

(2) The causes of major systemic errors may include, but are not limited to: Incorrect computer programming, ineffective worker training, problems in case conversion, insufficient server capacity, improper equipment, and ineffective States' business processes in the local offices related to the systems change.

(b) *State reporting.* (1) When the Food and Nutrition Service (FNS) determines that major systemic errors may have occurred in a State, the State shall provide the information that FNS identifies as necessary to make its determination that a systemic error has, or has not, occurred. Based on the data FNS gathers from the State, FNS will determine whether there has been a systemic error that affected a substantial number of households. FNS' data needs will be determined by the nature and timing of the systemic error, but will generally cover at least a 6 month time period. FNS will only request the information necessary to make its determination and calculate the proper amount of any potential claim against the State. FNS may require States to conduct additional reviews of cases randomly sampled from the State's caseload to determine the extent of a potential systemic error. When sample data is used, FNS will base its determination on the point estimate of the sample data and negotiate with the State on the size of the sample. FNS may also require a State to provide data from its automated eligibility (data processing) system.

(2) Unless otherwise specified by FNS, States shall report to FNS within 3 months of being notified of the data requirements.

(c) *FNS determination.* (1) FNS shall base its determination of whether a major systemic error exists on the data it requires to be provided by the State and any data from Federal review sources including the USDA Office of Inspector General, the General Accounting Office, and FNS reviews. FNS may also validate data provided by a State.

(2) FNS will notify a State of its determination and, when a major systemic error is determined to exist, inform the State of the specifics of the error(s) and prohibit claims collection from the affected cases. FNS will establish and inform the State on the time period for which overissuances to the subject cases are not subject to recipient claims collection.

(3) When FNS determines that a major systemic error exists, FNS shall determine the amount of the overissuance caused by the major systemic error. FNS will calculate the

claim amount based on the best information available and may require the State to provide information from its information management system or review a sample of cases.

(4) Error amounts below \$20 in a given month shall not be included in the determination of a systemic error.

(5) When a sample is used, the claim shall be based on the lower boundary of a 95 percent confidence interval. Example of calculation based on information from a sample: The sample estimate of the major systemic error is 8 percent over a 6 month period, but based on a 95 percent confidence interval of 2 percentage points, the rate used would be 6 percent. Therefore the claim would be 6 percent of value of the State's total issuance over the 6 months.

(6) If any funds resulting from the systemic error caused overissuances are collected based on the negligence or quality control provisions of 7 CFR parts 276 and 275, the claim calculated under paragraph (c)(3) of this section would be reduced by the amount collected.

(d) *Action on recipient claims collection.* (1) When FNS determines that a major systemic error has occurred, the State will be notified that claims resulting from the systemic error overissuances shall not be collected. FNS will specify the beginning date of the major systemic error the time period in which the errors occurred.

(2) States shall have 10 days from the date of notification by FNS to stop collection of the claims resulting from the systemic error.

(3) Once FNS determines that the systemic error has been corrected to the extent that it no longer affects a substantial number of households, the State will be notified of the ending date for prohibition on collection of claims for overissuances resulting from the major systemic error and that claims shall again be collected for all overissuances.

(4) If claims are collected from households based on overissuances caused the major systemic error, the State shall return the claim amount collected to these households by restoring benefits to households EBT account.

(e) *Collection of liabilities and appeals.* FNS shall initiate collection action unless an administrative appeal relating to the liability is pending. Appeals include administrative appeals in accordance with the procedures specified in § 276.7 and judicial appeals. While the amount of a State's liability may be recovered through offsets to their letter of credit as identified in § 277.16(c) of this chapter, FNS shall also have the option of billing

a State directly or using other claims collection mechanisms authorized under the Federal Claims Collection Act, depending upon the amount of the State's liability.

## PART 276—STATE AGENCY LIABILITIES AND FEDERAL SANCTIONS

3. The authority citation for part 276 continues to read as follows:

**Authority:** 7 U.S.C. 2011–2036.

4. In § 276.7, paragraph (a)(1) is revised to read as follows:

### § 276.7 Administrative review process.

(a) \* \* \*

(1) Whenever FNS asserts a claim against a State agency, the State agency may appeal the claim by requesting an administrative review. FNS claims that may be appealed are billings resulting from financial losses involved in the acceptance, storage, and issuance of coupons (§ 276.2), billings based on charges of negligence or fraud (§ 276.3), billings based on over-issuances for systemic errors (§ 276.3) and disallowances of Federal funds for State agency failures to comply with the Food and Nutrition Act, regulations, or the FNS-approved State Plan of Operations (§ 276.4).

\* \* \* \* \*

Dated: August 8, 2011.

**Audrey Rowe,**  
Administrator, Food, Nutrition, and  
Consumer Services.

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## DEPARTMENT OF ENERGY

### 10 CFR Part 431

[Docket No. EERE–2010–BT–NOA–0028]

RIN 1904–AC24

### Energy Conservation Program for Consumer Products and Certain Commercial and Industrial Equipment: Statement of Policy for Adopting Full-Fuel-Cycle Analyses Into Energy Conservation Standards Program

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Statement of Policy.

**SUMMARY:** In its effort to adopt several National Academy of Sciences (the Academy) recommendations, the U.S. Department of Energy (DOE) intends to modify the methods it uses to estimate the likely impacts of energy