

# Serious Deficiency Process in the Child and Adult Care Food Program and Summer Food Service Program



## Proposed Rule

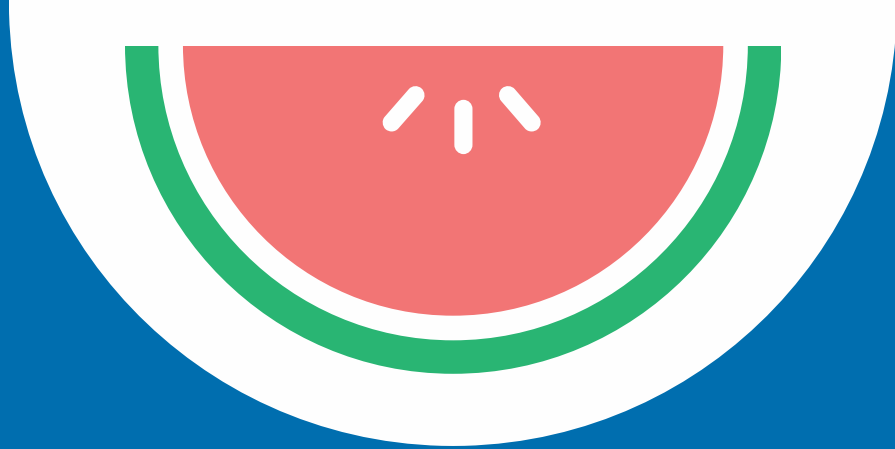


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# Introduction



# Today's Agenda

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- Purpose and Background
- Section-by-Section Review of Proposed Changes
- Request for Public Comments



# Submit Your Questions

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Submit your questions using the “Q&A” feature

## Background

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- The 2016 proposed rule, *Child Nutrition Program Integrity*, proposed to establish a serious deficiency process in SFSP and extend the process to unaffiliated centers in CACFP
- In 2019, FNS published a Request for Information (RFI) seeking experiences from program operators and State agencies with the Serious Deficiency process
- The *Child Nutrition Program Integrity Final Rule* had originally included amendments to make changes to the Serious Deficiency process
- Comments on RFI and *Child Nutrition Program Integrity* rulemaking led FNS to hold on amendments to serious deficiency and seek improved changes in a separate rulemaking

## Overview of the Rule

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- Serious Deficiency (SD) Process in CACFP and SFSP
- Path to Full Correction of Serious Management Problems
- Good Standing
- Suspension in CACFP and SFSP
- Reciprocal Disqualification and the National Disqualified List (NDL)
- Multi-State Sponsoring Organizations (MSSOs)

# Current Requirements of the CACFP SD Process

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## The Six Steps

- Identify serious deficiencies
- Issue a notice of serious deficiency
- Receive and assess the institution's written corrective actions
- Issue a notice of temporary deferral of the serious deficiency if the CAP is approved or issue a notice of proposed termination if the CAP is inadequate or not submitted
- Provide an appeal review, if requested, of the proposed termination and disqualification
- Issue a notice of final termination and disqualification if the appeal is upheld or issue a notice of temporary deferral if the appeal is overturned



## Overview of Proposed Changes to the SD Process

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- Establishes a serious deficiency process in SFSP
- Extends the serious deficiency process to CACFP unaffiliated sponsored centers
- Redefines findings that trigger the SD process as “serious management problems”
- Changes the point at which program operators are declared seriously deficient
- Codifies the analysis process to identify serious management problems, as described in the Serious Deficiency Handbook
- Creates a path to full correction of serious management problems



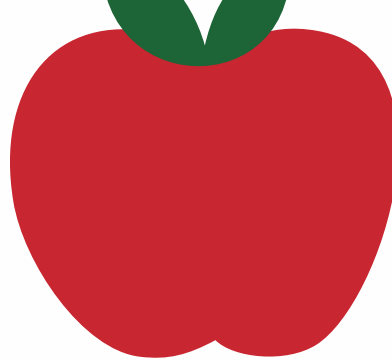
# Proposed Requirements of the SD Process

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## The Six Steps

- Identify serious management problems
- Issue a notice of serious management problems
- Receive and assess the program operators written corrective actions
- Issue a notice of successful corrective action or a notice of proposed termination with appeal rights
- Provide a fair hearing, if requested
- Issue a notice of successful appeal if the fair hearing vacates the proposed termination, or issue a notice of termination, serious deficiency, and disqualification, if the fair hearing upholds the proposed termination or the timeframe for requesting a fair hearing has passed



# Serious Deficiency Process in CACFP & SFSP





# Comparison of Current & Proposed SD Process

## Current Process

### Identify the serious deficiency

§226.6(c) – Denial of Applications and Terminations of Agreements &  
§225.11(c) – Denial of Applications and Terminations of Sponsors

- Lists for serious deficiencies for new, renewing, and participating CACFP institutions
- Lists for serious deficiencies for SFSP sponsors

## Proposed Process

### Identify the serious management problem

§226.25(a)(3) - Identifying Serious Management Problems &  
§225.18(a)(3) – Identifying Serious Management Problems

- Replaces serious deficiencies with serious management problems
- Serious management problems must be cited with specific regulatory violations
- Codifies the framework for identifying serious management problems from the *Serious Deficiency, Suspension, and Appeals for State Agencies and Sponsoring Organizations Handbook*

## Proposed Rule Framework for Identifying Serious Management Problems

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1. The severity of the problem.
2. The degree of responsibility.
3. The history of participation in the Program.
4. The nature of the requirements that relate to the finding.
5. The degree to which the problem impacts Program integrity.

# Comparison of Current and Proposed SD Process

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Current Process	Proposed Process
<p><u>Issue a Notice of Serious Deficiency</u> §226.6(c) &amp; §226.16(l) – Notice of serious deficiency &amp; No regulatory process in SFSP</p> <ul style="list-style-type: none"><li>• Declare the program operator seriously deficient</li><li>• Notice must detail the serious deficiencies and provide the program operator an opportunity to submit and implement a corrective action plan.</li></ul>	<p><u>Issue a Notice of Serious Management Problem</u> §226.25(a)(6)(i), §226.25(a)(7)(i) – First notification – notice of serious management problem &amp; §225.18(a)(6)(i) – First notification – notice of serious management problem</p> <ul style="list-style-type: none"><li>• Notice must detail the serious management problems and provide the program operator an opportunity to submit and implement a corrective action plan.</li></ul>

## Proposed Rule Notice of Serious Management Problems

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- Specify the serious management problem.
- Specify the regulatory requirements, instructions, or policies as the basis for each serious management problem.
- Specify the actions that must be taken to correct each serious management problem.
- Set time allotted for implementing the corrective action, including milestones and completion date.
- Specify that failure to fully implement corrective actions for each serious management problem within the allotted time will result in proposed termination and disqualification.
- Clearly state that voluntary termination after being notified of serious management problems will still result in termination and disqualification.
- Clearly state that serious management problems are not subject to a fair hearing.



## Comparison of Current & Proposed SD Process

### Current Process

#### Receive and Assess Corrective Actions

*§226.6(c)(1-3)* – Denial of Applications and Termination of Agreements,

*§226.16(l)* – Termination of Agreements for Cause &

*§225.11(f)* – Corrective action and termination of sites

- CACFP: Program operator must submit a corrective action plan (CAP) and the corrective actions must fully and permanently correct the serious deficiencies
- SFSP: Sponsors must take corrective actions whenever a State agency observes violations

### Proposed Process

#### Receive and Assess Corrective Actions

*§226.25(c)(1)* – Corrective Action Plans &

*§225.18(c)(1)* – Corrective Action Plans

- Program operator must submit a corrective action plan (CAP) that addresses root cause of each serious management problem
- CAP must include actions taken to address the serious management problem, who addressed the problem, when the action was taken, where the documentation is filed, and how staff were informed of the new policies and procedures
- Corrective actions must fully correct serious management problems

## Proposed Rule Corrective Action Timeframes

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- CACFP Institutions: As soon as possible or up to 90 days from the date the institution receives the first notification
- CACFP day care homes and unaffiliated sponsored centers: As soon as possible or up to 30 days from the date a day care home or unaffiliated sponsored center receives the first notification
- SFSP sponsors: Up to 10 days from the date the sponsor receives the first notification
- Note: more than 90 days may be allowed for CACFP institutions and 10 days for SFSP sponsors if corrective actions require long-term revision of management systems or processes







## Comparison of Current & Proposed SD Process

Current Process	Proposed Process
<p><u>Notice of temporary deferral of the serious deficiency determination</u> <i>§226.6(c)(1-3)(iii) &amp; §226.16(l)(3)</i> – Serious deficiency notification procedures</p> <ul style="list-style-type: none"><li>• If serious deficiencies are fully and permanently corrected, the serious deficiency determination is temporarily deferred</li></ul>	<p><u>Notice of successful corrective action</u> <i>§226.25(a)(6-7)(ii)(A)</i> – Notice of Successful Corrective Action &amp; <i>§225.18(a)(6)(ii)(A)</i> – Notice of Successful Corrective Action</p> <ul style="list-style-type: none"><li>• If corrective actions have been fully implemented to correct each serious management problem, a notice of successful corrective action is issued</li></ul>

## Proposed Process: Path to Full Correction

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- Program operators must submit a corrective action plan (CAP) that is approved by the administering agency
- Then the program operator is subject to a more frequent review cycle, which allows for the administering agency to confirm that corrective actions are upheld
- Program operators achieve full correction if there are no new or repeat serious management problems in subsequent and more frequent reviews



# Comparison of Current & Proposed SD Process

Current Process	Proposed Process
<p><u>Proposed Termination and Right to an Administrative Review</u>            §226.6(c)(1-3)(iii) &amp; §226.16(l)(3) – Serious Deficiency            Notification Procedures</p> <ul style="list-style-type: none"> <li>Renewing and participating institutions: If timely corrective action is not taken to fully and permanently correct the serious deficiencies, the administering agency must issue a notice of proposed termination and proposed disqualification</li> <li>Applying institutions: If timely corrective action is not taken to fully and permanently correct the serious deficiencies, the application is denied, and the State agency must issue a notice of proposed termination</li> <li>Proposed terminations are subject to administrative reviews</li> <li>If the serious deficiencies recur, the administering agency must move immediately to issue a notice of intent to terminate and disqualify and include procedures for seeking an administrative review of the denial and proposed disqualification</li> </ul>	<p><u>Proposed Termination and Right to a Fair Hearing</u>            §226.25(a)(6-7)(ii)(B) &amp;            §225.18(a)(6)(ii)(B) – Notice of Proposed Termination and Proposed Disqualification</p> <ul style="list-style-type: none"> <li>If corrective action has not been taken or fully implemented for each serious management problem within the allotted time and to the State agency’s satisfaction, the State agency must issue a notice of proposed termination &amp; proposed disqualification</li> <li>If serious management problems recur before full correction is achieved, the State agency must issue notice of proposed termination &amp; proposed disqualification</li> </ul>

## Proposed Rule Fair Hearing Procedures

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- Replace the term administrative review with fair hearing
- Proposed regulations define the term fair hearing to mean "due process granted upon request" for program operators in response to specified actions.
- These actions include denial of applications and proposed terminations
- Fair hearing procedures are found in proposed regulations at *§226.25(g)* & *§225.18(f)*
- Actions subject to fair hearings in CACFP are outlined in proposed regulations *§226.25(g)*
- Actions subject to fair hearings in SFSP are outlined under current regulations *§225.13*





## Comparison of Current & Proposed SD Process

### Current Process

#### Provide an Administrative Review, If Requested

§226.6(k) – Administrative Reviews for Institutions and Responsible Principals and Responsible Individuals &

§226.6(l) – Administrative Reviews for Day Care Homes

• Program operators must be advised of procedures for seeking an administrative review

- Request for an administrative review must be submitted in writing no later than 15 days after the date the notice of proposed termination is received
- State agency must acknowledge the receipt of request within 10 days of its receipt

### Proposed Process

#### Provide a Fair Hearing, If Requested

§226.25(g) & §225.18(g) – Fair Hearings

- Program operators must be advised in writing of its right to a fair hearing and the basis for the State agency's decision
- CACFP: Request for a fair hearing must be submitted at no later than 15 calendar days after the date of the notice of proposed termination is received
- CACFP: Administering agency must acknowledge receipt of request within 10 calendar days
- SFSP: Request for a fair hearing must be submitted at no later than 5 calendar days after the date of the notice of proposed termination is received



## Comparison of Old and Proposed SD Process

### Old Process

#### Serious Deficiency, Termination, and Disqualification

*§226.6(c)(3)(iii)(E) & §226.6(c)(2)(iii)(D) –*

Agreement Termination and Disqualification

- Participating & renewing institutions: if time for requesting an administrative review expires or the administering agency's action is upheld, the administering agency must terminate the program agreement, issue a notice of disqualification and place on the NDL
- Applying institutions: if time for requesting an administrative review expires or the administering agency's action is upheld, the administering agency must issue a notice of disqualification and place on the NDL

### New Process

#### Serious Deficiency, Termination, and Disqualification

*§226.25(a)(6-7)(iii)(B) – Notice of Serious Deficiency, Termination of the Agreement, and Disqualifications &*

*§225.18(a)(6)(iii)(B) – Notice of Serious Deficiency, Termination of the Agreement, and Disqualifications*

- If the time for requesting a fair hearing expires or when the fair hearing official upholds the administering agency's action, the program operator is declared seriously deficient, and the administering must issue a notice of disqualification and placement on the NDL



## Comparison of Old and Proposed SD Process

Old Process	New Process
<p><u>Vacate the Proposed Termination or Application Denial</u> <i>§226.6(c)(1-3)(iii) &amp; §226.16(l)(3)(i) – Serious Deficiency Notification Procedures &amp; §226.6(k-l) – Administrative Review Procedures</i></p> <ul style="list-style-type: none"><li>• If the administrative review vacates the proposed termination, the administering agency must notify the program operator</li><li>• The program operator still must correct serious deficiencies</li><li>• The serious deficiency determination is temporarily deferred</li></ul>	<p><u>Vacate the Proposed Termination</u> <i>§226.25(a)(6)(iii)(A) &amp; §225.18(a)(6)(iii)(A) – Notice to Vacate the Proposed Termination of the Institution’s Agreement</i></p> <ul style="list-style-type: none"><li>• If the fair hearing vacates the proposed termination, the administering agency must notify the program operator</li><li>• The program operator still must correct the serious management problems</li><li>• The program operator is reviewing more frequently until full correction is achieved</li></ul>

# Summary of Proposed SD Process

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- The administering state or sponsoring agency monitors a CACFP or SFSP program operator and identifies problems in program operation
- The monitor determines that the problems rise to the level of a serious management problem
- The program operator is provided an opportunity to submit a CAP, which must be approved and implemented
- If CAP is accepted and implemented, the program operator is reviewed more frequently
  - If the program operator demonstrates that the serious management problems are corrected over this time and no new serious management problems are identified, the institution has achieved full correction
  - If new serious management problems arise, the program operator remains on this frequent review cycle until it demonstrates full correction
  - If repeat serious management problems arise before full correction is achieved, the program operator is terminated and declared seriously deficient (subject to appeals)
- If CAP is not accepted, the program operator is terminated and declared seriously deficient (subject to appeals)



## Proposed Standard: Path to Full Correction in CACFP

If corrective actions are fully implemented to correct serious management problems, a more frequent review cycle is triggered.  
*§226.25(c)(3)*

Full correction is achieved when the following criteria are met:  
CACFP Institutions – 2 year cycle

- At least 2 full reviews, occurring at least once every 2 years, reveal no new or repeat serious management problems
- All reviews between the first and last full review, including targeted reviews, reveal no new or repeat serious management problems
- The first and last full review occur at least 24 months apart

CACFP Day Care Homes and Unaffiliated Sponsored Centers – no change in current cycle

- At least three consecutive full reviews reveal no new or repeat serious management problems; and
- All reviews between the first and last full review reveal no new or repeat serious management problems, including targeted reviews.



## Proposed Standard: Path to Full Correction in SFSP

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If corrective actions are fully implemented to correct serious management problems, a more frequent review cycle is triggered.

*§225.18(c)(3)*

Full correction is achieved when the following criteria are met:

### SFSP Sponsors – 1 year cycle

- At least 2 full reviews, occurring at least once every year, reveal no new or repeat serious management problems
- All reviews between the first and last full review, including targeted reviews, reveal no new or repeat serious management problems
- The first and last full review occur at least 12 months apart





## Good Standing

- Good Standing was introduced in a recent final rulemaking titled, *Streamlining Program Requirements and Improving Integrity in the Summer Food Service Program (SFSP)*, 87 FR 57304, September 19, 2022
- It established that a program operator would be in “good standing” if there were no major findings or if it had successfully implemented all corrective actions from the last compliance review
- However, it looked to future rulemaking to define the term in regulations.

### Proposed Definition:

- “...means the status of a program operator that meets its Program responsibilities, is current with its financial obligations, and if applicable, has fully implemented all corrective actions within the required period of time”
- See proposed sections *§210.2, §215.2, §220.2, §226.2 and current section §225.2.*

## Good Standing & the Proposed SD Process



How does good standing relate to the SD process?

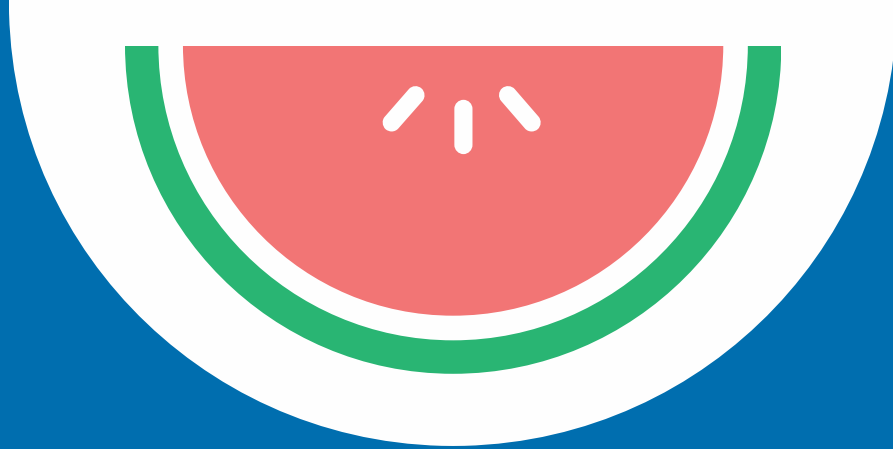
- Identification of serious management problems would take a program operator out of “good standing” until corrective actions are successfully implemented
- Once a program operator successfully implements corrective actions, continues to meet Program responsibilities and is current with financial obligations, the program operator will return to being in “good standing”
- Please note: successful implementation of corrective actions is not equivalent to full correction, which means that a program operator may return to being in “good standing” before full correction is achieved

# Request for Comments

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- Comments on the Proposed Six Steps
- Comments on the Criteria for Identifying Serious Management Problems
- Comments on the “Path to Full Correction”
- Comments on “Good Standing” definition





# Suspension in CACFP and SFSP



# Current Requirements

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## Federal Law

- Sec. 17 of the NSLA, at 42 U.S.C. 1766(d)(5)
- Circumstances that require the immediate suspension of program operations, such as threats to health, safety, or program integrity

## Current Regulations

- Administering agencies must immediately suspend participation for imminent threat to health or safety - *§226.6(c)(5)(i)(B)* and *§226.16(l)(4)(ii)*
- State agencies may suspend participation for false or fraudulent claims - *§226.6(c)(5)(ii)*
- No suspension procedures in SFSP

# Proposed Changes for Suspension



## Proposed Changes

### CACFP

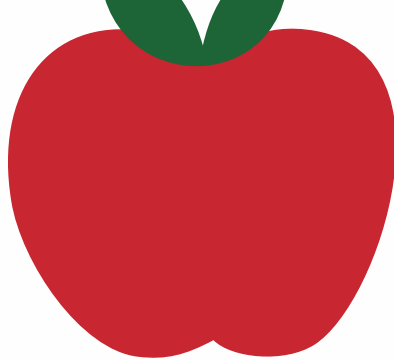
- Regulations for suspension procedures are found in proposed sections §226.25(f)(1-2)
- State agencies must suspend participation of an institution for false or fraudulent claims, effectively stopping flow of payments
- Suspension is not immediate and takes effect if time for requesting a fair hearing is passed or the fair hearing upholds the State agency's action

### SFSP

#### 2 proposed options

- Option A: No suspension procedures in SFSP. Sponsor is eligible to receive payments for all valid claims.
- Option B: State agency must suspend participation for false or fraudulent claims, at the same time it issues a notice of proposed termination





# Reciprocal Disqualification and the National Disqualified List (NDL)



# Termination For Cause

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## Current Requirements

- *Child Nutrition Program Integrity Final Rule* introduced Termination for Cause provisions, at §225.6(i) and §226.6(b)(4)(ii)
- State agencies must always terminate for cause if a sponsor in SFSP or a sponsoring organization in CACFP fails to fulfill Program responsibilities
- Regulations at §226.16(l) outline procedures for terminating a day care home's agreement with the sponsoring organization

# Termination For Cause

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## Proposed Changes

- Adds definition for “Termination for cause” in §225.2
- State agencies are required to terminate an agreement whenever a sponsor’s participation in SFSP or an institution’s participation in CACFP ends
- State agencies must terminate an agreement for cause, as described under the proposed serious deficiency process
- State agencies must terminate an agreement for cause if a program operator, responsible principal, or responsible individual is on the National Disqualified List

# Reciprocal Disqualification in All CN Programs

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## Current Requirements

- Sec. 12(r) of the NSLA, 42 U.S.C. 1760(r) requires that terminated schools, institutions, service institutions, facilities, or individuals that are on the National Disqualified List (NDL) cannot operate under other CN Programs
- “Reciprocal Disqualification” promotes program integrity by prohibiting a disqualified program operator from operating in other CN Programs

# Reciprocal Disqualification in All CN Programs

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## Proposed Changes

- New citation, at *§226.25(e)(1)*, would require reciprocal disqualification for termination and placement on the NDL for program operators with an existing program agreement
- Requires State agencies to apply termination procedures to other program operators disqualified in other CN Programs that are on the NDL
- State agencies will be required to develop contingency plans to ensure the smooth operation of meal services if a program operator is disqualified, found at *§225.18(d)(2)* and *§226.25(d)(2)*

## Proposed Changes: Reciprocal Disqualification

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- Establishes a reciprocal disqualification process that prohibits State agencies from approving an application for any program operator that is terminated for cause from any Child Nutrition Program (CNP) and placed on the NDL
- For program operators with existing agreements, the administering agency must terminate and disqualify the program operator when it is determined that the program operator was terminated for cause from a different CNP
- Reciprocal Disqualification for School Food Authorities (SFAs) – 2 proposed options:

Option 1: SFAs that are determined to be seriously deficient would be terminated and disqualified, as well as placed on the NDL, prohibiting them from operating any CN Programs

Option 2: SFAs that are determined to be seriously deficient would have their CACFP/SFSP agreements terminated, and the responsible principals and responsible individuals would be disqualified. State agencies, however, would have the discretion to disqualify the SFA and place it on the NDL

# Computer Matching Act (CMA) Requirements

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## Federal Legal Requirements

- The NDL is a Federal CMA system of records for disqualified institutions and individuals in the CACFP
- SAs independently verify records before taking action against participant or applicant
- The disqualified applicant or participant be given notice of the effect of the existing disqualification on eligibility and participation and be provided an opportunity to contest an eligibility decision.
- Records be retained only as long as they are accurate, timely, relevant and complete and be destroyed 3 years after entity is removed from the NDL

# Computer Matching Act (CMA) Requirements

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## Proposed Changes

- Incorporate CMA requirements, at §225.18(e)(3) and §226.25(e)(3), that State agencies enter into a written agreement with FNS to address protections of Personally Identifiable Information (PII) used in the NDL
- Proposed requirement, at §226.25(e)(3)(i)(C), that State agencies verify an individual is disqualified before taking adverse action against them
- Extending the NDL to the SFSP to include Sponsors, responsible principals, and responsible individuals disqualified from program participation





# Multi-State Sponsoring Organizations (MSSOs)



# Defining MSSOs

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## Proposed Changes

- Establish definitions for “Multi State Sponsoring Organizations” and “cognizant agencies” in Program regulations
- MSSOs are sponsors or sponsoring organizations that “operate in more than one State”
- Cognizant agencies are “any State agency or FNS Regional office that is responsible for oversight of CACFP or SFSP in the State where the MSSO’s headquarters is located”
- New requirements for State agencies and MSSOs will be added in §225.7 and §226.6(k)

# Defining MSSOs

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## Requirements for MSSOs

- MSSOs are required to submit the following information in their application:
  - The number of affiliated and unaffiliated sites they operate
  - Use of its administrative funds
  - Non-profit/For-profit status
- MSSOs are required to submit a comprehensive budget, including the following information:
  - Sum of all costs incurred
  - Costs directly attributable to operations w/in each State
  - Cost allocation plan for costs benefiting more than one State

# Defining MSSOs

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## Current Requirements

- There are no definitions for MSSOs and only one provision on how to treat MSSOs in current regulations
- State agencies are facing increased challenges to provide oversight of program operators that operate across State lines
- FNS has provided guidance on how to approach MSSOs in the past, but State agencies consistently face issues with coordination and the duplication of work when overseeing MSSOs

# Defining MSSOs

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## Requirements for ALL State Agencies

- Approve the administrative budgets of any MSSOs operating within their respective States
- Enter into a permanent written agreement with each MSSO operating within the State
- Track State-specific costs
- Conduct oversight of MSSO operations within the State
- Conduct audit resolution activities
- Make available copies of notices of termination and disqualification

# Defining MSSOs

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## Requirements for Cognizant State Agencies

- Determine if there will be shared administrative costs among the States in which the MSSO operates and how the costs will be allocated
- Coordinate monitoring
- Ensure that organization-wide audit requirements are met
- Oversee audit funding and costs
- Ensure compliance with procurement requirements

# Request for Comments

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- Comments on MSSO provisions:

In order for FNS to create regulations on MSSOs which are reasonable and logical, it is imperative that we get comments from State agencies and MSSOs to ensure we create the best processes for all stake holders involved.

# Resources

- [Link to Federal Register](#)
- [Link to FNS Webpage](#)
- Comment period closes on May 21, 2024

