

# Rules and Regulations

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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 531

RIN 3206-AK88

### Changes in Pay Administration Rules for General Schedule Employees; Correction

**AGENCY:** U.S. Office of Personnel Management.

**ACTION:** Correcting amendment.

**SUMMARY:** The U.S. Office of Personnel Management issued final regulations on pay setting rules for General Schedule employees on November 7, 2008 (73 FR 66143). This correcting amendment clarifies an instruction.

**DATES:** Effective on December 18, 2008.

**FOR FURTHER INFORMATION CONTACT:** Carey Jones, (202) 606-2858.

**SUPPLEMENTARY INFORMATION:**

#### Background

As published, the final regulation omitted a definition name in an amendatory instruction for § 531.203. This correcting amendment adds that name to the instruction so that the definition is properly revised in the CFR.

#### List of Subjects in 5 CFR Part 531

Government employees, Law enforcement officers, Wages.

U.S. Office of Personnel Management.

**Jeanne Jacobson,**  
*Manager, Pay Administration Group.*

■ Accordingly, 5 CFR part 531 is corrected by making the following correcting amendments:

#### PART 531—PAY UNDER THE GENERAL SCHEDULE

■ 1. The authority citation for part 531 continues to read as follows:

**Authority:** 5 U.S.C. 5115, 5307, and 5338; sec. 4 of Public Law 103-89, 107 Stat. 981;

and E.O. 12748, 56 FR 4521, 3 CFR, 1991 Comp., p. 316; Subpart B also issued under 5 U.S.C. 5303(g), 5305, 5333, 5334(a) and (b), and 7701(b)(2); Subpart D also issued under 5 U.S.C. 5335(g) and 7701(b)(2); Subpart E also issued under 5 U.S.C. 5336; Subpart F also issued under 5 U.S.C. 5304, 5305, and 5338; and E.O. 12883, 58 FR 63281, 3 CFR, 1993 Comp., p. 682 and E.O. 13106, 63 FR 68151, 3 CFR, 1998 Comp., p. 224.

■ 2. In § 531.203, revise the definitions of *position of record*, *rate of basic pay*, *special rate*, and *special rate supplement* to read as follows:

#### § 531.203 Definitions.

\* \* \* \* \*

*Position of record* means an employee's official position (defined by grade, occupational series, employing agency, LEO status, and any other condition that determines coverage under a pay schedule (other than official worksite)), as documented on the employee's most recent Notification of Personnel Action (Standard Form 50 or equivalent) and current position description. A position to which an employee is temporarily detailed is not documented as a position of record. For an employee whose change in official position is followed within 3 workdays by a reduction in force resulting in the employee's separation before he or she is required to report for duty in the new position, the position of record in effect immediately before the position change is deemed to remain the position of record through the date of separation.

\* \* \* \* \*

*Rate of basic pay* means the rate of pay fixed by law or administrative action for the position held by a GS employee before any deductions, including a GS rate, an LEO special base rate, a special rate, a locality rate, and a retained rate, but exclusive of additional pay of any other kind. For the purpose of applying the maximum payable rate rules in §§ 531.216 and 531.221 using a rate under a non-GS pay system as an employee's highest previous rate, *rate of basic pay* means a rate of pay under other legal authority which is equivalent to a rate of basic pay for GS employees, as described in this definition, excluding a rate under § 531.223. (See also 5 CFR 530.308, 531.610, and 536.307.)

\* \* \* \* \*

*Special rate* means a rate of pay within a special rate schedule established under 5 CFR part 530,

subpart C, or a similar rate for GS employees established under other legal authority (e.g., 38 U.S.C. 7455). The term *special rate* does not include an LEO special base rate or an adjusted rate including market pay under 38 U.S.C. 7431(c).

\* \* \* \* \*

*Special rate supplement* means the portion of a special rate paid above an employee's GS rate. However, for a law enforcement officer receiving an LEO special base rate who is also entitled to a special rate, the special rate supplement equals the portion of the special rate paid above the officer's LEO special base rate. When a special rate schedule covers both LEO positions and other positions, the value of the special rate supplement will be less for law enforcement officers receiving an LEO special base rate (since that rate is higher than the corresponding GS rate). The payable amount of a special rate supplement is subject to the Executive Schedule level IV limitation on special rates, as provided in 5 CFR 530.304(a).

\* \* \* \* \*

[FR Doc. E8-30106 Filed 12-17-08; 8:45 am]  
BILLING CODE 6325-39-P

## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

#### 7 CFR Parts 210 and 245

[FNS-2007-0024]

RIN 0584-AD61

### Verification of Eligibility for Free and Reduced Price Meals in the National School Lunch and School Breakfast Programs

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

**ACTION:** Interim rule.

**SUMMARY:** This interim rule implements provisions of the Child Nutrition and WIC Reauthorization Act of 2004 relating to verification of applications approved for free or reduced price meals in the National School Lunch Program and the School Breakfast Program. This interim rule includes changes to sample sizes for local education agencies (school districts) when conducting verification which include alternatives when there is an increase in the number

of responses to the requests for verification; direct verification provisions which allow the local educational agency to contact means-tested programs to verify the information on applications without contacting the applicant household for documentation; and revised deadlines for completion of verification efforts. This interim rule also establishes a standard sample size of three percent for local educational agencies that do not qualify for use of an alternative sample size. The direct verification provision will reduce the number of households that must be contacted to submit documentation. This interim rule incorporates other statutory changes designed to assist households in completing the verification process. These changes require the local educational agency to have a telephone number that households may call, without charge, for questions about verification. The local educational agency must also make at least one attempt to follow-up with households selected for verification prior to denying benefits when the household fails to respond. There is also a provision that gives local education agencies the discretion to replace selected applications when households are deemed unlikely to respond to the verification request. These are safeguards to avoid termination of a child's benefits due to misunderstandings or other difficulties that may preclude households from effectively complying with the verification request. The changes made in this interim rule are intended to enhance verification efforts which will improve the accuracy of benefit distribution.

**DATES:** *Effective date:* This rule is effective February 17, 2009.

*Comment dates:* Comments on Rule Provisions: Mailed comments on the provisions in this rule must be postmarked on or before March 18, 2009; e-mailed or faxed comments must be submitted by 11:59 p.m. March 18, 2009; and hand-delivered comments must be received by 5 p.m. March 18, 2009.

Comments on Paperwork Reduction Act Requirements: Comments on the information collection requirements associated with this rule must be received by January 20, 2009.

**ADDRESSES:** The Food and Nutrition Service invites interested persons to submit comments on this interim rule. Since comments are being accepted simultaneously on several rulemakings, please include the title (Verification of Eligibility for Free and Reduced Price

Meals in the National School Lunch and School Breakfast Programs). Comments may be submitted by any of the following methods:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov> and follow the instructions for submitting comments.

- Fax: 703-305-2879, attention Robert Eadie.

- Mail: Mr. Robert Eadie, Chief, Policy and Program Development Branch, Child Nutrition Division, Food and Nutrition Service, Department of Agriculture, 3101 Park Center Drive, Room 640, Alexandria, Virginia 22302-1594.

- Hand Delivery or Courier: Deliver comments to 3101 Park Center Drive, Room 640, Alexandria, Virginia 22302-1594, during normal business hours of 8:30 a.m.-5 p.m.

All comments submitted in response to this interim rule will be included in the record and will be made available to the public. Please be advised that the substance of the comments and the identity of the individuals or entities submitting the comments will be subject to public disclosure. All submissions will be available for public inspection at this location Monday through Friday, 8:30 a.m.-5 p.m. The Food and Nutrition Service may also make the comments available on the Federal eRulemaking portal.

**FOR FURTHER INFORMATION CONTACT:**

Address any questions to Robert M. Eadie, Child Nutrition Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Alexandria, VA 22302 or by telephone at 703-305-2590. A regulatory cost-benefit analysis was completed for this rule. Single copies may be requested from the Food and Nutrition Service's official identified above.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

*Summary of Changes Affecting Verification Procedures Made by Public Law 108-265*

The Child Nutrition and WIC Reauthorization Act of 2004 (Pub. L. 108-265, June 30, 2004) amended Section 9(b) of the Richard B. Russell National School Lunch Act (NSLA) concerning verification of households' applications for free and reduced price meals in the National School Lunch Program (NSLP) and the School Breakfast Program (SBP). In sections 104 and 105, Public Law 108-265 added a number of provisions and also incorporated into the NSLA provisions concerning verification activities that were previously addressed only in

regulations (7 CFR 245.6a) or guidance (primarily an instruction entitled "Eligibility Guidance for School Meals Manual," August, 2001). New requirements and modifications made by Public Law 108-265 to existing procedures are discussed in this preamble.

The primary changes made by Public Law 108-265 concerning verification are:

- Transferring the responsibility for conducting verification from the school food authority (SFA) to the local educational agency (LEA);
- Establishing a new standard verification sample size of three percent which is both the maximum and minimum requirement;
- Reducing sample sizes for LEAs that improve their verification response rates;
- Permitting LEAs to replace applications in the sample, on a case-by-case basis, when complying with the request for verification may pose a particular challenge to the selected household;
- Requiring LEAs to conduct a confirmation review of applications selected for verification to check for approval errors;
- Requiring LEAs to have a telephone number that households may call, at no charge, for assistance with verification;
- Establishing direct verification methods which use records from certain public agencies;
- Requiring follow-up by the LEA with households selected for verification; and
- Revising deadlines for completing verification activities.

This preamble discusses these changes in this order to provide the reader with a sequential overview of the verification process and an understanding of any new procedures as well as how existing procedures are affected. Please note that other related provisions of Public Law 108-265 concerning free and reduced price eligibility and certification are addressed in separate rulemakings.

*Implementation Memoranda Issued to Date*

Because the statutory amendments addressed in this interim rule became effective on July 1, 2005, the Food and Nutrition Service (FNS) issued a series of implementation memoranda, as required by section 501(a) of Public Law 108-265, to help administering agencies initiate implementation of the statutory provisions and assess how these changes would affect their existing verification procedures. It was especially important for LEAs to know

how verification efforts conducted for School Year 2004–2005 could affect their eligibility for alternative sample sizes in subsequent school years. The first memorandum was dated August 25, 2004 (SP–5) concerning the period for acceptable verification. Another memorandum dated November 15, 2004 (SP–8) concerned direct verification. The purpose of that memorandum, which also discussed the provision on mandatory direct certification of children who are members of households receiving food stamps, was to encourage State child nutrition agencies to work with their counterparts in State agencies administering means-tested programs that could be sources for direct verification. The next memorandum was dated November 19, 2004 (SP–9). That memorandum explained that if the non-response rate for School Year 2004–2005 was less than twenty percent, then the LEA would qualify to use an alternative sample size in School Year 2005–2006, the first year the new verification procedures were to be followed. It also explained that for School Year 2006–2007, an LEA was qualified to use an alternative sample size if there was at least a ten percent improvement between the non-response rate in School Year 2004–2005 and in School Year 2005–2006. Another memorandum was issued on March 10, 2005 (SP–13) addressing the new verification activities for LEAs including confirmation reviews, substitution of applications and follow-up. An April 19, 2005 (SP–14), memorandum discussed State education agency agreements with their counterparts to conduct direct verification. Other memoranda were issued on August 30, 2005 (SP–16), September 14, 2005 (SP–22), September 21, 2005 (SP–19), September 26, 2005 (SP–21), and September 27, 2005 (SP–18). These memoranda discussed and clarified various verification procedures. A July 25, 2006 memorandum (SP–27–2006) clarified that the standard sample size for verification is both a minimum and a maximum. A memorandum dated August 31, 2006 (SP–32–2006), provided clarification for direct certification. All of these memoranda may be found on the Child Nutrition Web site (<http://www.fns.usda.gov/cnd>.)

#### **Terminology: Responsible Entity**

Public Law 108–265 specified, in section 105(a), that in newly designated section 9(b)(3)(D)(ii) of the NSLA, the LEA must conduct the verification activities as well as activities related to certifying children as eligible for free or reduced price meals or free milk and

section 108(b) added a definition of LEA in section 12(d)(4) of the NSLA. Prior to this amendment, the NSLA indicated that the SFA, which is defined only in regulations, had the responsibility for conducting certification and verification activities. An SFA, as provided in existing regulations at 7 CFR 210.2, is the governing body responsible for the administration of one or more schools and which has the legal authority to operate the NSLP and SBP in those schools. Because the NSLA now specifies that the LEA is responsible for NSLP and SBP certification and verification activities, this rule uses the term LEA. While this change may only have modest immediate effect in implementation and program operations, it is important because it recognizes that income eligibility determinations may be used for a broad array of educational-related benefits and are no longer used exclusively for meal benefits. We note that this distinction was discussed in the House Report 108–445, which accompanied H. R. 3873, a bill related to the Senate bill which eventually became Public Law 108–265. That House Report noted that “[b]ecause eligibility determinations\* \* \* are used for purposes that extend beyond the receipt of free or reduced-price school meals, the Committee believes that school and district administrators, not food service personnel, should be held accountable for the accuracy of meal certifications reported to the state and the Secretary of Agriculture.”

#### **Terminology: Timing for Acceptable Documentation**

The existing regulations at 7 CFR 245.6a(a)(1) specify the period of time for acceptable income documentation; e.g., the household must submit information for the most recent full month available. This rule adds a paragraph at 7 CFR 245.6a(f)(2) to permit households to submit documentation verifying the source, amount and frequency of their income for any point in time within that period. Timing for documentation for direct verification purposes is discussed in V. Direct Verification.

## **II. Verification Sample Sizes**

### *Background*

Each school year, LEAs are required to verify the eligibility of children in a sample of household applications approved for free or reduced price meal benefits. Under the existing regulations at 7 CFR 245.6a(a), the SFA may verify a sample of randomly selected applications or a sample of focused applications. Under random sampling,

all applications have an equal chance of being selected for verification and the sample size is the lesser of three percent (3%) or 3,000 approved applications. Under focused sampling, the sample size is the lesser of one percent (1%) or 1,000 of all approved applications selected from applications with household monthly income within \$100 (\$1200 annually) of the free/reduced price income limit PLUS the lesser of one-half of one percent (.5%) or 500 applications with a Food Stamp Program, Food Distribution Program on Indian Reservations (FDPIR) or Temporary Assistance to Needy Families Program (TANF) case number, provided in lieu of household income information.

Section 105(a) of Public Law 108–265 amended section 9(b)(3) of the NSLA, 42 U.S.C. 1758(b)(3), by specifying a new standard sample size as well as alternative sample sizes for which LEAs may qualify. The law also revised the date for determining the sample size.

### *Date for Selection of Sample Size*

The existing regulatory date for determining the sample size is October 31 of the current school year. Public Law 108–265 amended the NSLA at section 9(b)(3)(D), 42 U.S.C. 1758(b)(3)(D), to establish October 1 of the current school year as the date for determining the sample size based on the number of approved free and reduced price meal applications on file for the current school year. This action changes the date the sample size is determined from October 31 to October 1. The earlier date should assist households selected for verification and should result in changes in eligibility status being acted upon more quickly. The provision on the date for sample size determination may be found in this interim rule at 7 CFR 245.6a(a)(5).

While LEAs must determine the required sample size based on the number of applications on file as of October 1, it may be that they begin their verification activities prior to October 1. This should assist LEAs in completing verification within the required timeframes.

### *Standard Sample Size*

Section 105(a) of Public Law 108–265 amended section 9(b) of the NSLA, which specified that the new standard sample size is the lesser of three percent (3%) of all applications approved by the LEA for the School Year as of October 1 or 3,000 error prone applications approved by the LEA for the School Year as of October 1. Public Law 108–265 also added a definition of error prone application at section

9(b)(3)(D)(i)(I), which is all household applications approved by the LEA as of October 1 that indicate monthly income within \$100 of the monthly limit or annual income within \$1200 of the annual limit of the applicable income eligibility guidelines. This is similar to the way income applications are selected under the existing focused sampling.

The new standard verification requirement established in Section 105(a) of Public Law 108–265 amended section 9(b) of the NSLA, which concentrates on error prone applications in the interest of improved accuracy of eligibility determinations. The definitions of error prone applications and standard sample size may be found in this interim rule at 7 CFR 245.6a(a)(2) and 7 CFR 245.6a(c)(3), respectively.

Section 105(a) of Public Law 108–265 amended section 9(b)(3)(D)(i)(I)(bb) of the NSLA to permit the Secretary to establish other criteria for error prone applications in lieu of the error prone application standards. At this time, we are not establishing any other criteria and are requesting suggestions on potential criteria for error prone applications. Some possible parameters include different thresholds depending on household size, or different triggers for consideration as an error prone application. Commenters should keep in mind the limited amounts of household information included on the meal benefit application.

#### *Mandatory Standard Sample Size*

The NSLA, as amended by Public Law 108–265, specifies that the sample size is three percent or 3,000 applications, whichever is less. This is both a minimum and a maximum sample size. Local educational agencies may no longer choose to verify a larger sample of applications as part of their normal verification activity. This includes LEAs with a small number of free or reduced price applications that have previously verified all applications.

However, LEAs are encouraged, on a case-by-case basis, to verify “for cause” any application which is questionable. Verification for cause may include situations in which a household reports zero income or when the LEA is aware of additional income or persons in the household. If the LEA verifies a household’s application for cause, the household must be notified in accordance with existing regulatory procedures and, if there is a decrease in benefits, the household would receive a notice of adverse action and would have the opportunity to appeal the LEA’s decision. This interim rule is codifying this procedure at 7 CFR 245.6a(c)(7)

which previously was only specified in program guidance.

#### *Alternative Sample Sizes*

Section 105(a) of Public Law 108–265 amended section 9(b)(3)(d)(iv) to provide two alternative sample sizes available to an LEA which qualifies through its efforts to improve the verification response rate (see below). The alternative sample sizes available to LEAs that qualify are: The lesser of 3,000 or three percent of all approved applications selected at random; or the lesser of 1,000 or one percent of error prone applications plus the lesser of 500 or one-half of one percent (0.5%) of approved applications with a Food Stamp Program, FDPIR or TANF case number provided in lieu of income information. These alternatives are also based on the number of approved applications as of October 1. The alternative sample sizes may be found at 7 CFR 245.6a(c)(4) in this interim rule.

#### *Completing the Sample Size*

Some LEAs will not have enough error prone applications to meet the standard or the 1000/1% element of that alternative sample size, as applicable. Section 9(b)(3)(D)(v) of the NSLA, as amended by section 105(a) of Public Law 108–265, states that the LEA must select additional approved applications at random to meet the applicable standard sample size or the 1000/1% element of that alternative. This provision is included in this interim rule at 7 CFR 245.6a(c)(5).

#### *Qualifications Applicable to All LEAs*

An LEA may qualify for an alternative verification sample size if it has a non-response rate for the preceding school year of less than twenty percent (20%). This requirement may be found in this interim rule at 7 CFR 245.6a(d)(2). In recognition of the effect of a household’s failure to respond to verification requests, Section 105 of Public Law 108–265 added incentives to LEAs to decrease their non-response rates. In 2002, FNS conducted a review of nearly 3,500 applications selected for verification in 14 large SFAs. A key finding of this review was that non-response to the verification process accounted for the most changes in benefits. Seventy-seven to eighty percent (77–80%) of reductions/terminations of benefits were the result of non-response. In an effort to determine the extent of verification non-responses, FNS added a regulatory requirement (68 FR 53483; September 11, 2003) that SFAs report information on verification activities, including the number of non-responses to their State

agency. Non-response rates are then reported annually by each State to FNS on the FNS–742, the Verification Summary Report. FNS will use the data from these reports to determine the effects on changes in non-response rates as a result of States’ efforts to decrease the number of children who lose benefits because of the household’s failure to respond.

The existing regulations do not define non-response rate. Section 105 of Public Law 108–265 added a definition of non-response rate. The statutory definition of non-response rate is the percentage of approved applications for which verification was not obtained after all required attempts; this definition may be found at 7 CFR 245.6a(a)(3) of this interim rule. (Also see the discussion in this preamble concerning what constitutes a non-response for the purposes of the LEAs’ obligation for follow-up activities.)

#### *Qualifications Applicable to Large LEAs*

Section 105 of Public Law 108–265 amended section 9(b)(3)(D)(iv)(IV) to provide criteria by which large LEAs may qualify for sample size alternatives. A large LEA is defined as one with more than 20,000 children approved by application (excluding children eligible through the direct certification process) as eligible for free or reduced price meals as of October 1 of the school year. To qualify for this alternative, a large LEA must have a non-response rate in the preceding school year which is at least ten percent (10%) below the rate for the second preceding school year. To meet this criterion, a large LEA would compare its non-response rates from one school year to another and determine if there is adequate improvement (at least ten percent (10%)) between the second preceding school year and the preceding school year.

For example, in School Year 2004–2005, the LEA had:

- 21,000 children approved for free and reduced price meal benefits based on a total of 6,000 approved applications; therefore, 180 household applications (3% of 6,000) are subject to verification;
- 45 households failed to respond to verification requests;
- Therefore, the non-response rate is 25% (45 ÷ 180 as a percentage).

The LEA would then calculate the level of improvement needed for School Year 2005–2006 as follows:

- The LEA must improve the non-response by at least 10%, with the 10% improvement determined by taking the previous non-response rate of 25% and multiplying it by 10%, which is 2.5%;

- The improvement level of 2.5% is then subtracted from the previous non-response rate (25.0% – 2.5%) which is 22.5%;

- Therefore, the LEA needs a non-response rate of 22.5% or less to meet the 10% minimum improvement level in order to qualify to use an alternative sample size.

In School Year 2005–2006:

- The LEA again had 6,000 approved applications, so the sample size is 180 (3% of 6,000);

- The number of non-respondents is 40 which is a non-response rate of 22.2% (40 ÷ 180 as a percentage);

- 22.2% is less than the minimum non-response rate of 22.5% needed to qualify for this option; therefore, this LEA may use the alternative sample sizes in School Year 2006–07.

This provision may be found at 7 CFR 245.6a(d)(4) of this interim rule.

#### *Qualifying for Alternative Sample Sizes*

As discussed above, Section 105 of Public Law 108–265 permits LEAs to qualify for alternative sample sizes by improving the rate of household responses to their verification efforts. An LEA must annually determine if it can qualify to use an alternative sample size. If the LEA does not reevaluate its eligibility for alternative sample sizes on an annual basis, it must use the standard sample size in 7 CFR 245.6a(c)(3) of this interim rule. Once the LEA determines that it qualifies, it must notify the State agency of the intended use of an alternative sample size, specify which option and indicate the basis for qualifying. The State agency may establish a deadline for notification and may establish criteria for reviewing and approving use of alternative sample sizes. This provision is found at 7 CFR 245.6a(d)(1) of this interim rule.

#### *Declining and Substituting Applications Selected for Verification*

Section 105 of Public Law 108–265 amended section 9(b)(3)(j) of the NSLA to allow an LEA to replace up to five percent of approved applications selected for verification upon individual review in accordance with criteria established by the Secretary. This provision effectively allows the LEA some flexibility in verifying applications from families/households that the LEA determines may not be able to satisfactorily respond to the verification request because of instability or communication difficulties. This should minimize the possibility that truly needy families may lose benefits simply due to their inability to fully understand the

requirements of the verification process. This interim rule is adopting this approach as the criteria that LEAs would use to remove applications and then select substitutes.

This procedure would be conducted, if the LEA chooses to use this option, once the applications are selected for verification. For each application removed from the verification sample, the LEA would replace it with another approved application. The maximum number of replacements is five percent of the sample selected. Prior to any contact with the selected households, the LEA would consider which households may have difficulties with completing the verification process and replace those applications. Replacement applications would be selected in accordance with the LEA's applicable procedures (*i.e.*, an error-prone application that is selected must be replaced with an error-prone application). Once the replacement process is complete, the LEA would notify the remaining households of the verification process. This provision does not permit an LEA to replace an application once the household is notified of its selection for verification. Further, this provision does not permit the LEA to eliminate a category of applications such as those from a particular group or community. The Department of Agriculture (the Department) will provide additional assistance to LEAs in selecting specific applications if it proves necessary. This provision may be found at 7 CFR 245.6a(e)(2) of this interim final rule.

### **III. Verification Process/Procedures**

Section 105(a) of Public Law 108–265 added provisions concerning follow-up with households selected for verification. These provisions are designed to improve and streamline the process for LEAs as well as to provide additional ways to assist households with completing the verification process, and reduce the non-response rate. Section 105(a) of Public Law 108–265 also added a requirement that LEAs must review applications selected for accuracy of each eligibility determination including math or other errors, prior to contacting the household. Section 105(a) also added section 9(b)(3)(F) allowing LEAs to use direct verification—a process in which information from specific means-tested programs is used as the basis for verifying application data.

#### *Preliminary/Confirmation Reviews*

Section 105(a) of Public Law 108–265 added a requirement that the LEA check the accuracy of the certification before

proceeding with verification of any application. In the statute, this is referred to as a “preliminary review.” The Department is using the term “confirmation review” in this preamble and in the regulatory language to emphasize that, while this review is the first verification activity conducted by the LEA, it is a confirmation of the original decision made on the application. The confirmation review must be made by someone other than the person who made the original determination. This procedure is intended to detect any arithmetic or other errors prior to beginning verification so that the LEA can appropriately review the documentation submitted by the household. Please note that any LEA or school that conducts confirmation reviews of all applications as part of its certification process meets this requirement.

The LEA must document that confirmation reviews were conducted. To this end, the prototype free/reduced price application developed by FNS includes a signature line for the person who conducted the confirmation review. The LEA may also maintain a list of applications and their disposition with the reviewer's signature attesting to completing this requirement. The person who conducts the confirmation review must not be the person who makes the initial eligibility determination. However, the provision does not preclude the person who completes the confirmation review from conducting the verification process. These provisions are found at 7 CFR 245.6a(e)(1) in this interim rule.

Section 105(a) of Public Law 108–265 also recognizes that some LEAs use electronic data systems that provide a high level of accuracy in making the initial eligibility determination, in accordance with the certification requirements of the NSLP, on applications for free or reduced price meals. If an LEA uses an electronic data system that rejects inconsistent or incomplete application information and that accurately determines eligibility based on income level and household size or other information establishing categorical eligibility for free meals, it is not subject to the requirement to conduct separate confirmation reviews.

An LEA with such a system must notify the State agency that it is not conducting confirmation reviews because its initial eligibility system accurately processes applications consistent with the income eligibility guidelines. State agencies may require additional documentation of the accuracy of the system and may require the LEA to conduct confirmation

reviews if they consider the system to be inadequate. This provision may be found at 7 CFR 245.6a(e)(1)(ii) of this interim rule.

#### *Disposition of Applications After the Confirmation Review*

The confirmation review can occur at one of two times—immediately after the initial review which makes it part of the certification process or as part of the verification process as a double check on only those applications selected for verification. When the confirmation review is part of the application process, the notice of eligibility reflects any adjustments made to the initial determination made as a result of the “up-front” confirmation review.

However, when the confirmation review is part of the verification process, the following requirements apply—

- If the confirmation review indicates that there should be an increase in benefits, the LEA must make the change as soon as possible, notify the household and proceed with verification;
- If the confirmation review shows that there should be a decrease in benefits from free to reduced price, the LEA should proceed with and complete verification before any notification of a new eligibility status is given. If the decrease is substantiated by the documentation submitted by the household or the household fails to respond (subsequent to at least one follow-up attempt by the LEA), the LEA will then provide the household with a notice of adverse action which will inform the household of the pending action and of their appeal rights.
- If the confirmation review indicates that the application should have been denied initially, the LEA would remove that application from the verification sample, select another like application (for example, another error prone application) and would provide the household with a notice of adverse action which will inform the household of the pending action to terminate their free or reduced price benefits and of their appeal rights.

These procedures are designed to avoid a possible unnecessary reduction in benefits. The verification notice requirements are not changed by adoption of the confirmation review; that is, the verification notice continues to explain that the application was selected, to detail the process and required documentation, to assign a deadline for receipt of documentation, and to provide a no-charge phone number to call for assistance. These

provisions may be found at 7 CFR 245.6a(f) of this interim rule.

#### *Direct Verification: Background*

Section 105(a) of Public Law 108–265 provides for a procedure called “direct verification.” The NSLA was amended to include, at section 9(b)(3)(F), an option for LEAs to directly verify applications selected for verification. This procedure is similar to the existing direct certification process. Direct verification allows the LEA to request information from an agency administering one of the means-tested programs listed in the NSLA without contacting the household. Contact with one of the means-tested programs is the first verification effort. Although existing regulations do not specifically include direct verification, existing 7 CFR 245.6a(b)(3) provides for use of agency records from a State or local agency that administers the Food Stamp Program, FDIPIR or TANF program which have similar eligibility limits and information maintained by the State employment office. This procedure is discussed in detail in this preamble under V. Direct Verification.

#### *Telephone Assistance With Verification*

As indicated earlier, the existing regulatory provision requiring that the LEA notify the household in writing of its selection for verification (except for those households’ whose eligibility status is verified through direct verification) did not change. However, Section 105(a) of Public Law 108–265 added provisions concerning contacts with households selected for verification.

The existing regulations do not require that the SFA provide a telephone number for households to call concerning verification, but the prototype application and verification forms as well as guidance encourage SFAs to provide a telephone contact for verification activities. Section 105(a) of Public Law 108–265 amended the NSLA to require that the written notification to households concerning verification include a telephone number that the household may call without charge. The telephone number could be toll-free. The toll-free telephone number must be to a source that can respond to the household’s questions about the verification process. This provision is found at 7 CFR 245.6a(f)(5) of this interim rule.

#### *Requirement for Follow-Up With Non-respondents*

Section 105(a) of Public Law 108–265 also added a requirement that the LEA make at least one follow-up attempt to

contact any household that fails to respond to a request for verification. This rule does not specify the method of follow-up or the timing; the follow-up attempt may be in writing, via e-mail, through a telephone call or in person. The LEA must document the attempt. Many LEAs already perform follow-up contacts.

As permitted in section 9(b)(3)(G)(iv) of the NSLA, this rule allows the LEA to contract with a third party to conduct the follow-up activity. Any use of a third party is subject to the confidentiality requirements in Section 9(b) of the NSLA and 7 CFR Part 245. Any contract is also subject to the procurement requirements in existing 7 CFR 210.21. The provision on third party contracts may be found in 7 CFR 245.6a(f)(6) of this interim rule. The use of a third party to perform follow-up contacts would facilitate this process for LEAs which may not have the staff resources to readily absorb this required function. It is important to note, however, that the information the contractors will be using is subject to the use and disclosure requirements in the NSLA and program regulations. All such information must be carefully controlled, remains the property of the LEA and may not be used by the contractor for any other purpose.

#### *Non-Response in Relation to Follow-Up Contacts*

A non-response, for the purposes of a follow-up contact, would arise when the LEA is unable to verify the household’s status for school meal benefits for which it was certified. A non-respondent household would be a household that failed to provide documentation that enables the LEA to resolve or confirm its eligibility status.

Follow-up contacts can assist families in continuing meal benefits for their children as well as improve LEAs’ verification completion rates. Examples of situations which indicate the need for a follow-up contact by the LEA would be—

- The household has not, in any way, contacted the LEA concerning its initial request for verification documentation.
- The household contacted the LEA and has submitted some but not all needed documentation. This could include needed written material from the household itself or the inability of the LEA to complete a collateral contact. In the latter situation, the household may need to indicate another collateral contact or provide other written evidence.
- The household contacted the LEA but the communication was

inconclusive and the LEA needs additional information.

- Information obtained from a public agency is incomplete or inconsistent with information on the application.

#### IV. Deadlines/Extensions

##### *Deadlines for Completing Verification*

The existing regulations establish the deadline for completing verification as December 15. Section 105(a) of Public Law 108–265 changed this date to November 15. This change will result in more timely determinations of the accuracy of children's eligibility for free or reduced price meals or free milk. Shifting this date closer to the beginning of the school year will allow LEAs to more promptly make necessary adjustments to eligibility status and thus target meal benefits more appropriately. The deadline is found at 7 CFR 245.6a(b)(1) of this interim rule.

Please note that the October 31 date for reporting data on the number of children eligible for free and reduced price meals and free milk has not changed. This date is a point in time used to ensure consistent data on program participants. The reference to the verification deadline in 7 CFR 210.18(h)(1)(iv) is also revised by this interim rule.

##### *Extending the Verification Deadline*

Section 105(a) of Public Law 108–265 also amended the NSLA to allow the State agency to extend the verification deadline to December 15 under criteria established by the Department. The regulations will now permit extensions of the verification deadline on a case-by-case basis, depending on justification submitted by the LEA. Reasons for extensions may include, but are not limited to, strikes or labor disputes or natural disasters. This provision is found at 7 CFR 245.6a(b)(2)(i) of this interim rule.

##### *Additional Extensions Due to Local Conditions*

Section 105(a) of Public Law 108–265 amended the NSLA to address verification alternatives when local conditions warrant. Section 9(b)(3)(I) specifies that the Department may allow alternatives to the sample size, the sample size selection criteria and to the verification deadline when a natural disaster, civil disorder, strike or other similar conditions exist. This allows LEAs flexibility in completing verification activities when circumstances prevent timely or complete compliance with the requirements. The law directs the Secretary to establish criteria for

extensions and alternatives. Requests under this provision would be necessary only if the LEA were requesting different sample size and selection criteria and/or an extension for completing verification beyond December 15. We emphasize that these requests would be made on a case-by-case basis and that approval would be given only when necessitated by unusual circumstances. Section 245.6a(b)(1)(ii) will now allow the State agency to request use of alternative sample sizes or sample selection and/or an extension of the deadline beyond December 15 through a written request to FNS.

#### V. Direct Verification

As discussed briefly above, section 105(a) of Public Law 108–265 amended section 9(b)(3)(F) of the NSLA to permit LEAs to directly verify households through information obtained from the State agency administering the Food Stamp Program, FDPIR, TANF or State Medicaid programs under title XIX of the Social Security Act (42 U.S.C. 1396 *et seq.*) and any similar income-tested program or other source of information determined by the Secretary.

Direct verification is a procedure that uses information directly obtained from an agency that administers a means-tested program (such as the Food Stamp Program) or that maintains information about income or wages (such as the State unemployment offices). Direct verification is similar to using agency records as a means of verification of information on a household's application. However, direct verification is conducted prior to contacting the household of its selection for verification. If the source of the direct verification information confirms the household's eligibility status, the household will not need to be notified of its selection as verification was completed through the agency contacts.

The use of direct verification can help LEAs in completing the verification process in a timely manner and lower the non-response rate since households do not need to be contacted if the eligibility status can be verified through extant data sources.

The direct verification process is discussed below as follows: (1) Information sources and the age and type of acceptable data; (2) direct verification using Food Stamp Program, FDPIR and TANF sources; (3) direct verification using state Medicaid program sources; (4) direct verification using State Children's Health Insurance Program (SCHIP) sources; and (5) using Medicaid/SCHIP information in States with higher income limits.

##### *Sources for Direct Verification and Timing*

Section 9(b)(3)(F)(i) of the NSLA specifies that direct verification may be achieved through systems of records maintained by the public agency administering the Food Stamp Program, FDPIR, TANF, or the State Medicaid program. It also permits the Department to include similar means-tested programs or sources of information. This interim rule incorporates the statutorily identified programs at 7 CFR 245.6a(g). Please note that while children are categorically eligible for free meals if they are in a Food Stamp Program or FDPIR household or in most TANF households (see below for a discussion of the exception), Medicaid recipients are not categorically eligible. In addition, because income eligibility limits for Medicaid vary from State to State and may exceed the threshold for free/reduced price meal benefits, a State agency must first determine what the limits are in its State. It must then determine whether the Medicaid office is able to provide household income information or an indication (such as the percentage of the Federal poverty line) of whether the household's income is within the limits for either free or reduced price benefits. These are the first steps in implementing direct verification with Medicaid.

Under the authority in the NSLA, we have determined that SCHIP, which is authorized under title XXI of the Social Security Act, should be included as a potential source for direct verification as it is an adjunct of the Medicaid program. As with the Medicaid program, SCHIP recipients are not categorically eligible for free or reduced price benefits and the income limits vary by State. Again, the first step for a State agency would be to determine how the SCHIP program is structured in its state. SCHIP is defined in 7 CFR 245.2 of the existing regulations.

Public Law 108–265 specified that the direct verification information from public agencies must be the most recent information available. The "most recently available information" is described in the NSLA as information reflecting program participation or income during the 180-day period immediately prior to the date of school meals application. The data need only indicate eligibility for the program at that point in time, not that the child was certified for that program's benefits within the 180-day period.

In order to be consistent with the documentation permitted for households notified of their selection for verification, LEAs have flexibility

with identifying acceptable documentation for direct verification purposes. As discussed earlier, household being verified may provide documentation for any point in time between the month prior to application and the time the household is required to provide income documentation. For consistency between verification and direct verification activities, this interim rule, at 7 CFR 245.6a(g)(5), therefore states that direct verification efforts may use information from any point in time between the month prior to application and the time direct verification is conducted. In other words, for direct verification LEAs must use information (which may never be more than 180 days old) that is the most recent available information; information from any one month from the period one month prior to application through the month direct verification is conducted; or information for all months from the month prior to application through the month direct verification is conducted.

#### *Names Provided to Direct Verification Sources*

LEAs or State agencies conducting direct verification must only submit the names of the eligible children and not names of other members of the household, such as parents, grandparents or non-school age siblings. This provision may be found at 7 CFR 245.6a(g)(1) of this interim rule.

#### *How Direct Verification Is Conducted Using Food Stamp Program, FDIPIR, and TANF Records*

Under section 9(b)(3)(F)(i)(I)–(III) of the NSLA, as amended by Public Law 108–265, LEAs may submit a list of identifiers for children listed on applications selected for verification to the agencies that administer the Food Stamp Program, FDIPIR or TANF.

These programs would then indicate if they have information that supports the child's eligibility for free or reduced meal benefits. This may be done even if the school meals application does not indicate receipt of benefits from one of these programs. This "direct verification" contact would occur prior to notifying the household of its selection for verification. If the data obtained was within the time frames discussed above and shows that a child was a member of a household participating in one of these programs, the child's eligibility for free meals is validated. If data indicates that one eligible child is a member of a household participating in the FSP, FDIPIR, TANF, or Medicaid, all eligible children in that child's household are verified. If none of the children's

participation is confirmed by the direct verification source, regular verification procedures must be followed. For consistency, this approach is now applied to applications selected for verification that contain case numbers. This change may be found at 7 CFR 245.6a(f)(3) in this interim rule.

With respect to the TANF program, eligibility for that program continues to be subject to the provision in the NSLA concerning TANF eligibility standards in place in 1995. Section 9(d)(2)(C) of the NSLA specifies that a child is eligible for free meals if the standards used for the State's TANF program are comparable to or more restrictive than the eligibility standards in effect on June 1, 1995. Therefore, direct verification to determine eligibility for free meals based on TANF information may be used only in those States that currently meet this criterion or in States that can provide the household's income level or indicate that the family's income is less than 130% of the applicable poverty guideline. Please note that while this section of the NSLA also addresses eligibility for reduced price meals, children in households receiving Food Stamp Program, TANF or FDIPIR benefits are categorically eligible for free meal benefits.

#### *Direct Verification Using State Medicaid Program Sources*

Public Law 108–265 amended the NSLA at section 9(b)(3)(F) to allow use of State Medicaid income and program participation information as sources of direct verification. The NSLA specifies that eligibility for free meals may be confirmed when the Medicaid income limit is 133% or less of the official poverty line and that eligibility for reduced price meals may be confirmed when the Medicaid income eligibility limit is no more than 185% of the official poverty line.

The LEA may verify children's eligibility for either free or reduced price meals based on Medicaid data. Medicaid and SCHIP (as added under the discretion provided to the Secretary) eligibility standards vary from State to State. If the State's Medicaid limit is between 133% and 185% of poverty, the Medicaid/SCHIP agency must also be able to provide a household's income and size or the percentage of the official poverty line that the household's income represents; otherwise, direct verification may not be feasible when there are different eligibility standards for receipt of Medicaid.

#### *Verification of Eligibility for Free Meal Benefits*

If the State's Medicaid program's eligibility standards are 133% or under of the poverty limits, the LEA can use information from the Medicaid agency to verify free status. While the income limit for free meals is 130% of the applicable poverty guideline, section 105(a) of Public Law 108–265 permits use of the greater percentage. The 133% figure was used because this is the Medicaid limit in a number of states for school-age children. When the Medicaid agency can identify which households are participating, the LEA has documented the child's eligibility for free meals. No additional individual documentation is needed. In states with Medicaid limits of 133% or below, there is no need to have the household's income because eligibility status is confirmed solely through Medicaid participation. These provisions may be found at 7 CFR 245.6a(g)(3) of this interim rule.

#### *Verification of Eligibility for Free or Reduced Price Benefits*

If the State's Medicaid limit is between 133% and 185% of the poverty limits and the Medicaid agency can provide the percentage or amount of income used, the LEA could use Medicaid information to verify the child's eligibility either for free or for reduced price benefits, depending on the basis for the child's Medicaid eligibility. In these states, the agency administering the Medicaid program must be able to provide the income amount and household size used to determine Medicaid eligibility or the percentage of the applicable poverty guideline for that income. That information can be used to confirm the child's status for free or reduced price meals, as appropriate. These provisions may be found at 7 CFR 245.6a(g)(4) of this interim rule.

#### *Direct Verification Using SCHIP*

Some States have used their SCHIP grants to expand their Medicaid coverage for children through higher income limits. Other States have separate SCHIP programs. For the latter States, the State agency must determine the income limits and establish the same type of parameters discussed above for State Medicaid programs.

#### *Resolving Discrepancies Between the Application and Information Received Through Direct Verification*

For the purposes of direct verification, the LEA submits the names and other identifiers, such as birthdates and addresses for a child certified for free or reduced price meals and selected for



verification. Therefore, direct verification potentially establishes a child's participation in one of the eligible programs, thereby confirming their eligibility for free or reduced price meals. Any child listed on the application who is certified for free or reduced price school meals who is established as participating in one or more sources of direct verification (within the applicable limits for the various programs) is verified. The LEA has completed verification for that household and household contact is not required. If the information received from sources of direct verification is inconsistent or inconclusive, the LEA must notify the household that it is subject to verification and the household must provide documentation of their income.

*Use of Direct Verification Is an LEA Option*

Public Law 108–265 expanded Section 9(b)(3)(F) of the NSLA to permit the use of direct verification by LEAs, although it is still optional. The law specifies that the decision to use direct verification is made at the LEA level. State agencies must support and assist any LEA's decision to use direct verification. State agencies should also work towards establishing contacts with their state-level counterparts to coordinate direct verification use and to develop a State-wide system to encourage the use of direct verification by LEAs.

If an LEA chooses to use direct verification, the State agency must work with the LEA in determining the best method for doing direct verification and assist in facilitating contacts with State-level agencies, as needed, to establish the mechanism for doing direct verification. Because administrative systems vary greatly among States, the Department is not establishing any specific procedural criteria in the regulations for conducting direct verification. This will provide State agencies with flexibility in developing procedures that best meet their needs.

*Agreements To Conduct Direct Verification*

Section 104(b) of Public Law 108–265 amended the Food Stamp Act of 1977 by adding Section 11(u), 7 U.S.C. 2020 (u), to require an agreement between the State agency administering the school meals programs and the State agency administering the Food Stamp Program. The Food Stamp Act of 1977 requires that State agencies to establish procedures to conduct direct verification for children eligible for free or reduced price school meals. All States have such agreements in place. For direct verification with other programs, the Department suggests that the State education agency enter into an agreement spelling out procedures, available data, etc., with each different State agency that will be a direct verification source.

*Additional Programs for Direct Verification*

Public Law 108–265 allows the Secretary to permit direct verification with similar means-tested programs or other sources of information. Prior to extending direct verification to additional programs, the Department would need to determine which programs have comparable eligibility standards and which are accessible to State agencies and/or LEAs. As mentioned above, we have extended direct verification to SCHIP. To assist us in expanding this provision further, we are requesting comments on any additional programs that could be included as sources for direct verification.

**VI. Miscellaneous**

*Effect of Public Law 108–265 on Existing Verification Provisions*

Some of the existing regulations in 7 CFR 245.6a are modified by this interim rule while others are unchanged but may be relocated. Under existing regulations, directly certified households are not subject to verification because their status was already determined through contact with the appropriate agency. This exception is not changed. However, the following categories of children were

added as not subject to verification as authorized by Public Law 108–265— children who are homeless, as defined under section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)); children served by a runaway and homeless youth grant program established under the Runaway and Homeless Youth Act (42 U.S.C. 5701 *et seq.*); or migratory children as defined in section 1309 of the Elementary and Secondary Education Act of 1965 (ESEA) (20 U.S.C. 6399). These groups will also be addressed in separate rulemakings. This provision is relocated by this interim rule from existing 7 CFR 245.6a(a)(5) to 7 CFR 245.6a(c)(2).

Existing regulations also provide for other exceptions from verification for children in residential child care institutions and schools. Further, LEAs using the special certification/ reimbursement procedures in 7 CFR 245.9 are not required to conduct verification except in the base year when applications are submitted. These exceptions remain in effect but are relocated from 7 CFR 245.6a(a)(5) to 7 CFR 245.6a(c)(2) by this interim rule.

*Clarifying What Information Is Submitted on the Verification Report*

LEAs, through their State agencies, submit the FNS–742, School Food Authority Verification Summary Report. We are clarifying, in newly redesignated 7 CFR 245.6a(h), that LEAs and State agencies only report on statutorily required verification activities. For example, an LEA would only report on the results of verifying the required three percent (up to 3,000 applications) of error prone applications. The verification report would not include any applications verified for cause as permitted in 7 CFR 245.6a(c)(7) as set forth in this interim rule.

*Unchanged Provisions*

The following chart shows other existing verification provisions that have been relocated and rewritten to improve their clarity and conformity with the provisions revised by this interim rule. These policies and procedures provided in these provisions are otherwise unchanged.

Provision	Existing citation	New citation
State agency conducting verification .....	7 CFR 245.6a(a) Introductory Text .....	7 CFR 245.6a(c)(1)(i).
Approval with essential documentation .....	7 CFR 245.6a(a)(1) .....	7 CFR 245.6a(c)(1)(ii).
Notification of households selected for verification.	7 CFR 245.6a(a)(2) Introductory Text .....	7 CFR 245.6a(f)(1).
Notification of households/social security numbers.	7 CFR 245.6a(a)(2)(i) through (a)(2)(iv) .....	7 CFR 245.6a(f)(1)(i) through (f)(1)(v).
Sources of information .....	7 CFR 245.6a(b) Introductory Text .....	7 CFR 245.6a(a)(7).
Verification reporting .....	7 CFR 245.6a(c) .....	7 CFR 245.6a(h).

Provision	Existing citation	New citation
Nondiscrimination .....	7 CFR 245.6a(d) .....	7 CFR 245.6a(i).
Adverse action .....	7 CFR 245.6a(e) .....	7 CFR 245.6a(j).

**VII. Procedural Matters**

*Executive Order 12866*

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

*Regulatory Impact Analysis*

Need for Action

This interim rule amends regulations to reflect changes made to the NSLA by Public Law 108–265, the Child Nutrition and WIC Reauthorization Act of 2004, regarding the verification of applications approved for free or reduced price meals in the NSLP and SBP. The provisions of this interim rule are expected to enhance verification efforts which will improve the accuracy of benefits distribution. FNS estimates that the net increase in administrative burden from implementing the provisions of this interim rule will be outweighed by the benefits of improved accuracy in the targeting of benefits.

Benefits

The interim rule is expected to better target NSLP and SBP benefits to eligible children. The rule’s requirement that LEAs make greater use of an error-prone sampling method to select applications for verification is expected to reduce the value of improper federal reimbursements. Increased reliance on focused sampling should also reduce the loss of benefits to otherwise eligible applicants who fail to respond to verification requests. Other provisions, such as moving the verification process closer to the beginning of the school year, and requiring LEAs to help applicants through the verification process, are also expected to better align benefit approval with applicant eligibility. Over the fiscal year 2008–2012 period, FNS estimates that the verification process will reduce improper federal meal reimbursements by \$19.7 million. This estimate considers only the direct savings that result from recertifying a subset of children whose applications were selected for verification. Additional savings are expected to follow as the data collected from the verification process, and from the FNS’ *Access, Participation, Eligibility and Certification* (APEC) study, facilitates the development of guidance, training,

and policy options to further reduce certification error.

Costs

FNS estimates that the net increase in administrative burden to LEAs will total \$0.13 million over the fiscal year 2008–2012 period.

*Regulatory Flexibility Act*

This interim rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612). Nancy Montanez Johner, 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. Local educational agencies already must conduct verification of a sample of applications for free and reduced school meals. This interim regulation provides additional options for local educational agencies that improve their verification techniques. The Department of Agriculture (the Department) does not anticipate any adverse fiscal impact resulting from implementation of this rulemaking; rather, the Department anticipates that benefits will be more targeted towards eligible children and that local educational agencies will have incentives to work towards improvements in their verification efforts to be able to have more flexibility. Although there may be some burdens associated with this rule, the burdens would not be significant and would be outweighed by the benefits of improved accuracy in the targeting of benefits and in enhanced flexibility for local school districts.

*Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes a requirement for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, the Department generally prepares a written statement, including a cost-benefit analysis. This is done for proposed and final rules that have “Federal mandates” which may result in expenditures of \$100 million or more in any one year by State, local, or tribal governments, in the aggregate, or by the private sector. When this statement is needed for a rule, section 205 of the UMRA generally requires the

Department to identify and consider a reasonable number of regulatory alternatives. It must then adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule.

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

*Executive Order 12372*

The National School Lunch Program and the School Breakfast Program are listed in the Catalog of Federal Domestic Assistance under Nos. 10.555 and 10.553, respectively. For the reasons set forth in the final rule in 7 CFR Part 3015, Subpart V, and final rule related notice at 48 FR 29114, June 24, 1983, these programs are included in the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

*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)(a)(B) of Executive Order 13132:

Prior Consultation With State Officials

Prior to drafting this interim final rule, we received input from State and local agencies at various times including national and regional meetings. The Child Nutrition Programs are State administered, federally funded programs. FNS sponsored a meeting in September 2004 to brief State agencies on the amendments to the NSLA and Child Nutrition Act made by the Child Nutrition and WIC Reauthorization Act of 2004 (Pub. L. 108–265). FNS received a number of comments from participants at that meeting as well as from meetings held within various states. In addition, FNS staff had informal and formal discussions with State and local officials on an ongoing basis regarding program implementation and performance. Upon request,

representatives of FNS have attended state-sponsored meetings to brief both State and local cooperators on the changes and to obtain feedback that forms the basis for any discretionary decisions in this rule.

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

State and local agencies are generally concerned about the paperwork and financial burdens placed on food service to conduct verification, especially in light of the potential for larger sample sizes and additional follow-up activities while local educational agencies are continuing to implement other changes to the verification reporting process.

The issuance of an interim rule was permitted by amendments made to the Richard B. Russell National School Lunch Act in section 501(b) of Public Law 108–265. This rule implements provision of Public Law 108–265. FNS plans to assist States with implementing the revised verification procedures and to issue additional guidance as needed in response to operational issues. The comment period will also allow States to share their operational concerns so that problems may be addressed in development of the final rule.

#### Extent to Which We Meet These Concerns

We believe that we adequately address the issues of paperwork and financial burdens by providing State and local flexibility in the manner in which local educational agencies implement the required verification sample sizes and other required activities. Additionally, expansion of the categories of children who are not subject to verification reduces the burden placed on local educational agencies and households. Those local educational agencies can reduce the number of applications/households that are subject to verification by qualifying for one of the verification sample size alternatives.

This rule is intended to have a preemptive effect on any State law that conflicts with its provisions or that would otherwise impede its full implementation. To the extent the rule includes discretionary changes, the Department has established compliance timeframes which give due consideration to State agency processes for notification of customers and stakeholders for the implementation of the new procedures in local offices.

#### Executive Order 12988

This interim final rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is intended to

have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would impede its full implementation. This rule is not intended to have retroactive effect unless that is specified in the **DATES** section of the preamble of the rule. Before any judicial challenge to the provisions of this rule or the application of its provisions, all administrative procedures that apply must be followed. The only administrative appeal procedures relevant to this interim rule are the hearings that local educational agencies must provide for decisions relating to eligibility for free and reduced price meals and free milk which are found at 7 CFR 245.7 for the NSLP, SBP, and SMP in schools.

#### Civil Rights Impact Analysis

FNS has reviewed this interim rule in accordance with the Department Regulations 4300–4, “Civil Rights Impact Analysis,” to identify any major civil rights impacts the rule might have on children on the basis of race, color, national origin, sex, age or disability. After a careful review of the rule’s intent and provisions, FNS has determined that this interim rule facilitates the participation of all eligible participants and does not establish any new burdens.

#### Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR part 1320) this rule contains information collections that are subject to review and approval by the Office of Management and Budget (OMB) before they can be implemented. FNS invites comments on information collection requirements contained in this interim rule for which FNS intends to seek approval. Those requirements will not become effective until approved by OMB. When these information collection requirements have been approved, FNS will publish separate action in the **Federal Register**.

Comments on the information collection requirements contained in this interim rule will be accepted under an abbreviated comment period of 30 days. To be assured of consideration, comments must be received by January 20, 2009.

Comments may be sent to the Office of Information and Regulatory Affairs (OIRA), either by fax to 202–395–6974 or by e-mail to [OIRA\\_submission@omb.eop.gov](mailto:OIRA_submission@omb.eop.gov) marked “attention, desk office for FNS.” Please also send a copy of your comments or requests for information to: Ms. Lynn Rodgers-Kuperman, Chief, Program Analysis and Monitoring Branch, Child

Nutrition Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 640, Alexandria, Virginia 22302. Comments will also be accepted if sent through <http://www.regulations.gov> by 11:59 p.m. on January 20, 2009. For further information or copies of the information collection, please contact Ms. Rodgers-Kuperman at the above address.

Comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. All responses to this Notice will be summarized and included in the request for OMB approval and will become a matter of public record.

*Title:* 7 CFR Part 245 Determining Eligibility for Free and Reduced Price Meals and Free Milk in Schools.

*OMB Number:* 0584–0026.

*Expiration Date:* 01/21/2010 .

*Type of Request:* Revision of currently approved information collection.

*Abstract:* Section 105 of the Child Nutrition and WIC Reauthorization Act of 2004 (Pub. L. 108–265), amends section 9(b) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1728(a)) by revising the requirements and procedures for conducting verification of a sample of applications approved for free or reduced price school meals. These new requirements are being codified under 7 CFR Part 245, Determining Eligibility for Free and Reduced Priced Meals and Milk in Schools, and 7 CFR Part 210, National School Lunch Program.

This interim rule implements direct verification procedures that allow local education agencies (LEAs) to request information from a State or local agency administering the Food Stamp Program, Food Distribution Program on Indian Reservations or Temporary Assistance to Needy Families Programs, which have similar eligibility limits without contacting the household directly. Without this provision, all households would be contacted when selected for verification. Also, this rule requires LEAs to follow up with any household

that fails to respond to a request for verification. The paperwork burden for LEAs is due to the requirement to conduct direct verification with the

Food Stamp Program and because of the requirement to conduct follow-up with households that fail to respond to the

request to provide documentation to verify eligibility.  
*Affected Public:* Local educational agencies.

ESTIMATED ANNUALIZED BURDEN

	7 CFR section	Annual No. of respondents	Number of responses per respondent	Average burden per response	Annual burden
Recordkeeping: Local educational agencies (LEAs) conduct verification using agency records					
Currently Approved .....	245.6a(b)(3)	16,342	1	.25	4,085.5
Total Proposed LEAs .....	245.6a(g)	16,342	1	.33	5,392.9
Difference .....					+1,307.4
Reporting: LEAs conduct one follow-up with verification non-respondents					
Currently Approved .....		0	0	0	0
Total Proposed LEAs .....	245.6a(f)(6)	3,824	1	.05	191.2
Difference .....					+191.2
Total New Burden .....					+1,498.6

*Estimated Number of Respondents:* 16,342.  
*Estimated Number of Responses per Respondent:* 2.  
*Estimated Hours per Response:* .09.  
*Estimated Total Annual Burden:* 1,498.6.

*E-Government Act Compliance*

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

*Public Participation*

This interim rule is being published without prior notice or public comment under authority of 5 U.S.C. 553(b)(3)(A) and (B). In recognition of the need to implement the provisions on verification and direct verification, as promptly as possible, in order to reduce the burden on participants and local educational agencies, section 501(b)(4) of Public Law 108–265 allows the Department to issue interim rules on these and other provisions in that law. This rule implements a number of provisions of Public Law 108–265 which were described in very specific statutory language. Consequently, these procedures were largely non-discretionary; including standard and alternative verification sample sizes, local educational agency qualifications for using an alternative sample size, detailed requirements for confirmation reviews and household contacts and mandatory dates for various aspects of the verification process. Further, due to the statutory mandate in section 501(a) of Public Law 108–265 to implement these provisions as soon as possible

through guidance, these procedures have been in effect since School Year 2004–2005. Based on these factors, the Department has determined in accordance with 5 U.S.C. 553(b) that Notice of Proposed Rulemaking and Opportunity for Public Comments prior to codification is unnecessary and contrary to the public interest. However, this rule is being promulgated as an interim rule and, as such, provides for a public comment period of 90 days. Comments received during this period will enable the Department to make, in the final rule, identified and need changes resulting from the experience of local educational agencies.

**List of Subjects**

*7 CFR Part 210*

Children, Commodity School Program, Food assistance programs, Grants programs—social programs, National School Lunch Program, Nutrition, Reporting and recordkeeping requirements, Surplus agricultural commodities.

*7 CFR Part 245*

Civil rights, Food assistance programs, Grant programs—education, Grant programs—health, Infants and children, Milk, Reporting and recordkeeping requirements, School breakfast and lunch programs.

■ Accordingly, 7 CFR Parts 210 and 245 are amended to read as follows:

**PART 210—NATIONAL SCHOOL LUNCH PROGRAM**

■ 1. The authority citation for 7 CFR part 210 continues to read as follows:

**Authority:** 42 U.S.C. 1751–1760, 1779.

■ 2. In § 210.18:

- a. Revise paragraph (h)(1)(iii);
- b. Amend paragraph (h)(1)(iv) by revising the first sentence and by removing the words “December 15” from the second sentence and adding in their place the words “November 15”; and
- c. Revise paragraph (h)(1)(vi).  
 The revisions read as follows:

**§ 210.18 Administrative reviews.**

\* \* \* \* \*

(h) \* \* \*

(1) \* \* \*

(iii) Determine that applications for verification are selected in accordance with the applicable procedures in § 245.6a(c) of this chapter and that no discrimination exists in the selection process.

(iv) Establish that verification is completed by November 15 (or other date established in accordance with § 245.6a(b)(2)(i) or (b)(2)(ii) of this chapter) including any follow-up activities as required in § 245.6a(f)(6) of this chapter. \* \* \*

\* \* \* \* \*

(vi) Ensure that verification records are maintained as required by § 245.6a(i) of this chapter.

\* \* \* \* \*

**PART 245—DETERMINING ELIGIBILITY FOR FREE AND REDUCED PRICE MEALS AND FREE MILK IN SCHOOLS**

■ 1. The authority citation is revised to read as follows:

**Authority:** 42 U.S.C. 1752, 1758, 1759a, 1772, 1773, and 1779.

■ 2. In § 245.2, revise the definition of *Verification* to read as follows:

**§ 245.2 Definitions.**

\* \* \* \* \*

*Verification* means confirmation of eligibility for free or reduced price benefits under the National School Lunch Program or School Breakfast Program. Verification shall include confirmation of income eligibility and, at State or local discretion, may also include confirmation of any other information required in the application which is defined as *Documentation* in § 245.2. Such verification may be accomplished by examining information provided by the household such as wage stubs, or by other means as specified in § 245.6a(a)(7). If a Food Stamp Program or TANF case number or a FDPIR case number or other identifier is provided for a child, verification for such child shall only include confirmation that the child is a member of a household receiving food stamps, TANF or FDPIR benefits. Verification may also be completed through direct contact with one or more of the public agencies as specified in § 245.6a(g).

## ■ 3. In § 245.6a:

- a. revise paragraphs (a) and (b);
- b. redesignate paragraphs (c), (d) and (e) as paragraphs (h), (i) and (j), respectively;
- c. add new paragraphs (c), (d), (e), (f), and (g); and
- d. amend newly redesignated paragraph (h) by revising the first sentence.

The revisions and additions read as follows:

**§ 245.6a Verification requirements.**(a) *Definitions.*

(1) *Eligible programs.* For the purposes of this section, the following programs qualify as programs for which a case number may be provided in lieu of income information and that may be used for direct verification purposes:

(i) The Food Stamp Program established under the Food Stamp Act of 1977 (7 U.S.C. 2011 *et seq.*) as defined in § 245.2;

(ii) The Food Distribution Program on Indian Reservations (FDPIR) as defined in § 245.2; and

(iii) A State program funded under the program of block grants to States for temporary assistance for needy families (TANF) as defined in § 245.2.

(2) *Error prone application.* For the purposes of this section, “error prone application” means an approved household application that indicates monthly income within \$100 or annual income within \$1,200 of the applicable income eligibility limit for free or for reduced meals.

(3) *Non-response rate.* For the purposes of this section, “non-response

rate” means the percentage of approved household applications for which verification information was not obtained by the local educational agency after verification was attempted. The non-response rate is reported on the FNS-742 in accordance with paragraph (h) of this section.

(4) *Official poverty line.* For the purposes of this section, “official poverty line” means that described in section 1902(l)(2)(A) of the Social Security Act (42 U.S.C. 1396a(l)(2)(A)).

(5) *Sample size.* For the purposes of this section, “sample size” means the number of approved applications that a local educational agency is required to verify based on the number of approved applications on file as of October 1 of the current school year.

(6) *School year.* For the purposes of this section, a school year means a period of 12 calendar months beginning July 1 of any year and ending June 30 of the following year.

(7) *Sources of information.* For the purposes of this section, sources of information for verification may include written evidence, collateral contacts, and systems of records as follows:

(i) Written evidence shall be used as the primary source of information for verification. Written evidence includes written confirmation of a household’s circumstances, such as wage stubs, award letters, and letters from employers. Whenever written evidence is insufficient to confirm income information on the application or current eligibility, the local educational agency may require collateral contacts.

(ii) Collateral contacts are verbal confirmations of a household’s circumstances by a person outside of the household. The collateral contact may be made in person or by phone. The verifying official may select a collateral contact if the household fails to designate one or designates one which is unacceptable to the verifying official. If the verifying official designates a collateral contact, the contact shall not be made without providing written or oral notice to the household. At the time of this notice, the household shall be informed that it may consent to the contact or provide acceptable documentation in another form. If the household refuses to choose one of these options, its eligibility shall be terminated in accordance with the normal procedures for failure to cooperate with verification efforts. Collateral contacts could include employers, social service agencies, and migrant agencies.

(iii) Agency records to which the State agency or local educational agency may have access are not considered collateral

contacts. Information concerning income, household size, or Food Stamp Program, FDPIR, or TANF eligibility maintained by other government agencies to which the State agency, the local educational agency or school can legally gain access may be used to confirm a household’s income, size, or receipt of benefits. Information may also be obtained from individuals or agencies serving the homeless, as defined under section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)); administering a runaway and homeless youth grant program, as established under the Runaway and Homeless Youth Act (42 U.S.C. 5701); or serving migratory children, as they are defined in section 1309 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6399). Agency records may be used for verification conducted after the household has been notified of its selection for verification or for the direct verification procedures in paragraph (g) of this section. Any information derived from other agencies must be used in accordance with the provisions concerning use and disclosure of eligibility information found in § 245.6(f) through (i) of this part.

(iv) Households which dispute the validity of income information acquired through collateral contacts or a system of records shall be given the opportunity to provide other documentation.

(b) *Deadline and extensions for local educational agencies.*

(1) *Deadline.* The local education agency must complete the verification efforts specified in paragraph (c) of this section not later than November 15 of each school year.

(2) *Deadline extensions.*

(i) The local educational agency may request an extension of the November 15 deadline, in writing, from the State agency. The State agency may approve an extension up to December 15 of the current school year due to natural disaster, civil disorder, strike or other circumstances that prevent the local educational agency from timely completion of verification activities.

(ii) In the case of natural disaster, civil disorder or other local conditions, USDA may substitute alternatives for the verification deadline in paragraph (b)(1) of this section.

(3) *Beginning verification activities.*

The local educational agency may conduct verification activity once it begins the application approval process for the current school year and has approved applications on file. However, the final required sample size must be based on the number of approved applications on file as of October 1.

(c) *Verification requirement.*

(1) *General.* The local educational agency must verify eligibility of children in a sample of household applications approved for free and reduced price meal benefits for that school year.

(i) A State may, with the written approval of FNS, assume responsibility for complying with the verification requirements of this section on behalf of its local educational agencies. When assuming such responsibility, States may qualify, if approved by FNS, to use one of the alternative sample sizes provided for in paragraph (c)(4) of this section if qualified under paragraph (d) of this section.

(ii) An application must be approved if it contains the essential documentation specified in the definition of *Documentation* in § 245.2 and, if applicable, the household meets the income eligibility criteria for free or reduced price benefits. Verification efforts must not delay the approval of applications.

(2) *Exceptions from verification.*

Verification is not required in residential child care institutions; in schools in which FNS has approved special cash assistance claims based on economic statistics regarding per capita income; or in schools in which all children are served with no separate charge for food service and no special cash assistance is claimed. Local educational agencies in which all schools participate in the special assistance certification and reimbursement alternatives specified in § 245.9 shall meet the verification requirement only in those years in which applications are taken for all children in attendance. Verification of eligibility is not required of households if all children in the household are determined eligible based on documentation provided by the State or local agency responsible for the administration of the Food Stamp Program, FDPIR or TANF or if all children in the household are determined to be homeless, as defined under section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)); served by a runaway and homeless youth grant program established under the Runaway and Homeless Youth Act (42 U.S.C. 5701); or are migratory as defined in section 1309 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6399).

(3) *Standard sample size.* Unless eligible for an alternative sample size under paragraph (d) of this section, the sample size for each local educational agency shall equal the lesser of:

(i) Three (3) percent of all applications approved by the local educational agency for the school year, as of October 1 of the school year, selected from error prone applications; or

(ii) 3,000 error prone applications approved by the local educational agency for the school year, as of October 1 of the school year.

(iii) Local educational agencies shall not exceed the standard sample size in paragraphs (c)(3)(i) or (c)(3)(ii) of this section, as applicable, and, unless eligible for one of the alternative sample sizes provided in paragraph (c)(4) of this section, the local educational agency shall not use a smaller sample size than those in paragraphs (c)(3)(i) or (c)(3)(ii) of this section, as applicable.

(iv) If the number of error-prone applications exceeds the required sample size, the local educational agency shall select the required sample at random, *i.e.*, each application has an equal chance of being selected, from the total number of error-prone applications.

(4) *Alternative sample sizes.* If eligible under paragraph (d) of this section for an alternative sample size, the local educational agency may use one of the following alternative sample sizes:

(i) *Alternative One.* The sample size shall equal the lesser of:

(A) 3,000 of all applications selected at random from applications approved by the local educational agency as of October 1 of the school year; or

(B) Three (3) percent of all applications selected at random from applications approved by the local educational agency as of October 1 of the school year.

(ii) *Alternative Two.* The sample size shall equal the lesser of the sum of:

(A) 1,000 of all applications approved by the local educational agency as of October 1 of the school year, selected from error prone applications or

(B) One (1) percent of all applications approved by the local educational agency as of October 1 of the school year, selected from error prone applications PLUS

(C) The lesser of:

(1) 500 applications approved by the local educational agency as of October 1 of the school year that provide a case number in lieu of income information showing participation in an eligible program as defined in paragraph (a)(1) of this section; or

(2) One-half (½) of one (1) percent of applications approved by the local educational agency as of October 1 of the school year that provide a case number in lieu of income information showing participation in an eligible

program as defined in paragraph (a)(1) of this section.

(5) *Completing the sample size.* When there are an insufficient number of error prone applications or applications with case number to meet the sample sizes provided for in paragraphs (c)(3) or (c)(4) of this section, the local educational agency shall select, at random, additional approved applications to comply with the specified sample size requirements.

(6) *Local conditions.* In the case of natural disaster, civil disorder, strike or other local conditions as determined by FNS, FNS may substitute alternatives for the sample size and sample selection criteria in paragraphs (c)(3) and (c)(4) of this section.

(7) *Verification for cause.* In addition to the required verification sample, local educational agencies must verify any questionable application and should, on a case-by-case basis, verify any application for cause such as an application on which a household reports zero income or when the local educational agency is aware of additional income or persons in the household. Any application verified for cause is not considered part of the required sample size. If the local educational agency verifies a household's application for cause, all verification procedures in this section must be followed.

(d) *Eligibility for alternative sample sizes.*

(1) *State agency oversight.* At a minimum, the State agency shall establish a procedure for local educational agencies to designate use of an alternative sample size and may set a deadline for such notification. The State agency may also establish criteria for reviewing and approving the use of an alternative sample size, including deadlines for submissions.

(2) *Lowered non-response rate.* Any local educational agency is eligible to use one of the alternative sample sizes in paragraph (c)(4) of this section for any school year when the non-response rate for the preceding school year is less than twenty percent.

(3) *Improved non-response rate.* A local educational agency with more than 20,000 children approved by application as eligible for free or reduced price meals as of October 1 of the school year is eligible to use one of the alternative sample sizes in paragraph (c)(4) of this section for any school year when the non-response rate for the preceding school year is at least ten percent below the non-response rate for the second preceding school year.

(4) *Continuing eligibility for alternative sample sizes.* The local

educational agency must annually determine if it is eligible to use one of the alternative sample sizes provided in paragraph (c)(4) of this section. If qualified, the local educational agency shall contact the State agency in accordance with procedures established by the State agency under paragraph (d)(1) of this section.

(e) *Activities prior to household notification.*

(1) *Confirmation of a household's initial eligibility.*

(i) Prior to conducting any other verification activity, an individual, other than the individual who made the initial eligibility determination, shall review for accuracy each approved application selected for verification to ensure that the initial determination was correct. If the initial determination was correct, the local educational agency shall verify the approved application. If the initial determination was incorrect, the local educational agency must:

(A) If the eligibility status changes from reduced price to free, make the increased benefits immediately available and notify the household of the change in benefits; the local educational agency will then verify the application;

(B) if the eligibility status changes from free to reduced price, first verify the application and then notify the household of the correct eligibility status after verification is completed and, if required, send the household a notice of adverse action in accordance with paragraph (j) of this section; or

(C) if the eligibility status changes from free or reduced price to paid, send the household a notice of adverse action in accordance with paragraph (j) of this section and do not conduct verification on this application and select a similar application (for example, another error-prone application) to replace it.

(ii) The requirements in paragraph (e)(1)(i) of this section are waived if the local educational agency is using a technology-based system that demonstrates a high level of accuracy in processing an initial eligibility determination based on the income eligibility guidelines for the National School Lunch Program. Any local educational agency that conducts a confirmation review of all applications at the time of certification meets this requirement. The State agency may request documentation to support the accuracy of the local educational agency's system. If the State agency determines that the technology-based system is inadequate, it may require that the local educational agency conduct a

confirmation review of each application selected for verification.

(2) *Replacing applications.* The local educational agency may, on a case-by-case basis, replace up to five percent of applications selected and confirmed for verification. Applications may be replaced when the local educational agency determines that the household would be unable to satisfactorily respond to the verification request. Any application removed shall be replaced with another approved application selected on the same basis (*i.e.*, an error-prone application must be substituted for a withdrawn error-prone application).

(f) *Verification procedures and assistance for households.*

(1) *Notification of selection.* Other than households verified through the direct verification process in paragraph (g) of this section, households selected for verification shall be provided written notice that their applications were selected for verification and that they are required, by such date as determined by the local educational agency, to submit the requested information to verify eligibility for free or reduced price meals. Any communications with households concerning verification must be in an understandable and uniform format and, to the maximum extent practicable, in a language that parents and guardians can understand. The written notice shall also include a telephone number for assistance in accordance with paragraph (f)(5) of this section. These households shall be advised of the type or types of information and/or documents acceptable to the school. This information must include a social security number for each adult household member or an indication that such member does not have one. Local educational agencies must inform selected households that:

(i) Section 9 of the Richard B. Russell National School Lunch Act requires that, unless the child's Food Stamp Program/FDPIR case number or other FDPIR identifier or TANF case number was provided, households selected for verification must provide the social security number of each adult household member;

(ii) In an adult member does not possess a social security number, that adult member must indicate that s/he does not possess one;

(iii) Provision of a social security number is not mandatory but if a social security number is not provided for each adult household member or an indication is not made that he/she does not possess one, benefits will be terminated;

(iv) The social security numbers may be used to identify household members in carrying out efforts to verify the correctness of information stated on the application and continued eligibility for the program. These verification efforts may be carried out through program reviews, audits, and investigations and may include contacting offices administering means-tested programs or the State employment security office and checking documentation produced by household members to prove the amount of income received. These verification efforts may also include contacting employers to determine income.

(v) The provisos in paragraphs (f)(1)(i) through (f)(1)(iv) of this section must be provided to the attention of each adult household member disclosing his/her social security number. State agencies and local educational agencies must ensure that the notice complies with section 7 of Public Law 93-579 (Privacy Act of 1974).

(vi) Households notified of their selection for verification must also be informed that, in lieu of any information that would otherwise be required, they can submit proof that the children are members of a household receiving assistance under the Food Stamp Program, FDPIR or TANF as described in paragraph (f)(3) of this section to verify the free meal eligibility of a child who is a member of a household receiving assistance under the Food Stamp Program, FDPIR or TANF household. Households must also be informed that, in lieu of any information that would otherwise be required, they may request that the local educational agency contact the appropriate officials to confirm that their children are homeless, as defined under section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)); are served by a runaway and homeless youth grant program established under the Runaway and Homeless Youth Act (42 U.S.C. 5701 *et seq.*); or are migratory as defined in section 1309 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6399). Households notified of their selection for verification shall be advised that failure to cooperate with verification efforts will result in the termination of benefits.

(2) *Documentation timeframe.*

Households selected and notified of their selection for verification must provide documentation of income. The documentation must indicate the source, amount and frequency of all income and can be for any point in time between the month prior to application for school meal benefits and the time

the household is requested to provide income documentation.

(3) *Food Stamp FDPIR or TANF recipients.* On applications where households have furnished Food Stamp Program or TANF case numbers or FDPIR case numbers or other FDPIR identifiers, verification shall be accomplished by confirming with the Food Stamp Program, FDPIR, or TANF office that at least one child who is eligible because a case number was furnished, is a member of a household participating in one of the eligible programs in paragraph (a)(1) of this section. The household may also provide a copy of "Notice of Eligibility" for the Food Stamp Program, FDPIR or the TANF Program or equivalent official documentation issued by the Food Stamp Program, FDPIR or TANF office which confirms that at least one child who is eligible because a case number was provided is a member of a household receiving assistance under the Food Stamp Program, FDPIR or the TANF program. An identification card for these programs is not acceptable as verification unless it contains an expiration date. If it is not established that at least one child is a member of a household receiving assistance under the Food Stamp Program, FDPIR or the TANF program (in accordance with the timeframe in paragraph (f)(2) of this section), the procedures for adverse action specified in paragraph (j) of this section must be followed.

(4) *Household cooperation.* If a household refuses to cooperate with efforts to verify, eligibility for free or reduced price benefits shall be terminated in accordance with paragraph (j) of this section. Households which refuse to complete the verification process and which are consequently determined ineligible for such benefits shall be counted toward meeting the local educational agency's required sample of verified applications.

(5) *Telephone assistance.* The local educational agency shall provide a telephone number to households selected for verification to call free of charge to obtain information about the verification process. The telephone number must be prominently displayed on the letter to households selected for verification.

(6) *Followup attempts.* The local educational agency shall make at least one attempt to contact any household that does not respond to a verification request. The attempt may be through a telephone call, e-mail, mail or in person and must be documented by the local educational agency. Non-response to the initial request for verification includes no response and incomplete or

ambiguous responses that do not permit the local educational agency to resolve the children's eligibility for free or reduced price meal and milk benefits. The local educational agency may contract with another entity to conduct followup activity in accordance with § 210.21 of this chapter, the use and disclosure of information requirements of the Richard B. Russell National School Lunch Act and this section.

(7) *Eligibility changes.* Based on the verification activities, the local educational agency shall make appropriate modifications to the eligibility determinations made initially. The local educational agency must notify the household of any change. Households must be notified of any reduction in benefits in accordance with paragraph (j) of this section. Households with reduced benefits or that are longer eligible for free or reduced price meals must be notified of their right to reapply at any time with documentation of income or participation in one of the eligible programs in paragraph (a)(1) of this section.

(g) *Direct verification.* Local educational agencies may conduct direct verification activities with the eligible programs defined in paragraph (a)(1) of this section and with the public agency that administers the State plan for medical assistance under title XIX of the Social Security Act (42 U.S.C. 1396 *et seq.*), (Medicaid), and under title XXI of the Social Security Act (42 U.S.C. 1397aa *et seq.*), the State Children's Health Insurance Program (SCHIP) as defined in § 245.2. Records from the public agency may be used to verify income and program participation. The public agency's records are subject to the timeframe in paragraph (g)(5) of this section. Direct verification must be conducted prior to contacting the household for documentation.

(1) *Names submitted.* The local educational agency must only submit the names of school children certified for free or reduced price meal benefits or free milk to the agency administering an eligible program, the Medicaid program or the SCHIP program. Names and other identifiers of adult or non-school children must not be submitted for direct verification purposes.

(2) *Eligible programs.* If information obtained through direct verification of an application for free or reduced price meal benefits indicates a child is participating in one of the eligible programs in paragraph (a)(1) of this section, no additional verification is required.

(3) *States with Medicaid Income Limits of 133%.* In States in which the income eligibility limit applied in the

Medicaid program or in SCHIP is not more than 133% of the official poverty line or in States that otherwise identify households that have income that is not more than 133% of the official poverty line, records from these agencies may be used to verify eligibility. If information obtained through direct verification with these programs verifies the household's eligibility status, no additional verification is required.

(4) *States with Medicaid Income Limits between 133%–185%.* In States in which the income eligibility limit applied in the Medicaid program or in SCHIP exceeds 133% of the official poverty line, direct verification information must include either the percentage of the official poverty line upon which the applicant's Medicaid participation is based or Medicaid income and Medicaid household size in order to determine that the applicant is either at or below 133% of the Federal poverty line, or is between 133% and 185% of the Federal poverty line. Verification for children approved for free meals is complete if Medicaid data indicates that the percentage is at or below 133% of the Federal poverty line. Verification for children approved for reduced price meals is complete if Medicaid data indicates that the percentage is at or below 185% of the Federal poverty line. If information obtained through direct verification with these programs verifies eligibility status, no additional verification is required.

(5) *Documentation timeframe.* For the purposes of direct verification, documentation must be the most recent available but such documentation must indicate eligibility for participation or income within the 180-day period ending on the date of application. In addition, local educational agencies may use documentation, which must be within the 180-day period ending on the date of application, for any one month or for all months in the period from the month prior to application through the month direct verification is conducted. The information provided only needs to indicate eligibility for participation in the program at that point in time, not that the child was certified for that program's benefits within the 180-day period.

(6) *Incomplete information.* If it is the information provided by the public agency does not verify eligibility, the local educational agency must conduct verification in accordance with paragraph (f) of this section. In addition, households must be able to dispute the validity of income information acquired through direct verification and shall be



given the opportunity to provide other documentation.

(h) *Verification reporting and recordkeeping requirements.* By March 1, each local educational agency must report information related to its annual statutorily required verification activity, which excludes verification conducted in accordance with paragraph (c)(7) of this section, to the State agency in accordance with guidelines provided by FNS.

\* \* \* \* \*

Dated: December 8, 2008.

**Nancy Montanez Johner,**

*Under Secretary Food, Nutrition and Consumer Services.*

[FR Doc. E8-29904 Filed 12-17-08; 8:45 am]

BILLING CODE 3410-30-P

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 7 CFR Part 319

[Docket No. APHIS-2007-0111]

RIN 0579-AC87

#### Importation of Ash Plants

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Affirmation of interim rule as final rule.

**SUMMARY:** We are adopting as a final rule, without change, an interim rule that amended the regulations governing the importation of nursery stock to prohibit or restrict the importation of ash (*Fraxinus* spp.) plants for planting, except seed, from all foreign countries except for certain areas in Canada that are not regulated areas for emerald ash borer. The interim rule was necessary to prevent further introductions of emerald ash borer into the United States and to prevent the artificial spread of this destructive plant pest.

**DATES:** Effective on December 18, 2008, we are adopting as a final rule the interim rule published at 73 FR 54665-54667 on September 23, 2008.

**FOR FURTHER INFORMATION CONTACT:** Dr. Arnold Tschanz, Senior Risk Manager, Commodity Import Analysis and Operations, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737-1231; (301) 734-5306.

#### SUPPLEMENTARY INFORMATION:

##### Background

The emerald ash borer (EAB, *Agilus planipennis*) is a highly destructive wood-boring insect that attacks ash trees

(*Fraxinus* spp., including green ash, white ash, black ash, and several horticultural varieties of ash). The insect, which is indigenous to Asia and known to occur in China, Korea, Japan, Mongolia, the Russian Far East, and Taiwan, eventually kills healthy ash trees after it bores beneath their bark and disrupts their vascular tissues. We do not know the full extent of the distribution of EAB throughout Asia and in other regions, nor do we know if there are other serious plant pests affecting *Fraxinus* spp. plants for planting present elsewhere in the world.

The regulations in 7 CFR part 319, "Foreign Quarantine Notices," prohibit or restrict the importation of certain plants and plant products to prevent the introduction or dissemination of plant pests and noxious weeds in the United States. In an interim rule<sup>1</sup> effective and published in the **Federal Register** on September 23, 2008 (73 FR 54665-54667, Docket No. APHIS-2007-0111), we amended the regulations in § 319.37-2(a) to prohibit imports of ash (*Fraxinus* spp.) plants for planting, except seed, from all foreign countries, with the exception of areas of Canada that are not regulated for EAB. To reflect that prohibition, we also amended § 319.37-7(a)(3) by removing *Fraxinus* spp. from the list of plants requiring postentry quarantine.

Comments on the interim rule were required to be received on or before November 24, 2008. We received one comment by that date. The comment was from a State entomologist who expressed support for the interim rule. Therefore, for the reasons given in the interim rule, we are adopting the interim rule as a final rule without change.

This action also affirms information contained in the interim rule concerning Executive Order 12866 and the Regulatory Flexibility Act, Executive Order 12988, and the Paperwork Reduction Act. Further, for this action, the Office of Management and Budget has waived its review under Executive Order 12866.

#### List of Subjects in 7 CFR Part 319

Coffee, Cotton, Fruits, Imports, Logs, Nursery stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

<sup>1</sup>To view the interim rule and the comment we received, go to <http://www.regulations.gov/jdmspublic/component/main?main=DocketDetail&d=APHIS-2007-0111>.

## PART 319—FOREIGN QUARANTINE NOTICES

■ Accordingly, we are adopting as a final rule, without change, the interim rule that amended 7 CFR part 319 and that was published at 73 FR 54665-54667 on September 23, 2008.

Done in Washington, DC, this 12th day of December 2008.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. E8-30077 Filed 12-17-08; 8:45 am]

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## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 7 CFR Part 319

[Docket No. APHIS-2007-0144]

RIN 0579-AC76

#### Importation of Baby Squash and Baby Courgettes From Zambia

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** We are amending the fruits and vegetables regulations to allow the importation into the continental United States of baby squash and baby courgettes from Zambia. As a condition of entry, both commodities must be produced in accordance with a systems approach that includes requirements for pest exclusion at the production site, fruit fly trapping inside and outside the production site, and pest-excluding packinghouse procedures. Both commodities must also be accompanied by a phytosanitary certificate with an additional declaration stating that the baby squash or baby courgettes have been produced in accordance with the requirements of the systems approach. This action will allow the importation of baby squash and baby courgettes from Zambia into the United States while continuing to provide protection against the introduction of quarantine pests.

**DATES:** Effective Date: January 20, 2009.

**FOR FURTHER INFORMATION CONTACT:** Shirley Wager Page, Branch Chief, Commodity Import Analysis and Operations, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737-1231; (301) 734-8758.

#### SUPPLEMENTARY INFORMATION:

##### Background

The regulations in "Subpart-Fruits and Vegetables" (7 CFR 319.56 through