

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

#### *Resolving Liabilities*

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

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

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

#### *Appeals*

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

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

changes are being made to the regulations.

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

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

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