

Rules and Regulations

Federal Register

Vol. 61, No. 126

Friday, June 28, 1996

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF AGRICULTURE

Food and Consumer Service

7 CFR Parts 272 and 277

[Am. No. 368]

RIN 0584-AB92

Food Stamp Program: Automated Data Processing Equipment and Services; Reduction in Reporting Requirements

AGENCY: Food and Consumer Service, USDA.

ACTION: Final rule.

SUMMARY: This rule: increases the cost thresholds above which prior written Federal approval is required for Federal financial participation in State automated data processing (ADP) equipment and services acquisitions; provides for State requests to be deemed to have provisionally met the prior approval requirement if the Food and Consumer Service (FCS) does not approve, disapprove, or request additional information about the request within 60 days of acknowledging receipt; and eliminates the requirement that State agencies submit a written summary pertaining to the State biennial system security reviews.

EFFECTIVE DATE: This rule is effective July 29, 1996.

FOR FURTHER INFORMATION CONTACT: John H. Knaus, Chief, Quality Control Branch, Program Accountability Division, Food Stamp Program, 3101 Park Center Drive, Room 904, Alexandria, Virginia 22302, (703) 305-2474.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

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

Executive Order 12372

The Food Stamp Program (FSP) is listed in the Catalog of Federal Domestic Assistance under 10.551 and information on State agency administrative matching grants for the FSP is listed under 10.561. For the reasons set forth in the final rule and related notice to 7 CFR part 3015, subpart v (48 FR 29115), the FSP is excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

Executive Order 12778

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. This 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 implementation. This rule is not intended to have retroactive effect unless so specified in the "Effective Date" section of this preamble. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted. In the FSP the administrative procedures are as follows: (1) For program benefit recipients—State administrative procedures issued pursuant to 7 U.S.C. 2020(e)(10) and 7 CFR 273.15; (2) for State agencies—administrative procedures issued pursuant to 7 U.S.C. 2023 set out at 7 CFR 276.7 (for rules related to non-QC liabilities) or Part 283 (for rules related to QC Liabilities); and (3) for program retailers and wholesalers—administrative procedures issued pursuant to 7 U.S.C. 2023 set out at 7 CFR 278.8.

Regulatory Flexibility Act

This rulemaking has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (Pub. L. 96-354, 94 Stat. 1164, September 19, 1980, 5 U.S.C. 601-612). Ellen Haas, Under Secretary for Food, Nutrition, and Consumer Services, has certified that this rule does not have a significant economic impact on a substantial number of small entities. This rule will affect State agencies by reducing the reporting requirements applicable to them.

Paperwork Reduction Act

We anticipate this rule could reduce the actual reporting burden by twenty percent or more. In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), FCS solicited comment through an April 1, 1996 publication in the Federal Register (61 FR 14288) of a notice on the information collection requirements relating to automated data processing and information retrieval systems. The comment period closed May 31, 1996. There were no comments on the portion of the reporting burden that this rule concerns. The proposed collection will be submitted to OMB for review and at that time the Department will publish a notice which will provide an additional opportunity to comment.

Background

On July 31, 1995, the Department of Agriculture (the Department) published in the Federal Register a Notice of Proposed Rulemaking which proposed changes to the Advance Planning Document (APD) process (60 FR 38,972 (1995)). There was a sixty-day comment period, which ended September 29, 1995. The Department received six comment letters on the proposed rule. Commenters represented the States of California, Louisiana, North Carolina, Pennsylvania and Texas and the National Association of State Human Services Finance Officers. Commenters expressed agreement with the proposed rule's objective to reduce reporting requirements. Two commenters supported the rule changes with no additional comment. One commenter was positive about the changes but had technical questions about their application. The three remaining commenters, while positive about the direction of the rule changes, felt FCS should take further action to reduce the reporting requirements.

Increased APD Prior Approval Cost Thresholds - 7 CFR 277.18(c)

The Department proposed to increase the cost thresholds for prior approval of APDs from \$500,000 to \$5 million or more in State and Federal costs for both competitive and noncompetitive acquisitions. Noncompetitive acquisitions from a non-governmental source that have total State and Federal acquisition costs of more than \$1 million but no more than \$5 million would need prior approval of the

justification for the sole source purchase. The previous threshold for such acquisitions was \$100,000. Three commenters thought the proposed increases were too small to reduce the reporting burden for their States. Two recommended that thresholds be scaled according to the total or client populations of a State. One commenter recommended that thresholds be raised to \$25 million for larger States; another recommended an increase to \$30 million. The theory behind these comments was that relatively minor projects in larger States, because of their costs, would receive disproportionate Federal attention and require continued reporting.

The Department is attempting to achieve a reasonable balance between greater State flexibility and prudent oversight of Federal investments. The thresholds were increased ten-fold in the proposed rule. While automation projects costing from \$5 million to \$25 million or \$30 million may not always be critical projects in larger States, they represent sizeable investments of Federal money. Introduction of a sliding scale for thresholds according to State population or caseload introduces an unnecessary complication to the APD process. At this time the Department believes a reasonable balance has been proposed. However, the Department will continue efforts to further streamline the APD process. After some experience with the new thresholds, further increases in or changes to the thresholds can be considered.

One commenter suggested that the Department limit its review of State ADP acquisitions to new development and that standard upgrades of existing equipment, replacement of obsolete or depreciated equipment, and normal growth (equipment for new staff) be exempt from Federal review. This commenter asserted there was rarely doubt as to the eventual approval of most of these requests and this action would permit further Federal focus on new automation initiatives. The Department is responsible for overseeing Federal investments and ensuring Federal requirements are met. At this time the Department believes these acquisitions, when in excess of the proposed thresholds, should receive continued Federal oversight. However, this suggestion will be part of considerations in continuing efforts to streamline the APD process and provide reporting relief to State agencies.

One commenter proposed that electronic benefit transfer (EBT) systems be subject to the higher APD thresholds. However, given the critical stage of development of a large number of EBT

projects, the Department believes it is in the mutual interest of States and the Federal government to continue reviewing EBT projects under standards that are specific to them.

Finally, one commenter wanted to know whether an APD would need to be submitted for a project if it unexpectedly exceeds the threshold at some point during its development or during its life cycle through enhancements. The proposed rule did not affect existing policy for underestimated projects. When State officials first realize that a project under development is likely to exceed the threshold, an APD should be submitted. After system implementation is complete, future enhancements during the system life cycle would need prior approval if their costs will exceed the threshold.

Reviews of Requests for Proposals (RFPs), Contracts and Contract Amendments—7 CFR 277.18(c)(2)(ii)

The Department proposed to increase thresholds for prior approval of RFPs and Contracts to \$5 million or more for competitive procurements and to more than \$1 million for non-competitive procurements. The proposed rule also would increase the threshold for prior Federal approval for contract amendments to those involving cost increases greater than \$1 million or contract time extensions of more than 120 days. FCS could review Requests for Proposals (RFPs), contracts and contract amendments under the threshold amounts on an exception basis or if the procurement was not adequately described in the APD.

Two commenters recommended that RFPs, contracts and contract amendments no longer be subject to review. According to one commenter, Federal review of these documents causes delays, duplicates State processes and represents Federal micro-management of State projects. The other commenter recommended elimination of these reviews since RFPs and contracts would have been already justified by an approved APD. While the Department substantially increased the thresholds for submitting these documents, the approval of RFPs, contracts and contract amendments was not eliminated. The Department is responsible for ensuring that Federal requirements are met for ADP acquisitions. Although an approved APD may provide for the eventual release of an RFP and signing of a contract, these documents are not necessarily identical in content and legal significance. Prior approval for these documents will be retained in the

final rule. However, the Department will reexamine these recommendations in upcoming efforts to further streamline the APD process and reduce State reporting requirements.

Two commenters believe the proposed rule is unclear about when RFPs, contracts and contract amendments which fall under the thresholds for submitting these documents will need prior approval. These commenters thought the rule could require States to submit RFPs, contracts or contract amendments when the ADP equipment or services acquisition did not need prior approval of either an APD or the sole source justification. The proposed rule did not change FCS' ongoing policy of subjecting these documents to review only if prior approval of the ADP acquisition was required in accordance with § 277.18(c)(1). As provided by § 277.18(c)(2)(ii), FCS will require prior approval of RFPs, contracts and contract amendments only if prior approval of an APD or the justification for a sole source procurement was required. Prior approval for RFPs, contracts and contract amendments under the applicable thresholds would be reviewed on an exception basis (such as if innovative automation is used) or if the procurement strategy was not adequately described or justified in the APD. If approval of these documents is needed, and they are under the thresholds, FCS will notify States to submit them. No substantive changes are made to the provisions at § 277.18(c)(2)(ii) (A), (B) or (C). However, wording in the provisions will be modified in the final rule to make the language more similar to language in DHHS' rule. The word "justified" is added to (A) and (B) and the word "described" is added to part (C).

Prompt Action on Requests for Prior Approval—7 CFR 277.18(c)(5)

Two commenters asked about the meaning of provisional approval, whether this approval could be withdrawn, and under what circumstances. One commenter wanted to know whether interest would be charged if a project was denied funding after it was begun. Provisional approval permits States to go forward with their automation projects after the Federal time-limit expires without penalty for not receiving prior Federal approval. Under previous policy, a project could be denied full funding if it was begun before Federal approval was received. However, provisional approval is distinct from formal approval and does not waive Federal requirements for these acquisitions. FCS' practice has

been not to establish claims if a State has acted in good faith. In the event FCS determines that the actions taken by the State are not approvable, notification in writing is provided, and funding approval is suspended pending corrective action. The State would be at financial risk if the State continues to draw funds for these charges after this notification. A claim would be established for funds drawn after the suspension and the State would again be notified in writing of the disallowance for all funds improperly drawn and any interest accrued on those funds. These charges would not be eligible for reimbursement by FCS. If FCS determines that the planned project does not meet the requirements for approval, no further funding would be approved and all approval action would be terminated.

One commenter was concerned that the date starting the count of the sixty-day Federal time-limit for responding to State requests is the date of the Department's acknowledgement letter. This commenter suggested the Department could delay State projects by delaying the mailing of the acknowledgement letter. The Department intends to acknowledge State requests promptly. If State agencies believe acknowledgement of their requests have been purposely delayed, a complaint should be filed with the appropriate FCS Regional Administrator.

APD Update (APDU)—7 CFR 277.18(e)

The Department proposed to raise the reporting threshold for submitting an annual APD Update (APDU) from \$1 million to \$5 million. The threshold for submittal of an APDU as needed was proposed for increases of \$1 million or more. The previous threshold was \$300,000 or 10 percent of the project cost, whichever is less.

According to two commenters, the threshold for annual APD updates is still too low to give their States reporting relief. These commenters recommended increases to \$25 million and \$30 million respectively. One commenter thought this increase was necessary since EBT projects will increase the amount of annual APD reporting required. In addition, one commenter thought the threshold for as needed APDUs should be raised from \$1 million or more to \$2.5 million or 10 percent, whichever is more. The Department believes a reasonable threshold increase for submittal of annual APDUs and the as needed APDUs is embodied in the proposed regulation. Since the thresholds for APDUs do not apply to EBT systems,

these provisions will not affect annual reporting for EBT systems. The thresholds for submitting APDUs will become final as proposed. However, APDU requirements will be reexamined in upcoming streamlining efforts.

Biennial System Security Reviews—7 CFR 277.18(p)(3)

The proposed rule eliminated the requirement that States submit summary information about the biennial ADP system security review to FCS. Instead, States are to retain copies of these reports and other pertinent supporting documentation for Federal on-site review. One commenter asked how long the biennial security review report should be kept by the State, who would be conducting reviews of these materials and how often they would be reviewed. States should keep a copy of their latest biennial security review report and pertinent supporting documentation (such as a summary of findings regarding compliance with security requirements and the corrective action plan with dated milestones) on file for Federal review. State record retention requirements would apply to these documents. FCS or agents acting on FCS' behalf will examine State security review reports on a periodic basis, as needed.

Miscellaneous

The Department is making a minor technical change to the section heading of § 277.18 by replacing the word "Automatic" with the word "Automated." This change is being made to make word usage in the section heading consistent with word usage in the rule's text.

Implementation—272.1(g)

All provisions in this final rule become effective July 29, 1996.

List of Subjects

7 CFR Part 272

Alaska, Civil rights, Food stamps, Grant programs—social programs, Reporting and recordkeeping requirements.

7 CFR Part 277

Food stamps, Government procedure, Grant programs—social programs, Investigations, Records, Reporting and recordkeeping requirements.

Accordingly, 7 CFR parts 272 and 277 are amended as follows:

1. The authority citation for parts 272 and 277 continues to read as follows:

Authority: 7 U.S.C. 2011–2032

PART 272—REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

2. In § 272.1, a new paragraph (g)(146) is added to read as follows:

272.1 General terms and conditions.

* * * * *

(g) *Implementation.* * * *

(146) Amendment No. 368. The provisions of Amendment No. 368 are effective on July 29, 1996.

PART 277—PAYMENTS OF CERTAIN ADMINISTRATIVE COSTS OF STATE AGENCIES

3. In § 277.18,

a. The section heading is amended by removing the word "Automatic" and adding in its place the word "Automated";

b. Paragraph (c)(1) is revised;

c. The second sentence in paragraph (c)(2)(ii)(A) is removed and two sentences are added in its place;

d. The second sentence in paragraph (c)(2)(ii)(B) is removed and two sentences are added in its place;

e. The second sentence in paragraph (c)(2)(ii)(C) is removed and two sentences are added in its place;

f. Paragraph (c)(5) is added;

g. Paragraph (e)(1) is amended by removing the words "\$1 million" and adding in their place the words "\$5 million";

h. Paragraph (e)(3)(i) is amended by removing the words "(\$300,000 or 10 percent, whichever is less)" and adding in their place the words "(\$1 million or more)";

i. The third and fourth sentences of paragraph (p)(3) are removed and one sentence is added in their place. The revision and additions read as follows:

§ 277.18 Establishment of an Automated Data Processing (ADP) and Information Retrieval System.

* * * * *

(c) *General acquisition requirements.*—(1) *Requirement for prior FCS approval.* A State agency shall obtain prior written approval from FCS as specified in paragraph (c)(2) of this section when it plans to acquire ADP equipment or services with proposed FFP that it anticipates will have total acquisition costs of \$5 million or more in Federal and State funds. This applies to both competitively bid and sole source acquisitions. A State agency shall also obtain prior written approval from FCS of its justification for a sole source acquisition when it plans to acquire ADP equipment or services non-competitively from a nongovernmental source which has a total State and Federal acquisition cost of more than \$1

million but no more than \$5 million. The State agency shall request prior FCS approval by submitting the Planning APD, the Implementation APD or the justification for the sole source acquisition signed by the appropriate State official to the FCS Regional Office. However, a State agency shall obtain prior written approval from FCS for the acquisition of ADP equipment or services to be utilized in an EBT system regardless of the cost of the acquisition.

(2) *Specific prior approval requirements.* * * *

(ii) * * *

(A) * * * However, RFPs costing up to \$5 million for competitive procurements and up to \$1 million for noncompetitive acquisitions from non-governmental sources and which are an integral part of the approved APD need not be submitted to FCS. States will be required to submit RFPs under this threshold amount on an exception basis or if the procurement strategy is not adequately described and justified in an APD. * * *

(B) * * * However, contracts costing up to \$5 million for competitive procurements and up to \$1 million for noncompetitive acquisitions from nongovernmental sources, and which are an integral part of the approved APD need not be submitted to FCS. States will be required to submit contracts under this threshold amount on an exception basis or if the procurement strategy is not adequately described and justified in an APD. * * *

(C) * * * However, contract amendments involving cost increases of up to \$1 million or time extensions of up to 120 days, and which are an integral part of the approved APD need not be submitted to FCS. States will be required to submit contract amendments under these threshold amounts on an exception basis or if the contract amendment is not adequately described and justified in an APD. * * *

* * * * *

(5) *Prompt action on requests for prior approval.* FCS will reply promptly to State requests for prior approval. If FCS has not provided written approval, disapproval or a request for additional information within 60 days of FCS' letter acknowledging receipt of the State's request, the request will be deemed to have provisionally met the prior approval requirement in paragraph (c) of this section. However, provisional approval will not exempt a State from having to meet all other Federal requirements which pertain to the acquisition of ADP equipment and

services. Such requirements remain subject to Federal audit and review.

* * * * *

(p) * * *

(3) * * * State agencies shall maintain reports of their biennial ADP system security reviews, together with pertinent supporting documentation, for Federal on-site review.

* * * * *

Dated: June 24, 1996.

Ellen Haas,

Under Secretary, Food, Nutrition, and Consumer Services.

[FR Doc. 96-16596 Filed 6-27-96; 8:45 am]

BILLING CODE 3410-30-P

Agricultural Marketing Service

7 CFR Part 1280

[Docket Number LS-96-004]

Sheep Promotion, Research, and Information Program

AGENCY: Agricultural Marketing Service; USDA.

ACTION: Final rule.

SUMMARY: This rule suspends indefinitely provisions of the Order and the Certification and Nomination Regulations, and postpones indefinitely the announced effective date of July 1, 1996, for assessment collection in the Rules and Regulations, and the assessment provisions of the Order. The Department of Agriculture (Department) conducted a review and evaluated the conduct and results of the February 6, 1996, nationwide sheep referendum. The Department discovered inconsistencies in the application of the referendum rules, and this action is the result of the discovery of these inconsistencies. A second nationwide referendum will be conducted among eligible sheep producers, sheep feeders, and importers of sheep and sheep products on a date to be announced by the Department.

EFFECTIVE DATE: This document is effective June 29, 1996.

The effective date of July 1, 1996 for Subpart A, §§ 1280.224 through 1280.228 in Subpart A, and Subpart B, §§ 1280.301 through 1280.318 is postponed indefinitely.

Additionally, in Subpart A, §§ 1280.101 through 1280.126, §§ 1280.201 through 1280.223, §§ 1280.229 through 1280.235 and §§ 1280.240 through 1280.246, and Subpart C, §§ 1280.400 through 1280.414 are suspended indefinitely.

FOR FURTHER INFORMATION CONTACT: Ralph L. Tapp, Chief, Marketing

Programs Branch, Room 2606-S; Livestock and Seed Division, AMS, USDA; PO Box 96456, Washington, DC 20090-6456. Telephone number 202/720-1115.

SUPPLEMENTARY INFORMATION: Prior documents: Notice—Invitation to submit proposals published January 4, 1995 (60 FR 381); Proposed Rule—Sheep and Wool Promotion, Research, Education, and Information Order published June 2, 1995 (60 FR 28747); Proposed Rule—Procedures for Conduct of Referendum published August 8, 1995 (60 FR 40313); Notice—Certification of Organizations for Eligibility to Make Nominations to the Proposed Board published August 8, 1995 (60 FR 40343); Proposed Rule—Rules and Regulations published October 3, 1995 (60 FR 51737); Proposed Rule—Sheep and Wool Promotion, Research, Education, and Information Order published December 5, 1995 (60 FR 62298); Final Rule and Referendum Order—Procedures for the Conduct of Referendum published December 15, 1995 (60 FR 64297); Final Rule—Sheep and Wool Promotion, Research, Education, and Information Order published May 2, 1996 (61 FR 19514); Final Rule—Rules and Regulations published May 9, 1996, (61 FR 21053); and Final Rule—Certification and Nomination Procedures published May 9, 1996 (61 FR 21049).

Executive Orders 12866 and 12778 and the Regulatory Flexibility Act and the Paperwork Reduction Act

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

This final rule was reviewed under Executive Order 12778, Civil Justice Reform. It is not intended to have a retroactive effect. This rule would not preempt any State or local laws, regulations, or policies unless they present an irreconcilable conflict with this rule.

The Sheep Promotion, Research, and Information Act of 1994 (Act (7 U.S.C. 7101-7111)) provides that any person subject to the Order may file with the Secretary a petition stating that the Order, any provision of the Order, or any obligation imposed in connection with the Order is not in accordance with the law, and requesting a modification of the Order or an exemption from certain provisions or obligations of the Order. The petitioner would have the opportunity for a hearing on the petition. Thereafter the Secretary would issue a decision on the petition. The Act