

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

#### 7 CFR Parts 211 and 235

RIN 0584-AD96

#### Fresh Fruit and Vegetable Program

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

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would establish the basic requirements for the operation of the Fresh Fruit and Vegetable Program (FFVP) in conformance with the Richard B. Russell National School Lunch Act. It would set forth administrative and operational requirements for FFVP operators at the State and local levels. The intent of these provisions is to ensure that the FFVP encourages the consumption of fresh fruits and vegetables by elementary school children, thus improving their dietary habits and long-term health.

**DATES:** To be assured of consideration, comments on this proposed rule must be received by the Food and Nutrition Service on or before April 24, 2012.

**ADDRESSES:** The Food and Nutrition Service (FNS) invites interested persons to submit comments on this proposed rule. Comments may be submitted by any of the following methods:

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

- *Mail:* Send comments to Julie Brewer, Chief, Policy and Program Development Branch, Child Nutrition Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Room 634, Alexandria, Virginia 22302, (703) 703-305-2590.

All comments submitted in response to this proposed 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 identities of the individuals or entities

submitting the comments will be subject to public disclosure. All written submissions will be available for public inspection at the address above during regular business hours (8:30 a.m. to 5 p.m.) Monday through Friday.

**FOR FURTHER INFORMATION CONTACT:** Jim Herbert, Chief, Policy and Program Development Branch, Child Nutrition Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Room 634, Alexandria, Virginia 22302; telephone: (703) 305-2572.

#### SUPPLEMENTARY INFORMATION:

##### Background

The FFVP began as a pilot program funded by the Farm Security and Rural Investment Act of 2002 (Pub. L. 107-171) to determine the best practices for increasing fruit (both fresh and dried) and fresh vegetable consumption in schools. The pilot program limited participation to a maximum of 25 schools per state. Selected primary and secondary schools in Indiana, Ohio, Michigan, Iowa and the Zuni Tribe of New Mexico participated in the pilot and were provided funds to purchase and serve free fruits and vegetables during school year 2002-2003. An evaluation conducted after the first year of operation disclosed that schools considered the pilot to be a success and wanted to continue the Program beyond the pilot if funding were provided. The pilot demonstrated student acceptance and interest in fresh fruit and vegetable consumption.

The pilot's success led to expansion of the FFVP. Congress viewed the continuation and expansion of the pilot as a positive step to combat childhood overweight and obesity. The Child Nutrition and WIC Reauthorization Act of 2004 (Pub. L. 108-265) added Pennsylvania, North Carolina, Mississippi, and Washington, and two Indian Tribal Organizations in South Dakota and Arizona starting in school year 2004-2005. In addition, the Reauthorization Act of 2004 permanently authorized the FFVP in those States by adding section 18(g), the Fresh Fruit and Vegetable Program, to the Richard B. Russell National School Lunch Act (NSLA). Section 18(g) required, to the maximum extent practicable, the selection of low-income schools and established the statutory requirements for FFVP operation.

In 2006, the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act (Pub. L. 109-97), provided one-time funding to further expand the FFVP to Utah, Wisconsin, New Mexico, Texas, Connecticut and Idaho for one year. Subsequently, the Consolidated Appropriations Act of 2008 (Pub. L. 110-161) provided one time funding to expand the FFVP to add non-participating States, allowed FNS to reallocate recovered FFVP funds from previous years and for the first time provided funds for the Federal administration of the FFVP.

The Food, Conservation and Energy Act of 2008 (Pub. L. 110-234), also known as the Farm Bill, continued the Program and, most significantly, permanently authorized the FFVP as a nationwide program. In addition, other important changes were also made to the FFVP. It eliminated references to the FFVP in section 18(g) of the NSLA and transferred the program authorization and all operational procedures to section 19 of the NSLA. It established selection criteria, requiring State agencies to conduct outreach to schools serving low income students and to select those schools with the highest number of students certified for free or reduced-price meals for participation in the FFVP. It also provided a significant funding increase, established a funding formula, and, for the first time, provided funds for States to administer the FFVP. The statute also made dried fruit ineligible to be served in the Program. Prior to the 2008 Farm Bill, the FFVP was available to secondary schools. The 2008 Farm Bill limited program participation to elementary schools beginning in school year 2010-2011. Additionally, the number of schools that a State agency can select to participate in the FFVP is no longer limited to 25 schools per state as was required in the pilot program and subsequent legislation. The Program continues to operate on a reimbursement basis and many of the responsibilities of the State agencies remain the same.

Based upon the record of continued support and expansion of the FFVP, the Program is highly regarded by Members of Congress, nutrition advocates, the health care community, parents and students. It is perceived as an effective strategy to help school children develop positive dietary habits during their

formative years. The Program is also of interest to farm to school advocates because it provides opportunities to link schools with local farms and increase children's access to fresh fruit and vegetables in schools. Most children do not achieve the recommended intakes of fruits and vegetables. Fruits and vegetables provide a variety of micronutrients and fiber and, therefore, are one of the key food groups emphasized by the 2010 Dietary Guidelines for Americans to maintain overall health and reduce the risk of chronic diseases, overweight and obesity.

The Farm Bill directed FNS to conduct an evaluation of the FFVP. The principle objectives of this evaluation are to determine whether children increase consumption of fruits and vegetables as a result of their participation in the FFVP and experience other dietary changes, such as a decrease in the consumption of less nutritious foods, as a result of their FFVP participation. Additionally, the evaluation will look at FFVP implementation and assess the role that additional factors—such as characteristics of schools selected for the program, method of fruit and vegetable distribution, level and role of nutrition education, etc.—may have with regard to the FFVP's impact on the dietary intake of participating children. An interim evaluation report was delivered to Congress in September.<sup>1</sup> That report finds that students consume an additional ¼ cup of fruits and vegetables, on average, on days when the program is operating. That is nearly 15 percent higher than average fruit and vegetable consumption of children in non-FFVP schools. In addition, the report finds no statistically significant increase in total calorie consumption by program participants. That finding suggests that fruits and vegetables are replacing other foods in the diets of participating children, rather than adding excess calories. The report is available on the FNS Web site at <http://www.fns.usda.gov/ora/MENU/Published/CNP/cnp.htm>.

### Major Provisions of the Proposed Rule

This proposed rule reflects the statutory requirements found in section 19 of the NSLA and the policy memoranda issued by FNS to implement the changes prompted by the 2008 Farm Bill. Although the statutory

requirements are already implemented, this proposed rule would set forth the regulatory requirements which will be codified upon adoption of a final rule. This preamble also discusses a few additional parameters established by FNS to ensure that the FFVP is administered similarly to the National School Lunch Program (NSLP) and School Breakfast Program (SBP), when appropriate, and in accordance with applicable Federal requirements.

This proposed rule would establish requirements for the administration and operation of the FFVP consistent with section 19 of the NSLA. FNS is seeking public comments that will help the agency establish regulatory requirements that reflect the intent of the law and are feasible for States and local program operators. Following the public comment period, FNS will issue a final rule to codify the program requirements in Title 7, Part 211 of the Code of Federal Regulations. While the rulemaking process is underway, State and local operators must continue to follow implementation memoranda and guidance materials issued by FNS based on section 19 of the NSLA.

### Program Administration

#### *Addendum to the Federal/State Agreement*

The FFVP is administered by FNS in collaboration with the State agencies responsible for the NSLP. In cases in which the State agency is not permitted by their State law to disburse funds paid to it under the Richard B. Russell National School Lunch Act (42 U.S.C. 1759), administration of the Program shall be in accordance with § 210.3 of the NSLP regulations. Section 211.3(b) of this proposed rule would require each State agency to amend its permanent Federal/State agreement to include administration of the FFVP. State agencies may use the prototype addendum in FNS memorandum SP 31–2008, which was issued to the State agencies on July 11, 2008. The FFVP would be administered by the State agencies as the NSLP and the SBP are administered. Unlike the pilot, during which State agencies worked directly with participating schools, this proposed rule requires that the State agencies work with School Food Authorities (SFAs) that are charged with administering the FFVP in the State. SFAs would be responsible for administering the program in their participating schools, including training such schools in the requirements of the Program as well as approving, consolidating and submitting monthly reimbursement claims to the State

agency for all participating schools, as they do in the NSLP and the SBP.

### Funding

Program funding is available to all State agencies on a school year basis to reimburse school food authorities for the service of fresh fruit and vegetables in selected elementary schools. Section 19 of the NSLA provides funding as follows: \$101 million for school year 2010–2011; and \$150 million for school year 2011–2012. For the subsequent school years, funding is based on the amount received in the preceding year, adjusted to reflect changes in the Consumer Price Index for the 12-month period ending the preceding April 30. Funds for Federal administration of the Program (\$500,000) are deducted from the available funding before allocating funds to each State agency.

The amount received by each State agency is based on the funding formula established in section 19 of the NSLA, which provides a minimum annual grant of 1 percent of the available funds to each State and the District of Columbia. Remaining funds are allocated to each State, the District of Columbia, Guam, Puerto Rico and the Virgin Islands based on the percentage of their population in relation to the United States total population. In States in which FNS administers the program in some or all schools, FNS shall have available applicable funds to administer and operate the program. In terms of administrative funds, it is proposed that for FNS Regional Office Administered Programs (ROAPs), funding for the FFVP would be determined by the proportion of the number of schools participating in the FFVP administered by the State agency compared to the number of schools participating in the FFVP administered by the FNS Regional Office. The funding provisions are in § 211.4 of the proposed regulatory text.

Under the proposed rule, each State agency would determine how to administer the FFVP within its existing personnel structure, workload, and other factors. A State agency would be allowed to set aside a portion of their total annual grant to cover the cost of State agency administration of the Program. As stated in § 211.6 of the proposed regulatory text, such an amount would be the lesser of 5 percent of the State agency's total FFVP funding for the school year or the amount required to pay the cost of one full-time coordinator for the Program, as included in the language of the Farm Bill. These options are intended to assist the State agency in developing a reasonable estimate for State agency costs of administering the FFVP. However, the

<sup>1</sup> Lauren Olsho, Jacob Klerman, and Susan Bartlett, *Food and Nutrition Service Evaluation of the Fresh Fruit and Vegetable Program (FFVP): Interim Evaluation Report*. Abt Associates, September 2011. <http://www.fns.usda.gov/ora/MENU/Published/CNP/cnp.htm>.

statute does not require that the State agency employ a full-time program coordinator. The amount of funds required for State administrative costs would have to be determined prior to selecting schools or allocating FFVP funds for schools. A State agency would also have the option of retaining no FFVP funds for State administrative costs, or may retain less State administrative funding than the formula allows, in order to increase the availability of Program funds for the purchase of fresh fruits and vegetables by the schools. In addition, this rule proposes to amend 7 CFR part 235, State Administrative Expense Funds, to allow the use of SAE funds for the administration of the FFVP. The FFVP is an eligible program, since it is authorized under the NSLA. If such funds are used for the administration of the FFVP, all necessary requirements for the use of such funds shall be followed in accordance with 7 CFR part 235.

To enable State agencies to administer the Program on a fiscal year basis, like other Child Nutrition Programs, FNS would provide Program funds in two allocations on or around July 1st and October 1st of each year. The July allocation would be a small portion of each State's total allocation and would reflect what the State and schools anticipate that they will expend or obligate for the first quarter of the school year. The October allocation would consist of the remaining balance of the State's grant. States would be required to expend or obligate the July and October allocations by the following September 30. For example, funds allocated to the States on July 1, 2011 would have to be obligated or expended by September 30, 2011 (the following September 30). Subsequent funds allocated in October of 2011 shall be obligated or expended by the following September 30, 2012. A state's unobligated funds would be returned to the Program and reallocated at a later date. . The provisions on funding allocation are found in § 211.5 of the proposed regulatory text.

As provided by statute, each State agency will determine the distribution of funds to each school and provide Program funding to those schools through the SFAs. Each school selected to participate in the FFVP would be allotted funds based on a per-student amount. As required by the statute, funding for participating schools must equal an amount of no less than \$50 and not more than \$75 per child per school year. Schools would be required to submit expenditure data to the SFA. SFAs would be required to consolidate school expenditure information and

submit their claims for reimbursement to the State agency on a monthly basis.

As provided in § 211.5(a)(1)(iii) and § 211.5(a)(2)(ii), respectively, participating SFAs must ensure that funds are allocated to participating schools for the school year and any unobligated or unspent funds will be recovered for reallocation in a future school year.

#### **Outreach to Schools Serving Low Income Children**

Prior to selecting schools for participation in the Program, section 19 of the NSLA requires that each State agency conduct outreach to schools serving the highest percentage of children certified for free and reduced price meals. Outreach would be conducted on a schedule that would enable the school application and selection processes to be completed in a timely manner to ensure that the selected schools are able to offer the Program at the start of the school year.

It is recognized that available funding may not be sufficient to institute the FFVP in each of the schools that have a student population where at least 50 percent of the enrolled students are certified eligible for free or reduced price school meals. Since the statute requires that participation priority be given to schools serving the highest percentage of free and reduced price certified students, State agencies should rank their schools starting with those at which 100 percent of the students are certified for free and reduced-price meals down to those in which 50 percent of the students are certified for free and reduced-price meals in order to actively target the most needy schools. In States in which FNS operates Regional Office Administered Programs (ROAPs), it is proposed that the State agency coordinate the ranking of schools with FNS to determine the number of ROAP schools that may be eligible for the FFVP in the State and for which outreach activities shall be targeted. States may actively target those elementary schools with the highest need to encourage participation in the Program. States that have more low-income elementary schools than could possibly be funded may choose to contact only those schools with the highest documented need. Schools with fewer than 50 percent of their students certified for free and reduced-price meals that meet the other FFVP eligibility criteria would only be considered for participation in the Program after all schools with higher documented percentages of free and reduced price student populations that applied for FFVP have been selected for

participation in the Program. Section 211.10(c)(2) proposes that such schools must be ranked in order of the percentage of free and reduced price certified students that they serve and be selected for participation in the FFVP on that basis.

Targeting schools with the highest need is one of the key statutory requirements in section 19 of the NSLA. Compliance with this requirement is nondiscretionary. This statutory requirement cannot be waived to give all schools in a State an equal chance to participate in the Program or to avoid restricting the Program to a few areas. Requiring outreach to schools that serve low income children is feasible because State agencies have access to the free and reduced-price data from all participating SFAs and should be able to easily target the elementary schools with the highest need. The SFAs may assist the State agencies with this outreach process. The outreach provision is found in § 211.10 of the proposed regulatory text.

#### **School Selection**

The intent of Congress to target Program participation to those elementary schools that serve the highest percentage of low income students precludes the use of a competitive process for selecting schools for participation in the FFVP. State agencies would be required to use the criteria specified in § 211.10 to select schools for participation in the Program. An inadequate or incomplete application from a school with a high free and reduced price certified enrollment may not be a reason to reject an application from such a school. As part of the outreach effort, a State agency would be required to assist eligible schools in meeting the application requirements for participation. However, SFAs or schools that have been documented as being deficient in managing FNS programs or there have been administrative findings documenting violations of the requirements of any FNS programs shall not be authorized to operate the FFVP.

Each State agency would be responsible for ensuring that the FFVP reaches elementary schools with the highest percentage of students certified as eligible for free and reduced-price meals. This is a key, nondiscretionary selection criterion that ensures that Program benefits are targeted in accordance with Congressional intent.

In order to determine the number of elementary schools that can be funded each year, section 19 of the NSLA requires State agencies to establish a per-student allocation. As required by

law, the per-student allocation shall not be less than \$50 or more than \$75 per school year. The State agency would be allowed to set a different per-student allocation for participating schools provided that the amount allotted per student is within the \$50–\$75 range established by law and the rationale for the differing allocations can be provided. In States in which FNS administers the program, ROAP schools in the State must be included when establishing such per-student funding allocations.

In summary, a State agency would need to consider the following criteria when selecting schools for participation in the Program:

- Only elementary schools that offer the NSLP may participate in the FFVP;
- Eligible schools must have at least 50 percent or more of their students certified as eligible for free and reduced-price school meals, except for those situations provided for in § 211.10(c)(2);
- Priority must be given to elementary schools with the highest need based upon the percentage of free and reduced-price children;
- Schools must submit an application for participation in the FFVP; and
- Schools must not have been documented as being deficient in managing any FNS program or there are no outstanding administrative findings documenting violations of the requirements of any FNS program.

#### Claims for Reimbursement

Prior to submission of a consolidated claim for reimbursement to the State agency, the SFA would review the FFVP expenditure information submitted to them by the participating schools to ensure that the FFVP expenses submitted by the schools are allowable. SFAs are required to maintain appropriate records to substantiate the claims submitted for reimbursement. As stated in § 211.9 of the proposed regulatory text, upon review, the State agency would be able to disallow payment for unallowable costs or disallow any claim that is otherwise inconsistent with the Program requirements.

#### Program Assistance and Monitoring

Other State agency functions would involve standard procedures found in all Child Nutrition Programs designed to ensure efficiency and integrity. As stated in § 211.14 of the proposed regulatory text, the State agency would be required to provide training and technical assistance to enable schools to operate the Program correctly. The State agency would review a participating school in conjunction with any

administrative review or oversight activity they may conduct under the NSLP or SBP. FNS intends to provide guidance to facilitate State agency reviews of the FFVP.

Since the FFVP is a relatively simple program and FNS has already provided ample technical assistance and guidance through memoranda, conference calls, webinars and annual conferences, we expect minor need for corrective action and anticipate that technical assistance will suffice in most cases. However, this proposed rule would give the State agency authority to withhold payment and to suspend or terminate a school's participation in the FFVP due to repeated failure to meet Program requirements. See § 211.15 and § 211.16 of the proposed regulatory text.

#### Reporting and Recordkeeping

The State agency would be required to submit an annual report disclosing the number of schools that applied and the number of schools selected, the enrollment and percentage of free and reduced-price participation for each selected school as well as the per student allocation being made to each selected school. In addition, the State agency must provide the number of schools that applied for participation and were not selected and the percentage of certified free and reduced price eligible students served by such schools. This information would demonstrate that the Program is reaching schools with the highest need. The State agency would also be required to submit a quarterly financial status report (currently the SF–425) via the Food Programs Reporting System (FPRS). The SF–425 has been designated in FPRS for the FFVP. A final financial status report (SF–425) would also be submitted for each fiscal year. State agency recordkeeping retention requirements would be for the same period of time required in the NSLP, i.e., a minimum of three years. The proposed reporting and recordkeeping provisions are in § 211.11 of the proposed regulatory text.

#### Program Operation

##### *Agreement With State Agency*

An SFA is responsible for the operation of the FFVP in schools within its jurisdiction. SFAs would enter into a written agreement, or amend an existing written agreement, with the State agency to offer the FFVP in the selected schools in conformance with the requirements established by law, regulations and FNS guidance that reflects current program operations. As part of the agreement, the SFA would

commit to using funds primarily for the purchase of fresh fruits and vegetables, offering the Program separately from the NSLP and SBP at a minimum of twice a week, but as frequently as possible during the school week and integrating the Program with other wellness activities. These and other responsibilities that would be included in the agreement are listed in § 211.10 of the proposed regulatory text. The State agency would have authority to amend, suspend or terminate the agreement if an SFA or a school repeatedly fails to operate the Program in accordance with the provisions of the agreement and/or the requirements of this part.

#### School Application

Eligible schools that wish to participate in the Program would be required to submit an application through the SFA. Such applications shall be submitted by the SFA to the State agency for FFVP approval. At a minimum, the application submitted to the State agency shall contain the following information for each school applying for Program participation:

- The total number of students enrolled in the school and the percentage of those students certified as eligible for free and reduced-price meals;
- A certificate of support for participation in the FFVP signed by all of the following: (1) The school food manager, (2) the school principal, and (3) the district superintendent (or equivalent position); and
- A program implementation plan that includes efforts to integrate the FFVP with other efforts to promote children's health, nutrition and physical activity, and to reduce overweight and obesity in children.

In addition, as a part of the implementation plan, each school would be encouraged to include a description of partnership activities undertaken or planned to enhance the operation of the FFVP in the school. FNS has developed an on-line FFVP Toolkit for States to submit "Best Practices". Both the toolkit and the FFVP Handbook may be found at <http://www.fns.usda.gov/cnd/FFVP/toolkit.htm> and at <http://www.fns.usda.gov/cnd/FFVP/handbook.pdf>.

Schools are encouraged to develop partnerships with one or more entities that can provide non-Federal resources to the FFVP operating in the school. Such entities could include representatives of the fruit and vegetable industries, grocery stores, local colleges and universities and local health

promotion resources. The FFVP handbook specifically encourages schools to use training materials and develop partnerships with all entities to promote the goals of program.

SFAs submitting information on behalf of schools reapplying to the Program based on their continued high need would be allowed, at the discretion of the State agency, to simply update the information the State agency has on file rather than submit a complete application package. This would simplify the application process for the SFA, the returning school and the State agency. However, SFAs wishing to add new schools to the Program would be required to submit a complete application for such schools that include all of the required elements noted above.

Schools that demonstrate both compliance with the FFVP requirements outlined in the regulations and continue to meet the Program eligibility requirements may be reapproved to continue FFVP participation. However, this does not eliminate the need for the State agency to evaluate FFVP eligibility priority for schools on an annual basis to ensure that schools serving the highest percentage of free and reduced price certified students are provided the opportunity to participate in the FFVP, in accordance with the eligibility criteria established by statute.

#### **Publicizing the FFVP in School**

Once selected for participation, a school would be responsible for announcing the availability of free fresh fruits and vegetables to children within the school. If the school has a Head Start program, a split-session kindergarten class, or a child care center, the school would notify these groups as well. When publicizing the Program, it is important that schools note that the FFVP is *not* intended to serve teachers, parents or other adults who are in the school. The only exception to this prohibition against serving FFVP components to adults who are in the school concerns specific teachers. It is proposed that it be acceptable for teachers who are in the classroom with the children during the FFVP service to partake of the fruit or vegetable being served to the children in order to reinforce the nutrition education message of the FFVP. Anecdotal information acquired through the operation of the FFVP indicates that teachers provide a positive role model if they consume fruits and vegetables with their students. However, no additional funding for the service of such components may be claimed for

reimbursement by the SFA or participating schools.

#### **Program Operation**

Each school selected to participate in the FFVP would have the flexibility to operate the Program within the basic statutory and regulatory requirements and FNS guidance. Each school would decide when, where, and how to serve the fresh fruit and vegetables, what mix of fresh fruits and vegetables to serve, how to involve teachers, parents and community members, how to incorporate nutrition education, how to publicize the availability of free fruits and vegetables, and other Program logistics. The actual operation of the Program would have to be consistent with the agreement between the SFA and the State agency, as described in § 211.10 of the regulatory text.

Although Congress funded the FFVP on a school year basis, we expect that the actual service of fresh fruits and vegetables in schools will begin when school begins for the students and end by June 30th. Schools would be expected to offer the Program during the entire school year (first to last day of school) to effect a positive change in the dietary habits of participating students. Schools that operate year-round may participate in the FFVP during their entire "school year". However, schools are not allowed to offer the Program during scheduled holidays, summer school sessions or when the Summer Food Service Program or the Seamless Summer option of the NSLP is in operation at the school.

Participating schools would be required to make the fresh fruits and vegetables available during the school day, separate and distinct from the NSLP and SBP meal service, at one or more locations in the school. This rule also proposes that such a food service would occur in each participating school at least twice a week. The Program would not operate before or after school hours. The school would also need to consider the time and place available to eat the fruits and vegetables and other logistical issues. The FFVP tool kit (<http://www.fns.usda.gov/cnd/FFVP/toolkit.htm>) encourages the collection of "Best Practices" and the FFVP manual (<http://www.fns.usda.gov/cnd/FFVP/handbook.pdf>) provides a number of suggestions in this area.

#### **Food Eligible To Be Served in the FFVP**

The purpose of the Program is to encourage the increased consumption of fresh fruits and fresh vegetables in elementary schools serving low income students. Schools participating in the Program would provide access to fresh

fruits and fresh vegetables that are appropriate for the grade levels of the enrolled children and that represent a variety of whole or pre-cut fresh fruits and vegetables. Frozen, canned, dried, certain types of vacuum packed and other types of processed fruits and vegetables would be prohibited from being served in the FFVP. In addition, schools would be required to limit the service of cooked fresh vegetables to a maximum of one service per week as part of a nutrition education lesson. Other ingredients of the cooked fresh vegetable dish would not be reimbursable under the Program. Low fat or non-fat dip for fresh vegetables is permitted in the Program in order to encourage consumption and enhance acceptability. Many vegetables may otherwise not be palatable to students. However, fruit is acceptable on its own and does not need to be enhanced for acceptability. Since fruit has naturally occurring sugar, we determined that dips for fruit will increase not only sugar but fat in children's diets and would be counterproductive to the goals of the Program.

The definition of the term "Fresh fruits and vegetables" as proposed in this rule has been based upon the definition of the term "fresh" included in § 101.95(a) of Title 21 Part 101 of the Food and Drug Administration Food Labeling regulations as well as an adaptation of FNS' approach to defining "unprocessed" agricultural products appropriate to the FFVP. We believe that this proposed definition best represents the types of fresh fruits and vegetables that Congress intended to be served to children enrolled in this Program. The proposed definition is included in § 211.2.

As required in § 211.21 of this proposed rule, the requirements found in § 210.10(g) of the NSLP regulations regarding accommodations for children with disabilities also exists in the FFVP. Schools must consider how this accommodation requirement may be applied in the operation of the FFVP. For example, in providing accommodations for the FFVP, schools may have to provide texture modifications. In doing so, it is recommended that schools consider starting with fresh fruit or vegetable products and avoid puréeing canned, frozen and vacuum packed fruits and vegetables and those in jars, including baby foods. In most instances, fresh fruits can be easily puréed; however, we recognize that this is not the case for most vegetables. Fresh vegetables may be used, but in most circumstances, will need to be cooked, then puréed.

The puréeing of fresh produce for these students must be done within the constraints of their medical requirements as allowed by their physician. However, schools should make sure that both the parent and the child's doctor are aware of the program and its intent to provide fresh produce in order to determine if the fresh items are acceptable choice for texture modifications.

#### Geographic Preference

Section 4302 of Public Law 110-246, the Food, Conservation, and Energy Act of 2008, amended section 9(j) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1758(j)) to require the Secretary of Agriculture to encourage institutions operating all Child Nutrition Programs to purchase unprocessed locally grown and locally raised agricultural products. We initially implemented the provisions through policy memoranda and explanatory question and answer communications dated January 9, 2009, July 22, 2009 and October 9, 2009. Most recently, a final rule entitled "Geographic Preference Option for the Procurement of Unprocessed Agricultural Products in Child Nutrition Programs", was published at 76 FR 22603 on April 22, 2011.

The geographic preference procurement option is applicable to purchases made in the FFVP. However, this provision shall only be applied within the context of the FFVP requirement that produce utilized in the program be *fresh*. The definition of "unprocessed agricultural products" in this proposal has been modified from the definition used for the rest of the Child Nutrition Programs since the geographic preference provisions of the Food, Conservation, and Energy Act of 2008 do not change the basic regulatory and statutory requirement that only *fresh* produce is allowed to be purchased in the FFVP. This definition may be found in § 211.13(b).

By utilizing the statutorily established geographic preference option in Child Nutrition Programs, purchasing institutions, such as States and SFAs, may specifically identify the geographic area within which unprocessed locally raised and locally grown fresh fruits and vegetables will originate. These procurements may be accomplished through informal or formal procurement procedures, as required by the FFVP regulations, which are consistent with the regulations of the other Child Nutrition Programs.

Should SFA's choose to exercise the geographic preference option, it basically allows schools operating the

FFVP to specifically define geographic areas from which they will seek to procure unprocessed local fresh fruits and vegetables. It is up to each school or SFA to determine how to define the geographic area from which such products will be procured. As previously stated, utilizing a geographic preference is an option that may or may not be utilized when procuring fresh fruits and vegetables for the Program.

#### Other Requirements

To ensure that the fresh fruits and vegetables are safe for consumption by the students, schools must follow the applicable sanitation and health standards established under State and local law and regulations, as well as the school's food safety program. Food safety requirements for schools are already in place under § 210.13 and § 220.7, respectively, of this chapter for schools participating in the school lunch and breakfast programs.

Section 19(d)(1)(E) of the statute encourages schools to submit a plan for implementation that includes partnerships with one or more entities that will provide non-Federal resources to the Program such as promotional materials, speakers, etc. Schools would also be expected to encourage the involvement of parents and the community in activities that enhance the Program such as seeking program partners and speakers, and other activities in support of the FFVP and nutrition education efforts.

#### Use of Program Funds

Schools shall use the majority of the Program funds for the purchase of fresh fruits and vegetables, including services for produce to be pre-cut and for the production of ready-made produce trays. FNS expects that the resources of the school foodservice operation would be available for the FFVP. However, FNS acknowledges that participating schools may have some additional expenses in connection with the Program such as buying new equipment to maintain food safety. As stated in § 211.6 of the proposed regulatory text, schools would be allowed to use no more than 15 percent of a school's total grant for non-food costs necessary to operate the Program. Such non-food costs would include, for example, the purchase of disposable supplies, equipment leases and purchases, and salaries and fringe benefits for employees that wash and cut produce, prepare food trays, distribute produce to classrooms, set up kiosks, restock vending machines, and clean up after the food service. Based on previous experience and information on the

FFVP operations, the 15 percent limitation on non-food costs seems reasonable and appropriate. However, we invite comments on this proposed limitation.

All FFVP expenditure information submitted to the SFA by a school for reimbursement would be reviewed by the SFA to ensure that such costs are allowable and reasonable given the number of children benefiting from the Program. The SFA claim for reimbursement submitted to the State agency must be signed by an SFA official and must be supported by records maintained by the SFA.

Non-reimbursable costs would include any food items that do not meet the definition of fresh fruits and vegetables included in § 211.2, such as processed or preserved fruits and vegetables (i.e., canned, frozen, dried and certain types of vacuum packed products), dip for fruit, fruit leather, jellied fruit, trail mix, nuts, fruit or vegetable pizza, fruit smoothies, promotional items such as posters and buttons, and nutrition education materials.

A variety of free nutrition education materials, both printed and online, are available from State and federal partners identified in the FFVP page of the Child Nutrition Programs public Web site, <http://www.fns.usda.gov/cnd/FFVP/FFVPResources.htm> as well as the FNS Team Nutrition site. Local partners, such as food retailers, health departments, and the USDA Extension Service, are also good sources for nutrition education and promotional materials that may be used in the Program.

The fruits and vegetables offered in the Program are intended to be consumed by children enrolled in the participating school during the school day at school, where there is the opportunity to monitor the distribution of the food and talk about the link between nutrition and health, as well as the importance of good hygiene before and during meals. Schools are not allowed to give children fruits and vegetables to take home.

#### Claims for Reimbursement

Each participating school would submit monthly expenditure information to the SFA in order to enable the SFA to submit the monthly claim for reimbursement to the State agency for the purchase of fresh fruits and vegetables and for allowable non-food costs in conformance with § 211.9 of the proposed regulatory text. Schools would be required to submit supporting documentation and would be required to maintain such information for review

for a period of three years after the date of submission of the final Financial Status Report. Purchase orders that commingle orders placed for fresh fruit and vegetables used in the FFVP as well as in other school meal programs would have to indicate which fresh produce is for the use in the FFVP.

It is proposed that expenditure information submitted by each participating school would be reviewed by the SFA to ensure that the school expenditures are appropriate to be claimed and are correct. The SFA would then consolidate the information submitted by the participating schools into a single claim for reimbursement for submission to the State agency. Such monthly claims for reimbursement shall be submitted by the SFAs to the State agency not later than 60 days following the last day of the full month covered by the claim in accordance with § 211.9 of the proposed rule. The State agency maintains responsibility to ensure the claims are accurate and reasonable.

## I. Procedural Matters

### A. Executive Order 12866 and Executive Order 13563

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

### B. Regulatory Impact Analysis

The following summarizes the conclusions of the regulatory impact analysis.

#### Need for Action

This proposed rule seeks to establish the regulatory requirements for the administration and operation of the FFVP, a new program which began as a pilot in a small number of schools in the year 2002 and is now available to over 4,640 selected schools nationwide. Given the incremental funding process, FNS expects that the Program will continue to grow. Currently, FFVP operators at the State and local levels follow policy memoranda and practical guidance.

#### Benefits

The intent of the proposed rule is to encourage the consumption of fresh fruits and vegetables by elementary school children. The *2010 Dietary Guidelines for Americans*<sup>2</sup> discusses the importance of fruits and vegetables to a

healthful diet. Most current consumption patterns of children and adults do not achieve the recommended intakes of many varieties of fruits and vegetables. The program is expected to be successful in introducing school children to a variety of produce that they otherwise might not have the opportunity to sample. By providing increased access to fruits and vegetables, the FFVP will address a key inconsistency between the diets of elementary school children and the *2010 Dietary Guidelines*.

The September 2011 interim evaluation of the FFVP finds that students are consuming more fruits and vegetables, an additional ¼ cup of fruits and vegetables on average, on days when the program is operating.<sup>3</sup> That is nearly 15 percent higher than average fruit and vegetable consumption of children in non-FFVP schools. The report also finds no statistically significant increase in calorie consumption among program participants. That important finding indicates that fruits and vegetables are replacing other foods rather than adding calories to the diets of participants and increasing the risk of weight gain.

This proposed rule would help FNS develop regulatory requirements in consultation with stakeholders and the public. The rulemaking process also provides the opportunity to consolidate all the FFVP requirements into Title 7, part 211 of the Code of Federal Regulations.

#### Costs

Although this proposed rule has been designated significant, the costs associated with implementing the proposed regulatory requirements are not expected to significantly add to current program costs at the State and local levels. The total cost of the proposed rule is projected to be \$778 million for FY2011–2015. One half million dollars per fiscal year is retained by USDA for the administration of the program. The rest of the funds are distributed to the States for the purchase of fresh fruit and vegetables, served free to all children enrolled in selected elementary schools, and administration of the program at the State and local levels. This cost is estimated as \$776 million for FY2011–2015. From this statutory grant, funds are made available to offset the costs incurred by State

agencies, SFAs and schools for administration of the program, including required reporting and recordkeeping, and for other allowable non-food costs.

The key responsibilities of the State agency would be: (1) Disseminate information about the Program to low-income schools; (2) solicit applications from eligible schools and select those with the highest percentage of free and reduced-price participation; (3) provide training and technical assistance to new schools and monitor program operation; and (4) submit quarterly financial reports and an annual report to FNS. These activities are not expected to be time consuming because the FFVP is a relatively simple program. FNS anticipates that many of these activities, including monitoring, would be conducted in conjunction with activities required under the NSLP. In addition, FNS has issued implementation memoranda and provided technical assistance through conference calls, online webinars, regional and state conferences, and workshops at the School Nutrition Association annual conference. The total State agency administrative 5-year cost (FY2011–2015) is estimated as \$23 million.

At the local level, schools are reimbursed for the food and allowable non-food costs. Schools would be required to submit expenditure data to the SFA and keep supporting records for three years. We expect that the staff, facilities and equipment used for the lunch program will be available to the FFVP. Food preparation (e.g., washing, peeling and cutting fruits and vegetables) may occasionally be necessary and could result in an added cost to the school. Other possible costs would include purchases of additional equipment and disposable supplies for the FFVP. For FY2011–2015, the total SFA and school administrative cost and allowable non-food cost is estimated as \$113 million. The total State agency, SFA and school administrative cost and allowable non-food 5-year cost is estimated as \$136 million.

### C. Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (RFA) of 1980, (5 U.S.C. 601–612). Pursuant to that review it has been certified that this rule would not have a significant impact on a substantial number of small entities. The administrative and operational requirements of the Program are simple. The Federal government provides funds for the purchase of fresh fruit and vegetables and general administration of the Program.

<sup>2</sup> U.S. Department of Agriculture and U.S. Department of Health and Human Services. *Dietary Guidelines for Americans*, 2010. 7th Edition, Washington, DC: US Government Printing Office, December 2010.

<sup>3</sup> Lauren Olsho, Lauren, Jacob Klerman, and Susan Bartlett, *Food and Nutrition Service Evaluation of the Fresh Fruit and Vegetable Program (FFVP): Interim Evaluation Report*. Abt Associates, September 2011. <http://www.fns.usda.gov/ora/MENU/Published/CNP/cnp.htm>.



Therefore, FNS does not expect that the proposed rule will have a significant economic impact on small entities.

#### *D. Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local and tribal governments and the private sector. Under section 202 of the UMRA, the Department generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures by State, local or tribal governments, in the aggregate, or the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, Section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the most cost effective or least burdensome alternative that achieves the objectives of the rule.

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

#### *E. Executive Order 12372*

The FFVP is listed in the Catalog of Federal Domestic Assistance Programs under 10.582. For the reasons set forth in the final rule in 7 CFR part 3015, subpart V, and related Notice (48 FR 29115, June 24, 1983), this program is included in the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials. The Child Nutrition Programs are federally funded programs administered at the State level. FNS headquarters and regional office staff engage in ongoing formal and informal discussions with State and local officials regarding program operational issues. This structure of the Child Nutrition Programs allows State and local agencies to provide feedback that forms the basis for any discretionary decisions made in this and other rules.

#### *F. Executive Order 13132*

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the

regulations describing the agency's considerations in terms of the three categories called for under Section (6)(b)(2)(B) of Executive Order 13121.

#### *1. Prior Consultation With State Officials*

FNS headquarters and regional offices have formal and informal discussions with State agency officials on an ongoing basis regarding the Child Nutrition Programs and policy issues. Prior to drafting this proposed rule, FNS held several conference calls and meetings with the State agencies to discuss the statutory requirements addressed in this proposed rule. In response, FNS received a number of questions which were summarized in practical guidance distributed to the State and local program operators. FNS also discussed the FFVP statutory requirements with program operators at national, regional and state conferences and received input which has been considered in drafting this proposed rule.

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

State agencies requested clarification on school applications and selection, allowable foods, and general program operation. These and other requirements are based on section 19 of the National School Lunch Act and FNS policy memoranda are discussed in the preamble.

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

FNS has considered the impact of this proposed rule on State and local operators. We have attempted to balance the goal of increasing the opportunities for low-income children to consume fresh fruits and vegetables against the need to establish basic regulatory requirements for a new program. At the State agency level, seeking applications from low-income schools could require persistence and assistance from the school food authorities. For schools, adequate staff resources to wash, cut, and serve the fresh fruits and vegetables could pose an occasional challenge. FNS has provided and continues to provide guidance and technical assistance to program operators, and expects that schools will only have minor difficulties in meeting the proposed requirements.

#### *G. Executive Order 12988*

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This proposed rule is intended to have preemptive effect with respect to any State or local laws,

regulations or policies which conflict with its provisions or which would otherwise impede its full and timely implementation. This rule is not intended to have retroactive effect unless so specified in the Effective Dates section of the final rule. Prior to any judicial challenge to the provisions of the final rule, appeal procedures in § 210.18(q) and § 235.11(f) of this chapter must be exhausted.

#### *H. Executive Order 13175*

E.O. 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. In late 2010 and early 2011, USDA engaged in a series of consultative sessions to obtain input by Tribal officials or their designees concerning the impact of this rule on the tribe or Indian Tribal governments, or whether this rule may preempt Tribal law. Reports from these consultations will be made part of the USDA annual reporting on Tribal Consultation and Collaboration. USDA will respond in a timely and meaningful manner to all Tribal government requests for consultation concerning this rule and will provide additional venues, such as webinars and teleconferences, to periodically host collaborative conversations with Tribal officials or their designees concerning ways to improve this rule in Indian country. We are unaware of any current Tribal laws that could be in conflict with the proposed rule. We request that commentors address any concerns in this regard in their responses.

#### *I. Civil Rights Impact Analysis*

FNS has reviewed this proposed rule in accordance with the Department Regulation 4300–4, “Civil Rights Impact Analysis,” to identify any major civil rights impacts the rule might have on children on the basis of age, race, color, national origin, sex, or disability. A careful review of the rule's intent and provisions revealed that this rule is not intended to reduce children's ability to participate in the National School Lunch Program, School Breakfast Program, Fresh Fruit and Vegetable Program, or Special Milk Program.



*J. Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35; see 5 CFR part 1320) requires that OMB approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number. This proposed rule contains information collections that are subject to review and approval by OMB; therefore, FNS has submitted an information collection under 0584–NEW, which contains the burden information in the proposed rule for OMB's review and approval.

Comments on the information collection in this proposed rule must be received by April 24, 2012. Send comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for FNS, Washington, DC 20503. Please also send a copy of your comments to Lynn Rodgers-Kuperman, Child Nutrition Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 636, Alexandria, Virginia 22302. For further information, or for copies of the information collection requirements, please contact Lynn Rodgers-Kuperman at the address indicated above. Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the Agency's functions, including whether the information will have practical utility; (2) the accuracy of the Agency's estimate of the proposed information collection burden, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and

clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All responses to this request for comments will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

*Title:* Fresh Fruit and Vegetable Program (FFVP).

*OMB Number:* [Not Yet Assigned] 0584–XXXX.

*Expiration Date:* [Not Yet Determined].

*Type of Request:* New Collection. *Abstract:* Section 120 of the Child Nutrition and WIC Reauthorization Act of 2004 amended the Richard B. Russell National School Lunch Act, 42 U.S.C. 1769(g) to authorize the Fresh Fruit and Vegetable pilot as a permanent program effective July 1, 2004. The Food, Conservation, and Energy Act of 2008 expanded the Program and significantly increased funding.

The purpose of the Program is to encourage increased consumption of fresh fruits and vegetables by children enrolled in elementary schools that serve low-income students. Schools interested in participating in the Program must submit an application annually. Participating schools must submit monthly expenditure data to their school food authority (SFA) for the purchase of fruits and vegetables. SFAs must review, approve, and forward the consolidated claims to the State agency (SA) for payment. Program violations identified in any review conducted by

the SA and/or SFA must be documented. As necessary, schools or SFAs must document any required corrective action.

SAs must submit financial reports on FFVP expenditures to FNS five times per year to include four quarterly reports and one final report. In addition, SAs must submit an annual report to FNS disclosing program data such as the number of schools that apply, the number that are selected for participation, their total enrollment, the percentage of students eligible for free and reduced-price meals to ensure that the Program is reaching low-income schools with the highest need and the per student allocation provided to each school.

The average burden per response and the annual burden hours are explained below and summarized in the charts which follow.

*Estimated Annual Burden for 0584–New, Fresh Fruit And Vegetable Program, 7 CFR 211*

*Recordkeeping: Estimated Annual Burden for 0584–NEW, Fresh Fruit and Vegetable Program, 7 CFR 211*

*Respondents for This Proposed Rule:* State agencies, School Food Authorities, Schools.

*Estimated Number of Respondents for This Proposed Rule:* 54 State agencies; 4,983 School Food Authorities; 4,983 Schools.

*Estimated Number of Responses per Respondent for This Proposed Rule:* 5.5.

*Estimated Total Annual Responses:* 55,515.

*Estimated Total Annual Recordkeeping Burden on Respondents for This Proposed Rule:* 264,413 hours.

## RECORDKEEPING

	Section	Estimated number of respondents	Frequency of response	Average annual responses	Average burden per response	Annual burden hours
SA must maintain records as necessary to support reimbursement to SFAs and reports submitted to FNS.	7 CFR 211.8(b) .....	54	9.0	486	0.25	121.50
SA maintains Claims for Reimbursement and records pertaining to financial action/compliance.	7 CFR 211.9(g) and 211.11(b).	54	1.0	54	0.33	17.82
SA maintains applications for participation.	7 CFR 211.10(d) .....	54	1.0	54	2.66	143.64
SA maintains on file evidence of investigations and actions.	7 CFR 211.14(b) and 211.14(d).	54	1.0	54	0.25	13.50
SA maintains records pertaining to claims against schools.	7 CFR 211.19(c) .....	54	1.0	54	0.33	17.82
SFA maintains monthly Claim for Reimbursement submitted by schools and supporting documentation.	7 CFR 211.9(a) and 211.11(b).	4,983	9.0	44,847	5	224,235.00

## RECORDKEEPING—Continued

	Section	Estimated number of respondents	Frequency of response	Average annual responses	Average burden per response	Annual burden hours
SFA maintains records to ensure school is conducting program accordingly (review conducted in conjunction with on-site review required under § 210.8).	7 CFR 211.14(b) .....	4,983	1.0	4,983	3	14,949.00
Schools must maintain all records pertaining to the Program for 3 years after the end of the fiscal year..	7 CFR 211.10(e)(15)	4,983	1.0	4,983	5	24,915.00
Total Recordkeeping for Proposed rule.	.....	10,020	5.5	55,515	4.76	264,413.28
Total Existing Recordkeeping Burden for Part 211.	.....	n/a	n/a	n/a	n/a	n/a
Total Recordkeeping Burden for Part 211 with Proposed rule.	.....	10,020	5.5	55,515	4.76	264,413.28

Reporting: Estimated Annual Burden for 0584—NEW, Fresh Fruit and Vegetable Program, 7 CFR 211

*Respondents for this Proposed Rule:* State agencies, School Food Authorities, Schools.

*Estimated Number of Respondents for This Proposed Rule:* 54 State agencies; 4,983 School Food Authorities; 4,983 Schools.

*Estimated Number of Responses per Respondent for This Proposed Rule:* 9.96.

*Estimated Total Annual Responses:* 99,822.

*Estimated Total Annual Reporting Burden on Respondents for This Proposed Rule:* 111,034 hours.

## REPORTING

	Section	Estimated number of respondents	Frequency of response	Average annual responses	Average burden per response	Annual burden hours
SA must submit first quarter estimates by each June 1 to FNSRO to receive allocation of funds..	7 CFR 211.5 .....	54	1	54	0.25	13.50
SA shall solicit applications for participation.	7 CFR 211.10(d) .....	54	1	54	1.25	67.50
SA must submit an annual FFVP report to FNS.	7 CFR 211.11(a)(1)	54	1	54	1.5	81.00
SFAs consolidate monthly claims from schools and submit claim forms to SA for reimbursement..	7 CFR 211.9(a) .....	4,983	9	44,847	1.5	67,270.50
SFA must submit to SA documented corrective action, no later than 30 days from the deadline for completion, for program violations identified on administrative reviews..	7 CFR 211.14(b) .....	4,983	1	4,983	3	14,949.00
Schools submit monthly claims for reimbursement for both food and non-food costs..	7 CFR 211.9(a) and 211.10(e)(10).	4,983	9	44,847	0.5	22,423.50
Any school interested in participating in the FFVP must complete an application including program implementation plan and description of partnership activities. All returning schools must update information on file..	7 CFR 211.10(d) .....	4,983	1	4,983	1.25	6,229.20
Total Reporting for Proposed rule*.	.....	10,020	9.9623	99,822	1.11232	111,034.20
Total Existing Reporting Burden for Part 211.	.....	n/a	n/a	n/a	n/a	n/a

## REPORTING—Continued

	Section	Estimated number of respondents	Frequency of response	Average annual responses	Average burden per response	Annual burden hours
Total Reporting Burden for Part 211 with Proposed rule*.	.....	10,020	9.9623	99,822	1.11232	111,034.20

\*Burden for SF-425 is captured in OMB 0348-0061.

SF-425 quarterly & annual financial report (54 respondents \* 5 frequency \* 1.5 hrs per response = 405 hours).

Summary of Burden (OMB 0584-NEW) 7 CFR 211	
Total No. Respondents .....	10,020
Average No. Responses per Respondent .....	15.5
Total Annual Responses .....	155,337
Average Hours per Response .....	2.417
Total Burden Hours for Part 211 .....	375,447.48

211.20 Other State agency responsibilities.  
211.21 Nondiscrimination.  
211.22 Program information.

**Authority:** 42 U.S.C. 1769a.

#### § 211.1 General purpose and scope.

The purpose of the Fresh Fruit and Vegetable Program is to increase fresh fruit and vegetable consumption in elementary schools to improve the diets and long-term health of the participating children and to help children understand the relationship between proper eating and good health. This Program makes free fresh fruits and vegetables available to students in selected schools in order to introduce children to fresh fruits and vegetables and to make these foods more prevalent in their diet. This part prescribes the general requirements for Program administration and participation as stated in section 19 of the Richard B. Russell National School Lunch Act, as amended (42 U.S.C. 1769a).

#### § 211.2 Definitions.

For the purpose of this part, the term: *Act* means the Richard B. Russell National School Lunch Act, as amended.

*Department* means the United States Department of Agriculture.

*Elementary school* means, under the Program, a nonprofit institutional day or residential school, including a public elementary charter school that provides elementary education, as determined under State law.

*Fiscal year* means a period of 12 calendar months beginning October 1st of any year and ending with September 30th of the following year.

*FNS* means the Food and Nutrition Service, United States Department of Agriculture.

*FNSRO* means the appropriate Regional Office of the Food and Nutrition Service of the Department.

*Free* means provided to all children at no charge.

*Free lunch* means a lunch served under the National School Lunch Program to a child from a household eligible for such benefits under 7 CFR part 245 of this chapter and for which neither the child nor any member of the household pays or is required to work.

*Fresh fruits and vegetables* means produce in its raw state which has not been frozen or subjected to any form of thermal processing or any other form of preservation. The following processes do not preclude the food from being considered to be *fresh*: The addition of waxes, the post-harvest use of approved pesticides, the application of a mild chlorine wash or mild acid wash on produce, or the treatment of raw foods with ionizing radiation within the limits established by the Food and Drug Administration. (21 CFR 101.95, Sept. 24, 2009.) In addition, such produce may include products that have been cooled, refrigerated, peeled, sliced, diced, cut, chopped, shucked, washed, treated with high water pressure or "cold pasteurized", packaged (such as placing produce in cartons or vacuum packaging, in which air is removed from a package of food and the package is hermetically sealed to ensure that the vacuum remains within the packaging) and bagged (such as placing produce in bags).

*Nonprofit* means, when applied to schools or institutions eligible for the Program, exempt from income tax under section 501(c)(3) of the Internal Revenue Code of 1986.

*NSLP* means the National School Lunch Program, under which participating schools operate a nonprofit lunch program in accordance with this title (7 CFR part 210) and receive general and special cash assistance and donated food from the Department.

*OIG* means the Office of the Inspector General of the Department.

*Program* means the Fresh Fruit and Vegetable Program.

*Reimbursement* means Federal cash assistance payable to participating schools for serving fresh fruits and vegetables to children at no charge in accordance with the requirements of this part.

*Reduced price lunch* means a lunch served under the NSLP:

(a) To a child from a household eligible for such benefits under 7 CFR part 245 of this chapter;

(b) For which the price is less than the school food authority designated full price of the lunch and which does not exceed the maximum allowable reduced

#### K. E-Government Act Compliance

The Food and Nutrition Service is committed to complying with the E-Government Act to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services and for other purposes.

#### List of Subjects in 7 CFR Parts 211 and 235

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

For the reasons set forth in the preamble, 7 CFR part 211 is proposed to be added as follows:

#### PART 211—FRESH FRUIT AND VEGETABLE PROGRAM

Sec.

- 211.1 General purpose and scope.
- 211.2 Definitions.
- 211.3 Administration.
- 211.4 Funding.
- 211.5 Funding availability.
- 211.6 Use of funds.
- 211.7 Payment process to States.
- 211.8 Reimbursement for school food authorities.
- 211.9 Claims for reimbursement.
- 211.10 Eligibility requirements.
- 211.11 Reporting and recordkeeping.
- 211.12 Special responsibilities for schools.
- 211.13 Procurement standards.
- 211.14 Program assistance and monitoring.
- 211.15 Withholding payments.
- 211.16 Suspension, termination and grant closeout procedures.
- 211.17 Penalties.
- 211.18 Management evaluations and audits.
- 211.19 Educational prohibitions.

price specified under 7 CFR part 245 of this chapter; and

(c) For which neither the child nor any member of the household is required to work.

*ROAP* means FNSRO Administered Programs.

*School* means for purposes of the Fresh Fruit and Vegetable Program:

(a) An educational institution of elementary and preprimary grades recognized as part of the educational system in the State and operating under public or nonprofit private ownership in a single building or complex of buildings which participates in the NSLP; or

(b) Any public or nonprofit private residential child care institution, or distinct part of such institution, which participates in the NSLP and serves elementary school and preprimary school children as defined by the State.

*School day* means calendar days in which the school is open and teaching, and encompasses the period between opening and dismissal.

*School food authority* means the governing body which is responsible for the administration of one or more schools; and has the legal authority to operate the Program therein or be otherwise approved by FNS to operate the Program.

*School week* means the normal school week of five consecutive days.

*School year* means a period of 12 calendar months beginning July 1st of any year and ending June 30th of the following year and, for purposes of Program, includes the service of food from the first day of class until the last day of class.

*Secretary* means the Secretary of Agriculture.

*State* means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and Guam.

*State agency* means:

(a) The State educational agency;

(b) Any other agency of the State which has been designated by the Governor or other appropriate executive or legislative authority of the State and approved by the Department to administer the NSLP in schools, as specified in § 210.3(b) of this chapter; or

(c) The FNSRO, where the FNSRO administers the Program as specified in § 211.3(b).

### § 211.3 Administration.

(a) *FNS*. FNS will act on behalf of the Department in the administration of the Program;

(b) *State agencies*. The responsibility for the administration of the Program at the state level will be in the State

educational agency or other State agency approved to administer the National School Lunch Program (NSLP). The FNSRO will administer the Program if it does so for the NSLP or any part of the NSLP in accordance with § 210.3(c) of this chapter. Each State agency desiring to offer the Program must amend the permanent Federal-State agreement to include administration of the Program in accordance with the applicable requirements of this part; 7 CFR parts 15, 15a, 15b, and 3016; and FNS instructions.

(c) *School food authorities*. The school food authority will be responsible for the administration of the Program in schools selected by the State agency for participation. State agencies must ensure that school food authorities administer the Program in accordance with the applicable requirements of this part; 7 CFR parts 15, 15a, 15b, and 3016 or 3019, as applicable; and FNS instructions. Each school food authority with schools selected for the Program must enter into an agreement with the State agency that addresses the administration of the Program during a specific school year in accordance with the provisions of this part, and, as applicable, 7 CFR parts 210, 235, 3016, and 3019, and with FNS Instructions.

### § 211.4 Funding.

(a) *Federal funding*. (1) Federal funds available to the Program each school year beginning July 1st will be as specified in Section 19 of the Act for school year 2010–2011 and for school year 2011–2012. For school year 2012–2013 and each school year thereafter, Program funds will be based on the amount received in the preceding year, as adjusted to reflect changes for the 12-month period ending the preceding April 30th in the Consumer Price Index for All Urban Consumers for items other than food published by the Department of Labor's Bureau of Labor Statistics. Unobligated funds from a preceding school year may be available to FNS for operation of the Program in subsequent years.

(2) No more than \$500,000 of the funds made available for the Program annually may be set aside for Federal administrative costs.

(b) *State funding*. (1) The minimum grant to each of the 50 states and the District of Columbia will equal 1 percent of the funds made available to carry out the Program for a school year.

(2) Remaining funds will be allocated to each of the 50 states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands based on the proportion of the state population to the U.S. population. In States in which FNS

administers part of the Program, funding for eligible ROAP schools shall be made available to the Regional Office administering the Program in the eligible schools in those states.

### § 211.5 Funding availability.

(a) FNS will notify each State agency of its total grant for the upcoming school year. Program funds will be provided to each State agency through two allocation distributions on or around July 1st and October 1st of each school year. The State agency will use the allocated funds to reimburse school food authorities for the purchase of fresh fruits and vegetables under the Program. The State agency must promptly notify FNS if it does not expect to obligate all the allocated funds by the dates specified in this section.

(1) *July 1 allocation*. (i) FNS will determine the July allocation for each State agency based on each State agency's estimate of the amount of funding needed to initiate and operate the Program during the first quarter of the school year. The State agency must submit a first quarter estimate to FNS by June 1st in order to receive the first allocation of funds on or about July 1st. The first quarter estimate shall include anticipated obligations for the purchase of fruits and vegetables and other reasonable expenses needed to implement the Program in the approved schools during the first quarter of the school year. The first quarter estimate may also include an amount for State administrative costs for the first quarter of the school year, as specified in § 211.6(a)(1).

(ii) All funds received and retained by the State agency for Program administration through the July allocation shall be obligated or expended by September 30th of that same school year.

(iii) Funds provided to school food authorities through the July 1st allocation shall be obligated or expended by September 30th of that same school year.

(iv) Any unobligated or unexpended funds shall be recovered by FNS and made available to the Program for reallocation at a later time.

(2) *October 1 allocation*. (i) The balance of the State agency's total Program funding for the school year will be allocated on or about October 1st of each school year. Any funds not expended or obligated by the State agency by the following September 30th of that fiscal year will be recovered by FNS and made available to the Program for reallocation at a later time. State agencies may only reallocate funds for Program costs incurred within the same

school year for which the funds were made available;

(ii) School food authorities must ensure that October 1st allocation funds made available to participating schools are expended or obligated during the period of performance for which the funds have been made available, otherwise the funds will be recovered by FNS and made available to the Program for reallocation at a later time.

(b) To stay within the assigned funds, each State agency must review the Program claims submitted by school food authorities and control Program reimbursement payments. The State agency may not advance Program funds to the school food authorities or to the schools selected to participate in the Program.

#### **§ 211.6 Use of funds.**

(a) *General.* Federal funds made available under the Program shall be used primarily for the purchase of fresh fruits and vegetables served free to all children enrolled in selected elementary schools.

(1) *State administrative costs.* Each State agency may retain a portion of its total grant to support administration of the Program. The amount that may be retained must be determined prior to determining the school allocations and must be the lesser of 5 percent of the State agency's total grant for the school year, or the amount required to pay the costs of one full-time coordinator for the Program in the State, as determined by the State agency based on the State personnel structure.

(2) *Local-level costs.* School food authorities and schools shall use Program funds primarily for the purchase of fresh fruits and vegetables. Program funds shall not be used for nutrition education or Program promotion. Costs for planning; food delivery, preparation, and service; equipment leases and purchases; and other non-food expenses in connection with the operation of the Program shall not exceed 15 percent of a school's total grant for the school year.

(3) State agencies may assess Program operations during the school year and may reallocate funds to school food authorities in the State. However, any such reallocations of funds shall only be made during the school year for which the funds became available and shall be expended or obligated during that same school year.

#### **§ 211.7 Payment process to States.**

(a) *Letter of credit.* FNS will generally make payments available by means of a letter of credit issued in favor of the State agency. The State agency will

receive funds for reimbursement to participating school food authorities through procedures established by FNS in accordance with 7 CFR part 3016. The State agency must minimize the time that elapses between the drawing of funds from the letter of credit and the disbursement of those funds to pay the Claims for Reimbursement. FNS may, at its option, reimburse a State agency by Treasury check. FNS will pay with funds available in settlement of a valid claim.

(b) *Recovery of funds.* FNS will recover any Federal funds made available to the State agency under this part which are in excess of obligations reported at the end of each fiscal year in accordance with 7 CFR 3016.23, "Period of Availability of Funds", and 7 CFR 3016.50–3016.52, "After-the-Grant-Requirements". Such recoveries must be reflected by a related adjustment in the State agency's letter of credit.

#### **§ 211.8 Reimbursement for school food authorities.**

(a) Reimbursement payments to nonprofit school food service operations must be made only to school food authorities operating the Program under a written agreement with the State agency. Such payments may be made for the purchase of fresh fruits and vegetables and other allowable costs in connection with the Program.

(b) Each State agency must maintain Program records as necessary to support the reimbursement payments made to school food authorities and the reports submitted to FNS under this part. Such records must be retained for a period of 3 years.

#### **§ 211.9 Claims for reimbursement.**

(a) Schools must submit expenditure data to their school food authority providing sufficient detail and documentation to justify the monthly reimbursement claimed by the school food authority. Schools shall certify that the information is true and correct. Such expenditure data for each month must include the cost of fresh fruits and vegetables purchased for the program that month and allowable non-food costs for that month.

(b) In submitting a Claim for Reimbursement to the State agency, each school food authority must certify that:

- (1) The claim is true and correct;
- (2) Records are available to support the claim;
- (3) The claim is in accordance with the existing agreement, and
- (4) Payment has not been received. If the first or last month of Program

operations for any year contains 10 operating days or less, such a month may be added to the Claim for Reimbursement for the appropriate adjacent month; however, Claims for Reimbursement may not combine operations occurring in two fiscal years.

(c) A final Claim for Reimbursement shall be postmarked and/or submitted to the State agency not later than 60 days following the last day of the full month covered by the claim. State agencies may establish shorter deadlines at their discretion. Claims not postmarked and/or submitted within 60 days shall not be paid with Program funds unless FNS determines that an exception should be granted.

(d) The State agency shall review all Claims for Reimbursement and discuss any discrepancies in the claim with the school food authority. The State agency may make adjustments on claims and may disallow payment of any claim, in whole or in part, that is inconsistent with the Program requirements or FNS implementation memoranda.

(e) If FNS does not concur with the State agency's action in paying a claim, FNS shall assert a claim against the State agency for the amount of such claim. In all such cases, the State agency shall have full opportunity to submit to FNS evidence or information to justify the action taken. If FNS determines the State agency's payment of a claim was unwarranted, the State agency shall promptly pay to FNS the amount of the claim.

(f) The Secretary has authority to settle and to adjust any claims arising under the Program, and to compromise or deny such claim or any part thereof. The Secretary also has the authority to waive such claims if the Secretary determines that to do so would serve the purposes of the Program. This provision shall not diminish the authority of the Attorney General of the United States under section 516 of Title 28, U.S. Code, to conduct litigation on behalf of the United States.

(g) The State agency shall maintain all records pertaining to action taken under this section for a period of three years after the date of submission of the final Financial Status Report (SF-425), except that, if audit findings have not been resolved, such records shall be retained beyond the three-year period for as long as required for the resolution of the issues.

#### **§ 211.10 Eligibility requirements.**

(a) *State agency outreach to eligible schools.* (1) Each State agency is required to conduct outreach to all elementary schools, including Native American schools, that participate in

the NSLP and have the highest proportion of students certified eligible for free and reduced price NSLP meals in the State. In cases in which FNS administers part of the Program in a State, the State agency and FNS shall coordinate outreach activities to ensure that all eligible schools are contacted. As part of the State agency's outreach requirement, such schools must be notified of:

(i) The eligibility of such schools for the Program;

(ii) That Program funding is available;

(iii) That priority is given to schools with the highest need; and

(iv) That the school would be likely to be selected to participate in the Program. At a minimum, the State agency must provide information to all elementary schools where at least 50 percent of the students are certified for free and reduced-price lunches and actively target those schools with the highest need and encourage them to participate in the Program.

(2) In cases in which there are more schools eligible for the Program than can be funded for participation, the State agency may limit outreach to only those schools with the highest percentages of free and reduced-price certified students.

(3) In situations in which a State agency does not have enough elementary schools with high percentages of students certified for free and reduced-price lunches in the NSLP, the State agency may extend Program outreach to other schools including those in which the free and reduced-price certified student population is below the 50 percent level. When soliciting such schools, priority for participation in the Program shall still be given to the schools that have the highest proportion of free and reduced price certified students.

(4) The outreach process shall be conducted prior to selecting any school for participation in the Program and may be conducted in collaboration with the school food authorities.

(b) *Per-student allocation.* State agencies shall allocate from \$50 to \$75 per student to operate the Program each school year. The per-student allocation for each school may vary by school within the established allocation range.

(c) *Selection criteria.* (1) Elementary schools that meet the following criteria may be selected for participation in the Program:

(i) Schools in which not less than 50 percent of the students are certified eligible for free or reduced price school lunches, except as noted in paragraph (c)(2) of this section, with priority for selection given to those schools that

serve the highest percentage of free and reduced price certified students.

(ii) Schools that have submitted an application for participation in accordance with paragraph (d) of this section; and

(iii) Schools that have not been documented as being deficient in managing any FNS program or that have no outstanding administrative findings documenting violations of the requirements of any FNS program.

(2) Applicant schools in which fewer than 50 percent of the students are certified as eligible for free and reduced price meals shall only be selected to participate in the program if all of the eligible higher need schools in the State have been selected for participation in the Program and the State agency has not reached its statewide participation goal. When selecting such schools, priority shall be given to schools in descending order beginning with those schools that serve the highest percentage of free and reduced price certified students.

(3) A State agency may only impose additional selection criteria with the approval of FNS if the State agency has more schools at the same need level than can be funded, and if such criteria are not inconsistent with the provisions in paragraph (c) of this section.

(d) *Application process.* Each year, the State agency shall solicit applications for participation from the elementary schools with the highest number of children certified for free and reduced-price meals. Each school must submit the application to operate the Program in the following school year to the State agency through their school food authority. At a minimum, the school application shall include:

(1) The total number of enrolled students and the percentage certified eligible for free and reduced price meals;

(2) A certificate of support for participation in the Program signed by the school food manager, school principal and district superintendent or equivalent position, as determined by the school; and

(3) A program implementation plan that includes efforts to integrate the Program with other initiatives to promote health and nutrition, reduce overweight and obesity, or promote physical activity. It is recommended that the plan also include a description of partnership with one or more entities, such as produce, fruit and vegetable industry groups and grocery stores, local colleges and universities or other organizations that will provide non-Federal resources to the school in support of the Program's goals.

(e) *Agreement.* Each school food authority must enter into a written agreement with the State agency to offer the Program. Under such agreement, the school food authority will be responsible for the operation of the Program in schools within its jurisdiction. Such agreement may be amended, suspended, or terminated as determined by the State agency in consultation with FNS. The agreement between the State agency and the school food authority will ensure that the school food authority will require the selected schools to:

(1) Make free fresh fruit and vegetables available to all enrolled children attending the participating school;

(2) Offer the Program during the regular school year, excluding holidays and summer break;

(3) Serve fresh fruits and vegetables to students during the school day, at least twice a week, and separately from the National School Lunch Program and School Breakfast Program service times;

(4) Offer a variety of fresh fruits and vegetables as defined in § 211.2 to children. The types of fruits and vegetables and portion sizes should reflect the ages and preferences of students. Frozen, canned, dried and other types of processed fruits and vegetables are not allowed;

(5) If dip for vegetables is provided, it must be fat-free or low-fat and must be limited to a 2 ounce serving size. Dip for fruit is not allowed;

(6) Limit the service of cooked fresh vegetables to no more than once each week and only when included as part of a nutrition education lesson. Other ingredients in the cooked fresh vegetable dish must be fat-free or low-fat and are not reimbursable;

(7) Publicize the availability of free fresh fruit and vegetables for children widely within the school through use of the public address system, flyers and other usual means of communication and ensure that the only adults allowed to receive FFVP components are teachers who are in the classroom with the students during the FFVP food service;

(8) Integrate Program activities with other school efforts to promote health, nutrition, healthy weight and physical activity;

(9) Participate in Program training offered by the school food authority and/or State agency, as applicable;

(10) Use Program funds primarily for the purchase of fresh fruits and vegetables;

(11) Maintain a financial management system as prescribed by the State agency

and obligate funds on a timely manner as instructed in § 211.5 of this part;

(12) Limit allowable non-food costs to no more than 15 percent of the school's total grant;

(13) Submit timely program expenditure information to the school food authority to enable the school food authority to submit consolidated reimbursement claims for the purchase of fresh fruits and vegetables served to students and allowable non-food expenses only;

(14) Acknowledge that failure to submit accurate expenditure information will result in the disallowance of payments and may result in suspension or termination from the Program;

(15) Acknowledge that if failure to submit accurate expenditure information or claims reflects embezzlement, willful misapplication of funds, theft, or fraudulent activity, the penalties specified in § 210.26 of this chapter will apply;

(16) Comply with the requirements of the Department's regulations respecting nondiscrimination (7 CFR parts 15, 15a, and 15b);

(17) Comply with the applicable procurement requirements found at § 211.13;

(18) Follow hazard analysis and critical control point (HACCP) principles, and sanitation and health standards established under State and local law and regulations in conformance with § 210.13 and § 220.7, respectively, of this chapter for schools participating in the National School Lunch and School Breakfast Programs;

(19) Comply with all Program requirements specified in this part; and

(20) When requested, make all records pertaining to the Program available to the State agency and to FNS for audit and administrative review, at any reasonable time and place. Such records must be retained for a period of three years after the end of the fiscal year to which they pertain, except that, if audit findings have not been resolved, the records must be retained beyond the three-year period as long as required for the resolution of the issues raised by the audit.

#### **§ 211.11 Reporting and recordkeeping.**

##### *(a) Reporting responsibilities.*

Participating State agencies must submit forms and reports to FNS to demonstrate compliance with Program requirements. The reports include, but are not limited to the following:

(1) *Annual FFVP Report.* Each State agency must submit an annual report to FNS by November 1st of the current school year disclosing the total number

of schools in the state eligible to participate in the program, the number of schools that applied for participation in the Program, the schools selected for the Program, the total enrollment and the percentages of students certified for free and reduced price meals in the participating schools and the per student allocation provided for each of the participating schools, the number of schools that applied for participation and were not selected and the percentage of free and reduced price certified students served by such schools.

(2) *Quarterly report.* Each State agency must submit to FNS a quarterly Financial Status Report (SF-425) on the use of Program funds. Such report must be postmarked and/or submitted no later than 30 days after the end of each fiscal year quarter;

(3) *End of year report.* Each State agency must submit a final SF-425 for each fiscal year. This final fiscal year closeout report must be postmarked and/or submitted to FNS within 120 days after the end of each fiscal year or part thereof that the State agency administered the Program. Obligations must be reported only for the fiscal year during which the obligations occur. FNS will not be responsible for reimbursing Program obligations reported later than 120 days after the close of the fiscal year in which they were incurred. Closeout procedures are to be carried out in accordance with 7 CFR part 3016.

(b) *Recordkeeping responsibilities.* State agencies and participating school food authorities are required to maintain records to demonstrate compliance with Program requirements. School food authorities must maintain on file each monthly Claim for Reimbursement and all supporting documentation by school. Records shall be retained as specified in § 210.23(c) of this chapter. School food authorities must make this information available to the Department and the State agency upon request.

#### **§ 211.12 Special responsibilities of schools.**

(a) In addition to the requirements of § 211.10(e), schools selected to participate in the Program must comply with the following:

(1) Have an implementation plan to operate the Program as required in the agreement between the school food authority and the State agency;

(2) When possible, partner with entities that can provide non-Federal resources to the Program; and

(3) Encourage the involvement of parents and the community in activities that enhance the Program such as seeking program partners and other

support activities as determined by the school.

(b) A State agency may establish additional school responsibilities with the approval of FNS if such responsibilities are consistent with the provisions of this part and support the goals of the Program.

#### **§ 211.13 Procurement standards.**

(a) *General.* In the operation and administration of the Program, State agencies and school food authorities shall comply with the requirements of 7 CFR part 210 and 7 CFR parts 3015, 3016 and 3019, as applicable, which implement the applicable Office of Management and Budget (OMB) Circulars, concerning the procurement of all goods and services with nonprofit school food service account funds.

(b) *Geographic preference.* (1) School food authorities participating in the Program, as well as State agencies making purchases on behalf of such school food authorities, may apply a geographic preference when procuring unprocessed locally grown or locally raised fresh fruits and vegetables. When utilizing the geographic preference to procure such products, the school food authority making the purchase or the State agency making purchases on behalf of such school food authorities have the discretion to determine the local area to which the geographic preference option will be applied;

(2) For the purpose of applying the optional geographic preference in paragraph (b)(1) of this section, "unprocessed locally grown or locally raised fresh fruits and vegetables" means only those agricultural products that retain their inherent character. For purposes of the FFVP, the effects of the following processes shall not be considered as changing fresh fruits and vegetables into a product of a different kind or character: cooling; refrigerating; size adjustment made by peeling, slicing, dicing, cutting, chopping, shucking; washing; packaging (such as placing fruit in cartons) and bagging (such as placing fruits or vegetables in bags or combining two or more types of vegetables or fruits in a single package).

#### **§ 211.14 Program assistance and monitoring.**

(a) *Program assistance.* Each State agency must provide training and technical assistance to the school food authorities to enable them to operate the Program successfully in selected schools. The training for new schools shall cover all Program requirements.

(b) *Program monitoring.* (1) A school food authority must review each participating school within the first year



of operation to ensure that the school is conducting the Program in accordance with the requirements of this part and FNS guidance. This general review, conducted in conjunction with the on-site review required under § 210.8 of this chapter, will ensure that the participating school has a financial system in place, including a budget and a timeline for expending Program funds, and is using Program funds as instructed by this part and FNS guidance.

(2) A State agency must review the Program performance for compliance with the provisions of this part. This review, to be conducted as specified by the Secretary in guidance, may take place in conjunction with any administrative review or Federal oversight activity required by this title.

(c) *Corrective action.* Corrective action is required for any violation cited in a Program review authorized in this section. Corrective actions may include technical assistance, training, recalculation of data to ensure the correctness of any Claim for Reimbursement that is being prepared at the time of the review, or other actions established by the State agency.

(d) *Investigations.* Each State Agency must promptly investigate complaints received or irregularities noted in connection with the operation of the Program and must take appropriate action to correct any irregularities. State Agencies must maintain on file evidence of such investigations and actions. The Office of Inspector General (OIG) of the Department must make investigations at the request of the State Agency or if FNS or FNSRO determines investigations by OIG are appropriate.

#### **§ 211.15 Withholding payments.**

In accordance with Departmental regulations at § 3016.43 and § 3019.62 of this chapter, the State agency must withhold Program payments, in whole or in part, to any school food authority that has failed to comply with the provisions of this part. Program payments must be withheld until the school food authority takes corrective action satisfactory to the State agency, or gives evidence that such corrective action will be taken, or until the State agency terminates the grant in accordance with § 211.16 of this part. Subsequent to the State agency's acceptance of the corrective actions, payments will be released for any claims in accordance with the provisions of this part.

#### **§ 211.16 Suspension, termination and grant closeout procedures.**

Whenever it is determined that a State agency has materially failed to comply with the provisions of this part, or with FNS guidelines, FNS may suspend or terminate the Program or take any other action as may be available and appropriate. FNS and the State agency must comply with the provisions of 7 CFR part 3016 concerning grant suspension, termination and closeout procedures. Furthermore, the State agency must apply these provisions, or the parallel provisions of 7 CFR part 3019, as applicable, to suspension or termination of the Program in school food authorities due to repeated failure to meet Program requirements, as documented by the State agency.

#### **§ 211.17 Penalties.**

Whoever embezzles, willfully misapplies, steals, or obtains by fraud any funds, assets, or property provided under this part whether received directly or indirectly from the Department, shall, if such funds, assets, or property are of a value of \$100 or more, be fined no more than \$25,000 or imprisoned not more than 5 years or both; or if such funds, assets, or property are of a value of less than \$100, be fined not more than \$1,000 or imprisoned not more than 1 year or both. Whoever receives, conceals, or retains for personal use or gain, funds, assets, or property provided under this part, whether received directly or indirectly from the Department, knowing such funds, assets, or property have been embezzled, willfully misapplied, stolen or obtained by fraud, shall be subject to the same penalties.

#### **§ 211.18 Management evaluations and audits.**

(a) Unless otherwise exempt, audits at the State and school food authority levels must be conducted in accordance with OMB Circular A-133 and the Department's implementing regulations at 7 CFR part 3052. For availability of the OMB Circular mentioned in this paragraph, please refer to 5 CFR part 1310.3.

(b) Each State agency must provide FNS with full opportunity to conduct management evaluations (including visits to schools) of any operations of the State agency under the Program and provide OIG with full opportunity to conduct audits (including visits to schools) of all operations of the State agency under the Program. Each State agency must make its records available, including records of the receipt and expenditure of funds under the Program, when FNS or OIG reasonably

requests. OIG must also have the right to make audits of the records and operations of any school.

#### **§ 211.19 Educational prohibitions.**

In carrying out the provisions of the Act, the Department shall not impose any requirements with respect to teaching personnel, curriculum, instructions, methods of instruction, or materials of instruction in any school as a condition for participation in the Program.

#### **§ 211.20 Other State agency responsibilities.**

(a) State agencies, or FNSROs where applicable, shall disallow any portion of a claim and recover any payment made to a school food authority that was not properly payable under this part. State agencies will use their own procedures to disallow claims and recover overpayments already made.

(b) Each State agency shall maintain all records pertaining to action taken under this section. Such records shall be retained for a period of three years after the date of the submission of the final Financial Status Report, except that, if audit findings have not been resolved, the records shall be retained beyond the three-year period for as long as required for the resolution of the issues raised by the audit.

(c) If FNS does not concur with the State agency action in paying a claim or a reclaim, or in failing to collect an overpayment FNS shall assert a claim against the State agency for the amount of such claim, reclaim or overpayment. In all such cases, the State agency shall have full opportunity to submit to FNS evidence or information concerning the action taken. If in the determination of FNS, the State agency's action was unwarranted, the State agency shall promptly pay to FNS the amount of the claim, reclaim, or overpayment.

(d) The amounts recovered by the State agency from schools may be utilized to:

(1) Make reimbursement payments for fresh fruits and vegetables served during the fiscal year for which the funds were initially available and

(2) Repay any State funds expended in the reimbursement of claims under the program and not otherwise repaid. Any amounts recovered which are not so utilized shall be returned to FNS in accordance with the requirements of 7 CFR part 210.

#### **§ 211.21 Nondiscrimination.**

(a) In the operation of the Program, no child shall be denied benefits or be otherwise discriminated against because of race, color, national origin, age, sex,

or disability. State agencies and school food authorities shall comply with the requirements of Title VI of the Civil Rights Act of 1964; title IX of the Education Amendments of 1972; section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975; Department of Agriculture regulations on nondiscrimination (7 CFR parts 15, 15a and 15b); and FNS Instruction 113–6.

(b) When accommodating children due to medical or special dietary needs, schools must follow the applicable provisions in § 210.10(g) of this chapter.

#### § 211.22 Program information.

School food authorities and schools desiring information about the Program should contact their State educational agency or the appropriate FNS Regional Office at the address or telephone number listed on the FNS Web site ([www.fns.usda.gov/cnd](http://www.fns.usda.gov/cnd)).

#### PART 235—STATE ADMINISTRATIVE EXPENSE FUNDS

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

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

2. Section 235.1 is amended by adding the phrase “and the Fresh Fruit and Vegetable Program (7 CFR part 211).” to the end of the second sentence.

Dated: February 10, 2012.

**Kevin W. Concannon,**

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

[FR Doc. 2012–4181 Filed 2–23–12; 8:45 am]

**BILLING CODE 3410–30–P**

#### DEPARTMENT OF ENERGY

##### 10 CFR Part 431

[Docket Number EERE–2010–BT–STD–0048]

RIN 1904–AC04

#### Energy Conservation Program: Energy Conservation Standards for Distribution Transformers; Correction

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Notice of proposed rulemaking and public meeting; correction.

**SUMMARY:** The U.S. Department of Energy (DOE) published a notice of proposed rulemaking on February 10, 2012, which proposed to amend DOE regulations regarding energy conservation standards for distribution transformers. It was recently discovered that values in certain tables of the proposed rule are inaccurate or absent. This notice corrects these inaccuracies as described.

**DATES:** DOE will accept comments, data and information regarding this correction before and after the February 23, 2012, public meeting, but no later than April 10, 2012.

**FOR FURTHER INFORMATION CONTACT:** James Raba, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–8654. Email: [Jim.Raba@ee.doe.gov](mailto:Jim.Raba@ee.doe.gov).

Ami Grace-Tardy, U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–5709. Email: [Ami.Grace-Tardy@hq.doe.gov](mailto:Ami.Grace-Tardy@hq.doe.gov).

#### SUPPLEMENTARY INFORMATION:

#### Background

Title III, Part B of the Energy Policy and Conservation Act of 1975 (EPCA or the Act), Public Law 94–163 (42 U.S.C. 6291–6309, as codified), established the Energy Conservation Program for “Consumer Products Other Than Automobiles.” Part C of Title III of EPCA (42 U.S.C. 6311–6317) established a similar program for “Certain Industrial Equipment,” including distribution transformers. The Energy Policy Act of 1992 (EPACT 1992), Public Law 102–486, amended EPCA and directed DOE to prescribe energy conservation standards for distribution transformers. (42 U.S.C. 6317(a)) On October 12, 2007, DOE published a final rule that established energy conservation standards for liquid-immersed distribution transformers and medium-voltage, dry-type distribution transformers (72 FR 58190). The Energy Policy Act of 2005 (EPACT 2005), Public Law 109–25, amended EPCA to establish energy conservation standards for low-voltage, dry-type distribution transformers. (42 U.S.C. 6295(y)) On February 10, 2012, DOE published a proposed rule with amended energy conservation standards for liquid-immersed, medium-voltage dry-type, and low-voltage, dry-type distribution transformers (77 FR 7282).

#### Need for Correction

As published, values in certain tables of the proposed rule are inaccurate or absent. DOE solicits public comment on the changes contained in this document as part of the February 10 NOPR.

#### Corrections

In proposed rule FR Doc. 2012–2642 appearing on page 7282 in the issue of Friday, February 10, 2012, the following corrections should be made:

1. On page 7285, Table I.5 is corrected to read as follows:

TABLE I.5—PROPOSED ELECTRICAL EFFICIENCIES FOR ALL LIQUID-IMMERSED DISTRIBUTION TRANSFORMER EQUIPMENT CLASSES (COMPLIANCE STARTING JANUARY 1, 2016)

Standards by kVA and equipment class			
Equipment class 1		Equipment class 2	
kVA	%	kVA	%
10 .....	98.70	15 .....	98.65
15 .....	98.82	30 .....	98.83
25 .....	98.95	45 .....	98.92
37.5 .....	99.05	75 .....	99.03
50 .....	99.11	112.5 .....	99.11
75 .....	99.19	150 .....	99.16
100 .....	99.25	225 .....	99.23
167 .....	99.33	300 .....	99.27
250 .....	99.39	500 .....	99.35
333 .....	99.43	750 .....	99.40
500 .....	99.49	1000 .....	99.43