

# Rules and Regulations

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## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

#### 7 CFR Parts 272 and 275

RIN 0584-AD31

#### Food Stamp Program: Non-Discretionary Quality Control Provisions of Title IV of Public Law 107-171

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

**ACTION:** Interim rule.

**SUMMARY:** On May 13, 2002, the President signed the Farm Security and Rural Investment Act of 2002 (the 2002 Act). Title IV of the 2002 Act (the Food Stamp Reauthorization Act of 2002) contains provisions concerning the Food Stamp Program. This rule amends the Food Stamp Program regulations to implement certain provisions concerning the Quality Control system in sections 4118 and 4119 of the Food Stamp Reauthorization Act of 2002. This interim rule revises the current regulations to reflect the new liability procedures and the new deadlines for completing the Quality Control review process and announcement of error rates. As a result of the change in the statute, a new two-year liability system will be instituted which will result in fewer State agencies being subject to liabilities for excessive payment error rates. There will be new time frames for State agencies to complete the quality control case review process and for the Department to issue error rates.

**DATES:** This interim rule is effective December 15, 2003. Comments on this rulemaking must be received on or before January 14, 2004 to be assured of consideration.

**ADDRESSES:** Comments should be submitted to Daniel Wilusz, Quality Control Branch, Program Accountability Division, Food and Nutrition Service,

USDA, 3101 Park Center Drive, Alexandria, Virginia, 22302. Comments may also be faxed to the attention of Daniel Wilusz at (703) 305-0928 or e-mailed to [Daniel.wilusz@fns.usda.gov](mailto:Daniel.wilusz@fns.usda.gov). All written comments will be open for public inspection at the office of the Food and Nutrition Service during regular business hours (8:30 a.m. through 5 p.m.). You may also download an electronic version of this rule at <http://www.fns.usda.gov/fsp/rules/Regulations/default.htm>.

#### FOR FURTHER INFORMATION CONTACT:

Questions regarding this rulemaking should be addressed to Margaret Werts Batko at the above address or by telephone at (703) 305-2516.

#### SUPPLEMENTARY INFORMATION:

##### Executive Order 12866

This rule has been determined to be Significant and was reviewed by the Office of Management and Budget under Executive Order 12866.

##### Executive Order 12372

The Food Stamp Program is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the final rule in 7 CFR part 3015, subpart V and related Notice (48 FR 29115, June 24, 1983), this Program is excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

##### Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act 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. State and local welfare agencies will be the most affected to the extent that they administer the Program.

##### Public Law 104-4

Unfunded Mandate Reform Act of 1995 (UMRA). Title II of UMRA establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, the Food and Nutrition Service (FNS) generally must prepare a written

statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, or tribal governments in the aggregate, or to the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires FNS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, and tribal governments or the private sector of \$100 million or more in any one year. This rule is, therefore, not subject to the requirements of sections 202 and 205 of the UMRA.

##### Federalism Summary Impact Statement

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

##### Civil Rights Impact Analysis

FNS has reviewed this interim 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, FNS has determined that this rule has no impact on any of the protected classes. These changes affect the quality control review system and not individual recipients' eligibility for or participation in the Food Stamp Program. FNS has no

discretion in implementing these changes. The changes are required to be implemented by law. All data available to FNS indicate that protected individuals have the same opportunity to participate in the Food Stamp Program as non-protected individuals. FNS specifically prohibits the State and local government agencies that administer the Program from engaging in actions that discriminate based on race, color, national origin, gender, age, disability, marital or family status. Regulations at 7 CFR 272.6 specifically state that "State agencies shall not discriminate against any applicant or participant in any aspect of program administration, including, but not limited to, the certification of households, the issuance of coupons, the conduct of fair hearings, or the conduct of any other program service for reasons of age, race, color, sex, handicap, religious creed, national origin, or political beliefs. Discrimination in any aspect of program administration is prohibited by these regulations, the Food Stamp Act of 1977 (the Act), the Age Discrimination Act of 1975 (Pub. L. 94-135), the Rehabilitation Act of 1973 (Pub. L. 93-112, section 504), and title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d). Enforcement action may be brought under any applicable Federal law. Title VI complaints shall be processed in accord with 7 CFR Part 15."

#### **Paperwork Reduction Act**

This interim rule does not contain changes to the reporting or recordkeeping requirements subject to approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). Reporting and recordkeeping requirements for quality control are approved under OMB numbers 0584-0074, 0584-0299, 0584-0303, and 0584-0034. There are no changes being made in this rulemaking that will alter the reporting and recordkeeping requirements related to quality control approved under these burdens. The legislative change concerning corrective action planning does not affect the burden in 0584-0010 for reporting and recordkeeping because the change only affects which States would be required to submit corrective action plans and because the number of states required to submit corrective action plans will not change under the new requirement. The burden approved under OMB number 0584-0010 was allowed to expire. The Food and Nutrition Service has initiated action to reinstate the burden under 0584-0010.

#### **Government Paperwork Elimination Act**

In compliance with the Government Paperwork Elimination Act, FNS is committed to providing electronic submission as an alternative for information collections associated with this rule. However, we are not able to make the entire process electronic at this time.

Part of the process allows electronic submission. The Quality Control review schedule (approved under OMB #0584-0299) serves as both the data summary entry form that the reviewer completes during each review, and subsequently, as the data input document for direct data entry into the Kansas City Computer Center (KCCC). While the data is manually collected on a paper form from information extracted from a case file, it is electronically submitted to the KCCC for tabulation and analysis. Some States have begun to use computerized versions of the worksheet (OMB number 0584-0074), which provides information collected on the review schedule. In addition, the FNS contractor for the data collection system has developed, at FNS request, a computerized version of the worksheet. States are being given the option to continue to use their own systems, the new computerized version provided by FNS or the paper version. When FNS computerized versions of the worksheet are used, the information is linked to and creates the review schedule.

Under OMB number 0584-0034, the burden for collecting and reporting information related to the review of negative cases and the status of sample selection and completion is approved. The FNS-245 serves as both the data summary entry form that the reviewer completes during each negative case review, and subsequently as the data input document for direct data entry into the KCCC. Therefore, while data is manually collected, it is electronically submitted to the KCCC for tabulation and analysis. The FNS-248 (Status of Sample Selection and Completion) collects information on the status of State reviews. The FNS-248 contains information not produced by the automated system, therefore this report is still necessary. However, we are considering ways that this data could be collected electronically.

The burden under OMB number 0584-0303 encompasses the sampling plan, arbitration, and good cause. At this time, these areas are not substantively electronic submissions. To the extent possible, States may submit documents or portions of documents electronically.

States have the option to maintain in paper or electronic format information compiled for the Performance Reporting System, including Management Evaluation, Data Analysis and Corrective Action information. The State maintains the information on site to be available for FNS review (OMB number 0584-0010).

#### **Executive Order 12988**

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations, or policies that conflict with its provisions or that would otherwise impede its full implementation. This rule is not intended to have retroactive effect unless so specified in the "Effective Date" paragraph of the final rule. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted. In the Food Stamp Program the administrative procedures are as follows: (1) For Program benefit recipients—State administrative procedures issued pursuant to 7 U.S.C. 2020(e)(1) and 7 CFR 273.15; (2) for State agencies—administrative procedures issued pursuant to 7 U.S.C. 2023 set out at 7 CFR 276.7 (for rules related to non-quality control (QC) liabilities) or Part 283 (for rules related to QC liabilities); (3) for retailers and wholesalers—administrative procedures issued pursuant to 7 U.S.C. 2023 set out at 7 CFR 278.8 and part 279.

#### **Regulatory Impact Analysis**

*Need for Action:* This rule amends the Food Stamp Program regulations to implement certain provisions concerning the Quality Control system in sections 4118 and 4119 of the Food Stamp Reauthorization Act of 2002. These provisions revise the liability procedures and establish new deadlines for completing the Quality Control review process and announcement of payment error rates. The rule has no Federal Program cost impacts, however, fewer States will be identified as having any potential liability, and any such liabilities will be significantly lower than under the existing system.

*Justification of alternatives.* The Department has no discretion regarding the legislative mandate to revise the liability and enhanced funding provisions of the QC system. Nor does it have discretion regarding the provision that revises time frames for completing the review and arbitration process and announcing individual State agency payment error rates at the

end of each annual review period. The Department does have discretion in resolving the liabilities established under the new system. The Secretary may: Waive all or a portion of the liability; require the State agency to reinvest up to 50 percent of the liability in activities to improve program administration, which new investment money shall not be matched by Federal funds; designate up to 50 percent of the liability as at-risk for repayment if a liability is established based on the State agency's payment error rate for the subsequent fiscal year; or assert any combination of these options. Once the Secretary issues the original resolution proposal, only the amounts designated as waived or reinvestment are subject to negotiation between the State agency and the Department.

*Effects on Food Stamp Recipients.* This action is not anticipated to have any impact on benefit levels or food stamp program participation, as it does not change the program's eligibility requirements or benefit calculation.

*Effects on Federal Program Costs.* Since this action is not anticipated to have any impact on benefit levels or food stamp participation, we do not anticipate any impact on food stamp benefit costs. There is also no anticipated financial impact in administration costs from the changes in how liabilities are calculated, assessed, or collected.

*Effects on Administering State Agencies:* This rule affects State agencies by revising the QC sanction system. Under this rule, fewer States will be identified as having any potential liability, and any such liabilities will be significantly lower than under the existing sanction system. State agencies will also have additional time to complete the quality control review process.

*Effect on Retailers.* This action is not anticipated to have any impact on food stamp retailers.

#### **Justification for Interim Rulemaking**

This action is being finalized without prior notice or public comment under authority of 5 U.S.C. 553(b)(3)(A) and (B). The provisions contained in this rule are mandated by sections 4118 and 4119 of the Food Stamp Reauthorization Act of 2002. The Department has no discretion in implementing the specific provisions contained in this rule. These provisions are effective for the Fiscal Year 2003 review period beginning October 1, 2002. The provisions included in this rule are mandated by legislation, and the Department has no discretion in the methodology establishing the national performance

measure, or in determining when State agencies develop corrective action plans resulting from payment error rates.

Thus, the Department has determined in accordance with 5 U.S.C. 553(b) that a notice of proposed rulemaking and an opportunity for prior public comments is unnecessary. Discretionary regulatory changes that result from sections 4118 and 4119 will be addressed subsequently in one or more proposed rulemakings.

#### **Background**

On May 13, 2002, the President signed Public Law 107-171, the Farm Security and Rural Investment Act of 2002. Title IV of Public Law 107-171, the Food Stamp Reauthorization Act of 2002, significantly revised the liability and enhanced funding provisions of the Quality Control (QC) system. In this interim rule, we are addressing the provisions in section 4118 of the Food Stamp Reauthorization Act of 2002 concerning establishment, adjustment, and collection of potential liabilities and the requirement to develop a corrective action plan when a State's payment error rate exceeds six percent. In this interim rule, we are also addressing the provision in Section 4119 that revises time frames for completing the review and arbitration process and announcing individual State agency error rates at the end of each annual review period. All remaining provisions not addressed in this rule will be addressed in one or more subsequent proposed rulemakings.

#### *Establishing Liabilities for Excessive Payment Error Rates*

Section 4118 of the Food Stamp Reauthorization Act of 2002 amended Section 16(c) of the Food Stamp Act of 1977, as amended, significantly revising the system for determining liabilities for payment error rates. Under the Food Stamp Act, as amended, prior to enactment of the Food Stamp Reauthorization Act of 2002, liability was determined each fiscal year. As defined in 7 CFR 275.23(e) of the program regulations, the payment error tolerance level was the national performance measure for the fiscal year. The national performance measure is defined as the sum of the products of each State agency's payment error rate times that State agency's proportion of the total value of national allotments issued for the fiscal year using the most recent issuance data available at the time the State agency is notified of its payment error rate. A State agency that exceeded this tolerance level was subject to a liability claim equivalent to the total value of the allotments issued

in the fiscal year by the State agency, multiplied by a factor that is the lesser of: (1) The ratio of the amount by which the payment error rate of the State agency for the fiscal year exceeds the national performance measure for the fiscal year, to the national performance measure for the fiscal year, or (2) one. This figure was then multiplied by the amount by which the payment error rate of the State agency for the fiscal year exceeded the national performance measure for the fiscal year.

Section 4118 of the Food Stamp Reauthorization Act of 2002 establishes a new multi-year liability system. The national performance measure continues to be defined as the sum of the products of each State agency's payment error rate times that State agency's proportion of the total value of national allotments issued for the fiscal year using the most recent issuance data available at the time the State agency is notified of its payment error rate. However, the method for determining any potential liability has changed. Under this system, Fiscal Year 2003 serves as the initial base year. For Fiscal Year 2004 and subsequent years, liability for payment shall be established whenever there is a 95 percent statistical probability that, for the second or subsequent consecutive fiscal year, a State agency's payment error rate exceeds 105 percent of the national performance measure. For example, if there were a 95 percent statistical probability that a State agency's payment error rate for Fiscal Year 2003 exceeded 105 percent of the Fiscal Year 2003 national performance measure, and again in Fiscal Year 2004, if there was a 95 percent statistical probability that the State's payment error rate exceeded 105 percent of the Fiscal Year 2004 national performance measure, a liability for Fiscal Year 2004 would be established. The amount of the liability shall be equal to the product of: The value of all allotments issued by the State agency in the (second or subsequent consecutive) fiscal year; multiplied by the difference between the State agency's payment error rate and 6 percent; multiplied by 10 percent.

In order to implement this change, we are revising 7 CFR 275.23(e). First, we are deleting subsections (e)(2), (e)(3), and (e)(4) because they address liability determinations for prior fiscal years that have already been resolved. Second, we are redesignating paragraph (e)(5) as paragraph (e)(2) and amending that subsection by deleting the words "and beyond" and replacing them with the words "through Fiscal Year 2002." Finally, a new paragraph (e)(3) is being

added that established the liability system for Fiscal Year 2004 and beyond. A conforming amendment is also being made redesignating paragraphs (e)(6), (e)(7), (e)(8), (e)(9), (e)(10), and (e)(11) as (e)(4), (e)(5), (e)(6), (e)(7), (e)(8), and (e)(9).

#### *Resolving Liabilities*

Prior to the passage of the Food Stamp Reauthorization Act of 2002, potential liabilities were established each year. The Secretary had unlimited authority to propose a resolution, including: waiving any or all of the amount; requiring that any or all of the amount be repaid to the Federal government; entering into an agreement to allow some or all of the liability amount to be reinvested in error reduction activities; or combining these options. Once issuing a proposed settlement plan to a State agency, the Secretary could negotiate with the State agency to revise any and all aspects of the proposed liability resolution.

Section 4118 establishes new requirements for resolving State agency liabilities for payment errors. Under the Food Stamp Act, as amended by the Food Stamp Reauthorization Act of 2002, the Secretary has the authority to waive or reduce any liability. The Secretary may require a State agency to reinvest up to 50 percent of the established liability in activities designed to reduce the payment error rate. The Secretary may also designate up to 50 percent of the liability as being "at-risk." A State agency would be required to pay to USDA any money designated as "at-risk" if a liability for payment errors is established for the State agency the following fiscal year. The Secretary may combine these three options. In accordance with the Food Stamp Reauthorization Act of 2002, the Department and any State agency found liable for an excessive payment error rate must settle any waiver amount or reinvestment amount before the end of the fiscal year in which the liability is determined. The amount designated as being at-risk in the proposed settlement plan sent to the State agency is not subject to negotiation, in accordance with the provision in the Food Stamp Reauthorization Act of 2002 which provides that the Department shall make its liability resolution determinations and enter into a settlement with the State agency *only with respect to any waiver amount or new investment amount* (emphasis added). When the Department notifies the State agency of its payment error rate and its potential liability, that letter will also designate the amount to be waived, and what amount is designated as at risk and/or

subject to reinvestment. Because the Department is authorized to enter into a settlement with a State agency concerning the amount to be waived or reinvested, the Department may opt to enter into negotiations with the State agency to waive any or all of the amount designated for reinvestment. Current regulations specify the requirements for reinvestment. Any reinvestment plan established for reinvestment either in the initial letter or as a result of negotiations must meet the requirements in 7 CFR 275.23(e)(11). However, the law does not allow the Department to negotiate any amount designated as at-risk, once that amount has been designated. Therefore, the Department will not negotiate with the State agency on the amount designated as at-risk once the notification letter has been sent to the State agency. The amount designated as at-risk cannot be reconsidered for waiving or reinvestment in the following year if a liability for payment errors is established for the State agency in the following fiscal year. A new paragraph (e)(10) is being added to § 275.23 establishing the Secretary's authority to resolve the liabilities under these three options.

#### *Appeals*

In accordance with the Food Stamp Act, as amended, State agencies may appeal the amount of the liability established as described above. However, State agencies may not appeal the Secretary's decision as to how such liability will be resolved; *i.e.*, waived, at-risk, or reinvestment. Nor is the amount of the national performance measure subject to either administrative or judicial appeal, in accordance with section 4118 of the Food Stamp Reauthorization Act of 2002. The time frames and procedures for appealing were not changed by the Food Stamp Reauthorization Act of 2002 and the procedures in 7 CFR part 283 of the regulations remain in place.

The Secretary is required to initiate collection for any amount owed by the State agency before the end of the fiscal year in which the liability is determined. However, the requirement to resolve all liabilities before the end of the fiscal year shall be suspended if an administrative appeal relating to the liability is pending. The provision suspending collection pending an administrative appeal existed in the Food Stamp Act prior to the passage of the Food Stamp Reauthorization Act of 2002 and was not changed by that Act. Current regulations address this suspension, and accordingly, no

changes are being made to the regulations.

Section 4118 provides that if a State agency appeals its liability determination, if the State agency began required reinvestment activities prior to an appeal determination, and if the liability amount is reduced to \$0 through the appeal, the Secretary shall pay to the State agency an amount equal to 50 percent of the new investment amount that was included in the liability amount subject to the appeal. If the Secretary wholly prevails on a State agency's appeal, section 4118 provides that the Secretary will require the State agency to invest all or a portion of the amount designated for reinvestment during the appeal to be reinvested or to be repaid to the Federal government. Section 4118 further specifies that if neither party wholly prevails that the remaining liability will be treated pursuant to regulations issued by the Secretary. In this rule, we are incorporating into new § 275.23(e)(10) the provisions in section 4118 concerning either the Secretary or the State wholly prevailing. We will address in a proposed rule how any remaining liability will be handled if neither party wholly prevails on appeal.

#### *Time Frames for Announcing the National Performance Measure and for Completing Quality Control Reviews and Resolving State/Federal Differences*

Section 4119 of the Food Stamp Reauthorization Act of 2002 establishes new dates for resolution of the case review and arbitration process and for issuance of the national average payment error rate, the individual State final error rates, and the amounts of any payments claimed or liability amounts established. Under the Food Stamp Act prior to the Food Stamp Reauthorization Act of 2002, all case reviews and arbitration had to be completed not later than 180 days after the end of the fiscal year. FNS was required to announce the national average payment error rate, the individual State final error rates, and the amounts of any liabilities within 30 days following completion of the case reviews and arbitration. Under section 4119, all case reviews and arbitration are required to be completed by May 31 following the end of the fiscal year. The national average payment error rate, the individual State final error rates, and the amounts of any payments claimed or liability amounts established are required to be announced by June 30 following the end of the fiscal year. In accordance with section 4118, this rule also requires that FNS provide a copy of each State agency's notice of payment claimed or liability amount due to the

State's chief executive officer and legislature. In this interim rulemaking, we are revising redesignated paragraph (e)(7) in § 275.23 to establish these new dates. Redesignated paragraph (e)(7) also requires FNS to provide the State chief executive officer and the legislature with a copy of the State's notice of payment claimed or liability amount. At this time we are not revising the time frames for processing individual cases or conducting individual arbitration cases. Implementing guidance was issued on January 22, 2003, providing interim direction to State agencies on completing cases reviews under these new time frames for Fiscal Year 2003. A proposed rule will be issued that addresses these issues.

#### Corrective Action Planning

Current regulations provide that corrective action planning shall be done by a State agency when it fails to reach the yearly target (§ 275.16(b)(1)), when the State agency is not entitled to enhanced funding (§ 275.16(b)(2)), or when the State agency's negative case error rate exceeds one percent (§ 275.16(b)(3)). Section 4118 of the Food Stamp Reauthorization Act of 2002 requires State agencies to do corrective action planning whenever its payment error rate is six percent or greater. Accordingly, we are revising § 275.16(b)(1) to require corrective action planning whenever a State agency's error rate equals or exceeds six percent. This change will have little real impact on State agencies because current regulations require corrective action planning whenever a State agency is not eligible for enhanced funding. One of the criteria for enhanced funding is that the payment error rate is below 5.90 percent. Therefore, all State agencies with error rates above 5.90 percent are already required to develop corrective action plans.

In addition several technical changes throughout 7 CFR part 275 have been made to correct references to paragraphs changed in this rulemaking and to fix typographical errors.

#### Implementation

This rule is effective December 15, 2003. Section 4118 of the Food Stamp Reauthorization Act of 2002 was effective October 1, 2002, and section 4119 was effective upon enactment, May 13, 2002. This rule reflects these statutory provisions which impact the establishment of payment error rates, the national performance measure, and sanctions and liabilities for Fiscal Year 2003 and beyond.

#### List of Subjects

##### 7 CFR Part 272

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

##### 7 CFR Part 275

Administrative practice and procedure, Food stamps, Reporting and recordkeeping requirements.

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

■ 1. The authority citation for parts 272 and 275 continue 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)(169) to read as follows:

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

\* \* \* \* \*  
(g) *Implementation.* \* \* \*  
(169) *Amendment No. 395.* The provisions of Amendment 395 are effective December 15, 2003.

#### PART 275—PERFORMANCE REPORTING SYSTEM

##### § 275.3 [Amended]

■ 3. In § 275.3, the last sentence of paragraph (c) is amended by removing the reference “§ 275.23(e)(8)” and adding in its place the reference “§ 275.23(e)(6)”.

##### § 275.11 [Amended]

■ 4. In § 275.11, the third sentence of paragraph § 275.11(g) is amended by removing the reference “§ 275.25(e)(8)” and adding in its place the reference “§ 275.23(e)(6)”.

■ 5. In § 275.16, paragraph (b)(1) is revised to read as follows:

##### § 275.16 Corrective action planning.

\* \* \* \* \*  
(b) \* \* \*  
(1) Result from a payment error rate of 6 percent or greater (actions to correct errors in individual cases, however, shall not be submitted as part of the State agency's corrective action plan);

\* \* \* \* \*

■ 6. In § 275.23:

■ a. Paragraph (d)(1)(iii) is amended by removing the reference “(e)(8)(iii)” and adding in its place the reference “(e)(6)(iii)”.

■ b. Paragraph (e)(1) is amended by removing the reference “(e)(8)” and adding in its place the reference “(e)(6)”.

■ c. Paragraphs (e)(2), (e)(3), and (e)(4) are removed.

■ d. Paragraph (e)(5) is redesignated as paragraph (e)(2) and is further amended by removing the words “and beyond” in the paragraph heading and adding in their place the words “through Fiscal Year 2002”.

■ e. Newly redesignated paragraph (e)(2)(i) is amended by removing the words “and subsequent years” and adding in their place the words “through Fiscal Year 2002”; and further amended by removing the word “rates” in the second sentence and adding in its place the word “rate”.

■ f. A new paragraph (e)(3) is added.

■ g. Paragraphs (e)(6), (e)(7), (e)(8), (e)(9), (e)(10), and (e)(11) are redesignated as paragraphs (e)(4), (e)(5), (e)(6), (e)(7), (e)(8) and (e)(9), respectively.

■ h. Newly redesignated paragraph (e)(5)(i)(B)(3) is amended by removing the reference “(e)(7)(i)(A)” and adding in its place the reference “(e)(5)(i)(A)”.

■ i. Newly redesignated paragraph (e)(5)(i)(C)(3)(iii) is amended by removing the reference “(e)(5)(i)”

wherever it appears and adding in its place the reference “(e)(2)(i)”.

■ j. Newly redesignated paragraph (e)(5)(i)(E) is amended by removing the reference “(e)(7)(i)(A) through (e)(7)(i)(D)” and adding in its place the reference “(e)(5)(i)(A) through (e)(5)(i)(D)”.

■ k. Newly redesignated paragraph (e)(5)(i)(E)(2) is amended by removing the reference “(e)(7)(i)(E)” and adding in its place the reference “(e)(5)(i)(E)”.

■ l. Newly redesignated paragraph (e)(5)(ii) is amended by removing the reference “(e)(7)(i)(A) through (e)(7)(i)(E)” and adding in its place the reference “(e)(5)(i)(A) through (e)(5)(i)(E)”.

■ m. Newly redesignated paragraph (e)(5)(iii) is amended by removing the reference “(e)(7)” and adding in its place the reference “(e)(5)”.

■ n. Newly redesignated paragraph (e)(6)(i)(D) is amended by removing the reference “(e)(8)(iii)” and adding in its place the reference “(e)(6)(iii)”.

■ o. Newly redesignated paragraphs (e)(6)(iii)(A) and (e)(6)(iii)(B) are amended by removing the reference “(e)(8)(i)(C)” wherever it appears and adding in its place the reference “(e)(6)(i)(C)”.

■ p. Newly redesignated paragraph (e)(7) is amended by removing the first and second sentences and adding in their place four new sentences.

■ q. Newly redesignated paragraph (e)(8) is amended by removing the reference “§ 275.23(e)(5)” and adding in its place the reference “paragraphs (e)(2) and (e)(3) of this section”.

■ r. Newly redesignated paragraph (e)(9) is amended by removing the words “and

subsequent” in the first sentence and adding in their place the words “through Fiscal Year 2002”.

■ s. Newly redesignated paragraph (e)(9)(iii) is amended by removing the reference “(e)(11)(vi)” and adding in its place the reference “(e)(9)(vi)”.

■ t. A new paragraph (e)(10) is added. The additions read as follows:

**§ 275.23 Determination of State agency program performance.**

\* \* \* \* \*

(e) \* \* \*  
 (3) *Establishment of payment error rates and liability.* For Fiscal Year 2003 and subsequent years, FNS shall announce a national performance measure not later than June 30 after the end of the fiscal year. The national performance measure is the sum of the products of each State agency’s error rate times that State agency’s proportion of the total value of national allotments issued for the fiscal year using the most recent issuance data available at the time the State agency is notified of its payment error rate. Once announced, the national performance measure for a given fiscal year will not be subject to change. The national performance measure announced under this paragraph (e)(3) is not subject to administrative or judicial review. Liability for payment shall be established for Fiscal Year 2004 and beyond whenever there is a 95 percent statistical probability that, for the second or subsequent consecutive fiscal year, a State agency’s payment error rate exceeds 105 percent of the national performance measure. The amount of the liability shall be equal to the product of:

- (i) The value of all allotments issued by the State agency in the (second or subsequent consecutive) fiscal year; multiplied by
- (ii) the difference between the State agency’s payment error rate and 6 percent; multiplied by
- (iii) 10 percent.

\* \* \* \* \*

(7) \* \* \* The case review process and the arbitration of all difference cases shall be completed by May 31 following the end of the fiscal year. FNS shall determine and announce the national average payment error rate for the fiscal year by June 30 following the end of the fiscal year. At the same time FNS shall notify all State agencies of their individual payment error rates and payment error rate liabilities, if any. FNS shall provide a copy of each State agency’s notice to its respective chief executive officer and legislature. \* \* \*

\* \* \* \* \*

(10) *Resolution of liabilities for FY 2003 and beyond.* FNS may: waive all or a portion of the liability; require the State agency to reinvest up to 50 percent of the liability in activities to improve program administration, which new investment money shall not be matched by Federal funds; designate up to 50 percent of the liability as “at-risk” for repayment if a liability is established based on the State agency’s payment error rate for the subsequent fiscal year; or assert any combination of these options. Once FNS establishes its proposed liability resolution plan, the amount assigned as at-risk is not subject to settlement negotiation between FNS and the State agency and may not be reduced unless an appeal decision revises the total dollar liability. FNS and the State shall settle any waiver amount or reinvestment amount before the end of the fiscal year in which the liability amount is determined unless an administrative appeal relating to the claim is pending. If a State agency appeals its liability determination, if the State agency began required reinvestment activities prior to an appeal determination, and if the liability amount is reduced to \$0 through the appeal, FNS shall pay to the State agency an amount equal to 50 percent of the new investment amount that was included in the liability amount subject to the appeal. If FNS wholly prevails on a State agency’s appeal, FNS will require the State agency to invest all or a portion of the amount designated for reinvestment during the appeal to be reinvested or to be repaid to the Federal government.

Dated: October 3, 2003.  
**Eric M. Bost,**  
*Under Secretary, Food, Nutrition, and Consumer Services.*  
 [FR Doc. 03-26176 Filed 10-15-03; 8:45 am]  
**BILLING CODE 3410-30-P**

**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 945**

[Docket No. FV03-945-1 FR]

**Irish Potatoes Grown in Certain Designated Counties in Idaho, and Malheur County, Oregon; Increased Assessment Rate**

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

**ACTION:** Final rule.

**SUMMARY:** This rule increases the assessment rate established for the Idaho-Eastern Oregon Potato Committee

(Committee) for the 2003-04 and subsequent fiscal periods from \$0.0026 to \$0.0045 per hundredweight of potatoes handled. The Committee locally administers the marketing order which regulates the handling of Irish potatoes grown in certain designated counties in Idaho, and Malheur County, Oregon. Authorization to assess potato handlers enables the Committee to incur expenses that are reasonable and appropriate to administer the program. The fiscal period began August 1 and ends July 31. The increased assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

**EFFECTIVE DATE:** October 17, 2003.

**FOR FURTHER INFORMATION CONTACT:** Barry Broadbent, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1220 SW Third Avenue, Suite 385, Portland, Oregon 97204-2807; Telephone: (503) 326-2724, Fax: (503) 326-7440 or E-mail: *Barry.Broadbent@usda.gov*; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: *Jay.Guerber@usda.gov*.

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Agreement No. 98 and Marketing Order No. 945, both as amended (7 CFR part 945), regulating the handling of Irish potatoes grown in certain designated counties in Idaho, and Malheur County, Oregon, hereinafter referred to as the “order”. The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the “Act”.

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, Idaho-Eastern Oregon potato handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as