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## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

#### 7 CFR Parts 272 and 275

RIN 0584-AD29

#### Food Stamp Program: High Performance Bonuses

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

**ACTION:** Final rule.

**SUMMARY:** This rule finalizes amendments to the Food Stamp Program (FSP) regulations that were proposed in a Notice of Proposed Rulemaking (NPRM), "Food Stamp Program High Performance Bonuses", published on December 17, 2003 in the *Federal Register*. The NPRM proposed regulations that would implement section 4120 of the Farm Security and Rural Investment Act of 2002 (FSRIA) which authorized the Food and Nutrition Service (FNS) to award bonuses to States that demonstrate high or improved performance in administering the FSP. The NPRM proposed performance measures for the high performance bonuses for fiscal year (FY) 2005 and beyond. It also proposed the data that would be used to measure the identified performance. This final rule summarizes and discusses the comments we received as well as adjusts the regulatory language when necessary in response to those comments.

**DATES:** This final rule is effective April 8, 2005. The provisions of this final rule are required to be implemented no later than April 8, 2005.

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#### SUPPLEMENTARY INFORMATION:

##### I. Procedural Matters

###### *Executive Order 12866*

This final rule was determined to be significant, although not economically significant, and was reviewed by the Office of Management and Budget (OMB) in conformance with Executive Order 12866.

###### *Executive Order 12372*

The FSP is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the final rule in 7 CFR part 3105, subpart V and related Notice (48 FR 29115, June 24, 1983), the FSP is excluded from the scope of Executive Order 12372. This Executive Order requires intergovernmental consultation with State and local officials regarding Federal financial assistance and direct Federal development. The Food Stamp Program is excluded because it is an entitlement program and benefits are provided directly to individuals.

###### *Executive Order 12988*

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

###### *Regulatory Flexibility Act*

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601-612). Eric M. Bost, Under Secretary for Food, Nutrition, and Consumer Services, has certified that this rule will not have a significant economic impact on a substantial number of small entities. The changes will affect State and local agencies that administer the FSP, to the extent that they must implement the provisions described in this action.

#### *Unfunded Mandate Analysis*

Title II of the Unfunded Mandate Reform Act of 1995 (UMRA), Pub. L. 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 UMRA, the Department generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, or tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule.

This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) that impose costs on State, local, or tribal governments or to the private sector of \$100 million or more in any one year. Thus, this rule is not subject to the requirements of section 202 and 205 of UMRA.

#### *Regulatory Impact Analysis*

##### Need for Action

This final rule is needed to implement the provisions of Section 4120 of the FSRIA that authorized FNS to establish performance measures relating to actions taken to correct errors, reduce rates of error, improve the eligibility determinations and other indicators of effective administration; measure States' performance against these performance measures; and award performance bonus payments totaling \$48 million for each fiscal year to State agencies that show high or improved performance relating to the performance measures.

##### Benefits

State agencies will benefit from the provisions of this rule because they have the potential to be awarded bonuses for high or improved performance in administering the FSP.

Recipients will benefit from the provisions of this rule because, as the State agencies seek to improve their performance in determining eligibility, issuing benefits, and attracting and

retaining participants, their actions will positively affect applicants and participants.

#### Costs

The cost of implementing these provisions is \$48 million each fiscal year, or \$240 million over 5 years.

#### *Executive Order 13132*

#### Federalism Summary Impact Statement

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

#### Prior Consultation With State Officials

Prior to drafting the NPRM, FNS received input from State and local agencies. Since the FSP is a State administered, Federally funded program, our national headquarters staff and regional offices have formal and informal discussions with State and local officials on an ongoing basis regarding FSP implementation and policy issues. This arrangement allows State and local agencies to provide feedback that forms the basis for any discretionary decisions made in this and other FSP rules. In addition, FNS solicited ideas at various State, regional, national, and professional conferences. FNS also consulted with State government representatives and our partners in the anti-hunger arena through meetings with such entities as the National Conference of State Legislators (NCSL), the National Governors Association (NGA), and the American Public Human Services Association (APHSA). Finally, we solicited comments on these amendments through the rulemaking process. The comment period for the NPRM opened on December 17, 2003 and closed on February 17, 2004. FNS received comments from 14 State or local agencies that administer the FSP, 3 interest groups, one university and one individual.

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

Results of the consultations that were held prior to the publication of the NPRM were discussed in the preamble of that rule and therefore will not be discussed here. The comments that FNS received in response to the NPRM are discussed at length later in this preamble.

#### Extent to Which We Met Those Concerns

FNS considered comments on the NPRM prior to publishing this final rule. Our responses to these comments are discussed at length later in this preamble.

#### *Civil Rights Impact Analysis*

FNS has reviewed this final rule in accordance with the Department Regulation 4300-4, "Civil Rights Impact Analysis," to identify and address any major civil rights impacts the rule might have on minorities, women, and persons with disabilities. After a careful review of the rule's intent and provisions, and the characteristics of food stamp households and individual participants, FNS has determined that there is no adverse effect on any of the protected classes. The rulemaking is directed at State agencies and not applicants or recipients. If there were a trickle down effect on applicants or recipients, it would more than likely be positive and affect all applicants and recipients as this rulemaking includes incentives for State agencies to improve the eligibility determination and certification systems.

FNS has no discretion in implementing the law, which was effective upon enactment of the FSRIA on May 13, 2002. However, FNS does have discretion regarding the performance measures on which to base the awards. As discussed above, these performance measures are directed at State agencies. To the extent States act on these incentives, customer service and payment accuracy may improve. Therefore, FNS anticipates no adverse impact on any of the individuals eligible for food stamps and no disproportionate impact on any protected class.

In general, all data available to FNS indicate that protected individuals have the same opportunity to participate in the FSP as non-protected individuals. FNS specifically prohibits the State and local government agencies that administer the FSP from engaging in actions that discriminate based on race, color, national origin, gender, age, disability, marital or family status (FSP nondiscrimination policy can be found at 7 CFR 272.6(a)). Where State agencies have options, and they choose to implement a certain provision, they must implement it in such a way that it complies with the regulations at 7 CFR 272.6.

#### *Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR 1320) requires that the Office of Management and Budget (OMB) approve all

collections of information by a Federal agency before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number. There are no revisions to information collections identified in this rule. This rule contains information collections that have been previously approved by OMB. The burden for the Quality Control Negative Case Action Review Schedule (FNS-245) is approved under OMB #0584-0034. The Quality Control Review Schedule (FNS-380-1) is approved under OMB #0584-0299. The Integrated Quality Control Review Worksheet (FNS-380) is approved under OMB #0584-0074. The State Coupon Issuance and Participation Estimates (FNS-388) is approved under OMB #0584-0081.

#### *Government Paperwork Elimination Act (GPEA)*

FNS is committed to compliance with the GPEA, which requires Government agencies, in general, to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

## II. Discussion of Comments

### *A. Background*

Section 16(a) of the Food Stamp Act of 1977 (the Act), 7 U.S.C. 2025(a), establishes the base administrative cost-sharing rate between the Federal Government and States at 50 percent. That is, pursuant to Section 16(a), FNS will typically reimburse half a State's costs incurred in administering the FSP. The Act, prior to enactment of the FSRIA, provided that a State agency would receive enhanced funding if it had a payment error rate less than or equal to 5.9 percent and a negative case error rate less than the national weighted mean negative case error rate for the previous year. State agencies and advocate groups expressed concerns that this incentive was too narrowly focused on payment accuracy and should be modified to also reward States for efficient management of the FSP in other areas.

On May 13, 2002, the enactment of FSRIA re-designed the quality control (QC) system, replacing enhanced funding with bonuses for States with high or most improved performance in administering the FSP, while significantly reducing liabilities assessed against States with poor accuracy outcomes.

On December 17, 2003, FNS published the NPRM titled "Food Stamp Program High Performance

Bonuses” (68 FR 70193) which proposed to implement the FSRIA high performance bonus provisions. Elimination of enhanced funding and changes in the liability system will be dealt with in a separate rulemaking.

Section 4120 of the FSRIA (Pub. L. 107–171) amended Section 16 of the Act (7 U.S.C. 2025) to authorize FNS to: establish performance measures relating to actions taken to correct errors, reduce rates of error, improve eligibility determinations, and other indicators of effective administration; measure States’ performance against these performance measures; and award performance bonus payments totaling \$48 million for each fiscal year to State agencies that show high or most improved performance relating to the performance measures. Section 16(d)(2) of the Act (7 U.S.C. 2025 (d)(3)) provides that FNS must establish the performance measures through guidance for FY 2003 and FY 2004 and by regulation for FY 2005 and beyond. Section 16(d)(3) (7 U.S.C. 2025(d)(3)) prohibits a State from being eligible for a performance bonus payment any fiscal year for which it has a liability amount established. Section 16(d)(4) (7 U.S.C. 2025(d)(4)) provides that the amount of the bonus payment and whether or not to award such bonus payment is not subject to administrative or judicial review. Pursuant to Section 16(d)(2)(B)(ii) of the amended Act (7 U.S.C. 2025 (d)(2)(B)(ii)), FNS is to award the bonus payments in the fiscal year following the fiscal year of performance.

#### B. General Rule

##### 1. Section 275.24

The NPRM proposed to establish a new section 7 CFR 275.24, High Performance Bonuses. Section 275.24 (a)(1) through (a)(7) of the proposal set forth the general guidelines for the high performance bonuses. We received several comments on these provisions. FNS will address each provision and the comments received individually.

##### 2. Section 275.24(a)(1)

In the NPRM, section 275.24(a)(1) proposed that FNS would award bonuses totaling \$48 million for each fiscal year to State agencies that show high or most improved performance. Section 275.24(b) proposed to make awards to 30 States in 7 categories: the lowest and most improved combined payment error rates (\$24 million); the lowest and most improved negative error rates (\$6 million); the highest and most improved participant access rates (PAR) (\$12 million); and the best application processing timeliness rate

(\$6 million). It proposed that 50 percent, or \$24 million, of the award money be allocated to payment accuracy based upon States’ error rates, the sole criterion used under the previous enhanced funding.

One commenter generally disagreed with dividing the bonuses among a limited number of States. The commenter claimed that such a distribution was a disincentive because States could maintain a low error rate year after year and yet never qualify for a bonus. This commenter suggested that every State that strives to reach and maintain an acceptable performance level should receive a bonus. FNS does not believe that providing bonus funds to all States that attempt to maintain a certain level of error meets the intent of the legislation or that such an approach would be as effective as the proposed process.

One commenter suggested FNS use a composite ranking to determine the best overall State and make awards based on that ranking. FNS held many discussions with various stakeholders prior to drafting the NPRM. It was clear from these meetings that several individual performance measures were preferable over a composite measure. Because many stakeholders specifically mentioned this in those discussions, and because FNS received no other comments to this effect on the NPRM, FNS has decided to retain the structure of providing the awards based on individual performance measures.

Five commenters expressed dissatisfaction with the way FNS proposed to divide the money among the categories. Four of these commenters expressed concern that too much money had been allocated towards payment accuracy. One commenter argued that, while program integrity is important, there are other indicators of successful FSP administration that should be recognized and rewarded equally. This commenter recommended allocating more money towards rewarding States with high and improved PAR. Another commenter argued that the FSRIA intended to move away from a system that measured FSP performance solely via payment accuracy. This same commenter pointed out that while the FSRIA modified the quality control sanction system, the system remains in place and, due to the national average feature, a number of States would continue to be sanctioned every year. Therefore, this commenter found it inappropriate that FNS should emphasize payment accuracy in the high performance bonus system as well. This commenter recommended a more

balanced division of the bonus money—awarding the majority to customer service measures. A third commenter argued that the QC system already imposes severe fiscal penalties on States that do not perform within acceptable standards. In addition, States are given incentives to focus on program integrity by keeping a share of the recipient claims they collect. This commenter argued that the purpose of the high performance bonus system was to provide a balance to the system. This commenter recommended that the best way to do this would be to allocate 70 percent of the \$48 million to client service/access measures. A fourth commenter urged FNS to consider apportioning a larger share of the \$48 million towards the customer service measures thus buttressing an emphasis on improving access.

One commenter suggested that FNS allocate even more towards payment accuracy—\$30 million. This suggestion was not based on the importance of payment accuracy, but on the belief that less should be allocated for the PAR due to inaccurate data.

FNS maintains its conviction that allocating fifty percent of the total amount towards payment accuracy is appropriate. FNS is aware that the FSRIA intended to move away from awarding States solely on the merits of error rates. The last year of enhanced funding, FNS paid out more than \$77 million in bonuses based on States’ error rates. Therefore, allocating \$24 million in performance bonuses based on payment accuracy is a significant reduction in money awarded to States based on error rates. At the same time, FNS believes it is important to allocate this amount to payment accuracy as it continues to be one of the Agency’s highest priorities and of critical importance to Congress and the taxpayer. In addition, it is an established index that measures outcomes that are influenced by many aspects of FSP management, such as policies, training and customer service. FNS believes allocating more than \$24 million towards payment accuracy would be excessive, as the other measurements are also significant. Therefore, FNS is retaining this provision to allocate \$24 million towards payment accuracy.

##### 3. Section 275.24(a)(2)

Section 275.24(a)(2) proposed awarding the bonuses no later than September 30th of the fiscal year following the performance measurement year. FNS received no comments on this specific provision. However, FNS did receive comments on how it relates to

awarding the bonus for the best and most improved PAR. These comments will be discussed later in the preamble. This provision is statutorily mandated (7 U.S.C. 2025(d)(2)(B)(ii)) and, therefore, we are adopting the proposed regulatory modification as final with no changes.

#### 4. Section 275.24(a)(3)

Section 275.24(a)(3) proposed that a State agency would not be eligible for a bonus payment in any fiscal year for which it has a liability amount established. FNS received three comments opposing this provision. One commenter argued that this provision penalizes States that have made the greatest strides in addressing problem areas. This commenter suggested that, if a State against which a liability has been established wins an award, FNS should use the award to offset any liabilities. This commenter stressed that this would not only recognize improvement but serve as an incentive as well. Another commenter argued that awards for improvement should not be tied to a liability payment because improvement should be rewarded regardless of the national standard for payment accuracy. This commenter urged FNS to consider a legislative change. This commenter believes high achievement in customer service should be rewarded regardless of a State's payment accuracy rate. One commenter plans to seek a legislative change which would allow FNS to award bonuses to States even if they have been assessed a liability.

At this point in time, FNS is unable to modify this provision due to the statutory mandate of 7 U.S.C. 2025(d)(3). Therefore, FNS is adopting this provision as final with no changes.

FNS received one comment suggesting we modify the regulatory language to clarify that the only kind of liability that may render a State ineligible for a bonus is a penalty for an excessive QC payment error rate in the same year for which enhanced funding might otherwise be awarded. This commenter suggested that we articulate that this does not include leftover QC penalties due to a failed reinvestment plan or penalties for other deficiencies in FSP operations. This same commenter noted that the proposed rule does not clearly state that if a State is disqualified from receiving a bonus payment due to a QC penalty, the State with the next best performance will win the performance bonus just as if the disqualified State were a poor performer.

FNS agrees with this commenter and, therefore, is modifying the regulatory

language at § 275.24(a)(3) to provide that a State agency is not eligible for a bonus payment in any fiscal year for which it has a liability amount established as a result of an excessive payment error rate in the same year. If a State is disqualified from receiving a bonus payment and the State is not tied for a bonus, the State with the next best performance will be awarded a bonus payment.

#### 5. Section 275.24(a)(4)

Section 275.24(a)(4) proposed that the determination whether, and in what amount, to award a performance bonus payment is not subject to administrative or judicial review. FNS received no comments on this provision. This provision is statutorily mandated by 7 U.S.C. 2025(d)(4) and, therefore, FNS is adopting it as final.

#### 6. Section 275.24(a)(5)

Section 275.24(a)(5) proposed that FNS divide the award money among the States in each category in proportion to the size of their caseloads (the average number of households per month for the fiscal year for which performance is measured). FNS received four comments on this provision, each arguing that this method is unfair to small States with small caseloads. Each of these commenters suggested that FNS establish a base amount for each award and then divide the remainder according to caseload size. This method, they argue, would provide more of an incentive for smaller States. Suggestions for the amount of the base award differed among commenters, from \$150,000 in general to \$1 million specifically in the payment accuracy category.

FNS recognizes that the proposed system is somewhat biased against smaller States, especially if a State with a small caseload wins in the same category as a State with a large caseload. Therefore, FNS is modifying the regulatory language at § 275.24(a)(5) to provide that FNS will award a base amount of \$100,000 to each State agency that is an identified winner in each category. FNS will divide the remaining award money among the States in each category in proportion to the size of their caseloads.

#### 7. Section 275.24(a)(6)

Section 275.24(a)(6) proposed that a State cannot be awarded two bonuses in the same category (payment accuracy, negative error rate, or participant access rate). If a State is determined to be the best and the most improved in a category, it would only be awarded a bonus for being the most improved. This

allows the "next best" State to receive an award as being among the best States.

FNS received three comments on this provision. One commenter agreed with awarding a State only one award, but suggested that it be for the best and not for the most improved. This commenter reasoned that the State with the best performance should get the award for being the best, regardless of the degree of improvement. One commenter agreed with the proposal to recognize the State in the most improved category thus allowing the State with the next best performance to receive an award. This commenter reasoned that this method allows more States exhibiting outstanding performance to receive awards. This commenter also stated that recognizing and rewarding improvement is important, but it is more appropriate to give award money to States qualifying as the best. The third commenter suggested that FNS first calculate the monetary amount of the award for each bonus and then award the State in the category in which it would receive the higher bonus.

FNS is committed to awarding both high and improved performance in administering the FSP. FNS believes it is important to emphasize high performance. Therefore, FNS has decided to award a State that is a double winner (best and most improved) the award for being the best while at the same time acknowledging that the State also achieved in the most improved category. FNS will then award a bonus to the next State in the best category. FNS is not adopting the commenter's suggestion concerning awarding the State the highest monetary amount. FNS believes that the amount of the bonus award is secondary to the recognition a State receives.

#### 8. Section 275.25(a)(7)

Section 275.24(a)(7) proposed that, where there is a tie to the fourth decimal point, FNS will add the additional State(s) into the category and the money will be divided among all the States. FNS received no comments on this provision and is adopting it as final with no changes.

#### 9. Innovation

In the preamble of the NPRM, FNS specifically solicited comments on whether or not to include "innovation" as a measure of high performance and, if so, what criteria could be used to rank innovative projects. We received two comments suggesting we create a category for innovation. One commenter indicated that to be valid, results of a project need to be measurable (quantifiable) and repeatable among

other states; need to affect something important to the FSP; and need to be something an individual State can effect. One commenter strongly supported the idea of allocating money to reward State innovation, even if that pot of money is relatively small. This commenter recommended requiring States to apply for the award. This way, FNS would be able to collect information on innovative practices that it could then share with all the States. This commenter suggested that in the application the States answer the following questions: What problem did the State attempt to solve? Did the State work in partnership with other state agencies or non-profit groups to identify and resolve the problem? What quantifiable results are available to support the States' success? Is the idea exportable to other States?

FNS appreciates the comments concerning creating a performance bonus category for innovation. However, FNS received only two comments supporting this idea and has concluded that a determination of innovation would be too subjective. At the same time, FNS values the idea of collecting and sharing innovative ideas. Therefore, FNS is examining how best to do this outside of the performance bonus arena.

#### 10. Additional Comments

FNS received two comments suggesting it include a performance measurement for Food Stamp Employment and Training (FSET) participation rate and most employed. One of the commenters put forth this suggestion because FSET is a major component of the FSP. The other indicated that this category would be an outcome measure that supports the goal of increasing family self-sufficiency rather than just an administrative process.

In drafting the policy for FY 2003 and FY 2004 and in drafting the NPRM, FNS did consider including a category for FSET. While FNS recognizes that this activity is important, it is not critical to the administrative performance of the FSP as outlined in the FSRIA. Furthermore, FNS does not have access to data that would be necessary for such a measure. Therefore, FNS is not adopting this suggestion.

#### C. Payment Accuracy

##### 1. Section 275.24(b)(1)

Section 275.24(b)(1) proposed to divide \$24 million (50 percent of the total amount) among the 10 States with the lowest and the most improved combined payment error rate (the error rate). Section 275.24(b)(1)(i) proposed

awarding bonuses to the 7 States with the lowest combined payment error rates based on the validated quality control payment error rates for the performance measurement year. One commenter suggested that FNS award bonuses in the area of payment accuracy to the ten best and the ten most improved States. This commenter argued that such a method would provide a greater incentive to States and would represent FNS' highest priority and the State's ability to manage the FSP. One commenter argued that rewarding improvement is more important than rewarding the best and, therefore, FNS should award 12 States in this category: six States that are the best and six States that are the most improved.

FNS appreciates these comments. However, FNS believes that awarding 20 States in the area of payment accuracy would result in bonus amounts that would be so small they would reduce States' incentive. Furthermore, FNS believes that the proposed provision strikes a good balance by recognizing three States that improved the most while still providing the greater number of bonuses for the best performers. FNS will adopt this provision as final with no changes.

##### 2. Section 275.24(b)(1)(ii)

Section 275.24(b)(1)(ii) proposed awarding the 3 States with the largest percentage point decrease in the combined payment error rates based on the comparison of the validated quality control payment error rates for the performance measurement year and the previous fiscal year. FNS received four comments on this provision.

Two commenters suggested that States only get awards if States' error rates are at or below the national average payment error rate. The FSRIA provided no restrictions on awarding States for improvement, while it did provide for a restriction for awarding States with established liabilities. FNS views these awards as an incentive for improvement, especially for States with already high error rates. If FNS only awarded States that were at or below the national average, what incentive then would these bonuses serve for those States that have high error rates? Also, if States had significantly higher error rates than the national average, they very well may be in sanction mode and would be statutorily prohibited from receiving a bonus. Finally, FNS contends that States that are already at or below the national average can compete for an award in the "best" category. Therefore, while FNS appreciates the comments on this

subject, FNS is not adopting the commenters' suggestion.

One commenter supported basing the award for most improved on percentage point decrease (absolute improvement). Another commenter disagreed with this suggestion. This commenter argued that it is much harder for a State with an already low error rate to improve by several percentage points and, therefore, States with a solid performance record and significant percentage improvement would not be rewarded. In addition, this commenter argued that the State with a lower error rate is costing the FSP less money. This commenter suggested that FNS measure percentage improvement (relative improvement) so all States have an opportunity to realize a performance bonus not just those that have high dollar errors.

FNS stands by the proposal to use percentage point improvement (absolute improvement) as the best means of measuring improvement. To illustrate, we will repeat the example given in the proposed rulemaking at 68 FR 70197: if State A has a 10 percent error rate in FY 2004 and a 6 percent error rate in FY 2005, it has shown an absolute improvement rate of 4 percent (the difference between 10 and 6) and a relative improvement rate of 40 percent (the percentage reduction from 10). If State B has a 6 percent error rate in FY 2004 and a 3 percent error rate in FY 2005, it has had an absolute improvement rate of 3 and a relative improvement rate of 50 percent. States that improve by more percentage points have more of an impact on the national FSP and on their own caseload than States that make a relative improvement. And, as discussed above, States that have already low error rates can compete for and very well may win in the "best" category. Therefore, we are adopting this provision as final with no changes.

#### D. Negative Error Rate

##### 1. Section 275.24(b)(2)

Section 275.24(b)(2) proposed to divide \$6 million among the 4 States with the lowest negative error rates and the 2 States with the most improved negative error rates. The negative error rate measures the correctness of the State agency's action to deny an application, or suspend or terminate the benefits of a participating household. It also measures whether a State correctly determined a household's eligibility in terms of the State's compliance with Federal procedural requirements.

One commenter recommended that the definition of a negative error be revised to exclude procedural issues

when the household is not eligible anyway, *e.g.* denying the case on the 29th day instead of the 30th. Negative cases are defined in 7 CFR 271.2 and the review procedures for negative cases are specified in 7 CFR 275.12 and the FNS Handbook 310, the Food Stamp Program Quality Control Review Handbook. Those procedures are based on certification policy. Revisions to quality control review policy are outside of the scope of this rulemaking. Therefore, FNS will not adopt the commenter's suggestion, but will consider the idea in future rulemaking.

#### 2. Section 275.24(b)(2)(i)

Section 275.24(b)(2)(i) proposed to award bonuses to the 4 States with the lowest negative error rates based on validated quality control negative error rates for the performance year. One commenter supported this measure. One commenter questioned how FNS would validate the negative error rate from year to year to determine the most improved. This commenter pointed out that in the past the State's negative error rates have not been validated unless the State was below the national average for active reviews. This commenter questioned if the negative error rates would be validated for all States whether or not they have met the active error rate or would only the State's error rate be used. If the State's rate will be used, this commenter expressed concern that the results would be questionable if not validated. For several years, FNS has been validating all State agencies' negative case error rates because of concerns about the quality of the data and fair and equitable treatment of applicants. Although this comment is outside the scope of this rulemaking, FNS recognizes the merit of the comment and intends to continue to validate all State agencies' negative case error rates.

#### 3. Section 275.24(b)(2)(ii)

Section 275.24(b)(2)(ii) proposed to award bonuses to the 2 States with the largest percentage point decrease in their negative error rates based on the comparison or the performance measurements year's validated quality control negative error rates with those of the previous fiscal year. One commenter supported the idea of awarding States for improvement in the negative error rate but suggested it be a smaller amount of money than for the best. One commenter supported using percentage points versus percentage improved. One commenter opposed this method. This commenter suggested that awarding funds for improvement may result in States that have worked diligently to

reach a low error rate losing to States that have had continuously high error rates. Again, as discussed above, FNS believes that States that improve by more percentage points have more of an impact on the national FSP and on their own caseload than States that make percentage improvement. Additionally, States that have already low error rates can compete for and very well may win in the "best" category. Therefore, we are adopting this provision as final with no changes.

#### 4. Threshold

In the preamble of the NPRM, FNS specifically solicited comments on whether States must attain a certain threshold to be rewarded for an improved negative error rate. For example, should a State be rewarded if it improves its negative error rate from 20 percent to 15 percent, even though its negative error rate is still very high? One commenter suggested setting separate thresholds for groups of States created within each bonus category. These groups could be based on caseload, metropolitan area, and expenditure level. Alternatively, this commenter suggested setting no threshold because it could exclude those States whose improvement had the largest possible impact on the caseload, in terms of the number of cases positively affected. In addition, using a threshold for the most improved negative error rate would be incongruous since no such thresholds are used for the other most improved categories. One commenter supported awarding States for most improved even if their negative error rate was above the national average. At the same time, this commenter suggested that in lieu of the bonus money, we award these States special recognition.

Three commenters opposed awarding States for most improved when their negative error rates were above the national average. One commenter argued that it would not be fair to award a State for improvement when its negative error rate was still very high. A second commenter argued that since the entire purpose of the bonuses is to reward States for correct administration of the FSP, a State that is incorrectly denying or terminating more cases than the national average should not receive a financial award. A third argued that States that win awards for improvement in their negative error rate should be held to some basic level of performance. This commenter suggested that States should not be awarded for most improved if they are more than 30 percent above the national average for negative error rates. According to this

commenter this approach is consistent with the statutory provision that disqualifies States from receiving a bonus payment if they are subject to a QC penalty in that fiscal year.

FNS views these bonuses as incentives for States to improve. However, FNS also recognizes that if a State has an excessively high negative error rate even after improvement, then it should not be rewarded. While the FSRIA did not provide for a restriction, FNS agrees with the comments. Therefore, FNS has decided to take a moderate position on this issue and provide that States that are more than 50 percent above the national average negative error rate may not receive a bonus in this category regardless of improvement.

#### E. Program Access Index

##### 1. Section 275.24(b)(3)

Section 275.24(b)(3)(i) and (b)(3)(ii) proposed to divide \$12 million among the 4 States with the highest and the 4 States with the most improved participant access rate (PAR). Section 275.24(b)(3)(iii) proposed to use a variety of data sources to calculate the PAR. FNS proposed that the denominator be composed of annual State counts of persons below 125 percent of poverty from the Census Bureau's March Supplement to the Current Population Survey (CPS). These counts are based on annual income received in the previous calendar year. For the numerator, or the number of food stamp participants, FNS proposed to use administrative counts of participants by State over the same calendar year as for the Census Bureau's persons below 125 percent of poverty, averaging 12 months of data. In addition, FNS proposed to make adjustments for two special situations. First, because persons receiving Supplemental Security Income (SSI) are ineligible for food stamps in California, FNS proposed to reduce the number of persons below 125 percent of poverty in California by the percentage of such persons who received SSI in the previous year. Second, because some individuals residing on reservations may choose to receive food assistance from either the FSP or the Food Distribution Program on Indian Reservations (FDPIR) but not both simultaneously, FNS proposed to add the number of FDPIR participants to the number of food stamp participants, using administrative data averaged over a calendar year.

## 2. Name Change

It has come to FNS' attention that there is a lot of confusion between the PAR and the official Participation Rate. FNS believes that part of the confusion is due to the similar names. In an attempt to distinguish this performance bonus measure from the official participation rate, FNS is changing the term Participant Access Rate (PAR) to the Program Access Index (PAI). Normally, "rate" is used to measure how often something occurs (food stamp participation) among all the times it could occur (food stamp eligibles). By changing this to an "index" FNS believes it will be clearer that it is relating a pair of numbers that are similar but do not have the same properties of a rate. Not all food stamp participants have low-income as defined in the denominator of the index, nor are all persons in the denominator eligible to participate.

## 3. Poverty Threshold

Section 275.24(b)(3)(iii) proposed to use 125 percent of poverty in calculating the PAI. This threshold differs from what FNS used for fiscal years 2003 and 2004 (100 percent of poverty). However, our analysis showed that using 125 percent of poverty better correlates to the official FSP participation rates. The official FSP participation rate uses 130 percent of income in the denominator. FNS looked at using 130 percent of poverty in the PAI but found that the data is not readily available from the Census Bureau and it would require time and additional expense to obtain the tabulations. In addition, FNS analyses found that using 130 percent in the PAI denominator versus 125 percent made no impact in the correlation to the official participation rates. As a result, FNS decided for efficiency and validity that using 125 percent of poverty in the PAI denominator was acceptable. FNS proposed in the preamble that, if the Agency could receive the estimate of individuals with income below 130 percent of poverty from the Census Bureau within a reasonable timeframe and the data better correlates to the official statistics, FNS would use numbers of people below 130 percent rather than 125 percent of poverty.

FNS received several comments on this proposal. Two commenters supported using 130 percent of poverty, stating it is more accurate. One commenter suggested we request a re-tabulation of data from Census. Two commenters, while not opposed to using 125 percent or 130 percent, proposed making adjustments for immigrants and

individuals who live on reservations. Finally, one commenter suggested FNS not foreclose the possibility of Census providing data on the number of individuals with income below 130 percent of the poverty line in a timely fashion. This commenter suggested FNS craft the regulatory language so that FNS reserves the right to substitute the number of people below 130 percent for the number below 125 percent of poverty if the data is available in a timely manner. Comments related to ineligible aliens and undocumented immigrants will be discussed later in the preamble. FNS analyses show that a denominator using persons with income below 125 percent of poverty with certain adjustments produces a rate that best correlates to the official State participation rates. However, FNS does not want to preclude using 130 percent of poverty if that information should become available in time to calculate the PAI. FNS agrees that the final regulation should allow certain flexibility in improving the PAI calculation because of new and better data. Therefore, FNS is amending the proposed language to provide that FNS reserves the right to use the number of people below 130 percent of poverty should the data be available in a timely manner. Any such substitution would apply to all States.

One commenter expressed concern that the Census Bureau poverty counts appeared to be inaccurate for FY 2002 because, in one particular State identified by the commenter, the poverty count increased more than the State population, and because unemployment did not increase by as much in that State during that time period. FNS contends that in addition to population growth, there are several other factors that can affect the poverty count. Poverty can increase faster than unemployment if wage rates are not increasing or more workers are employed only part-time. The Census Bureau and FNS recognize the problems small entities have with uncertainty in the poverty estimates. However, FNS knows of no specific problem in that particular State and, moreover, knows of no other more reliable data source. Lacking better information or data, FNS will continue to use Census Bureau data on the count of people in poverty in each State.

## 4. American Community Survey versus the Current Population Survey

In the preamble to the proposed rule, FNS stated that since the American Community Survey (ACS) has a larger sample and is released earlier than the CPS, FNS was considering using data

from that survey to calculate the PAI. However, since the survey was relatively new, FNS was going to examine the data over time to determine how well the PAI using ACS poverty counts correlated to the official FSP participation rate. If this data were more consistent, FNS would use it instead of the CPS.

FNS received several comments on this proposal. One commenter agreed that FNS should evaluate data from the ACS because of its larger sample size. One commenter suggested that FNS use whichever data source best correlates with the full Census. One commenter argued that neither data source was appropriate because they are both based on samples that do not accurately reflect the true extent of poverty, particularly in small jurisdictions subject to small sample sizes. One commenter urged FNS to use the ACS because it is a year-by-year supplement to the Decennial Census and is, therefore, more up-to-date, and because of its larger sample size.

FNS agrees that the national survey based on a sample is problematic for smaller jurisdictions. However, FNS knows of no other more reliable source of data available in a timely manner that could be used to calculate a measure of participation access that is comparable across all States and time. The CPS is made up of a scientifically selected sample designed to represent the civilian non-institutional population. While it does not pull a sample from every county in the country, it does statistically represent State populations. As it is planned, the ACS will have a much larger sample size than the CPS when fully implemented. FNS does not want to preclude using the ACS, especially if, when it becomes nationally representative, it proves to be a better source of data for calculating the PAI. Therefore, this final regulation provides that FNS will use the CPS, but reserves the right to use new and better data should it become available.

## 5. Determining the Number of Participants

Section 275.24(b)(3)(iii) proposed using State participation data, averaged over 12 months, to determine the number of participants. One commenter opposed using an average because it flattens out the actual increase in participation, especially for States that are actively conducting outreach activities throughout the year. This commenter suggested using the end results for the last month of the year (December). However, using participation in a single month like December is an advantage only when



caseloads are rising. When caseloads are decreasing, this would actually disadvantage some States.

Using an average smoothes out this effect. FNS chose average participation in the calendar year because the income data from the CPS, which is the basis for the count of persons with income below 125 percent of poverty, is available solely for a calendar year.

The Census Bureau does not collect monthly income in a large enough national survey to provide accurate monthly counts of persons with incomes below 125 percent of poverty by State. FNS is not adopting the commenter's suggestion and instead will continue to use an average 12 months of data based on a calendar year.

#### 6. Making Adjustments

Section 275.24(b)(3)(iii) proposed that, to calculate the PAI, FNS would make adjustments for the SSI population in California and the FDPIR participants in States with reservations. FNS received several comments concerning the proposed adjustments. Several commenters proposed that, to improve the accuracy of the PAI, FNS should make adjustments for all those who are ineligible (such as immigrants or individuals who are not meeting the work requirements), or take into consideration other State specific situations that affect participation in the FSP such as the economy or urban versus rural populations. In addition, these commenters pointed out that FNS proposed to adjust differently for SSI recipients in California and individuals that received FDPIR. These commenters argued that since both populations are ineligible for the FSP they should be treated similarly. Several commenters suggested alternative ways to calculate the PAI, or that FNS seek a legislative change that would allow it to award these bonuses later so it can use the official participation rate.

FNS has decided not to change the method used to calculate the PAI or to adjust for such factors as ineligible individuals not addressed in the proposed rule (immigrants or individuals who are not meeting the work requirements), the economy, or rural versus urban populations with one exception. State-reported participation includes people provided benefits under special disaster conditions. FNS will subtract from the number of participants the state-reported number of people who received food stamp disaster assistance to better reflect on-going administration of the regular FSP. Disaster assistance is approved in limited circumstances and operates under special rules that differ from

those of the regular FSP. FNS will subtract only those disaster assistance recipients who are new to the FSP—not existing participants who are issued replacement benefits. These individuals were not participating in the FSP under normal operations before the disaster. To the extent they apply and continue to participate under normal program rules in the following months, they are included in the count of participants.

FNS agrees with the comment that some adjustment should be made for FDPIR participants and SSI recipients in California, and that the adjustment approach should be consistent for both. Consistency could be achieved by either: (1) Adding the count of FDPIR and California SSI recipients to the numerator of the PAI, or (2) subtracting the count of low-income FDPIR and California SSI recipients from the denominator. Because the number of participants in FDPIR and California SSI recipients offers no information on the effectiveness of State food stamp agency operations, FNS believes it is preferable to exclude FDPIR and California SSI participants from the denominator of the PAI.

FNS will make this adjustment by using prior-year information from the CPS to estimate the number of California SSI recipients with income below 125 percent of poverty. Data limitations prevent a similar estimate of the number of FDPIR participants with income below the 125 percent of poverty. Therefore, FNS will subtract the average monthly number of FDPIR participants from the number of persons with income below 125 percent of poverty in each State. Although some FDPIR participants with incomes above 125 percent of poverty may qualify for benefits, FNS believes that the number will be relatively small.

We received one comment on the data used to remove SSI recipients in California from the denominator. This commenter suggested that since FNS is using Census data to determine the number of eligibles in the State, FNS should use Census figures to back out the SSI recipients from the denominator. In fact, the methodology proposed in the NPRM used Census data from the CPS to remove from the denominator the SSI recipients with incomes below 125 percent of poverty in California.

#### 7. Additional Comments

One commenter urged FNS to clarify in the regulations how the PAI is calculated in order to "ensure full transparency" regarding distribution of funds and to make it more difficult for future Administrations to tinker with

the formula without going through the public comment process. FNS agrees with this commenter that the regulations should be as complete as possible and believes that the regulations as written in this final rule are complete.

This same commenter suggested that FNS specify that the PAI is the share of eligible individuals in food stamp households who participate in the FSP. FNS would like to reiterate in the preamble that the PAI is the ratio of participants to persons with incomes below 125 percent of poverty, not eligible individuals. The official State participation rate is the ratio of participants to eligibles. FNS agrees and regrets that there is a lot of confusion over these two rates. Therefore, as discussed above, this measure will now be referred to as the Program Access Index.

#### F. Application Processing Timeliness

##### 1. Section 275.24(b)(4)

Section 275.24(b)(4) proposed to divide \$6 million among the 6 States with the highest percentage of timely-processed applications. One commenter supported the proposal to measure application-processing timeliness because it is an essential component of customer service.

##### 2. Section 275.24(b)(4)(i)

Section 275.24(b)(4)(i) proposed collecting data on application-processing timeliness through the QC system. FNS initiated collection of data as part of the QC reviews beginning with FY 2003 cases. Instructions for collecting this information are found in the FNS 310 Handbook, The Food Stamp Program Quality Control Review Handbook. In the preamble to the proposed rule, FNS specifically sought comment on this data collection instrument and its ability to collect the sought after information. FNS received two comments regarding the data collection instrument. One commenter suggested we use different QC codes for the data collection instrument: 1. Timely; 2. Not timely—agency caused; 3. Not timely—client caused; 4. Application filed outside of fiscal year; and, 5. Unable to determine timeliness of application processing. FNS appreciates the merit of this comment. However, FNS has determined that there is no reason to change the codes since client-versus agency-caused delays is not relevant with regard to this measure.

One commenter opposed using QC data for this measurement saying it would result in inconsistent reporting.



This commenter cautioned that since the QC data collection instrument is new, States would be unfamiliar with it, and would, therefore, have many questions and may not report the data in the same way. This commenter suggested FNS modify the Program Activity Statement (FNS-366) to capture the data since States already have this procedure in place. This commenter felt that specific revisions to the FNS-366 form would result in more consistency since it is common to all States. FNS seriously considered using the FNS-366 form, but wanted to have a mechanism for validating these numbers. QC provides that mechanism. Therefore, FNS will verify the QC application processing data for any State that is in contention for a bonus.

### 3. Section 275.24(b)(4)(ii)

Section 275.24(b)(4)(ii) proposed that a timely processed application is one that provides an eligible applicant the "opportunity to participate," as defined in 7 CFR 274.2, within thirty days for normal processing or 7 days for expedited processing. New applications that are processed outside of this standard would be untimely for this measure, except for applications that are properly pending in accordance with 7 CFR 273.2(h)(1)(i)(C). Properly pending applications would not be counted for (as timely) nor against (as untimely) States' timeliness rate—they will be excluded from this particular calculation altogether.

One commenter argued that the measure as proposed does not fully capture the issue of timeliness and its importance in the delivery of food assistance. This commenter pointed out that this measure treats States with average processing times of 15 days the same as States with average processing times of 25 days and, thus, treating these States the same does not accurately reflect their performance with respect to timeliness. This commenter suggested we incorporate average processing time into the measure to provide States with an incentive to do better than simply meeting the statutory deadlines. FNS contends that average processing time can mask the effect of those States that process the bulk of their applications outside of the 30 days, but their average processing time is better than those States that consistently process their application within the 30 day standard. For example State X processes 100 applications, 20 in 31 days and the rest in 10 days, for an average of 14.1 days. State Y processes 90 applications in 20 days and 10 in 40 days, for an average of 22 days. FNS believes it is important

that as many applicants as possible be served in a timely manner. Therefore, while FNS sees merit in using averaging, FNS believes that the timeliness rate as proposed is a more accurate measure and is adopting it in this final rule.

### 4. Client-Caused Delays

In the preamble of the NPRM, FNS specifically sought comment on whether to exclude all client-caused delays from this measure and, if so, how to work that into the existing reporting and QC framework. Two commenters opposed the proposal to measure timeliness against the statutory standard of 30 days from the date of application. These commenters suggested that we measure timeliness in accordance with the regulations at 7 CFR 273.2(h)(2)(i), which provide procedures for when the 30-day standard is not met (such as State and client-caused delays). Otherwise, a State following these regulatory procedures would be penalized for purposes of awarding the performance bonus even though all timeliness standards may have been complied with under Federal regulations. Excluding client-caused delays would also have a big impact on States with large immigrant populations and multiple languages as client-caused delays are considerably higher in such States than those without such populations. As discussed in the preamble to the NPRM, FNS recognizes that the statutory time frame differs from the latitude afforded by the regulations. However, FNS believes that excellent customer service should be measured by whether or not the statutory time frame of 30-day processing is met as opposed to compliance with the regulations that allows for up to 60-day processing in some cases. Furthermore, FNS believes all States are faced with challenges of serving applicants with one barrier or another (e.g., language and culture). Measuring application-processing timeliness against a 30-day standard, therefore, rewards States that take the extra steps to overcome these challenges.

Four commenters suggested excluding all client-caused delays from the measurement, not just those client-caused delays due to lack of verification. While FNS appreciates the merit of these comments, FNS believes that a State has the ability and the responsibility to influence clients' performance throughout the application process, such as helping to obtain verification, or accurately and adequately explaining the processing time frames and deadline dates. Again,

this measure will reward States that go above and beyond to provide excellent customer service by providing needy individuals benefits in a timely fashion.

Two commenters agreed with the exception that applications that are properly pending because the applicant failed to provide verification should not count in the measure of overdue applications.

One commenter stated that States should not be held to a time frame of an application date for another program (such as TANF) when the client did not request food stamp benefits until a later date, perhaps during the interview for the other program. In this instance, the commenter suggested that the date of the interview should be the date the client requested food stamps. Existing FSP policy is that if an individual applies for another program but does not apply for the FSP until sometime later in the application process for the other program, then the date of application is the date that the individual applies for the FSP and not the other program.

### 5. Expedited Time Frames

Three commenters pointed out that the proposed rule does not address expedited time frames. One of these commenters questioned whether the policy regarding 30-day processing, which makes an exception for cases the State agency has pending due to incomplete verification, applied to expedited service cases. This commenter suggested that this policy be extended to all situations in which the client fails to comply with requirements necessary for agencies to meet the 7-day timeframe. FNS contends that the exception regarding failure to provide verification should not apply in cases that are entitled to expedited service. Verification requirements for expedited service cases are greatly reduced. The only information the State agency is required to verify in such cases is the identity of the head of the household. The State agency is not required to verify this information with paper documents, but may do so through a collateral contact. State agencies are encouraged to verify all other information prior to certification; however, they are permitted to postpone verification in the interest of providing food stamp benefits to destitute individuals. Therefore, since the probability of client-caused delays in expedited service cases due to failure to provide verification is minimal, FNS is not adopting the commenters suggestion.

Two commenters recommended that in cases of late determination for

expedited service, the 7-day time period be calculated from the date the agency discovers a household is entitled to expedited service and not the date of application. FNS believes that it is important to note that States are required to pre-screen applications to determine whether or not the applicant is entitled to expedited service. While all States face the challenge of accurately determining this need, those that do an excellent job in this endeavor or take the extra step to determine if a client is in dire need of nutritional assistance should be rewarded appropriately.

#### 6. Section 275.24(b)(4)

Proposed § 275.24(b)(4) defined a timely-processed application as one that provides an eligible applicant the "opportunity to participate," as defined in 7 CFR 274.2, within 30 days or 7 days for expedited processing. One commenter recommended that the "opportunity to participate" in the Electronic Benefit Transfer (EBT) environment be described. FNS recognizes that the "opportunity to participate," as defined in 7 CFR 274.2, addresses systems that provide benefits in the form of food stamps or authorization documents as opposed EBT. However, revising that definition is outside of the scope of this rulemaking. Nevertheless, FNS has provided guidance delineating this term further, particularly in the EBT environment. Existing FSP policy regarding this performance measure is that the "opportunity to participate" consists of providing households with authorization documents (ATP cards), coupons, or EBT cards and having issuance facilities open and available for households to obtain their benefits. State agencies must mail or have EBT cards available for pick-up (and post benefits to the EBT account and provide all the training and PIN numbers) in time to assure that the recipient can access his benefits before the 30-day standard or 7-day standard expires.

Furthermore, in an EBT system, the client has the opportunity to participate:

- 24 hours after the client is notified by phone or in person to come into the office to pick up his card (assuming benefits are posted to the account, and the client has his PIN number or will be provided his PIN number when he comes in to get his card); or,
- Three days after he has been notified by mail to come in and pick up his card (assuming benefits are posted to his account, and the client has his PIN number or will be provided his PIN number when he comes in to get his card).

#### 7. Approvals

In the preamble of the NPRM, FNS proposed that only approvals be included in the determination of timeliness since this measure is focused on meeting the 30-day and 7-day standards for providing eligible households the opportunity to participate. FNS received five comments on this proposal. Two commenters supported excluding denials from this measurement because an early denial is not an indicator of strong performance. Three commenters supported including denials in this measurement because it is important to advise households of denials as well as certification and it requires as much time. While FNS believes it is important to notify a client about denial of benefits in a timely fashion, FNS agrees that an early denial is not good if the applicant has not been provided sufficient time to provide the required documentation. FNS is not aware of problems with late denials, but also does not collect information on the timeliness of denials at this time. FNS will investigate the timeliness of denials with States and determine whether further data analysis and regular collection of data might be warranted. However, denials will not be included in this measure.

#### 8. Section 275.24(b)(4)(iii)

Section 275.24(b)(4)(iii) proposed that QC reviewers evaluate for timeliness only new applications in the State QC active sample that were filed on or after the beginning of the fiscal year because they were filed within the performance measurement year for which the bonuses are awarded. Two commenters opposed this provision. One commenter expressed concern that the sample pool would be too small to yield valid program data. This commenter suggested that the sample be expanded to all active cases sampled during the fiscal year. One commenter pointed out that this method excludes clients who apply in August and September whose eligibility is not determined until October or later. This might bias timeliness determinations for states that experience increases in applications in the late summer. FNS has been monitoring the sample size based on the proposed policy and contends that it is large enough to be statistically valid. In addition, FNS believes that it is important to measure a State agency's performance within a fiscal year and, therefore, will retain the provision as proposed.

#### List of Subjects

##### 7 CFR Part 272

Civil rights, Claims, Food stamps, Grant programs, Reporting and recordkeeping requirements, Unemployment compensation, Wages.

##### 7 CFR Part 275

Administration, Management evaluation reviews, Quality control reviews, Data analysis and evaluation, Corrective action, Responsibilities for reporting on program performance, Program performance.

■ Accordingly, 7 CFR Parts 272 and 275 are amended as follows:

■ 1. The authority citation for Parts 272 and 275 continues to read as follows:

Authority: 7 U.S.C. 2011–2036.

#### PART 272—REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

■ 2. In § 272.1, add paragraph (g)(170) to read as follows:

##### § 272.1 General terms and conditions.

(g) \* \* \*

(170) Amendment No. 396. The provisions of amendment number 396 are effective April 8, 2005.

#### PART 275—PERFORMANCE REPORTING SYSTEM

■ 3. A new § 275.24 is added to read as follows:

##### § 275.24 High performance bonuses.

(a) *General rule.* (1) FNS will award bonuses totaling \$48 million for each fiscal year to State agencies that show high or improved performance in accordance with the performance measures under paragraph (b) of this section.

(2) FNS will award the bonuses no later than September 30th of the fiscal year following the performance measurement year.

(3) A State agency is not eligible for a bonus payment in any fiscal year for which it has a liability amount established as a result of an excessive payment error rate in the same year. If a State is disqualified from receiving a bonus payment under this paragraph (a)(3), and the State is not tied for a bonus, the State with the next best performance will be awarded a bonus payment.

(4) The determination whether, and in what amount, to award a performance bonus payment is not subject to administrative or judicial review.

(5) In determining the amount of the award, FNS will first award a base amount of \$100,000 to each State agency that is an identified winner in each

category. Subsequently, FNS will divide the remaining money among the States in each category (see paragraph (b) of this section) in proportion to the size of their caseloads (the average number of households per month for the fiscal year for which performance is measured).

(6) A State cannot be awarded two bonuses in the same category; the relevant categories are payment accuracy (which is outlined in paragraph (b)(1) of this section), negative error rate (which is outlined in paragraph (b)(2) of this section), or program access index (which is outlined in paragraph (b)(3) of this section). If a State is determined to be among the best and the most improved in a category, it will be awarded a bonus only for being the best. The next State in the best category will be awarded a bonus as being among the best States.

(7) Where there is a tie to the fourth decimal point for the categories outlined in paragraphs (b)(1) through (b)(4) of this section, FNS will add the additional State(s) into the category and the money will be divided among all the States in accordance with paragraph (a)(5) of this section.

(b) *Performance measures.* FNS will measure performance by and base awards on the following categories of performance measures:

(1) *Payment accuracy.* FNS will divide \$24 million among the 10 States with the lowest and the most improved combined payment error rates as specified in paragraphs (b)(1)(i) and (b)(1)(ii) of this section.

(i) *Excellence in payment accuracy.* FNS will provide bonuses to the 7 States with the lowest combined payment error rates based on the validated quality control payment error rates for the performance measurement year as determined in accordance with this part.

(ii) *Most improved in payment accuracy.* FNS will provide bonuses to the 3 States with the largest percentage point decrease in their combined payment error rates based on the comparison of the validated quality control payment error rates for the performance measurement year and the previous fiscal year, as determined in accordance with this part.

(2) *Negative error rate.* FNS will divide \$6 million among the 6 States with the lowest and the most improved negative error rates as specified in paragraphs (b)(2)(i) and (b)(2)(ii) of this section.

(i) *Lowest negative error rate.* FNS will provide bonuses to the 4 States with the lowest negative error rates based on the validated quality control negative error rates for the performance

year as determined in accordance with this part.

(ii) *Most improved negative error rate.* FNS will provide bonuses to the 2 States with the largest percentage point decrease in their negative error rates, based on the comparison of the performance measurement year's validated quality control negative error rates with those of the previous fiscal year, as determined in accordance with this part. A State agency is not eligible for a bonus under this criterion if the State's negative error rate for the fiscal year is more than 50 percent above the national average.

(3) *Program access index (PAI).* FNS will divide \$12 million among the 8 States with the highest and the most improved level of participation as specified in paragraphs (b)(3)(i) through (b)(3)(iii) of this section. The PAI is the ratio of participants to persons with incomes below 125 percent of poverty, as calculated in accordance with paragraph (b)(3)(iii) of this section (the PAI was formerly known as the participant access rate (PAR)).

(i) *High program access index.* FNS will provide bonuses to the 4 States with the highest PAI as determined in accordance with paragraph (b)(3)(iii) of this section.

(ii) *Most improved program access index.* FNS will provide bonuses to the 4 States with the most improved PAI as determined in accordance with paragraph (b)(3)(iii) of this section.

(iii) *Data.* For the number of participants (numerator), FNS will use the administrative annual counts of participants minus new participants certified under special disaster program rules by State averaged over the calendar year. For the number of people below 125 percent of poverty (denominator), FNS will use the Census Bureau's March Supplement to the Current Population Survey's (CPS) count of people below 125 percent of poverty for the same calendar year. FNS will reduce the count in each State where a Food Distribution Program on Indian Reservations (FDPIR) program is operated by the administrative counts of the number of individuals who participate in this program averaged over the calendar year. FNS will reduce the count in California by the Census Bureau's percentage of people below 125% of poverty in California who received Supplemental Security Income in the previous year. FNS reserves the right to use data from the American Community Survey (ACS) in lieu of the CPS, and to use the count of people below 130 percent of poverty, should these data become available in a timely

fashion and prove more accurate. Such a substitution would apply to all States.

(4) *Application processing timeliness.* FNS will divide \$6 million among the 6 States with the highest percentage of timely processed applications.

(i) *Data.* FNS will use quality control data to determine each State's rate of application processing timeliness.

(ii) *Timely processed applications.* A timely processed application is one that provides an eligible applicant the "opportunity to participate" as defined in § 274.2 of this chapter, within thirty days for normal processing or 7 days for expedited processing. New applications that are processed outside of this standard are untimely for this measure, except for applications that are properly pending in accordance with § 273.2(h)(2) of this chapter because verification is incomplete and the State agency has taken all the actions described in § 273.2(h)(1)(i)(C) of this chapter. Such applications will not be included in this measure. Applications that are denied will not be included in this measure.

(iii) *Evaluation of applications.* Only applications that were filed on or after the beginning of the performance measurement (fiscal) year will be evaluated under this measure.

Dated: January 31, 2005.

**Eric M. Bost,**

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

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**BILLING CODE 3410-30-P**

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 932

[Docket No. FV04-932-2 FR]

#### **Olives Grown in California; Redistricting and Reapportionment of Producer Membership on the California Olive Committee**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This rule redefines the producer districts and reapportions each district's membership on the California Olive Committee (committee). The Federal marketing order for California olives (order) regulates the handling of canned ripe olives grown in California and is administered locally by the committee. This rule reduces the number of producer districts in the production area from four to two and reapportions the committee representation from each district to