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DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 272, 275, and 283

[Amdt. No. 348]

Food Stamp Program: Hunger Prevention Act of 1988 and Mickey Leland Childhood Hunger Relief Act; Rules of Practice; Administrative Law Judges

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule establishes the rules of practice governing the administrative review process for State agencies challenging food stamp quality control (QC) claims and is intended to speed the resolution of the QC claims. This action is necessary to implement program administrative review requirements mandated by the Hunger Prevention Act of 1988 and the Omnibus Budget Reconciliation Act of 1993 (Mickey Leland Childhood Hunger Relief Act).

DATES: 1. *Effective Date:* This rule is effective August 5, 1994.

2. *Implementation Date:* This rule must be implemented for all QC billing actions beginning with fiscal year 1986.

FOR FURTHER INFORMATION CONTACT: John Knaus, Chief, Quality Control Branch, Program Accountability Division, Food Stamp Program, Food and Nutrition Service, USDA, 3101 Park Center Drive, room 907, Alexandria, Virginia 22302, (703) 305-2474.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

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.

Executive Order 12372

The Food Stamp Program is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in 7 CFR part 3015, subpart V and related Notice (48 FR 29115), the Food Stamp Program is excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

Executive Order 12778

This final 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 that conflict with its provisions or that 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 Food Stamp Program 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); (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 action has also been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601-612). William E. Ludwig, Administrator of the Food and Nutrition Service, has certified that this rule will not have a significant economic impact on a substantial number of small entities. Only State and local welfare agencies will be affected to the extent that they are involved with appeals of Food Stamp Program quality control claims. The procedures to appeal quality control claims are being changed by this rule to streamline and reduce the time and resources State and local welfare agencies previously devoted to

such appeals. Potential and current participants in the Food Stamp Program will not be affected.

Paperwork Reduction Act

This rulemaking does not contain recordkeeping and reporting requirements subject to approval by the Office of Management and Budget under the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35) and falls within the exceptions to coverage.

Background

On January 19, 1993, the Department issued a Notice of Proposed Rulemaking (NPRM) at 58 FR 5188 to implement section 603 of the Hunger Prevention Act of 1988 (HPA) (Pub. L. 100-435). The HPA amended the Food Stamp Act of 1977, as amended (the Act) (7 U.S.C. 2011-2032) regarding the Food Stamp Program's administrative review process for QC claims (7 U.S.C. 2023(a)). A total of eight comment letters were received on the proposed rule. One commenter subsequently advised the Department that it considered its comment letter to be inappropriate to the subject of the NPRM and withdrew its letter. The following analysis is based on the remaining seven comment letters.

Since issuance of the proposed regulations on January 19, 1993, Congress has enacted Chapter 3, Title XIII of the Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66 (Mickey Leland Childhood Hunger Relief Act) (Leland Act) to further streamline the appeals process for QC claims established under section 16(c) of the Act, 7 U.S.C. 2025(c). Section 13951 of the Leland Act amended sections 13(a)(1), 14(a) and 16(c) of the Act to: (1) Provide that State agencies will be assessed interest on outstanding QC liabilities if the administrative appeals process takes more than one year to resolve these claims; (2) to establish timeframes for the administrative review process and (3) to provide that an administrative law judge (ALJ) shall consider a State agency's contention of good cause when considering whether to waive all or part of a State agency's QC liability.

A full explanation of the rationale of the proposed rule is contained in its preamble. It is suggested that interested parties refer to that preamble for additional background information (58 FR 5188). Following is a detailed discussion on the comments received on

the proposed rule, non-discretionary revisions based on the Leland Act and the provisions of the final rule. The Department has determined that, with respect to the revisions based upon non-discretionary provisions of the Leland Act referenced above, notice and comment are unnecessary since the Department has no discretion with respect to these provisions. accordingly, such revisions have been made through this final rule.

Discussion of the Regulations

In the following discussion, we have identified each section of the regulation being addressed and have interspersed comments and responses as appropriate. The regulatory language from the NPRM was retained except where indicated.

Section 283.4: Filing Appeals for QC Claims of \$50,000 or More

This section of the NPRM contains the procedures which State agencies are to follow in appealing the bill for collection from the Food and Nutrition Service (FNS) for QC claims of \$50,000 or more.

Time: In § 283.4(a) of the NPRM, the Department proposed that a State agency must file a notice of appeal within 10 days of receipt by certified mail or personal service of the bill for collection from FNS.

Comments: The Department received three comments on this provision. One commenter stated that the 10-day time span to file the written notice of appeal was too short and that a 30-day period would be more reasonable. Two commenters indicated that it was unclear whether the notice of appeal or the bill for collection must be served by certified mail or personal service. These commenters questioned if it was FNS' intent to require that the notice of appeal be filed by certified mail or personal service.

Response: The Department has considered the comment urging extension of the 10-day requirement but cannot adopt this suggestion. Section 13951 of the Leland Act retained the 10-day filing requirement for the notice of appeal but provides that the filing deadline shall be extended by the ALJ for cause shown. The Department believes that the requirements for the content of the notice of appeal are minimal and should not pose any undue difficulty for the State agency to meet the 10-day filing deadline. If an extension is requested, the request and cause for such request must be submitted to the ALJ or chief judge prior to the expiration of the 10-day filing deadline. The Department has also

revised § 283.22(f) to incorporate this provision.

The Department also notes that section 13951(c)(4) of the Leland Act authorizes the ALJ to extend the deadlines for filing of the appeal petition, answer, rebuttal and initial decision for cause shown.

The Department has considered the comment concerning the service of the notice of appeal and has revised this section to clarify that it is not FNS' intention to require the State agency to file the notice of appeal by certified mail or personal service. As discussed in the preamble to the NPRM, the State agency will have 10 days from receipt of the bill for collection to file a notice of appeal with the Hearing Clerk. Section 283.22(b) of the NPRM provides that the notice of appeal is considered to be filed on the date that it is postmarked or, if hand delivered, the date it is received by the Hearing Clerk. FNS will continue its policy of issuing the bill for collection either by certified mail or personal service. Once the State agency receives the bill for collection, it will have 10 calendar days to file its notice of appeal, unless an extension is requested prior to the expiration of the 10-day filing deadline.

Exhaustion of Administrative remedies: The Department has added new §§ 283.4(b) and 283.25(b) to clarify that the State agency must appeal the bill for collection to the ALJ in order to exhaust available administrative remedies as a prerequisite to seeking judicial review. While the Department believes it is clear that Congress intended section 14(a) of the Act to require the State agency to exhaust an administrative appeal before the ALJ before seeking judicial review, the rule has been clarified to specifically require such exhaustion. Thus, the decision of the ALJ is final for purposes of judicial review. However, as discussed in the preamble regarding § 283.17(c)(3), either party to the appeal may, at its option, seek reconsideration of ALJ decision or review by the Judicial Officer. Accordingly, §§ 283.4 (b)-(c) of the NPRM have been renumbered as §§ 283.4 (c)-(d) and §§ 283.25 (b)-(h) of the NPRM have been renumbered §§ 283.25 (c)-(i).

Content of the notice: In § 283.4(c) of the NPRM, the Department proposed the information which an acceptable notice of appeal must contain and that failure to file an acceptable notice of appeal would result in a dismissal of the notice by the ALJ and a waiver of the opportunity for further review unless the State agency pursues reconsideration by the ALJ or review by the Judicial Officer.

Comment: The Department received one comment on this provision. The commenter indicated that there were no provisions for a State to remedy a technical defect or omission in a notice of appeal.

Response: The Department has considered the comment concerning the technical defect or omission from the notice of appeal, and has determined that adoption of this suggestion is unnecessary since the NPRM contains provisions for a State to remedy a technical defect or omission in a notice of appeal. As discussed in § 283.4(c)(2) of the NPRM, if the ALJ dismisses the notice of appeal because the State agency fails to file an adequate notice, the State agency may remedy the defect and either request reconsideration by the ALJ or review by the Judicial Officer in accordance with §§ 283.17(d) and 283.20 of the NPRM. These provisions would not apply for failure to file a timely notice of appeal or request for extensions of time to file. This section has been renumbered in the final rulemaking as § 283.4(d).

Good Cause: In § 283.4(d) of the NPRM, the Department proposed that the Secretary's determination concerning good cause be final and not subject to an appeal to the ALJ.

Comment: The Department received one comment on this provision. The commenter objected to the fact that FNS' good cause determinations will not be subject to the appeal process.

Response: Section 13951(c)(4) of the Leland Act deleted the provision of section 603 of the HPA which provided that the Secretary retained the authority to waive some or all of a State's QC claim where the Secretary determined that the State agency had good cause for failure to meet its error rate goal and that the decision of the Secretary was not subject to review by the ALJ. The Leland Act requires that the ALJ, in considering a State agency's appeal of QC liability consider all grounds for denying the claim, in whole or in part, including the contention of a State agency that the claim should be waived, in whole or in part, for good cause. The Department intends to publish a proposed rulemaking addressing the good cause criteria, as defined in the Leland Act. The regulation will be used by the Secretary and/or the Secretary's designee to assess, evaluate and respond to claims by the State for a good cause waiver of liability in conjunction with the appeals process. The Department has deleted § 283.4(d) of the NPRM. Additionally, § 283.5(a) of the NPRM has been amended to reflect Leland Act changes to good cause.

Receipt of notice of appeal and assignment of docket number: In § 283.4(e)(iii) of the NPRM, the Department proposed that the Hearing Clerk would acknowledge timely receipt of the notice of appeal and advise the State agency that the appeal petition must be filed within 30 days of service of the Hearing Clerk's letter.

Comment: The Department received one comment on this provision. The commenter indicated that the 30-day deadline for filing the appeal petition is too burdensome for States and that a 60-day deadline would be more appropriate. The commenter believed that the extended time period would enable States to obtain necessary legal support and to better develop appropriate arguments in support of the appeal petition.

Response: The Department has revised the deadline for filing the appeal petition from 30 days to 60 days. Section 13951(c)(4) of the Leland Act requires that the State agency submit evidence in support of the appeal not later than 60 days after receiving a notice of the claim and provides that the ALJ shall extend the 60-day deadline for cause shown. As previously discussed, § 283.22(f) of this final rule requires the State agency to file a written request for the extension prior to the due date for the submission with a showing of cause for the extension. This provision is in keeping with the legislative intent of the HPA that the appeals process be streamlined and the appeal procedures be as expeditious as possible.

Stay of Collection: In § 283.4(f) of the NPRM, the Department proposed that a timely notice of appeal would automatically stay collection action on the QC claim. However, interest would continue to accrue on the outstanding claim.

Comment: The Department received one comment on this provision. The commenter noted that since the NPRM would allow the Department to seek review by the Judicial Officer, the final determination of the ALJ may be delayed beyond the two year period during which interest on a QC claim would not accrue. The commenter suggested that in order to avoid the imposition of interest due to a delay that the State agency did not seek, the accrual of interest should be tolled (suspended) during the review by the Judicial Officer.

Response: The Department has considered this comment but cannot adopt this suggestion. Section 13951(a)(2) of the Leland Act provides that interest on the unpaid claim would accrue either from a date that is one year after the date the bill is received or the

date of the decision on the administrative appeal, whichever is earlier. The Leland Act does not allow a suspension of interest beyond the one-year period, regardless of the reason for the delay in a final administrative decision.

Content of the Appeal Petition: In § 283.4(g)(3) of the NPRM, the Department proposed that the State agency must request an oral hearing and that failure to request that hearing would result in the forfeiture of the opportunity for an oral hearing. The QC claim would then be decided using the procedures established under subpart C.

Comment: The Department received one comment on this provision. The commenter suggested that rather than making an oral hearing an option for the State agency, the Department should make this a standard element in the process which the State must request be omitted if the State wishes an appeal to be decided without oral hearing. The commenter argued that this change would avoid any misunderstanding on the part of the State agency or the Department as to whether the State intended to request an oral hearing.

Response: The Department has considered this comment and has decided not to adopt the suggestion. Section 603 of the HPA provides that determinations regarding a QC claim shall be made on the record after an opportunity for an agency hearing. In addition, section 13951(c)(4) of the Leland Act requires that, on the request of the Secretary or the State agency, the ALJ shall hold an evidentiary hearing. The Department is retaining the provisions of the NPRM which require that the State agency notify the Hearing Clerk in its appeal petition if the State agency desires an oral hearing. The Department wishes to emphasize that a State agency that waives an oral hearing would not generally be permitted to later request that an oral hearing be conducted. The Department will amend § 283.4(g)(3) to cross-reference § 283.15(a) to clarify those circumstances under which it would be possible for a State agency to receive an oral hearing if it had not initially requested the oral hearing in its appeal petition. In addition, the Department has added § 283.4(i) to provide that if no hearing had been requested, the appeal would proceed in accordance with the procedures set forth under subpart C (Summary Procedure for Appeals of QC Claims of Less than \$50,000). In the event that the appeal is pursued under subpart C, procedures exist under § 283.26(a) to provide the State agency with an opportunity to request an oral hearing if the State agency does not

believe that the summary procedure is adequate for handling the appeal and that an oral hearing is necessary.

Section 283.6: Answer

This section of the NPRM contains the procedures that FNS is to follow in responding to the State agency's appeal petition.

Filing and service: In § 283.6(a) of the NPRM, the Department proposed that FNS would be allowed 30 days from the date of service of the State agency's appeal petition to file its answer to that petition.

Comment: The Department received one comment recommending that FNS be given 60 days in which to file an answer to the State agency's appeal petition. The commenter also agreed with the provision that failure to file a timely answer would be considered, for purposes of the appeal, an admission of the State agency's allegations.

Response: The Department has revised the deadline for FNS to file an answer to the State agency's appeal petition from 30 days to 60 days. Section 13951(c)(4) of the Leland Act requires that not later than 60 days after a State agency submits evidence in support of the appeal, the Secretary shall submit responsive evidence to the ALJ and provides that the ALJ shall extend the 60-day deadline for cause shown. As previously discussed, § 283.22(f) of the final rule requires the Secretary to file a written request for the extension prior to the due date for the submission with a showing of cause for the request.

Section 283.8: Amendment of Appeal or Answer

This section of the NPRM contains the provision allowing either party to amend the appeal or answer at any time prior to the other party filing a motion for a hearing.

Comment: The Department received one comment on this provision. The commenter noted that the preamble and the regulations do not contain a timeline in which the motion for a hearing is to be filed. The commenter suggested that it would be difficult to conclude that both parties would be knowledgeable if a motion for a hearing was filed with the appeal petition or the answer to the appeal petition.

Response: The Department is revising this provision to incorporate section 13951(c)(4) of the Leland Act which requires the State agency to submit rebuttal evidence to the ALJ, to the extent such evidence exists, not later than 30 days after the Secretary submits responsive evidence. The Department is retaining the provision in the NPRM

which allows either party to amend the appeal or answer at any time prior to the other party filing a motion for a hearing. An amendment following such a motion would require approval by the ALJ.

The Department wishes to clarify that the motion for a hearing would not be filed with the appeal or the answer to the appeal. Rather, as discussed in § 283.15(b), a motion for a hearing is filed by either party after the completion of all scheduled prehearing actions (such as discovery) that were agreed upon during the prehearing conference, scheduling conference or as otherwise established by the ALJ. The filing of a motion for a hearing advises the ALJ and the other parties to the appeal that the party has completed all prehearing activities and is ready to proceed with the hearing. Because the timing for the filing of the motion for a hearing is dependent upon the completion of all previously agreed upon prehearing activities, it is not possible to provide an absolute timeline as to when a motion for a hearing would be filed.

Section 283.10: Consent Decision

This section of the NPRM contains the provision allowing the parties to the appeal to mutually agree to end the appeal process prior to the ALJ issuing an initial decision. The consent decision would not be subject to review by the Judicial Officer or by the Federal Court.

Comment: The Department received one comment on this provision. The commenter suggested that this section be modified to state clearly that the parties may enter into a stipulation as to facts and that this would not preclude further review of the legal issues. The commenter was concerned that legal issues would not be considered if the underlying basis for the legal issues were facts which were not in dispute.

Response: The Department has considered this comment and has decided not to adopt it since the concerns of the commenter are addressed in § 283.11, the pre-hearing conference (and similarly in § 283.29—scheduling conference). As provided for in § 283.11(c), one purpose of the ALJ conducting a prehearing conference is to allow the parties to consider the possibility of obtaining stipulations as to facts in order to expedite and aid in the disposition of the appeal. The Department wishes to clarify that the purpose of the consent decree is to allow the parties to mutually agree to conclude the appeal process prior to the ALJ issuing an initial decision on the merits of the appeal. It is similar to settlement of a civil action in court. The consent decree is not subject to further review by the Judicial Officer or the

Federal court. The appeals process contains prehearing procedures to allow the parties to enter into a stipulation as to facts which would not preclude further review of the legal issues. Furthermore, the Department believes that stipulations as to facts may be appropriate at any point to further expedite the appeal.

Section 283.11: Prehearing Conference and Procedure

This section of the NPRM contains the procedures for and the requirements of the prehearing conference.

Reporting: In § 283.11(d) of the NPRM, the Department proposed that the prehearing conference would not be stenographically reported unless ordered by the ALJ.

Comment: The Department received one comment on this proposal. The commenter noted that given the multiplicity of issues to be addressed at the prehearing conference, any party should be entitled to obtain a stenographic transcript of a prehearing conference at its own expense.

Response: The Department has considered this comment and has revised § 283.11(d) to clarify that any party may petition the ALJ to allow for a stenographic transcript of a prehearing conference at the petitioner's own expense. A copy of the prehearing transcript must be made available to the ALJ and the other parties to the appeal at no cost to the other parties. In response to this comment, the Department has also revised § 283.15(o) to clarify that the cost of preparing the hearing transcript and providing one copy of the transcript to the ALJ and the other parties to the appeal shall be borne by the party requesting the hearing. The Department further notes that where these costs are incurred by the State, such costs are eligible for reimbursement in accordance with part 277 of the Food Stamp Program regulations.

Section 283.12: Discovery

This section of the NPRM contains the procedures which the parties to the QC appeal are to follow in pursuing discovery. The ALJ would establish the scope of and schedule for the completion of discovery.

Comment: The Department received one comment concerning the organization of § 283.12. The commenter noted that this section was confusing and that organizational changes would clarify and simplify this provision.

Response: The Department has considered this comment and has adopted this suggestion. The

Department has made the following changes from the NPRM: § 283.12(b)(5) (Supplementation of response) has been renumbered as § 283.12(c); a new § 283.12(d) (Frequency and use of discovery) has been created and §§ 283.12(b)(3)(ii) and 283.12(b)(3)(iv) have been moved to this new subsection; a new § 283.12(e) (Protective Orders) has been created and §§ 283.12(b)(3)(iii) and 283.12(b)(8) have been moved to this new subsection; § 283.12(b)(7) (Failure to respond to discovery) has been renumbered as § 283.12(f); a new § 283.12(g) (Decision of the ALJ) has been created and §§ 283.12(b)(3) (vii) and (viii) have been moved to this subsection; a new § 283.12(h) (Failure to comply with an order) has been created and §§ 283.12(b)(7) (i) and (ii) have been moved to this new subsection; § 283.12(b)(4) (Postponements or delays) has been renumbered as § 283.12(i). In addition, § 283.12(b)(6) (Inclusion in the record) has been moved to § 283.15(i) and § 283.12(b)(9) (Exchange of witness and rebuttal witness lists, statements and exhibits) has been moved to § 283.15(d).

Depositions: In § 283.12(a) of the NPRM, the Department proposed that the ALJ could order the taking of depositions in order to elicit testimony which otherwise might not be available at the time of the hearing.

Comments: The Department received five comments on this provision. All of the commenters objected to restricting the use of depositions to those instances in which testimony might not otherwise be available. One commenter argued that the States' right to due process at the administrative appeal level was in jeopardy. Another commenter noted that by categorically prohibiting the use of depositions other than to preserve testimony, FNS has seriously compromised the States' ability to challenge error-rate penalty claims. This commenter also argued that by preventing the ALJ from using discovery depositions as one tool of litigation management, FNS has compromised the ALJ's ability to preside over the taking of evidence.

Response: The Department has considered these comments but has not adopted them. It is the Department's position that the use of depositions should be restricted to those instances in which the witness may be unavailable to testify at the hearing. The Department believes that the discovery procedures provided in the NPRM for interrogatories, admissions, request for production of documents, and depositions, as well as the prehearing conference, provide adequate discovery

tools for the parties to prepare for the oral hearing or to submit cross motions for summary judgment pursuant to § 283.30.

In addition, the Department believes that permitting discovery depositions would result in substantial costs and delay in the appeals process. The Department recognizes that a significant goal of the amendments to the Act by section 603 of the HPA was to create a more efficient appeals process. The House Report states that an objective of section 603 of the HPA was to "streamline[] the appeals process of the quality control system." * * * H.R. Rep. No. 828, 100th Cong., 2d Sess. 32 (1988). Further, Representative Panetta stated during debate of the HPA, "(a) third set of changes aims to speed the resolution of financial claims against State agencies for excessive error by streamlining the appeals process and providing for the payment of interest." 134 Cong. Rec. 20,982 (1988). Representative Emerson reiterated this same intention. 134 Cong. Rec. 20,984 (1988). The Department believes that restricting the use of depositions to those instances in which the witness may be unavailable to testify at the hearing is in keeping with the stated intent of Congress.

Interrogatories and Admissions: In §§ 283.12(b)(1) and (2) of the NPRM, the Department proposed that the parties be limited to fifteen interrogatories and admissions, including subparts, unless additional questions were authorized by the ALJ.

Comments: The Department received five comments on these provisions. All of the commenters objected to limiting the number of interrogatories and admissions. One commenter noted that given the ALJ's authority to limit discovery, it would be more efficient not to impose an arbitrary limit on the number of interrogatories and admissions. The commenter argued that the responding party could request a protective order from the ALJ if it felt that the requests were burdensome.

Response: The Department has considered these comments and has revised §§ 283.12(b)(1) and (2) to permit twenty-five interrogatories and admissions, including subparts, unless additional questions are authorized by the ALJ. The Department continues to believe that a limit on the number of interrogatories and admissions available without approval by the ALJ is reasonable given the authority of the ALJ to authorize an increase in that number. The Department disagrees that it should be the responsibility of the responding party to pursue a protective order if the scope of the discovery is

burdensome. Rather, it is reasonable to place the responsibility on the requesting party to justify why the ALJ should authorize an increase in the number of interrogatories and admissions. This limit is also consistent with congressional intent to streamline the appeals process.

Production of Documents: In § 283.12(b)(3) of the NPRM, the Department proposed that any party to the appeal may serve a request for the production of documents that are in the possession or control of another party. The Department also proposed that the requested documents would be provided upon payment of fees for search and duplication of the documents.

Comment: The Department received two comments on this provision. One commenter noted that while the preamble to the NPRM contained a provision requiring that the requested documents be relevant to the issues under appeal, the regulatory language did not contain that requirement. The commenter suggested that the Department adopt the standard set forth in the Federal Rules of Civil Procedure. The second commenter opposed the assessment of fees for the production of documents. The commenter noted that since only governmental agencies are participating in the review of the QC claim, the Department ought to forgo the assessment of fees.

Response: The Department has considered the comment concerning the issue of the relevancy of the documents and has decided to revise § 283.12(b)(3) to be consistent with Rule 26(b)(1) of the Federal Rules of Civil Procedure.

The Department has considered the comment concerning the assessment of fees for the production of documents and has decided not to adopt it. The Department believes that it is consistent and equitable that the costs of the search and duplication of documents under a request for production be borne by the party making the request. State agencies may submit such costs for reimbursement under 7 CFR part 277.

Postponements or delays: In § 283.12(b)(4) of the NPRM, the Department proposed that the hearing or other proceedings of the appeal process would not be postponed or delayed pending a response to or resolution of issues pertaining to a Freedom of Information Act (FOIA) request.

Comment: The Department received one comment on this provision. The commenter strongly disagreed with the proposal that no delays or postponements of the QC appeal occur pending receipt of documents requested under FOIA. The commenter argued

that documents requested under FOIA may be crucial to the resolution of the appeal and suggested that either a timeline should be imposed for furnishing documents requested under the FOIA or delays/postponements should be accepted as part of the process.

Response: The Department has considered this comment but has decided not to adopt it. The Department has established procedures for the production of documents which would negate the need for a party to the appeal to pursue document production under the provisions of FOIA. As provided for in § 283.12(b)(3) of the NPRM, the parties to the appeal are afforded the opportunity under the discovery process to request all documents relevant to the issues under appeal or which would reasonably lead to the discovery of such documents. In addition, the ALJ will establish the deadline by which all discovery activities must be completed. While the Department must process the FOIA and provide all responsive nonprivileged documents, it is inappropriate to delay or postpone the QC appeal pending action on the FOIA request. This also furthers congressional intent to streamline the appeals process. This section has been renumbered in the final rulemaking as § 283.12(i).

Witnesses and Exhibits: In § 283.12(b)(9)(ii) of the NPRM, the Department proposed that a witness whose name did not appear on the list of witnesses would not be permitted to testify at the hearing. In addition, exhibits which were not provided to the opposing party 15 days prior to the hearing would not be admitted into evidence at the hearing absent a showing of cause.

Comment: The Department received two comments on this provision. The commenters argued that there may be situations where a witness identified on an exchanged list is unavailable to testify at the hearing. However, the party may have a substitute witness not identified on the exchanged list who is available to testify. The party should be permitted to amend the list upon a showing of cause.

One commenter noted that there are circumstances where it is unnecessary to exchange documents during the prehearing process because those documents are already in the possession of each party through their normal course of business. The commenter argued that under this circumstance the regulation should require that the parties need only identify documents in the possession of the opposing party and notice an intention to introduce them at the hearing.

Response: The Department has considered the comment concerning witnesses and has revised the regulations to clarify that it is the intent of the Department that in those situations where a party shows cause as to the reason a witness's name did not appear on the witness list, upon motion and approval by the ALJ, that witness will be permitted to testify at the hearing. The Department also wishes to clarify that if this situation arises, the other parties to the appeal may request a delay in the hearing to allow for an opportunity to prepare for this previously unidentified witness.

The Department has considered the comment concerning the exchange of documents and has determined that adoption of this suggestion is unnecessary since § 283.11(a)(3) of the NPRM provides the parties with the option of either furnishing copies or a list of documents that the party anticipates relying upon at the hearing. Since exhibits are not necessarily previously existing documents which are in the possession of the other party, the Department is retaining the provision concerning the exchange of exhibits. This section of the NPRM has been moved in the final rulemaking to § 283.15(d).

Section 283.15: Procedure for Hearing

This section of the NPRM contains the procedures related to the scheduling and conducting of hearings before the ALJ.

Comment: The Department received one comment concerning the organization of this section. The commenter suggested that since §§ 283.12(b)(6) (Inclusion in the record) and (9) (Exchange of witness and rebuttal witness lists, statements and exhibits) relate to the hearing procedures, these two subsections should be moved to § 283.15.

Response: The Department has considered this comment and has adopted this suggestion. The Department has made the following changes from the NPRM: § 283.12(b)(9) has been moved and renumbered as § 283.15(d) and § 283.15(b)(6) has been moved and renumbered as § 283.15(i). The remaining sections of 283.15 have been renumbered, as necessary.

Time and Place: In § 283.15(b) of the NPRM, the Department proposed that the ALJ shall schedule a hearing upon receipt of a motion by any party setting forth the issue and stating that the matter is ready for a hearing.

Comment: The Department received one comment on this provision. The commenter indicated that this provision could be interpreted as allowing the ALJ

to deny a party's request for a hearing. The commenter suggested that this section be revised to clarify that this section pertains only to the scheduling of a hearing. The commenter also noted that this section suggests that a hearing is permitted only if material facts are disputed and suggested that this section should be revised to permit the ALJ to hear oral arguments on legal issues even if there are no material facts in dispute.

Response: Section 13951(c)(4) of the Leland Act requires that the ALJ decide the appeal within 60 days after receipt of rebuttal evidence by the State agency, or, if no rebuttal evidence is submitted, within 90 days after the State submits the notice of appeal and evidence in support of the appeal. Given these statutory deadlines, the ALJ shall establish at the prehearing conference the dates by which the parties must complete prehearing activities. The parties would, following completion of such activities, file a motion stating that they are ready for hearing. The Leland Act authorizes the ALJ to extend certain statutory deadlines for cause shown. The Department anticipates that the ALJ may extend procedural deadlines for cause shown to accommodate the completion of prehearing and posthearing activities as is shown to be necessary. As previously discussed, § 283.22(f) of the final rule requires the parties to file a written request for an extension prior to the due date with a showing of cause for the extension requested.

The Department has considered the comment concerning the motion for a hearing and has determined that a revision to this provision is unnecessary, other than to eliminate the requirement to set forth the issues within the motion. The Department believes that the issues will be adequately framed by the prehearing procedures. Upon filing for a motion for hearing, an oral hearing will be scheduled within the statutory time frames provided by the Leland Act, unless an extension has been requested and granted by the ALJ or the ALJ has extended the time frames *sua sponte*.

The Department has considered the comment concerning the ALJ conducting an oral hearing on the legal issues when there are no material facts in dispute. The Department has not adopted this suggestion. The Department wishes to clarify that the purpose of the oral hearing is to present the facts which are in dispute. If it is determined or agreed at prehearing or otherwise that there are no material facts in dispute, then the appropriate course of action would be to pursue resolution of the remaining legal issues

utilizing the procedures established under subpart C—Summary Procedure for Appeals of QC Claims of Less than \$50,000. These legal issues should be the basis for cross motions for summary judgment. In view of the comment received, the Department has revised § 283.31(d) to allow the ALJ to request oral argument, if necessary, in those instances when a stipulation of all material facts has been entered by the parties to the appeal.

Time and Place: In § 283.15(b) of the NPRM, the Department proposed that the hearing before the ALJ shall be held at the Department of Agriculture, Washington, DC.

Comment: The Department received two comments on this provision. Both commenters objected to the hearings being held exclusively in Washington, DC and suggested that the ALJ should determine the location of the hearing taking into account the convenience of the parties and their witnesses.

Response: The Department has considered this comment and has revised § 283.15(b) to permit the ALJ to hold the hearing at a location more convenient to the parties and their witnesses upon a showing of unusual or extraordinary circumstances. The Department has determined that budgetary constraints will not be considered an unusual or extraordinary circumstance since these costs are eligible for reimbursement, in part, in accordance with part 277 of the Food Stamp Program regulations. The Department believes that requiring a showing of unusual or extraordinary circumstances takes into consideration such burdens of the parties while also preserving the efficiency of the appeals process.

Order of appearance: In § 283.15(f) of the NPRM, the Department proposed that FNS would have the burden of proving, by a preponderance of the evidence, the QC claim against the State and that the State agency would have the burden of proving, by a preponderance of the evidence, the facts upon which it bases its appeal.

Comment: The Department received one comment on this provision. The commenter argued that contrary to the intent of Congress, the proposed rule shifted the burden of proof to the States. The commenter suggested that this section be modified to require that FNS, and not the States, bear the burden of proving its error-rate penalty claim against the State. This burden of proof would be required for all factual matters put in issue.

Response: The Department has considered this comment and has

determined that a revision to this provision is unnecessary.

The Department, however, wishes to reiterate that it has the ultimate burden of persuasion, by a preponderance of the evidence, of the QC error rate claim against the State throughout the appeals process. Nothing in the NPRM or this final rule changes that burden.

However, if the Department makes a *prima facie* case, the burden of going forward with the evidence upon which the State bases its appeal shifts to the State agency. The State must prove any evidence offered to meet this burden of going forward by a preponderance. It is well settled that a fact can never be proven by something less than a preponderance of the evidence. This section has been renumbered in the final rulemaking as § 283.15(g).

Objections: In § 283.15(h) of the NPRM, the Department proposed that at the hearing any party may object to a ruling by the ALJ and that any objection not made to the ALJ could not be raised if there were a subsequent review by the Judicial Officer.

Comment: The Department received one comment on this provision. The commenter noted that there appeared to be some confusion of intent between the preamble and the regulatory language. The commenter questioned if it was the intent of the Department to limit materials presented to the Judicial Officer.

Response: The Department has considered this comment and wishes to clarify that the review by the Judicial Officer shall be based on decisions rendered by the ALJ. The ALJ must have been provided the opportunity to render a decision on an issue before that issue can be appealed to the Judicial Officer. If a party to the appeal fails to raise an objection to the ALJ, that objection cannot be raised with the Judicial Officer since the ALJ had not rendered a decision on that objection. This section has been renumbered in the final rulemaking as § 283.15(j).

Official Records or documents: In § 283.15(j) of the NPRM, the Department proposed that official government records or documents could be admitted into evidence without the production of the person who prepared the document. The party could either submit the officially published document or a certified copy of the document. The Department's Office of General Counsel would prepare the certification for FNS and other Departmental records.

Comment: The Department received one comment on this provision. The commenter noted that this procedure was too cumbersome since it apparently would require that States go to the

USDA General Counsel to certify each and every FNS document, including policy statements.

Response: The Department has considered this comment and wishes to clarify that State agencies would only be required to request that the USDA General Counsel certify FNS documents if such documents are not officially published documents. The Department also wishes to clarify that official records or documents may include official State government records or documents. In similar fashion, for unpublished State documents, any necessary certification would be provided by State personnel having the legal authority to make such certification. This section has been renumbered in the final rulemaking as § 283.15(l).

Section 283.17: Post-Hearing Procedures

This section of the NPRM contains the procedures which will be followed at the completion of the hearing before the ALJ. This section includes the requirements for post-hearing submissions by the parties to the appeal as well as the issuance of the ALJ decision.

ALJ's initial decision: In § 283.17(c)(1) of the NPRM, the Department proposed that the ALJ would issue a decision on the appeal within a reasonable period of time after the termination of the time allowed for filing of proposed findings of fact, conclusions of law, orders, and any briefs in support thereof.

Section 1395i(c)(4) of the Leland Act requires that the ALJ decide the appeal within 60 days after receipt of rebuttal evidence by the State agency, or, if no rebuttal evidence is submitted, within 90 days after the State submits the notice of appeal and evidence in support of the appeal. The Department has revised §§ 283.17(c)(1) and 283.32(a) to incorporate this legislative provision. As previously discussed, § 283.22(f) of the final rule requires the State agency to file a written request for the extension prior to the due date for the submission with a showing of cause for the extension.

ALJ's Initial decision. In § 283.17(c)(3) of the NPRM, the Department proposed that no decision would be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

Comment: The Department received one comment on this provision. The commenter noted that if the decision of the ALJ is adverse to the State agency, judicial review by the Federal court should not be precluded because the State agency did not seek review by the Judicial Officer.

Response: The Department has considered this comment and has revised the final rule to provide that the initial decision of the ALJ is considered final for purposes of judicial review. However, this would not preclude FNS, or any other party to the appeal, from seeking either reconsideration by the ALJ or review by the Judicial Officer.

Motion for Reconsideration: In § 283.17(d)(3) of the NPRM, the Department proposed that a response to the motion for reconsideration would be allowed only upon the request of the ALJ.

Comment: The Department received two comments on this provision. The commenters argued that a response to a motion for reconsideration should be the standard procedure rather than at the discretion of the ALJ.

Response: The Department has considered this comment and has revised § 283.17(d)(3) to provide that the other parties to the appeal shall respond within 10 days of receipt of the brief or written materials filed by the party requesting reconsideration unless an extension has been requested and granted by the ALJ or the ALJ has extended the time frame *sua sponte*.

Motion for Reconsideration: In § 283.17(d)(4) of the NPRM, the Department proposed that the parties to the appeal could not pursue a motion for reconsideration if the initial ALJ decision had been revised based upon a previous motion for reconsideration.

Comment: The Department received one comment on this provision. The commenter noted that other agencies permit a party to file a motion for reconsideration at any time, as of right, on the basis of material error, new evidence, or substantially changed circumstances.

Response: The Department has considered this comment but has decided not to adopt it. The Department believes that with the modification to § 283.17(d)(3) allowing all parties to the appeal to respond to the initial motion for reconsideration, any further requests for review of the ALJ's decision should be made to the Judicial Officer.

Section 283.18: Motions and Requests

This section of the NPRM contains the procedures related to the filing of motions and requests with the ALJ or the Judicial Officer.

Response to motions and requests: In § 283.18(d) of the NPRM, the Department proposed that a party have 20 days to respond to a motion or request and that the party initiating the motion or request not be permitted to reply to the response of the other party unless ordered to do so by the ALJ.

Comment: The Department received one comment on this provision. The commenter argued that by not being permitted to file a reply brief, the party initiating the motion or request is disadvantaged since the initiating party would not have access to arguments raised in response to the motion or request. The commenter recommended that one response be allowed each party after the initial motion and response.

Response: The Department has considered this comment but has decided not to adopt it. This provision is in keeping with the congressional intent that the appeal process be streamlined and that the appeal procedures be as expeditious as possible. Since the ALJ can direct *sua sponte* that a reply be filed either to clarify issues or upon motion in those instances where a party believes that a reply is necessary, the Department believes that restricting the number of responses to a motion or request which may be filed would not be disadvantage to the party initiating the motion or request.

The Department has also revised the 20-day time frame to respond to a motion or request in order to address the statutory deadlines established by section 13951(c)(4) of the Leland Act for the completion of the appeals process. Given these deadlines, the Department has shortened the 20-day time frame to 10 days unless an extension has been requested and granted by the ALJ or the ALJ has extended such time frame *sua sponte*.

Section 283.20: Review by the Judicial Officer

This section of the NPRM contains the procedures for appealing the initial ALJ decision to the Department's Judicial Officer.

Filing of review petition: In § 283.20(a) of the NPRM, the Department proposed that within 30 days of receipt of the initial ALJ decision, any party to the appeal may seek Judicial Officer review.

Comments: The Department received four comments on this provision. The commenters objected to this provision arguing that the HPA prohibits Secretarial review of decisions made by the ALJ. The commenters recommended that the Department delete this provision.

Response: The Department has considered these comments but has decided not to adopt the recommendation to forgo Secretarial review of the initial ALJ decision. As discussed under § 283.17(c)(3), the Department has revised the regulations to provide that the initial decision of the

ALJ shall be considered final for purposes of judicial review. However, this would not preclude any party to the appeal from seeking reconsideration by the ALJ or review by the Department's Judicial Officer within 30 days of the ALJ's decision.

It is the Department's position that the specific incorporation of section 557 of the Administrative Procedure Act (APA) (5 U.S.C. 557) by section 603 of the HPA, necessarily means that the Secretary is authorized to review ALJ decisions. Indeed, the APA expressly provides that an agency action can be final for purposes of the APA, and thus for purposes of judicial review, even though it is subject to reconsideration or appeal to a higher authority within the agency. 5 U.S.C. 704. This interpretation is consistent with both the expressed statutory language and legislative history of section 603 of the HPA. See Memorandum for Alan C. Raul, General Counsel, U.S. Department of Agriculture, from Douglas R. Cox, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice (February 20, 1991).

The Department has also determined that review by the Secretary of issues raised on appeal is a more efficient process for resolving disputes concerning initial ALJ decisions that if such issues were brought to the federal courts without providing the Secretary the opportunity to review and, if necessary, revise such decisions. The Secretary has delegated to the Judicial Officer the authority to act as the final deciding officer in adjudicatory proceedings subject to 5 U.S.C. 556 and 557. Section 283.20 will permit the Judicial Officer, on behalf of the Secretary, to address the party's objections to the initial ALJ decision, to apply expertise on the issues under review, exercise informed discretion, and create a more concise record for any subsequent judicial review. This procedure will also ensure that there is continuity in the decisions which are rendered for cases involving similar issues.

Submission of briefs: In § 283.20(h)(i) of the NPRM, the Department proposed that if the Judicial Officer determined that there were reasonable grounds that additional evidence which is material was not presented to the ALJ, the Judicial Officer shall remand the matter back to the ALJ for disposition.

Comment: The Department received one comment on this provision. The commenter questioned if it was the Department's intent to limit materials presented to the Judicial Officer.

Response: The Department has considered this comment and wishes to clarify that the Judicial Officer reviews the record created before the ALJ. However, if a party to the appeal can persuade the Judicial Officer that there are reasonable grounds why material evidence was not presented to the ALJ, the Judicial Officer shall remand the matter back to the ALJ for further consideration.

Section 283.30: Cross Motions for Summary Judgment

This section of the NPRM contains the procedures which are to be followed if the appeal is being pursued under subpart C—Summary Procedures for Appeal of QC Claims of Less than \$50,000.

Comment: The Department received one comment on this provision. The commenter expressed a concern that the 35 page limitation on the brief accompanying the motion for summary judgment and the 15 page reply brief limitation were too restricted and recommended that a higher page limit be established.

Response: The Department considered this comment but decided not to adopt it. The Department believes that given the authority of the ALJ to increase the size of the brief and reply brief, the page limitations are reasonable. These page limits are consistent with congressional intent to streamline the appeals process. The Department has also made changes to subpart C to conform to the timeframes specified in the Leland Act.

Implementation

In accordance with section 701(b)(5)(c) of the HPA, the amendments to section 14 of the Act are effective and must be implemented for all QC billing actions beginning with Fiscal Year 1986.

List of Subjects

7 CFR Part 272

Administrative practice and procedures, Food stamps, Reporting and recordkeeping requirements.

7 CFR Part 275

Administrative practice and procedures, Food stamps, Reporting and recordkeeping requirements.

7 CFR Part 283

Administrative practice and procedures, claims, Food stamps, Government procedures, and penalties.

For the reasons set out in the preamble, 7 CFR parts 272 and 275 are amended and 7 CFR part 283 is added as follows:

1. The authority citation for parts 272 and 275 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)(135) is added in numerical order to read as follows:

§ 272.1 General terms and conditions.

(g) Implementation. * * *

(135) Amendment No. 348. The provisions of Amendment No. 348 are effective August 5, 1994 and must be implemented for all QC billing actions beginning with Fiscal Year 1986.

PART 275—PERFORMANCE REPORTING SYSTEM

3. Section 275.23 is amended by revising paragraph (e)(5)(iii) to read as follows:

§ 272.23 Determination of State Agency Program Performance.

(e) * * *

(5) * * *

(iii) Whenever a State is assessed for an excessive payment error rate, the State shall have the right to request an appeal in accordance with procedures set forth in part 283 of this chapter.

4. 7 CFR part 283 is added to read as follows:

PART 283—APPEALS OF QUALITY CONTROL ("QC") CLAIMS

Subpart A—General

Sec.

- 283.1 Meaning of words.
- 283.2 Scope and applicability.
- 283.3 Definitions.

Subpart B—Appeals of QC Claims of \$50,000 or More

- 283.4 Filing appeals for QC claims of \$50,000 or more.
- 283.5 Motion to dismiss.
- 283.6 Answer.
- 283.7 Procedures upon failure to file an answer.
- 283.8 Rebuttal or amendment of appeal or answer.
- 283.9 Withdrawal of appeal.
- 283.10 Consent decision.
- 283.11 Prehearing conference and procedure.
- 283.12 Discovery.
- 283.13 Subpoenas.
- 283.14 Fees of witnesses.
- 283.15 Procedure for hearing.
- 283.16 Consolidation of issues.
- 283.17 Post-hearing procedure.
- 283.18 Motions and requests.
- 283.19 ALJs.
- 283.20 Review by the Judicial Officer.

- 283.21 Ex parte communications.
- 283.22 Form; filing; service; proof of service; computation of time; and extensions of time.
- 283.23 Procedural matters.

Subpart C—Summary Procedure for Appeals of QC Claims of Less Than \$50,000

- 283.24 Incorporation of procedures by reference.
- 283.25 Filing Appeals for QC claims of less than \$50,000.
- 283.26 Request that appeals be handled under procedures in subpart B for appeals of QC claims of \$50,000 or more.
- 283.27 Procedures upon failure to file an answer.
- 283.28 Discovery.
- 283.29 Scheduling conference.
- 283.30 Cross motions for summary judgment.
- 283.31 Review of the record.
- 283.32 ALJ's initial decision.

Authority: 7 U.S.C. 2011-2032.

Subpart A—General

§ 283.1 Meaning of words.

As used in this part, words in the singular form shall be deemed to import the plural, and vice versa, as the case may require.

§ 283.2 Scope and applicability.

The rules of practice in this part, shall be applicable to appeals by State agencies of Food and Nutrition Service quality control (QC) claims for Fiscal Year ("FY") 1986 and subsequent fiscal years pursuant to sections 14(a) and 16(c) of the Food Stamp Act of 1977, as amended, 7 U.S.C. 2023(a) and 2025(c).

§ 283.3 Definitions.

As used in this part, the terms as defined in the Food Stamp Act of 1977, as amended, 7 U.S.C. 2011-2032 ("Act"), and in the regulations, standards, instructions or orders issued thereunder, shall apply with equal force and effect. In addition, and except as may be provided otherwise in this section:

Administrator means the Administrator, Food and Nutrition Service, U.S. Department of Agriculture ("USDA").

ALJ means any Administrative Law Judge in USDA appointed pursuant to 5 U.S.C. 3105 or detailed to the USDA pursuant to 5 U.S.C. 3344 and assigned to the appeal.

Appeal means the appeal to the ALJ.

Ex parte communication means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include procedural matters.

Filing. A pleading or other document allowed or required to be filed in accordance with this part shall be

considered filed when postmarked, if mailed, or when received, if hand delivered.

FNS means the Food and Nutrition Service, USDA.

Hearing means that part of the appeal which involves the submission of evidence before the ALJ for the record in the appeal.

Hearing Clerk means the Hearing Clerk, USDA, Washington, DC 20250.

Judicial Officer means an official of the USDA delegated authority by the Secretary of Agriculture, pursuant to the Act of April 4, 1940 (7 U.S.C. 450c-459g) and Reorganization Plan No. 2 of 1953 (5 U.S.C. 1970 ed., Appendix, P. 550), as amended by Public Law 97-35, title I, sec. 125, 95 Stat. 357, 369 (1981) (7 U.S.C. 2201 note), to perform the adjudicating function involved (7 CFR 2.35(a)), or the Secretary of Agriculture if the authority so delegated is exercised by the Secretary.

OC claim means a claim made pursuant to 7 U.S.C. 2025(c).

Secretary means the Secretary of the USDA.

State agency means:

(1) The agency of State government, including the local offices thereof, which is responsible for the administration of the federally aided public assistance programs within the State, and in those States where such assistance programs are operated on a decentralized basis, it includes the counterpart local agencies which administer such assistance programs for the State agency; and

(2) The Indian tribal organization of any Indian tribe determined by the Secretary to be capable of effectively administering a Food Stamp Program in accordance with the Food Stamp Act of 1977, as amended, 7 U.S.C. 2011-2032.

Subpart B—Appeals of QC Claims of \$50,000 or More

§ 283.4 Filing appeals for QC claims of \$50,000 or more.

(a) *Time*. A State agency may appeal the bill for collection from FNS for a QC claim of \$50,000 or more for a food stamp QC error rate in excess of the tolerance level. A State agency shall file a written notice of appeal, in accordance with this subpart, within 10 days of receipt of the bill for collection from FNS for a QC claim of \$50,000 or more. The State agency may request an extension to the 10-day filing requirement in accordance with § 283.22(f). FNS shall issue the bill for collection by certified mail or personal service.

(b) *Exhaustion of administrative remedies*. The State agency must appeal

the bill for collection to the ALJ, pursuant to this subpart, and exhaust the available administrative remedies before filing suit in the Federal District Courts.

(c) *Filing.* The notice of appeal shall be filed with the Hearing Clerk in accordance with § 283.22(b).

(c) *Content of the notice.* (1) A notice of appeal, in order to be considered acceptable, must contain the following information:

(i) A brief and clear statement that it is an appeal from a QC claim of \$50,000 or more identifying the period the claim covers, the date and amount of the bill for collection, and the date of receipt of the bill for collection;

(ii) Identification of the State agency as the appellant and FNS as the appellee;

(iii) A statement that the notice of appeal is filed pursuant to section 14(a) of the Food Stamp Act;

(iv) A copy of the bill for collection which constitutes the basis for the filing of the notice of appeal shall be attached to the notice.

(2) Failure to file an acceptable notice of appeal may result in a challenge by FNS to the notice, dismissal of the notice by the ALJ and a waiver of the opportunity for further appeal or review by the Judicial Officer unless the State agency pursues the options as discussed in §§ 283.17(d) and 283.20.

(e) *Receipt of notice of appeal and assignment of docket number.* Upon receipt of a notice of appeal, the Hearing Clerk shall assign the appeal a docket number. The Hearing Clerk shall:

(1) Send the State agency a letter which shall include the following information:

(i) Advice that the notice of appeal has been received and the date of receipt;

(ii) The docket number assigned to the appeal and instructions that all future communications related to the appeal shall reference the docket number, and;

(iii) Advice that the State agency must file and serve its appeal petition, as set forth in § 283.22, not later than 60 days after receiving a notice of the claim. Failure to file a timely appeal petition may result in a waiver of further appeal rights.

(2) Send FNS a copy of the notice of appeal and a copy of the letter to the State agency.

(f) *Stay of collection.* The filing of a timely notice of appeal shall automatically stay the action of FNS to collect the QC claim asserted against the State agency until a decision is reached on the acceptability of the appeal, and in the case of an acceptable appeal, until a final administrative determination has

been issued. However, interest will accrue on the outstanding claim amount during the stay as provided in section 13(a)(1) of the Food Stamp Act of 1977, as amended (7 U.S.C. 2022(a)(1)).

(g) *Content of the appeal petition.* The appeal petition shall include:

(1) A brief statement of the allegations of fact and provisions of law that constitute the basis for the appeal including a statement as to whether a factual basis for good cause relief exists;

(2) The nature of the relief sought, and;

(3) A request for an oral hearing, if desired by the State agency. Failure to request an oral hearing will result in a forfeiture of the opportunity for such a hearing, except as provided in § 283.15(a).

(h) *FNS answer.* Upon service of the State agency appeal petition, FNS shall:

(1) File an answer, in accordance with § 283.6, not later than 60 days after the State agency submits its appeal petition and;

(2) Advise the Hearing Clerk if FNS wishes to have an oral hearing.

(i) *Oral hearing not requested.* If no oral hearing has been requested, the appeal shall proceed in accordance with the procedures set forth under subpart C of this part.

§ 283.5 Motion to dismiss.

(a) *Filing of motion to dismiss.* Prior to or at the same time as filing the answer, FNS may file a motion to dismiss. The appeal may be challenged on the basis that the notice of appeal was not filed within 10 days or as that time may have been extended by the ALJ, the appeal petition was not filed in accordance with § 283.4, or that the appeal petition is substantially incomplete and could not be quickly and easily cured by amendment. The motion must be accompanied by clear and convincing proof of any of these factors alleged as grounds for dismissal.

(b) *Service of motion to dismiss.* FNS shall serve the State agency with a copy of the motion to dismiss. The State agency will have 10 days from date of service to submit objections to the motion.

(c) *Ruling on a motion to dismiss.* The ALJ will rule on the motion to dismiss before any further action proceeds on the basis of the merits of the appeal. The basis of the ruling will be clearly documented and will become part of the official record. If the ALJ denies the motion, FNS shall file its answer in accordance with § 283.6 within 60 days of service of the ALJ's ruling, unless there is a motion for reconsideration filed pursuant to § 283.17(d) or review

by the Judicial Officer is sought pursuant to § 283.20.

(d) *Dismissal of appeal.* If the ALJ finds the basis for the motion to have merit, the appeal may be dismissed. The initial decision of the ALJ shall become final and effective 30 days after service in accordance with § 283.17(c)(2) unless either party pursues the options as discussed in §§ 283.17(d) and 283.20.

(e) *Waiver.* Failure to file for dismissal of the appeal by the time the answer is required to be filed will result in waiver of the right to request dismissal.

§ 283.6 Answer.

(a) *Filing and service.* Not later than 60 days after the State agency submits its appeal petition, or within 60 days following service of a ruling in accordance with § 283.5, FNS shall file an answer signed by the FNS Administrator or authorized representative or the attorney of record in the appeal. The attorney may file an appearance of record prior to or simultaneously with the filing of the answer.

(b) *Contents.* The answer shall clearly admit, deny, or explain each of the allegations of the appeal petition and shall:

(1) Clearly set forth any defense asserted by FNS; or

(2) State that FNS admits all the facts alleged in the appeal petition; or

(3) State that FNS admits the jurisdictional allegations of the appeal petition and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(c) *Default.* Failure to file a timely answer shall be deemed, for purposes of the appeal, an admission of the allegations in the appeal petition and failure to deny or otherwise respond to an allegation of the appeal petition shall be deemed for purposes of the appeal, an admission of said allegation, unless FNS and the State agency have agreed to a consent decision pursuant to § 283.10.

§ 283.7 Procedures upon failure to file an answer.

The failure by FNS to file an answer shall constitute a waiver of hearing. Upon such failure to file, the State agency shall file a proposed decision, along with a motion for adoption thereof, both of which shall be served upon FNS by the State agency. Within 10 days after service of such motion and proposed decision, FNS may file objections thereto. If the ALJ finds that meritorious objections have been filed, the State agency's motion shall be denied with supporting reasons. If

meritorious objections are not filed, the ALJ shall issue an initial decision without further procedures or hearing. Copies of the initial decision or denial of the State agency's motion shall be served on each of the parties and shall be included as part of the official record. Where the decision as proposed by the State agency is adopted as the ALJ's initial decision, such decision of the ALJ shall become final and effective 30 days after service in accordance with § 283.17(c)(2) unless reconsideration or review by the Judicial Officer is sought as discussed in §§ 283.17(d) and 283.20.

§ 283.8 Rebuttal or amendment of appeal or answer.

(a) Not later than 30 days after FNS submits an answer in accordance with § 283.6, the State agency may submit rebuttal evidence.

(b) At any time prior to the filing of a motion for a hearing pursuant to § 283.15(b), the appeal petition or the answer may be amended without prior authorization by the ALJ. Thereafter, such an amendment may only be made as authorized by the ALJ upon a showing of cause.

§ 283.9 Withdrawal of appeal.

At any time before the ALJ files an initial decision, the State agency may withdraw its appeal and agree to pay the full amount of the claim. By withdrawing an appeal, the State agency waives all opportunity to appeal or seek further administrative or judicial review on the claim or related matters.

§ 283.10 Consent decision.

At any time before the ALJ files an initial decision, FNS and the State agency may agree to entry of a consent decision. Such decision shall be filed in the form of a decision signed by the parties with appropriate space for signature by the ALJ and shall contain an admission of at least the jurisdictional facts, consent to the issuance of the agreed decision without further procedure and such other admissions or statements as may be agreed between the parties. The ALJ shall enter such decision without further procedures, unless an error is apparent on the face of the document. Such decision shall be final and shall take effect 30 days after the date of the delivery or service of such decision and is not subject to further administrative or judicial.

§ 283.11 Prehearing conference and procedure.

(a) *Time and place.* The ALJ shall direct the parties or their counsel to participate in a prehearing conference at any reasonable time prior to the hearing.

The prehearing conference shall be held at the U.S. Department of Agriculture, Washington, DC. Reasonable notice of the time, place of the prehearing conference and if personal attendance will be necessary shall be given. Prehearing conferences may be conducted telephonically. The ALJ shall order each of the parties to furnish at the prehearing conference or at another time prior to the hearing the following:

(1) An outline of the appeal or defense;

(2) The legal theories upon which the party will rely;

(3) Copies of or a list of documents that the party anticipates relying upon at the hearing; and

(4) A list of witnesses who will testify on behalf of the party. At the discretion of the party furnishing such list of witnesses, the names of the witnesses need not be furnished if they are otherwise identified in some meaningful way, such as a short statement of the type of evidence they will offer.

(b) *Procedures.* The ALJ shall not order any of the foregoing procedures that a party can show are inappropriate or unwarranted under the circumstances of the particular appeal.

(c) *Matters to be considered.* At the prehearing conference, the following matters shall be considered:

(1) The simplification of issues;

(2) The necessity of amendments to pleadings;

(3) The possibility of obtaining stipulations of facts and of the authenticity, accuracy, and admissibility of documents, which will avoid unnecessary proof;

(4) The limitation of the number of expert or other witnesses;

(5) Negotiation, compromise, or settlement of issues;

(6) The exchange of copies of proposed exhibits;

(7) The nature of and the date by which discovery, as provided in § 283.12, must be completed;

(8) The identification of documents or matters of which official notice may be requested;

(9) A schedule to be followed by the parties for the completion of the actions decided at the conference; and

(10) Such other matters as may expedite and aid in the disposition of the appeal.

(d) *Reporting.* (1) A prehearing conference will not be stenographically reported unless so directed by the ALJ.

(2) Any party to the appeal may, upon motion, request the ALJ to allow for a stenographic transcript of a prehearing conference. The party requesting the transcript shall bear the transcription cost of producing the transcript and the

duplication cost for one transcript provided to the ALJ and to the other parties to the appeal.

(e) *Order.* Actions taken as a result of a conference shall be reduced to an appropriate written order, unless the ALJ concludes that a stenographic report, if available, shall suffice, or, in the event the conference takes place within 7 days of the beginning of the hearing, the ALJ elects to make a statement on the record at the hearing summarizing the actions taken.

§ 283.12 Discovery.

(a) *Dispositions.*—(1) *Motion for taking deposition.* Only upon a finding by the ALJ that a deposition is necessary to preserve testimony as provided in this subparagraph, upon the motion of a party to the appeal, the ALJ may, at any time after the filing of the answer, order the taking of testimony by deposition. The motion shall set forth:

(i) The name and address of the proposed deponent;

(ii) The name and address of the person (referred to hereafter in this section as the "officer") qualified under the regulations in this part to take depositions, before whom the proposed examination is to be made;

(iii) The proposed time and place of the examination, which shall be at least 15 days after the date of service of the motion; and

(iv) The reasons why such deposition should be taken, which shall be solely for the purpose of eliciting testimony which otherwise might not be available at the time of the hearing, for use as provided in accordance with paragraph (a)(7) of this section.

(2) *ALJ's order for taking depositions.* If the ALJ finds that the testimony may not otherwise be available at the hearing, the taking of the deposition may be ordered. The order shall be served upon the parties, and shall state:

(i) The time and place of the examination;

(ii) The name of the officer before whom the examination is to be made; and

(iii) The name of the deponent. The officer and the time and place need not be the same as those suggested in the motion.

(3) *Qualifications of officer.* The deposition shall be made before an officer authorized by the law of the United States or by the law of the place of the examination to administer oaths, or before an officer authorized by the Secretary to administer oaths.

(4) *Procedure on examination.* (i) The deponent shall be examined under oath or affirmation and shall be subject to cross-examination. Objections to

questions or documents shall be in the short form, stating the grounds of objections relied upon. The questions propounded, together with all objections made (but not including argument or debate), shall be recorded verbatim. In lieu of oral examination, parties may transmit written questions to the officer prior to the examination and the officer shall propound such questions to the deponent.

(ii) The party taking the deposition shall arrange for the examination of the witness either by oral examination, or by written questions upon agreement of the parties or as directed by the ALJ. If the examination is conducted by means of written questions, copies of the questions shall be served upon the other party to the appeal and filed with the officer at least 10 days prior to the date set for the examination unless otherwise agreed, and the other party may serve cross questions and file them with the officer at any time prior to the time of the examination.

(iii) The parties may stipulate in writing or the ALJ may upon motion order that a deposition be taken by telephone. A deposition taken by telephone is to be taken at the place where the deponent is to answer questions propounded to the deponent.

(iv) The parties may stipulate in writing or the ALJ may upon motion order that a deposition be recorded by other than stenographic means. The stipulation or the order shall designate the manner of recording, preserving and filing of the deposition, and may include other provisions to assure that the recorded testimony is accurate and trustworthy.

(5) *Certification by the officer.* The officer shall certify on the deposition that the deponent was duly sworn and that the deposition is a true record of the deponent's testimony. The officer shall then securely seal the deposition, together with one copy thereof (unless there are more than two parties in the appeal, in which case there should be another copy for each additional party), in an envelope and mail the same by registered or certified mail to the Hearing Clerk.

(6) *Corrections to the transcript.* (i) At any time prior to the hearing, any party may file a motion proposing corrections to the transcript of the deposition.

(ii) Unless a party files such a motion in the manner prescribed, the transcript shall be presumed to be a true, correct, and complete transcript of the testimony given in the deposition proceeding and to contain an accurate description or reference to all exhibits in connection therewith, and shall be deemed to be

certified correct without further procedure.

(iii) At any time prior to the use of the deposition in accordance with paragraph (a)(7) of this section and after consideration of any objections filed thereto, the ALJ may issue an order making any corrections in the transcript which the ALJ finds are warranted, and these corrections shall be entered onto the original transcript by the Hearing Clerk (without obscuring the original text).

(7) *Use of depositions.* A deposition ordered and taken in accordance with the provisions of this section may be used in an appeal under these rules if the ALJ finds that the evidence is otherwise admissible and

(i) That the witness is deceased;
(ii) That the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment;
(iii) That the party offering the deposition has endeavored to procure the attendance of the witness by subpoena, but has been unable to do so; or

(iv) That such exceptional circumstances exist as to make it desirable, in the interests of justice, to allow the deposition to be used. If the party upon whose motion the deposition was taken refuses to offer it in evidence, any other party may offer the deposition or any part thereof in evidence. If only part of a deposition is offered in evidence by a party, any other party may require the introduction of any other part which is relevant be considered with the part introduced, and any party may introduce any other parts.

(b) *Interrogatories, requests for admissions and requests for production of documents—(1) Interrogatories.* A party may submit written interrogatories to any other party to an appeal. The time for submitting and responding to written interrogatories shall be set by the ALJ at the pre-hearing conference, but in no event shall the time for response be less than 20 days from the date of service or within such time as determined upon motion to the ALJ. The number of interrogatories submitted by each party shall not exceed twenty-five questions including subparts, unless additional interrogatories are authorized by the ALJ. Each interrogatory should be answered separately and fully in writing, unless it is objected to, in which event the reasons for objection should be stated in lieu of an answer. The answers are to be signed under penalty of perjury by the person making them. Objections shall be signed by the attorney of record in the

appeal or by the responding party's authorized representative.

(2) *Request for admissions.* A party may submit a written request for admission of the truth of any matters relevant to the appeal to any other party to the appeal. The time for submitting a written request for admission shall be set by the ALJ at the pre-hearing conference. The number of admissions contained in a request submitted by a party shall not exceed twenty-five unless additional admissions are authorized by the ALJ. The matter is admitted unless, within 20 days after service thereof, or within such time as determined upon motion to the ALJ, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter signed by the party, counsel or designated representative. If objection is made, the reasons therefor should be stated. The answer should specifically deny the matter or set forth in detail why the answering party cannot truthfully admit or deny the matter. An answering party may not give lack of information or knowledge as a reason for the failure to admit or deny unless it is stated that reasonable inquiry has been made and that the information known or readily obtainable is insufficient to enable the party to admit or deny. A party who considers that a matter for which an admission has been requested presents a genuine issue for hearing may not, on that ground alone, object to the request; the party may deny the matter or set forth reasons why the matter cannot be admitted or denied.

(3) *Request for production of documents.* (i) Any party may serve upon any other party to the appeal a request for production of documents which are in the possession or control of the party upon whom the request is served. The time for service and response to such a request shall be set by the ALJ at the pre-hearing conference. Upon payment of fees for search and duplication of documents, any party to the appeal may obtain copies of such documents.

(ii) Parties may request production of any documents regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. Grounds for objection will not exist if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(iii) If such documents include privileged information or information the disclosure of which is proscribed by the Food Stamp Act of 1977, as amended, such documents need not be produced.

(c) *Supplementation of response.* A party who knows or later learns that a response is incorrect is under a duty to correct such response as soon as possible. A party who has responded to a request for discovery with a response that was complete when made is under a duty to supplement the response to include information thereafter acquired. A party is under a duty to supplement responses with respect to any question directly addressed to:

- (1) The identity and location of persons having knowledge of discoverable matters; and
- (2) The identity of each person expected to be called as an expert witness at the hearing, the subject matter on which such expert(s) is expected to testify, and the substance of the testimony.

(d) *Frequency and use of discovery.* The ALJ shall limit, upon motion of a party, the frequency or extent of discovery if the ALJ determines that:

- (1) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- (2) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
- (3) The discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

(e) *Protective orders*—(1) *Request for protective order.* A party served with such a request may file a motion for a protective order before the date on which a response to the discovery request is due, stating why discovery should be limited or should not be required.

(2) *Issuance of protective order.* In issuing a protective order, the ALJ may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense, including one or more of the following:

- (i) That discovery not be had;
- (ii) That the discovery may be had only through a method of discovery other than that requested;
- (iii) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;
- (iv) That discovery be conducted with no one present except persons designated by the ALJ; and
- (v) That the contents of discovery or evidence be sealed.

(f) *Failure to respond to discovery*—(1) *Motions to compel.* If a deponent fails to respond or gives an evasive or incomplete answer to a question propounded at a deposition pursuant to paragraph (a) of this section or a party fails to respond or gives evasive or incomplete answers to written interrogatories or admissions, or fails to respond, in full or in part, to a request for production of documents served pursuant to paragraph (b) of this section, the party seeking discovery may apply for an order compelling an answer by filing and serving a motion on all parties and deponents.

(2) *Filing motion to compel.* (i) Such motion must be filed within 20 days following the service of the unresponsive answer upon deposition or within 20 days after expiration of the period allowed for answers to interrogatories or production of documents.

(ii) On matters related to an oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

(3) *Responding to motion to compel.* A response to the motion may be filed in accordance with § 283.18(d).

(g) *Decision of the ALJ.* (1) The ALJ may grant a motion to compel production or deny a motion for a protective order only if the ALJ finds that the discovery sought is necessary for the expeditious, fair, and reasonable consideration of the issues; it is not unduly costly or burdensome; it will not unduly delay the proceeding; and the information sought is not privileged.

(2) The initial decision of the ALJ regarding the motion to compel the production of privileged documents or the motion for a protective order shall become final and effective 10 days after service unless either party pursues the options as discussed in §§ 283.17(d) and 283.20.

(h) *Failure to comply with an order.*

(1) If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by order of the ALJ, such refusal may subject the refusing party to proceedings to compel compliance with the ALJ's order in the appropriate United States district court.

(2) If any party or other person refuses to obey an order made under this section requiring an answer to designated questions or production of documents, the ALJ may order that the matters regarding which questions were asked or the contents of the document or documents or any other designated facts should be taken to be established for the purposes of the proceeding in

accordance with the claim of the party obtaining the order.

(i) *Postponements or delays.* No hearing, proceeding or other matter under this part shall be postponed or otherwise delayed pending the response or resolution of issues pertaining to a request for information pursuant to the Freedom of Information Act, 5 U.S.C. 552.

§ 283.13 Subpoenas.

(a) *Issuance of subpoenas.* The attendance and testimony of witnesses and the production of documentary evidence from any place in the United States on behalf of any party to the appeal may be required by subpoena at the designated place of hearing. Except for cause shown, requests for subpoenas shall be filed at least 15 days prior to the date of the hearing. Subpoenas shall be issued by the ALJ, over the facsimile signature of the Secretary, upon a reasonable showing by the applicant of the grounds, necessity and reasonable scope thereof.

(b) *Service of subpoenas.* (1) When the ALJ issues a subpoena under this section, the party who requested such subpoena shall serve all other parties with a copy of the subpoena, notice of the names and addresses of the individuals subpoenaed and specify any documents required to be produced.

(2) Subpoenas may be served:

- (i) By a U.S. Marshal or deputy marshal,
- (ii) By any other person who is not less than 18 years of age, or
- (iii) By registering and mailing a copy of the subpoena addressed to the person to be served at the last known principal place of business or residence.

(3) Proof of service may be made:

- (i) By the return of service on the subpoena by the U.S. Marshal or deputy marshal,
- (ii) If served by an employee of the Department, by a certificate stating that he personally served the subpoena upon the person named therein,
- (iii) If served by another person, by an affidavit of such person stating that he personally served the subpoena upon the person named therein, or
- (iv) If service was by registered mail, by an affidavit made by the person mailing the subpoena that it was mailed as provided herein and by the signed return post-office receipt. Where the subpoena is issued on behalf of the Secretary and service is by mail, the return receipt without an affidavit or certificate of mailing shall be sufficient proof of service.

(4) In making personal service, the person making service shall leave a copy of the subpoena with the person

subpoenaed, or, if such person is not immediately available, with any other responsible person authorized to accept service residing or employed at the place of residence or business of the person subpoenaed.

(5) The original of the subpoena, bearing or accompanied by the required proof of service, shall be returned to the official who issued the same. The party at whose request the subpoena is issued shall be responsible for the service thereof.

§ 283.14 Fees of witnesses.

Witnesses summoned under these rules shall be paid the same fees and expenses that are paid witnesses in the courts of the United States. Fees shall be paid by the party at whose request the witness appears. Current Federal, State, or local government employees shall not be eligible to receive witness fees.

§ 283.15 Procedure for hearing.

(a) *Request for hearing.* A party may request a hearing on the facts by including such request in its Appeal Petition or Answer, whichever is appropriate. Failure to request a hearing within the time specified shall constitute a waiver of the opportunity for such a hearing, except as provided for under § 283.4(i). In the event FNS denies any material facts and fails to request a hearing, the matter may be set down for hearing on motion of the State agency or upon the ALJ's own motion.

(b) *Time and place.* If any material issue of fact is joined by the pleadings, the ALJ, upon motion of any party, stating that the matter is ready for hearing, shall set a time for the hearing, as soon as feasible thereafter, with due regard for the public interest and the convenience and necessity of the State agency and FNS. The hearing shall be held at the U.S. Department of Agriculture, Washington, DC. Upon a showing of unusual or extraordinary circumstances, the ALJ may order that the hearing be held at another location. The ALJ shall file a notice stating the time and place of the hearing. If any change in the time of the hearing is made, the ALJ shall file a notice of such change, which notice shall be served upon the parties, unless it is made during the course of an oral hearing and made a part of the transcript or actual notice given to the parties.

(c) *Appearances.* The parties may appear in person or by attorney of record in the appeal or by any other designated representative. Any person who appears as attorney or as a party's designated representative must conform to the standards of ethical conduct

required by practitioners before the courts of the United States.

(d) *Exchange of witness and rebuttal witness lists, statements and exhibits.*

(1) Witness and rebuttal witness lists, copies of prior statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements or depositions that a party intends to offer in lieu of live testimony in accordance with § 283.12(a)(7), shall be exchanged at least 15 days in advance of the hearing or at such other time as may be set by the ALJ.

(2) A witness whose name does not appear on the witness list shall not be permitted to testify and exhibits which were not provided to the opposing party as provided above shall not be admitted into evidence at the hearing absent a showing of cause and as authorized by the ALJ.

(e) *Department of attorney or representative.* (1) Whenever an ALJ finds that a person acting as attorney or designated representative for any party to the appeal is guilty of unethical or contumacious conduct in, or in connection with an appeal, the ALJ may order that such person be precluded from further acting as attorney or representative in the appeal. Review by the Judicial Officer may be taken on any such order, but no appeal of the QC claim shall be delayed or suspended pending disposition of the debarment review by the Judicial Officer. Provided, however, that the ALJ shall suspend the appeal of the QC claim for a reasonable time for the purpose of enabling the party to obtain another attorney or representative.

(2) Whenever it is found, after notice and opportunity for hearing, that a person who is acting or who has acted as attorney or representative for another person in any proceeding before the U.S. Department of Agriculture, is unfit to act as such counsel because of such unethical or contumacious conduct, such person will be precluded from acting as the attorney or representative in any or all proceedings before the Department as found to be appropriate.

(f) *Failure to appear.* (1) If FNS or the State agency, after being duly notified, fails to appear at the hearing without cause, that party shall be deemed to have waived the opportunity for an oral hearing and to have admitted any facts which may be presented at the hearing. Such failure by either party shall also constitute an admission of all the material allegations of fact contained in any pleadings submitted by the other party. The party who appears shall have the option of whether to follow the procedure under § 283.7 or to present

evidence, in whole or in part, in the form of declarations or by oral testimony before the ALJ.

(2) Failure to appear at a hearing shall not be deemed to be a waiver of the right to be served with a copy of the ALJ's initial decision, to file a motion for reconsideration pursuant to § 283.17(d) or to seek review by the Judicial Officer in accordance with § 283.20.

(g) *Order of proceeding.* Except as may be decided otherwise by the ALJ, FNS shall proceed first at the hearing. FNS has the burden of proving, by a preponderance of the evidence, the QC claim against the State agency for a QC error rate in excess of the tolerance level. The State agency will proceed second and must prove, by a preponderance of the evidence, the facts upon which it bases its appeal.

(h) *Evidence.* (1) The testimony of witnesses at a hearing shall be on oath or affirmation and subject to cross-examination.

(2) Upon a finding of cause, the ALJ may order that any witness be examined separately and apart from all other witnesses except those who may be parties to the appeal or whose presence is shown by a party to be essential to the presentation of the party's cause.

(3) After a witness called by either party has testified on direct examination, any other party may request and obtain the production of any statement, or part thereof, of such witness in the possession of the opposing party which relates to the subject matter as to which the witness has testified. Such production shall be made according to the procedures and subject to the definitions and limitations prescribed in the Jencks Act (18 U.S.C. 3500).

(4) Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded by order of the ALJ insofar as practicable.

(i) *Inclusion in the record.* At the oral hearing or as ordered by the ALJ, depositions to the extent deemed admissible, written interrogatories, written requests for admission and respective responses may be offered in evidence by the party at whose instance they were taken. If not offered by such party, they may be offered in whole or in part by any other party. If only part of a deposition, written interrogatory, written request for admission or response thereto is offered in evidence by a party, any other party may require that all of it, which is relevant to the part introduced, be offered, and any party may introduce any other parts.

Such depositions, written interrogatories, written requests for admission and respective responses thereto shall be admissible in evidence subject to such objections as to relevancy, materiality or competency of the testimony as were noted at the time of their taking or are made at the time they are offered in evidence.

(j) *Objections.* (1) If a party objects to the admission of any evidence or to the limitation of the scope of any examination or cross examination or to any other ruling by the ALJ, the party shall state briefly the grounds of such objection, whereupon an automatic exception will follow if the objection is overruled by the ALJ.

(2) Only objections made before the ALJ may be subsequently relied upon on review by the Judicial Officer.

(k) *Exhibits.* Four copies of each exhibit shall be filed with the ALJ. However, where there are more than two parties in the appeal, an additional copy shall be filed for each additional party. A true copy of an exhibit may be substituted for the original.

(l) *Official records or documents.* An official government record or document or entry therein, if admissible for any purpose, shall be admissible in evidence without the production of the person who made or prepared the same, and shall be prima facie evidence of the relevant facts stated therein. Such record or document shall be evidenced by an official publication thereof or by a copy certified by a person having legal authority to make such certification.

(m) *Official notice.* Official notice shall be taken of such matters as are judicially noticed by the courts of the United States and of any other matter of technical, scientific, or commercial fact of established character. Provided, that the parties shall be given adequate opportunity to show that such facts are erroneously noticed.

(n) *Offer of proof.* Whenever evidence is excluded by the ALJ, the party offering such evidence may make an offer of proof, which shall be included in the transcript. The offer of proof shall consist of a brief statement describing the evidence excluded. If the evidence consists of a brief oral statement, it shall be included in the transcript in toto. If the evidence consists of a document or other exhibit, it shall be marked for identification and inserted in the hearing record. In either event, if the Judicial Officer, upon review, determines that the ALJ's ruling excluding the evidence was erroneous and prejudicial, the evidence shall be considered a part of the transcript and hearing record. If the Judicial Officer determines that the ALJ's ruling

excluding the evidence was erroneous and prejudicial, and that it would be inappropriate to have such evidence considered a part of the hearing record without reopening the hearing, the Judicial Officer may direct that the hearing be reopened to permit the taking of such evidence or for any other purpose in connection with the excluded evidence.

(o) *Transcript.* Hearings shall be recorded and transcribed verbatim. The party requesting the hearing shall bear the transcription cost of producing the transcript and the duplication cost for one transcript provided to the ALJ and to the other parties to the appeal.

§ 283.16 Consolidation of issues.

Similar issues involved in appeals by two or more State agencies may be consolidated upon motion by the State agencies, FNS, or at the discretion of the ALJ if it is decided that consolidation would help to promote administrative efficiency.

(a) *Disposition of consolidated issues.* If the ALJ orders consolidation, the issues consolidated will be considered first. If a hearing has been requested by any of the parties that have had issues consolidated, arguments on the consolidated issues will be heard before arguments on dissimilar issues. The ALJ will take the information into consideration along with arguments on other issues in preparing initial decisions for QC appeals in which some issues have been consolidated.

(b) *Initial decision.* (1) If the ALJ decides the evidence and arguments by the State agencies on the consolidated issues cannot be overcome by the evidence presented by FNS and are sufficient to grant the relief requested by a State agency or all State agencies in which the issue is involved, the ALJ shall prepare an initial decision as provided in § 283.17(c).

(2) FNS may file a motion for reconsideration pursuant to § 283.17(d) or seek review by the Judicial Officer in accordance with § 283.20.

§ 283.17 Post-hearing procedure.

(a) *Corrections to transcript.* (1) At any time, but not later than the time fixed for filing proposed findings of fact, conclusions of law, order and briefs, any party may file a motion proposing corrections to the transcript.

(2) Unless a party files such a motion in the matter prescribed, the transcript shall be presumed to be a true, correct, and complete transcript of the testimony given at the hearing and to contain an accurate description or reference to all exhibits received in evidence and made part of the hearing record. The

transcript shall be deemed to be certified without further action by the ALJ.

(3) At any time prior to the filing of the ALJ's initial decision and after consideration of any objections filed as to the transcript, the ALJ may issue an order making any corrections in the transcript that the ALJ finds are warranted. Such corrections shall be entered into the original transcript by the Hearing Clerk (without obscuring the original text).

(b) *Proposed findings of fact, conclusions of law, order, and briefs.* The parties may file proposed findings of fact, conclusions of law and orders based solely upon the record and on officially noticed matters, and briefs in support thereof. Briefs may be filed at the discretion of the ALJ. The ALJ shall announce at the hearing the time within which these documents may be filed.

(c) *ALJ's initial decision.* (1) The ALJ shall decide the appeal not later than 60 days after receipt of rebuttal evidence submitted by the State agency or, if the State agency does not submit rebuttal evidence, not later than 90 days after the State agency submits the notice of appeal and evidence in support of the appeal. In accordance with § 283.22(f), the ALJ may, upon motion or *sua sponte*, extend this deadline for cause shown.

(2) The ALJ shall prepare, upon the basis of the record and officially noticed matters, and shall file, an initial decision which shall include a decision on a request for good cause relief, a copy of which shall be served upon each of the parties.

(3) Such initial decision shall be considered final for purposes of judicial review without further proceedings, unless there is a motion for reconsideration filed pursuant to § 283.17(d) or review by the Judicial Officer is sought pursuant to § 283.20.

(4) If no motion for reconsideration or review by the Judicial Officer is filed, the initial decision shall constitute the final notice of determination for purposes of judicial review and shall become effective 30 day after service.

(d) *Motion for reconsideration.* (1) Except as provided in paragraph (d)(4) of this section, any party may file a motion for reconsideration of the initial decision within 30 days of service of the initial decision. If served by mail, the time for filing a motion for reconsideration will be 5 days longer in accordance with § 283.22.

(2) Every such motion must set forth the matters claimed to have been erroneously decided and the basis of the alleged errors. Such motion shall be accompanied by a supporting brief.

(3) Responses to such motions shall be filed in accordance with § 283.18(d).

(4) No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.

(5) The ALJ may dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

(6) If the ALJ denies a motion for reconsideration, the initial decision shall constitute the final notice of determination for purposes of judicial review and shall become effective 30 days after service unless review by the Judicial Officer is sought in accordance with § 283.20.

(7) If the ALJ issues a revised initial decision, that decision shall constitute the final notice of determination for purposes of judicial review and shall become effective 30 days after service unless review by the Judicial Officer is sought in accordance with § 283.20.

§ 283.18 Motions and requests.

(a) *Filing.* All motions and requests shall be filed with the Hearing Clerk, and served upon all the parties by the moving or requesting party, except motions and requests made on the record during the oral hearing. The ALJ assigned to the appeal or the Chief Judge shall rule upon all motions and requests filed or made prior to seeking review of the ALJ's initial decision pursuant to § 283.20, except motions directly relating to such review. Thereafter, the Judicial Officer shall rule on any motions and requests as well as the motions directly relating to the review of the ALJ's initial decision.

(b) *Time for filing.* Any motion or request may be filed at any time, except that:

(1) Motions to dismiss pursuant to § 283.5 must be filed within the time allowed for filing an answer; and

(2) Motions for reconsideration must be filed within 30 days of service of the ALJ's initial decision pursuant to § 283.17(d).

(c) *Contents.* All written motions and requests shall state the particular order, ruling, or action desired and the grounds therefor.

(d) *Response to motions and requests.* Within 10 days after service of any written motion or request or within such shorter or longer period as may be fixed by the ALJ or Judicial Officer, an opposing party may file a response to the motion or request. The moving party shall have no right to reply to the response; however, the ALJ or Judicial Officer may order that a reply be filed.

(e) *Certification to the Judicial Officer.* The submission or certification of any motion, request, objection, or other

question to the Judicial Officer prior to the seeking of review pursuant to § 283.20 shall be made by and in the discretion of the ALJ. The ALJ may either rule upon or certify the motion, request, objection, or other question to the Judicial Officer, but not both.

§ 283.19 ALJs.

(a) *Assignment.* No ALJ shall be assigned to serve in any appeal who:

(1) Has any pecuniary interest in any matter or business involved in the appeal,

(2) Is related by blood or marriage to any party in the appeal, or

(3) Has any conflict of interest which might impair the ALJ's objectivity in the appeal.

(b) *Disqualification of ALJ.* (1) Any party to the appeal may, by motion, request that the ALJ withdraw from the appeal on one or more of the grounds set out in paragraph (a) of this section. Such motion shall set forth with particularity the alleged grounds for disqualification. The ALJ may then either rule upon or certify the motion to the Judicial Officer, but not both.

(2) The ALJ may withdraw from any appeal for any reason deemed by the ALJ to be disqualifying.

(c) *Powers.* (1) Subject to review as provided elsewhere in this part, the ALJ, in any assigned appeal, shall have the power to:

(i) Rule upon motions and requests;

(ii) Set the time and place of a pre-hearing conference and the time of the hearing, adjourn the hearing from time to time, and change the time of the hearing;

(iii) Administer oaths and affirmations;

(iv) Regulate the scope and timing of discovery;

(v) Issue and enforce subpoenas as authorized under 7 U.S.C. 2023(a) and these rules;

(vi) Summon and examine witnesses and receive evidence at the hearing;

(vii) Appoint expert witnesses in accordance with the provisions of Rule 706 of the Federal Rules of Evidence;

(viii) Admit or exclude evidence;

(ix) Hear oral argument on facts or law;

(x) Upon motion of a party, decide cases, in whole or in part, by non-oral hearing procedures under subpart C of this part where there is no disputed material issue of fact;

(xi) Perform all acts and take all measures necessary for the maintenance of order, including the exclusion of contumacious counsel or other persons;

(xii) Take all other actions authorized under the Act and these rules, including the extension of time upon motion of a party or *sua sponte* for cause shown.

(2) The ALJ may not rule upon the validity of Federal statutes or regulations.

(d) *Who may act in the absence of the ALJ.* In case of the absence of the ALJ or the ALJ's inability to act, the powers and duties to be performed by the ALJ under these rules of practice in connection with any assigned appeal may, without abatement of the appeal, unless otherwise directed by the Chief Judge, be assigned to any other ALJ.

§ 283.20 Review by the Judicial Officer.

(a) *Filing of review petition.* (1) Within 30 days after service of the ALJ's initial decision, or any part thereof, any party may seek Judicial Officer review of such decision by filing a review petition with the Hearing Clerk. However, if another party files a motion for reconsideration under § 283.17(d), consideration of the review petition shall be stayed automatically pending resolution of the motion for reconsideration. If a motion for reconsideration is timely filed, a review petition may be filed within 30 days after the ALJ denies the motion or issues a revised initial decision, whichever applies.

(2) As provided in § 283.15(h), objections made before the ALJ regarding evidence or regarding a limitation on examination or cross-examination or other ruling may be relied upon in a Judicial Officer review.

(3) Each issue set forth in the review petition, and the arguments thereon, shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations or authorities being relied upon in support thereof. A brief in support may be filed simultaneously with the review petition.

(b) *Response to review petition.* Within 30 days after service of a copy of a review petition and any brief in support thereof, any other party to the proceedings may file a response in support of or in opposition to the review petition and in such response any relevant issue, not presented in the review petition, may be raised.

(c) *Transmittal of the record.* (1) Whenever a review petition of an ALJ's initial decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the appeal.

(2) Such record shall include: The pleadings; motions and requests filed and rulings thereon; the transcript of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a prehearing conference; such proposed findings of

fact, conclusions of law, orders, and briefs in support thereof, as may have been filed in connection with the appeal; the ALJ's initial decision; the motion for reconsideration of the ALJ's initial decision; the ALJ's initial decision on the motion for reconsideration and the review petition, and such briefs in support thereof and responses thereto as may have been filed.

(d) *Oral argument.* A party filing a review petition may request, within the prescribed time for filing such review petition, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, the responding party may file a request for such oral argument. Failure to make such request to appear before the Judicial Officer, within the prescribed time period, shall be deemed a waiver of the opportunity for oral argument. There is no right to appear personally before the Judicial Officer. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard by the Judicial Officer on review, whether oral or on brief, shall be limited to the issues raised in the review petition to the Judicial Officer or in the response to such petition, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit adequate preparation on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed within a reasonable time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to commence and conclude the argument.

(h) *Submission of briefs.* By agreement of the parties, a review may be submitted for decision on the briefs, but the Judicial Officer may direct that the review be argued orally.

(i) *Additional evidence.* If any party demonstrates to the satisfaction of the Judicial Officer that additional evidence not presented to the ALJ is material, not cumulative, and that there were reasonable grounds for the failure to present such evidence to the ALJ, the Judicial Officer shall remand the matter

to the ALJ for consideration of such additional evidence.

(j) *Decision of the Judicial Officer on review.* (1) As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of the record and any matter of which official notice is taken, shall rule on the review.

(2) The Judicial Officer may adopt, reduce, reverse, compromise, remand or approve settlement of any claim initially decided by the ALJ under this part.

(3) The Judicial Officer shall promptly serve each party to the appeal with a copy of the ruling of the Judicial Officer which shall be considered the final determination and contain a statement describing the right to seek judicial review.

(4) Judicial review must be sought within 30 days of service of the final notice of determination by the Judicial Officer pursuant to 7 U.S.C. 2023(a).

§ 283.21 Ex parte communications.

(a) *ALJ/Judicial Officer.* At no time prior to the issuance of the final decision shall the ALJ or Judicial Officer discuss ex parte the merits of the appeal or review with any person who is connected with the appeal or review in an advocative or in an investigative capacity, or with any representative of such person. However, procedural matters shall not be included within this limitation; and furthermore, the ALJ or Judicial Officer may discuss the merits of the case with such a person if all parties to the appeal or review, or their attorneys have been given notice and an opportunity to participate. A memorandum of such discussion shall be included in the record.

(b) *Parties; interested persons.* No party or other interested person shall make or knowingly cause to be made to the ALJ or Judicial Officer an ex parte communication relevant to the merits of the appeal or review.

(c) *Procedure.* If the ALJ or Judicial Officer receives an ex parte communication in violation of this section, the one who receives the communication shall place in the public record of the appeal or review:

- (1) All such written communications;
- (2) Memoranda stating the substance of all such oral communications; and
- (3) Copies of all written responses, and memoranda stating the substance of all oral responses thereto.

(4) Upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this section, the ALJ or Judicial Officer may, to the extent consistent with the

interests of justice and the policy of the underlying statute, require the party to show cause why its claim or interest in the appeal or review should not be dismissed, denied, disregarded or otherwise adversely affected on account of such violation.

(d) *Decision.* To the extent consistent with the interests of justice and the policy of the underlying statute, a violation of this section shall be sufficient grounds for a decision adverse to the party who knowingly commits a violation of this section or who knowingly causes such a violation to occur.

§ 283.22 Form; filing; service; proof of service; computation of time; and extensions of time.

(a) *Form.* (1) The original and two copies of all papers in a proceeding conducted under this subpart shall be filed with the Hearing Clerk.

(2) Every pleading and paper filed in the proceeding shall contain a caption setting forth the title of the action, the docket number assigned by the Hearing Clerk, and a descriptive title (e.g., Motion for Extension of Time).

(3) Every pleading and paper shall be signed by and contain the address and telephone number of the representative for the party on whose behalf the paper was filed.

(b) *Filing.* Papers are considered filed when they are postmarked, or, received, if hand delivered. Date of mailing may be established by a certificate from the party or representative or by proof that the document was sent by certified or registered mail.

(c) *Service.* A party filing a document with the ALJ shall, at the time of filing, serve a copy of such document on every other party. Service upon any party of any document shall be made by delivering or mailing a copy to the party's last known address. When a party is represented by an attorney or designated representative, service shall be made upon such attorney or representative in lieu of the actual party.

(d) *Proof of service.* A certificate of the person serving the document by personal delivery or by mail, setting forth the date, time and manner of service, shall be proof of service.

(e) Computation of time.

(1) In computing any period of time under this part or in an order issued thereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday or legal holiday observed by the Federal Government, in which event it includes the next business day.

(2) When a document has been served by mail, an additional five days will be added to the time permitted for any response.

(f) *Extensions of time.* Requests for extensions of time shall be submitted to the ALJ, Chief Judge or the Judicial Officer prior to the expiration of the original due date. The time for the filing of any document or paper required or authorized under the rules in this part may be extended by the ALJ, Chief Judge or the Judicial Officer, if, in the judgment of the ALJ, Chief Judge or the Judicial Officer, there is cause for the extension. In instances where the time permits notice of the request for extension, time shall be given to the other party to submit views concerning the request.

§ 283.23 Procedural matters.

(a) *Communications from Hearing Clerk.* In order to expedite the appeal process, the Hearing Clerk may develop form letters and transmittal forms to be used for notices, service of papers, requests for information, and all other communications between the Hearing Clerk's Office and the parties.

(b) *Representation.* All parties may be represented by attorneys or by designated representatives. Attorneys or designated representatives appearing for the parties shall file formal notices of appearances and withdrawals with the Hearing Clerk.

Subpart C—Summary Procedure for Appeals of QC Claims of Less Than \$50,000

§ 283.24 Incorporation of procedures by reference.

Except as otherwise provided, the following procedures detailed in subpart B of this part shall apply to appeals of QC claims of less than \$50,000: § 283.5 *Motion to Dismiss*; 283.6 *Answer*; 283.8 *Rebuttal or Amendment of Appeal or Answer*; 283.9 *Withdrawal of Appeal*; 283.10 *Consent Decision*; 283.18 *Motions and Requests*; 283.19 *ALJ's*; 283.20 *Review by the Judicial Officer*; 283.21 *Ex Parte Communications*; 283.22 *Filings; Service; Extensions of Time; and Computations of Time*; and 283.23 *Procedural Matters*.

§ 283.25 Filing appeals for QC claims of less than \$50,000.

(a) *Time.* A State agency may appeal the bill for collection from FNS for a QC claim of less than \$50,000 for a food stamp QC error rate in excess of the tolerance level. A State agency must file a written notice of appeal, in accordance with this section, within 10 days of receipt of the bill for collection from

FNS for a QC claim of less than \$50,000. The State agency may request an extension to the 10-day filing requirement in accordance with § 283.22(f). FNS shall issue the bill for collection by certified mail or personal service.

(b) *Exhaustion of administrative remedies.* The State agency must appeal the bill for collection to the ALJ, pursuant to this subpart, and exhaust the available administrative remedies before filing suit in the Federal District Courts.

(c) *Filing.* The notice of appeal shall be filed with the Hearing Clerk.

(d) *Content of the notice of appeal.* (1) A notice of appeal, in order to be considered acceptable must contain the following information:

(i) A brief and clear statement that it is an appeal from a QC claim of less than \$50,000 identifying the period the claim covers, the date and amount of the bill for collection, and the date of receipt of the bill for collection;

(ii) Identification of the State agency as the appellant and FNS as the appellee;

(iii) A statement that the notice of appeal is filed pursuant to section 14(a) of the Food Stamp Act;

(iv) A true copy of the bill for collection which constitutes the basis for the filing of the notice of appeal shall be attached to the notice.

(2) Failure to file an acceptable notice of appeal may result in a challenge by FNS to the notice and dismissal of the notice by the ALJ and a waiver of the opportunity for further appeal or review by the Judicial Officer unless the State agency pursues the options as discussed in §§ 283.17(d) and 283.20.

(e) *Receipt of notice of appeal and assignment of docket number.* Upon receipt of a notice of appeal, the Hearing Clerk shall assign the appeal a docket number. The Hearing Clerk shall:

(1) Send the State agency a letter which shall include the following information:

(i) Advise that the notice of appeal has been received and the date of receipt;

(ii) The docket number assigned to the appeal and instructions that all future communications related to the appeal shall reference the docket number, and;

(iii) That the State agency must file and serve its appeal petition, as set forth in § 283.22 not later than 60 days after receiving a notice of the claim. Failure to file a timely appeal petition may result in a waiver of further appeal rights.

(2) Send FNS a copy of the notice of appeal and a copy of the letter to the State agency.

(f) *Stay of collection.* The filing of a timely notice of appeal shall automatically stay the action of FNS to collect the QC claim asserted against the State agency until a decision is reached on the acceptability of the appeal, and in the case of an acceptable appeal, until a final administrative determination has been issued. However, interest will accrue on the outstanding claim amount during the stay as provided in section 13(a)(1) of the Food Stamp Act of 1977, as amended (7 U.S.C. 2022(a)(1)).

(g) *Content of appeal petition.* The appeal petition shall include:

(1) A brief statement of the allegations of fact and provisions of law that constitute the basis for the appeal including a statement as to whether a factual basis for good cause relief exists, and

(2) The nature of the relief sought.

(h) *FNS answer.* Upon service of the State agency appeal petition, FNS shall file an answer, pursuant to § 283.6, not later than 60 days after the State agency submits its appeal petition.

§ 283.26 Request that appeals be handled under procedures in subpart B for appeals of QC claims of \$50,000 or more.

(a) If, after the filing of its appeal petition, the State agency does not believe that the summary procedure provided in this subpart is adequate for handling the appeal and that an oral hearing is necessary, the State agency may file, no later than the date established for the conclusion of any discovery pursuant to § 283.29, a motion that its appeal be handled under the procedures in subpart B of this part.

(b) The motion shall specify why the State agency believes that the summary procedure is inadequate and what harm will result if an oral hearing is not held.

(c) FNS will have 10 days from service of the State agency's motion that the appeal be handled under subpart B of this part to submit arguments either in support of or against the State agency's position.

(d) The ALJ will review the State agency's motion and the information submitted by FNS and decide which procedures shall be used in the appeal.

§ 283.27 Procedures upon failure to file an answer.

The failure by FNS to file an answer shall constitute a waiver of the opportunity to file a cross motion for summary judgment pursuant to § 283.30. Upon such failure to file, the State agency shall file a proposed decision, along with a motion for adoption thereof, both of which shall be served upon FNS by the State agency. Within 10 days after service of such

motion and proposed decision, FNS may file with the Hearing Clerk objections thereto. If the ALJ finds that meritorious objections have been filed, the State agency's motion shall be denied with supporting reasons. If meritorious objections are not filed, the ALJ shall issue an initial decision without further procedures. Copies of the decision or denial of State agency's motion shall be served on each of the parties and shall be included as part of the official record. Where the decision as proposed by the State agency is adopted as the ALJ's initial decision, such decision of the ALJ shall become final and effective 30 days after service unless reconsideration or review by the Judicial Officer is sought as discussed in §§ 283.17(d) and 283.20.

§ 283.28 Discovery.

Upon motion and as ordered by the ALJ, written interrogatories, written requests for admissions and written requests for the production of documents, may be served by any party to the appeal upon any other party and used in accordance with § 283.12(b).

§ 283.29 Scheduling conference.

(a) *Time and place.* The ALJ shall direct the parties or their counsel to attend a scheduling conference following the filing of a notice of appeal pursuant to § 283.25. The scheduling conference shall be held at the U.S. Department of Agriculture, Washington, DC. Reasonable notice of the time and place of the scheduling conference shall be given. The ALJ may order each of the parties to furnish at the scheduling conference the following:

- (1) An outline of the appeal or defense;
- (2) The legal theories upon which the party will rely;
- (3) Copies of or a list of documents that the party anticipates relying upon;
- (b) *Procedures.* The ALJ shall not order any of the foregoing procedures that a party can show are inappropriate or unwarranted under the circumstances of the particular appeal.

(c) *Scheduling conference.* At the scheduling conference, the following matters shall be considered:

- (1) The simplification of issues;
- (2) The necessity of amendments to pleadings;
- (3) Stipulations of facts and of the authenticity, accuracy, and admissibility of documents;
- (4) Negotiation, compromise, or settlement of issues;
- (5) The exchange of copies of proposed exhibits;
- (6) The nature of and the date by which discovery, as provided in § 283.28, must be completed;

(7) The identification of documents or matters of which official notice may be requested;

(8) A schedule to be followed by the parties for the filing of cross-motions for summary judgment and completion of other actions decided at the conference; and

(9) Such other matters as may expedite and aid in the disposition of the appeal.

(d) *Reporting.* A scheduling conference will not be stenographically reported unless so directed by the ALJ.

(e) *Attendance at scheduling conference.* In the event the ALJ concludes that personal attendance by the ALJ and the parties or counsel at a scheduling conference is unwarranted or impractical, but decides that a conference would expedite the appeal, the ALJ may conduct such conference by telephone.

(f) *Order.* Actions taken as a result of a conference shall be reduced to an appropriate written order, unless the ALJ concludes that a stenographic report shall suffice.

§ 283.30 Cross motions for summary judgment.

Appeals filed pursuant to this subpart shall be determined upon cross motions for summary judgment unless the matter is heard under subpart B of this part in accordance with § 283.26. Cross motions for summary judgment shall be filed by the parties along with the appeal petition and answer or in accordance with the schedule established by the ALJ pursuant to § 283.29. Motions for summary judgment shall address the issues raised by the pleadings and may be supported by declarations. Motions and accompanying briefs in support of summary judgment shall not exceed 35 pages excluding exhibits unless otherwise authorized by the ALJ. Reply briefs may be filed by the parties in accordance with the schedule established by the ALJ. Reply briefs may not exceed 15 pages in length, excluding exhibits.

§ 283.31 Review of the Record.

(a) The ALJ shall review the cross motions for summary judgment, briefs, reply briefs and supporting materials submitted by both FNS and the State agency.

(b) If the ALJ decides that additional information or briefing is required from a party, a request for such information or briefing shall be submitted to such party with a copy to the other party. The request shall identify the additional information or specific issues to be addressed and shall specify the date(s) by which such information or briefing

must be provided. Upon receipt of such additional information or briefing, the ALJ shall provide the other party an opportunity to submit responsive information or briefing.

(c) If the party to whom a request for additional information or briefing is made fails to submit the information or brief the issue(s) as requested, the ALJ may decide the appeal based on the existing record.

(d) If the ALJ decides that oral argument is necessary on legal issues, the ALJ shall set a time for the oral arguments as soon as feasible thereafter, with due regard for the public interest and the convenience and necessity of the State agency and FNS. The oral arguments shall be held at the U.S. Department of Agriculture, Washington, DC. Upon a showing of unusual or extraordinary circumstances, the ALJ may order that the argument be held at another location. The ALJ shall file a notice stating the time and place of the oral arguments. If any change in the time of the oral arguments is made, the ALJ shall file a notice of such change, which notice shall be served upon the parties, unless it is made during the course of the oral arguments and made a part of the transcript or actual notice given to the parties.

(e) Oral argument shall not be transcribed unless so ordered in advance by the ALJ for cause shown upon request of a party or upon the ALJ's own motion.

§ 283.32 ALJ's initial decision.

(a) The ALJ shall decide the appeal not later than 60 days after receipt of rebuttal evidence submitted by the State agency pursuant to § 283.8 or, if the State agency does not submit rebuttal evidence, not later than 90 days after the State agency submits the notice of appeal and evidence in support of the appeal. The ALJ may extend this deadline for cause shown.

(b) The ALJ shall prepare, upon the basis of the record, and shall file an initial decision which shall include a decision on a request for good cause relief, a copy of which shall be served upon each of the parties.

(c) Such initial decision shall constitute the final notice of determination for purposes of judicial review without further proceedings, unless there is a motion for reconsideration filed pursuant to § 283.17(d) or review by the Judicial Officer is sought pursuant to § 283.20.

Dated: June 22, 1994.
 William E. Ludwig,
 Administrator, Food and Nutrition Service.
 [FR Doc. 94-16003 Filed 7-5-94; 8:45 am]
 BILLING CODE 3410-30-U-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 23

[Docket No. 118CE, Special Condition 23-ACE-76]

Special Conditions; Ballistic Recovery Systems, Modified for Small General Aviation Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions.

SUMMARY: These special conditions are being issued for the supplementary type certification of the Ballistic Recovery Systems, Inc., parachute recovery system installed in small general aviation airplanes. This system is referred to as the GARD. Airplanes modified to use this system will incorporate novel or unusual design features for which the applicable airworthiness regulations do not contain adequate or appropriate safety standards. These special conditions contain the additional airworthiness standards that the Administrator considers necessary to establish a level of safety equivalent to the original certification basis for these airplanes.

EFFECTIVE DATE: August 5, 1994.

FOR FURTHER INFORMATION CONTACT: Lowell Foster, Aerospace Engineer, Standards Office (ACE-100), Small Airplane Directorate, Aircraft Certification Service, Federal Aviation Administration, 601 East 12th Street, Kansas City, Missouri, 64106; telephone (816) 426-5688.

SUPPLEMENTARY INFORMATION:

Background

On January 12, 1987, the Ballistic Recovery System, Inc. (BRS), 9242 Hudson Boulevard, Lake Elmo, Minnesota 55042, filed an application for a supplemental type certificate (STC) to install the GARD-150 parachute recovery system on Cessna 150/A150 Series and 152/A152 Model Airplanes. Subsequently, they received the STC under Special Condition 23-ACE-33, dated November 17, 1987. The parachute recovery system is intended to recover an airplane in emergency situations such as mid-air collision, loss of engine power, loss of airplane

control, severe structural failure, pilot disorientation, or pilot incapacitation with a passenger on board. The GARD-150 system, which is only used as a last resort, is intended to prevent serious injuries to the airplane occupants by parachuting the airplane to the ground.

BRS followed their STC on the Cessna 150/A150 and 152/A152 Series with request for special conditions on the General Aviation Recovery Device (GARD) system that would be applicable to most general aviation airplanes. The nature of the parachute recovery system applies to most general aviation airplanes with similar configurations and characteristics. Separate special conditions for each airplane model are not needed.

Parachute recovery systems typically consist of a parachute packed in a canister mounted on the airframe. A solid propellant rocket motor or compressed air may deploy the canopy and is usually located on the side of the canister. A door positioned above the canister seals the canister, parachute canopy, and rocket motor from the elements and provides free exit when the canopy is deployed. These systems are deployed by a mechanical pull handle mounted so that the pilot and passenger can reach it. At least two separate and independent actions are required to deploy the system.

A multicable bridle attaches the canopy bridle to the airplane primary structure. The cable lengths are designed to provide the best airplane touchdown attitude. The cables are routed externally and covered with small frangible fairings from the fuselage exist holes to the attach points.

The applicants must supplement the FAA-approved Flight Manual as part of the STC. The supplement will describe the system, define the operating envelope with appropriate warnings, and define required system maintenance and inspection information. A separate FAA-approved Operating Manual describing the previous items will be provided for those airplanes that do not have an FAA-approved Flight Manual.

Recommended placards should be located near the pull handle in clear view of the pilot to identify the system and operating envelope, state deployment actions, and provide appropriate warnings. A warning placard should also be located on the canister near the rocket motor.

Discussion

The installation of parachute recovery systems in part 23, VLA, and primary category airplanes was not envisioned when the certification basis for these airplanes was established. In addition,

the Administrator has determined that current regulations do not contain adequate or appropriate safety standards for a parachute recovery system; therefore, this system is considered a novel and unusual design feature.

Special conditions may be issued and amended, as necessary, as part of the type certification basis if the Administrator finds that the airworthiness standards designated in accordance with § 21.101(b)(1) do not contain adequate or appropriate safety standards because of the novel and unusual design features of the airplane modification. Special conditions, as appropriate, are issued after public notice in accordance with § 11.49 (as amended October 25, 1989), as required by §§ 11.28 and 11.29(b). The special conditions become part of the type certification basis, as provided by § 21.17(a)(2).

The flight test demonstration requirements will ensure that the parachute recovery system will perform its intended function without exceeding its strength capabilities. Demonstrations will be required to show that the parachute will deploy in various specified flight conditions.

Occupant restraint requirements will ensure that airplanes modified with a parachute recovery system are equipped with a restraint system designed to protect the occupants from injury during parachute deployment and ground impact.

Requirements for parachute performance will ensure all of the following: (a) The parachute complies with the applicable section of TSO-C23c (SAE AS8015A) at the critical airplane weights. (b) The parachute deployment loads do not exceed the structural strength of the airplane. (c) The system will provide a ground impact that does not result in serious injury of the passengers. (d) The system will operate in adverse weather conditions.

The requirements for the functions and operations of the parachute recovery system will ensure all of the following: (a) There is no fire hazard associated with the system. (b) The system has adequate reliability. (c) The sequence of arming and activating the system will prevent inadvertent deployment. (d) The system can be activated from either the pilot's or the copilot's position by various sized people. (e) The system will be labeled to show its identification function and operating limitations. (f) It must be shown that the occupants will be protected from serious injury after touchdown under various adverse