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DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 246

Special Supplemental Food Program for Women, Infants and Children (WIC): Participation of Homeless Individuals

AGENCY: Food and Nutrition Service, USDA.

ACTION: Interim rule.

SUMMARY: This interim rule amends regulations governing the Special Supplemental Food Program for Women, Infants and Children (WIC) to comply with the mandates of section 212 of the Hunger Prevention Act of 1988 (Pub. L. 100-435), enacted on September 19, 1988. The purpose of this rulemaking is to facilitate participation of otherwise eligible homeless persons in WIC. In accordance with the Act, this rulemaking defines "homeless individual" and specifically identifies WIC as a supplement to food assistance which may be provided by soup kitchens, shelters, and other forms of emergency food assistance. The definition of "homeless individual" specifies types of overnight facilities whose otherwise eligible residents must be granted access to WIC if such facilities meet conditions insuring that the individuals, not the facility, benefit from the program. The rulemaking also permits State agencies to extend WIC to persons associated with other institutions, provided the same conditions are met. Also pursuant to legislative mandates, the interim rule requires State agencies to include in their State plans a description of how they will provide program benefits to, and meet the special nutritional and nutrition education needs of, homeless individuals; a plan for disseminating

program availability and eligibility information; and a plan to determine whether a homeless facility or institution meets the four mandatory conditions.

These regulations further require that competent professional authorities take into account the special needs and problems of homeless individuals when prescribing supplemental foods. Finally, State agencies may, under the interim regulations, request permission from the Food and Nutrition Service (FNS) to make substitutions for foods required in the food packages in order to accommodate the circumstances of the homeless.

DATES: This rulemaking becomes effective January 16, 1990. Comments must be received on or before April 13, 1990.

ADDRESS: Comments may be mailed to Ronald J. Vogel, Director, Supplemental Food Programs Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, room 1017, Alexandria, Virginia 22302, (703) 756-3748. All written submissions will be available for public inspection at this address during regular business hours (8:30 a.m. to 5 p.m.) Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Barbara Hallman, Supplemental Food Programs Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, room 1017, Alexandria, Virginia 22302, (703) 756-3730.

SUPPLEMENTAL INFORMATION:

Classification

This interim rule has been reviewed under Executive Order 12291, and has been determined not to be major. The Department does not anticipate that this rule will have an impact on the economy of \$100 million or more. This rule will not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. Further, this rule will not have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601-612). Pursuant to that review, the

Administrator of the Food and Nutrition Service has certified that this interim rule will not have a significant impact on a substantial number of small entities.

The reporting requirements established by this rulemaking in §§ 246.4, 246.7(i), and 246.10 have been reviewed by the Office of Management and Budget under control number 0584-A536, in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3507).

This rulemaking implements legislative mandates of section 212 of Public Law 100-435, which became effective on September 19, 1988. For this reason, the Administrator of FNS has certified that it is appropriate to waive the solicitation of public comments prior to implementation through a proposed rulemaking. However, the Department has exercised some discretion in the implementation of the legislative provisions of Public Law 100-435, and believes the rule may be improved by public comment. Therefore, comments are solicited on this rule until April 13, 1990. All comments received will be analyzed, and any appropriate changes in the rule will be incorporated in the subsequent publication of a final rule.

This program is listed in the Catalog of Federal Domestic Assistance Programs under 10.557 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials (7 CFR part 3015, subpart V, and final rule-related notice published June 24, 1983 (48 FR 29114)).

Background

There have never been specific, direct regulatory barriers to homeless persons' participation in the WIC program, such as the need for a fixed address or a durational residency requirement. Furthermore, particular attention has long been focused in the Child Nutrition Act of 1966, as amended, on the needs of special populations, e.g., migrants and native Americans. With the enactment of Public Law 100-435, Congress has ensured that homeless individuals will now receive special program emphasis. Over the past year, the Department has encouraged States to make a special effort to seek out and serve otherwise eligible homeless individuals. A number of State agencies have already begun to direct attention toward making the WIC Program more available and accessible

to eligible homeless women, infants, and children, for example, by tailoring the food packages, or establishing local agency clinics and WIC certification offices in hotels which house homeless families. Other States have held statewide training sessions for their local WIC agencies to educate them about the special problems most frequently encountered by homeless individuals, and how WIC can help to alleviate some of these problems. The Department has tried to assist and encourage States in such efforts by providing them with: (1) The names and addresses of organizations currently working to assist the homeless; (2) data which help to characterize the homeless population; and (3) State-developed procedures that show promise in accommodating the homeless.

Many of the legislative requirements of Public Law 100-435 pertaining to the homeless can be met under existing WIC Program regulations. State agencies already have considerable flexibility in their food prescription and food delivery procedures. Therefore, it is not difficult to tailor the food package for homeless participants to include, for example, ultra-high temperature (UHT) milk, which does not require refrigeration, and smaller, single-serving packages of cereal or juice. Food delivery systems are also adaptable within the parameters of the current regulations by expediting such as issuing more food instruments, each for smaller quantities of food, so that storage does not become a problem.

Regulations have never precluded otherwise eligible persons residing in institutions that do not serve meals from unqualified access to the WIC Program. However, the rules on WIC services for persons residing in institutions that do serve meals have not been clear. Two regulatory provisions that have contributed to the conclusion that persons in residential institutions that serve meals are not eligible for WIC services are discussed below.

First, "family" has been defined in § 246.2 as "a group of related or nonrelated individuals who are *not* residents of an institution but who are living together as one economic unit." This definition has been viewed by some State agencies as a basis for denying WIC participation to all persons residing in institutions. However, the provision was intended only to preclude the consideration of all residents of one institution as one "family" for the WIC income determination process. This was clarified in November, 1987 in FNS Instruction 803-13. Second, § 246.12(o) of the regulations, which states that "The

State agency shall ensure that supplemental foods are not issued for use in institutions which serve meals" has been interpreted in the WIC community to mean that persons in residential institutions may not benefit from WIC. Upon further review, the Department determined that the intent of the provision, i.e., to ensure that the WIC Program benefits the participant rather than the institution, could be satisfied without denying benefits to persons in such institutions. The provision was not intended to preclude from WIC otherwise eligible persons. The Department clarified this issue through FNS Instruction 803-13 in November 1987. This Instruction established conditions, discussed in detail below, under which residents of institutions serving meals could, in fact, participate in WIC. These conditions ensure that such participation is consistent with the concern that gave rise to the regulatory intent of § 246.12(o) that participation must benefit the individual, not the institution, and that foods provided through WIC retain their identity as supplemental foods meant solely for the participant's use instead of being utilized by the institution in lieu of foods which the institution would ordinarily provide. FNS Instruction 803-13 granted authority to State agencies to serve residents of institutions meeting the stipulated conditions. Such service was allowed, not mandated. Without an express legislative mandate that service be provided the persons in institutions with meal service, the Department believed States should have the authority to establish their own program service priorities.

However, section 212(b) of Public Law 100-435 makes such service mandatory by amending the Child Nutrition Act of 1966 to specify that WIC is supplemental to receipt of food assistance through specific types of overnight facilities generally designed to offer some degree of room, board, and services to homeless persons on a temporary basis. WIC legislation has already specified that WIC is to be a "supplemental" program. Section 212(b) strengthens this principle by specifying that WIC is supplementary to the Food Stamp Program and any other food distribution program which issues food in lieu of food stamps. The statutory definition of "homeless individual," to be discussed in detail later in this preamble, specifies the types of overnight facilities in which homeless persons may spend the night and still be eligible for the WIC Program. As indicated above, under previous regulations and FNS

Instruction 803-13, the State agency could have opted not to serve persons in such settings. For example, a State could decide to direct limited WIC benefits to persons with any access to the food resources provided to persons using an overnight facility or institution. Public Law 100-435 mandates that persons using the specified types of facilities be deemed eligible for WIC if they meet the other regulatory eligibility requirements. Thus, this interim rulemaking makes WIC services mandatory to otherwise eligible persons in specified types of facilities to the extent that caseload slots are available at the local agency where they apply. These regulations will also permit States to make WIC services available to otherwise eligible persons in other types of residential accommodations.

Because the regulatory prohibition in § 246.12(o) against issuance of supplemental foods for use in institutions that serve meals has caused past misinterpretation, it is stricken by this interim rulemaking. In lieu thereof, and consistent with the intent of that provision, the Department has introduced into the rulemaking the conditions from FNS Instruction 803-13 which ensure that WIC benefits are, in fact, supplemental for the *participant*: that the participant rather than the "homeless facility" or "institution" gains from the program. These conditions apply both to (1) "homeless facilities" as specified in Public Law 100-435, whose otherwise eligible residents *must* be granted access to WIC; and (2) "institutions," whose residents the WIC State agency may, at its discretion, serve. Institutions include traditional types of residential, longer term institutions such as rehabilitative facilities and correctional facilities. It should be noted, however, that the more rigidly structured and regimented an institution is, the harder it is likely to be for the institution to comply with all four stipulated conditions.

Individual provisions of this interim rulemaking are discussed in detail below.

1. Definitions: "Homeless Facility," "Institution," "Family," and "Homeless Individual" (Section 246.2)

As indicated above, this rulemaking applies conditions (§ 246.7(m)) to residential accommodations in order to ensure that the program benefits the participant and not the accommodation. These conditions do not apply to private residences and residential accommodations without meal service since these living arrangements do not present a systematic risk that the WIC

participant will not receive full benefit of program participation.

The accommodations to which the conditions of § 246.7(m) do apply are divisible into those whose residents must be served if they meet program eligibility requirements and caseload is available ("homeless facility"), and those whose residents may, at the State agency's discretion, be served ("institution"). The definition of "homeless facility" derives from Public Law 100-435 and means any of the following facilities which provide meal service: A supervised publicly or privately operated shelter (including a welfare hotel or congregate shelter) designed to provide temporary living accommodations; a facility that provides a temporary residence for individuals intended to be institutionalized; and a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings. This definition includes all of the facility types referenced under the legislative definition of "homeless individual" except "a temporary accommodation in the residence of another individual." This latter category has been excluded because the conditions of § 246.7(m) do not apply to private residences.

The term "institution" is reserved for residential accommodations with a meal service, excluding private residences and homeless facilities. The State agency may, at its discretion, serve otherwise eligible persons in institutions that meet the specified conditions.

The definition of "family" is revised to read as follows: "a group of related or unrelated individuals who are living together as one economic unit, except that residents of a homeless facility or an institution shall not all be considered members of a single family." This revision removes the ambiguous language that has been inappropriately interpreted as barring residents of homeless facilities/institutions from the program and incorporates into regulations the clarification of FNS Instruction 803-13 that residents of homeless facilities/institutions cannot all be considered members of a single family for purposes of determining their income eligibility.

Section 212(a) of Public Law 100-435 establishes a definition of the term "homeless individual" which applies to the WIC Program, and section 212(c) effectively extends this definition to persons in shelters for victims of domestic violence. "Homeless individual" thus includes persons in a broad range of circumstances, from "street people" to those residing in another's home on a temporary basis. Under the statute, a "homeless

individual" is one who lacks a fixed and regular nighttime residence or whose primary nighttime residence is one of the following: (1) A supervised publicly or privately operated shelter (including a welfare hotel, congregate shelter or shelter for victims of domestic violence) designed to provide temporary living accommodations; (2) an institution that provides a temporary residence for individuals intended to be institutionalized; (3) a temporary accommodation in the residence of another individual; or (4) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings. The definition of "homeless individual" is added to § 246.2, Definitions, of this interim rule. Throughout this preamble and in the rule, reference to homeless persons will encompass persons in the four specifically named types of homeless facilities listed above, or persons not in such facilities who lack a fixed and regular nighttime residence.

2. State Plan Amendments (Section 246.4)

Public Law 100-435 mandates additional requirements for the annual State plan of operations.

a. Provision of benefits to, and nutrition needs of, homeless persons. First, the State agency must now include in its State plan a description of how it will provide program benefits to, and meet the special nutrition education needs of, homeless participants. This requirement is addressed in §§ 246.4(a)(6), 246.4(a)(9), and 246.4(a)(11)(ii), which address, respectively, plans to provide program benefits to eligible migrants, Indians, and (with the enactment of Public Law 100-435) homeless persons; nutrition education goals and plans; and methods for providing nutrition education to participants. State agencies must assure the Department that an otherwise eligible homeless woman, infant, or child without any overnight shelter or in an overnight facility will not be denied WIC benefits because of circumstances directly related to that individual's homelessness. For example, lack of cooking facilities or storage space, problems frequently encountered by homeless persons, could have no bearing on the eligibility determination process. Furthermore, a homeless participant's access to program benefits, such as referrals to other public assistance agencies, or nutrition education contacts, may not be curtailed solely because of that person's homelessness. A number of States have already begun to develop special nutrition education lesson plans and

referral plans which address the particular needs and difficulties that homeless participants encounter.

b. Announcement of program availability to organizations serving homeless persons. Second, States must include in their State plans, per section 212(c) of Public Law 100-435, a plan for the annual public announcement and distribution of information on the availability of program benefits, including participant eligibility criteria, the location of local agencies operating the program, and the four conditions established by a new § 246.7(m)(1)(i) of this rulemaking, to organizations and agencies serving homeless individuals. This new State plan requirement is incorporated into § 246.4(a)(7). A requirement for public announcement within 90 days of publication of this rule is added in § 246.7(m)(2).

c. Compliance of homeless facilities/institutions with stipulated conditions. Regulations will also be revised to add a new paragraph, § 245.4(a) (19), to require States to describe in their State Plans the process by which the State will ensure that homeless facilities serving otherwise eligible homeless WIC applicants can satisfy the four conditions in new § 246.7(m)(1)(i). (If the State agency chooses also to serve persons in institutions, the State agency will be expected to apply the same procedures to institutions. Such procedures must also be described in the State Plan of Operations.)

d. Modification of benefit delivery systems to meet needs of homeless persons. Section 212(c) of Public Law 100-435 allows States to adapt methods of delivering benefits to accommodate the special needs and problems of homeless individuals. If a State or a local agency does develop and implement special food delivery procedures for homeless participants, such procedures must also be described in the State plan, as required under § 246.4(a)(14)(ix). State agencies have always had the option of establishing special food delivery procedures to accommodate the unique problems and needs of special populations, such as Indians or migrants. They are now encouraged to extend such attention to the homeless. There is considerable flexibility within the parameters of the current program regulations allowing States, for example, to issue several food instruments for smaller portions of the food package instead of a single instrument for the entire package. The Department has consistently required States to provide detailed descriptions of their food delivery systems as an integral part of the State plan; Public

Law 100-435 merely extends this requirement to encompass any food delivery system procedures or food package alterations which may be developed specifically for service to homeless participants. Technical, nonsubstantive revisions have been made to bring the paragraphs at the end of § 246.4(a)(14) into proper grammatical relationship with each other.

The procedure manual would also be an appropriate place for the State to promulgate policies or provide guidance to local agencies for food delivery or for tailoring food packages to meet the special needs and circumstances of the homeless.

3. Conditions Applicable to Homeless Facilities and Institutions (Section 246.7(m)(1)(i))

The Department believes that regulatory conditions must be established to ensure, per the legislative mandate, that WIC benefits supplement the participant's diet rather than replace food which homeless facility or an institution would otherwise provide, consistent with the general purposes of the WIC Program. The regulations must also ensure that a homeless person's ability to participate fully in WIC is protected. Therefore, the following four conditions in FNS Instruction 803-13 are established by regulation in a new § 246.7(m)(1)(i).

a. Program must benefit participant, not homeless facility or institution. First, the homeless facility/institution must not accrue financial or in-kind benefit from a person's participation in WIC, e.g., by reducing its expenditures for food because some of its residents participate in WIC. If such institutional benefit were permitted, WIC participation would not enhance the participant's individual welfare and would not supplement the individual's diet. Resources which should have benefitted only the individual participant would in effect be subsumed into the budget and food inventories to meet needs defined by the homeless facility/institution.

b. WIC foods must not be used in communal feeding. Second, food items purchased with WIC food instruments must not be used in communal feeding. WIC provides a specific package of foods intended to meet the individual nutritional needs of each participant based on that individual's stage of growth, development, and health and nutrition status. If WIC foods were used in the homeless facility's or the institution's communal food service, they might reduce institutional food purchases, and would not enhance the

individual WIC participant's diet to the degree intended.

c. Restrictions apply to the use of proxies. Third, homeless facility/institutional proxies may not, as a standard procedure, pick up WIC food instruments for all program participants in their respective facilities or transact the food instruments in bulk. The Department is concerned that a person's benefits from the WIC Program not be diminished as a result of staying in a homeless facility or institution.

While proxies may be used in certain situations (such as illness) for some participants, proxies may not routinely pick up and transact WIC food instruments for all participants in the homeless facility/institution. Were institutional proxies permitted to perform these functions routinely, participants' contacts with WIC clinics, and thus with health care and referral services, would be seriously curtailed. Furthermore, if the homeless facility/institution managed food instruments and purchased WIC foods in bulk, a logical extension of this practice would be the use of WIC foods in communal food service rather than for the specific benefit of the WIC participants for whose use they are issued.

d. No restrictions or constraints can exist relative to program participation. Finally, no homeless facility/institutional constraints may be placed on the ability of the WIC participant to partake of supplemental foods and all associated WIC services made available to participants by the local WIC agency. This general prohibition stresses the need for full, free, and direct participant access to all program benefits and services which would ordinarily be available to participants not associated with a homeless facility or an institution.

Homeless facilities/institutions must meet these requirements in order to render their residents eligible for WIC. However, the homeless facilities/institutions themselves do not receive any program funds or provide any program services. Further, they do not stand to benefit directly from the WIC participation of their residents, nor are they subject to any legal liability for failure to comply with the above four conditions. Thus, unlike the relationship between the State agency and its vendors and local agencies, the State's relationship with homeless facilities/institutions is informal, not contractual. It does not entail an application process or appeal procedure. However, the State or local agency must develop a way of determining and documenting that a homeless facility or institution meets the

requisite conditions and set forth its plans for doing so in its annual State Plan. The Department does not intend to stipulate how State agencies must establish that a homeless facility or institution meets the four conditions. However, States which implement the following can be reasonably assured of fulfilling the requirements of this provision.

A State may secure from the homeless facility or institution a written statement (1) attesting to compliance with these conditions, (2) establishing the State or local agency's authority to ensure compliance with these conditions through periodic on-site monitoring, and (3) establishing the homeless facility/institution's responsibility to inform the State or local agency in the event that it ceases to meet any of these conditions. The State agency would not be required to conduct, or to cause the local agency to conduct, a visit before the statement is signed, or to monitor after the statement has been obtained. However, such visits would serve not only to ensure compliance, but also as a means for becoming more aware of the needs and circumstances of homeless persons so that WIC can better serve them.

State agencies are required by § 246.4(a)(7) to announce publicly, on an annual basis, the availability of the program to homeless individuals, and to disseminate information on participant eligibility requirements, the location of WIC local agencies, and the institutional conditions of new § 246.7(m)(1)(i) to organizations and agencies serving the homeless within 90 days of publication of this interim rule. The Department has already provided State agencies with a list of organizations serving the homeless and their respective contact persons. This list may be used as a point of departure for identifying all of the relevant agencies and organizations in each community. State or local agencies should periodically provide all local certifying offices with complete and up-to-date lists of homeless facilities in their vicinity which comply with the four conditions described above.

As indicated above, persons in homeless facilities meeting the four conditions must be certified if (1) they meet the eligibility requirements under § 246.7(b), and (2) slots are available in the local agency where they apply. As with other applicants, if the local agency has filled its caseload, the homeless have access to the waiting list, from which they will be taken for certification as slots are vacated in accordance with their standing in the participant priority system of § 246.7(d)(4). Homelessness does not have a bearing on a person's

placement in the appropriate priority level, though the State agency may establish a subpriority within a priority level for homeless persons.

4. Short-term Certification Option (Section 246.7(m)(3))

In addition to requiring early interaction with organizations serving the homeless, this rulemaking further facilitates timely access to WIC for homeless persons by providing for short-term certifications prior to the State's obtaining assurance that the homeless facilities in which they reside meet the four conditions. Under § 246.7(m)(3) of this interim rule, the State agency may authorize or require its local agencies to certify, for a period of up to 60 days, persons residing in such homeless facilities whose compliance with any of the four conditions is unknown. During this period, the State or local agency is expected to determine if the homeless facility is interested and able to meet the four conditions. In the event that the homeless facility does not meet the conditions, the State or local agency should provide timely information to the participant about any other overnight facilities for the homeless in the area which do meet the four conditions. If this determination is obtained within the 60-day period of short-term certification, the State agency must extend the person's certification period to the standard length for other persons in the same category, i.e., pregnant women, infants, etc. If it becomes known that a homeless facility falls out of compliance with any of the four conditions, all WIC participants residing in it must receive 30 days notice of the need to sever connection with the homeless facility or be disqualified from WIC. This 30-day notice period will also suffice as the required notice of adverse action specified in § 246.7(i)(6). Section 246.7(i)(6) is revised to reflect this requirement as the only exception to the standard requirement for 15-day notice of adverse action. These provisions also apply to institutions in the event that State agencies choose to extend participation to residents of institutions.

Local agencies are not required to determine whether each program applicant is homeless. However, homelessness will frequently become known to the certifying official in the process of gathering basic information such as the applicant's address. If a person is identified as homeless, the local agency must determine whether the applicant is staying overnight in one of the types of allowable facilities that meets the four specified conditions. There may be instances in which a participant becomes homeless after

having been certified for WIC. In such cases, providing the individual's residence (however temporary) is still within the local WIC agency's defined service area, the participant's eligibility to complete the certification period will not be affected by homelessness.

Barring a statewide WIC funding shortage that makes mid-certification disqualifications necessary, such participants must be allowed to complete their certification periods. This requirement applies regardless of whether they take up residence in a homeless facility or institution which does not meet the four conditions in § 246.7(m)(1)(i). If the participant moves into a facility known not to meet these requirements, the local agency would, however, be expected to recommend facilities which do. If the facility has not previously been considered for compliance with § 246.7(m)(1)(i), such consideration should be undertaken in a timely manner for future reference, even though the outcome does not affect the participant's current certification.

5. State Option To Serve Persons in Institutions (§ 246.7(m)(4))

As stated above, persons in homeless facilities as specified in the definition of "homeless individual" must, if they meet eligibility requirements and if caseload slots are available where they apply, be given access to WIC if the State determines that the homeless facility meets the above four conditions. Section 246.7(m)(4) of the interim rule also provides that State agencies may serve persons in institutions which meet the requirements. This option simply incorporates into program regulations the provisions of FNS Instruction 803-13 with regard to types of residential accommodations not covered by Public Law 100-435.

States should keep in mind that the four conditions are not to be construed as participant eligibility criteria in addition to those delineated in § 246.7(b) or as barriers to participation in the WIC Program. Rather, the conditions protect the program interests of prospective participants in institutions as part of a larger effort to extend WIC benefits to them.

6. Food Package Adaptations For Homeless Participants (Section 246.1(e))

a. Adaptations within food package requirements. Regulations governing the WIC food package allow a wide variety of types, forms, and packaging sizes of foods from which to choose. This latitude in food package design makes it possible to meet most cultural and ethnic preferences. For example, over 40 varieties of cereals, approximately half

of which are formulated to appeal to children; a large number of domestic cheeses; and a wide selection of fruit and vegetable juices and milks, such as skim, buttermilk, or evaporated milk meet the Federal requirements for WIC foods.

Given this latitude and variety, current WIC food packages are also sufficiently flexible to meet the special needs of homeless persons in most instances. WIC State agencies have devised creative ways to accommodate homeless WIC participants within the framework of the existing WIC food package requirements. For example, some States provide WIC foods such as juice, cereal, cheese, and milk in smaller package sizes and issue more food instruments, each for a smaller part of the total food package, so that the homeless can acquire WIC foods in smaller quantities, thus reducing the need for conventional storage facilities. In some instances, single-serving containers are prescribed. To address the lack of refrigeration, some States have authorized the use of currently allowed ultra-high-temperature (UHT) milk. States have also addressed the problem of poor water supply by authorizing ready-to-feed formula for WIC infants.

The Department has encouraged and will continue to encourage these creative approaches, and has shared with all WIC State agencies the plans and guidance being used by some of these States to illustrate the possibilities within existing WIC food package requirements. The WIC food package consists of foods rich in nutrients known to be lacking in the diets of pregnant and breastfeeding women, infants and young children. These key nutrients are iron, protein, and vitamin A and C. It is thus important that every effort be made to afford homeless eligible persons the full nutritional benefits of WIC.

b. Adaptations entailing exceptions to food package requirements. However, in rare instances still greater flexibility in food packages may be warranted. Section 246.10(e) of the WIC regulations has long allowed States to submit for FNS review and approval a plan to make substitutions for required foods in order to accommodate specific cultural eating patterns. FNS evaluates each proposed substitution plan based on the criteria described in § 246.10(e)(2) and the State's justification for the proposed substitutions, and then makes a determination as to the acceptability of the plan. This interim rule amends § 246.10(e) to allow State agencies to submit plans for food packages intended to address the specific identified needs

of specific homeless WIC participants, which may include elimination or substitution of specific foods. The Department will approve alternatives for homeless persons only if fully justified and directed only to homeless individuals in special circumstances, such as those specifically without consistent access to modest facilities for sanitary food storage, preparation, and service. State agencies seeking exceptions must describe in detail the circumstances under which homeless persons would receive the modified food packages and the reasons for removing certain foods and, where substitutions are altered, justification for providing others in their place, including rationale for proposed replacement foods or quantity increases beyond regulatory maximums for required foods as a means of compensating for foods which would be dropped from the package. The Department expects State agencies to explore exhaustively all alternatives within existing food package regulations before submitting alternative plans for food packages for homeless persons.

States wishing to propose and justify only *modest* variations to the standard WIC food packages based on need and nutrition rationale, such as small quantity adjustments to meet commercial packaging configurations, or alternative non-WIC foods such as canned instead of dried beans, would be likely to receive positive and expeditious consideration.

List of Subjects in 7 CFR Part 246.

Food assistance programs, Food donations, Grant programs—Social programs, Infants and Children, Maternal and child health, Nutrition education, Public assistance programs, WIC, women.

For reasons set forth in the preamble, 7 CFR part 246 is amended as follows:

PART 246—SPECIAL SUPPLEMENTAL FOOD PROGRAM FOR WOMEN, INFANTS, AND CHILDREN

1. The authority citation for Part 246 continues to read as follows:

Authority: Sec. 645, Pub. L. 100-460, 102 Stat. 2229; secs. 212 and 501, Pub. L. 100-435, 102 Stat. 1645 (42 U.S.C. 1786); sec. 3, Pub. L. 100-356, 102 Stat. 669 (42 U.S.C. 1786); secs. 8-12, Pub. L. 100-237, 101 Stat. 1733 (42 U.S.C. 1786); secs. 341-353, Pub. L. 99-500 and 99-591, 100 Stat. 1783 and 3341 (42 U.S.C. 1786); sec. 815, Pub. L. 97-35, 95 Stat. 521 (42 U.S.C. 1786); sec. 3, Pub. L. 96-499, 94 Stat. 2599; sec. 203, Pub. L. 95-627, 92 Stat. 3611 (42 U.S.C. 1786).

2. In § 246.1, a new sentence is added at the end of the section to read as follows:

§ 246.1 General purpose and scope.

*** The program shall be supplementary to the Food Stamp Program; any program under which foods are distributed to needy families in lieu of food stamps; and receipt of food or meals from soup kitchens, or shelters, or other forms of emergency food assistance.

3. In § 246.2, the definition of "family" is revised and the definitions of "homeless facility," "homeless individual" and "institution" are added in alphabetical order to read as follows:

§ 246.2 Definitions.

"Family" means a group of related or nonrelated individuals who are living together as one economic unit, except that residents of a homeless facility or an institution shall not all be considered as members of a single family.

"Homeless facility" means the following types of facilities which provide meal service. A supervised publicly or privately operated shelter (including a welfare hotel or congregate shelter) designed to provide temporary living accommodations; a facility that provides a temporary residence for individuals intended to be institutionalized; or a public or private place not designed for, or normally used as, a regular sleeping accommodation for human beings.

"Homeless individual" means a woman, infant or child who lacks a fixed and regular nighttime residence; or whose primary nighttime residence is: A supervised publicly or privately operated shelter (including a welfare hotel, a congregate shelter, or a shelter for victims of domestic violence) designated to provide temporary living accommodation; an institution that provides a temporary residence for individuals intended to be institutionalized; a temporary accommodation in the residence of another individual; or a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

"Institution" means any residential accommodation which provides meal service, except private residences and homeless facilities.

4. In § 246.4:

a. Paragraphs (a)(6), (a)(7), (a)(9), and (a)(11)(ii) are revised;

b. At the end of paragraph (a)(14)(vi) the word "and" is removed;

c. At the end of paragraph (a)(14)(vii) the period is removed and a semicolon is added in its place;

d. At the end of paragraph (a)(14)(viii) the period is removed, and ";" and "is" is added in its place;

e. A new paragraph (a)(14)(ix) is added; and

f. A new paragraph (a)(19) is added.

The revisions and additions read as follows:

§ 246.4 State plan.

(a) ***

(6) Plans to provide program benefits to eligible migrant farmworkers and their families, to Indians, and to homeless individuals.

(7) The State agency's plans, to be conducted in cooperation with local agencies, for informing eligible persons of the availability of Program benefits, including the eligibility criteria for participation, the location of local agencies operating the Program, and the institutional conditions of § 246.7(m)(1)(i) of this part. Such information shall be publicly announced by the State agency and by local agencies at least annually. Such information shall also be distributed to offices and organizations that deal with significant numbers of potentially eligible persons, including health and medical organizations, hospitals and clinics, welfare and unemployment offices, social service agencies, farmworker organizations, Indian tribal organizations, organizations and agencies serving homeless individuals, and religious and community organizations in low-income areas.

(9) The State agency's nutrition education goals and action plans, including a description of the methods that will be used to meet the special nutrition education needs of migrant farmworkers and their families, Indians, and homeless persons.

(11) ***

(ii) Methods for providing nutrition education to participants, including homeless individuals.

(14) ***

(ix) If the State agency plans to adapt its food delivery system to accommodate the needs of homeless individuals, a description of such adaptations.

(19) The State agency's plan to ensure that residents of homeless facilities, and residents of institutions if it chooses to make the Program available to them, are

served only if the homeless facilities/institutions meet the four conditions established in § 246.7(m)(1)(i) of this part.

5. In § 246.7:

- a. Paragraph (i)(6) is revised; and
- b. A new paragraph (m) is added.

The revision and addition read as follows:

§ 246.7 Certification of participants.

(i) * * *

(6) A person who is about to be disqualified from Program participation at any time during the certification period shall be advised in writing not less than 15 days before the disqualification, except that persons who may be disqualified due to residence in homeless facilities or institutions that do not meet the conditions of § 246.7(m)(1)(i)(A)-(D) of this part shall receive 30 days advance notice. Such notification shall include the reasons for this action, and the participant's right to a fair hearing. Further, such notification need not be provided to persons who will be disqualified for not picking up supplemental foods or food instruments in accordance with paragraph (g)(1)(ii) of this section.

(m) *Certification of persons in homeless facilities and institutions.* (1) Pregnant, breastfeeding, and postpartum women, infants or children who meet the requirements of paragraph (b) of this section, and who reside in a homeless facility, shall be considered eligible for the Program and shall be treated equally with all other eligible applicants at the local agency where they apply for WIC benefits. Provided that: the State or local agency has taken reasonable steps to:

(i) Confirm that the homeless facility meets the following conditions:

(A) The homeless facility does not accrue financial or in-kind benefit from a person's participation in the Program, e.g., by reducing its expenditures for food service because its residents are receiving WIC foods;

(B) Foods provided by the WIC Program are not subsumed into a communal food service, but are available exclusively to the WIC participant for whom they were issued;

(C) Institutional proxies do not, as a standard procedure, pick up food instruments for all Program participants in their respective homeless facilities or transact the food instruments in bulk; and

(D) The homeless facility places no constraints on the ability of the

participant to partake of the supplemental foods and nutrition education available under the Program;

(ii) Contact the homeless facility periodically to ensure continued compliance with these conditions; and

(iii) Require the homeless facility to notify the State or local agency if it ceases to meet any of these conditions.

(2) The State agency may authorize or require local agencies to make the Program available to applicants who meet the requirements of paragraph (b) of this section, but who reside in institutions, provided that such institutions meet the conditions of paragraphs (m)(1)(i)(A)-(D) of this section. The State agency shall oversee institutions whose residents it chooses to serve in accordance with paragraphs (m)(1)(ii)-(iii) of this section.

(3) The State agency shall, by March 14, 1990, publicly announce the availability of the program to homeless individuals and disseminate information on program eligibility requirements, the location of local agencies administering the program, and the requirements of paragraphs (m)(1)(i)(A)-(D) of this section to organizations and agencies serving homeless individuals.

(4) If a caseload slot is available at the local agency, a resident of a homeless facility or an institution which has not been found out of compliance with the conditions of paragraphs (m)(1)(i)(A)-(D) of this section may be certified for a period of up to 60 days, during which time the State or local agency shall attempt to determine if the homeless facility/institution meets the requisite conditions. At the end of this period, the local agency shall extend the participant's certification period to the length provided to other participants in the same category (i.e., pregnant women, infants, children, etc.) if the homeless facility/institution has been determined to be in compliance with the conditions. As soon as the State or local agency determines that a homeless facility/institution does not meet the conditions, the local agency shall refer the participant to any other accommodations in the area which do meet the four conditions. Should a participant become homeless during a certification period, and move into a homeless facility or institution within the local agency's service area, the participant shall, except as provided under paragraph (g) of this section, be allowed to complete the certification period regardless of whether the homeless facility or institution meets the requirements of § 246.7(m)(1)(i).

6. In § 246.10, paragraph (e) is revised to read as follows:

§ 246.10 Supplemental foods.

(e) *Plans for substitutions or eliminations.* (1) The State agency may submit to FNS a plan for substitution of food acceptable for use in the Program to allow for different cultural eating patterns and substitution or elimination of a category of foods to accommodate the special needs of homeless persons. The plan shall provide the State agency's justification, including a specific explanation of the cultural eating pattern or the homeless situation which requires the proposed alteration and other information necessary for FNS to evaluate the plan as specified in paragraph (e)(2) of this section for cultural substitutions and in paragraph (e)(3) of this section for homeless substitutions or eliminations.

(2) FNS will evaluate a State agency's plan for substitution of foods for different cultural eating patterns based on the following criteria:

(i) Any proposed substitute food must be nutritionally equivalent or superior to the food it is intended to replace.

(ii) The proposed substitute must be widely available to participants in the areas where the substitute is intended to be used.

(iii) The cost of the substitute must be equivalent to or less than the cost of the food it is intended to replace.

(3) FNS will evaluate a State agency's plan for substitution or elimination of a food category to accommodate the special needs of a specific group of homeless persons based on the justification presented by the State agency documenting the need. Documentation shall illustrate that all alternatives from within existing food packages have been explored and shall include a specific description of the circumstances of the homeless persons to be served that necessitate the proposed food package alteration.

(4) FNS will make a determination on the proposed plan based on the evaluation criteria specified in paragraph (e)(2) or (e)(3) of this section, as appropriate. The State agency shall substitute or eliminate foods only after receiving the written approval of FNS.

§ 246.12 [Amended]

7. In § 246.12:

- a. Paragraph (o) is removed; and
- b. Paragraphs (p)-(u) are redesignated as paragraphs (o)-(t).

8. In § 246.28:

- a. The OMB control number for § 246.4 is revised; and
- b. The OMB control numbers for §§ 246.7(i) and 246.10 are added.

The revision and additions read as follows:

§ 246.28 OMB control numbers.

7 CFR Part 246 Sections where requirements are described	Current OMB control No.
4.....	0584-A536
.7(1).....	0584-A536
.10.....	0584-A536

Dated: December 7, 1989.

G. Scott Dunn,

Acting Administrator, Food and Nutrition Service.

[FR Doc. 89-29159 Filed 12-13-89; 8:45 am]

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Agricultural Marketing Service

7 CFR Part 966

[Docket No. FV-90-101]

Tomatoes Grown in Florida; Partial Exemption From the Handling Regulation for Yellow-Meated Tomatoes

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This interim final rule exempts shipments of yellow-meated tomatoes from the container requirement in the Florida tomato handling regulation under marketing order No. 966. Allowing handlers to ship yellow-meated tomatoes in containers other than those currently authorized under the order will facilitate the movement of such tomatoes and should improve returns to producers of Florida tomatoes.

DATES: The interim final rule is effective December 14, 1989; comments which are received by January 16, 1990, will be considered prior to issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this action to: Docket Clerk, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2525-S, Washington, DC 20090-6456. Three copies of all written material shall be submitted, and they will be made available for public inspection at the Office of the Docket Clerk during regular business hours. All comments should reference the docket number and the date and page number of this issue of the Federal Register.

FOR FURTHER INFORMATION CONTACT: Kenneth G. Johnson, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2525-S, Washington, DC 20090-6456, telephone (202) 447-5331.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement No. 125 and Marketing Order No. 966 (7 CFR part 966), both as amended, regulating the handling of tomatoes grown in Florida. The marketing agreement and order are authorized by the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the Act.

This interim final rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 100 handlers of Florida tomatoes subject to regulation under the marketing order, and approximately 180 producers in the production area. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2) as those having annual receipts less than \$500,000, and small agricultural service firms are defined as those whose annual receipts are less than \$3,500,000. The majority of the handlers and producers of Florida tomatoes may be classified as small entities.

Under the marketing order, tomatoes shipped to fresh markets are required to meet the handling requirements specified in 7 CFR 966.323 (as amended at 53 FR 3191, February 4, 1988). The current requirements include a minimum grade of U.S. No. 3 and a minimum size of 2½ inches in diameter. Pack and container specifications are also in effect. In addition, all lots are required to be inspected and certified as meeting these grade, size, pack, and container requirements by an authorized

representative of the Federal or Federal-State Inspection Service.

The Florida Tomato Committee (committee) met on September 7 and October 11, 1989, and unanimously recommended that shipments of yellow-meated tomatoes be exempt from the container requirement included in the handling regulation which specifies that tomatoes be packed in containers of 20 or 25 pounds net weight.

The yellow-meated tomato is a commodity just recently available from Florida. It is now being grown in relatively small volumes within the production area, and will be marketed as a specialty item. Like other tomato specialty items (e.g., greenhouse-grown tomatoes), yellow-meated tomatoes are typically harvested at a fully mature stage and are too fragile to withstand packing and shipping in the currently authorized 20- and 25-pound multi-layer cartons. Typically, tomatoes, such as greenhouse-grown and others that are exempt under § 966.323(d)(1) from the handling regulation, that are fully mature are packed in smaller, single-layer containers. This helps to reduce or eliminate damage that could occur during handling and shipping and thereby supply markets with the quality product desired. The committee therefore recommended that yellow-meated tomatoes be exempt from the requirement that they be packed in the larger containers. This action will facilitate the marketing of yellow-meated tomatoes, and should result in the development of new markets and the expansion of marketing opportunities for Florida tomato growers and handlers.

Although this rule exempts handlers from the requirement that they pack yellow-meated tomatoes in 20- or 25-pound containers, such tomatoes are still subject to all other provisions of the handling regulation, including the minimum grade and size requirements. The committee believes that, aside from the container specifications, the current handling requirements are appropriate for yellow-meated tomatoes. Requiring these tomatoes to meet the established grade, size, pack, and inspection requirements will ensure that the overall quality of tomatoes shipped from the production area will not be affected by this action.

Section 8(e) of the Act requires that whenever grade, size, quality or maturity requirements are in effect for certain commodities under a domestic marketing order, including tomatoes, imports of that commodity must meet the same or comparable requirements. However, the Act does not authorize the imposition of container requirements on