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Part II

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Food and Nutrition Service

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7 CFR Parts 210, 215, 220, et al.

Child Nutrition Program Integrity; Proposed Rule

**DEPARTMENT OF AGRICULTURE****Food and Nutrition Service****7 CFR Parts 210, 215, 220, 225, 226 and 235**

RIN 0584-AE08

**Child Nutrition Program Integrity****AGENCY:** Food and Nutrition Service, USDA.**ACTION:** Proposed rule.

**SUMMARY:** This rule proposes to codify several provisions of the Healthy, Hunger-Free Kids Act of 2010 affecting the integrity of the Child Nutrition Programs, including the National School Lunch Program (NSLP), the Special Milk Program for Children, the School Breakfast Program, the Summer Food Service Program (SFSP), the Child and Adult Care Food Program (CACFP) and State Administrative Expense Funds. The Department is proposing to establish criteria for assessments against State agencies and program operators who jeopardize the integrity of any Child Nutrition Program; establish procedures for termination and disqualification of entities in the SFSP; modify State agency site review requirements in the CACFP; establish State liability for reimbursements incurred as a result of a State's failure to conduct timely hearings in the CACFP; establish criteria for increased State audit funding for CACFP; establish procedures to prohibit the participation of entities or individuals terminated from any of the Child Nutrition Programs; establish serious deficiency and termination procedures for unaffiliated sponsored centers in the CACFP; eliminate cost-reimbursement food service management company contracts in the NSLP; and establish procurement training requirements for State agency and school food authority staff in the NSLP. In addition, this rulemaking would make several operational changes to improve oversight of an institution's financial management and would also include several technical corrections to the regulations. The proposed rule is intended to improve the integrity of all Child Nutrition Programs.

**DATES:** To be assured of consideration, written comments must be postmarked on or before May 31, 2016.

**ADDRESSES:** The Food and Nutrition Service, USDA, invites interested persons to submit written comments on this proposed rule. In order to ensure proper receipt, written comments must be submitted through one of the following methods only:

- *Preferred method:* Federal eRulemaking Portal at <http://www.regulations.gov>. Follow the online instructions for submitting comments.

- *Mail:* Comments should be addressed to Andrea Farmer, Chief, School Meal Programs Branch, Policy and Program Development Division, Child Nutrition Programs, Food and Nutrition Service, Department of Agriculture, 3101 Park Center Drive, Alexandria, Virginia 22302-1594.

- *Hand Delivery or Courier:* Deliver comments to the Food and Nutrition Service, Child Nutrition Programs, 3101 Park Center Drive, Alexandria, Virginia 22302-1594, during normal business hours of 8:30 a.m.–5:00 p.m., Monday through Friday.

Comments sent by other methods not listed above will not be able to be accepted and subsequently, not posted. All comments submitted in response to this proposed rule will be included in the record and will be made available to the public. Duplicate comments are not considered. 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. The Department will make the comments publicly available on the Internet via <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Mandana Yousefi, Community Meal Programs Branch, Policy and Program Development Division, Child Nutrition Programs, Food and Nutrition Service at (703) 305-2590.

**SUPPLEMENTARY INFORMATION:**

- I. Public Comment Procedures
- II. Executive Summary
- III. Background and Discussion of the Proposed Rule
- IV. Procedural Matters

**I. Public Comment Procedures**

Your written comments on the proposed rule should be specific, should be confined to issues pertinent to the proposed rule, and should explain the reason(s) for any change you recommend or proposal(s) you oppose. Where possible, you should reference the specific section or paragraph of the proposal you are addressing. We invite specific comments on various aspects of the rule as described later in this preamble. We also invite comments from State agencies, sponsors, and providers on the administrative cost of compliance with any of the provisions in the rule. Additionally, we invite comments on the potential impact of the changes in the proposed rule on Program access, particularly in areas through the country where there are a limited number of providers available to

operate the Programs. Comments received after the close of the comment period (refer to **DATES**) will not be considered or included in the Administrative Record for the final rule.

We also invite your comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

(1) Are the requirements in the proposed regulations clearly stated?

(2) Does the rule contain technical language or jargon that interferes with its clarity?

(3) Does the format of the rule (e.g., grouping and order of sections, use of headings, and paragraphing) make it clearer or less clear?

(4) Would the rule be easier to understand if it was divided into more (but shorter) sections?

(5) Is the description of the rule in the preamble section entitled "Background and Discussion of the Proposed Rule" helpful in understanding the rule? How could this description be more helpful in making the rule easier to understand?

**II. Executive Summary***Purpose of the Regulatory Action*

This proposed rule would codify several provisions of the Healthy, Hunger-Free Kids Act of 2010 (HHFKA), Public Law 111-296, that affect the integrity of the Child Nutrition Programs, including the National School Lunch Program (NSLP), the Special Milk Program for Children (SMP), the School Breakfast Program (SBP), the Summer Food Service Program (SFSP), the Child and Adult Care Food Program (CACFP), and State Administrative Expense Funds (SAE). In addition, this rule would incorporate policy changes resulting from several findings from recently conducted targeted management evaluations of the CACFP by the Food and Nutrition Service (FNS), and USDA Office of Inspector General audit findings, as well as other miscellaneous revisions to the regulations. The rule is intended to improve the integrity of all Child Nutrition Programs.

USDA anticipates that the provisions under this proposed rule would be implemented 90 days following publication of the final rule, with the exception of those related to CACFP audit funds and those related to assessments against State agencies and program operators. The provision granting eligible State agencies additional CACFP audit funds will be implemented upon publication of the final rule. Because States and school districts have been working diligently to implement the provisions of the

Healthy, Hunger-Free Kids Act, USDA anticipates that the provision establishing criteria for assessments against State agencies and program operators would be implemented one school year following publication of the final rule to provide entities the time they need to complete successful implementation.

#### *Summary of the Major Provisions of the Regulatory Action*

The major provisions addressed in this rule are:

**Section 303 of the HHFKA: Fines for Violating Program Requirements**—Section 303 of the HHFKA requires the Secretary to establish criteria for the imposition of fines in the Child Nutrition Programs, referred to as assessments in this proposed rule. An assessment refers to a required payment of funds from non-Federal sources. Under section 303, the Secretary or a State agency may establish an assessment against any school food authority or school administering the Child Nutrition Programs if the Secretary or the State agency determines that the school or school food authority failed to correct severe mismanagement of any program, failed to correct repeated violations of program requirements, or disregarded a requirement of which they have been informed. Section 303 also provides the Secretary the authority to establish an assessment against any State agency if the Secretary determines the State agency has failed to correct severe mismanagement of any program, failed to correct repeated violations of program requirements, or disregarded a requirement of which they have been informed.

**Section 322 of the HHFKA: SFSP Disqualification**—Section 322 requires the Secretary to establish procedures for the termination and disqualification of entities participating in the SFSP, to maintain a list of entities that have been terminated or disqualified from SFSP, and to make this list available to States for use in approving or renewing service institutions' applications for SFSP participation.

**Section 331(b) of the HHFKA: State Agency/Sponsor Review Requirements in the CACFP**—Section 331(b) requires the Secretary to develop for State agencies additional criteria or priorities for use in choosing institutions for review, including institutions at risk of having serious management problems and institutions conducting activities other than the CACFP.

**Section 332 of the HHFKA: State Liability for Payments to Aggrieved Child Care Institutions**—Section 332

requires State agencies to pay all valid claims for reimbursement, from non-Federal sources, if the required timeframes for a fair hearing are not met.

**Section 335 of the HHFKA: CACFP Audit Funding**—Section 335 allows the Department to increase the amount of audit funds made available to a CACFP State agency if the State agency demonstrates it can effectively use the funds to improve Program management in accordance with criteria established by the Department.

**Section 362 of the HHFKA: Disqualified Schools, Institutions, and Individuals**—Section 362 makes any school, institution, service institution, facility, or individual that has been terminated from any Child Nutrition Program and who is on the CACFP or SFSP National Disqualified List ineligible for participation in or administration of any Child Nutrition Program.

#### *Costs and Benefits*

While all entities—school food authorities, schools, institutions, sponsors sites, sponsoring organizations, day care centers and State agencies—administering Child Nutrition Programs will be affected by this rulemaking, the economic effect is not expected to be significant as explained below.

### **III. Background and Discussion of the Proposed Rule**

The Department is proposing to amend the regulations for the NSLP, SMP, SBP, SFSP, CACFP, and SAE found at 7 CFR parts 210, 215, 220, 225, 226 and 235, respectively. These changes are intended to improve the integrity of the affected Child Nutrition Programs.

The proposed changes respond to provisions of the HHFKA, findings from management evaluations of the CACFP by the Department and from an audit by the Department's Office of Inspector General. In addition, the proposal includes technical corrections and other miscellaneous revisions to the regulations. Each of the proposed changes is discussed in detail below.

The Department recognizes that the provisions in this proposed rule impact many aspects of State administration of Child Nutrition Programs. As a result, the Department will provide guidance and technical assistance to State agencies to ensure successful implementation of this regulation.

USDA anticipates that the provisions under this proposed rule would be implemented 90 days following publication of the final rule, with the

exception of those related to assessments against State agencies and program operators and CACFP audit funds. The provision establishing criteria for assessments against State agencies and program operators would be implemented one school year following publication of the final rule. The provision granting eligible State agencies additional CACFP audit funds will be implemented upon publication of the final rule.

#### *Proposed Changes in Response to the HHFKA*

##### **Section 303 of the HHFKA: Fines for Violating Program Requirements**

Section 303 of the HHFKA amended section 22 of the Richard B. Russell National School Lunch Act (NSLA) (42 U.S.C. 1769c) to require the Secretary to establish criteria by which the Secretary or the State agency may impose a fine, referred to in this proposed rule as an assessment, against any school food authority or school administering a program authorized under the NSLA or the Child Nutrition Act of 1966 (42 U.S.C. 1771 *et seq.*) (CNA). An assessment refers to a required payment of funds from non-Federal sources. The provision also authorizes the Secretary to establish an assessment against any State agency administering a program under the NSLA or the CNA. Assessments established pursuant to section 303 are limited to those situations where a school, school food authority, or State agency has failed to correct severe mismanagement of any program, disregarded a requirement of which it has been informed, or failed to correct repeated violations of program requirements.

The provision implies that an assessment would be established only in situations where the regular monitoring, oversight, corrective action and technical assistance processes used by a State agency or the Department do not result in correction of identified program violations. It is important to note that the statutory scheme only anticipates assessments be established in instances of *severe* mismanagement of a program, disregard of a program requirement of *which the program operator had been informed*, or failure to correct *repeated* violations. These criteria suggest that violations that would result in assessments would be egregious or persistent in nature, remaining unresolved after the normal monitoring and oversight activities have failed to secure corrective action.

Current program regulations require rigorous FNS and State agency monitoring and oversight. For example, in accordance with 7 CFR part 210.29,

FNS conducts management evaluations of State agencies administering the NSLP and SBP based on relative-risk for program administration issues, rather than by a calendar cycle. At a minimum, each State agency receives a management evaluation once every five years to assess compliance with all aspects of the State agency's operation of the NSLP and SBP. Any findings are recorded in the management evaluation report and are either immediately corrected or a corrective action plan is implemented with subsequent follow-up activity until the violations are corrected. In addition, the monitoring and oversight process for the NSLP and SBP calls for a State agency administrative review of each school food authority once every three years. As part of the 7 CFR 210.18 administrative review requirements, State agencies must assess a school food authority's compliance with specific performance standards as well as with general areas of review. School food authorities failing to demonstrate compliance must develop a corrective action plan and take corrective actions to ameliorate the problem. The State agency must assess the corrective actions taken, provide any needed technical assistance, recover any improperly paid Federal funds, and if needed, conduct a follow-up review. Generally, State agencies and school food authorities work together to correct Program violations for the betterment of the Program and the children they serve.

However, there have been cases, albeit few, where program operators have failed to correct Program violations through the normal administrative review requirements and technical assistance. This proposed rule would provide both the Department and State agencies the authority to establish an assessment after the normal monitoring and oversight activities have been unsuccessful in correcting program violations. The Department anticipates assessments would be established only on rare occasions in securing corrective action. However, it should serve as a useful tool when egregious or persistent disregard of Program requirements occurs.

Amendatory language under this proposed rule would affect the NSLP, SMP, SBP, SFSP, CACFP, and USDA Donated Foods in schools and institutions. The Department published proposed regulation "Fresh Fruit and Vegetable Program" in the **Federal Register** on February 24, 2012 (77 FR 10981), which would establish the basic structure of the Fresh Fruit and Vegetables Program (FFVP), and related requirements, as authorized under

section 19 of the NSLA (42 U.S.C. 1769a). While the authority set forth in section 303 also extends to the FFVP, this proposed rule does not include amendatory changes relating to the FFVP, as the FFVP regulations have not yet been codified. It is the intention of the Department to incorporate language identical to that proposed at § 210.26(b) to extend the authority provided under section 303 to the FFVP when that rule is finalized. Any comments related to assessments established in the FFVP under section 303 should be submitted to the Department in response to this proposed rulemaking.

Section 303 prescribes upper limits on the amount of the assessments that can be established against any school food authority, school, and State agency. In calculating assessments against school food authorities and schools, the Department is directed to base the amount on the reimbursement earned by the school food authority or school for the program in which the violation occurred. The amount of the assessment may not exceed the equivalent of:

- For the first assessment, 1 percent of the amount of meal reimbursements earned for the fiscal year;
- For the second assessment, 5 percent of the amount of meal reimbursements earned for the fiscal year; and
- For the third or subsequent assessment, 10 percent of the amount of meal reimbursements earned for the fiscal year.

In calculating assessments established against State agencies, the Department is directed to base the amount on the SAE funds made available to the State agency for the State agency's administration of the Child Nutrition Programs. Therefore, the amount of the assessment is based on SAE funds for all Child Nutrition Programs, not only SAE support earned by the program in which the violation occurred. The amount of the assessment may not exceed the equivalent of:

- For the first assessment, 1 percent of funds made available for SAE during the fiscal year;
- For the second assessment, 5 percent of funds made available for SAE during the fiscal year; and
- For the third or subsequent assessment, 10 percent of the amount funds made available for SAE during the fiscal year.

The proposed regulation bases these limits on the most recent fiscal year for which meal reimbursements or SAE allocations closeout data are available. Finally, section 303 specifies that funds used to pay an assessment must be derived from non-Federal sources. This new authority to establish assessments

is expected to serve as a deterrent to those State and local program operators who disregard the program requirements of any Child Nutrition Program.

This rule proposes to amend the regulations for the NSLP, SMP, SBP, SFSP, and CACFP at §§ 210.26(b), 215.15(b), 220.18(b), 225.18(k), and 226.25(i) to codify the authority to establish an assessment, identify the violations for which an assessment would be established, and establish the monetary limits to which an assessment may be imposed, as outlined in the NSLA.

Section 303 authorizes the Secretary or a State agency to establish assessments against school food authorities and schools administering any Child Nutrition Program. However, in addition to school food authorities and schools, other types of institutions operate the Child Nutrition Programs in accordance with the statutory and regulatory framework. Institutions, sites, sponsors, day care centers, and day care providers also may operate under the SMP, SFSP, or CACFP.

Investigations conducted by the USDA OIG and management evaluations of State agencies conducted by the Department identified problems in the Child Nutrition Programs associated with non-school Program operators. In 2006, OIG conducted an audit of the SFSP in California and Nevada which found the majority of private nonprofit sponsors reviewed to be noncompliant in Program requirements related to meal counts, costs and income reporting, as well as State health and safety code requirements. In addition, the Child Care Assessment Project (CCAP) Final Report, published by the Department in July 2009, identified inaccurate meal counts and menu records by providers and private nonprofit sponsoring organizations and a failure to employ the serious deficiency process as intended. These findings indicate patterns of non-compliance in CACFP and SFSP by entities/institutions which are not school food authorities or schools. OIG has several audits currently underway, including a review of management controls in the CACFP, areas of risk assessment in the CACFP and a follow up of the 2006 SFSP audit in California and Nevada. The findings of these audits can be found in the Review of the Management Controls in the CACFP Final Report published by the Department in November 2011.

With these findings in mind and consistent with the Department's authority in Section 10(a) of the CNA, 42 U.S.C. 1779(a), to promulgate regulations necessary to carry out the

Child Nutrition Programs, this rule would extend to all entities that have an agreement with the State agency. Thus, this proposed rule would apply to school food authorities, schools, institutions, sites, sponsors, day care centers, and day care providers. The resultant rule would ensure program integrity and equitable treatment of all participating entities and institutions.

Given the fiscal consequences of this provision, the Department would provide school food authorities, institutions, and sponsors the opportunity to appeal any assessment established pursuant to this regulatory authority. School food authorities, institutions, and sponsors administering the NSLP, SFSP, and CACFP currently have the ability to appeal fiscal action through the existing administrative review process in the NSLP, SFSP, and CACFP regulations. This proposed rule would expand current regulatory appeal rights to include any assessment established pursuant to this regulatory authority and would extend those appeal rights and procedures to both the SMP and SBP. To ensure the appeal process is completed on a timely basis, this proposed rule would make the determination of the State agency review official final and not subject to further administrative review. The proposed rule also would require the State agency to notify the Department at least 30 days prior to establishing an assessment.

Finally, the proposal would provide the Department and the State agency the authority to suspend or terminate the participation of an entity if the established assessment is not paid.

This rule also proposes to amend the SAE regulations at § 235.11(c) to incorporate the Department's authority to establish an assessment against a State agency, the violations for which an assessment would be established, and the monetary limits to which an assessment may be established.

The proposed rule would expand the current criteria previously established in regulation for establishing an assessment to include the State's failure to correct both State and local mismanagement of the program as a violation for which an assessment may be established. This reflects the State agencies' responsibility for ensuring the proper administration of the programs at both the State and local level.

As with program operators, this proposed rule would provide State agencies the ability to appeal any assessment established through the existing administrative review process for State agencies in § 235.11(g), would make the determination of the

Department review official in any appeal final and not subject to further administrative or judicial review, and would provide the authority for the Department to suspend or terminate the participation of the State agency if the State agency failed to pay the assessment.

Finally, the proposed rule would require that all assessments and any interest charged would be collected and paid to the Department and transmitted to the U.S. Department of the Treasury. Funds received by and from the State agencies as a result of assessments must be paid from non-Federal sources. As such, the funds could not be used by the Department.

Accordingly, proposed rule changes are found at §§ 210.18(q), 210.26(b), 215.15(b), 220.18(b), 225.13(a), 225.18(k), 226.6(k)(2)(xii), 226.25(i), and 235.11(c) and (g).

#### Section 322 of the HHFKA: SFSP Disqualification

Section 322 of the HHFKA amended section 13 of the NSLA (42 U.S.C. 1761) by adding a new paragraph (q), *Termination and Disqualification of Participating Organizations*. Under this new authority, State agencies are required to follow the procedures for the termination of participation of institutions in the SFSP established by the Secretary. The procedures for termination must include a provision for a fair hearing and prompt determination for any service institution aggrieved by any action of the State agency that affects the participation of the service institution in the SFSP or the claim of the service institution for reimbursement. The Secretary is required to maintain a list of institutions and individuals that have been terminated or otherwise disqualified from participation in the SFSP and to make the list available to States for use in approving or renewing applications by institutions for participation in the SFSP.

Prior to enactment of the HHFKA, the Department and State agencies did not have the authority to *disqualify* SFSP sponsors. Current regulations at § 225.11(c) only provide authority to terminate sponsor participation. These regulations prohibit State agencies from entering into an agreement with any applicant sponsor, or allowing participation in the Program, of a sponsor that was seriously deficient in its operation of the SFSP, or any other Federal Child Nutrition Program. Additionally, State agencies are required to terminate the Program agreement with any sponsor determined to be seriously deficient and provide a

sponsor reasonable opportunity to correct problems before termination. Current regulations indicate the types of serious deficiencies which are grounds for disapproval of an application or termination.

Current regulations at § 225.11(f) require State agencies to terminate participation of sites or sponsors for failure to correct Program violations within timeframes specified in a corrective action plan. Additionally, participation of a site must be immediately terminated if there is an imminent threat to the health or safety of the participating children. Once terminated, claims for reimbursement may not be submitted. Under § 225.13, State agencies must afford sponsors the right to appeal termination and denial of an application for participation.

This proposed rule would reorganize the current SFSP regulations, amend the current SFSP termination process, and establish a disqualification process similar to the process employed in the CACFP, with modifications reflecting the shorter duration of the SFSP. For example, the proposed maximum timeframe for which the corrective action plan may be implemented in SFSP is 10 days, whereas in the CACFP this maximum timeframe is 90 days.

Because SFSP and CACFP are administered by the same State agency in many States, using similar procedures is expected to facilitate and streamline the implementation of the SFSP termination and disqualification process. Thus, the Department will develop a National Disqualified List (NDL) for SFSP that is modeled after the current CACFP NDL.

The proposed rule makes a number of changes throughout the SFSP regulations in order to present a holistic approach to the termination and disqualification process. An overview of the proposed changes follows.

The proposed rule would add the following definitions to § 225.2, *Definitions*. These definitions are generally consistent with those set forth in the CACFP regulations at § 226.2:

- *Administrative review* means a fair hearing provided upon request to an entity that has been given notice by the State agency of any action that will affect their participation or reimbursement in the SFSP.
- *Administrative review official* means the independent and impartial official who conducts the administrative review.
- *National disqualified list* mean a list, maintained by the Department, of sponsors, responsible principals, and responsible individuals disqualified from participation in the SFSP.

• *Responsible principal or responsible individual* means a sponsor principal, any other individual employed by, or under contract with, a sponsor, or an individual not compensated by the sponsor, determined to be responsible for a sponsor's serious deficiency.

• *Seriously deficient* means the status of a sponsor that has been determined to be non-compliant in one or more aspects of its operation of the Program.

• *State agency list* means a list maintained by the State agency, which includes a synopsis of information concerning seriously deficient sponsors and which must be updated throughout all stages of the termination and disqualification process.

Maintaining a State agency list is a new requirement for State agencies under this proposed rule.

Under current § 225.6(b), *Approval of sponsor applications*, paragraph (b)(9) prohibits the State agency from approving the application of any applicant sponsor that has been determined to be seriously deficient. However, the State agency may approve the application of a sponsor that has been disapproved or terminated in prior years if the applicant demonstrates to the satisfaction of the State agency that it has taken appropriate corrective actions to prevent recurrence of the deficiencies. This proposed rule would expand paragraph (b)(9) to require the State agency to develop policies and procedures to confirm that serious deficiencies have been fully and permanently corrected. This confirmation must address the circumstances that led to the serious deficiency, the responsible parties, the timeframe for corrective action, and policies and/or procedures that are in place to avoid recurrence of the serious deficiency within the same Program year or in subsequent Program years.

Under current Program regulations at § 225.6(c), *Content of sponsor application*, paragraph (c)(1) establishes basic application requirements, and paragraph (c)(2)(ii) requires new sponsors and sponsors that have experienced significant operational problems in the prior year to include additional information in their application.

This rule proposes to expand paragraph (c)(1) to require the application to include the following information: Full legal name; any previously used names; mailing address; and date of birth of the sponsor's principals, which includes, but is not limited to, the Executive Director and Chairman of the Board of Directors; and the sponsor's Federal Employer

Identification Numbers (FEIN) and/or the Dun and Bradstreet Data Universal Numbering System (DUNS) numbers. This information would be included in entries submitted by the State agency for placement on the SFSP NDL if the sponsor is terminated for cause. Limited access to the SFSP NDL would be granted to authorized State agency personnel tasked with decisions regarding application approvals or terminations from participation.

However, FNS is particularly interested in comments regarding this proposed change and whether sponsors, in addition to State agencies, should also have limited access to the SFSP NDL.

In addition the proposed rule would expand paragraph (c)(2)(ii) to require new sponsors and sponsors who have experienced problems in the prior year to submit a certification, similar to that which is required under the CACFP, that:

- The information on the application, as required in paragraph (c)(1) is true and correct;
- Serious deficiencies identified during the previous year have been fully and permanently corrected;
- The sponsor, sites under its jurisdiction, or any responsible principals have not been terminated for cause from any Child Nutrition Program during the past seven years unless reinstated in, or determined eligible for, that program, including by the payment of any debts owed, or are not currently on the CACFP or the SFSP NDL; and
- The sponsor, sites under its jurisdiction, or any responsible principals have not been convicted of any activity that occurred during the past seven years and that indicated a lack of business integrity.

Current Program regulations at § 225.6(d), *Approval of sites*, identifies criteria State agencies must consider when approving sites for participation in the SFSP. This proposed rule would expand the criteria in paragraph (d) to specify that State agencies may not approve a site if the site or its responsible individuals are currently on the CACFP or the SFSP NDL or have been terminated for cause from the NSLP, SBP, or SMP.

The proposed rule would make a number of revisions to § 225.11, including re-titling the section as *Administrative actions for program violations*, and reorganizing the provisions.

Proposed § 225.11(c), *List of serious deficiencies*, would revise existing paragraph (c) to expand the list of serious deficiencies to include:

- The submission of false information to the State agency, including

concealing criminal convictions, that occurred in the past seven years and that indicate a lack of business integrity;

- A significant number of Program violations at a site;
- Termination or disqualification from another Child Nutrition Program; and
- Any action affecting a sponsor's ability to administer the Program in accordance with Program requirements

Additionally, proposed paragraph (c) would allow no more than 10 days for corrective action to be completed, unless otherwise approved by the Department. If the State agency cannot confirm that serious deficiencies have been fully and permanently corrected, in accordance with § 225.6(b)(9), the sponsor would be terminated. Current regulations do not specify a timeframe for corrective action and CACFP regulations allow for a timeframe of 90 days. However, given the short duration of SFSP, the Department determined a 10-day timeframe would best meet the needs of the SFSP in ensuring Program integrity. State agencies, institutions, and sites are encouraged to address the sufficiency of the proposed 10-day corrective action timeframe in their comments on the rule.

Proposed § 225.11(d), *Serious deficiency procedures*, would identify the actions a State agency must take to declare an institution or individual seriously deficient. This proposed paragraph is new to the SFSP and is modeled after the CACFP serious deficiency notification procedures found at § 226.6(c)(1)(i), § 226.6(c)(1)(iii)(A), and § 226.6(c)(2)(iii)(A). Under the proposed rule, if an entity is seriously deficient, the State agency must declare it as such and send a notification of serious deficiency to the applicable parties. At the same time the notice is issued, the State agency would be required to add applicable parties to the State agency list, indicate that the notice of serious deficiency(ies) has(ve) been issued, include the basis for the serious deficiency determination, and provide a copy of the notice to the Department. Proposed § 225.11(d)(4) incorporates the required components of this notice.

Proposed § 225.11(d)(5) addresses the proposed requirements for the State agency list. The State agency list, as discussed above, would include a synopsis of information concerning seriously deficient sponsors and would be updated throughout all stages of the termination and disqualification process. The requirement to maintain a State agency list is new to the SFSP and is modeled after the CACFP State agency list. As previously mentioned,

the term, *State agency list*, is defined in proposed § 225.2.

Proposed § 225.11(e), *Corrective action procedures*, restates the provisions of existing § 225.11(f)(1), which require the sponsor to take corrective action for violations identified on a site review. The proposed rule expands the corrective action requirement for serious deficiencies requiring a longer-term revision of management systems, meaning actions that require a significant amount of time to ensure the serious deficiency is properly addressed. In such situations, the proposal would require the corrective action plan to identify serious deficiencies and a date by which corrective action must be completed and would clarify the State agency's monitoring responsibility. At the same time, the State agency would be required to revise the State agency list to indicate that the corrective action plan has been submitted, and provide a copy of the plan to the Department.

Proposed § 225.11(f), *Successful corrective action*, would identify the procedures a State agency must take if the serious deficiency is fully and permanently corrected. This proposed paragraph is new to SFSP and is modeled after the CACFP successful corrective action process found at § 226.6(c)(1)(iii)(B) and § 226.6(c)(2)(iii)(B). Under the proposed rule, the State agency would notify all affected parties that the State agency has accepted the corrective action. For those sponsors whose applications were denied, the State agency would afford a new or renewing sponsor the opportunity to resubmit its application.

Under the proposed rule, if the State agency initially determines that the sponsor's corrective action is complete, but later determines that the serious deficiency has recurred, the State agency would move immediately to issue a notice of termination and disqualification, which is similar to the process used in CACFP. However, FNS is particularly interested in comments regarding this proposed change and whether it would be more effective to provide the State agency with discretion to restart the serious deficiency process for recurring deficiencies when appropriate, rather than requiring immediate termination and disqualification.

Proposed § 225.11(g), *Termination procedures*, would incorporate the termination procedures a State agency must take if the corrective action plan is not successfully completed. Proposed paragraph (g)(1) would require the State agency to terminate the sponsor's

agreement if timely corrective action is not taken to fully and permanently correct the serious deficiency. This paragraph is new to SFSP and is modeled after the CACFP termination procedures. However, the SFSP process differs in that termination occurs immediately following failed corrective action, but includes an opportunity for administrative review. As noted above in discussing the distinctions between the Programs' corrective action timeframes, the short duration of the SFSP dictates a more immediate need to protect Program integrity through quick resolution of an institution's serious deficiencies or removal from SFSP.

Proposed paragraphs (g)(2) through (g)(4) would restate existing SFSP provisions requiring the State agency to terminate a sponsor's site if the sponsor fails to take corrective action noted in the State agency's review report or if there is an imminent threat to the health and safety of the participating children, and to notify any food service management company providing meals to a site within 48 hours of a site's termination.

Proposed paragraphs (g)(5) and (g)(6) would require the State agency to terminate an institution's agreement if the Department or another State determines the institution to be seriously deficient and subsequently disqualifies the institution in this Program or any other Child Nutrition Program. Section 362 of the HHFKA amended section 12 of the NSLA (42 U.S.C. 1760) to prohibit any school, institution, service institution, facility, or individual that has been terminated from any Child Nutrition Program from participating in or administering any Child Nutrition Program. This provision requires expanded access to the CACFP or SFSP NDL allowing State agencies to conduct oversight of sections 322 and 362 of the HHFKA.

Under proposed paragraph (g)(7), the State agency must notify all affected parties that the State agency has terminated the sponsor's agreement or participation of the sponsor's site. The notice would include the procedures for seeking an administrative review of the State agency's decision.

Proposed § 225.11(h), *Disqualification procedures*, would identify the disqualification procedures a State agency must take in the event that the time to request an administrative review expires or when the administrative review official upholds the State agency's decision.

Under the proposed rule, the State agency must notify all affected parties who have been disqualified. At the same time the notice of disqualification is

issued, the State agency must update the State agency list and provide a copy of the notice and related information to FNS. If the State agency does not administer all the Child Nutrition Programs, the State agency must notify the State agency administering the other programs of the disqualification. The proposed rule would also require State agencies to develop a process to notify WIC State agencies of entities or individuals terminated for cause or disqualified. These proposed actions are new to SFSP and are modeled after the CACFP agreement termination and disqualification procedures found at § 226.6(c)(1)(iii)(E) and § 226.6(c)(2)(iii)(E).

Proposed § 225.11(i), *National disqualified list*, would reference the authority of the Department to maintain an NDL and make the list available to all State agencies. This proposed paragraph is new to the SFSP and is modeled after the CACFP NDL requirements found at § 226.6(c)(7). Once placed on the SFSP NDL, an entity or individual may not participate in any of the Child Nutrition Programs in any capacity. The entity or individual must remain on the list until the Department, in consultation with the State agency, determines that the entity or individual is no longer seriously deficient, or until seven years have elapsed since the disqualification, provided all debts owed have been paid.

The Department also is proposing to amend § 225.13, *Appeal Procedures*, to include the opportunity to appeal the termination of a sponsor's agreement and any other action of the State agency affecting a sponsor's participation, or its claim for reimbursement. Proposed § 225.13(e) would require State agencies to provide its administrative review procedures to sponsors annually and upon request. Under this proposal, upon termination, sponsors would be provided an opportunity to request an administrative review. However, disqualification from the Program would not be subject to appeal. Although current regulations at § 225.13(b)(1) allow sponsors to continue operation during an appeal of termination, unlike the procedures in CACFP, sponsors are not eligible for continued reimbursement during this period. This modification is necessary due to the short duration of the SFSP. If the termination is ultimately upheld upon review, the sponsor and responsible individuals would be disqualified; if the termination is overturned, the sponsor would be eligible for reimbursement for properly documented meals served during the review period, unless the termination

was based on imminent danger to the health or safety of children.

Accordingly, the proposed rule changes are found at §§ 225.2, 225.6(b), 225.6(c)(2)(ii)(E), 225.6(c)(2)(ii)(D), 225.6(d), 225.11, 225.13(a), 225.13(e), and 225.18(b).

Section 331(a) and 321 of the HHFKA: Termination of Operating Agreements in CACFP and SFSP

Section 331(a) of the HHFKA amended section 17(d)(1) of the NSLA (42 U.S.C. 1766(d)(1)) to require all institutions that meet the conditions of eligibility for participation in the CACFP to enter into permanent agreements with the respective State agency. Previously this was not a requirement, but only an option for State agencies. Similarly, section 321 of the HHFKA amended section 13(b) of the NSLA (42 U.S.C. 1761(b)) to require institutions that meet the conditions of eligibility for participation in the SFSP to enter into permanent agreements with the applicable State agency. State agencies were advised of the section 331(a) and section 321 requirements for permanent operating agreements in a memorandum issued January 14, 2011, *Child Nutrition Reauthorization 2010: Permanent Agreements in the Summer Food Service Program and the Child and Adult Care Food Program* (CACFP 07–2011 and SFSP 03–2011).

Section 331(a) and section 321 allow State agencies and institutions which enter into permanent agreements in either the CACFP or SFSP to terminate a permanent agreement for convenience. As a result, either party to the permanent agreement may terminate the agreement for considerations unrelated to the institution's performance of program responsibilities under the agreement. In addition, sections 331(a) and 321 require State agencies to (1) terminate the permanent agreement for cause; or (2) terminate the permanent agreement when an institution's participation in the program ends.

To effect the changes required by section 331(a) in CACFP, the proposed rule would revise § 226.6(b)(4) to require State agencies to: (1) Terminate an institution's agreement whenever an institution's participation in the Program ends; and (2) terminate the agreement for cause in accordance with CACFP regulations. In addition, the proposed rule would allow the State agency or institution to terminate the agreement at the convenience of the State agency for considerations unrelated to the institution's performance of Program responsibilities under the agreement. Examples of termination for convenience include a

State agency's inability to effectively monitor a remote location or an institution's desire to self-terminate. No change is made to current regulations prohibiting termination for convenience once an entity has been declared seriously deficient and corrective action has not been completed and approved.

The proposal also would amend the CACFP definition of *Termination for convenience* in § 226.2. As currently defined, *Termination for convenience* means termination of a day care home's Program agreement by either the sponsoring organization or the day care home, due to considerations unrelated to either party's performance of Program responsibilities under the agreement. Under the proposed rule, the definition would be expanded to include agreements between the State agency and an institution, and a sponsoring organization and an unaffiliated center. This change is intended to reflect sections 331(a) and (c) of the HHFKA, which require permanent operating agreements between State agencies and institutions and between sponsoring organizations and sponsored centers.

The proposed rule also would amend SFSP regulations at § 225.6(e) to incorporate changes related to termination for cause and end of Program activity in the SFSP comparable to those discussed above for the CACFP. Because the SFSP regulations currently do not include a definition of *Termination for convenience*, no changes are made to the SFSP definitions.

Accordingly, the proposed rule changes are found at §§ 225.2, 225.6(b)(4) and 225.6(c).

Section 331(b) of the HHFKA: State Agency Sponsor Review Requirements in the CACFP

Section 331(b) of the HHFKA amended section 17(d) of the NSLA (42 U.S.C. 1766(d)) to direct the Department to develop a policy for required reviews of institutions in the CACFP. As directed by the statute, each State agency must conduct: (1) At least one scheduled site visit at not less than 3-year intervals to each institution to identify and prevent management deficiencies and fraud and abuse under the Program and to improve Program operations; and (2) more frequent reviews of any institution that sponsors a significant share of facilities participating in the Program, conducts activities other than the CACFP, has serious management problems as identified in a prior review, is at risk of having serious management problems, or meets such other criteria as are defined by the Department.

Current regulations at § 226.6(m)(6) require State agencies to annually review at least 33.3 percent of all institutions participating in the CACFP in each State. Institutions with 1 to 100 facilities must be reviewed at least once every three years. Institutions with more than 100 facilities must be reviewed at least once every two years. New institutions with five or more facilities must be reviewed within the first 90 days of operation. This proposed rule would amend § 226.6(m)(6) to modify the review requirements for institutions that must be reviewed at least every two years. In addition to reviewing institutions with more than 100 facilities as currently required, the proposal also would require the State agency to review, at least every 2 years, institutions with 1 to 100 facilities that conduct activities other than CACFP, and institutions that have been identified during a previous review as having serious management problems, or that are at risk of having serious management problems. Institutions that conduct activities other than CACFP with more than 100 facilities are currently reviewed at least once every two years; therefore, the proposed rule would not alter the review requirement for these institutions.

Examples of criteria to be considered as posing a risk of serious management problems include: Change in ownership or significant staff turnover; change in licensing status; complaints received by facilities, day care providers, or participants; significant change in the number of claims submitted; or significant increase in the number of sponsored facilities or day care homes.

The composition of institutions varies throughout each State, therefore, determining the burden placed on State agencies by requiring more frequent reviews of institutions is difficult to predict. The Department asks for comments regarding the effect this proposed rule will have with respect to the frequency and number of reviews the State agency would be required to administer.

Accordingly, the proposed rule changes are found at § 226.6(m)(6).

Section 332 of the HHFKA: State Liability for Payments to Aggrieved Child Care Institutions

Section 17(e) of the NSLA (42 U.S.C. 1766(e)) requires State agencies to provide an opportunity for a fair hearing and a prompt determination to any institution aggrieved by any action by the State agency that affects either the participation of the institution in the CACFP or the claim of the institution for reimbursement in the CACFP.



Section 332 of the HHFKA amended section 17(e) of the NSLA (42 U.S.C. 1766(e)) to require State agencies failing to meet required timeframes in providing a fair hearing and a prompt determination to pay all valid claims for reimbursement to the appellant institution and the facilities of the institution, using funds from non-Federal sources. The State's liability for these claims begins on the day after the end of any regulatory deadline for providing the opportunity for a fair hearing and making the determination, and ending on the date on which a hearing determination is made. Section 332 directs the Department to provide written notice of this liability to a State agency at least 30 days prior to the imposition of any liability for reimbursement.

Current regulations at § 226.6(k)(5)(ix) specify the procedures for administrative reviews in CACFP. Under those procedures, State agencies must acknowledge the receipt of the request for an administrative review within 10 days of its receipt of the request. Within 60 days of the State agency's receipt of the request for an administrative review, the administrative review official must inform the State agency, the institution's executive director and chairman of the board of directors, and the responsible principals and responsible individuals of the administrative review's outcome. Current regulations at § 226.6(c)(3)(iii)(E)(5) specify that all valid claims for reimbursement must be paid to the institution and the facilities of the institution while under administrative review unless the State or local health or licensing officials have cited an institution for serious health or safety violations.

This proposed rule would make no changes to the existing administrative review procedures or timeframes. However, the proposed rule at § 226.6(k)(5)(ii) would require the State agency to provide a copy of the written request for an administrative review, including the date of receipt of the request, to the Department within 10 days of receipt of the request. This information would allow the Department to track State agency progress and timeliness in meeting the required administrative review timeframe.

The proposed rule at § 226.6(k)(5)(ix) would inform State agencies failing to meet the required timeframe for providing a fair hearing and a prompt determination of their liability to pay all valid claims for reimbursement to the institution. Under § 226.6(k)(11) of the proposal, a State agency that fails to

meet the 60-day timeframe set forth in paragraph (k)(5)(ix) would pay all valid claims for reimbursement to the institution during the period beginning on the 61st day and ending on the date on which the hearing determination is made. The Department would notify the State agency of its liability for all valid claims for reimbursement to an aggrieved institution(s) at least 30 days prior to imposing any liability. Liability for reimbursement would begin 61 days following the State agency's receipt of a request for an administrative review and end on the date on which a hearing determination is made. During this period, the State agency would be required to pay from non-Federal sources all valid claims for reimbursement to the aggrieved institution. The Department expects State agencies to assess the validity of such claims using the same standards used to review all claims for reimbursement. The Department would monitor the approval and payment of such claims during management evaluations to ensure State agencies act in good faith when assessing the validity of claims once State liability is imposed. This proposed requirement is expected to improve State compliance with the required timeframes for fair hearings, thus improving the stewardship of Federal funds.

During fiscal years 2010 and 2011, the Department conducted CACFP Targeted Management Evaluations (TMEs) of State agencies administering the CACFP to identify patterns of regulatory non-compliance with the serious deficiency process. For the 10 most recent appeals of a Notice of Proposed Termination, State agencies were asked to determine the average number of days elapsed between the State agency's receipt of an institution's request and the date of the administrative review official's decision. Of the 21 State agencies for which TMEs were completed in FY 2010 and for which appeal data was provided, on average, 9 completed the administrative review process within the required 60 days; 13 within 90 days; and 14 within 120 days. In some instances, the date on which a hearing determination was made was hundreds of days after receipt of the State agency's request for an administrative review, resulting in appellants continuing to earn Federal reimbursement for long after the required 60-day review period had elapsed. Shifting the responsibility to State agencies for payments to aggrieved child care institutions is expected to serve as a deterrent to those State agencies that have habitually failed to meet the required timeframes.

The Department considered changing the 60-day timeframe currently set forth in § 226.6(k)(5)(ix) to alleviate any burden State agencies may face as a result of financial and/or administrative challenges. However, the 60-day timeframe is intended to provide those seeking administrative review with a prompt determination while protecting the use of Federal funds against noncompliant entities. The TME findings do not provide a clear resolution to meeting these counterbalancing priorities. Thus, the Department is requesting comments on the 60-day timeframe and any modification which would meet State needs without compromising the need for a timely decision for the appellant and maintaining CACFP integrity.

Finally, the proposed rule at § 226.6(k)(11)(ii) would afford a State agency the opportunity to seek a reduction or reconsideration of its liability by submitting to the Department information concerning the State's liability for reimbursement to an aggrieved institution, including information regarding any mitigating circumstances.

The Department recognizes the financial implications for State agencies resulting from implementation of this proposed rule and will assist State agencies' efforts to ensure their administrative review structures meet the required timeframes. The Department also recognizes that many State agencies are experiencing difficult fiscal circumstances. The Department will work with the State agencies to establish milestones to implement this provision and minimize potential financial burdens. The Department encourages State agency commenters to address the financial implications of this proposed rule as related to their State and suggest appropriate milestones the Department could require of State agencies during implementation.

Accordingly, the proposed rule changes are found at §§ 226.6(k)(5)(ii), 226.6(k)(5)(ix) and 226.6(k)(11).

#### Section 335 of the HHFKA: CACFP Audit Funding

Section 17(i) of the NSLA (42 U.S.C. 1766(i)) authorizes the Secretary to provide funds to each CACFP State agency to conduct audits of participating institutions. Each fiscal year, each State agency receives up to 1.5 percent of the funds used by the State in the Program during the second preceding fiscal year for this purpose.

Section 335 of the HHFKA amended section 17(i) of the NSLA, 42 U.S.C. 1766(i), to allow the Department to

make available, for each fiscal year beginning 2016 (*i.e.*, October 1, 2015), and each fiscal year thereafter, additional funding for a total of up to 2 percent of the funds used by each State agency in the Program during the second preceding year, if the State agency can effectively use the funds to improve Program management under criteria established by the Department. This provision is expected to allow for better Program management and improve the integrity of the CACFP.

Program integrity audits are an integral component of the CACFP, allowing State agencies to monitor Program funding and operations to ensure that providers and sponsors are operating the Program in accordance with the law. In accordance with the NSLA, current regulations at § 226.4(j) require funds be made available for the expense of conducting audits and reviews to each State agency in an amount equal to 1.5 percent of the Program reimbursement provided to institutions within the State. Additionally, the amount of assistance provided to a State agency for this purpose in any fiscal year may not exceed the State's expenditures for conducting audits as permitted under § 226.8 during such fiscal year.

To effect the changes envisioned by section 335, the Department proposes to amend § 226.4(j), *Audit funds*, by making minor technical changes to existing language and including the opportunity for State agencies, beginning in fiscal year 2016 and each fiscal year thereafter, to request an increase in the amount of audit funds. The technical changes correct the misuse of the phrase 'Program reimbursement provided to institutions' in reference to the Program funds used to conduct audits.

This proposed change is consistent with section 17(i) of the NSLA (42 U.S.C. 1766(i)) and does not alter the current formula used to calculate audit funds. The proposed rule would also require approval by the Department for increased funding. Such approval would be based on criteria related to the State agency's ability to effectively use the funds to improve Program management. Additionally, the proposed rule would limit the total amount of audit funds made available to a State agency to 2 percent of Program funds used by the State during the second fiscal year preceding the fiscal year for which the funds are made available.

The proposed rule would allow State agencies to submit a request for an increase in the amount of audit funds. The Department's approval will be

based on criteria related to the effective use of funds to improve program management. The Department expects this criteria to include a description of the additional audit and other allowable activity (*e.g.*, additional review activity) the State agency would conduct. The Department expects this process to be similar to the process currently used for reallocation of State administrative funds.

#### Section 362 of the HHFKA: Disqualified Schools, Institutions, and Individuals

Section 362 of the HHFKA amended section 12 of the NSLA (42 U.S.C. 1760) to prohibit any school, institution, service institution, facility, or individual that has been terminated from any Child Nutrition Program (*i.e.*, the NSLP, SMP, SBP, SFSP, and CACFP), and that is on the CACFP and SFSP NDL, from being approved to participate in or administer any Child Nutrition Program. This provision is expected to protect program integrity and federal funds since entities that have been terminated or disqualified from one Child Nutrition Program will be prevented from participating in all of the Department's Child Nutrition Programs.

In assessing implementation of section 362, the Department determined the need to clarify three areas. First, section 362 prohibits approval of schools, institutions, service institutions, facilities, and individuals which have been terminated or disqualified from any Child Nutrition Program. However, additional types of entities participate in the Child Nutrition Programs. The Department concluded, then, that the prohibition in section 362 is not limited to those identified entities, but extends to all entities which participate in the Child Nutrition Programs in similar capacities. This furthers the intended effect of section 362, which is to prevent an entity terminated or disqualified from one Child Nutrition Program from participating in another Child Nutrition Program. Thus, the rule also would apply to school food authorities, child care institutions, sponsoring organizations, sites, day care centers, and day care homes which participate in the Child Nutrition Programs.

This provision only applies to the entities authorized to participate in the Child Nutrition Programs. Entities administering the Special Supplemental Nutrition Program for Women, Infants and Children (WIC) (or to the WIC Farmers' Market Nutrition Program) under section 17 of the Child Nutrition Act of 1966 are referred to as "local agencies." Because section 362 does not

include the term "local agencies," the Department determined that this provision does not apply to the WIC Program, but State agencies must notify WIC State agencies of entities disqualified from participation in any Child Nutrition Program so WIC State agencies may look into potential threats to WIC Program integrity. Finally, the Department also determined that the term "individuals" refers to responsible principals or responsible individuals, and not individuals receiving nutrition assistance benefits under the Child Nutrition Programs.

Second, section 362 identifies "termination" from a Child Nutrition Program as a criterion which results in ineligibility for participation in or administration of any Child Nutrition Program. However, as discussed later in this preamble, two types of termination may be invoked in CACFP. One type is termination for convenience which is not performance based, and can be used by either party. The Department determined that termination for convenience does not warrant disqualification from other Child Nutrition Programs because it is not based on failure to administer the Program. The second type of termination is termination for cause, based on failure to properly administer the program or otherwise perform pursuant to the agreement. Upon review, Department concluded that "termination" in section 362 refers to termination for cause.

Third, section 362 prohibits a State agency from approving for participation in or administration of the Child Nutrition Programs, any entity terminated from a Child Nutrition Program and appearing on the CACFP NDL or SFSP NDL. In practice, the NSLP, SMP, and SBP currently do not maintain or refer to an NDL. It is possible that school food authorities which also participate in CACFP would appear on the CACFP NDL. In the future and pursuant to section 322 as discussed earlier, a school food authority terminated from SFSP participation would be added to that Program's NDL. The Department concluded that in order to fully implement the intent of Congress to protect integrity of all Child Nutrition Programs as expressed in section 362, the implementation of the provision should be read more broadly to prohibit participation in or administration of any Child Nutrition Program.

For these reasons, the proposed rule would prohibit an entity's participation if it meets either criterion. In other words, the State agency may not approve any entity terminated from a

Child Nutrition Program or any entity appearing on the CACFP or SFSP NDL for participation in or administration of any Child Nutrition Program. The Department encourages commenters to address this proposed interpretation.

Thus, this proposed rule amends the regulations for the NSLP, SMP, SBP, and SFSP to prohibit a State agency from approving any school, school food authority, institution, service institution, facility, individual, sponsoring organization, site, child care institution, day care center, or day care home from participating in or administering the Program if the entity or its officials: (1) Have been terminated for cause from any Child Nutrition Program; or (2) are currently listed on the CACFP NDL or SFSP NDL.

Current regulations for CACFP address the duration of ineligibility. Under § 226.6(b)(1)(xiii), an entity remains included on the CACFP NDL and thus ineligible to participate in CACFP, until the State agency, in consultation with the Department, determines that the deficiency(ies) that resulted in the ineligible status has(ve) been corrected, or seven years have passed. In all cases, all debts owed must be repaid prior to removal from the CACFP NDL. State agencies are required to consult the CACFP NDL when reviewing any entity's new or renewal application, and to deny the entity's application if either the entity, or any of its principals, is on the CACFP NDL. The proposed rule would adopt the CACFP approach to limiting the duration of ineligibility.

Under this proposed rule, the State agency's decision not to approve an entity to participate in or administer a program based on the entity's termination for cause from a Child Nutrition Program or placement on the CACFP NDL or SFSP NDL is final and not subject to further administrative or judicial review. This rule also proposes that for entities currently administering a program, the State agency must use procedures currently specified in regulations to suspend or terminate participation if it is discovered that the entity was terminated for cause from another Child Nutrition Program.

Finally, the proposed rule would require State agencies to develop a process to share information about entities and individuals no longer eligible to administer or participate in the programs within the State. The process must be approved by the Department and must ensure the State agency works closely with any other State agency administering a Child Nutrition Program to ensure information is shared on a timely basis. The

proposed rule would also require State agencies to develop a process to notify WIC State agencies of the entities' or individuals' termination for cause, since they might be associated with the WIC Program. The Department has chosen to allow State agencies to develop their own process due to the different organizational structures of each State.

CACFP and SFSP State agencies will be required to develop a process to share information on entities and individuals terminated or disqualified with other Child Nutrition Programs if such a process is not presently in place. Under § 226.6(b)(1)(xiii), Program participation is prohibited when the institution or any of its principals have been declared ineligible for any other publically funded program by reason of violation that program's requirements. Therefore, the Department expects CACFP State agencies to currently have such process in place. To avoid duplicative efforts and streamline efforts, the Department expects to utilize the database currently used to maintain the NDL by the Department for the CACFP for the SFSP NDL.

The Department requests comments on this requirement, specifically the process State agencies may propose to share information, and the potential obstacles or burdens a State agency may face. The Department also asks for comments on the extent to which State agency access to the NDLs would have to be expanded under these proposed requirements.

Accordingly, the proposed rule changes are found at §§ 210.9(d), 215.7(g), 220.7(h), 225.6(b)(12), 225.6(c)(2)(ii)(E)(3), 225.6(d)(1)(v), 225.6(e), 225.11(c)(5), 225.11(h)(2), 225.14(c)(3), 225.14(c)(4), and 226.6(b)(1)(xiii).

#### Serious Deficiency and Termination Procedures for Sponsored Centers in the CACFP

This proposed rule also amends current CACFP regulations, to make a corresponding change as a result of the intended effect of section 362. The provision explicitly prohibits entities terminated or disqualified from one Child Nutrition Program from being approved to participate in or administer any Child Nutrition Program. Approval or participation of seriously deficient sponsored child or adult day care center, then, would be contrary to the intent of that provision. In order to implement section 362, this proposed rule would create serious deficiency, termination, and disqualification procedures which are essential to meeting the intent of statute.

Current CACFP regulations at § 226.6 include serious deficiency, termination, and disqualification procedures for sponsored day care homes, but not sponsored centers. There are two types of sponsored centers, affiliated and unaffiliated. Unlike affiliated centers, unaffiliated centers are not part of the same legal entity as the sponsoring organization responsible for administration of the CACFP. Currently, if an unaffiliated center is seriously deficient in the operation of the Program, it is the sponsor which a State agency would declare seriously deficient. In practice, it is the responsibility of the sponsor to complete the corrective action plan, and it is the sponsor that will ultimately be terminated and disqualified from the Program if the serious deficiency is not corrected. Additionally, current regulations permit the sponsor to simply end its association with a seriously deficient unaffiliated center, rather than implementing corrective action to eliminate the serious deficiency and come into compliance with Program regulations. Therefore, under current regulations, it is possible for a problematic unaffiliated center that has been removed from the CACFP to participate in the Program under another sponsor, or in another Child Nutrition Program, without the knowledge of the State agency that a serious management deficiency exists in that facility.

The Department has identified CACFP integrity issues arising from the inability to declare unaffiliated centers as seriously deficient and to terminate and disqualify the centers from CACFP participation. Currently, problematic unaffiliated centers and operators of those centers are not disqualified from participation if they are found to be in violation of Program requirements. Rather they may terminate their participation voluntarily and seek to participate in the Program under another sponsoring organization, putting Program integrity at risk.

This proposed rule would establish serious deficiency, termination, and disqualification procedures for unaffiliated sponsored centers consistent with the procedures established for day care homes in current regulations. Specifically, the Department proposes to amend § 226.2, *Definitions*, to require inclusion of unaffiliated centers and the full legal name and any other names previously used of entities on the *State agency list*. The Department proposed to add the definition of *Sponsored Center* in a separate proposed rule published April 9, 2012, in the **Federal Register** (77 FR

21018), *Child and Adult Care Food Program: Amendments Related to the Healthy, Hunger-Free Kids Act of 2010*.

Under that proposal, *Sponsored Center* is defined to mean a center that operates the Program under the auspices of a sponsoring organization and is categorized as either an affiliated or unaffiliated center. Unaffiliated centers would be entities required to have permanent agreements with their sponsoring organization, as they are legally distinct from the sponsoring organizations, unlike affiliated centers that are part of the same legal entity.

Under § 226.6(c)(3)(ii)(R), State agencies would be required to declare sponsoring organizations seriously deficient if they fail to properly implement the termination and administrative procedures required in the Program. If an institution does not properly oversee the participation of their unaffiliated centers, they could be declared seriously deficient by the State agency or the Department.

Under this proposed rule, throughout the disqualification process as specified in § 226.6(c)(7) and § 226.6(c)(8), where day care homes are referenced, unaffiliated centers are also included in the requirement. The request for removal of a day care home, unaffiliated center, or responsible principal and responsible individual from the CACFP NDL must be made by the State agency, with concurrence by the Department. The Department's concurrence is necessary to ensure the serious deficiencies no longer exist prior to removal.

Under this rule, the administrative review process would be amended at § 226.6(l) and § 226.6(m) to include unaffiliated centers. The Department proposes to allow State agencies to make different elections with regard to who offers the administrative review, either the State agency or the sponsoring organization, to day care homes and unaffiliated centers. The Department anticipates that while a State agency may prefer the sponsoring organization offer administrative reviews to day care homes, the State agency may choose to offer administrative reviews to unaffiliated centers.

Under this proposed rule, § 226.16, *Sponsoring organization provisions*, would be amended to include unaffiliated centers wherever day care homes are referenced, as applicable. Additionally, § 226.16(l)(2) would be amended by adding specific serious deficiencies applicable for unaffiliated centers only. Serious deficiency procedures for sponsoring organizations are also amended under this proposed rule to include unaffiliated centers,

applying the same requirements to day care homes and unaffiliated centers, where applicable.

A technical change was made under the proposed rule in § 226.2 to the definition of 'Facility' by removing the word 'family' to correct the meaning of facility as sponsored center or day care home.

Accordingly, the proposed rule changes are found at §§ 226.2, 226.6(c)(2)(ii)(H), 226.6(c)(3)(ii)(R), 226.6(c)(7), 226.6(c)(8), 226.6(l), 226.6(m)(3)(ix), 226.16(b), 226.16(c), 226.16(d), and 226.16(l).

#### Miscellaneous Provisions

##### Elimination of Cost-Reimbursement Contracts

Current Program regulations at 7 CFR 210.16(c) prohibit contracts which permit all income and expenses to accrue to the food service management company, "cost-plus-a-percentage-of-cost" contracts, and "cost-plus-a-percentage-of-income" contracts. School food authorities are currently permitted to use two types of contracts when procuring Program goods and services. Contracts that provide for fixed fees, commonly referred to as 'fixed price contracts,' are those that provide for management fees established on a per meal basis. Cost-reimbursable contracts, an alternative to fixed price contracts, are those that provide for payment of allowable incurred costs. Unlike fixed price contracts, cost-reimbursable contracts require the return of rebates, discounts and credits on all costs from the food service management company to the school food authority. During management evaluations, FNS has observed that non-compliant cost-reimbursable contracts are becoming more common.

Since 2002, the Department's OIG has conducted various reviews of the effectiveness of Federal and State oversight and monitoring of school food authority contracts with food service management companies (FSMCs). These OIG reports, entitled "National School Lunch Program—Food Service Management Company Contracts" published January 2013, "National School Lunch Program Cost-Reimbursable Contracts with a Food Service Management Company" published December 2005, and "National School Lunch Program Food Service Management Companies" published April 2002, identified compliance problems associated with procurements at the local level. OIG identified some instances where school food authorities were not receiving (1) purchase discounts and rebates in full

and/or (2) the proper value of USDA foods returned to their nonprofit food service account. For the most part, OIG concluded that the instances arose from problematic language in cost-reimbursement contracts between FSMCs and local school food authorities. FNS has attempted to resolve such issues by requiring State agencies to review contracts prior to execution by school food authorities per Program regulations at 7 CFR 210.19(a)(5). Further efforts have been made by FNS to educate State agencies and school food authorities through trainings on procurement standards using national conferences, and stakeholder meetings. Likewise, Regional offices have offered additional trainings to State agency staff. FNS has also provided technical assistance during management evaluations, reviewed State agency prototype solicitations and contracts, if available; assisted on administrative reviews to assess school food authority contracts and monitoring of contractor performance; and developed tools to assist State agencies when reviewing and approving school food authority contracts with FSMCs. This proposal is the next step in ensuring the oversight and monitoring of school food authority contracts with FSMCs.

All school food authorities, including sub grantees, must follow applicable Federal procurement regulations when entering into agreements to purchase products and services under the NSLP. However, in evaluating State agency oversight of FSMC contracts, during agency compliance reviews and with information provided by OIG audits and investigations, FNS determined that many school food authorities with FSMC cost-reimbursable contracts are engaged in practices that weaken the competitive procurement process. The most prevalent area of non-compliance found in FSMC cost-reimbursable contracts is the failure to return the value of discounts, rebates, and credits to the nonprofit food service account. This loss represents millions of dollars for school food authority nonprofit food service accounts annually. FNS has determined that it is too complex and burdensome for school food authority staff to consistently and effectively ensure compliance with program requirements across all cost-reimbursable contracts. State agencies have expressed a lack of expertise and the magnitude of monitoring transactions at this level is unduly burdensome and growing. Increasingly, school food authorities are moving from self-operated programs to contracting

operations with a FSMC. As a result of State agency challenges, FNS has published guidance for school food authorities on considerations before contracting the operation with a FSMC and on the benefits and burdens of fixed-price contracts and cost-reimbursable contracts. FNS has conducted trainings on this guidance for State agencies and made presentations at stakeholder national conferences, provided technical assistance during management evaluations, assisted State agencies on administrative reviews of school food authorities and developed review tools to assist State agencies with oversight. Additionally, FNS has engaged many stakeholders (industry, State Agencies, school food authorities, GAO, and OIG) in discussion on how to best address these concerns. Despite FNS's technical assistance, training, and guidance, State agencies continue to report challenges, which are costly to school food authority nonprofit food service accounts. Based on FNS' engagements, requiring fixed price contracts is the next logical step in protecting and strengthening Program integrity.

This rule proposes to amend § 210.16(c) to eliminate cost-reimbursable contracts as a type of food service management company contract school food authorities may use in the NSLP. This rule proposes to require the use of only fixed-price contracts, such as contracts that provide per meal and/or management fees established on a per meal basis, either with or without economic price adjustments tied to a standard index. In solicitations seeking and resulting in a fixed-price contract, contractors respond with bids/proposals that have already taken discounts, rebates and other credits into consideration when formulating their final bid prices; this holds true for any fixed-fee component of a cost-reimbursable contract.

Current Program regulations at 7 CFR 210.16(a)(10) require school food authorities who employ a FSMC in the operation of its nonprofit school food service to ensure that the State agency has reviewed and approved the contract terms. However, current Program regulations at 7 CFR 210.19(a)(5) require each State agency to annually review, not approve, each contract and contract amendment between any school food authority and FSMC to ensure compliance with all the provisions and standards before the execution of the contract by either party. This rule also proposes to amend and align 7 CFR 210.19(a)(5) with the requirements in 7 CFR 210.16(a)(10) to require each State agency to annually review, and now

also approve, each contract and contract amendment between any school food authority and food service management company. Requiring approval will serve to strengthen oversight of compliance with all the provisions and standards before the execution of the contract by either party. State agencies, institutions, and FSMCs are encouraged to address the elimination of cost-reimbursable contracts as a type of food service management company contract school food authorities may use in the NSLP in their comments on the rule.

Accordingly, the proposed rule changes are found at § 210.16 and § 210.19(a)(5).

#### Annual Procurement Training in NSLP

This rule also proposes to incorporate recommendations made by the Department of Agriculture's Office of Inspector General (OIG) audit report entitled "*National School Lunch Program-Food Service Management Company Contracts*" (Audit). Specifically, the audit found risk of misuse of Federal funds due to difficulties experienced by State agencies and school food authorities enforcing contractual terms and regulatory procurement requirements. Therefore, this rule proposes that a portion of the professional standards required for school nutrition programs include procurement training specifically for personnel tasked with this key area. Further, such training must be documented.

Currently, regulatory requirements related to program operations training are found in the professional standards requirements for the NSLP. The Department issued a memorandum on February 12, 2013, strongly encouraging periodic training for State agency and school food authority staff tasked with procurement responsibilities. See *Guidance Reaffirming the Requirement that State agencies and School Food Authorities Periodically Review Food Service Management Company Cost Reimbursable Contracts and Contracts Associated with USDA Foods* (SP 23–2013), <http://www.fns.usda.gov/guidance-reaffirming-requirement-state-agencies-and-school-food-authorities-periodically-review-food>. Given that the Audit, as well as the Department's own monitoring activities, determined that program integrity may be at risk, it is necessary to specifically require training to ensure that all relevant staff are aware of procurement requirements. Under such a requirement, State agency and school food authority staff annually would gain knowledge of procurement requirements for implementation at the State and local level.

This proposed rule would require State agency and school food authority staff tasked with procurement responsibilities to successfully complete procurement training annually. The Department expects State agencies to ensure required training includes applicable State and Federal procurement requirements as found in existing statutes and regulations. This requirement may be met at the discretion of the State agency through a variety of methods, including using State developed procurement training or trainings on the aforementioned procurement areas developed by other expert organizations such as the USDA web-based procurement training offered by the National Food Service Management Institute, available at no cost (<http://www.nfsmi.org/Templates/TemplateDefault.aspx?qs=cELEPTEzNQ>). State agencies and school food authorities would be required to maintain documentation of compliance with this provision.

Accordingly, the proposed rule changes are found at § 210.15(b)(8), § 210.20(b)(16), and § 210.21(h).

#### Financial Reviews of Sponsors in the CACFP

Through TMEs of State agencies conducted by the Department in fiscal years 2010 and 2011 and previous management evaluations, it was determined that misuse of funds was often an indicator of a sponsoring organization's systemic Program abuse. It was also determined that financial reviews of sponsors conducted by State agencies could be improved to better detect and prevent the misuse of funds.

Current regulations at § 226.7(g) require State agencies to approve sponsors' budgets and assess sponsors' compliance with Program requirements, including ensuring that Program funds are used only for allowable expenses. Currently, the process by which sponsor compliance with CACFP financial rules is assessed is left to the discretion of the State agency, consistent with Program regulations. Thorough reviews of sponsor financial records are vital in ensuring Program integrity. The Department found that the financial reviews conducted by State agencies were inconsistent with federal regulations and often lacked focus on a sponsor's CACFP bank account activity, but rather focused on matching the sponsors' representation of their expenses to supporting documents. This often resulted in other suspicious transactions on a sponsor's CACFP bank account to be left unnoticed if supporting documents presented were valid.

Currently federal regulations do not require sponsors to fully account for their expenditure of CACFP funds. A sponsor may use funds for both allowable and unallowable expenditures, but provide a State agency reviewer with receipts for only the allowable costs to support Program administration. It is possible for the amount of the allowable expenditures to appear reasonable to a State reviewer if the expenditures match the approximations made in the sponsor's approved budget for that fiscal year. However, a reviewer is only required to confirm support for the receipts provided by the sponsor and thus may never be provided with or become aware of the sponsor's unallowable expenditures.

Also, the State agency's current ability to monitor sponsors' use of CACFP funds is limited. While sponsors must submit annual budgets for State agency approval, which must detail the project expenditures by cost category, sponsors are not required to report actual expenditures. Requiring annual reporting of actual expenditures would improve sponsor accountability, and provide State agencies a means by which to identify misuse of CACFP funds. State agencies could then reconcile reported expenditures to Program payments to ensure funds are spent on allowable costs, and use the reported actual expenditures as the basis for selecting a sample of expenditures for validation against the sponsor's CACFP bank account activity. To facilitate reconciliation, the report should use the same cost categories as are used on the sponsor's approved annual budget.

The Department proposes to require State agencies to have a system in place to annually review at least one month's bank account activity of all sponsoring organizations compared to documents adequate to demonstrate that the transactions meet Program requirements. Under this rule, if the State agency identifies any expenditures that have the appearance of violating Program requirements, the State agency reviewer could continue to investigate the account activity further or refer the matter to someone else within the State agency, such as an auditor.

This proposed rule also would require State agencies to have a system in place to annually review a report of actual expenditures of Program funds and the amount of meal reimbursement funds retained from centers (if any) for administrative costs for all sponsoring organizations of unaffiliated centers. Under this rule, State agencies would be required to reconcile reported

expenditures with Program payments to ensure funds are fully accounted for, and use the reported actual expenditures as the basis for selecting a sample of expenditures for validation. If the State agency identifies any expenditures that have the appearance of violating Program requirements, the State agency would be required to refer the sponsoring organization's account activity to the appropriate State authorities for verification as discussed above.

Accordingly, the proposed rule changes are found at §§ 226.7(b), 226.7(m) and 226.10(c).

#### Informal Purchase Methods

Informal purchase methods are used in conducting the procurement of services, supplies, and other property whose cost falls below the threshold established for requiring a procuring entity to formally solicit bids or proposals from suppliers. The availability of informal purchase methods for procurements under Federal awards is covered in the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (the "Uniform Guidance") published by the OMB at 2 CFR part 200 and adopted by USDA at 2 CFR part 400. The Department is proposing to update applicable program regulations at 7 CFR 226.21 and 226.22 in order to bring their procurement provisions into conformity with the government-wide and departmental pronouncements referenced above.

There are two types of informal purchase methods: small purchases and micro-purchases. These methods differ in terms of dollar thresholds below which their use is permitted, and the degree of informality that characterizes each of them. The Uniform Guidance sets the applicable dollar thresholds, which are periodically adjusted for inflation. 2 CFR 200.67 of the Uniform Guidance authorizes a program operator to use the micro-purchase method for a transaction in which the aggregate cost of the items purchased does not exceed the prescribed threshold. 2 CFR 200.67 currently sets the micro-purchase threshold at \$3,500. Under section 200.88, a program operator can use the small purchase method for purchases ranging in cost from \$3,501 to the simplified acquisition threshold of \$150,000. As noted above, formal advertising is required for procurements above that threshold.

7 CFR 226.21 (Food service management companies) and 226.22 (Procurement standards) of the CACFP regulations currently contain

procurement provisions that are inconsistent with the foregoing requirements. Specifically, they do not mention the micro-purchase threshold and set the threshold for small purchases at \$10,000. The \$10,000 threshold does not align with current practices and is thus obsolete.

Given the foregoing, the Department is proposing to remove the \$10,000 figure and substitute language referencing the applicable passages in the Uniform Guidance. This will benefit the CACFP by expanding the availability of the informal purchase methods. It will also resolve all questions about which threshold applies, the one set by program regulations or the one(s) given in the Uniform Guidance. The Department will no longer need to update the Program regulations each time the thresholds are adjusted for inflation.

Accordingly, the proposed rule changes are found at §§ 226.21(a), 226.22(i)(1), 226.22(l)(2), and 226.22(l)(3).

The Department recognizes that the provisions in this proposed rule impact many aspects of State administration of Child Nutrition Programs. As a result, the Department will provide guidance and technical assistance to State agencies to ensure successful implementation of this regulation. USDA anticipates that the provisions under this proposed rule would be implemented 90 days following publication of the final rule, with the exception of those related to assessments against State agencies and program operators and CACFP audit funds. The provision establishing criteria for assessments against State agencies and program operators would be implemented one school year following publication of the final rule. The provision granting eligible State agencies additional CACFP audit funds will be implemented upon publication of the final rule.

#### IV. Procedural Matters

##### A. Executive Order 12866 and Executive Order 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, of

reducing costs, of harmonizing rules, and of promoting flexibility.

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

#### B. Regulatory Impact Analysis Summary

As required for all rules that have been designated significant by the Office of Management and Budget, a Regulatory Impact Analysis (RIA) was developed for this proposal. A summary is presented below.

#### Need for Action

The proposed rule updates the regulations governing the administration of USDA's child nutrition programs in response to statutory changes made by The Healthy, Hunger-Free Kids Act of 2010.<sup>1</sup> These changes, as well as other discretionary changes, will help ensure proper and efficient administration of the programs, reduce misuse of program funds, improve compliance with meal patterns and nutrition standards, reduce participant certification error, improve the integrity of the procurement process, and reduce meal counting and claiming error through increased administrative review and penalties for non-compliance.

#### Benefits

Each of the proposed rule's provisions is intended to remedy deficiencies in the administration of USDA's child nutrition programs at the sponsor, provider, SFA, and State agency levels. The rule addresses the types of problems commonly encountered in CACFP sponsor reviews, in USDA's Targeted Management Evaluations of the CACFP, and in Coordinated Review Effort (CRE) and in School Meals Initiative (SMI) reviews of schools and school food authorities. Through the reforms outlined in the preceding sections, the rule is expected to increase the quality of program meals served to participants, as inefficiently managed funds and improper payments subvert the nutritional intent of program meals. This rule generates these benefits through the following specific actions:

- A reduction in the incidence of existing meal pattern violations,

resulting in improved nutrition for program participants; and

- prompt compliance with new Federal regulations on school meal nutrition standards and nutrition standards for competitive school foods that will further improve the school nutrition environment; and through the following specific transfers:
  - An increase in Federal audit funding available to State agencies;
  - a reduction in financial mismanagement that diverts Federal funds from their intended purpose of providing nutritious meals to children;
  - a reduction in certification errors that will better target Federal benefits to eligible children; and
  - full compliance with Sections 205 and 206 of HRFKA that prevent Federal meal reimbursements, intended primarily to provide meals to low income students, from subsidizing meals for more affluent students, and from subsidizing non-program foods.

These are the expected results of the rule's provisions, which add new requirements to existing reviews of child nutrition program sponsors, subject additional sponsors to periodic review, increase USDA and State agency authority to penalize seriously deficient sponsors and providers, and standardize the processes of termination and disqualification from program participation, all of which will contribute to an increase in the quality of program meals served to program participants.

We cannot quantify these nutritional benefits, nor can we quantify the dollar effects of the actions and transfers listed above, as we do not know the rates or magnitudes of error in the population, nor do we know the percentage of errors that will be avoided or rectified because of the implementation of these provisions. However, the size of the problem addressed by the proposed rule has been partly quantified:

- The 2014 USDA Agency Financial Report (<http://www.ocfo.usda.gov/docs/USDA%20AFR%202014-12.30.2014.pdf>) estimates that improper payments in the NSLP and the SBP due to certification error<sup>2</sup> and meal counting and claiming errors<sup>3</sup> totaled \$2.67 billion (\$1.75 billion in the NSLP and

\$923 million in the SBP) in FY 2014. Even small percentage point reductions in these improper payment amounts, which the rule's provisions can help to promote, would quickly exceed the cost of its implementation.

- The 2014 USDA Agency Financial Report estimates that improper payments in the CACFP due to mistakes by program sponsors in determining the reimbursement eligibility of family day care home providers ("tiering" errors) totaled \$10 million in FY 2014. In addition, data gathered by USDA during its 2004–2007 Child Care Assessment Project (CCAP) are suggestive of possible over-reporting of Federally reimbursable meals served by family day care home providers.<sup>4</sup> Estimates of the value of improper claims by CACFP centers, or by sponsors and service providers in the remaining USDA child nutrition programs, are not available.

Though the data available is limited, the estimates of improper payments in the NSLP and SBP alone indicate that the potential impact of the proposed rule is substantial.

#### Costs/Administrative Impact

Most of the cost of complying with the rule is associated with the additional review responsibilities placed on State administering agencies. Other State agency costs are tied to documentation, and establishing and carrying out new procedures for termination and disqualification of program sponsors, providers, and responsible individuals. Program sponsors will incur minimal additional cost to provide their State agencies with additional financial data. The primary Federal government cost, an increase in funds made available for CACFP audits, is expected to offset the additional administrative costs incurred by State agencies.

The regulatory impact analysis quantifies the impact of the three provisions in the rule that we estimate have non-negligible cost implications for the Federal government, State agencies, and/or SFAs, as well as the new reporting and recordkeeping requirements of the rule. The following table summarizes these effects.

or paid meals served when submitting claims for reimbursement.

<sup>4</sup> "Child Care Assessment Project Final Report", USDA Food and Nutrition Service, Child Nutrition Division, July 2009, pp. 34–36 ([http://www.fns.usda.gov/cnd/Care/Management/pdf/CCAP\\_Report.pdf](http://www.fns.usda.gov/cnd/Care/Management/pdf/CCAP_Report.pdf)).

<sup>1</sup> Public Law 111–296.

<sup>2</sup> Improper payments due to certification error include both overpayments and underpayments. Overpayments occur when children are certified for free or reduced-price meals when their household incomes exceed the thresholds for those benefits. Federal reimbursements for meals served to those children are too high. Underpayments occur when children are denied free or reduced-price benefits,

and Federal reimbursements for meals served to those children are too low.

<sup>3</sup> These include cashier errors, when meals are identified as reimbursable when they are missing a required meal component, or when the cashier makes a mistake in identifying the child receiving the meal as free, reduced-price, or paid eligible. Counting and claiming errors also include mistakes made in totaling the number of free, reduced-price,

TABLE 1—SUMMARY OF ESTIMABLE ADMINISTRATIVE COSTS AND RESOURCES<sup>5</sup>

	Fiscal year (millions)					Total
	2017	2018	2019	2020	2021	
<b>State agency administrative costs</b>						
State agency sponsor reviews (CACFP)	\$2.7	\$2.8	\$2.8	\$2.9	\$3.0	\$14.2
State agency bank statement reviews (CACFP) .....	1.3	1.3	1.3	1.4	1.4	6.7
Information collection burden (reporting and recordkeeping) .....	0.3	0.3	0.4	0.4	0.4	1.8
Total State agency administrative costs .....	4.3	4.4	4.5	4.7	4.8	22.7
<b>School Food Authority administrative costs</b>						
SFA Information collection burden (reporting and recordkeeping) .....	\$0.1	\$0.1	\$0.1	\$0.1	\$0.1	\$0.6
<b>Increase in Federal audit funding for State agencies (CACFP)</b>						
Low estimate .....	\$2.1	\$2.2	\$2.3	\$2.4	\$2.5	\$11.6
Upper bound estimate .....	16.3	17.3	17.8	18.5	19.2	89.1

We note that the maximum available amount of additional federal audit funding for State agencies (presented as the projected upper bound estimate in Table 1) exceeds the combined estimated costs of the rule’s State agency sponsor review, sponsor bank statement review, and information collection requirements.

*C. Regulatory Flexibility Act*

This proposed rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612). Pursuant to that review, it has been determined that this rule will not have a significant impact on a substantial number of small entities. This rule sets forth proposed provisions to implement sections 303, 322, 331(b), 332, 335, 362, of Public Law 111–296, the HHFKA that affects the management of USDA’s Child Nutrition programs. Most of the provisions included in the proposed rule increase the authority of USDA and State agencies to enforce existing program rules, and do not impose additional burden on small entities. The rule does impose some additional reporting and documentation requirements on program sponsors and providers, but we expect these costs to be very small relative to existing program requirements.

*D. 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 by State, local or tribal governments, in the aggregate, or 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 Secretary 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 proposed rule does not contain Federal mandates (under the regulatory provisions of Title II of the UMRA) that would result in expenditures for State, local and tribal governments or the private sector of \$100 million or more in any one year. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

*E. Executive Order 12372*

The NSLP, SBP, SAE, SMP, CACFP and SFSP are listed in the Catalog of Federal Domestic Assistance Programs under NSLP No. 10.555, SBP No. 10.553, SAE No. 10.560, SMP No. 10.556, CACFP No. 10.558, and SFSP No. 10.559, respectively and are subject to Executive Order 12372 which requires intergovernmental consultation with State and local officials (See 2 CFR chapter IV). The Child Nutrition Programs are federally funded programs

administered at the State level. The Department headquarters and regional office staff engage in ongoing formal and informal discussions with State and local officials regarding program operational issues. This structure of the Child Nutrition Programs allows State and local agencies to provide feedback that forms the basis for any discretionary decisions made in this and other rules.

*F. Executive Order 13132*

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency’s considerations in terms of the three categories called for under Section (6)(b)(2)(B) of Executive Order 13121.

1. Prior Consultation With State Officials

FNS headquarters and regional offices have formal and informal discussions with State agency officials on an ongoing basis regarding the Child Nutrition Programs and policy issues. Prior to drafting this proposed rule, FNS held several conference calls and meetings with the State agencies and organizations representing local program operators, advocacy groups and State government to discuss the statutory requirements addressed in this proposed rule.

<sup>5</sup>Numbers shown in Table 1 may not add due to rounding.



## 2. Nature of Concerns and the Need To Issue This Rule

State agencies expressed concern regarding the implementation of the provisions, specifically the administrative burden that may be placed on the State agencies. State agencies also expressed concerns relating to the fiscal consequences of the state liability provision.

## 3. Extent to Which the Department Meets Those Concerns

FNS has considered the impact of this proposed rule on State and local operators. We have attempted to balance the goal of strengthening the integrity of the Child Nutrition Programs against the need to minimize the administrative burden placed on program operators. FNS will provide guidance and technical assistance to program operators once the final rule is published, and expects to provide on-going assistance to State and local program operators to ensure the provisions of this rulemaking are implemented efficiently and in a manner that is least burdensome.

### G. Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This proposed rule is 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 unless so specified in the Effective Dates section of the final rule. Prior to any judicial challenge to the provisions of the final rule, appeal procedures in § 210.18(q), § 225.13, § 226.6(k) and § 235.11(f), of this chapter, must be exhausted.

### H. Executive Order 13175

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.

In the spring of 2011, FNS offered opportunities for consultation with Tribal officials or their designees to discuss the impact of the HHFKA on tribes or Indian Tribal governments. The

consultation sessions were coordinated by FNS and held on the following dates and locations:

1. HHFKA Consultation Webinar & Conference Call—April 12, 2011
2. HHFKA Consultation In-Person—Rapid City, SD—March 23, 2011
3. HHFKA Consultation Webinar & Conference Call—June 22, 2011
4. Tribal Self-Governance Annual Conference In-Person Consultation in Palm Springs, CA—May 2, 2011
5. National Congress of American Indians Mid-Year Conference In-Person Consultation, Milwaukee, WI—June 14, 2011
6. FNS Quarterly Consultation Conference Call, May 2, 2012

The six consultation sessions in total provided the opportunity to address Tribal concerns related to school meals. There was only one question asked about this regulation, regarding how the NDL functions, which was explained by FNS staff during an aforementioned Tribal Consultation session. Additional comments were not received. Reports from these consultations are part of the USDA annual reporting on Tribal consultation and collaboration. FNS will respond in a timely and meaningful manner to Tribal government requests for consultation concerning this rule. Currently, FNS provides regularly scheduled quarterly consultation sessions as a venue for collaborative conversations with Tribal officials or their designees.

### I. Civil Rights Impact Analysis

FNS and the Department has reviewed this proposed rule in accordance with the Departmental Regulation 4300-4, "Civil Rights Impact Analysis," to identify any major civil rights impacts the rule may have on program participants on the basis of age, race, color, national origin, sex, or disability. After a careful review of the rule's intent and provisions, FNS has determined that this rule is no intended impact in any of the protected classes and is not intended to reduce a child or eligible adult's ability to participate in the National School Lunch Program, School Breakfast Program, Special Milk Program, Child and Adult Care Food Program or Summer Food Service Program.

### J. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35; see 5 CFR part 1320) requires that 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 has submitted an information collection under 0584-NEW, which contains the burden information in the proposed rule for OMB's review and approval. These changes are contingent upon OMB approval under the Paperwork Reduction Act of 1995. When the information collection requirements have been approved, FNS will publish a separate action in the **Federal Register** announcing OMB's approval.

Comments on the information collection in this proposed rule must be received by May 31, 2016.

Send comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for FNS, Washington, DC 20503. Please also send a copy of your comments to, Andrea Farmer, Child Nutrition Programs, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Alexandria, Virginia 22302. For further information, or for copies of the information collection requirements, please contact Andrea Farmer at the address indicated above. Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the Agency's functions, including whether the information will have practical utility; (2) the accuracy of the Agency's estimate of the proposed information collection burden, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) 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 request for comments will be summarized and included in the request for OMB approval. All comments will also become a matter of public record. Once OMB approval is obtained, FNS will merge burden hours into the currently approved National School Lunch Program, OMB Control Number 0584-0006, expiration date 2/29/2016; Child and Adult Care Food Program, OMB Control Number 0584-0055, expiration date 9/30/2016; and Summer Food Service Program for Children, OMB Control Number 0584-0280, expiration date 3/31/2016, respectfully.

*Title:* 7 CFR parts 210, 215, 220, 225, 226 and 235, Child Nutrition Programs Integrity Proposed Rule.

*OMB Number:* Not Yet Assigned.

*Expiration Date:* Not Yet Determined.

*Type of Request:* New Collection.

*Abstract:* This rule proposes to codify several provisions of the Healthy, Hunger-Free Kids Act of 2010 affecting the management of the Child Nutrition Programs, including the National School Lunch Program (NSLP), the Special Milk Program for Children, the School Breakfast Program, the Summer Food Service Program (SFSP), the Child and Adult Care Food Program (CACFP) and State Administrative Expense Funds. The Department is proposing to establish criteria for establishing assessments against State agencies and program operators who jeopardize the integrity of any Child Nutrition Program; eliminate cost-reimbursement

food service management company contracts in the NSLP; establish procurement training requirements for State agency and school food authority staff in the NSLP, establish procedures for termination and disqualification in the SFSP; modify State agency site review requirements in the CACFP; establish State liability for reimbursements incurred as a result of a State's failure to conduct a timely hearing in the CACFP; establish criteria for an increase in State audit funding; establish procedures to prohibit the participation of entities or individuals terminated from any of the Child Nutrition Programs; and establish serious deficiency and termination procedures for sponsored centers in the CACFP. In addition, this rule would make several operational changes to improve oversight of an institution's financial management and would also

include several technical corrections. The proposed rule is intended to improve the integrity of all Child Nutrition Programs. The average burden per response and the annual burden hours for reporting and recordkeeping are explained below and summarized in the charts which follow.

**CACFP—7 CFR Part 226**

*Affected Public:* State Agencies.

*Estimated Number of Respondents:* 54.

*Estimated Number of Responses per Respondent:* 39.29.

*Estimated Total Annual Responses:* 2,122.

*Estimated Time per Response:* 2.4345.

*Estimated Total Annual Burden:* 5,166.

Refer to the table below for estimated total annual burden.

Affected public	Estimated number of respondents	Number of responses per respondent	Total annual responses	Estimated total hours per response	Estimated total burden
<b>Reporting</b>					
State Agencies .....	54	13.15	710	4.095	2,907.5
<b>Recordkeeping</b>					
State Agencies .....	54	26.15	1,412	1.5995	2,258.5
<b>Total of Reporting and Recordkeeping CACFP</b>					
Reporting .....	54	13.15	710	4.095	2,907.5
Recordkeeping .....	54	26.15	1,412	1.5995	2,258.5
Total .....	54	39.29	2,122	2.435	5,166

With OMB Approval, 0584–NEW CACFP burden will be merged to OMB Control Number 0584–0055.

**SFSP—7 CFR Part 225**

*Affected Public:* State Agencies.

*Estimated Number of Respondents:* 53.

*Estimated Number of Responses per Respondent:* 21.

*Estimated Total Annual Responses:* 1,113.

*Estimate Time per Response:* 6.214.

*Estimated Total Annual Burden:* 6,916.5.

Refer to the table below for estimated total annual burden.

Affected public	Estimated number of respondents	Number of responses per respondent	Total annual responses	Estimated total hours per response	Estimated total burden
<b>Reporting</b>					
State Agencies .....	53	20	1,060	6.5	6,890
<b>Recordkeeping</b>					
State Agencies .....	53	1	53	.5	26.5
<b>Total of Reporting and Recordkeeping SFSP</b>					
Reporting .....	53	20	1,060	6.5	6,890
Recordkeeping .....	53	1	53	.5	26.5
Total .....	53	21	1,113	6.214	6,916.5

With OMB Approval, 0584–NEW SFSP burden will be merged to OMB Control Number 0584–0280.

NSLP—7 CFR Part 21  
*Affected Public:* State Agencies and School Food Authorities.  
*Estimated Number of Respondents:* 20,914.  
*Estimated Number of Responses per Respondent:* 2.0054.  
*Estimated Total Annual Responses:* 41,940.  
*Estimate Time per Response:* .25.  
*Estimated Total Annual Burden:* 10,485.  
 Refer to the table below for estimated total annual burden.

Affected public	Estimated number of respondents	Number of responses per respondent	Total annual responses	Estimated total hours per response	Estimated total burden
<b>Reporting</b>					
State Agencies .....	0	0	0	0	0
<b>Recordkeeping</b>					
State Agencies .....	56	1	56	.25	14
School Food Authorities .....	19,822	1	19,878	.20	3,964.4
<b>Total of Reporting and Recordkeeping NSLP</b>					
Reporting * .....	0	0	0	0	0
Recordkeeping .....	19,878	1	19,878	.20	3,978.4
Total .....	19,878	1	19,878	.2	3,978

\* There is no reporting burden associated with procurement training requirements for State agency and SFA staff in the NSLP. With OMB Approval, 0584–NEW NSLP burden will be merged to OMB Control Number 0584–0006.

**K. E-Government Act Compliance**

The Food and Nutrition Service 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 programs—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.

**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.

**7 CFR Part 235**

Administrative practice and procedure, Food assistance programs, Grant programs—education, Grant programs—health, Infants and children, Reporting and recordkeeping requirements, School breakfast and lunch programs.

Accordingly, 7 CFR parts 210, 215, 220, 225, 226, and 235 are proposed to be 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 § 210.9, add paragraph (d) to read as follows:

**§ 210.9 Agreement with State agency.**

\* \* \* \* \*

(d) *Terminations or disqualifications.*

(1) *General.* The State agency may not approve any school food authority or school to participate in or administer the Program if the school food authority, school, or its officials:

(i) Have been terminated for cause from any program authorized under this part or parts 215, 220, 225 and 226 of this chapter; or

(ii) Are currently included on the National disqualified lists under §§ 225.11 or 226.6 of this chapter.

(2) *Duration.* State agencies must ensure that school food authorities or schools described in paragraph (d)(1) of this section do not participate in or administer the Program until the State agency, in consultation with FNS, determines that the deficiency(ies) has(ve) been corrected, or until seven years have elapsed since they were terminated or disqualified. However, if a school food authority, school or official has failed to repay debts owed under the Program, they will remain ineligible until the debt has been repaid.

(3) *State actions.* The State agency’s decision not to approve a school food authority or school to participate in or administer the Program as required by paragraph (d)(1) of this section is final and not subject to further administrative or judicial review. For school food authorities and schools currently administering the Program, the State agency must suspend or terminate the Program in accordance with the procedures set forth in § 210.25.

(4) *Process for identifying terminations and disqualifications.* State agencies must develop a process to

share information on school food authorities, schools and individuals not approved to administer or participate in the programs as described under paragraph (d)(1) of this section. The process must be approved by the Food and Nutrition Service Regional Office (FNSRO) and must ensure the State agency works closely with any other State agency within the State administering the programs under parts 215, 220, 225, 226, 246 and 248 of this chapter to ensure information is shared for program purposes and on a timely basis.

■ 3. In § 210.15, add paragraph (b)(8) to read as follows:

**§ 210.15 Reporting and recordkeeping.**

\* \* \* \* \*

(b) \* \* \*

(8) Records to document compliance with the procurement training requirements under § 210.21(h).

■ 4. In § 210.16, revise paragraph (c) introductory text and add paragraph (c)(4) to read as follows:

**§ 210.16 Food service management companies.**

\* \* \* \* \*

(c) *Contracts.* Contracts that permit all income and expenses to accrue to the food service management company, “cost-plus-a-percentage-of-cost,” “cost-plus-a-percentage-of-income,” and “cost-reimbursable” contracts are prohibited. Contracts that provide for fixed-fees such as those that provide for management fees established on a per meal basis are allowed. Only fixed-price contracts, such as contracts that provide a per meal and/or management fees established on a per meal basis, either with or without economic price adjustments tied to a standard index, are allowed. Contractual agreements with food service management companies shall include provisions which ensure that the requirements of this section are met. Such agreements must also include the following:

\* \* \* \* \*

(4) Provisions in 7 CFR part 250, subpart D must be included to ensure the value of donated foods, *i.e.*, USDA Foods are credited to the nonprofit school food service account.

■ 5. In § 210.18, revise paragraph (q) introductory text and paragraph (q)(1) introductory text to read as follows:

**§ 210.18 Administrative reviews.**

\* \* \* \* \*

(q) *School food authority appeal of State agency findings.* Except for FNS-conducted reviews authorized under § 210.29(d)(2), each State agency shall establish an appeal procedure to be

followed by a school food authority requesting a review of a denial of all or a part of the Claim for Reimbursement, withholding payment arising from administrative or follow-up review activity conducted by the State agency under § 210.18, or assessments established under § 210.26. State agencies may use their own appeal procedures provided the same procedures are applied to all appellants in the State and the procedures meet the following requirements: Appellants are assured of a fair and impartial hearing before an independent official at which they may be represented by legal counsel; decisions are rendered in a timely manner not to exceed 120 days from the date of the receipt of the request for review; appellants are afforded the right to either a review of the record with the right to file written information, or a hearing which they may attend in person; and adequate notice is given of the time, date, place and procedures of the hearing. If the State agency has not established its own appeal procedures or the procedures do not meet the above listed criteria, the State agency shall observe the following procedures at a minimum:

(1) The written request for a review shall be postmarked within 15 calendar days of the date the appellant received the notice of the denial of all or a part of the Claim for Reimbursement, withholding of payment, or assessments established under § 210.26, and the State agency shall acknowledge the receipt of the request for appeal within 10 calendar days;

\* \* \* \* \*

**§ 210.19 [Amended]**

■ 6. In § 210.19: Amend paragraph (a)(5) by adding the phrase “and approve” after the words “annually review” in the first sentence.

■ 7. In § 210.20, add paragraph (b)(16) to read as follows:

**§ 210.20 Reporting and recordkeeping.**

\* \* \* \* \*

(b) \* \* \*

(16) Records to document compliance with the procurement training requirements under § 210.21(h).

■ 8. In § 210.21, add paragraph (h) to read as follows:

**§ 210.21 Procurement.**

\* \* \* \* \*

(h) *Procurement training.* State agency and school food authority staff tasked with procurement responsibilities shall successfully complete annual training in procurement standards including but not limited to the procurement process generally, government-wide Federal

procurement requirements, competitive procurements, the Buy American provision, State agency and school food authority responsibilities in regard to food service management company contracts and all contract changes, USDA Foods, intergovernmental cooperation, geographic preference, protests, and ethics in accordance with § 210.21(a). State agencies and school food authorities must retain records to document compliance with the procurement training requirements in this paragraph.

■ 9. Revise § 210.26 to read as follows:

**§ 210.26 Penalties and assessments.**

(a) *Penalties.* Whoever embezzles, willfully misapplies, steals, or obtains by fraud any funds, assets, or property provided under this part whether received directly or indirectly from the Department shall, if such funds, assets, or property are of a value of \$100 or more, be fined not more than \$25,000 or imprisoned not more than 5 years or both; or if such funds, assets, or property are of a value of less than \$100, be fined not more than \$1,000 or imprisoned not more than 1 year or both. Whoever receives, conceals, or retains for personal use or gain, funds, assets, or property provided under this part, whether received directly or indirectly from the Department, knowing such funds, assets, or property have been embezzled, willfully misapplied, stolen, or obtained by fraud, shall be subject to the same penalties.

(b) *Assessments.*

(1) The State agency may establish an assessment against any school food authority when it has determined that the school food authority or school under its agreement has:

(i) Failed to correct severe mismanagement of the Program;

(ii) Disregarded a Program requirement of which the school food authority or school had been informed; or

(iii) Failed to correct repeated violations of Program requirements.

(2) FNS may direct the State agency to establish an assessment against any school food authority when it has determined that the school food authority or school meets the criteria set forth under paragraph (b)(1) of this section.

(3) Funds used to pay assessments established under this paragraph must be derived from non-federal sources. In calculating an assessment, the State agency must base the amount of the assessment on the reimbursement earned by the school food authority or school for this Program for the most recent fiscal year for which closeout

data are available, provided that the assessment does not exceed the equivalent of:

(i) For the first assessment, 1 percent of the amount of meal reimbursement earned for the fiscal year;

(ii) For the second assessment, 5 percent of the amount of meal reimbursement earned for the fiscal year; and

(iii) For the third or subsequent assessment, 10 percent of the amount of meal reimbursement earned for the fiscal year.

(4) The State agency must inform the FNSRO at least 30 days prior to establishing the assessment under this paragraph. The State agency must send the school food authority written notification of the assessment established under this paragraph and provide a copy of the notification to the FNSRO. The notification must:

(i) Specify the violations or actions which constitute the basis for the assessment and indicate the amount of the assessment;

(ii) Inform the school food authority that it may appeal the assessment and advise the school food authority of the appeal procedures established under § 210.18(q);

(iii) Indicate the effective date and payment procedures should the school food authority not exercise its right to appeal within the specified timeframe.

(5) Any school food authority subject to an assessment under paragraph (b)(1) of this section may appeal the State agency's determination. In appealing an assessment, the school food authority must submit to the State agency any pertinent information, explanation, or evidence addressing the Program violations identified by the State agency. Any school food authority seeking to appeal the State agency determination must follow State agency appeal procedures.

(6) The decision of the State agency review official is final and not subject to further administrative or judicial review. Failure to pay an assessment established under this paragraph may be grounds for suspension or termination.

(7) Money received by the State agency as a result of an assessment established under this paragraph against a school food authority and any interest charged in the collection of these assessments must be remitted to FNS.

#### **PART 215—SPECIAL MILK PROGRAM FOR CHILDREN**

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

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

■ 11. In § 215.7, add paragraph (g) to read as follows:

#### **§ 215.7 Requirements for participation.**

\* \* \* \* \*

(g) *Terminations or disqualifications.*

(1) *General.* The State agency may not approve any school food authority, school or child care institution to participate in or administer the Program if the school food authority, school, child care institution or its officials:

(i) Have been terminated for cause from any program authorized under this part or parts 210, 220, 225 and 226 of this chapter; or

(ii) Are currently included on the National disqualified lists under §§ 225.11 or 226.6 of this chapter.

(2) *Duration.* State agencies must ensure that school food authorities, schools or child care institutions described in paragraph (g)(1) of this section do not participate in or administer the Program until the State agency, in consultation with FNS, determines that the deficiency(ies) has(ve) been corrected, or until seven years have elapsed since they were terminated or disqualified. However, if a school food authority, school, child care institution or official has failed to repay debts owed under the Program, they will remain ineligible until the debt has been repaid.

(3) *State actions.* The State agency's decision not to approve a school food authority, school or child care institution to participate in or administer the Program as required by paragraph (g)(1) of this section is final and not subject to further administrative or judicial review. For school food authorities, schools and child care institutions currently administering the Program, the State agency must suspend or terminate the Program in accordance with the procedures set forth in § 215.16.

(4) *Process for identifying terminations and disqualifications.* State agencies must develop a process to share information on school food authorities, schools, child care institutions and individuals not approved to administer or participate in the programs as described under paragraph (g)(1) of this section. The process must be approved by the FNSRO and must ensure the State agency works closely with any other State agency within the State administering the programs under parts 210, 220, 225, 226, 246 and 248 of this chapter to ensure information is shared for program purposes and on a timely basis.

■ 12. Revise § 215.15 to read as follows:

#### **§ 215.15 Withholding payments and establishing assessments.**

(a) *Withholding payments.* In accordance with OMB regulations at 2 CFR part 200.338 (Remedies for noncompliance), implemented by Departmental regulations at 2 CFR part 400, the State agency may withhold Program payments in whole or in part, to any school food authority which has failed to comply with the provisions of this part. Program payments shall be withheld until the school food authority takes corrective action satisfactory to the State agency, or gives evidence that such corrective actions will be taken, or until the State agency terminates the grant in accordance with § 215.16. Subsequent to the State agency's acceptance of the corrective actions, payments will be released for any milk served in accordance with the provisions of this part during the period the payments were withheld.

(b) *Assessments.* (1) The State agency may establish an assessment against any school food authority, school under its agreement, or child care institution when it has determined that the school food authority or child care institution has:

(i) Failed to correct severe mismanagement of the Program;

(ii) Disregarded a Program requirement of which the school food authority, school, or child care institution had been informed; or

(iii) Failed to correct repeated violations of Program requirements.

(2) FNS may direct the State agency to establish an assessment against any school food authority or child care institution when it has determined that the school food authority, school, or child care institution has committed one or more acts the under paragraph (b)(1) of this section.

(3) Funds used to pay an assessment established under this paragraph must be derived from non-federal sources. In calculating an assessment, the State agency must base the amount of the assessment on the reimbursement earned by the school food authority, school, or child care institution for this Program for the most recent fiscal year for which closeout data are available, provided that the assessment does not exceed the equivalent of:

(i) For the first assessment, 1 percent of the amount of reimbursement earned for the fiscal year;

(ii) For the second assessment, 5 percent of the amount of reimbursement earned for the fiscal year; and

(iii) For the third or subsequent assessment, 10 percent of the amount of reimbursement earned for the fiscal year.

(4) The State agency must inform the FNSRO at least 30 days prior to establishing an assessment under this paragraph. The State agency must send the school food authority or child care institution written notification of the assessment established under this paragraph and provide a copy of the notification to the FNSRO. The notification must:

(i) Specify the violations or actions which constitute the basis for the assessment and indicate the amount of the assessment;

(ii) Inform the school food authority or child care institution that it may appeal the assessment and advise the school food authority or child care institution of the appeal procedures established under § 210.18(q) of this chapter;

(iii) Indicate the effective date and payment procedures should the school food authority or child care institution not exercise its right to appeal within the specified timeframe.

(5) Any school food authority or child care institution subject to an assessment under paragraph (b)(1) of this section may appeal the State agency's determination. In appealing an assessment, the school food authority or child care institution must submit to the State agency any pertinent information, explanation, or evidence addressing the Program violations identified by the State agency. Any school food authority or child care institution seeking to appeal the State agency determination must follow State agency appeal procedures.

(6) The decision of the State agency review official is final and not subject to further administrative or judicial review. Failure to pay an assessment established under this paragraph may be grounds for suspension or termination.

(7) Money received by the State agency as a result of an assessment established under this paragraph against a school food authority and any interest charged in the collection of these assessments must be remitted to FNS.

## PART 220—SCHOOL BREAKFAST PROGRAM

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

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

■ 14. In § 220.7, add paragraph (h) to read as follows:

### § 220.7 Requirements for participation.

\* \* \* \* \*

(h) *Terminations or disqualifications.*

(1) *General.* The State agency may not approve any school food authority or

school to participate in or administer the Program if the school food authority, school or its officials:

(i) Have been terminated for cause from any program authorized under this part or parts 210, 215, 225 and 226 of this chapter; or

(ii) Are currently included on the National disqualified lists under §§ 225.11 or 226.6 of this chapter.

(2) *Duration.* State agencies must ensure that school food authorities or schools described in paragraph (h)(1) of this section do not participate in or administer the Program until the State agency, in consultation with FNS, determines that the deficiency(ies) has(ve) been corrected, or until seven years have elapsed since they were terminated or disqualified. However, if a school food authority, school or official has failed to repay debts owed under the Program, they will remain ineligible until the debt has been repaid.

(3) *State actions.* The State agency's decision not to approve a school food authority or school to participate in or administer the Program as required by paragraph (h)(1) of this section is final and not subject to further administrative or judicial review. For school food authorities and schools administering the Program, the State agency must suspend or terminate the Program in accordance with the procedures set forth in § 220.19.

(4) *Process for identifying terminations and disqualifications.* State agencies must develop a process to share information on school food authorities, schools and individuals not approved to administer or participate in the programs as described under paragraph (h)(1) of this section. The process must be approved by the FNSRO and must ensure the State agency works closely with any other State agency within the State administering the programs under parts 210, 215, 225, 226, 246 and 248 of this chapter to ensure information is shared for program purposes and on a timely basis.

■ 15. Revise § 220.18 to read as follows:

### § 220.18 Withholding payments and assessments.

(a) *Withholding payments.* In accordance with Departmental regulations 2 CFR part 400, the State agency may withhold Program payments, in whole or in part, to any school food authority which has failed to comply with the provisions of this part. Program payments shall be withheld until the school food authority takes corrective action satisfactory to the State agency, or gives evidence that such corrective actions will be taken, or

until the State agency terminates the grant in accordance with § 220.19. Subsequent to the State agency's acceptance of the corrective actions, payments will be released for any breakfasts served in accordance with the provisions of this part during the period the payments were withheld.

(b) *Assessments.* (1) The State agency may establish an assessment against any school food authority or school under its agreement when it has determined that the school food authority has:

(i) Failed to correct severe mismanagement of the Program;

(ii) Disregarded a Program requirement of which the school food authority or school had been informed; or

(iii) Failed to correct repeated violations of Program requirements.

(2) FNS may direct the State agency to establish an assessment against any school food authority when it has determined that the school food authority or school has committed one or more acts the under paragraph (b)(1) of this section.

(3) Funds used to pay an assessment established under this paragraph must be derived from non-federal sources. In calculating an assessment, the State agency must base the amount of the assessment on the reimbursement earned by the school food authority or school for this Program for the most recent fiscal year for which closeout data are available, provided that the assessment does not exceed the equivalent of:

(i) For the first assessment, 1 percent of the amount of meal reimbursement earned for the fiscal year;

(ii) For the second assessment, 5 percent of the amount of meal reimbursement earned for the fiscal year; and

(iii) For the third or subsequent assessment, 10 percent of the amount of meal reimbursement earned for the fiscal year.

(4) The State agency must inform the FNSRO at least 30 days prior to establishing an assessment under this paragraph. The State agency must send the school food authority written notification of the assessment established under this paragraph and provide a copy of the notification to the FNSRO. The notification must:

(i) Specify the violations or actions which constitute the basis for the assessment and indicate the amount of the assessment;

(ii) Inform the school food authority that it may appeal the assessment and advise the school food authority of the appeal procedures established under § 210.18(q) of this chapter;

(iii) Indicate the effective date and payment procedures should the school food authority not exercise its right to appeal within the specified timeframe.

(5) Any school food authority subject to an assessment under paragraph (b)(1) of this section may appeal the State agency's determination. In appealing an assessment, the school food authority must submit to the State agency any pertinent information, explanation, or evidence addressing the Program violations identified by the State agency. Any school food authority seeking to appeal the State agency determination must follow State agency appeal procedures.

(6) The decision of the State agency review official is final and not subject to further administrative or judicial review. Failure to pay an assessment established under this paragraph may be grounds for suspension or termination.

(7) Money received by the State agency as a result of an assessment established under this paragraph against a school food authority and any interest charged in the collection of these assessments must be remitted to FNS.

**PART 225—SUMMER FOOD SERVICE PROGRAM**

■ 16. 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).

■ 17. In § 225.2, add new definitions “*Administrative review*”, “*Administrative review official*”, “*National disqualified list*”, “*Responsible principal or responsible individual*”, “*Seriously deficient*” and “*State agency list*” in alphabetical order to read as follows:

**§ 225.2 Definitions.**

*Administrative review* means the fair hearing provided upon request to:

(a) A sponsor that has been given notice by the State agency of any action that will affect their participation or reimbursement under the Program, in accordance with § 225.13; and

(b) A principal or individual responsible for a sponsor's serious deficiency after the responsible principal or responsible individual has been given a notice of intent to disqualify them from the Program.

*Administrative review official* means the independent and impartial official who conducts the administrative review held in accordance with § 225.13.

\* \* \* \* \*

*National disqualified list* means the list, maintained by the Department, of

sponsors, responsible principals, and responsible individuals disqualified from participation in the Program.

\* \* \* \* \*

*Responsible principal or responsible individual* means:

(a) A principal, whether compensated or uncompensated, who the State agency or FNS determines to be responsible for a sponsor's serious deficiency;

(b) Any other individual employed by, or under contract with, a sponsor who the State agency or FNS determines to be responsible for the sponsor's serious deficiency; or

(c) An individual not compensated by the sponsor who the State agency or FNS determines to be responsible for a sponsor's serious deficiency.

\* \* \* \* \*

*Seriously deficient* means the status of a sponsor that has been determined to be non-compliant in one or more aspects of its operation of the Program; such noncompliance is also referred to as a serious deficiency.

\* \* \* \* \*

*State agency list* means an actual paper or electronic list, or the retrievable paper records, maintained by the State agency, which includes a synopsis of information concerning seriously deficient sponsors in that State. The list must be made available to FNS upon request, and must include the following information:

(a) Sponsors determined to be seriously deficient by the State agency, including the names and mailing addresses of the sponsors, the basis for each serious deficiency determination, and the status of the sponsors as they move through the possible subsequent stages of corrective action, agreement termination, and/or disqualification, as applicable;

(b) Responsible principals and responsible individuals determined by the State agency to be associated with the serious deficiency, including their full legal names, and any other names previously used, mailing addresses, and dates of birth.

\* \* \* \* \*

■ 18. In § 225.5, add paragraph (g) to read as follows:

**§ 225.5 Payments to State agencies and use of Program funds.**

\* \* \* \* \*

(g) FNS may establish an assessment against any State agency administering the Program, consistent with the provisions set forth in § 235.11(c) of this chapter.

■ 19. In § 225.6,

■ a. Revise paragraph (b)(9);

■ b. Add paragraph (b)(12);

■ c. Amend paragraph (c)(1) by revising the third sentence;

■ d. Add paragraph (c)(2)(ii)(E);

■ e. Add paragraph (c)(3)(ii)(D);

■ f. Add paragraph (d)(1)(v);

■ g. Revise paragraph (e) introductory text;

The revisions and additions read as follows:

**§ 225.6 State agency responsibilities.**

\* \* \* \* \*

(b) \* \* \*

(9) The State agency shall not approve the application of any applicant sponsor identifiable through its organization or principals as a sponsor which has been determined to be seriously deficient as described in § 225.11(c). However, the State agency may approve the application of a sponsor which has been determined to be seriously deficient in prior years in accordance with this paragraph if the applicant demonstrates to the satisfaction of the State agency that it has taken appropriate corrective actions to prevent recurrence of the deficiencies. The State agency must develop policies and procedures to confirm that serious deficiencies have been fully and permanently corrected. This confirmation must address the circumstances that led to the serious deficiency, the responsible parties, the timeframe for corrective action and policies and/or procedures that are in place to avoid recurrence of the serious deficiency within the same Program year or in subsequent Program years.

\* \* \* \* \*

(12) *Terminations or disqualifications.*

(i) *General.* The State agency may not approve any sponsor or site to participate in or administer the Program if the sponsor, site or its responsible principals or individuals:

(A) Have been terminated for cause from any program authorized under this part, parts 210, 215, 220, or 226 of this chapter; or

(B) Are currently included on the National disqualified lists under this part or § 226.6 of this chapter.

(ii) *Duration.* State agencies must ensure that sponsor or sites described in paragraph (b)(12)(i) of this section do not participate in or administer the Program until the State agency, in consultation with FNS, determines that the deficiency(ies) has(ve) been corrected, or until seven years have elapsed since they were terminated or disqualified. However, if a sponsor, site or its responsible principals or individuals has failed to repay debts owed under the Program, they will

remain ineligible until the debt has been repaid.

(iii) *State actions.* The State agency's decision not to approve a sponsor or site to participate in or administer the Program as required by paragraph (b)(12)(i) of this section is final and not subject to further administrative or judicial review.

(c) \* \* \*  
(1) \* \* \* The State agency may use the application form developed by FNS, or it may develop an application form, for use in the Program; provided that such form requests the full legal name, any previously used names; mailing address; date of birth of the sponsor's principals which includes the Executive Director and Chairman of the Board; and the sponsor's Federal Employer Identification Number (FEIN) and/or Dun and Bradstreet Data Universal Numbering System (DUNS) number.  
\* \* \*

(2) \* \* \*  
(ii) \* \* \*

(E) Sponsors must submit a certification of the following information:

- (1) That all information on the application is true and correct;
  - (2) That serious deficiencies identified during the previous year have been fully and permanently corrected;
  - (3) That the sponsor, sites under its jurisdiction or any responsible principals have not been terminated for cause from any program authorized under this part, parts 210, 215 220, and 226 of this chapter during the past seven years or are not currently included on the National disqualified lists under this part or § 226.6 of this chapter. Or, if the sponsor has been terminated for cause from any program authorized under this part, parts 210, 215 220, and 226 of this chapter during the past seven years, the sponsor has been reinstated in, or determined eligible for, that program, including the payment of any debts owed; and
  - (4) That the sponsor, sites under its jurisdiction or any responsible principals have not been convicted of any activity that occurred during the past seven years and that indicated a lack of business integrity. A lack of business integrity includes fraud, antitrust violations, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, obstruction of justice, or any other activity indicating a lack of business integrity as defined by the State agency.
- (3) \* \* \*  
(ii) \* \* \*

(D) Certification that all information on the application is true and correct.

- \* \* \* \* \*
- (d) \* \* \*
- (1) \* \* \*
- (v) The site and its responsible individuals are not currently on the National disqualified lists under this part or 226.6 of this chapter and have not been terminated for cause from any program authorized under this part, parts 210, 215, and 220 of this chapter as specified in § 225.6(b)(12).  
\* \* \* \* \*

(e) *State-Sponsor Agreement.* A sponsor approved for participation in the Program must enter into a permanent written agreement with the State agency. The existence of a valid permanent agreement does not limit the State agency's ability to terminate the agreement, as provided under § 225.11(g). The State agency must terminate the sponsor's agreement whenever a sponsor's participation in the Program ends. The State agency must terminate the agreement for cause under § 225.6(b)(12)(i), or if the sponsor or its responsible principal or responsible individual are on the National disqualified lists under this part or § 226.6 of this chapter, as required under § 225.11(i). The State agency or sponsor may terminate the agreement at its convenience for considerations unrelated to the institution's performance of Program responsibilities under the agreement. All sponsors must agree in writing to:  
\* \* \*

■ 20. Revise § 225.11 to read as follows:

**§ 225.11 Administrative actions for program violations.**

(a) *Investigations.* Each State agency shall promptly investigate complaints received or irregularities noted in connection with the operation of the Program, and shall take appropriate action to correct any irregularities. The State agency shall maintain on file all evidence relating to such investigations and actions. The State agency shall inform the appropriate FNSRO of any suspected fraud or criminal abuse in the Program which would result in a loss or misuse of Federal funds. The Department may make investigations at the request of the State agency, or where the Department determines investigations are appropriate.

(b) *Meal disallowances.* (1) If the State agency determines that a sponsor has failed to plan, prepare, or order meals with the objective of providing only one meal per child at each meal service at a site, the State agency shall disallow

the number of children's meals prepared or ordered in excess of the number of children served.

(2) If the State agency observes meal service violations during the conduct of a site review, the State agency shall disallow all of the meals observed to be in violation.

(3) The State agency shall also disallow children's meals which are in excess of a site's approved level established under § 225.6(d)(2).

(c) *List of serious deficiencies.* The list of serious deficiencies is not identical for each category of sponsor (new, renewing, participating) because the type of information likely to be available to the State agency is different, depending on whether the State agency is reviewing a new or renewing sponsor's application or is conducting a review of a participating sponsor. The State agency shall afford a sponsor an opportunity not greater than 10 days, unless approved by the FNSRO, to correct problems before terminating the sponsor for being seriously deficient. Serious deficiencies which are not fully and permanently corrected will result in the sponsor's termination from the program. Serious deficiencies which are grounds for termination or disapproval of application include, but are not limited to, any of the following:

- (1) Noncompliance with the applicable bid procedures and contract requirements of Federal child nutrition program regulations;
- (2) The submission of false information to the State agency, including but not limited to a determination that the sponsor has concealed a conviction for any activity that occurred during the past seven years and that indicates a lack of business integrity. A lack of business integrity includes fraud, antitrust violations, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, obstruction of justice, or any other activity indicating a lack of business integrity as defined by the State agency;
- (3) Failure to return to the State agency any start-up or advance payments which exceeded the amount earned for serving meals in accordance with this part, or failure to submit all claims for reimbursement in any prior year, provided that failure to return any advance payments for months for which claims for reimbursement are under dispute from any prior year shall not be grounds for disapproval in accordance with this paragraph;
- (4) Significant number of Program violations at a site, or Program



violations at a significant proportion of the sponsor's sites. Such violations include, but are not limited to, the following:

- (i) Noncompliance with the meal service requirements;
- (ii) Failure to maintain adequate records;
- (iii) Failure to adjust meal orders to conform to variations in the number of participating children;
- (iv) The simultaneous service of more than one meal to any child;
- (v) The claiming of Program payments for meals not served to participating children;
- (vi) Service of a significant number of meals which did not include required quantities of all meal components;
- (vii) Excessive instances of off-site meal consumption; and
- (viii) Continued use of food service management companies that are in violation of health codes.

(5) Termination or disqualification from another Child Nutrition Program, in accordance with § 225.6(b)(12)(i); and

(6) Any action affecting the sponsor's ability to administer the Program in accordance with Program requirements.

(d) *Serious deficiency procedures.* (1) If the State agency determines that a sponsor has committed one or more serious deficiencies listed in paragraph (c) of this section, the State agency must declare the sponsor to be seriously deficient.

(2) If the State agency determines that a responsible principal or individual has committed one or more serious deficiencies listed in paragraph (c) of this section, the State agency must declare the responsible principal or individual to be seriously deficient.

(3) If the State agency holds an agreement with a sponsor whose principal FNS determines to be seriously deficient and subsequently disqualified, the State agency must determine the sponsor to be seriously deficient and initiate action to terminate and disqualify the sponsor. The State agency must initiate these actions no later than 10 days after the date of the principal's disqualification by FNS.

(4) If the State agency determines a sponsor, responsible principal or individual to be seriously deficient, the State agency must notify the sponsor's Executive Director and Chairman of the Board of Directors. The notice must identify the responsible principals and responsible individuals (e.g., for new sponsor, the person who signed the application) and must be sent to those persons as well. The State agency may specify in the notice different corrective action, and time periods for completing the corrective action for the sponsor, the

responsible principals and responsible individuals. The notice must also specify:

- (i) The serious deficiency(ies);
- (ii) The actions to be taken to correct the serious deficiency(ies);
- (iii) The time allotted to correct the serious deficiency(ies);
- (iv) That the serious deficiency determination is not subject to administrative review;
- (v) For new sponsors, that failure to fully and permanently correct the serious deficiency(ies) within the allotted time will result in either the denial of a new sponsor's application and the disqualification of the sponsor and the responsible principals and responsible individuals;

(vi) For renewing and participating sponsors, that failure to fully and permanently correct the serious deficiency(ies) within the allotted time will result in the State agency's denial of the renewing sponsor's application, the termination of the sponsor's agreement, and the disqualification of the sponsor and the responsible principals and responsible individuals;

(vii) That the State agency will not pay any claims for reimbursement or allowable administrative expenses incurred until the State agency has approved any sponsor's application and the sponsor has signed a Program agreement;

(viii) For renewing and participating sponsors, that the sponsor's withdrawal of its application, after having been notified that it is seriously deficient, will still result in the sponsor's formal termination by the State agency and placement of the sponsor and its responsible principals and individuals on the National disqualified list;

(ix) That, if the sponsor voluntarily terminates its agreement after receiving the notice of serious deficiency, the sponsor and the responsible principals and responsible individuals will be disqualified; and

(x) That, if the State agency does not possess the date of birth for any individual named as a "responsible principal or individual" in the serious deficiency notice, the submission of that person's date of birth is a condition of corrective action for the sponsor and/or individual.

(5) *State agency list.* At the same time the notice is issued, the State agency must add the sponsor, responsible principals and/or individuals to the State agency list, indicate that the notice of serious deficiency(ies) has(ve) been issued, include the basis for the serious deficiency determination, and provide a copy of the notice to the appropriate FNSRO.

(e) *Corrective action procedures.* (1) Whenever the State agency observes violations during the course of a site review, it shall require the sponsor to take corrective action within 10 days, unless approved by the FNSRO. If the State agency finds a high level of meal service violations, the State agency shall require a specific immediate corrective action plan to be followed by the sponsor and shall either conduct a follow-up visit or in some other manner verify that the specified corrective action has been taken.

(2) For serious deficiencies requiring the long-term revision of management systems or processes, the corrective action must be approved by the FNSRO and must include milestones and a definite completion date that the State agency will monitor. The determination of serious deficiency will remain in effect until the State agency determines that the serious deficiency(ies) has(ve) been fully and permanently corrected within the allotted time.

(3) At the same time the notice of serious deficiency is issued, the State agency must also update the State agency list to indicate that the corrective action plan has been issued and provide a copy of the corrective action plan to the appropriate FNSRO.

(f) *Successful corrective action.* If corrective action has been taken to fully and permanently correct the serious deficiency(ies) within the allotted time and to the State agency's satisfaction, the State agency must:

(1) Notify the sponsor's Executive Director and Chairman of the Board of Directors, and the responsible principals and responsible individuals, that the State agency has temporarily deferred its serious deficiency determination; and

(2) Offer the new or renewing sponsor the opportunity to resubmit its application. If the new or renewing sponsor resubmits its application, the State agency must complete its review of the application within 30 days after receiving a complete and correct application.

(3) If corrective action is complete for the sponsor but not for all of the responsible principals and responsible individuals (or vice versa), the State agency must continue with the actions against the remaining parties;

(4) At the same time the notice is issued as required under paragraph (f)(1), the State agency must also update the State agency list to indicate that the serious deficiency(ies) has(ve) been corrected and provide a copy of the notice to the appropriate FNSRO; and

(5) If the State agency initially determines that the sponsor's corrective

action is complete, but later determines that the serious deficiency(ies) has recurred, the State agency must move immediately to issue a notice of termination and proposed disqualification, in accordance with paragraph (g) of this section.

(g) *Termination procedures.* (1) If corrective action is not taken to fully and permanently correct the serious deficiency(ies) within the timeframe established in paragraph (e)(1) of this section, the State agency must immediately terminate the sponsor's agreement.

(2) The State agency shall terminate the participation of a sponsor's site if the site or sponsor fails to take action to correct the Program violations noted in a State agency review report within the timeframes established by the corrective action plan.

(3) The State agency shall immediately terminate the participation of a sponsor's site if during a review it determines that the health or safety of the participating children is imminently threatened.

(4) If the site is vended, the State agency shall within 48 hours notify the food service management company providing meals to the site of the site's termination.

(5) If the State agency holds an agreement with a sponsor that FNS determines to be seriously deficient and subsequently disqualifies, the State agency must terminate the institution's agreement effective no later than 10 days after the date of the sponsor's disqualification by FNS. As noted in § 225.13(f)(4), the disqualification is not subject to administrative review. At the same time the notice of disqualification is issued, the State agency must add the sponsor to the State agency list and provide a copy of the notice to the appropriate FNSRO.

(6) If the State agency holds an agreement with a sponsor operating in more than one State that another State determines to be seriously deficient and subsequently disqualifies, the State agency must terminate the institution's agreement effective no later than 10 days after the date of the sponsor's disqualification by FNS. As noted in § 225.13(f)(4), the disqualification is not subject to administrative review. At the same time the notice of disqualification is issued, the State agency must add the sponsor to the State agency list and provide a copy of the notice to the appropriate FNSRO.

(7) If the State agency terminates the sponsor's agreement for cause, the State agency must notify the sponsor's Executive Director and Chairman of the Board of Directors, and the responsible

principals and responsible individuals, of the termination and disqualification. At the same time the notice is issued, the State agency also must update the State agency list and provide a copy of the notice to the appropriate FNSRO. The notice also must specify:

(i) That the State agency is terminating the sponsor's agreement and will disqualify the sponsor and the responsible principals and responsible individuals;

(ii) The basis for the actions; and

(iii) The procedures for seeking an administrative review of the application denial and/or termination as provided in § 225.13.

(8) If this action results in children not receiving meals under the Program, the State agency shall make reasonable effort to locate another source of meal service for these children.

(h) *Disqualification procedures.* (1) When the time for requesting an administrative review expires or when the administrative review official upholds the State agency's denial of the sponsor's application or termination, the State agency must notify the sponsor's Executive Director and Chairman of the Board of Directors, and the responsible principals and responsible individuals that the sponsor and the responsible principal and responsible individuals have been disqualified.

(2) At the same time the notice of disqualification is issued, the State agency must update the State agency list. The State agency must provide a copy of the notice and the mailing address and date of birth for each responsible principal and responsible individual to the appropriate FNSRO to place the sponsor, responsible principal and/or responsible individuals on the National disqualified list. If the State agency does not administer all programs authorized under this part or parts 210, 215, 220 and 226 of this chapter, the State agency must develop a process to share information on sponsors, responsible principals and responsible individuals that were terminated and disqualified, with any other State agency in its State, administering a Child Nutrition Program. The State agency also must notify any State agency in its State, administering a program under parts 246 and 248 of this chapter, of the termination and disqualification of any sponsor, responsible principal, or responsible individual. The process must be approved by the FNSRO and must ensure the State agency works closely with any other State agency within the State administering the programs under parts 210, 215, 220, 226, 246, and 248

of this chapter to ensure information is shared for Program purposes and on a timely basis.

(i) *National disqualified list.* (1) FNS will maintain the National disqualified list and make it available to all State agencies. In addition:

(i) No sponsor, responsible principals or responsible individuals on the National disqualified lists under this part or § 226.6 of this chapter may participate in the Program as a sponsor or site. The State agency must not approve the application of a new or renewing sponsor if the sponsor, responsible principals or responsible individuals are on the National disqualified lists under this part or § 226.6 of this chapter. If the State agency holds an agreement with a sponsor that has been placed on the National disqualified lists under this part or § 226.6 of this chapter, the State agency must terminate the agreement.

(ii) No individual on the National disqualified lists under this part or § 226.6 of this chapter, may serve as a principal for any sponsor or as a site operator.

(2) Once included on the National disqualified list, a sponsor and responsible principals and responsible individuals remain on the National disqualified list until such time as FNS, in consultation with the appropriate State agency, determines that the serious deficiency(ies) that led to their placement on the list has(ve) been corrected, or until seven years have elapsed since they were disqualified from participation. However, if the sponsor, principal or individual has failed to repay debts owed under the Program, they will remain on the list until the debt has been repaid; and

(3) Within 10 days of disqualifying a sponsor, the State agency must provide the appropriate FNSRO the full legal name, previously used names, mailing address, and date of birth of each responsible party, which includes, but is not limited to, the Executive Director and Chairman of the Board of Directors. In addition, the sponsor's Federal Employer Identification Numbers (FEIN) and/or the Dun and Bradstreet Data Universal Numbering System (DUNS) numbers must be provided.

(4) A sponsor or a responsible principal or individual may only be removed from the National disqualified list based on the determination of the State agency with concurrence from FNS.

■ 21. In § 225.13,

■ a. Revise paragraph (a); and

■ b. Add paragraphs (e) and (f).

The revision and additions read as follows:

**§ 225.13 Appeal procedures.**

(a) Each State agency shall establish a procedure to be followed by an applicant appealing: A denial of an application for participation (except if the applicant has failed to complete a corrective action plan from the previous year); a denial of a sponsor's request for an advance payment; a denial of a sponsor's claim for reimbursement (except for late submission under § 225.9(d)(6)); a State agency's refusal to forward to FNS an exception request by the sponsor for payment of a late claim or a request for an upward adjustment to a claim; a claim against a sponsor for remittance of a payment; an assessment established under § 225.18(k); the termination of the sponsor or a site; termination of a sponsor's agreement; a denial of a sponsor's application for a site; a denial of a food service management company's application for registration, if applicable; the revocation of a food service management company's registration, if applicable; or any other action of the State agency affecting a sponsor's participation, or its claim for reimbursement. Appeals shall not be allowed on decisions made by FNS with respect to late claims or upward adjustments under § 225.9(d)(6).

(e) The State agency's administrative review procedures must be provided:

- (1) Annually to all sponsors;
- (2) To a sponsor and to each responsible principal and responsible individual when the State agency takes any action subject to an administrative review; and
- (3) Any other time upon request.

(f) The State agency is prohibited from offering administrative reviews of the following actions:

- (1) A decision by FNS to deny an exception request by a sponsor for payment of a late claim, or for an upward adjustment to a claim;
- (2) A determination that a sponsor is seriously deficient;
- (3) A determination by the State agency that the corrective action taken by a sponsor does not completely and permanently correct a serious deficiency;
- (4) Disqualification of a sponsor or a responsible principal or responsible individual, and the subsequent placement on the State agency list and the National disqualified list; or
- (5) Termination of a sponsor or responsible principal or responsible individual under § 225.6(b)(12)(i).

■ 22. In § 225.14, redesignate paragraphs (c)(3) through (c)(7) as paragraphs (c)(5), through (c)(9); and add new paragraphs (c)(3) and (c)(4).

The additions read as follows:

**§ 225.14 Requirements for sponsor participation.**

\* \* \* \* \*

(c) \* \* \*

(3) Has not been terminated from any program authorized under this part or parts 210, 215, 220 and 226 of this chapter during the past seven years unless reinstated in, or determined eligible for, that program, as specified in § 225.6(b)(12);

(4) Is not currently listed on the National disqualified lists under this part or § 226.6 of this chapter;

\* \* \* \* \*

■ 23. In § 225.18,

- a. Remove paragraph (b)(2) and redesignate paragraph (b)(3) as paragraph (b)(2);
- b. Amend newly redesignated paragraph (b)(2) by removing the words "any funds paid to the State agency or a sponsor or" and "or by the State agency from a sponsor";
- c. Add paragraph (k).

The addition reads as follows:

**§ 225.18 Miscellaneous administrative provisions.**

\* \* \* \* \*

(k) *Assessments.*

(1) The State agency may establish an assessment against any sponsor when it has determined that the sponsor or site has:

- (i) Failed to correct severe mismanagement of the Program;
- (ii) Disregarded a Program requirement of which the sponsor or site had been informed; or
- (iii) Failed to correct repeated violations of Program requirements.

(2) FNS may direct the State agency to establish an assessment against any sponsor when it has determined that the sponsor or site meets the criteria set forth under paragraph (k)(1) of this section.

(3) Funds used to pay an assessment established under this paragraph must be derived from non-federal sources. In calculating an assessment, the State agency must base the amount of the assessment on the reimbursement earned by the sponsor or site for this Program for the most recent fiscal year for which closeout data are available, provided that the assessment does not exceed the equivalent of:

- (i) For the first assessment, 1 percent of the amount of meal reimbursement earned for the fiscal year;
- (ii) For the second assessment, 5 percent of the amount of meal reimbursement earned for the fiscal year; and
- (iii) For the third or subsequent assessment, 10 percent of the amount of

meal reimbursement earned for the fiscal year.

(4) The State agency must inform the FNSRO at least 30 days prior to establishing an assessment under this paragraph. The State agency must send the sponsor written notification of the assessment established under this paragraph and provide a copy of the notification to the FNSRO. The notification must:

(i) Specify the violations or actions which constitute the basis for the assessment and indicate the amount of the assessment;

(ii) Inform the sponsor that it may appeal the assessment and advise the sponsor of the appeal procedures established under § 225.13; and

(iii) Indicate the effective date and payment procedures should the sponsor not exercise its right to appeal within the specified timeframe.

(5) Any sponsor subject to an assessment under paragraph (k)(1) of this section may appeal the State agency's determination. In appealing an assessment, the sponsor must submit to the State agency any pertinent information, explanation, or evidence addressing the Program violations identified by the State agency. Any sponsor seeking to appeal the State agency determination must follow State agency appeal procedures.

(6) The decision of the State agency review official is final and not subject to further administrative or judicial review. Failure to pay an assessment established under this paragraph may be grounds for suspension or termination.

(7) Money received by the State agency as a result of an assessment established under this paragraph against a sponsor and any interest charged in the collection of these assessments must be remitted to FNS.

**PART 226—THE CHILD AND ADULT CARE FOOD PROGRAM**

■ 24. 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).

■ 25. In § 226.2,

- a. Amend the definition of "Facility" by removing the word "family"; and
- b. Revise the definitions of "State agency list" and "Termination for convenience".

The revisions read as follows:

**§ 226.2 Definitions.**

\* \* \* \* \*

*State agency list* means an actual paper or electronic list, or the

retrievable paper records, maintained by the State agency, that includes a synopsis of information concerning seriously deficient institutions and providers or unaffiliated centers terminated for cause in that State. The list must be made available to FNS upon request, and must include the following information:

(a) Institutions determined to be seriously deficient by the State agency, including the full legal names, and any other names previously used, and mailing addresses of the institutions, the basis for each serious deficiency determination, and the status of the institutions as they move through the possible subsequent stages of corrective action, proposed termination, suspension, agreement termination, and/or disqualification, as applicable;

(b) Responsible principals and responsible individuals who have been disqualified from participation by the State agency, including their full legal names, and any other names previously used, mailing addresses, and dates of birth; and

(c) Day care home providers or unaffiliated centers whose agreements have been terminated for cause by a sponsoring organization in the State, including their full legal names, and any other names previously used, mailing addresses, and dates of birth.

\* \* \* \* \*

*Termination for convenience* means termination of a Program agreement due to considerations unrelated to either party's performance of Program responsibilities under the agreement between;

(a) A State agency and the sponsoring organization;

(b) A sponsoring organization and the unaffiliated center; or

(c) A sponsoring organization and the day care home.

\* \* \* \* \*

■ 26. In § 226.4, revise paragraph (j) to read as follows:

**§ 226.4 Payments to States and use of funds.**

\* \* \* \* \*

(j) *Audit funds.* For the expense of conducting audits and reviews under § 226.8, funds shall be made available to each State agency in an amount equal to one and one-half percent of the Program funds used by the State during the second fiscal year preceding the fiscal year for which these funds are to be made available. Beginning in fiscal year 2016 and each fiscal year thereafter, State agencies may request an increase in the amount of funds made available under this paragraph. FNS approval for increased funding will be based on

criteria related to the effective use of funds to improve program management. The total amount of audit funds made available to any State agency under this paragraph may not exceed two percent of Program funds used by the State during the second fiscal year preceding the fiscal year for which the funds are made available. The amount of assistance provided to a State under this paragraph in any fiscal year may not exceed the State's expenditures under § 226.8 during the fiscal year in which funds are made available.

\* \* \* \* \*

■ 27. In § 226.6,

■ a. Revise paragraph (b)(1)(xiii)(A);

■ b. Revise paragraph (b)(1)(xv);

■ c. Revise paragraph (b)(4)

■ d. Amend paragraph (c)(2)(ii)(H) by removing the words "day care home" and adding the phrase "relating to day care homes and unaffiliated centers as" after the word "provisions";

■ e. Amend paragraph (c)(3)(ii)(R) by removing the words "day care home" and adding the phrase "relating to day care homes and unaffiliated centers as" after the word "provisions";

■ f. Revise paragraphs (c)(7)(vi) and (c)(8);

■ g. Amend paragraph (k)(2)(xi) by removing "and"

■ h. Redesignate paragraph (k)(2)(xii) as paragraph (k)(2)(xiii) and add new paragraph (k)(2)(xii);

■ i. Amend paragraph (k)(5)(ii) by adding a second sentence at the end of the paragraph;

■ j. Amend paragraph (k)(5)(ix) by adding the third sentence at the end of the paragraph;

■ k. Add paragraph (k)(11);

■ l. Amend paragraph (l) by revising the paragraph heading and by revising paragraph (l)(1);

■ m. Amend paragraph (l)(2) by adding the words "and/or unaffiliated center" after the word "home";

■ n. Amend paragraph (l)(4) by adding the words "and unaffiliated centers" after the word "homes" in the paragraph heading;

■ o. Amend paragraph (l)(4)(i) by adding the words "and unaffiliated centers" after the word "homes";

■ p. Amend paragraph (l)(4)(ii) by adding the words "or an unaffiliated center" after the word "home";

■ q. Amend paragraph (l)(5) by removing the words "election pursuant" and adding the words "election(s) according" in their place; by adding the words "or unaffiliated centers" after the word "home" in all instances it appears; and by adding the words "or unaffiliated centers" after the word "homes";

■ r. Revise paragraph (m)(3)(ix); and  
■ s. Revise paragraphs (m)(6)(i) and (m)(6)(ii).

The additions and revisions read as follows:

**§ 226.6 State agency administrative responsibilities.**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(xiii) *Ineligibility for other publicly funded programs.*

(A) *General.* A State agency is prohibited from approving an institution's application if, during the past seven years, the institution or any of its principals have been declared ineligible for any other publicly funded program by reason of violating that program's requirements. This prohibition does not apply if the institution or the principal has been fully reinstated in, or determined eligible for, that program, including the payment of any debts owed.

(1) A State agency is prohibited from approving an institution's application if, during the past seven years, the institution, unaffiliated center, day care home provider, or any principals were terminated for cause from any program authorized under parts 210, 215, 220, 225 of this chapter; or any institution, unaffiliated center, day care home provider, or any principals are currently listed on the National disqualified lists under this part or § 225.11 of this chapter.

(2) State agencies must develop a process to share information on any institution, unaffiliated center, day care home provider, or principal terminated or disqualified under this part with any agency within the State administering a Child Nutrition Program under parts 210, 215, 220, and 225 of this chapter. State agencies also must notify any agency within the State administering a program under parts 246 and 248 of this chapter, of the termination and disqualification of any institution, unaffiliated center, day care home provider, or principal. The process must be approved by the FNSRO and must ensure the State agency works closely with any other State agency within the State administering the programs under parts 210, 215, 220, 225, 246 and 248 of this chapter to ensure information is shared for program purposes and on a timely basis.

\* \* \* \* \*

(xv) *Certification of truth of applications and submission of names and addresses.* Institutions must submit a certification that all information on the application is true and correct, along with the name, mailing address, and

date of birth of the institution's executive director and chairman of the board of directors or, in the case of a for-profit center that does not have an executive director or is not required to have a board of directors, the owner of the for-profit center. In addition, the institution's Federal Employer Identification Numbers (FEIN) and/or the Dun and Bradstreet Data Universal Numbering System (DUNS) numbers must be provided;

\* \* \* \* \*

(4) *Program agreements.*

(i) The State agency must require each institution that has been approved for participation in the Program to enter into a permanent agreement governing the rights and responsibilities of each party. The existence of a valid permanent agreement, however, does not eliminate the need for an institution to comply with the reapplication and related provisions at paragraphs (b) and (f) of this section.

(ii) The existence of a valid permanent agreement does not limit the State agency's ability to terminate the agreement, as provided under paragraph (c)(3) of this section. The State agency must terminate the institution's agreement whenever an institution's participation in the Program ends. The State agency must terminate the agreement for cause based on violations by the institution or its responsible principals in accordance with paragraph (c) of this section. The State agency or institution may terminate the agreement at its convenience for considerations unrelated to the institution's performance of Program responsibilities under the agreement.

\* \* \* \* \*

(c) \* \* \*

(7) \* \* \*

(vi) *Removal of day care homes and unaffiliated centers or responsible principals and responsible individuals from the list.* Once included on the National disqualified list, a day care home, unaffiliated center, or responsible principals and responsible individuals will remain on the list until such time as the State agency, in concurrence with the appropriate FNSRO, determines that the serious deficiency(ies) that led to its placement on the list has(ve) been corrected, or until seven years have elapsed since its agreement was terminated for cause. However, if the day care home, unaffiliated center, or responsible principals and responsible individuals remain as failed to repay debts owed under the Program, it will remain on the list until the debt has been repaid.

(8) *State agency list.*

(i) *Maintenance of the State agency list.* The State agency must maintain a State agency list (in the form of an actual paper or electronic list or retrievable paper records). The list must be made available to FNS upon request, and must include the following information:

(A) Institutions determined to be seriously deficient by the State agency, including the full legal names, and any other names previously used, and mailing addresses of the institutions, the basis for each serious deficiency determination, and the status of the institutions as they move through the possible subsequent stages of corrective action, proposed termination, suspension, agreement termination, and/or disqualification, as applicable;

(B) Responsible principals and individuals who have been disqualified from participation by the State agency, including their full legal names, and any other names previously used, mailing addresses, and dates of birth; and

(C) Day care home providers and unaffiliated centers whose agreements have been terminated for cause by a sponsoring organization in the State, including their full legal names, and any other names previously used, mailing addresses, and dates of birth.

(ii) *Referral of disqualified day care homes and unaffiliated centers to FNS.* Within 10 days of receiving a notice of termination and disqualification from a sponsoring organization, the State agency must provide the appropriate FNSRO the name, mailing address, and date of birth of each day care home provider, unaffiliated centers, or responsible principals and responsible individuals whose agreement is terminated for cause.

\* \* \* \* \*

(k) \* \* \*

(2) \* \* \*

(xi) *Overpayment demand.* Demand for the remittance of an overpayment (see § 226.14(a));

(xii) *Assessment.* An assessment established by FNS or the State agency under § 226.25(i); and

\* \* \* \* \*

(5) \* \* \*

(ii) \* \* \* The State agency must provide a copy of the written request for an administrative review, including the date of receipt of the request to the appropriate FNSRO within 10 days of its receipt of the request.

\* \* \* \* \*

(ix) \* \* \* State agencies failing to meet the timeframe set forth in this paragraph are liable for all valid claims for reimbursement to aggrieved

institutions, as specified in paragraph (k)(11)(i) of this section.

\* \* \* \* \*

(11) *State liability for payments.*

(i) A State agency that fails to meet the 60-day timeframe set forth in paragraph (k)(5)(ix) of this section must pay from non-Federal sources all valid claims for reimbursement to the institution during the period beginning on the 61st day and ending on the date on which the hearing determination is made.

(ii) FNS will notify the State agency of its liability for reimbursement at least 30 days before liability is imposed. The timeframe for written notice from FNS is an administrative requirement and may not be used to dispute the State's liability for reimbursement. The State agency may submit for FNS review information supporting a request for a reduction or reconsideration of the State's liability for reimbursement. After review, FNS will recover any improperly paid Federal funds.

(l) *Administrative reviews for day care homes and unaffiliated centers.*

(1) *General.* The State agency must ensure that, when a sponsoring organization proposes to terminate its Program agreement with a day care home or unaffiliated center for cause, the day care home or unaffiliated center and any responsible principals are provided an opportunity for an administrative review of the proposed termination. The State agency may do this either by electing to offer a State-level administrative review, or by electing to require the sponsoring organization to offer an administrative review. State agencies may make different elections with regard to who offers the administrative review for day care homes and for unaffiliated centers; however, the same election must apply to all day care homes and the same election must apply to all unaffiliated centers. The State agency must notify the appropriate FNSRO of its election under this option, or any change it later makes under this option within 30 days of any subsequent change under this option. The State agency or the sponsoring organization must develop procedures for offering and providing these administrative reviews, and these procedures must be consistent with this paragraph (l).

\* \* \* \* \*

(m) \* \* \*

(3) \* \* \*

(ix) If a sponsoring organization of day care homes or unaffiliated centers, implementation of the serious deficiency and termination procedures for day care homes or unaffiliated

centers and, if such procedures have been delegated to sponsoring organizations in accordance with paragraph (l)(1) of this section, the administrative review procedures for day care homes and unaffiliated centers;

\* \* \* \* \*

(6) \* \* \*

(i) At least once every three years, independent centers and sponsoring organizations of 1 to 100 facilities must be reviewed. A review of such a sponsoring organization must include reviews of 10 percent of the sponsoring organization's facilities;

(ii) At least once every two years, sponsoring organizations with more than 100 facilities, sponsoring organizations that conduct activities other than CACFP with 1 to 100 facilities and independent centers and sponsoring organizations that have been identified during a previous review as having serious management problems or that are at risk of having serious management problems must be reviewed. These reviews must include reviews of 5 percent of the first 1,000 facilities and 2.5 percent of the facilities in excess of 1,000; and

\* \* \* \* \*

■ 28. In § 226.7,

■ a. Revise paragraph (b); and

■ b. Remove paragraph (m).

The revision reads as follows:

**§ 226.7 State agency responsibilities for financial management.**

\* \* \* \* \*

(b) *Financial management system.* Each State agency shall establish and maintain an acceptable financial management system, adhere to financial management standards and otherwise carry out financial management policies in accordance with 2 CFR parts 200, 400, 415, 416, 417, 418, 421, and FNS Instruction 796-2, as applicable, and related FNS guidance to identify allowable Program costs and establish standards for institutional recordkeeping and report. The State agency shall provide guidance on financial management requirements to each institution.

(1) State agencies shall also have a system in place for:

(i) Annually reviewing at least one month's bank account activity of all sponsoring organizations against documents adequate to support that the transactions meet program requirements. If the State agency identifies any expenditures that have the appearance of violating Program requirements, the State agency must refer the sponsoring organization's account activity to the appropriate State authorities for verification;

(ii) Annually reviewing actual expenditures reported of Program funds and the amount of meal reimbursement funds retained from centers (if any) for administrative costs for all sponsoring organizations of unaffiliated centers. State agencies shall reconcile reported expenditures with Program payments to ensure funds are fully accounted for, and use the reported actual expenditures as the basis for selecting a sample of expenditures for validation. If the State agency identifies any expenditures that have the appearance of violating Program requirements, the State agency must refer the sponsoring organization's account activity to the appropriate State authorities for verification: And

(iii) Monitoring and reviewing the institutions' documentation of their nonprofit status to ensure that all Program reimbursement funds are used:

(A) Solely for the conduct of the food service operation; or

(B) To improve such food service operations, principally for the benefit of the participants.

(2) The financial management system standards for institutional recordkeeping and reporting shall:

(i) Prohibit claiming reimbursement for meals provided by participant's family, except as authorized § 226.18(e); and

(ii) Allow the cost of meals served to adults who perform necessary food service labor under the Program, except in day care homes.

\* \* \* \* \*

■ 29. In § 226.10, revise paragraph (c) to read as follows:

**§ 226.10 Program payment procedures.**

\* \* \* \* \*

(c) Claims for Reimbursement shall report information in accordance with the financial management system established by the State agency, and in sufficient detail to justify the reimbursement claimed and to enable the State agency to provide the final Report of the Child and Adult Care Food Program (FNS 44) required under § 226.7(d). In submitting a Claim for Reimbursement, each institution shall certify that the claim is correct and that records are available to support that claim.

(1) Prior to submitting its consolidated monthly claim to the State agency, each sponsoring organization must perform edit checks on each facility's meal claim. At a minimum, the sponsoring organization's edit checks must:

(i) Verify that each facility has been approved to serve the types of meals claimed; and

(ii) Compare the number of children or eligible adults enrolled for care at each facility, multiplied by the number of days on which the facility is approved to serve meals, to the total number of meals claimed by the facility for that month. Discrepancies between the facility's meal claim and its enrollment must be subjected to more thorough review to determine if the claim is accurate.

(2) Sponsoring organizations of unaffiliated centers must submit an annual report detailing actual expenditures of Program funds and the amount of meal reimbursement funds retained from centers (if any) for administrative costs for the year to which the claims apply. The report shall use the same cost categories as the approved annual budget submitted by the sponsoring organization.

(3) Sponsoring organizations of for-profit child care centers or for-profit outside-school-hours care centers must submit the number and percentage of children in care (enrolled or licensed capacity, whichever is less) that documents that at least 25 percent are eligible for free or reduced-price meals or are title XX beneficiaries. Sponsoring organizations of such centers must not submit a claim for any for-profit center in which less than 25 percent of the children in care (enrolled or licensed capacity, whichever is less) during the claim month were eligible for free or reduced-price meals or were title XX beneficiaries.

(4) For each month in which independent for-profit child care centers and independent for-profit outside-school-hours care centers claim reimbursement, they must submit the number and percentage of children in care (enrolled or licensed capacity, whichever is less) that documents at least 25 percent are eligible for free or reduced-price meals or are title XX beneficiaries. However, children who only receive at-risk afterschool snacks and/or at-risk afterschool meals must not be considered in determining this eligibility.

(5) Independent for-profit adult day care centers shall submit the percentages of enrolled adult participants receiving title XIX or title XX benefits for the month claimed for months in which not less than 25 percent of enrolled adult participants were title XIX or title XX beneficiaries. Sponsoring organizations of such adult day care centers shall submit the percentage of enrolled adult participants receiving title XIX or title XX benefits for each center for the claim. Sponsoring organizations of such centers shall not submit claims for adult day care centers

in which less than 25 percent of enrolled adult participants were title XIX or title XX beneficiaries for the month claimed.

\* \* \* \* \*

■ 30. In § 226.16,

■ a. Amend paragraph (b)(2) and (b)(3) by removing the phrase “child care and adult day care”;

■ b. Amend paragraph (b)(4) by removing the phrase “on or after June 20, 2000”;

■ c. Amend paragraph (b)(6), by adding the phrase “or unaffiliated center” after the word “home” in the first sentence; and by adding the phrase “or an unaffiliated center’s” after the word “home’s” in the second sentence;

■ d. Amend paragraph (b)(8) by adding the phrase “or unaffiliated centers” after the word “homes”;

■ e. Amend paragraph (c) by removing the phrase “child care and adult day care”;

■ f. Amend paragraph (d)(1) by removing the phrase “child care and adult day care” after the word “each” and the phrase “child care” after the phrase “capability of the”;

■ g. Revise paragraph (d)(3);

■ h. Amend paragraph (i) by removing the phrase “child care and adult day care”;

■ i. Amend paragraph (l)(1) by adding the phrase “or an unaffiliated center” after the word “home” both times it appears in the text;

■ j. Amend paragraph (l)(2) by adding the phrase “or unaffiliated centers” after the word “homes” in the paragraph heading and in the introductory text;

■ k. Amend paragraph (1)(2)(vii) by adding the phrase “, unaffiliated center or responsible principle” after the word “home”;

■ l. Add paragraph (l)(2)(x);

■ m. Amend paragraph (l)(3) by adding the phrase “or unaffiliated center” after the word “home” each time it appears in the text;

■ n. Amend paragraph (l)(3)(i) by adding the phrase “or unaffiliated center” after the word “home”;

■ o. Amend paragraph (l)(3)(i)(B) by adding the phrase “or unaffiliated center” after the word “home”;

■ p. Amend paragraph (l)(3)(i)(E) by adding the phrase “or unaffiliated center’s” after the word “home’s”; and removing the words “and its” and adding the words “, unaffiliated center or any responsible” in their place;

■ q. Amend paragraph (l)(3)(i)(F) by adding the phrase “or unaffiliated center’s” after the word “home’s” both times it appears in the text; and removing the words “and its” and adding the words “, unaffiliated center, or any responsible” in their place;

■ r. Revise paragraphs (l)(3)(ii) and (l)(3)(iii);

■ s. Amend paragraph (l)(3)(iv) by adding the phrase “or unaffiliated center’s” after the word “home’s”;

■ t. Amend paragraph (l)(3)(v) by adding the phrase “or unaffiliated center’s” after the word “home’s” both times it appears and adding the phrase “or unaffiliated center” after the word “home”;

■ u. Revise paragraph (l)(4); and

■ v. Revise paragraph (m).

The addition and revisions read as follows:

**§ 226.16 Sponsoring organization provisions.**

\* \* \* \* \*

(d) \* \* \*

(3) Additional mandatory training sessions, as defined by the State agency, for key staff from all sponsored facilities not less frequently than annually. At a minimum, such training must include instruction, appropriate to the level of staff experience and duties, on the Program’s meal patterns, meal counts, claims submission and review procedures, recordkeeping requirements, and reimbursement system.

\* \* \* \* \*

(l) \* \* \*

(2) \* \* \*

(x) For unaffiliated centers only:

(A) Use of a food service management company that is in violation of health codes;

(B) Failure to adjust meal orders to conform to variations in the number of participants;

(C) Claiming reimbursement for meals served by a for-profit child care center or a for-profit outside-school-hours case center during a calendar month in which less than 25 percent of the children in care (enrolled or licensed capacity, whichever is less) were eligible for free or reduced-price meals or were title XX beneficiaries;

(D) Claiming reimbursement for meals served by a for-profit adult day care center during a calendar month in which less than 25 percent of its enrolled adult participants were title XIX or title XX beneficiaries;

(E) Failure to perform any of the other financial and administrative responsibilities required by this part;

(F) The fact that the unaffiliated sponsored center or any of its responsible principals have been declared ineligible for any other publicly funded program by reason of violating that program’s requirements during the past seven years unless reinstated in, or determined eligible for, that program, including the payment of

any debts owed. However this prohibition does not apply if the unaffiliated center or any of its responsible principals have been fully reinstated in, or are now eligible to participate in, that program.

(3) \* \* \*

(ii) *Successful corrective action.* If the day care home or unaffiliated center corrects the serious deficiency(ies) within the allotted time and to the sponsoring organization’s satisfaction, the sponsoring organization must notify the day care home or unaffiliated center that it has temporarily deferred its determination of serious deficiency. The sponsoring organization must also provide a copy of the notice to the State agency. However, if the sponsoring organization accepts the day care home’s or unaffiliated center’s corrective action, but later determines that the corrective action was not permanent or complete, the sponsoring organization must then propose to terminate the day care home’s or unaffiliated center’s Program agreement and disqualify any responsible principals, as set forth in paragraph (l)(3)(iii) of this section.

(iii) *Proposed termination of agreement and proposed disqualification.* If timely corrective action is not taken to fully and permanently correct the serious deficiency(ies) cited, the sponsoring organization must issue a notice proposing to terminate the day care home’s or unaffiliated center’s agreement for cause. The notice must explain the day care home’s or unaffiliated center’s opportunity for an administrative review of the proposed termination in accordance with § 226.6(l). The sponsoring organization must provide a copy of the notice to the State agency. The notice must specify that:

(A) It may continue to participate and receive Program reimbursement for eligible meals served until its administrative review is concluded;

(B) Termination of the day care home’s or unaffiliated center’s agreement will result in termination for cause and disqualification; and

(C) If the day care home seeks to voluntarily terminate its agreement after receiving the notice of intent to terminate, the day care home or unaffiliated center or any responsible principals will still be placed on the National disqualified list.

\* \* \* \* \*

(4) *Suspension of participation for day care homes or unaffiliated centers.*

(i) *General.* If State or local health or licensing officials have cited a day care

home or an unaffiliated center for serious health or safety violations, the sponsoring organization must immediately suspend the day care home's or unaffiliated center's CACFP participation prior to any formal action to revoke the day care home's or unaffiliated center's licensure or approval. If the sponsoring organization determines that there is an imminent threat to the health or safety of participants at a day care home or an unaffiliated center, or that the day care home or an unaffiliated center has engaged in activities that threaten the public health or safety, and the licensing agency cannot make an immediate onsite visit, the sponsoring organization must immediately notify the appropriate State or local licensing and health authorities and take action that is consistent with the recommendations and requirements of those authorities. An imminent threat to the health or safety of participants and engaging in activities that threaten the public health or safety constitute serious deficiencies; however, the sponsoring organization must use the procedures in this paragraph (l)(4) of this section (and not the procedures in paragraph (l)(3) of this section) to provide the day care home or an unaffiliated center notice of the suspension of participation, serious deficiency, and proposed termination of the day care home's or an unaffiliated center's agreement.

(ii) *Notice of suspension, serious deficiency, and proposed termination.* The sponsoring organization must notify the day care home or unaffiliated center that its participation has been suspended, that the day care home or unaffiliated center has been determined seriously deficient, and that the sponsoring organization proposes to terminate the agreement for cause, and must provide a copy of the notice to the State agency. The notice must specify that:

(A) The serious deficiency(ies) found and the day care home or unaffiliated center's opportunity for an administrative review of the proposed termination in accordance with § 226.6(l);

(B) Participation (including all Program payments) will remain suspended until the administrative review is concluded;

(C) If the administrative review official overturns the suspension, the day care home or unaffiliated center may claim reimbursement for eligible meals served during the suspension;

(D) Termination of the day care home's or unaffiliated center's agreement will result in the placement of the day care home or unaffiliated

center on the National disqualified list; and

(E) If the day care home or unaffiliated center seeks to voluntarily terminate its agreement after receiving the notice of proposed termination, the day care home or unaffiliated center will still be terminated for cause and disqualified.

(iii) *Agreement termination and disqualification.* The sponsoring organization must immediately terminate the day care home's or unaffiliated center's agreement and disqualify the day care home or unaffiliated center when the administrative review official upholds the sponsoring organization's proposed termination, or when the day care home's or unaffiliated center's opportunity to request an administrative review expires.

(iv) *Program payments.* A sponsoring organization is prohibited from making any Program payments to a day care home or unaffiliated center that has been suspended until any administrative review of the proposed termination is completed. If the suspended day care home or unaffiliated center prevails in the administrative review of the proposed termination, the sponsoring organization must reimburse the day care home or unaffiliated center for eligible meals served during the suspension period.

(m) Sponsoring organizations of day care homes or unaffiliated centers must not make payments to employees or contractors solely on the basis of the number of homes or centers recruited. However, such employees or contractors may be paid or evaluated on the basis of recruitment activities accomplished.

#### § 226.21 [Amended]

■ 31. In § 226.21, amend paragraph (a) by removing the text "\$10,000" and adding in its place the words "the small purchase threshold as defined by 2 CFR 200.88 and established by 41 U.S.C. 134, as applicable,".

■ 32. In § 226.22,

a. Amend paragraph (i)(1) by removing the text "\$10,000" and adding in its place the words "the small purchase threshold as defined by 2 CFR 200.88 and established by 41 U.S.C. 134 as applicable" both times it appears; and

b. Amend paragraph (l)(2) and (l)(3) by removing the text "\$10,000" and adding in its place the words "the small purchase threshold as defined by 2 CFR 200.88 and established by 41 U.S.C. 134, as applicable," both times it appears;

■ 33. In 226.25, add paragraph (i) to read as follows:

#### § 226.25 Other provisions.

\* \* \* \* \*

(i) *Assessments.*

(1) The State agency may establish an assessment against any institution when it has determined that the institution, unaffiliated center, or day care provider has:

(i) Failed to correct severe mismanagement of the Program;

(ii) Disregarded a Program requirement of which the institution, unaffiliated center, or day care provider had been informed; or

(iii) Failed to correct repeated violations of Program requirements.

(2) FNS may direct the State agency to establish an assessment against any institution when it has determined that the institution, unaffiliated center, or day care provider has committed one or more acts under paragraph (i)(1) of this section.

(3) Funds used to pay an assessment established under this paragraph must be derived from non-federal sources. In calculating an assessment, the State agency must base the amount of the assessment on the reimbursement earned by the institution, unaffiliated center, or day care provider for this Program for the most recent fiscal year for which closeout data are available, provided that the assessment does not exceed the equivalent of:

(i) For the first assessment, 1 percent of the amount of meal reimbursement earned for the fiscal year;

(ii) For the second assessment, 5 percent of the amount of meal reimbursement earned for the fiscal year; and

(iii) For the third or subsequent assessment, 10 percent of the amount of meal reimbursement earned for the fiscal year.

(4) The State agency must inform the FNSRO at least 30 days prior to establishing an assessment under this paragraph. The State agency must send the institution written notification of an assessment established under this paragraph and provide a copy of the notification to the FNSRO. The notification must:

(i) Specify the violations or actions which constitute the basis for the assessment and indicate the amount of the assessment;

(ii) Inform the institution that it may appeal the assessment and advise the institution of the appeal procedures established under § 226.6(k);

(iii) Indicate the effective date and payment procedures should the institution not exercise its right to appeal within the specified timeframe.

(5) Any institution subject to an assessment under paragraph (i)(1) of this



section may appeal the State agency's determination. In appealing an assessment, the institution must submit to the State agency any pertinent information, explanation, or evidence addressing the Program violations identified by the State agency. Any institution seeking to appeal the State agency determination must follow State agency appeal procedures.

(6) The decision of the State agency review official is final and not subject to further administrative or judicial review. Failure to pay an assessment established under this paragraph may be grounds for suspension or termination.

(7) Money received by the State agency as a result of an assessment established under this paragraph against an institution and any interest charged in the collection of these assessments must be remitted to FNS.

#### **PART 235—STATE ADMINISTRATIVE EXPENSE FUNDS**

■ 34. The authority citation for part 235 continues to read as follows:

**Authority:** Secs. 7 and 10 of the Child Nutrition Act of 1966, 80 Stat. 888, 889, as amended (42 U.S.C. 1776, 1779).

■ 35. In § 235.11,

■ a. Redesignate paragraphs (c), (d), (e) and (f) as paragraphs (d), (e), (f) and (g); and add new paragraph (c);

■ b. Amend newly redesignated paragraph (e) by removing the phrase “or (c)” after the phrase “paragraphs (b)” and adding in its place the phrase “, (c) or (d)”; and

■ c. Amend newly redesignated paragraph (g) by adding in the first sentence “and (c)” after the words “provisions of paragraph (b)”; and adding the words “or assessment” after the word “sanction” each time it appears.

The addition reads as follows:

#### **§ 235.11 Other provisions.**

\* \* \* \* \*

(c) *Assessments.*

(1) FNS may establish an assessment against any State agency administering the programs under parts 210, 215, 220, 225 and 226 of this chapter and in part 250 of this chapter as it applies to the operation of the Food Distribution Program in schools and child and adult care institutions when it has determined that the State agency has:

(i) Failed to correct a State or local mismanagement of the programs;

(ii) Disregarded a program requirement of which the State has been informed; or

(iii) Failed to correct repeated violations of the program requirements.

(2) Funds used to pay an assessment established under paragraph (c)(1) must

be derived from non-federal sources. The amount of the assessment will not exceed the equivalent of:

(i) For the first assessment, 1 percent of the funds made available under § 235.4 during the most recent fiscal year for which closeout data are available;

(ii) For the second assessment, 5 percent of the funds made available under § 235.4 during the most recent fiscal year for which closeout data are available; and

(iii) For the third or subsequent assessment, 10 percent of the funds made available under § 235.4 during the most recent fiscal year for which closeout data are available.

(3) State agencies seeking to appeal an assessment established under this paragraph must follow the procedures set forth in § 235.11(g). Failure to pay an assessment established under this paragraph may be grounds for suspension or termination.

\* \* \* \* \*

Dated: March 22, 2016.

**Kevin Concannon,**

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

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