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## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

#### 7 CFR Part 226

RIN 0584-AD-67

#### Child and Adult Care Food Program: Increasing the Duration of Tiering Determinations for Day Care Homes

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

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the Child and Adult Care Food Program (CACFP) regulations to implement a provision of the Child Nutrition and WIC Reauthorization Act of 2004 that increases the duration of the tiering status determinations from three years to five years for family or group day care homes participating in CACFP. This change, which was effective on June 30, 2004, applies only to tiering status determinations based on the eligibility of elementary school children for free or reduced price school meals. Day care homes that are located in the attendance areas of elementary schools in which at least half of the enrolled children are certified eligible to receive free or reduced price school meals receive higher reimbursement rates (tier I) for CACFP meals served to children in care.

**DATES:** This rule contains information collection requirements that may not become effective until approved by the Office of Management and Budget (OMB). The Food and Nutrition Service will publish a document in the **Federal Register** announcing the effective date once these requirements have been approved.

**FOR FURTHER INFORMATION CONTACT:** Keith Churchill, Policy and Program Development Branch, Child Nutrition Division, Food and Nutrition Service, USDA, 3101 Park Center Drive,

Alexandria, VA 22302, phone (703) 305-2590.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

##### *What Are Tiering Determinations?*

One of the major changes made to the CACFP by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub. L. 104-193), section 708(e)(13) amendment to section 17 of the National School Lunch Act, was to require a two-tiered system of reimbursements for family and group day care home providers. Since July 1, 1997 when implementing Program regulations became effective, CACFP day care home providers have been categorized as either tier I or tier II for reimbursement purposes. Tier I day care homes receive higher reimbursement rates because they are located in low-income areas or their family income is determined to be low-income. The threshold for a determination of low-income is at or below 185 percent of the Federal income poverty guidelines. Tier II providers who do not meet these criteria receive lower reimbursement rates. However, tier II providers may receive the higher tier I reimbursement rates for any child in care whose family income is determined to be low-income. This determination is based on an income eligibility application for free or reduced price meals that is voluntarily completed by the child's parent or guardian.

One of the primary ways in which day care homes qualify for tier I rates is based on data from nearby elementary schools in which at least half of all the enrolled students are certified eligible for free or reduced price school meals. Any day care home that is located within the attendance area of an elementary school that is at the 50 percent level for free or reduced price meals qualifies for tier I rates. Other data sources that may be used to determine tier I status include census block data and providers' income eligibility applications. Prior to the change made by the Child Nutrition and WIC Reauthorization Act of 2004 (Pub. L. 108-265), the duration of tiering determinations varied by data source; *i.e.*, one year if based on the income eligibility statement of the provider, three years if based on school data, and ten years or longer if based on census block data.

##### *What Did the New Law Change About Tiering Determinations?*

Section 119 of Pub. L. 108-265 amended section 17(f)(3)(E)(iii) of the Richard B. Russell National School Lunch Act (NSLA), 42 U.S.C. 1766(f)(3)(iii), to increase the duration of tiering determinations from three years to five years for family or group day care homes whose tiering status is derived from school data. The school data, which is provided annually by the State agency that administers the National School Lunch Program (NSLP) to the CACFP State agency, lists the elementary schools in which at least 50 percent of the enrolled children are certified eligible for free or reduced price school meals. This provision affects family or group day care homes that are participating in the CACFP and are located in the attendance area of an elementary school that is listed at the 50 percent level for free or reduced price school meal eligibility.

##### *When Was This Change Effective?*

The change made by Pub. L. 108-265 was effective on June 30, 2004.

##### *What Guidance Has the Department Provided on This Change?*

The Food and Nutrition Service (FNS) notified CACFP State agencies in writing on July 8, 2004 of the increased duration of tiering status determinations based on school data. In this written guidance, available at <http://www.fns.usda.gov/cnd/care/Reauth-Memos/2004-07.pdf>, FNS explained that the tiering classifications based on school data for new day care homes (with signed agreements as of June 30, 2004 or later) now last five years. Thus, the tiering status of those day care homes approved in 2004 will not have to be redetermined by their sponsoring organizations until 2009. FNS stated in the guidance that the tiering status for day care homes of currently participating providers (*i.e.*, those whose agreements were signed prior to June 30, 2004) may be extended by two years for a total of five years; the guidance also clarified that no other changes to the requirements of day care homes' tiering status determinations were made by Pub. L. 108-265.

### *How Will This Change Affect Day Care Home Providers?*

Tier I day care providers whose tiering status is based on school data will retain tier I status for five years instead of three years. This change should provide them with improved ability to project future program reimbursements and may enhance their ability to plan for future day care activities and expenses.

### *How Will This Change Affect Sponsoring Organizations?*

The primary change for sponsoring organizations of day care homes participating in the CACFP will be a reduction in their workload. Sponsors now have five years before it is necessary to redetermine the tiering status of day care homes based on school data instead of every three years. As the current regulations stipulate, sponsoring organizations receive school data that is updated each year; this information is used to determine the tiering status of new day care providers. The regulations at 7 CFR 226.6(f)(1)(iii) prohibit State agencies from requiring that sponsoring organizations must routinely redetermine tiering status of tier I day care homes each year based on updated school data.

### *How Will This Change Affect State Agencies?*

The effect on State agencies should be minimal. The annual responsibilities of State agencies, as described in the NSLP and CACFP regulations are unchanged by the lengthening of tiering status determinations based on school data. Consistent with section 17(f)(3)(E)(iii)(I) of the NSLA, NSLP State agencies must continue to provide the school data to CACFP State agencies annually as required in 7 CFR 210.19(f) of the NSLP regulations, and CACFP State agencies must continue to pass the information along to sponsoring organizations of day care homes as specified in 7 CFR 226.6(f)(1)(iii).

### *What Changes Does This Rule Make to the CACFP Regulations?*

Responsibilities for administering the tiering system for day care homes are described in the CACFP regulations—for State agencies at 7 CFR 226.6(f)(1)(iii) and for sponsoring organizations at 7 CFR 226.15(f). This final rule amends these two paragraphs to increase the duration of tiering status based on school data from three years to five years. These are the only changes that are made to the CACFP regulations by this rulemaking.

## **II. Procedural Matters**

### *Executive Order 12866*

This rule has been determined to be not significant and therefore was not reviewed by the Office of Management and Budget (OMB) under Executive Order 12866.

### *Regulatory Flexibility Act*

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612). Roberto Salazar, Administrator for the Food and Nutrition Service, has certified that this rule will not have a significant impact on a substantial number of small entities. This rule will implement a statutory change that increases the duration of tiering status determinations from three years to five years for family and group day care homes. This change should positively impact day care home providers that are located in low-income areas or that are determined to be low-income because they will have an additional two years of reimbursement at the higher tier I rates before their tiering status must be redetermined. This change will also positively impact sponsoring organizations by reducing the frequency of the redeterminations of tiering status of the family or group day care homes under their sponsorship. The U.S. Department of Agriculture does not anticipate any significant negative fiscal impact resulting from the implementation of this final rule.

### *Public Law 104–4*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, the Food and Nutrition Service (FNS) generally prepares 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 final rule contains no Federal mandates (under 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. Thus, this final rule is not subject to the requirements of sections 202 and 205 of the UMRA.

### *Executive Order 12372*

The Child and Adult Care Food Program is listed in the Catalog of Federal Domestic Assistance under No. 10.558. For the reasons set forth in the final rule in 7 CFR part 3015, subpart V and related Notice (48 FR 29115), this program is subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

### *Executive Order 13132*

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have “federalism implications,” agencies are directed to provide a statement for inclusion in the preamble to the regulation describing the agency’s considerations in terms of the three categories called for under section (6)(a)(B) of Executive Order 13132. FNS has considered the impact of this rule on State and local governments and has determined that this rule would not have federalism implications. This final 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.

### *Executive Order 12988*

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This final rule will have a preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which otherwise impede its full implementation. This final rule does not have retroactive effect unless so specified in the **DATES** section of this preamble. Prior to any judicial challenge to the provisions of this final rule or the application of the provisions, all applicable administrative procedures must be exhausted. In the Child and Adult Food Care Program, the administrative procedures are set forth at: (1) 7 CFR 226.6(k), which establishes appeal procedures; and (2) 7 CFR 226.22 and 7 CFR parts 3016 and 3019, which address administrative appeal procedures for disputes involving procurement by State agencies and institutions.

### *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, FNS has determined that there is no negative effect on these groups. All data available to FNS indicate that protected individuals have the same opportunity to participate in the CACFP as non-protected individuals. Regulations at 7 CFR 226.6(f)(4)(iv) require that CACFP institutions agree to operate the Program in compliance with applicable Federal civil rights laws, including title VI of the Civil Rights Act of 1964, title IX of the Education amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and the Department's regulations concerning nondiscrimination (7 CFR part 15, 15a, and 15b). At 7 CFR 226.6(m)(1), State agencies are required to monitor CACFP institution compliance with these laws and regulations.

#### *Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35, see 5 CFR 1320) requires that OMB approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number. Information collections in this final rule have been previously submitted to OMB for approval under OMB #0584-0055. A 60-day notice was published in the **Federal Register** on December 6, 2004, which provided an opportunity for the public to submit comments on the reduction to the information collection burden resulting from the changes in the CACFP made by this final rule. This burden change has not yet been approved by OMB. FNS will publish a document in the **Federal Register** once these requirements have been approved.

#### *Government Paperwork Elimination Act*

FNS is committed to compliance with the Government Paperwork Elimination Act (GPEA), which requires Government agencies to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. This rule does not require the submission of additional information.

#### *Public Participation*

This action is being finalized without prior notice or public comment under authority of 5 U.S.C. 553(b)(3)(A) and (B). This rule implements through amendments to current program regulations a nondiscretionary provision

mandated by the Child Nutrition and WIC Reauthorization Act of 2004 (Pub. L. 108-265). Thus, the Department has determined in accordance with 5 U.S.C. 553(b) that Notice of Proposed Rulemaking and Opportunity for Public Comments is unnecessary and contrary to the public interest and, in accordance with 5 U.S.C. 553(d), finds that good cause exists for making this action effective without prior public comment.

#### **List of Subjects in 7 CFR Part 226**

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

■ Accordingly, 7 CFR part 226 is amended as follows:

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

■ 1. The authority citation for part 226 continues to read as follows:

**Authority:** Secs. 9, 11, 14, 16, and 17, Richard B. Russell National School Lunch Act, as amended (42 U.S.C. 1758, 1759a, 1762a, 1765, and 1766).

#### **§ 226.6 [Amended]**

■ 2. In § 226.6, amend the fifth sentence in paragraph (f)(1)(iii) by removing the words "three years" and adding in their place the words "five years".

#### **§ 226.15 [Amended]**

■ 3. In § 226.15, amend the tenth sentence in paragraph (f) by removing the words "three years" and adding in their place the words "five years".

Dated: February 15, 2005.

**George A. Braley,**

*Acting Administrator.*

[FR Doc. 05-3267 Filed 2-18-05; 8:45 am]

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#### **DEPARTMENT OF AGRICULTURE**

#### **Rural Housing Service**

#### **7 CFR Part 3560**

#### **RIN 0575-AC13**

#### **Reinvention of the Sections 514, 515, 516 and 521 Multi-Family Housing Programs**

**AGENCY:** Rural Housing Service, USDA.

**ACTION:** Interim final rule; delay of effective date.

**SUMMARY:** The Rural Housing Service is delaying implementation of selected sections of the interim final rule published on November 26, 2004 (69 FR 69032-69176). The interim final rule contains requirements regarding citizenship eligibility about which the Agency received several comments. The comments suggested that Agency procedures unnecessarily imposed more requirements than those required under the Department of Housing and Urban Development (HUD) procedures for similar programs. As a result the Agency has decided to delay implementation of the sections listed below in order to harmonize its procedures with HUD under 42 U.S.C. 1436a.

**DATES:** The effective date for §§ 3560.152(a)(1), 3560.154(a)(7), 3560.156(c)(12), and 3560.254(c)(3) are delayed indefinitely from February 24, 2005, until the Agency publishes an effective date in a future **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Stephanie White, Director, Multi-Family Housing Portfolio Management Division, Rural Housing Service, U.S. Department of Agriculture, Room 1265, South Building, Stop 0782, 1400 Independence Avenue, SW., Washington, DC 20250-0782, telephone (202) 720-1615.

#### **SUPPLEMENTARY INFORMATION:**

#### **Delay of Implementation**

■ In the interim final rule published November 26, 2004 (69 FR 69032-69176), implementation of the specific words in quotes in the following specific sections will be delayed indefinitely:

#### **PART 3560—[AMENDED]**

#### **§ 3560.152 [Amended]**

■ On page 69133, second column, § 3560.152 (a) (1) "Be a United States citizen or qualified alien, and";

#### **§ 3560.154 [Amended]**

■ On page 69134, third column, § 3560.154 (a) (7) "\* \* \* and a certification that the applicant is a U.S. citizen or a qualified alien as defined in § 3560.11 \* \* \*";

#### **§ 3560.156 [Amended]**

■ On page 69136, third column, § 3560.156 (c) (12) "\* \* \* their citizenship status, \* \* \*"; and

#### **§ 3560.254 [Amended]**

■ On page 69144, first column, § 3560.254 (c) (3) "Whose head of the household is a U.S. citizen or a legal alien as defined in § 3560.11."