Federal Register
Vol. 59, No. 48
Friday, March 11, 1994

Presidential Documents

Title 3—

The President

Executive Order 12903 of March 9, 1994

Nuclear Cooperation With EURATOM

By the authority vested in me as President by the Constitution and laws of the United States of America, including section 126a(2) of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2155(a)(2)), and having determined that, upon the expiration of the period specified in the first proviso to section 126a(2) of such Act and extended for 12-month periods by Executive Orders Nos. 12193, 12295, 12351, 12409, 12463, 12506, 12554, 12587, 12629, 12670, 12706, 12753, 12791, and 12840, failure to continue peaceful nuclear cooperation with the European Atomic Energy Community would be seriously prejudicial to the achievement of United States non-proliferation objectives and would otherwise jeopardize the common defense and security of the United States, and having notified the Congress of this determination, I hereby extend the duration of that period to March 10, 1995. Executive Order No. 12840 shall be superseded on the effective date of this Executive order.

William J. Clinton

THE WHITE HOUSE,
March 9, 1994.

[FR Doc. 94-5915
Filed 3-9-94; 3:57 pm]
Billing code 3195-01-P

Editorial note: For the President's message to the Congress on this Executive Order, see issue 10 of the *Weekly Compilation of Presidential Documents.*

Rules and Regulations

Federal Register
Vol. 59, No. 48
Friday, March 11, 1994

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 246

RIN No. 0584–AB13

Special Supplemental Food Program for Women, Infants, and Children (WIC): Coordination Rule: Mandates of the Child Nutrition and WIC Reauthorization Act of 1989

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule amends regulations governing the Special Supplemental Food Program for Women, Infants, and Children (WIC) to comply with the mandates of sections 123 and 213 of the Child Nutrition and WIC Reauthorization Act of 1989 enacted on November 10, 1989. This final rule contains both funding and nonfunding provisions. The major nonfunding provisions in this final rule include: Extending adjunct or automatic income eligibility to certain family members; enhancing outreach efforts and program access; defining breastfeeding and establishing breastfeeding promotion activities; referring and providing participants with information about other health and welfare programs; permitting State agencies the option to establish alternative means of issuing food instruments, such as mailing them to participants; and, reducing the frequency with which State agencies must review their local agencies. This final rule also incorporates other legislative mandates, such as, Governmentwide debarment and suspension (nonprocurement) requirements, a drug-free workplace, and new restrictions on lobbying.

DATES: This rule is effective on March 11, 1994, except that the nondiscretionary funding provisions set forth in § 246.14 and § 246.16 were, by law, effective October 1, 1989. State agencies shall implement all other provisions no later than October 1, 1994.

FOR FURTHER INFORMATION CONTACT: Barbara Hallman, Chief, Policy and Program Development Branch, Supplemental Food Programs Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, room 542, Alexandria, VA 22302, (703) 305–2746.

SUPPLEMENTARY INFORMATION:

Classification

Executive Order 12866

This final rule is issued in conformance with Executive Order 12866.

Regulatory Flexibility Act

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 (FNS) has determined that this final rule will not have a significant impact on a substantial number of small entities. State and local agencies will be most affected because of the additional program administration and education requirements. However, some program administration requirements have also been reduced by this rule. The net effect on State and local agencies is expected to be minimal. Participants and applicants will also be affected by simplified application and benefits issuance procedures.

Paperwork Reduction Act

The reporting and recordkeeping requirements established in the proposed rulemaking of July 9, 1990 in §§ 246.4, 246.6, 246.7, 246.11 and the reductions in the reporting and recordkeeping requirements set forth in §§ 246.11 and 246.19 were reviewed and approved by the Office of Management and Budget under Control Number 0584–0043 in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3505). No changes in the reporting/recordkeeping burden for the sections cited above have been incorporated into the final rule.

All existing reporting and recordkeeping requirements in §§ 246.14 and 246.16 for funding activities have been incorporated into this final rule, and no changes in burden hours for those activities are reflected in this final rule. The requirements for these sections have been approved by OMB for use through November 30, 1995 under OMB control number 0584–0043. This final rule, however, does impose on WIC State and local agencies one additional reporting and recordkeeping requirement of documenting both direct and in-kind expenditures for breastfeeding promotion and support.

As required by section 3504(h) of the Paperwork Reduction Act of 1980, the Department submitted to the Office of Management and Budget (OMB) for its review the information reporting and recordkeeping requirement of documenting both direct and in-kind expenditures for breastfeeding promotion and support. This reporting and recordkeeping requirement has been approved by OMB for use through August 31, 1995 under OMB control number 0584–0427.

Organizations and individuals desiring to submit comments regarding any aspect of these information collection requirements, including suggestions for reducing the burdens, should direct them to the Director, Supplemental Food Programs Division, (address above) and to the Office of Information and Regulatory Affairs, OMB, room 3208, New Executive Office Building, Washington, DC 20503, Attn: Laura Oliven, Desk Officer for the Food and Nutrition Service.

Executive Order 12372

The Special Supplemental Food Program for Women, Infants and Children (WIC) 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 48 FR 29114 (June 24, 1983)).

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 which conflict with its provisions or which would otherwise impede its full implementation. This rule is not intended to have retroactive effect unless so specified in the

"EFFECTIVE DATE" paragraph 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 WIC Program, the administrative procedures are as follows: (1) Local agencies and vendors—State agency hearing procedures issued pursuant to 7 CFR 246.18; (2) applicants and participants—State agency hearing procedures issued pursuant to 7 CFR 246.9; (3) sanctions against State agencies (but not claims for repayment assessed against a State agency) pursuant to 7 CFR 246.19—administrative appeal in accordance with 7 CFR 246.22; and (4) procurement by State or local agencies—administrative appeal to the extent required by 7 CFR 3016.36.

Good Cause Determinations

This final rule incorporates several new statutory requirements from Public Law 101–147 which were not contained in a prior proposed rule. These are nondiscretionary funding provisions which revise the methodology for determining the amount of funds available for NSA, require that a portion of these funds be used for breastfeeding promotion and support, permit conversion of food funds to NSA funds under certain specified circumstances, provide optional spend forward authority to State agencies, and establish timelines for allocation and reallocation of funds. In light of the nondiscretionary nature of these requirements, and since the legislatively mandated effective date of these requirements was October 1, 1989, the Administrator of the Food and Nutrition Service has found, in accordance with 5 U.S.C. 553(b), that prior notice and comment are impracticable, unnecessary and contrary to the public interest, and that good cause exists for publishing revisions to § 246.16 without prior notice and comment.

Two additional changes which were not proposed are contained in this final rule. First, this final rule incorporates in § 246.2 reference to the existing requirements of the non-discretionary department-wide rule governing lobbying which applies to WIC. This new reference merely incorporates existing, non-discretionary provisions of 7 CFR part 3018, "New Restrictions on Lobbying," into WIC Program regulations. Second, current § 246.7(c)(2)(v) contains a non-inclusive list of references of non-discretionary provisions of Federal law which prohibit certain benefits paid under other Federal programs from being considered as income for the WIC Program. This final rule renumbers that section as § 246.7(d)(2)(iv)(c), and amends it to update it with additional references to other non-discretionary income exclusions. With respect to these revisions, the Administrator of the Food and Nutrition Service has found, pursuant to 5 U.S.C. 553(b), that prior notice and comment are impracticable, unnecessary and contrary to the public interest, and that good cause exists for publishing these revisions without prior notice and comment.

Background

Public Law 101–147, the Child Nutrition and WIC Reauthorization Act of 1989, enacted on November 10, 1989, amended a wide range of WIC Program functions in such areas as income eligibility determinations; program outreach, referral and access; coordination; breastfeeding promotion; and food delivery systems. Therefore, on July 9, 1990, the Department published a proposed rule (55 FR 28033) addressing primarily the discretionary and nondiscretionary mandates of Public Law 101–147 that were unrelated to funds utilization and allocation. These provisions have been commonly referred to as the "nonfunding" provisions of Public Law 101–147. Also included in the proposed rule were references to requirements in Department-wide rules which apply to WIC: Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, 7 CFR part 3016, and Governmentwide Debarment and Suspension (Non-Procurement) Requirements and Government Requirements for a Drug-Free Workplace, 7 CFR part 3017. Several nonfunding provisions were issued in separate rulemakings, as noted below.

The proposed rule provided for a 30-day comment period, which ended on August 8, 1990. Forty-seven comment letters were received on the proposed rule from a variety of sources, including State and local agencies and health professionals, advocacy groups and other public interest groups, and the general public.

The Department has given all comments careful consideration in the development of this final rule and would like to thank all commenters who responded to the proposal. In addition, subsequent meetings with various State and local agency staff on this rule provided a forum for staff to more fully discuss the concerns and recommendations made in their comment letters. Such discussions and individual comments on the proposed rule, which provided a detailed and thorough analysis of issues, were invaluable to the Department in developing this final rule. A summary of these meetings is contained in the Department's rulemaking record.

Although the proposed rule contained both discretionary and nondiscretionary nonfunding provisions of Public Law 101–147, State agencies were encouraged to focus on and direct their comments to the discretionary provisions of the law. In addition, the Department has worked with WIC State agencies to voluntarily implement the provisions designated as nondiscretionary, including those provisions proposed verbatim from the law. These legislative provisions required no further interpretation on the part of the Department as to how State and local agencies would implement them. While all provisions addressed in the proposal will be discussed further, those which are discretionary will be addressed in greater detail.

The proposed rulemaking published by the Department did not include any of the funding provisions mandated by Public Law 101–147 because the Department intended to publish these requirements in a separate rulemaking. However, because the law requires several nondiscretionary revisions to the WIC Program funds allocation procedures which preclude the Department from exercising discretion in their implementation, the Department has included these funding provisions in this final rule.

As indicated previously, these funding provisions include: (1) Revising the methodology for determining the amount of funds available for NSA, (2) requiring that at least $8 million of the NSA funds must be spent on breastfeeding promotion and support, (3) permitting, under certain circumstances, the conversion of food funds to funds to support NSA and an option for States to spend forward up to 3 percent of their food grants into the succeeding fiscal year, and (4) establishing timelines for the allocation and reallocation of funds. These provisions cannot be modified in response to public comment because the legislative language is explicit regarding implementation of these provisions. Because these provisions result in significant changes to § 246.16 of the WIC Program regulations, the Department is revising and republishing § 246.16(a) through (k), redesignated in this final rule as paragraphs (a) through (i), in its entirety. In addition and as required by law, these provisions were effective on October 1, 1989 and were reflected in grants to State agencies since Fiscal Year 1990.

This final rule also incorporates into § 246.7 of the WIC Program regulations references to various cash payments which are required by statute to be excluded from consideration as income for Federal assistance programs. Further, due to the addition of these references and other changes necessary to incorporate adjunct income eligibility requirements, newly designated paragraph (d) in § 246.7 has been revised and republished in its entirety in this final rule.

Department-wide rules implementing new Governmentwide lobbying restrictions, 7 CFR part 3018, are also included in this final rule. In addition, OMB Circular A–90, "Cooperating with State and Local Governments to Coordinate and Improve Information Systems" has been replaced by OMB Circular A–130. Therefore, all references to Circular A–90 have been revised to reference OMB Circular A–130.

Several nonfunding provisions of Public Law 101–147 were implemented in previous rulemakings. Therefore, they were not included in the proposed rule of July 9, 1990 and are not addressed in this final rule. First, the provision that State agencies be given the option to certify and provide program benefits to incarcerated persons (sections 123(a)(4)(A)(iv) and 123(a)(4)(E)) were published in an interim rule on December 14, 1989 (54 FR 51289) and in a final rule on August 5, 1992 (57 FR 34500). On February 1, 1990 (55 FR 3385), a final rule was published which implemented two nondiscretionary benefit-related provisions of section 123(a)(2) of Public Law 101–147—automatic WIC income eligibility for fully eligible current recipients of Food Stamps, AFDC, and/or Medicaid benefits, and the State agency option to exclude military off-base housing allowance payments from an applicant's countable income for purposes of determining WIC income eligibility. Finally, the requirements of sections 123(a)(3)(D) and 123(a)(4)(A)(i)(II) of the law regarding the provision of information on, and coordination with, substance abuse counseling and treatment services were included in a separate proposed rule issued on March 30, 1990 (55 FR 11946). This rule was issued in its final form on February 26, 1993 at 58 FR 11497.

Following is a discussion of each provision, as proposed, comments received on the proposed rule, an explanation of the provisions set forth in this final rule, and a discussion of several nondiscretionary provisions, including four basic areas of funding provisions in Public Law 101–147, which have been incorporated into this final rule.

1. References to 7 CFR Part 3016

Until the publication of the final rule entitled "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments" on March 11, 1988 (53 FR 8044), the requirements for grants and cooperative agreements were set forth in 7 CFR part 3015. This rule was promulgated to establish consistency and uniformity among some 23 Federal agencies in the administration of grants to, and cooperative agreements with, State and local governments and federally-recognized Indian tribal governments. The final rule was published as 7 CFR part 3016, replacing part 3015 for most grants and subgrants to these government entities, including WIC grants, effective October 1, 1988. Therefore, as proposed, this final rule would change all references to 7 CFR part 3015 contained in part 246 to "7 CFR part 3016."

2. Breastfeeding Provisions (§§ 246.2, 246.3(e)(4), 246.11(c)(2), 246.11(c)(3), 246.11(c) (5)–(6) and (8), and 246.14(c)(10))

Public Law 101–147 established a number of mandates relative to breastfeeding. The significant number of provisions in Public Law 101–147 concerning breastfeeding promotion and support activities, and the level of detail with which most of these provisions are addressed, clearly demonstrate strong Congressional support for breastfeeding promotion and support efforts in the WIC Program. This strong support, in turn, reflects nutritional science and medical opinion that breastfeeding offers significant nutritional and health benefits to infants.

The Department shares this belief and has always actively encouraged the promotion and support of breastfeeding as the optimal method of infant feeding. Program regulations already contain a number of provisions in support of breastfeeding. Furthermore, the Department has taken non-regulatory actions in this area, including the development of publications to help local agency staff teach participants about breastfeeding; participation in cooperative efforts with other Federal agencies and organizations to promote breastfeeding, such as the USDA Breastfeeding Promotion Consortium which meets semi-annually; and the award of grants for projects on breastfeeding, such as the funding of a WIC Breastfeeding Promotion Study and Demonstration to identify, evaluate, and demonstrate approaches to promote breastfeeding effectively in WIC and, more recently, the award of grants to test the effectiveness of breastfeeding incentives in eight locations. The provisions regarding breastfeeding contained in Public Law 101–147 will serve to strengthen the emphasis in current regulations by focusing more attention on the promotion and support of breastfeeding activities at both the State and local levels. State and local agencies are encouraged to expand their efforts to increase the incidence and duration of breastfeeding among WIC participants.

This final rule amends the regulations to include nondiscretionary provisions (many of which have already been implemented by State agencies) which: (1) Require that the State agency include in its annual plan of operation and administration a plan to promote breastfeeding and to coordinate WIC operations with local programs for breastfeeding promotion, (2) require each State agency to designate an agency staff member to coordinate breastfeeding promotion efforts, (3) require that the State agency provide training to persons providing breastfeeding promotion and support, (4) authorize the purchase of breastfeeding aids by State and local agencies as an allowable administrative expense, (5) require that the State agency provide breastfeeding promotion materials in languages other than English, and (6) establish a requirement that of the funds set aside for nutrition services and administration, at least $8 million must be spent in the area of breastfeeding promotion and support. This $8 million set-aside is discussed in further detail in section 11 of this preamble. This final rule also revises the regulations to implement the discretionary breastfeeding provisions, which are: (1) Definition of "breastfeeding," (2) breastfeeding promotion and support standards, and (3) annual evaluation of breastfeeding promotion and support efforts.

a. *Definition of "Breastfeeding" (§ 246.2).* Section 123(a)(6) of Pub. L. 101–147 adds a new section 17(h)(4)(A) to the Child Nutrition Act (CNA) of 1966 to require the Secretary, in consultation with the Secretary of Health and Human Services, to develop a definition of "breastfeeding" for the purpose of the WIC Program. Accordingly, the Department asked the Committee on Breastfeeding Promotion of the National Association of WIC Directors (NAWD), representatives from USDA and the Maternal and Child Health Bureau in the Department of Health and Human Services (DHHS),

and other experts on breastfeeding, to provide input on developing a national definition of breastfeeding. The NAWD Committee recommended that "breastfeeding" be defined as "the provision of mother's milk to her infant on the average of at least once a day." The DHHS concurred with this recommended definition for WIC Program purposes.

Except as may otherwise be specified, this definition would be consistently applicable to all aspects of the WIC Program, including the evaluation of promotional efforts and the determination of categorical eligibility as a breastfeeding woman. The definition also recognizes that any breastfeeding, even if only on an average of once a day, provides some immunological and nutritional benefits which would otherwise not be provided to an infant, as well as significant psychological benefits, including assisting the transition to motherhood, and assisting the formation of strong bonds between the mother and her infant.

It is the Department's belief that a result of successful breastfeeding promotion should be a serious commitment to breastfeeding on the part of mothers so that breastfeeding will be the rule rather than the exception. The Department also acknowledges that any amount of breastfeeding should be encouraged. Partial breastfeeding supplemented by formula feeding is preferable to no breastfeeding at all. Therefore, the Department proposed the following definition of "breastfeeding" be added to § 246.2: "the practice of feeding a mother's breastmilk to her infant(s) on the average of at least once per day."

The majority of commenters addressing the definition of "breastfeeding" supported the provision as proposed. Therefore, in view of the comments received and the Department's previous consultation with the National Association of WIC Directors, and the Secretary of the Department of Health and Human Services, including the Centers for Disease Control (CDC), the definition of "breastfeeding" in this final rule remains unchanged from the proposed rule.

b. *Designation of breastfeeding coordinator (§ 246.3(e)(4)).* Section 123(a)(6) of Pub. L. 101–147 amends section 17(h)(4)(C) of the CNA of 1966 to require each State agency "to designate an agency staff member to coordinate breastfeeding promotion efforts identified in the State plan of operation and administration." Therefore, the Department proposed in its July 9, 1990 rulemaking to add the breastfeeding promotion coordinator position to the list of State staffing requirements set forth in § 246.3(e)(4).

One commenter addressed this issue and recommended that the Department specify the staffing standards per caseload as well as the duties and responsibilities of a breastfeeding coordinator. It was the intent of the Department to allow the State agency the flexibility under this provision to delineate the duties and responsibilities of the breastfeeding coordinator in its State. However, the Department strongly urges State agencies to make breastfeeding promotion and education duties the first priority for this position. Other duties, may be assigned to this position, but should be related to nutrition services if at all possible. In this way a breastfeeding coordinator will have the flexibility to perform duties specific to the needs of the particular State. Accordingly, the Department is adopting the provision as proposed.

c. *Training for breastfeeding promotion (§ 246.11(c)(2)).* Section 123(a)(6) of Public Law 101–147 adds a new section 17(h)(4)(D) to the CNA of 1966 requiring the State agency "to provide training on the promotion and management of breastfeeding to staff members of local agencies who are responsible for counseling (WIC) participants * * * concerning breastfeeding." Therefore, the proposed rule added a new sentence at the end of § 246.11(c)(2) of the current WIC Program regulations to require State agencies to provide training on the promotion and management of breastfeeding to local agency staff.

The majority of commenters approved this provision as proposed. One commenter approved the provision but indicated that additional funds would be needed to provide such training to local agency staff.

Congress has already augmented the existing requirement that States expend at least one-sixth of their nutrition services and administration (NSA) grants on nutrition education by mandating in Public Law 101–147 a targeted expenditure nationally of at least $8 million for the promotion and support of breastfeeding among WIC participants. The Department has issued a policy memorandum which clarifies that salary and benefit expenses of staff and non-WIC staff to deliver/attend training on breastfeeding promotion and support have been and continue to be allowable breastfeeding promotion and support expenditures. Accordingly, the proposed modification of § 246.11(c)(2) is adopted without changes.

d. *Provision of non-english breastfeeding materials (§ 246.11(c)(3)).* Section 17(f)(14)(A) of the CNA of 1966 has long required State agencies to provide nutrition education materials to local agencies in languages other than English in areas where a substantial number of low-income households speak other languages. Section 123(a)(4)(D) of Public Law 101–147 amends section 17(f)(14)(A) of the CNA of 1966 specifically to add breastfeeding promotion materials and instruction to this requirement.

The Department proposed to revise § 246.11(c)(3) of the regulations to require that the State agency "identify or develop resources and educational materials, including breastfeeding promotion and instruction materials, for use in local agencies, taking reasonable steps to include materials in languages other than English, in areas where a significant number or proportion of the population needs the information in a language other than English, considering the size and concentration of such population, and where possible, the reading level of the participants."

One commenter responded affirmatively to the provision. This commenter, however, recommended these materials be developed at the Federal level. The Department may develop some materials to assist State agencies in meeting this requirement. However, such action on the part of the Department does not alleviate the obligation imposed by this legislation on State agencies to produce or provide such materials for their WIC participants.

State agencies should note that the joint statement of explanation accompanying H.R. 24 (Congressional Record, October 10, 1989, H6863) clarifies that Congress does not expect State agencies to develop and produce all such materials on their own in cases where private entities have donated a sufficient supply of materials which include correct, complete, and up-to-date information. Furthermore, the Department believes that any printed information, either about breastfeeding, nutrition education, or the application/certification process itself, should reflect, where possible, the reading level of WIC participants, regardless of the language used. Accordingly, the final rule retains the requirement as proposed.

e. *Breastfeeding promotion and support standards and evaluation (§ 246.11(c)(5)–(6) and (8)).* Section 123(a)(3)(C) of Public Law 101–147 adds a new section 17(e)(2) to the CNA of 1966 mandating that the Department "prescribe standards to ensure that

adequate * * * breastfeeding promotion and support are provided."

The Department requested the assistance of National Association of WIC Directors' (NAWD) Committee on Breastfeeding Promotion in developing and prescribing the breastfeeding promotion standards required by Public Law 101–147. The standards/requirements recommended by this Committee were based on a position paper previously developed by NAWD on Breastfeeding Promotion, and reflect the concern of NAWD that requirements such as these be general in nature. In its July 9, 1990 proposed rule, the Department proposed to add the following requirements in new §§ 246.11(c)(8)(i)–(iv): (1) The State agency shall develop a policy that creates a positive clinic environment which endorses breastfeeding as the preferred method of infant feeding; (2) Each local agency shall designate a staff person to coordinate breastfeeding promotion and support activities; (3) The State and local agency shall incorporate task-appropriate breastfeeding promotion and support training into orientation programs for new staff involved in direct contact with WIC clients, and; (4) The State agency shall develop a plan to ensure that women have access to breastfeeding promotion and support activities during the prenatal and postpartum periods.

New section 17(e)(2) of the CNA of 1966 also mandates that States annually evaluate breastfeeding promotion and support activities, including the views of participants concerning the effectiveness of the nutrition education and breastfeeding promotion and support they received. Section 246.11(c)(5) of the WIC regulations currently requires that WIC State agencies perform and document annual evaluations of nutrition education activities, which have always encompassed breastfeeding promotion. Because existing program regulations already contained annual nutrition education evaluation requirements, the Department proposed some minor modifications to existing §§ 246.11 (c)(5) and (c)(8) to emphasize that breastfeeding education and promotion are to be included in these evaluations.

A few commenters who addressed these proposed changes opposed the annual review requirement for breastfeeding promotion and support and recommended the frequency of this review activity be revised to be consistent with the biennial review of local agencies as required in Public Law 101–147.

Because language in Public Law 101–147 requires that evaluations of breastfeeding promotion and support activities be performed annually by State agencies, this provision must be retained as proposed. However, as indicated above, this annual evaluation, for most States, will not be a new requirement, because most if not all have included it as a part of the currently required nutrition education evaluation. For those that have not, it is likely to be a simple extension of the evaluation currently being performed annually of nutrition education activities, and likely entails utilizing the same assessment tool currently used to evaluate nutrition education activities, such as a survey. Furthermore, during management evaluation reviews which must be conducted at least biennially, as set forth in § 246.19(b)(3) of this final rule, State agencies are required to monitor compliance with all aspects of program operation including whether local agencies are complying with the nutrition education and breastfeeding promotion and support activities required by § 246.11(c)(8).

Therefore, in this final rule, § 246.11 (c)(5), (c)(6), and (c)(8) are adopted as proposed. In addition to the assessment of participants' views concerning the effectiveness of nutrition education and breastfeeding promotion and support they received, the Department would encourage all State agencies to include in their evaluation an assessment of the outcomes of nutrition education and breastfeeding promotion and support, including the incidence and duration of breastfeeding.

f. *Breastfeeding aids as an allowable administrative expense (§ 246.14(c)(10)).* Section 123(a)(6) of Public Law 101–147 adds a new section 17(h)(4)(B) to the CNA of 1966 mandating that the Department "authorize the purchase of breastfeeding aids by State and local agencies as an allowable expense under nutrition services and administration." To implement this legislative mandate, a new § 246.14(c)(10), which includes "breastfeeding aids" as allowable administrative costs, was proposed to be added by the Department in its proposed rulemaking. Accordingly, the proposed rule would allow, but would not require, State agencies to purchase, and authorize their local agencies to purchase, breastfeeding aids with WIC NSA funds.

Although commenters generally supported the provision as proposed, several suggested that more detail be added on the breastfeeding aids which may be considered allowable costs. FNS believes the detailed discussion in the preamble to the proposed rule adequately addressed this subject. It has also issued additional guidance through its regional offices in a January 17, 1991 policy memorandum entitled, "Allowable Costs for the Promotion and Support of Breastfeeding and the Reporting of Allowable Nutrition Services Expenditures."

However, in this final rule a new paragraph (c)(10) has been modified to state that allowable NSA costs include "the cost of breastfeeding aids which directly support the initiation and continuation of breastfeeding." This is consistent with the preamble of the proposed rule and policy issued by the Department, that breastfeeding aids include, but are not limited to, devices such as breast pumps, breastshells, and nursing supplementers, which directly support the initiation and continuation of breastfeeding.

Breast pumps, including manual, battery-operated, or electric models, are used to express breast milk for storage and later use or to relieve over-fullness. Breastshells (i.e., breastshields and breast cups) are used for correcting inverted nipples. A pregnant woman with this problem is usually encouraged to start wearing such a device as early in pregnancy as possible. If the problem continues after the infant is born, it may be necessary to wear the aid between breastfeedings. Nursing supplementers are small tubes which are taped against the mother's body through which infant formula or other nourishment is expressed as the infant breastfeeds. This permits the mother to supplement breastfeeding when the supply of breastmilk is insufficient to meet the infant's nutritional needs without resorting to bottlefeeding. Avoiding the use of a bottle for supplementary feeding eliminates possible confusion for the infant who is learning how to breastfeed.

Other devices or aids, such as nursing pads or nursing bras, which also directly support the initiation and continuation of breastfeeding, may also be purchased with NSA funds. However, State and local agencies should weigh the benefits of providing this more marginal equipment, which provides less direct support for the initiation and continuation of breastfeeding, against the importance of management functions and participant benefits (e.g., nutritional counseling) that could otherwise be provided or enhanced with the NSA funds. The Department recommends that States establish very specific policy for local agencies regarding what, if any, types of breastfeeding aids may be purchased so that the most efficient use is made of NSA funding resources. While all of the devices or aids mentioned in this section are Federally allowable

expenses, the Department recommends that States restrict the use of administrative funds to aids or devices without which breastfeeding for particular participants would be overly difficult, e.g., breastshells, nursing supplementers, and breastpumps. However, items and aids for breastfeeding that go beyond the scope of the WIC Program would not be allowable costs.

3. Adjunct or Automatic WIC Income Eligibility (§§ 246.2 and 246.7(d)(2)(vi))

Section 123(a)(2) of Public Law 101–147 amended section 17(d)(2)(A) of the CNA of 1966 to provide adjunct (i.e., automatic) WIC income eligibility to the following individuals applying for program benefits: (1) Recipients of Food Stamps, Aid to Families with Dependent Children (AFDC), or Medicaid Program benefits, and (2) a member of a family which contains an AFDC recipient or a pregnant woman or infant receiving Medicaid.

The intent of Congress in passing this provision was to reduce the administrative burden on local agency WIC staff in the income determination process, expedite an applicant's entry into the program thereby removing potential barriers to program participation, and result in increased referrals from WIC to other health and social service programs (H.R. Rep. No. 101–194, p. 11–12).

Final regulations were published on February 1, 1990 at 55 FR 3385 to implement the nondiscretionary, benefit-related provision of extending adjunct income eligibility to "fully" eligible recipients of Food Stamps, AFDC, or Medicaid Program benefits. However, that final rule left several issues outstanding including presumptive eligibility, definition of "family" for adjunct purposes, and the length of the certification periods. These and other issues were addressed in the proposed rule.

Before discussing the proposed and final provisions in this area and the comments received on the proposed rule, several facts regarding adjunct income eligibility are important to restate. First, this provision provides only automatic income eligibility. Persons who are determined income eligible for WIC must still meet the other prong of WIC eligibility and be determined at nutritional risk before they can participate in the WIC Program and receive benefits.

Secondly, in accordance with the language of Public Law 101–147, which specifically cites programs conducted under Federal law, these provisions apply only to recipients of the Federal AFDC, Medicaid, and Food Stamp Programs. A few States are administering programs financed solely by State funds that operate like and parallel the Federal AFDC or Medicaid programs. In addition, some States have chosen to extend Medicaid program benefits with State funds to pregnant women and infants who have incomes above 185 percent of poverty. Persons participating in such state-administered programs cannot be determined or classified as adjunctively income eligible for the WIC Program on that basis. As discussed in further detail below, however, some of these individuals may, at the State agency's discretion, be determined automatically income eligible for WIC based on participation in certain State-administered programs if the State program has income limits at or below the WIC Program income guidelines, as set forth in newly redesignated § 246.7(d)(2)(vi)(B) of this final rule (previously set forth in § 246.7(c)(2)(vii)). This provision has been in the WIC regulations since 1981.

Third, while the legislation states that "recipients" of AFDC, Medicaid, or Food Stamp benefits or a member of a family which contains a recipient of certain programs are adjunctively income eligible for WIC, "recipients" in this context and as intended in this rule are individuals who have been certified or determined eligible to receive benefits from one or more of these programs. It would not be feasible to base adjunct income eligibility status for WIC on whether an individual actually receives AFDC, Medicaid, or Food Stamp benefits at the time of WIC application. For example, an individual may be certified as eligible to receive Medicaid benefits but at the time he/she applies for WIC benefits is not in need of or has not sought Medicaid services. Section 246.7(d)(2)(vi)(A) has been modified by this final rule to clarify this point.

Fourth, individuals are required to document that they are certified as eligible to receive AFDC, Medicaid, or Food Stamp Program benefits. This requirement was first established in the final rule published in the **Federal Register** on February 1, 1990 at 55 FR 3385. Such documentation would include, for example, a participant's program identification card, or notice of program eligibility. State agencies may also, if they have the capability, assist applicants in obtaining such documentation through use of available means such as an online access data system. Some of the State's program identification cards may not provide the data necessary to confirm that the individual is currently certified as eligible to receive program benefits. State agencies should ensure that the documentation required sufficiently confirms that a WIC applicant is currently certified as eligible to participate in any one of these programs.

Note that for both Medicaid and AFDC, a recipient is an individual. This is not the case in the Food Stamp Program. Food Stamp benefits are for household units. Thus, a Food Stamp "recipient" may be one individual or a group of individuals who are determined eligible for benefits. Accordingly, some Food Stamp recipients may not have documentation to confirm that they are certified as eligible to receive food stamp benefits. They may only have documentation which identifies that the head of the household and other unnamed family members are certified as eligible to receive benefits. In such cases, State agencies should require the WIC applicant to document that the person named as the head of the household for Food Stamp purposes is certified as eligible to receive Food Stamp benefits, and that the WIC applicant resides with the individual named as the Food Stamp head of household, or provide other similar documentation which proves that the applicant is certified as eligible to receive Food Stamp benefits.

a. *Definition of "Family" for members of families that contain an AFDC recipient or a pregnant woman or infant receiving assistance under the Medicaid program (§§ 246.2 and 246.7(d)(2)(vi)).* As mentioned previously, the legislation extends adjunct income eligibility for WIC to an individual who is a member of a family which contains an AFDC recipient or a member of family in which a pregnant woman or infant receives Medicaid. The purpose of this provision is to ensure that family members of AFDC and certain Medicaid participants, who might not themselves be AFDC or Medicaid participants, would be determined adjunctively income eligible for WIC. Consider, for example, a family unit which includes a pregnant woman and a 2-year old child. The pregnant woman participates in the Medicaid Program; however, the child does not qualify. By including family members as adjunctively income eligible for WIC, Public Law 101–147 extends automatic WIC income eligibility to the child, as well as to its mother. This provision also serves to facilitate closer coordination between WIC and other health and welfare programs that serve the same population and thereby streamlines administrative procedures.

Prior to issuing a proposed rule on this provision, USDA considered the development of a new definition of "family" that was consistent across WIC, Medicaid and AFDC. After discussion with Federal Medicaid and AFDC Program counterparts, however, there was some concern that use of any one of the Federal programs' definitions of family for purposes of this provision might exclude, in some rare situations, an individual as adjunctively income eligible for WIC who in effect may have been considered or counted as a family member in one of these programs. AFDC and Medicaid approach the concept of "family" in a significantly different manner from each other and from WIC. The AFDC and Medicaid "families"—referred to in these programs as "budget units" or "filing units"—may be composed exclusively of persons directly receiving the program benefit or may include recipients and non-recipients. Additional persons who contribute to the economic unit may be excluded from consideration in these programs because they are not related to the applicant by blood, marriage, or some other form of legal relationship. In contrast, § 246.2 of the WIC regulations defines "family" as "a group of related or nonrelated individuals who are living together as one *economic unit* * * *" FNS Instruction 803–3, Rev. 1, dated April 1, 1988, reiterates this regulatory definition. It considers persons as members of a single family, or economic unit, when their "production of income and consumption of goods and services are related."

In addition, use of the equivalents of "family" in AFDC and Medicaid for purposes of determining adjunct income eligibility in WIC would require either (1) that the WIC applicant provide information on the persons who were considered to be family members for AFDC or Medicaid; (2) WIC authorities to be charged with the responsibility for obtaining such information from these other programs; or (3) WIC staff master the complex eligibility determination procedures of these programs so that, working with the WIC applicant, they could, independent of the other programs, reestablish the composition of the applicant's AFDC or Medicaid "family" for WIC purposes. These alternatives would impose significant unnecessary burdens on the applicant and/or the program involved. Such procedures would increase the administrative complexity of the programs and adversely impact on the delivery of benefits to participants, and would, therefore, be in direct opposition to Congressional intent.

In order to establish a proposed adjunct income eligibility procedure which effectively results in an expedited income determination process for such applicants and limits administrative burden on local agencies, as intended by Congress, the Department proposed to expand the definition of "family" in § 246.2 of the regulations solely for use in establishing WIC adjunct income eligibility.

The Department proposed in its rulemaking to use a definition of "family" that would not require the Food Stamp, AFDC or Medicaid Program to report information to WIC authorities. Nor would it require the WIC applicant to secure additional information from these programs. As proposed, the definition of "family" in § 246.2 was revised to provide that, for purposes of determining WIC adjunct or automatic income eligibility only, "family" would be defined as persons living together, except that residents of an institution could not be considered members of a single family. WIC Program authorities could easily apply this definition with minimal burden on applicants. The Department believed that this proposed definition would not exclude any person who would have been encompassed by the AFDC and Medicaid concepts of "family."

The majority of commenters addressing this issue opposed the provision. They objected to different definitions being applied to three types of applicants—adjunct income eligibles, applicants not adjunctively income eligible, and homeless persons—and indicated that such variation would create a "double standard" for eligibility and confusion for WIC clinic staff. In addition, they indicated that individuals may make manipulations in their household compositions or family members, i.e., request AFDC or Medicaid recipients to move in with them, in order to gain WIC adjunct income eligibility status. Other commenters approved the provision with modifications. For example, one commenter expressed concern with the fact that the definition, as proposed, did not address how a foster child should be counted, and recommended the definition incorporate current policy which counts a foster child as a family of one. Several commenters concurred with the definition as proposed as long as the Department's ultimate goal was to move towards a single definition.

In view of the concerns raised by commenters and the intent of Congress that the Department establish an expedited process yet limit the administrative burden on WIC local agencies, the Department has decided in this final rule to use the WIC Program's current definition of "family" for adjunct income eligibility purposes. Therefore, no change is necessary in this final rule to the regulatory text.

The Department agrees with commenters that (1) the definition as proposed is broad and would bring into the WIC Program a number of persons who may not otherwise be income eligible for program benefits, and (2) the use of a common definition of "family" for adjunct and nonadjunct applicants in order to determine WIC income eligibility is preferable in order to ensure limited administrative burden on WIC local agencies. As reflected by commenters, merely living with an individual who has been determined eligible to receive AFDC or a pregnant woman or infant eligible for Medicaid benefits should not necessarily be the sole factor in determining what family members will also be deemed adjunctively income eligibility for WIC. The Department would like to note that the proposed definition of "family" for adjunct purposes was an attempt to account for any slight effect that might result from variation between the WIC Program's definition of "family" and the budgetary or filing unit used by the AFDC and Medicaid Programs. However, after further review, the Department believes that using the current WIC definition of "family" for adjunct income eligibility purposes would encompass all, or virtually all persons that were considered in the budgetary or filing unit for AFDC or Medicaid, and which are categorically eligible for WIC.

For purposes of determining under § 246.7(d)(2)(vii) which family members must also be deemed adjunctively income eligible for WIC, and as set forth in the current WIC Program regulations, § 246.2, "'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." Therefore, those family members, categorically eligible for WIC, who would be adjunctively income eligible are (as is currently the case in WIC) those individuals, related or nonrelated, who usually (although not necessarily) live together and share income and resources with an individual who has been certified eligible to receive AFDC or a pregnant woman or infant who has been certified as eligible to receive Medicaid benefits. Further, in response to commenter concerns, the Department would like to emphasize and clarify how this definition applies to foster children. As

set forth in FNS Instruction 803–3, Rev. 1, a foster child who is the legal responsibility of a welfare or other agency is considered a family of one. Therefore, a foster child who remains the legal responsibility of the State and is certified as eligible to receive AFDC or Medicaid (if the foster child is an infant), can never confer adjunct income eligibility to family members. Only the foster child would be adjunctively income eligible for WIC.

The Department also proposed to revise § 246.7(d)(2)(vii) of the regulations to implement the legislative mandate that a person who documents that he/she is a member of a family which includes an AFDC recipient or a pregnant woman or an infant who receives Medicaid shall be determined adjunctively income eligible for WIC. No commenters addressed this issue. In this final rule, this paragraph has been renumbered as (d)(2)(vi)(A)(*2*) and has also been modified slightly to eliminate potential confusion by replacing the word "receives" with the phrase "is certified eligible to receive." This change is explained fully in Section 3 of this preamble, above, and is intended to include persons who are currently certified as eligible for Medicaid or AFDC although they are not currently participating in those programs.

The remainder of this provision remains as proposed. It retains the requirement that an applicant seeking adjunct eligibility must document, at a minimum, that the family member is certified as eligible to receive such benefits and that the family member resides with the applicant. Examples of documentation to confirm that a family member is certified as eligible to participate in AFDC or Medicaid is also addressed previously in this preamble. Documentation that the WIC applicant resides with the individual certified as eligible to receive such benefits need not be extensive. Such documentation would include, for example, a letter or envelope addressed to the family member who participates in, for example, AFDC, which matches the WIC applicant's address, or a program identification card or notice of eligibility which includes the family member's name and address and matches the WIC applicant's address.

As set forth in newly designated § 246.7(d)(2)(vi)(B) of this final rule, State agencies continue to have the option to accept, as evidence of income within Program guidelines, documentation of the applicant's participation in State administered programs that routinely require documentation of income, *provided* that those programs have income eligibility guidelines at or below the State agency's WIC Program income guidelines. This section had been redesignated as § 246.7(d)(2)(x) in the proposed rule. It has again been renumbered in this final rule.

As set forth in Public Law 101–147, section 123(a)(2) of the law revises section 17(d)(2) of the CNA of 1966 to specify that persons who are at nutritional risk shall be eligible for the WIC Program if the individual meets WIC's maximum income limit (which in the law is prescribed as the limit prescribed for the National School Lunch Program Act for free and reduced price meals), or receives food stamps, AFDC, or Medicaid benefits, or is a member of a family that receives AFDC or in which a pregnant woman or an infant receives Medicaid. Therefore, as set forth in the law, persons determined adjunctively income eligible for WIC are not further required to meet WIC's maximum income limit set at 185 percent of poverty. Accordingly, the Department proposed in § 246.7(d)(2)(x) that persons who are adjunctively income eligible shall not be subject to these income limits. No comments were received on this proposed provision. Therefore, in this final rule, the Department has retained the provision as proposed, however, it has been redesignated as § 246.7(d)(2)(vi)(C). State agencies should be aware that there are cases where an adjunctively income eligible individual's family income can actually exceed the income limit of 185 percent of poverty. For example, in the Medicaid Program, some States employ what is known as the "Katie Beckett" or "TEFRA" option to serve disabled children who in the past would have been institutionalized but now live at home. These children are deemed income eligible for Medicaid without regard to the income of the parents. However, as set forth in the law, participation in Medicaid (or one or more of the other programs described above) is the sole factor in determining an applicant as adjunctively income eligible for WIC benefits, assuming the applicant has elected to apply for WIC benefits on this basis. The fact that a few such individuals may actually have family incomes which exceed WIC guidelines is not determinative in these instances.

b. *Adjunct income eligibility for presumptively eligible recipients of assistance under AFDC or Medicaid (§ 246.7(d)(2)(vi)).* Adjunct income eligibility for fully eligible recipients of Food Stamps and assistance under AFDC and Medicaid was established in a final rule published on February 1, 1990 at 55 FR 3385. That rulemaking did not grant adjunct income eligibility to "presumptively," or provisionally, eligible recipients of AFDC or Medicaid who apply for WIC. No similar presumptive eligibility provision exists in the Food Stamp Program.

Presumptive eligibility essentially entails granting full AFDC benefits to all or, at the option of the State, certain eligible recipient categories, and limited Medicaid benefits to pregnant women based on their categorical eligibility, before they have completed the application process and have been determined fully eligible. Such recipients are subsequently removed from the program if they are determined to be ineligible once the application process has been completed. In both the AFDC and Medicaid Programs, States have the option to provide presumptive eligibility determinations. Currently, approximately 30 States have opted to provide such determinations under the Medicaid Program and approximately 13 States under the AFDC Program. In the February 1, 1990 final rulemaking, the Department did not permit these presumptively eligible recipients of the AFDC and Medicaid Programs to be considered adjunctively income eligible for WIC because the Department needed first to gather more information about the meaning and implications of presumptive eligibility in these programs.

Although, as indicated above, presumptively eligible AFDC and Medicaid recipients may ultimately prove to be ineligible for these programs, in actual practice, as confirmed with our Federal Medicaid and AFDC counterparts, such persons characteristically prove to be fully eligible upon completion of the eligibility determination process. This is not, therefore, a frequent cause of persons ceasing to be certified as eligible to receive benefits under these programs after relatively brief periods of participation, and it is by no means the only cause of early termination. Individuals may cease to be certified as eligible to participate in AFDC, Medicaid, or the Food Stamp Program at any time because these programs, for the most part, reassess eligibility more frequently than the WIC Program. Furthermore, persons may cease to be certified as eligible to receive benefits under these programs for reasons entirely unrelated to changes in their income, e.g., an AFDC recipient who neglects to submit the required monthly reporting form may be terminated from the program. Even when persons cease to be certified as eligible to receive benefits under these programs because of increases in their income, the

possibility remains that they may still meet WIC income eligibility guidelines.

Therefore, the Department intended, as explained in the preamble of its proposed rulemaking, that any WIC applicant determined presumptively eligible for AFDC or Medicaid would also be considered adjunctively income eligible for WIC. However, the proposed regulatory language in § 246.7(d)(2)(vii)(A) inadvertently did not specifically mention presumptive eligibility.

The majority of commenters approved the Department's proposal to extend WIC adjunct income eligibility to persons participating in AFDC or Medicaid based on presumptive eligibility determinations. However, several commenters recommended that the actual regulatory text be revised specifically to grant WIC adjunct income eligibility status to applicants determined presumptively eligible for AFDC or Medicaid.

Therefore, based on the comments received, this final rule, in newly designated § 246.7(d)(2)(vi)(A)(*1*), states that applicants who are certified as eligible to receive Food Stamps, AFDC or Medicaid, or applicants who are presumptively eligible for AFDC or Medicaid, and document such eligibility, shall be determined adjunctively income eligible for WIC.

c. *Cessation of food stamp, AFDC or medicaid benefits and its impact on WIC certification periods and mid-certification disqualification of adjunct income eligible participants (§ 246.7(h)(1)).* An additional issue which was addressed in the Department's proposed rule is how to treat WIC participants who gain adjunct income eligibility only to be subsequently determined ineligible for Food Stamps, AFDC or Medicaid, and the impact, if any, such a determination should have on these individuals' WIC certification periods. Currently, WIC local agencies are required to make a WIC income eligibility determination at the time of initial application and subsequent applications. The standard certification period is 6 months, though pregnant women may be certified for the term of their pregnancies and up to 6 weeks postpartum, and State agencies may opt to certify infants who are under six months of age for a period extending to their first birthday. However, in § 246.7(g) of the current WIC regulations and under current WIC policy, if a reassessment of program eligibility is performed mid-certification and the individual is determined ineligible, the local agency must disqualify the individual in the middle of a certification period. Examples of situations which might trigger a reassessment include a change in income reported by a participant, rehiring of temporarily laidoff workers and validated citizen complaints of eligibility violations. If the State agency has reason to believe that a participant may no longer be income-eligible, prudent management would dictate the need to conduct a reassessment. However, WIC participants are not required to report income changes during certification periods nor are local agencies required to inquire about such changes. State agencies have been informed that they may wish to establish formal policies for when it is appropriate to conduct a mid-certification reassessment.

As discussed earlier in section 3.b. of this preamble, there are a variety of reasons why persons may cease to be certified as eligible to participate in one or more benefit programs that confer adjunct income eligibility for WIC, many of which do not signal a change in financial status. To require in these regulations that adjunctively income eligible WIC participants must report cessation of benefits in any one of these programs during their WIC certification periods would be inconsistent with current policy regarding the reporting of income changes for other WIC participants.

Therefore, the Department proposed in its rulemaking to allow State agencies to confer adjunct income eligibility for the entire WIC certification period to persons who, at the time of application for WIC, were either recipients of Food Stamps, Medicaid, or AFDC, or were members of families which contain an AFDC recipient or a pregnant woman or an infant who receives Medicaid. In the proposed rule, a statement was added to newly designated § 246.7(h)(1) to the effect that the State agency need not, during a certification period, reassess the income eligibility of a person who has been enrolled in WIC based on adjunct income eligibility.

While the majority of commenters approved the proposal that adjunctively income eligible participants be given a full certification period, some commenters opposed the proposed change in the regulations. Although the intent of the proposal was to confer equal treatment for adjunct and nonadjunct income eligible participants by ensuring such participants are provided a full certification period, several commenters noted that the proposed regulatory language change to the mid-certification disqualification requirements resulted in and reflected inequitable treatment. In effect, nonadjunct participants could be disqualified mid-certification while participants adjunctively income eligible for WIC were guaranteed continued participation regardless of income changes during the certification period. Such commenters recommended the regulatory language be revised to reflect consistent mid-certification reassessment policy regardless of the method used to initially determine an individual's income eligibility for WIC.

Therefore, in response to these concerns, the Department has clarified these issues in this final rule. First, no change is reflected in this final rule concerning WIC certification periods. All participants, including those determined adjunctively income eligible or income eligible under the State option set forth in newly designated § 246.7(d)(2)(vi)(B) would be subject to the certification periods set forth in newly designated § 246.7(g)(1), except in those cases where State policy permits shorter certification periods in certain circumstances, as permitted in newly designated § 246.7(g)(1)(v).

Secondly, newly designated § 246.7(h)(1) has been revised with regard to mid-certification disqualification action. State agencies shall continue to ensure that local agencies disqualify an individual during a certification period if, on the basis of a reassessment of WIC eligibility, the individual is determined ineligible. In addition, newly designated paragraph (h)(1) has been revised to clarify the procedures to be followed in the case of participants who at the time of certification were determined adjunctively income eligible (or income eligible under the State option) for WIC. As set forth in this paragraph, an individual determined adjunctively income eligible or eligible under the State option, shall not be disqualified mid-certification solely on the basis of a determination that they (or where applicable for adjunct eligibility purpose, a member of their family) are no longer certified as eligible to participate in AFDC, Medicaid, Food Stamps, or another qualified State-administered program (as permitted in § 246.7(d)(2)(vi)(B)). As discussed above, such participants or a family member or members may no longer be certified as eligible to participate in any one of these programs for reasons entirely unrelated to their income status. In addition, while the WIC participant may have been determined adjunctively income eligible for WIC due to certified eligibility for Medicaid but may have been recently terminated from the Medicaid Program, such an individual could be certified as eligible to participate in AFDC and/or Food

Stamps. Therefore, such an individual would continue to be classified as an adjunct income eligible WIC participant and would not be disqualified mid-certification.

Therefore, as set forth in paragraph (h)(1) of this final rule, State agencies are required to ensure that local agencies disqualify such an individual during a certification period if, on the basis of a reassessment of Program eligibility he/she is no longer deemed adjunctively income eligible (or income eligible under the State option), and after utilizing standard income screening procedures employed for other WIC applicants, such an individual does not meet income criteria. Any mid-certification reassessment of an adjunct income eligible participant must first involve a determination of whether the individual (1) is certified as eligible to participate in at least one of the programs which triggers adjunct income eligibility or (2) is a member of a family which contains an individual certified as eligible to receive AFDC or a pregnant woman or an infant is certified as eligible to receive Medicaid or (3) is participating in a qualified State-administered program, if the State agency has chosen to implement this option. If none of the conditions exist, the reassessment process would proceed with the usual income screening procedures used for individuals not adjunctively income eligible for the Program. If, utilizing these procedures, the individual is no longer income eligible, he/she must be disqualified or terminated from the program mid-certification. Such procedures ensure equal treatment of any WIC participant if his/her eligibility is reassessed mid-certification. The distinction in this final rule is that the process used to reassess an adjunctively income eligible participant must be approached differently in order to ensure an equitable determination of continued eligibility. Just as there is not a requirement for reporting income changes during the certification period, adjunctively income eligible participants are not required to report changes in their status which may effect the basis for their eligibility during the certification period.

4. State Plan Requirements (§ 246.4(a))

a. *Enhanced outreach.* In recognition of the importance of enrolling women in WIC as early in their pregnancy as possible, section 123(a)(4)(A)(ii) of Public Law 101–147 amends section 17(f)(1)(C)(vii) of the CNA of 1966 to require that the State agency's outreach plan include "emphasis on reaching and enrolling eligible women in the early months of pregnancy, including provisions to reach and enroll eligible migrants." This legislation adds an emphasis on outreach and also specifically refers to migrants as a target population. Therefore, the Department proposed to revise § 246.4(a)(7) of the regulations to require a description in the State plan of how the State intends to emphasize contacting and enrolling eligible women in the early months of pregnancy and migrants through its outreach efforts. One commenter responded to this proposal by recommending additional resources be provided State agencies to reach potentially eligible migrants.

This final rule retains the provision as proposed. In response to the commenter's recommendation, the Department notes that through the overall increases in the amount of NSA funding provided to State agencies as a result of increases in program funds appropriated by Congress and the increased percentage of the appropriation which is allocated as NSA funds as a result of Public Law 101–147, State agencies will receive more NSA funds to carry out the activities required by this provision to reach and enroll migrants.

b. *Plans to promote breastfeeding.* Section 123(a)(4)(A)(i) of Public Law 101–147 amends section 17(f)(1)(C)(iii) of the CNA of 1966 to require that State plans include a plan to coordinate WIC operations with "local programs for breastfeeding promotion." Because coordination between WIC and other programs is already covered in § 246.4(a)(8) of program regulations, the Department proposed to modify this paragraph to include breastfeeding promotion.

Further, section 123(a)(4)(A)(iv) of Public Law 101–147 amends section 17(f)(1)(C)(xi) of the CNA of 1966 to require that the State agency describe in its State plan the manner in which it intends to provide nutrition education "and promote breastfeeding."

Nutrition education goals and action plans are currently addressed in § 246.4(a)(9). Therefore, the Department proposed in its rulemaking to revise § 246.4(a)(9) of the WIC regulations to include, as part of the State's description of its nutrition education goals and action plans, a description of the methods that would be used to promote breastfeeding.

No comments were received on these proposed provisions. Therefore, this final rule retains the provision as proposed.

WIC Program regulations (§ 246.11(e)(1)) have long required State and local agencies to encourage all pregnant participants to breastfeed unless contraindicated for health reasons. The breastfeeding promotion and support provisions of Public Law 101–147 therefore serve to reinforce and intensify efforts by WIC Program staff to encourage breastfeeding.

c. *WIC benefits for foster children.* Section 123(a)(4)(A)(ii) of Public Law 101–147 added a new paragraph (viii) to section 17(f)(1)(C) of the CNA of 1966, requiring State agencies to describe in their State plans how they will provide program benefits "to infants and children under the care of foster parents, protective services, or child welfare authorities, including infants exposed to drugs perinatally."

Accordingly, the Department proposed to add a new § 246.4(a)(20) to the WIC regulations to incorporate this legislative mandate.

The majority of commenters addressing this issue approved the provision, as proposed, but suggested modifications. One commenter recommended that the Department develop a method of allowing WIC staff access to such a child's medical records in order to determine nutritional risk. Another commenter recommended that the Department require Federally-funded State child social service programs to coordinate with WIC. While the Department is currently involved in coordination efforts with numerous Federal health and social service programs, we would encourage State agencies to initiate discussions with their State counterparts administering such programs in order to bring about the suggested actions and coordination efforts within the State. With regard to both recommendations, we would encourage State agencies to enter into written agreements with health and welfare programs serving foster children, as provided in § 246.26(d) of the WIC regulations pertaining to confidentiality. Such written agreements provide an effective mechanism to encourage coordination of services and the sharing of information for eligibility and outreach purposes.

Because these comments do not necessitate changes in the provision as proposed, the Department is adopting it without changes.

In explaining the provision, Senator Leahy noted (Congressional Record, August 3, 1989, S10021–2) that Congress intended that implementation of this provision would entail State or local WIC agencies contacting foster care and protective service agencies and providing them with written information about the WIC Program. It would then be up to the foster care and

protective service agencies to make this information available to their clients.

In regard to a clarification requested by a commenter, this outreach effort and provision of WIC materials would include agencies serving foster children in group settings. Because such group settings would be considered only temporary arrangements, they would fall under the very broad definition of homeless facilities used in the WIC Program. As such, this clarification of policy was recently issued by the Department as guidance to States in implementing the final homeless regulations published in the **Federal Register** on August 5, 1992 (57 FR 34500).

d. *Improved access for employed persons and rural-area residents.* Most local WIC clinics are located where WIC participants are concentrated within their service delivery areas, and are organized to take and process WIC applications during "normal" business hours. This may pose problems for WIC applicants and participants who are employed and cannot always take time off from their jobs long enough to complete the application/certification process or participate in nutrition education activities, and for applicants and participants who reside in rural areas which may be a considerable distance away from the nearest WIC local agency or clinic. Similar problems are encountered by these two groups of participants when they need to make subsequent trips to the local WIC office to pick up their food instruments.

Section 123(a)(4)(A)(iv) of Public Law 101–147 focuses attention on this issue by adding a new section 17(f)(1)(C)(x) to the CNA of 1966 requiring State agencies to describe in their State plans how they will "improve access to the program for participants and prospective applicants who are employed, or who reside in rural areas, by addressing their special needs through the adoption or revision of procedures and practices to minimize the time participants and applicants must spend away from work and the distances that participants and applicants must travel, including appointment scheduling, adjustment of clinic hours, clinic locations, or mailing of multiple vouchers." Therefore, a new § 246.4(a)(21) was proposed by the Department with the intent to reiterate this legislative mandate.

Of those commenters addressing this issue, the majority either opposed the provision or approved the provision but expressed some concerns. Some commenters expressed concern with staffing the clinic for late hours, and in one commenter's opinion such action would place too much demand on local agencies to change clinic hours which could result in clinic closings. Several commenters noted that additional funds would be needed to hire additional staff and provide clinic security for extended or after-hours operation.

It should be noted that this State plan requirement addressing improved program access for employed applicants and residents of rural areas is flexible. As proposed, the Department inadvertently used language in the regulatory text which implied that a State's plan to improve program access for employed individuals or individuals who reside in rural areas must include appointment scheduling, adjustment of clinic hours and/or locations and alternate means of delivery of benefits. This inadvertent error may have generated the concerns raised by commenters. As noted above, the legislative language did not specify that all of these procedures must be implemented, but rather cited several examples of procedures which might be implemented. In other words, a State agency may choose to implement procedures to adjust clinic hours and/or locations, but may prefer not to implement alternative procedures for delivery of benefits, such as mailing vouchers. The intent of this legislative provision is to ensure State agencies take some action to recognize and accommodate the special needs of employed persons and those living in rural areas. Therefore, the proposed § 246.4(a)(21) has been modified to clarify that at least one of the procedures/practices contained in this paragraph must be implemented, but that each State agency has the option of choosing which one. State agencies are encouraged, but not required, to implement more than one of these procedures/practices. In addition, this provision has been revised to incorporate the legislative requirement, as discussed below in Section 6.d. of the preamble, that each State agency must adopt policies to require local agencies to schedule appointments for adult individuals applying or reapplying for the WIC Program for themselves or on behalf of others who are employed, if the local agencies do not currently do so.

While several commenters raised valid security and staffing concerns with adjusting clinic hours, there are alternatives available that achieve the goal of improved Program access without significant resource or security implications. For example, if extended evening hours are not feasible in all local agencies, the agencies might consider closing clinic offices early one day during the week and providing Saturday morning clinic hours. Local agencies might also provide "early-bird" morning services. In this way, both the security and staffing issues may have a minimal impact on the feasibility of implementing this procedure. Another option is to establish smaller satellite facilities that are open a half day to one day a week for purposes of certification and food instrument issuance that rotate throughout the local agency's "catchment area" in which hard to reach participants live.

e. *Conforming state plan amendments and related provisions.* The proposed rule contained amendments to conform WIC Program regulations to ensure compliance with certain existing, Department-wide or government-wide requirements of general applicability. The first of these are the conforming amendments to State Plan requirements contained in §§ 246.24(a) (22) and (23). They concern the Department's requirements, set-forth in 7 CFR part 3017, on debarment and suspension and maintenance of a drug-free workplace. In addition, § 246.6(b), which contains the requirements for agreements entered by the State agency with local agencies, was amended in the proposed rule to reflect the debarment and suspension provisions in 7 CFR part 3017. This final rule further amends it to incorporate by reference any applicable restrictions on the use of Federal funds for lobbying which are contained at 7 CFR part 3018. The substance of these provisions is more fully discussed in section 20 of this preamble.

In addition, as discussed in section 10 of this preamble, Public Law 101–147, as set forth in the Department's proposed rulemaking and these final regulations (§ 246.12(r)(8)), authorizes State agencies to issue food instruments to participants through means other than direct participant pick-up. As set forth in this final rule in § 246.4(a)(21), a State agency which chooses to issue food instruments through alternative means must include a description of this system in its State Plan and describe measures to ensure the integrity of program services, such as nutrition education and health care/social services linkages, and fiscal accountability. In addition, as required by § 246.12(r)(8) of this final rule, if a State agency opts to mail WIC food instruments, it must provide justification, in the description of the alternative issuance system in its State Plan, for mailing WIC food instruments to areas where food stamps are not mailed.

5. Outreach/Certification in Hospitals (§ 246.6(f))

A number of local agencies operate the WIC Program within a hospital, or have cooperative arrangements with an area hospital to certify WIC applicants. Such arrangements enable eligible newborn infants to begin receiving WIC benefits from the earliest possible date, and facilitate enrollment of at-risk mothers who may not have been eligible during pregnancy immediately after the birth of their child. Section 123(a)(4)(B) of Public Law 101–147 builds upon existing local agency/hospital WIC relationships by adding a new section 17(f)(8)(D) to the CNA of 1966 to require each local agency which either operates a WIC Program within a hospital or has a cooperative arrangement with one or more hospitals to "advise potentially eligible individuals that receive inpatient or outpatient prenatal, maternity, or postpartum services, or accompany a child under the age of 5 who receives well-child services, of the availability of Program benefits." The legislation also requires that local agencies, "to the extent feasible, provide an opportunity for individuals who may be eligible to be certified within the hospital for participation in the program."

The Department proposed to add a new paragraph (f) to § 246.6 to state that a local agency which has such an arrangement with a hospital would be required to enter into a written agreement with the hospital incorporating the provisions of the legislative mandate. This agreement would, in turn, be appended to the State agency's agreement with the local agency. No requirement exists for local WIC agencies which do not operate the program in a hospital or through a cooperative agreement with a hospital to establish such an arrangement.

An overwhelming majority of commenters opposed the provision as proposed. The main concern expressed by commenters was the Department's proposal that local agencies enter into written agreements with hospitals. Several commenters indicated that such an agreement could potentially jeopardize existing arrangements and cooperative efforts local agencies have established with many hospitals and would be unnecessarily prescriptive.

Based on commenters' concerns, the Department has deleted in this final rule the requirement that local agencies enter into written agreements with hospitals. The remainder of § 246.6(f) is adopted as proposed. As set forth in this paragraph, the State agency is required to ensure that each local agency operating the program within a hospital and/or that has a cooperative arrangement with a hospital advises potentially eligible individuals that receive inpatient or outpatient prenatal, maternity, or postpartum services, or that accompany a child under the age of 5 who receives well-child services, of the availability of program services. In addition, to the extent feasible, individuals who may be eligible to be certified for WIC within the hospital should be provided such an opportunity.

6. Program Referral and Access (§ 246.7(b))

In response to mandates of Public Law 101–147 which place increased emphasis on improving access to the WIC Program and referrals to other health-related or public assistance programs, the Department proposed to add a new paragraph (b) to § 246.7. The specific proposed requirements regarding improved program access and referral, including comments received and changes made in this final rule, are discussed in detail below.

a. *Providing written information on other programs to WIC applicants/participants.* Section 123(a)(3)(D) of Public Law 101–147 adds a new section 17(e)(3)(A) to the CNA of 1966 which requires State agencies to "ensure that written information concerning food stamps, the program for aid to families with dependent children under part A of title IV of the Social Security Act, and the child support enforcement program under part D of title IV of the Social Security Act is provided on at least 1 occasion to each adult participant in and each applicant for the program." The Department proposed to implement this requirement by adding a new subparagraph (1) in newly designated § 246.7(b).

While the majority of commenters approved the provision as proposed, many of these commenters recommended various changes to the regulatory text or questioned the intent of the provision as discussed in the preamble to the proposed rule. First, several commenters recommended that such information be provided to one adult member in any family as opposed to "each adult participant in and each applicant for the program." Commenters noted that as proposed, the requirement could result in multiple copies of the same materials being provided to different household members, including children, in the same family. One commenter recommended the provision of materials be extended to adult caretakers. Secondly, several commenters recommended such information be provided to applicants and participants "on at least one occasion" as required by law and not once each certification period as noted in the proposed preamble.

Based on commenters' concerns, § 246.7(b)(1) has been modified to require State agencies to ensure that written information concerning the Food Stamp, Aid to Families with Dependent Children and the Child Support Enforcement Programs is provided on at least one occasion to "adult participants and adult individuals applying for the WIC Program for themselves or on behalf of others." Because Congress did not intend this provision to result in an inordinate administrative burden, the Department believes that providing one adult member or caretaker of a household with the required information is sufficient and meets the intent of Congress.

In addition, while the proposed rule did not specifically define the phrase "on at least one occasion," the Department suggested in the preamble that the requirement should mean at each certification or recertification. However, based on commenters' concerns that this suggestion went beyond the intent of Congress, the Department wishes to make clear that State agencies have the flexibility to define what "on at least one occasion" means. It may be defined as only at the initial application or at each application or reapplication. Since these comments arose only in connection with the proposed preamble, this portion of § 246.7(b)(1) is being adopted as proposed.

State agencies may find that a routine distribution at every application is actually administratively easier or less burdensome than distribution only at initial application. Also, household circumstances can change dramatically in a 6-month period. For example, some applicants and participants who received the information at the initial WIC application visit may not have contacted one of these programs because they felt their circumstances at that point in time did not necessitate seeking other types of assistance. However, 6 months later at a subsequent WIC application visit, the family's circumstances may warrant contacting other assistance programs. Therefore, the availability of such program information at the reapplication visit would assist the family in seeking additional services. Further, a program's requirements can change from year to year, in which case WIC applicants and participants should be apprised or updated regarding these changes. While

the State agency must require local agencies to provide this information on one occasion, it should consider such factors when determining if more frequent distribution is appropriate.

In addition, a statement of explanation agreed on by the House and Senate to accompany H.R. 24 makes it clear that this requirement can be satisfied by providing a fact sheet which contains basic information about these programs and the addresses and phone numbers of local offices where low-income families can apply (Congressional Record, October 10, 1989, H6863). Further, WIC agencies are not required to document in each WIC participant's or applicant's file that the fact sheet was provided, as this would unnecessarily increase paperwork burdens for local WIC agency staff.

Finally, it is not the intent of this provision to require WIC agencies to develop and create fact sheets on other assistance programs. WIC State and/or local agencies are encouraged to consult with their State and/or local counterparts administering the Food Stamp, AFDC and Child Support Enforcement Programs to ascertain the existence and availability of program fact sheets for dissemination in WIC clinics. State and/or local agencies may simply need to duplicate copies of a fact sheet or materials developed by another assistance program.

The Department wishes to reiterate that this final rule attempts to minimize the administrative and paperwork burden associated with providing information to Program applicants concerning the Food Stamp, AFDC, Medicaid, and Child Support Enforcement Programs. However, the Department believes very strongly that WIC's role in providing referrals to other health and social service programs is critical to WIC's mission to promote and protect the health and well-being of at-risk women, infants, and children. Therefore, the Department fully expects State and local agencies to aggressively promote and pursue appropriate referrals on behalf of their clients and, as appropriate, institute measures to determine whether clients have in fact made contact with other service providers.

b. *Referrals to Medicaid.* Section 123(a)(3)(D) of Public Law 101–147 adds a new section 17(e)(3)(B) to the CNA of 1966 requiring State agencies to "provide each local WIC agency with materials showing the maximum income limits, according to family size, applicable to pregnant women, infants, and children up to age 5 under the medical assistance program established under title XIX of the Social Security Act (in this section referred to as the 'medicaid program')." In addition, a new section 17(e)(3)(C) is added to the CNA by the same section of Public Law 101–147 to require that local agencies, in turn, "provide to individuals applying for the program under this section, or reapplying at the end of their certification period, written information about the Medicaid program and referral to such program or to agencies authorized to determine presumptive eligibility for such program, if such individuals are not participating in such program and appear to have family income below the applicable maximum income limits for the program." In the proposed rule, the Medicaid referral provisions were addressed by adding a new subparagraph (2) to newly designated § 246.7(b).

The majority of commenters approved the provision as proposed. Therefore, the proposed rule is adopted with two minor clarifications the Department feels are needed. First, this final rule clarifies in the regulatory text that information about the Medicaid Program must be provided to "adult individuals applying and reapplying for the WIC Program for themselves or on behalf of others." This clarification is intended to ensure that duplicative materials are not provided to multiple family members applying for the program, which the Department believes was not intended by Congress. This is also consistent with the revision made in this final rule to newly designated § 246.7(b)(1) regarding the provision of written information on the Food Stamp, AFDC and Child Support Enforcement Programs. State and local agencies should note, however, that Congress specified in the law that information on the Medicaid Program must be provided to individuals at the time of application and reapplication. In addition, the joint statement of explanation accompanying H.R. 24 further supports this requirement by directing State agencies to provide local agencies with "the information necessary to conduct such referrals, including * * * the appropriate agency where the participant or applicant could apply for Medicaid" (Congressional Record, October 10, 1989, H6863). Thus, this final rule retains reference to providing this information to those both applying and reapplying to the WIC Program.

Second, the proposed regulatory language has been revised to clarify that referrals to the Medicaid Program include the referral of infants and children to the appropriate agency in the area authorized to determine eligibility for early and periodic screening, diagnostic, and treatment (EPSDT) services. EPSDT services are authorized under title XIX of the Social Security Act and are a component of and provided under the Medicaid Program. In addition, the proposed requirement has been revised to clarify that it includes the referral of pregnant women to the appropriate entity in the area authorized to determine presumptive eligibility for the Medicaid Program, if the State has chosen to make such determinations. As mentioned previously, based on current data, approximately 30 States have opted to provide presumptive eligibility determinations under the Medicaid Program.

Several clarifications are necessary regarding this requirement since it was misunderstood by some commenters. First, the requirement to refer individuals to the Medicaid Program applies only to individuals seeking WIC benefits who do not currently participate in the Medicaid Program. Therefore, the effects of implementing this provision could be minimal if a large majority of WIC applicants and participants already participate in the Medicaid Program. Second, while Medicaid eligibility is based on various factors, including citizenship and alien status, it is not the intent of this provision that WIC local agency staff become experts in Medicaid eligibility and screen WIC applicants based on various Medicaid eligibility factors, including for example, whether such individuals are U.S. citizens. Such extensive screening procedures would be outside the intent and scope of this requirement and are not the responsibility of WIC local agencies in implementing this provision.

As reflected in this requirement, the determination by local clinic staff of whether to refer an individual to Medicaid would entail a comparison of the family income, as determined for WIC income eligibility purposes, to the State Medicaid Program's maximum income limits according to family size, supplied by the WIC State agency to its local agencies. One factor which local clinic staff need to consider, however, in performing this comparison is that Medicaid by law counts a pregnant woman as if the child were born and living with her, whereas by law the WIC Program does not count the child. For example, a pregnant woman applies for WIC benefits and her family size, which includes herself and her spouse, is a two-person household for WIC income eligibility purposes. In performing the comparison of this family's potential Medicaid eligibility, this household's income should be compared to a family

size of three persons on the State's Medicaid income eligibility scale.

Further, as indicated by Congress, it is not the intent that such referrals to Medicaid by local WIC agencies be documented in each individual's WIC file. Moreover, as indicated above in Section 6.a. of this preamble, the requirement to provide Medicaid information can be met by use of a simple fact sheet, and it is not the intent of this provision to require WIC agencies to develop and create a fact sheet on the Medicaid Program. WIC State and/or local agencies are encouraged to consult with their State and/or local Medicaid counterparts to determine the existence and availability of program fact sheets for dissemination in WIC clinics. State and/or local agencies may simply need to duplicate copies of a fact sheet or materials developed by the State's Medicaid Program. Although Congress envisioned minimal administrative burden on State and local agencies in providing applicants/participants with information about other assistance programs, the Department believes, as stated above, that the referral of WIC applicants and participants to other health and welfare programs is a vital WIC function and critical to the WIC Program's mission to promote and protect the health and well-being of at-risk women, infants, and children.

c. *Referrals to other food assistance programs when WIC is fully enrolled.* Section 123(a)(4)(F) of Public Law 101–147 adds a new paragraph 17(f)(19) to the CNA of 1966 which requires each local agency to "provide information about other potential sources of food assistance in the local area to individuals who apply in person to participate in the program under this section, but who cannot be served because the program is operating at capacity in the local area." The Department proposed to incorporate this legislative mandate in the WIC regulations by adding a new subparagraph (3) to newly designated § 246.7(b) of the regulations.

No comments were received on this specific requirement, and the Department is retaining this provision with one minor change to clarify that the information need only be provided to adults who apply or reapply for themselves or on behalf of others. This eliminates duplicative and unnecessary distribution of this information to infants or children. If individuals cannot be served because the program is operating at capacity in the local area, local agencies shall provide to individuals applying or reapplying for the program for themselves, or on behalf of others, information about other potential sources of food assistance in the local area. Such potential sources of food assistance would include, but are not limited to, food banks, food pantries, and soup kitchens which provide emergency or immediate food assistance, as well as more structured food assistance programs such as the Food Stamp Program, the Commodity Supplemental Food Program where available, the Emergency Food Assistance Program, and/or the Food Distribution Program on Indian Reservations (FDPIR), as appropriate. Information and referrals provided under this section need not be documented in participant files.

d. *Scheduled appointments for employed participants and applicants.* Most local agencies utilize an appointment system for the WIC application/certification process. However, in some local agencies, particularly the smaller ones, persons wishing to apply for WIC are seen on a first-come, first-served basis. This type of intake system creates a particular hardship for the employed applicant or participant who must take time off from work in order to be certified for WIC, and may be required to wait a long time for service at the clinic if a number of clients are in line ahead of her. In order to facilitate participation of working families in WIC, section 123(a)(4)(F) of Public Law 101–147 adds a new Section 17(f)(20)(B) to the CNA of 1966 requiring local agencies that do not routinely schedule certification appointments to "schedule appointments for each employed individual seeking to apply or be recertified for participation in such program so as to minimize the time each such individual is absent from the workplace due to such application or request for recertification." Therefore, the Department proposed to incorporate the requirement that local agencies schedule appointments for employed WIC applicants/participants through the addition of a new § 246.7(b)(4). The majority of commenters supported the provision as proposed. This final rule retains the requirement as proposed, but clarifies, consistent with the preceding referral provisions, that this requirement applies to adult applicants seeking to apply or reapply for themselves or on behalf of others.

7. Contacting Pregnant Women Who Miss Certification Appointments (§ 246.7(b)(5))

Section 123(a)(4)(F) of Public Law 101–147 adds a new section 17(f)(20)(A) to the CNA of 1966 requiring the State agency to adopt a policy that would "require each local agency to attempt to contact each pregnant woman who misses an appointment to apply for participation in the program, in order to reschedule the appointment, unless the phone number and the address of the woman are unavailable to such local agency."

The statement of explanation agreed upon by the House and Senate which accompanied H.R. 24 provides specific guidance regarding how this mandate should be implemented. First, Congress did not envision that compliance would entail "elaborate efforts" by the local agency; rather, "a brief phone call or the mailing of a post card would suffice" (Congressional Record, October 10, 1989, H6863). Second, although the legislation does not require that an effort be made to contact the pregnant woman who has missed an appointment if the local agency lacks her address and phone number, Congress expressed the view that "local agencies should get her phone number (and/or the address) when a pregnant woman makes an appointment. This should become a routine part of making appointments for pregnant women, * * * (if it) * * * is not already" (Congressional Record, October 10, 1989, H6863). The Department believes that this is, in fact, standard practice at most local agencies.

In commenting on this provision at the time S. 1484 was introduced, Senator Leahy indicated that it "applies at the initial certification interview only. It does not apply to missed appointments for picking up WIC vouchers or to missed appointments at recertification" (Congressional Record, August 3, 1989, S10018).

Pursuant to the direction of Congress that follow-up contacts be made, but that the process not be labor-intensive (Congressional Record, October 10, 1989, H6863), the Department proposed to add a new paragraph (b)(5) in § 246.7 which required each local agency to contact each pregnant woman who misses her first appointment to apply for participation in the Program in order to reschedule the appointment. In addition, the Department proposed that each local agency, at the time of initial contact, would be required to request an address and telephone number where the pregnant woman could be reached. Without this requirement, it would be difficult for local agencies to conduct the Congressionally mandated follow-up with pregnant women who miss their first certification appointment, and the Congressional intent of promoting early program intervention for these women would be thwarted. In addition, the Department proposed several minimum procedures to comply with the

legislative requirement. First, if the applicant failed to attend her first certification appointment, the local agency would be required to attempt to contact her by telephone or mail. If she is contacted by phone, she must be offered one additional certification appointment. Second, if the applicant could not be reached by telephone and initial contact is by mail, the local agency would be required to send the applicant one card or letter requesting that the applicant contact the local agency for a second appointment.

The majority of commenters supported these proposed requirements and indicated that it is essential that the program facilitate the certification of this high-risk population. Several commenters focused their concerns on the proposed minimum procedural requirements. One of these commenters indicated that follow-up calls are ineffective due to nonworking numbers, recordings, and frequent moves by some individuals, and further noted that there is no consensus such calls increase the show rate. Some commenting State agencies recommended the Department provide State and local agencies with the flexibility to determine procedurally how to implement the provision. They indicated that other types of follow-up procedures could produce more effective show rates. For example, a local agency could schedule an appointment and provide an alternate appointment in a followup postcard. Applicants would be instructed to call if the scheduled appointment was unacceptable. These commenters emphasized that local agencies should have the option to use a reminder (before the appointment) and/or follow-up system. They indicated the postcard and reminder system and calling the day before the appointment are effective procedures.

While the Department must require compliance with the legislative mandate to contact pregnant women who miss their initial certification appointment, the Department does have flexibility to modify in this final rule the minimum procedural requirements to accomplish this mandate. Therefore, based on commenters' concerns, proposed paragraph (b)(5) has been modified in this final rule to only require that each local agency must attempt to contact each pregnant woman who misses her first appointment to apply for participation in the Program in order to reschedule the appointment. As noted above, Congress intends this requirement to apply at the initial certification interview only and does not apply to missed appointments for WIC voucher pick up or to missed appointments at subsequent applications. In order to facilitate such an attempt to contact these women if an initial certification appointment is missed, this final rule retains the requirement, from the proposed rule, that local agencies must request an address and telephone number of each pregnant woman at the time of the initial contact.

As requested by commenters, the specific procedures for implementing this requirement have been deleted from this final rule. It is the responsibility of State and/or local agencies to determine appropriate procedures and they should be addressed in each State's procedure manual. In developing such procedures, State and/or local agencies should consider those addressed in the proposed rule, commenters' recommendations as noted above and any first-hand experiences in attempting to contact applicants in order to minimize no-show rates. As suggested by commenters, the Department also encourages, but does not require, local agencies to send out a reminder notice prior to the certification appointment, especially where there is a long lag time between the initial contact and the date of the appointment. Such a precaution could reduce the number of missed initial appointments requiring follow-up action.

8. Prior Notification to Participants for Termination Due to Funding Shortages (§ 246.7(h)(2))

Section 246.7(g)(2) in current regulations (redesignated § 246.7(h)(2) in the proposed rulemaking) permits a State agency to discontinue program benefits to certified participants in the event that it experiences funding shortages which would warrant taking such action. Because such a step would constitute an adverse action against a participant, section 123(a)(4)(C)(ii) of Pub. L. 101–147 adds a new section 17(f)(9)(B) to the CNA of 1966 requiring State agencies in this situation to first issue a notice to affected participants identifying "the categories of participants whose benefits are being suspended or terminated due to the shortage." The Department proposed to add this requirement in a new paragraph (j)(9) in § 246.7.

Current regulations require State agencies to provide 15 days advance notification of disqualification. To maintain consistency with the statutory language, the Department proposed that the first sentence of redesignated § 246.7(j)(6) (formerly § 246.7(i)(6)) be revised to indicate that 15 days advance notice must be given in cases of suspension, as well as disqualification.

No comments were received on these proposed provisions. Therefore, the Department is retaining these requirements as proposed. As discussed in the proposed rule preamble, State agencies would be able to define the "categories" of participants to be terminated or suspended in a variety of ways, given the alternative methods available to them to achieve the necessary reduction in costs through mid-certification disqualifications. Further, as discussed in Section 6.c. of this preamble, § 246.7(h)(3) of the final rule requires local agencies to provide referrals to other food assistance programs when their caseloads are full. State agencies may wish to advise their local agencies to provide similar referrals to WIC participants who are disqualified or suspended due to a funding shortage.

9. Documentation of Nutrition Education in a Master File (§ 246.11(e)(4))

Nutrition education has always been an integral component of the WIC Program. Any nutrition education provided to WIC participants has always been required by regulations to be documented in each WIC participant's casefile. However, many nutrition education activities, especially those directed toward children or involving considerable dialogue (such as food preparation demonstrations), lend themselves to group activities. In such cases, individual casefile documentation becomes an administrative hardship for the local agency staff. Therefore, section 213(a)(1) of Public Law 101–147 adds a new Section 17(e)(5) to the CNA of 1966 which alleviates this paperwork requirement by allowing local agencies to "use a master file to document and monitor the provision of nutrition education services (other than the initial provision of such services) to individuals that are required, under standards prescribed by the Secretary, to be included by the agency in group nutrition education classes." The law applies the master file documentation option to nutritional education contacts, after the first such contact during a certification period, which are provided, per Departmental mandate, to persons in groups. However, because of the wide variety of both the nutrition education services that can be provided to WIC participants and the techniques and strategies appropriate for providing these various services, the Department does not dictate terms and conditions under which subsequent nutrition education contacts could be provided in a group setting.

The Department proposed to revise § 246.11(e)(4) to comply with this legislative requirement by permitting local agencies to document nutrition education contacts, except for initial contacts, in a participant master file when such contacts are provided in a group setting. Further, proposed § 246.11(e)(4) provided that should a participant miss (no-show or refusal) a nutrition education appointment, the local agency is required, for purposes of monitoring and further education efforts, to document this fact in the participant's file, or, at the local agency's discretion, in a master file, in the case of a second or subsequent missed contact where the nutrition education was offered in a group setting.

The majority of comments approved this provision as proposed. They indicated that this provision would help to reduce and eliminate the current paperwork burden, thus allowing more time on actual nutrition education. Therefore, this final rule retains the provision, as proposed.

With regard to this requirement, State agencies may not prohibit a local agency from exercising the option to document nutrition education in a master file, as permitted in these final regulations. First, as designated by Congress in Public Law 101–147, this is a paperwork reduction burden provision. Secondly, the legislative language specifically refers to "Each local agency * * *" when addressing the option to use a master file. For State agencies to prohibit local agencies from exercising this option would be in direct violation of the Congressional intent of this provision.

One commenter recommended the Department suggest mechanisms for effective monitoring of the provision when implemented by local agencies. The Department will address this issue in guidance materials which will be issued to assist State agencies with this task.

10. Alternatives to Participant Pick-Up for Issuance of WIC Food Instruments (§§ 246.7(f)(2)(iv), 246.7(h)(1)(ii) and 246.12(r)(8))

Section 213(a)(2)(A)(ii) of Public Law 101–147 adds a new section 17(f)(7)(B) to the CNA of 1966 allowing States to provide for the delivery of WIC food instruments "to any participant who is not scheduled for nutrition education counseling or a recertification interview through means, such as mailing, that do not require the participant to travel to the local agency to obtain the food instruments." This section of the law also requires State agencies to describe any plans for issuance of vouchers by mail in its State Plan. Further, the law states that the Department may disapprove a State plan with respect to issuance of WIC vouchers by mail "in any specified jurisdiction or part of a jurisdiction within a State only if the Secretary finds that such issuance would pose a significant threat to the integrity of the program * * *".

By including the alternative issuance provision in Public Law 101–147, Congress intended to broaden the authority of State agencies to deliver food benefits to participants. Problems of convenience, transportation, and accessibility to the local agency can be addressed by use of alternative means of issuance of WIC food instruments. In addition, alternative means of issuance of WIC food instruments can significantly alleviate clinic congestion and keep participants as well as applicants from having to wait for long periods of time at local agencies. Local agency staffs would also be freed by use of other issuance alternatives to spend more time on certification and nutrition education activities, including high-risk contacts.

As indicated above, however, Congress did impose certain restrictions on the issuance of food instruments through alternative means. First, the method may not, in the judgment of the Department, pose a significant threat to the integrity of the program. The concept of program integrity encompasses both the quality and coordination of the full range of program services—supplemental foods, nutrition education, and health care referrals—and fiscal accountability. Congress specifically stressed the former aspect of program integrity by stipulating that food instruments may not be mailed to participants who are scheduled for a certification interview or for a nutrition education contact. Applicants must be seen when they enter the program in order to provide referrals and to ensure integration into the health care system with which WIC is coordinated.

Under current WIC regulations (§ 246.12(r)(8)(i)–(ii)) and in accordance with guidelines established by the State agency, local agencies have had the authority to mail food instruments on a case-by-case basis to individual participants in specific circumstances which make direct pick-up infeasible, e.g., illness or imminent childbirth. State agencies have also had the authority to permit the mailing of food instruments on a local agency-wide basis in response to specific temporary conditions, e.g., inclement weather or damage to a bridge that is a critical transportation link. In such circumstances, certification appointments and nutrition education have been rescheduled and food instruments mailed.

The new legislation expands the authority of States to mail food instruments. Therefore, in order to comply with the legislative mandate, the Department proposed to revise § 246.12(r)(8) to expand State agency authority to implement alternative issuance systems through means other than direct pick-up, such as mailing food instruments, provided that direct pick-up must be required of participants when scheduled for nutrition education or for an appointment to determine whether participants are eligible for a second or subsequent certification period. The Department further proposed that the State agency may provide the issuance of food instruments through means, such as mailing, to specified categories of participants in specified areas. However, as proposed and per the mandate of Public Law 101–147, State agencies would be required by the new § 246.4(a)(21) (discussed in Section 4.d. of this preamble) to describe in their State plans any alternative food instrument distribution policies and systems. Further, for conformity, the reference to § 246.12(r)(8)(i) and (ii) in § 246.7(f)(2)(iv) was proposed to be changed to § 246.12(r)(8).

Use of an alternative means of issuance, such as mailing food instruments, in no way reduces the State and local agency's responsibility to ensure accountability for issuance and receipt of food instruments, as required by § 246.12(l) of current regulations. Therefore, this was an issue which was addressed by the Department in the preamble to its proposed rulemaking. The Department indicated that State agencies which opted to distribute food instruments by mail would be expected to ensure that the food instruments do, in fact, reach the intended persons. In order to monitor non-participation, the State agency instead would need to trace food instruments not redeemed back to participant files. Therefore, the Department proposed to revise § 246.7(h)(1)(ii) to specify that non-redemption of food instruments for a number of consecutive months would be a basis for disqualification.

Mailing by certified mail, return receipt requested, was a method identified in the preamble to the proposed rule that should be considered by State agencies to ensure accountability for issuance and receipt of food instruments by participants. Commenters were asked, in response to

the proposed rule, to suggest other means of ensuring accountability in alternate issuance systems which could be shared as guidance to State and local agencies in the preamble to the final rule.

The majority of commenters overwhelmingly opposed the proposed provision in § 246.7(h)(1)(ii) whereby participants could be disqualified for failure to redeem food instruments for a number of consecutive months if such instruments were provided by the State agency by means other than direct pick-up. Commenters viewed this requirement as creating an undue administrative burden on State and local agencies to track unredeemed food instruments in such cases. In addition, commenters indicated that such a requirement was not feasible given the timeframe which exists before data are available to State agencies on non-redemption. Commenters also indicated that the provision, as proposed, created a different requirement for WIC food instruments mailed versus those instruments picked up at the clinic. Several commenters noted that if a State agency can ensure delivery, there is no need to require the tracking of redemption data for such participants.

With regard to the proposed revision to § 246.12(r)(8), which provides State agencies with the option to implement alternative means of delivery of WIC food instruments other than by means of direct pick-up, the majority of commenters approved the provision but offered comments regarding their experiences with mailing of food instruments or recommendations on the method which should be used to mail the food instruments to participants. Those supporting the provision indicated that implementation of this option would reduce transportation and accessibility barriers to WIC services.

Of those approving the provision but suggesting modifications, one commenter recommended that State agencies be given discretion in procedural implementation, and another commenter recommended the Department delete the reference to mailing food instruments to "specified categories of participants in specified areas" because this created limitations on a State agency's implementation of the provision. One commenter viewed the proposed preamble discussion as contradictory and recommended the Department clarify the relationship between this new provision and policy which has been in existence regarding the circumstances in which food instruments may be mailed.

The majority of commenters responded to the request in the preamble to the proposed rule for suggestions of methods State agencies may want to consider in the mailing of food instruments to ensure accountability and receipt of the food instruments by participants. Several commenters recommended that food instruments should not be sent certified mail due to the expense.

They recommended that food instruments mailed should be sent first class, but that the following phrase should be added on the envelope: "Do Not Forward, Return to Sender" or "Do Not Forward, Address Correction Requested." One commenter recommended that for security purposes the name of the clinic should be deleted from the return address. The Department will provide State agencies with additional guidance in this area, using experience gained and effective techniques utilized by WIC State agencies which currently mail WIC food instruments in limited circumstances and the experience and knowledge gained by States in mailing food stamps in the Food Stamp Program.

Based primarily on comments received on § 246.12(r)(8) of the proposed rulemaking, the Department has made the following changes in this final rule. First, based on comments received on the Department's proposed revision to § 246.7(h)(1)(ii) regarding mid-certification disqualification for failure of participants to redeem mailed food instruments for a specified number of consecutive months, the Department has modified this requirement in this final rule. The intent of the proposed revision was to establish a mid-certification disqualification policy for participants mailed food instruments which would be comparable to disqualification due to failure on the part of participants to pick up their WIC food instruments. Therefore, in this final rule, § 246.7(h)(1)(ii) has been revised to state that a participant may be disqualified mid-certification for failure to obtain food instruments or supplemental foods for a number of consecutive months, as specified by the State agency, evidenced by indicators such as failure to pick up supplemental foods or food instruments, nonreceipt of food instruments as evidence by return of mailed instruments, or failure to have an electronic benefit transfer (EBT) card revalidated to authorize the purchase of supplemental foods. As set forth in this final rule, this requirement ensures similar treatment of all participants, regardless of the method in which they may receive or obtain authorization to purchase supplemental foods, including the mailing of food instruments or use of an EBT system as alternative issuance systems.

Second, for clarification purposes, paragraph (r)(8) has been revised to include reference to an EBT system as an example of an alternative WIC food instrument issuance system. An EBT system has been pilot-tested by one WIC State agency, who is currently in the process of developing an expanded demonstration project. Other State agencies have also shown an interest in this type of issuance system.

Third, as requested by commenters, a reference in the proposed rule to what appeared to be limitations on the mailing of food instruments to only "specified categories of participants in specified areas" has been deleted in this final rule. Therefore, this paragraph allows State agencies the option to provide for the issuance of food instruments through an alternative means, such as EBT or mailing to any participant, except when participants are scheduled for nutrition education or for an appointment to determine whether participants are eligible for a second or subsequent certification period, unless FNS determines that such action would jeopardize the integrity of program services or program accountability.

Fourth, § 246.12(r)(8) has been revised to specify that if a State agency opts to mail WIC food instruments, it must provide justification, as part of the description of its alternative issuance system in its State plan, as required in § 246.4(a)(21) of this final rule, for mailing WIC food instruments to areas where food stamps are not mailed. In assessing the impact on program integrity and accountability, WIC State agencies and FNS will review Food Stamp Program experience in mailing food stamps. Some States do not mail food stamps either statewide or to certain areas due to the probability of or experienced high mail issuance losses. As of Fiscal Year 1992, approximately 11 States have chosen not to implement a mail issuance system for food stamps. Some States, however, that have implemented mail issuance systems may only mail food stamps to certain areas of the State. A decision by a State not to mail food stamps could be based on, for example, the probability of or experienced high mail issuance losses, the use of an EBT system in some areas, or other reasons which may be unrelated to mail issuance losses.

WIC State agencies and FNS must review such decisions on the part of States in determining if it is appropriate to mail WIC food instruments to such areas. Close coordination on this issue with State Food Stamp Program staff

will be necessary. For example, WIC State agencies will need to determine whether a State has chosen not to mail food stamps or to mail only to certain areas, the reason(s) why such decision(s) were made, and if food stamps are being mailed, the dollar value of current mail issuance losses in the State's Food Stamp Program. In approving a WIC State agency's plan to mail to areas where food stamps are not mailed, FNS will not approve a plan in which all WIC participants would be mailed food instruments in an area where food stamps are not mailed due to the probability of or experienced high mail issuance losses. However, FNS may approve, for example, a State agency's plan to mail WIC food instruments in an area where food stamps are not mailed due to reasons unrelated to mail issuance losses.

Fifth, in this final rule, paragraph (r)(8) further provides that State agencies which opt to mail food instruments must establish and implement a system which ensures the return of food instruments to the State or local agency if the participant no longer resides or receives mail at the address to which the food instruments were mailed. Inclusion of this requirement is intended to reflect a balance between responding to commenters' concerns that the Department permit greater flexibility in the procedural implementation of this requirement and the Department's concern, that such procedures ensure program accountability for the issuance and receipt of mailed food instruments. While some commenters viewed the tracking of unredeemed mailed food instruments as an administrative burden, good program management dictates a reconciliation of food instruments, as required in § 246.12(n)(1), which includes reconciling food instruments issued to food instruments redeemed, unredeemed, lost, stolen and voided.

Currently, while alternative means of issuance present certain advantages of convenience for participants and local agencies, these same advantages can be achieved through modifications of the participant pick-up system. Section 246.12(r)(7) of current regulations permits State agencies to give the participant up to a 3-month supply of food instruments at one time. Thus through this multiple-issuance strategy, States can reduce to two the number of times the participant must visit the WIC local agency during the standard 6-month certification period. The new statutory provision regarding alternative means of issuance would not change the number of personal appearances required per certification period.

In any event, the Department would not recommend that State agencies reduce the participant's frequency of visits to the local agency merely for reasons of local agency convenience, independent of consideration for the quality of service to participants.

In addition, a commenter requested clarification on the relationship of this new legislative provision to what has been permitted by the Department in the past in terms of mailing food instruments. In the past, mailing of food instruments was permitted only to meet specific needs on a case-by-case basis. The new provision would permit a State agency to continue their current policy of mailing food instruments on a case-by-case basis or expand its use of mailing food instruments. For example, a State agency could continue to permit a nutrition education or a certification appointment to be rescheduled if extenuating circumstances exist, e.g., illness, inclement weather, and authorize the mailing of that month's food instruments. A participant who may have been scheduled for a certification visit could be mailed food instruments due to inclement weather as long as the mailed food instruments represent no more than a one-month extension to the participant's certification period, as permitted by the current § 246.7(f)(3) which is newly designated as § 246.7(g)(3) in this final rule. The certification appointment (or nutrition education session) *must* be scheduled during the next issuance cycle and the participant must be required to pick up WIC food instruments at the time of her rescheduled visit.

State agencies which decide to mail food instruments may want to consider which groups of participants (based either categories or on location) are most in need of this service and least in need of regular direct contact with WIC staff. For example, mailing might be appropriate for lower risk participants in a sparsely populated rural area where they must travel great distances to reach their WIC clinic, and for working families. Mailing might be less appropriate for pregnant women, for whom regular interface with clinic staff—and the health care system which may be on WIC clinic premises—can contribute significantly to positive pregnancy outcomes. In the final analysis, State agencies must weigh the benefits of participant convenience and reduced administrative burden against the benefit of frequent contact with participants and the goal of balanced, coordinated delivery of services, which is facilitated through such contact. Furthermore, the State agency will need to assess which local agency service area(s) are more appropriate locations for mailing of food instruments. It is not likely to be appropriate, given numerous factors which must be considered, including program integrity and accountability, for a State agency to establish a policy of mailing food instruments to all participants statewide.

The Department will carefully scrutinize plans for alternative issuance of food instruments through the State plan review process and monitor the effects of implementation during management evaluations in order to ensure that alternative issuance systems do not jeopardize the quality of program services or fiscal accountability.

As discussed in Section 4.d. of this preamble, State agencies opting to implement an alternative WIC food instrument issuance system must describe this system in its State plan, as required by Public Law 101–147 and addressed in §§ 246.4(a)(21) and 246.12(r)(8) of this final rule.

11. Nutrition Services and Breastfeeding Promotion (§§ 246.14(c)(1) and 246.16(b)(2))

This final rule revises Program regulations to incorporate certain non-discretionary funding requirements of Public Law 101–147, which are described below. Although not previously proposed, this final rule incorporates these non-discretionary changes in §§ 246.14(c)(1) and 246.16(b)(2).

Prior to the enactment of Public Law 101–147, section 17(h)(1) of the CNA of 1966 required that not less than one-sixth of the funds expended by each State agency for NSA costs be used for nutrition education activities, but there was no requirement that any portion of this amount be used specifically for promotion and support of breastfeeding among WIC mothers. Section 123(a)(6) of Public Law 101–147 recognizes the importance of breastfeeding by creating a new section 17(h)(3)(A)(i)(II) of the CNA of 1966.

This new section earmarks $8 million in State agency NSA grants for the promotion and support of breastfeeding among WIC mothers. The mandated utilization of this $8 million, and its relationship to the existing one-sixth NSA requirement are described below.

The earmarked $8 million is the amount of NSA funds that, at a minimum, must be expended to support and promote breastfeeding. These funds are intended to be used to promote increases in the number of breastfeeding

mothers and the length of time that these mothers breastfeed. As noted above in this preamble in section 2.f., breastfeeding aids are allowable administrative expenses, as set forth in § 246.14(c)(10) of this final rule. In addition, this final rule revises § 246.14(c)(1) to specify that in addition to the cost of nutrition education, the cost of breastfeeding promotion and support activities which meet the requirements of § 246.11 are allowable nutrition services and administration costs.

In addition, this final rule revises § 246.14(c)(1) to specify that each State agency's target share of the $8 million expenditure requirement will be determined by the State agency's average monthly number of pregnant and breastfeeding WIC participants as a percentage of the average monthly number of pregnant and breastfeeding participants in the WIC Program in all State agencies. These targets will be announced at the same time that final grants for the fiscal year are announced. As discussed further in section 16 of this preamble, in this final rule, § 246.16(b)(2) has been revised to indicate that the grant levels will be issued in a timely manner.

As set forth in § 246.14(c)(1) of this final rule, the $8 million expenditure target for breastfeeding promotion and support provided by section 123(a)(6) of Public Law 101–147 is an augmentation of the amount of funds State agencies must spend on nutrition education and related activities as specified in newly-amended section 17(h)(3)(A)(i) of the CNA of 1966. The total spending requirement for nutrition education, including breastfeeding promotion and support, is one-sixth of the amount of NSA funds allocated to the State agency for nutrition education in general, plus the State agency's proportionate share of the $8 million targeted specifically for breastfeeding promotion support. Of this aggregate amount, the targeted amount is the minimum which must be spent on breastfeeding promotion and support. However, total spending on breastfeeding promotion and support may exceed this minimum, since funds from the one-sixth allocation may be used for additional breastfeeding promotion and support, or for other nutrition education purposes.

The following is a simplified example of how NSA funds, the one-sixth spending requirement for nutrition education and related services and targeted amounts for breastfeeding promotion and support are calculated for a particular State:

Total NSA Expenditures	$600
Proportionate Share of $8 Million (targeted for breastfeeding promotion and support only)	10
⅙ Nutrition Education Requirement (may include additional breastfeeding promotion and support)	100
Aggregate sum of ⅙ and Proportionate Share (total expenditure requirement for nutrition education and breastfeeding promotion and support)	110
Total remaining funds for other NSA	490

As allowed by section 123(a)(6) of Public Law 101–147 and as set forth in § 246.14(c)(1) of this final rule, State agencies are permitted, subject to approval by the Department, to spend less than their identified breastfeeding support and promotion target amount if: (a) The State agency so requests, and (b) the request is accompanied by documentation that other resources will be used to conduct nutrition education activities at a level commensurate with the level at which such activities would be conducted if the target share amount were expended. State agencies may also request permission to spend less than the amount earmarked for nutrition education if they can, similarly, document that other resources are being used to meet the requirement. These other resources include in-kind services provided by volunteer private organizations and professionals, or other State and local personnel. Section 246.14(c)(1) has also been modified to clarify that State agencies should submit documentation of other resources to be used in lieu of NSA funds to the appropriate WIC regional office for advance approval. If a State agency does not have such documentation approved, and its nutrition education and breastfeeding promotion and support expenditures are less than the required amount of expenditures, the Department will issue a claim for the difference.

12. Funding Authorizations—§§ 246.16(a)(1) and 246.16(a)(6)

Section 123(a)(5) of Public Law 101–147 amends section 17(g)(1) of the CNA of 1966 to change the funding authorization for the WIC Program to include a specific provision that allows appropriations 1 year in advance of the beginning of the fiscal year in which the funds become available for disbursement to the States. If appropriations are enacted for a year in advance, this would enable State agencies to know total grant funds for the current fiscal year and the next fiscal year. This provision previously existed for the WIC Program and appeared in section 3 of the National School Lunch Act. It has now been specifically referenced in the WIC authorizing legislation. Therefore, this final rule revises § 246.16(a) to add a new paragraph (a)(1) to incorporate this provision.

Section 123(a)(5)(D) of Public Law 101–147 amends section 17(g)(5) (as redesignated by section 123(a)(5)(B)) of the CNA of 1966 to expand funding for studies and demonstration projects. It permits the Secretary to use one-half of 1 percent (not to exceed $5 million) for evaluation and demonstration purposes, which is an increase from the previous statutory limit of $3 million. Section 246.16(b)(1) of the current regulations has been redesignated as § 246.16(a)(6) in this final rule and revised to address the Secretary's authority to increase the amount of funds used for studies and demonstration projects.

13. Nutrition Services and Administration (NSA) Funding—§ 246.16(c)(2)

Administrative costs associated with the WIC Program were formerly referred to as administrative and program services costs. Public Law 101–147 has changed the name of these costs to "nutrition services and administration (NSA) costs". Therefore, the definition of "Administrative and program services costs" in § 246.2 has been removed and replaced with a definition of "Nutrition services and administration costs." In addition, all other references within part 246 to "administrative and program services" costs or funds have been revised accordingly.

During the past few years, WIC Program participation has increased substantially in States that have implemented measures to lower WIC food costs. This increase in participation, as well as additional Program requirements in areas such as drug abuse education and referral, prevention and detection of vendor abuse, improved management information systems at the State and local level, improved program access for rural areas and the working poor, improved nutrition services and more effective Program coordination, had been increasingly difficult to accomplish within existing limits on funds set for NSA. Previously, section 17(h)(1) of the CNA of 1966 mandated that 20 percent of the funds appropriated for the WIC Program (less funds used for evaluation and demonstrations) be made available for State agency and local agency costs for NSA. There has been extensive discussion and research to determine

whether the 20 percent funding limitation for NSA was an appropriate level to permit State and local programs to operate the WIC Program. As mandated in section 8(c) of the Commodity Distribution Reform Act and WIC Amendments of 1987 (Pub. L. 100–237), the Department submitted to Congress in March 1989, a report entitled Study of Funding for Nutrition Services and Program Administration in the WIC Program. The report concluded that the WIC Program faced a serious erosion of per participant administrative resources due to significant participation increases. Among the solutions proposed was the establishment of a base-level NSA grant per participant with an appropriate inflation index. Public Law 101–147 amends section 17(h)(1) of the CNA of 1966 to eliminate the 20 percent limitation for NSA funding and, in lieu thereof, adopts a national guaranteed average administrative grant per person to be used in determining the amount of total funds available for NSA. As described below in a simplified example, NSA funds will now be apportioned on a per-participant basis.

The amount available for NSA will be determined by the Department based on the ratio of the national guaranteed average administrative grant per person to the total projected cost per person. This ratio is derived as follows. Once the national guaranteed average administrative grant per person is calculated, the projected per participant food cost is determined based on State agency reported food expenditure and participation data. The national guaranteed average administrative grant per person is then added to the projected food cost per participant to estimate the total projected cost per person. The ratio of the NSA cost per participant to the total cost per participant can then be derived. This ratio determines the amount available for NSA. In the following simplified example, 25 percent of the appropriation would go to NSA since the guaranteed average administrative grant per person represents 25 percent of the total projected cost per person.

Projected Food Cost/Person	$30–75%
Guaranteed Admin./Person	$10–25%
Total Projected Cost/Person	$40–100%

Section 123(a)(6) of Public Law 101–147 also amends section 17(h)(1)(B)(ii) of the CNA of 1966 to change the method for determining the inflation adjustment for NSA funding. Previously, the same inflation adjustments were applied to both food benefit funds and NSA funds. Many State agencies argued that inflationary increases in food costs did not track with inflationary increases in salary and wage costs. In the Study of Funding for Nutrition Services and Program Administration in the WIC Program, it was shown that from Fiscal Year 1981 through Fiscal Year 1987 the average administrative expenditure per person had risen by an average of 2.3 percent per year. This rate of increase has been much lower than the 7 percent rate of inflation for salaries during the same time period. Salaries constitute one of the largest NSA costs. Approximately 70 percent of all NSA expenditures are for salaries and related benefits. As State agencies can only expend the Federal WIC funds granted to them, their expenditures could not keep pace with inflation. In recognition of these NSA expenditure trends, Congress determined that separate inflation indices were needed for food and NSA funding, which are incorporated into revised § 246.16(c)(2).

a. *National NSA Funding.* Section 123(a)(6) of Public Law 101–147 amends section 17(h)(1) of the CNA of 1966 to guarantee funds sufficient to provide a national average per participant grant for NSA. As stipulated in such amendments, § 246.16(c)(2) of this final rule specifies that the national average per participant grant shall be equal to the national average per participant grant for Fiscal Year 1987, adjusted to reflect annual inflation increases. The Fiscal Year 1987 figure is $8.24. Section 17(h)(1)(B)(ii) provides that the adjustment for inflation for a current fiscal year will be made by revising the national average per participant grant for NSA for Fiscal Year 1987 to reflect the percentage change from the base year level in the index for State and local government purchases. This index is calculated using the implicit price deflator, and is published by the Bureau of Economic Analysis of the Department of Commerce. It measures the price increase of State and local government purchases including compensation for employees and purchases of structures, durable goods (such as equipment), nondurable goods (such as food, paper goods, and clothing), and services.

The base year for the index, as established in section 17(h)(l)(B)(ii)(I), is the 12-month period ending June 30, 1986. It has a value of 100. The inflation adjustment shall reflect the percentage change between this base year value and the most recent estimate that is available as of the start of a current fiscal year of the value of such index for the 12-month period ending June 30 of the previous fiscal year. The difference between the most recent estimate and the base index of 100 is multiplied by $8.24 to establish a current year's national average per participant grant. In any fiscal year, any remaining funds after funds for NSA have been identified will be made available for food benefits. These requirements are also incorporated into revised § 246.16(c)(2).

b. *Allocations to state agencies.* Section 123(a)(6) of Public Law 101–147 amends section 17(h)(2)(A) of the CNA of 1966 to require that the formula for allocating NSA funding must be designed to take into account the varying needs of each State, participation levels in each State, a minimum grant amount, and other factors which promote proper, efficient and effective program administration. Section 123(a)(6) of Public Law 101–147 also amends section 17(h)(2)(A) of the CNA of 1966 to require that the funding formula must provide each State agency with an estimate of participation and a per participant grant for NSA. The NSA funding formula outlined in § 246.16(c)(2) of the WIC Program regulations as revised by this final rule reflects these requirements. The Department is currently evaluating the funding formula contained in § 246.16 to ensure that the formula promotes proper, efficient and effective program administration, and may undertake a future rulemaking if modifications are necessary.

Public Law 101–147 also amends section 17(h)(2)(B)(i) to specify that the total NSA grant level is the operational level for NSA costs that a State agency is authorized to spend for any given fiscal year. Section 246.16(c)(2)(iv) has been added to this final rule to reflect this, as described below.

14. Nutrition Services and Administration Performance Standard—§§ 246.16(c)(2)(ii) and 246.16(e)

A new provision mandated by section 123(a)(6) of Public Law 101–147, which amends section 17(h)(2)(B)(ii) of the CNA of 1966, provides that the Secretary may reduce a State agency's NSA operational level if its per participant expenditure for NSA is more than 15 percent higher than its per participant NSA grant, without good cause. This will only occur in those State agencies that fail to reach the Federally-projected participation level. Guidelines for determining the Federally-projected participation level are set forth in § 246.16(c)(3)(ii)(B) of the current regulations and redesignated as § 246.16(c)(2)(ii)(B) by this final rule.

In order to carry out revised section 17(h)(2)(B)(ii), § 246.16(e)(2)(ii) is revised to provide that if a State

agency's per participant expenditure exceeds its per participant grant by more than 15 percent, the Secretary shall reduce the State agency's NSA operational level in the subsequent fiscal year. In accordance with section 17(h)(2)(B)(ii) however, a State agency may avoid a reduction to its NSA operational level in the subsequent fiscal year by showing good cause. Section 246.16(c)(2)(ii) is revised by this final rule to permit a State agency to submit in writing a "good cause" justification for exceeding the 15 percent limit. Circumstances that may meet the "good cause" criterion include, but are not limited to, dramatic and unforeseen increases in food costs which result in an inability to reach Federally-projected participation levels.

Section 246.16(e)(2)(ii) further requires justification for exceeding the 15 percent limit to be submitted to the Department at the time the State agency submits its closeout report for the applicable fiscal year.

It should be noted that section 123(a)(6) of Public Law 101–147 amends section 17(h)(2)(B) of the CNA of 1966 to require that each State agency's operational level for NSA be maintained, except when the State agency's administrative expenditure per person exceeds its administrative grant per person by more than 15 percent without good cause. This precludes NSA grant reductions in concert with food grant reductions pursuant to a State agency's failure to meet the 95 percent standard for food expenditures contained in § 246.16(e)(2) of the current regulations. Therefore, this final rule amends § 246.16(e)(2)(i) to no longer require that a corresponding level of NSA funds be deducted for failure to meet the 95 percent performance standard for food expenditures.

15. Local Agency Funding—§ 246.16(d)

Section 123(a)(6) of Public Law 101–147 amends section 17(h)(6) of the CNA of 1966 to require that State agencies develop local agency NSA funding allocation standards taking into consideration factors such as local agency staffing needs, population density, participation and the availability of administrative support from other sources. Section 246.16(d)(2) of the current WIC Program regulations already includes these funding allocation standards for local agencies. Although no changes to this section have been made in this final rule, this section is republished for the convenience of the reader.

However, section 123(a)(6) of Public Law 101–147 also amends subsection 17(h) of the CNA of 1966 by adding paragraph (7) which provides that State agencies are permitted to advance NSA funds to local agencies following approval of "(A) a new local agency; (B) a new cost containment measure; or (C) a significant change in an existing cost containment measure." Therefore, § 246.16(d)(3) of this final rule has been revised to incorporate this legislative provision.

16. Cost Containment Cash Flow Provisions (§§ 246.16(a)(3), 246.16(a)(4), 246.16(b)(2), 246.16(b)(3), 246.16(b)(4), and 246.16(b)(5))

In the past, some State agencies that have implemented infant formula rebate systems have experienced cash flow problems. In some rebate systems, a State agency receives payments from manufacturers based on the number of units of the product purchased with WIC funds. Cash flow problems have resulted because of the delay between the time the State agency pays retail vendors for food instruments and the time the State agency receives rebate payments from manufacturers.

To help alleviate these cash flow problems, new funding mechanisms have been set forth in Public Law 101–147 for those State agencies that have implemented an approved cost-containment measure. Section 17(i) of the CNA of 1966 has been amended by section 123(a)(7)(C) by adding a new paragraph (7) which authorizes State agencies with approved cost-containment measures (defined in § 246.2 as competitive bidding, rebates, home delivery and direct distribution) to temporarily borrow current fiscal year first quarter cash to defray fourth quarter expenses from the prior fiscal year. Therefore, in this final rule § 246.16(b)(4) is redesignated as (b)(5) and this legislative provision has been added in a new § 246.16(b)(4). As further required by section 17(i)(7), section 246.16(b)(4) requires that these borrowed funds must be restored when the State agency receives the rebate funds or other reimbursement resulting from its cost containment measure. This provision is not an extension of the back-spending authority which is a permanent transfer of funds that allows the State agency to use current year food funds to pay prior year food expenditures which is contained in section 17(i)(3)(A)(i) of the CNA of 1966 and § 246.16(b)(3)(i) of the current regulations. In addition, § 246.16(b)(2) has been revised to specify that the Department will issue final grant levels to State agencies in a timely manner.

In a further effort to reduce cash flow difficulties within a given fiscal year due to approved cost containment measures, section 123(a)(5)(C) of Public Law 101–147 amends section 17(g) of the CNA of 1966 to require the initial allocation of appropriated funds to include not less than ⅓ of the appropriated funds and the second and third quarter allocations to include not less than ¼ of appropriated funds. This helps ensure that adequate cash is available in the early part of the fiscal year to make payments to vendors while waiting for rebate payments. Therefore, in this final rule a new § 246.16(a)(3) has been added to incorporate this legislative provision.

Further, section 123(a)(5)(C) of Public Law 101–147 amends section 17(g)(3)(C) of the CNA of 1966 to require that in the case of an appropriation of not more than 4 months, such as a continuing resolution, all appropriated amounts shall be allocated, except amounts reserved by the Secretary to carry out the provisions in section 17(g)(5) of the CNA of 1966 (as reflected in § 246.16(a)(6) of this final rule). This exception provides that one-half of 1 percent, not to exceed $5 million per fiscal year, shall be available to the Secretary for program evaluation, technical assistance to State agencies administration of pilot projects, and other specified purposes. This requirement to fully allocate all other amounts not reserved to the Secretary for these purposes is incorporated in a new § 246.16(a)(4) in this final rule.

It should be noted that while these provisions are helpful, they do not solve all cash flow problems. State agencies with significant rebate savings should institute management controls to avoid cash flow problems and potentially disruptive funding shortfalls, particularly at the end of the Federal fiscal year.

17. Allocation Timelines (§§ 246.16(a)(2), 246.16(a)(4), and 246.16(a)(5))

Public Law 101–147 sets forth explicit deadlines for the allocation of WIC Program funds. It is imperative that timely allocations are made to State agencies, especially reallocation of unspent funds, to ensure efficient and effective use of all program resources. Section 123(a)(5)(C) of Public Law 101–147 amends section 17(g)(2)(A)(i) of the CNA of 1966 to provide that the initial allocation of funds to State agencies must be made within 15 days of enactment of appropriating legislation. Therefore, a new § 246.16(a)(2) has been added in this final rule to incorporate this provision. Subsequent allocations must be made by the beginning of each quarter.

Newly added section 17(g)(2)(B) of the law further requires that unused funds from a prior fiscal year that are identified by the end of the first quarter of the current fiscal year (December 31) must be recovered and reallocated not later than the beginning of the second quarter of the fiscal year. That provision further states that unused funds from a prior fiscal year identified after the end of the first quarter must be reallocated on a timely basis. These provisions are set forth in a new § 246.16(a)(5) in this final rule.

18. Conversion of Food Funds to Nutrition Services and Administration Funds (§§ 246.16(b)(3), 246.16(f), and 246.16(h))

Under section 8 of the Commodity Distribution Reform Act and WIC Amendments of 1987 (Pub. L. 100–237), which amended section 17(h)(5) of the CNA of 1966, State agencies that implemented one of the four designated cost containment measures, specifically defined as competitive bidding, rebates, home delivery and direct distribution, were authorized to convert food funds to cover allowable nutrition services and administration expenditures related to increased participation attributable to the resulting cost savings. The purpose of conversion was to cover additional NSA expenses not funded by the Department's NSA funding formula. The conversion authority pursuant to Public Law 100–237 was exceedingly complicated and was focused on accommodating sudden decreases in food costs resulting from newly instituted cost containment measures.

Public Law 101–147 has simplified the conversion process. Section 123(a)(6) of Public Law 101–147 further amends section 17(h)(5)(A) of the CNA of 1966 to provide that State agencies which, through acceptable measures, increase participation beyond Federally-projected participation levels can convert food funds to NSA funds necessary to maintain that year's per participant grant for NSA to the extent that such funds are needed to cover allowable NSA expenses. The Department points out that unlike the prior conversion provision, new section 17(h)(5)(A) is based on participation increases accomplished through "acceptable measures," not just the four designated cost containment measures. Therefore, § 246.16(f) of this final rule amends § 246.16(f) to provide that in addition to the cost containment measures which were specified in Public Law 100–237 (i.e. competitive bidding, rebates, direct distribution, and home delivery), "acceptable measures" could include, but are not necessarily limited to, curtailment of vendor abuse and increased breastfeeding promotion. It is not possible to more fully specify in advance all acceptable measures utilized to increase participation as many unforeseen situations could occur. State agencies may not convert food funds if participation increases are achieved through measures that are not in the nutritional interests of participants or are not otherwise allowable under program regulations. An example of an unacceptable measure which increases participation is a reduction/modification in the food package not related to the nutritional needs of participants.

The number of participants reported by the State agency will be monitored by the Department and any significant increases in participation must be satisfactorily explained by the State agency to insure that increases were achieved through acceptable measures in compliance with WIC Program regulations. The State agency does not have to request prior approval to convert funds from food to NSA funds but State agencies are strongly advised to seek guidance from the Department if in doubt concerning conversion authority. Additionally, State agencies are encouraged to plan expenditures and anticipate the number of participants early so as not to convert food funds needed to support anticipated caseload. Any State agency which has NSA expenditures that exceed the limits of its conversion authority shall have such excess expenditures disallowed. Section 246.16(h) of this final rule describes this disallowance.

As the new procedure is a straightforward mathematical process, State agencies do not need prior Departmental approval to convert. At the end of the fiscal year, the Department will reconcile the total reported NSA expenditures to the total authorized spending level (authorized NSA grant plus allowable conversions). Allowable conversions will be determined based on the difference between the Federally-projected participation for the year and the actual number of participants served. The participation difference multiplied by the per participant grant for NSA represents the allowable conversions.

As specified by section 123(a)(6) of Public Law 101–147, which amends section 17(h)(5)(A)(ii) of the CNA of 1966, the maximum rate by which food funds may be converted to NSA funds is the current year's administrative per participant grant. This final rule revises § 246.16(f) to specify that the conversion will be determined after the initial allocation (excluding partial year appropriations) by dividing the current year administrative grant (inclusive of regional discretionary funds) by the current year Federally-projected participation level.

Section 123(a)(7) of Public Law 101–147 also amends the CNA of 1966 regarding spend forward of unspent funds. Previously, the term "carry forward" was used to describe this procedure. In order to be consistent with the CNA of 1966, we use the term "spend forward" in this rule. Substantive modifications to the spend forward provisions are explained below.

It is recognized that the process of program expansion is a gradual one which must be preceded by adequate planning and staffing adjustments, and must take place in a controlled manner consistent with sound program management. Consequently, State agencies may not be able to utilize all of the savings resulting from their food cost containment measures as fast as such savings accrue. Recognizing these factors, section 3(b) of Public Law 100–356 amended section 17(i)(3) of the CNA of 1966 to permit a State agency implementing one of the four cost containment measures identified in section 17(h)(5)(A) to spend forward into the first fiscal year following the implementation of a cost containment measure up to 5 percent of its food grant. This provision was intended to allow State agencies the time to add additional participants when a substantial amount of savings is involved. Therefore, any cost containment measure in which savings exceeded 5 percent of the State agency's food grant authorized the State agency to spend forward up to 5 percent of its food grant. In the second fiscal year following the implementation of its cost containment system, the State agency was required to request permission from the Department in order to spend forward food funds, up to a maximum of 5 percent of its food grant. The actual amount of funds spent forward-up to this 5 percent limit was negotiable and ultimately depended on Departmental discretion. In accordance with section 123(a)(7)(B) of Public Law 101–147, amending section 17(i)(3)(D) of the CNA of 1966, the 5 percent cap on the amount of food funds that may be spent forward into the second fiscal year following implementation of an approved cost containment system has been reduced to a maximum of 3 percent beginning with Fiscal Year 1989 grants. However, State agencies no longer have to request the permission of the Department to spend forward these funds. This change allows State

agencies to know in advance the amount of food funds that can be spent forward which will, in turn, facilitate better planning of expenditures for the following year. The spend forward provision and the 3 percent cap requirement are set forth in revised § 246.16(b)(3) of this final rule.

Section 3(a) of Public Law 100–356 added subparagraph (D) to section 17(h)(5) of the CNA of 1966 to protect a State's administrative grant per participant from declining more than 2 percent per year due to increases in participation achieved through cost containment measures. Section 123(a)(6) of Public Law 101–147 eliminates the 2 percent conversion protection. Since the basis for determining the total amount of NSA funds is now directly related to expected participation levels, it is no longer necessary to protect a State agency from a sharp decrease in NSA funds related to unexpected participation increases. Therefore, reference in § 246.16(h) of the current WIC regulations to the 2 percent conversion protection has been deleted in this final rule.

19. Local Agency Review Requirement (§ 246.19(b)(3))

Section 213(a)(2)(B) of Public Law 101–147 adds a new section 17(f)(21) to the CNA of 1966 mandating that "each State agency shall conduct monitoring reviews of each local agency at least biennially." Prior to this final rule, § 246.19(b)(3) of the regulations has required State agencies to review all of its local agencies annually. As explained in the July 9, 1990 proposed rule, the Department believes it is appropriate to amend § 246.19(b)(3) to reduce the frequency required of local agency reviews. As proposed, the State agency would be required to review each local agency under its jurisdiction not less frequently than every other year. The State agency would continue to be required to review the greater of 20 percent of the clinics in each local agency or one clinic for each local agency it reviews. In addition, the State agency would continue to have the authority to conduct more frequent reviews.

The majority of commenters supported the proposed change and were pleased with the flexibility afforded by this provision. One State agency indicated it would continue yearly reviews of those local agencies which may show marginal performance, but perform biennial reviews on the majority of agencies. Two State agencies recommended a revision to the regulatory text which permits State agencies to conduct additional on-site reviews. They recommended that more frequent reviews should be based on a State agency's determination that such reviews were necessary in the interest of the efficiency and effectiveness of the program instead of "as it finds necessary." Therefore, based on these comments and the legislative mandate that State agencies conduct such reviews at least biennially, the Department has retained, in § 246.19(b)(3) of this final rule, the provision as proposed, except that the last sentence regarding authority to conduct more frequent reviews has been revised as recommended by commenters. As reflected in the legislative mandate and as set forth in the regulatory text, State agencies have the authority to conduct on-site monitoring reviews of local agencies more frequently than biennially. As set forth in this final rule, the State agency may conduct additional on-site reviews as the State agency determines to be necessary in the interest of the efficiency and effectiveness of the program.

20. Reference to Departmental Rule on Debarment and Suspension, Drug-Free Workplace, and Lobbying Restrictions (Sections 246.2, 246.3(b) and (c)(2), 246.4(a), 246.6(b), 246.24(a))

a. *Nonprocurement debarment and suspension.* Executive Order (E.O.) 12549, signed by the President on February 18, 1986, stipulated the establishment of debarment and suspension procedures to protect the integrity of nonprocurement programs funded by the Federal Government and procurement contracts that equal or exceed $25,000 at the grantee and subgrantee levels. This action was taken to parallel the debarment and suspension system already in place for Federal procurement activities. In response to E.O. 12549, a final rule creating 7 CFR part 3017 was published in the **Federal Register** on January 30, 1989 (54 FR 4722).

The Department proposed in its rulemaking to add to the definition section a reference to "7 CFR part 3017" which indicates that it is the Department's common rule regarding Governmentwide Debarment and Suspension (Nonprocurement). As proposed, § 246.24(a), "Procurement and property management," was also amended to require compliance with the mandates of 7 CFR part 3017.

The majority of commenters approved these provisions as proposed. Because these provisions merely reference compliance with a pre-existing regulatory mandate, the Department is retaining the provisions as proposed in this final rule, except several clarifications. As proposed, a new § 246.4(a)(22) has been added to require the State to include in its State Plan an assurance that, as clarified in this final rule, each local agency and any subgrantees of the State agency and/or local agencies are in compliance with the nonprocurement debarment/suspension requirements of 7 CFR part 3017. In addition, this final rule revises § 246.6(b)(1), as proposed, to require as part of the local agency agreement with the State agency, assurance that the local agency complies with the debarment/suspension requirement of 7 CFR part 3017. In order to comply with these requirements, it is incumbent on State and local agencies when contracting with, for example, banks, consultants, and infant formula manufacturing companies that they seek certifications from such entities attesting to the fact that they have not been debarred or suspended. These requirements are to be incorporated into any new contracts entered into with such entities or any renewal of current awards. Such provisions would not be required to be incorporated into any current contract or agreements because, in some cases, such revisions could potentially render the conditions set forth in the contracts null and void. Finally, the proposed revision to § 246.24(a) has been changed in this final rule to clarify that State and local agencies in procuring supplies, equipment, and other services shall ensure that their subgrantees comply with the debarment and suspension requirements in 7 CFR part 3017.

b. *Drug-free workplace requirements.* A final rule expanding 7 CFR part 3017 was published in the **Federal Register** on May 25, 1990 (55 FR 21679), addressing the Governmentwide Drug-Free Workplace Requirements of the Drug-Free Workplace Act of 1988, Public Law 100–690, enacted on November 18, 1988. The governmentwide drug-free workplace mandates in 7 CFR part 3017 require Federal grantees to certify that they will provide and maintain drug-free workplaces as a condition of receiving Federal grant assistance. These requirements apply only to direct Federal grant agreements, i.e., to the State WIC agencies. The Department's regulation, 7 CFR part 3017, implements the requirements of Public Law 100–690, which became effective March 18, 1989. It states that a Federal agency may not enter into a new grant agreement or renew an existing agreement unless a drug-free workplace certification is obtained from the grantee. The proposed

rule preamble stated that Federal/State WIC agreement forms were being revised to include such an assurance, and that State agencies should sign the certification as an addendum to their current Federal/State WIC agreement. Since publication of the proposed rule, Federal/State WIC agreement forms have been revised to include such an assurance. The forms contain two check-off boxes. By checking off one box the grantee verifies that a certification form is on file with the Department. If no certification form has been submitted or if any changes have occurred since the previous certification form was submitted, then a second box must be checked and a certification form attached to the Federal/State agreement. By signing the certification, the State agency agrees to provide and maintain a drug-free workplace. The Department, in its proposed rulemaking, incorporated this legislative mandate in the WIC regulations by adding a new § 246.4(a)(23), which requires WIC State agencies to provide in their State plans an assurance of compliance with the requirements of 7 CFR part 3017 regarding a drug-free workplace, including a description of how they will provide and maintain such a workplace. No comments were received on this specific provision. Because the assurance is now included in the Federal/State agreement, this final rule revises § 246.4(a)(23) to delete the assurance portion of the requirement from the State plan, but has maintained the requirement for a description of the State agency's plans to provide and maintain such a workplace. The assurance requirement is moved by this final rule to § 246.3(c)(2), which provides the requirements for the Federal/State agreement.

c. *Lobbying restrictions.* Section 319 of the 1990 Appropriations Act (31 U.S.C. 1352) of the Department of Interior and Related Agencies (Pub. L. 101–121), enacted October 23, 1989, contains provisions which prohibit the use of federal funds for lobbying for specific federal awards and requires recipients of any federal grants, contracts, loans, and cooperative agreements to disclose expenditures made with their own funds for such purposes. Section 319 of that act also required the Office of Management and Budget (OMB) to issue governmentwide guidance for agency implementation of, and compliance with, these restrictions. OMB's interim final governmentwide guidance published in the **Federal Register** on December 20, 1989, became effective December 23, 1989. The Department's final rule 7 CFR part 3018, implementing new restrictions on lobbying, was published in the **Federal Register** on February 26, 1990 at 55 FR 6736. The OMB subsequently issued guidance on the common rule in a June 12, 1990 memorandum to federal agencies which was published as a Notice in the **Federal Register** on June 15, 1990 at 55 FR 24540. Public Law 101–121 and 7 CFR part 3018 apply to WIC State and local agencies and any entities the State or local agency contracts with, including infant formula manufacturing companies, as long as each covered action exceeds $100,000. According to 7 CFR part 3018, Indian tribes or tribal organizations (§ 3018.105(l)) and any individual Federal actions $100,000 or under (§ 3018.110) are excluded from the lobbying restriction requirements. For grants, the $100,000 limit applies to each fiscal year award, or the period of the grant if other than the federal fiscal year. For contracts, the $100,000 limit applies to each contract.

Section 3018.105(b) defines as "covered actions," grants, loans, cooperative agreements, or Federal contracts. Of these covered Federal actions, only grants or contracts are likely to arise in the WIC Program context.

Although the Department's proposed rule did not address the legislative lobbying restrictions, reference to this nondiscretionary requirement has been added in this final rule. A definition has been added in this final rule for "7 CFR part 3018," the Department's Common Rule regarding Governmentwide Lobbying Restrictions, and other appropriate references have been added which require compliance with 7 CFR part 3018.

21. Revision of References to OMB Circular A–90

OMB Circular A–90, which primarily addressed the Federal responsibilities for oversight of grantee information systems, was superseded by OMB Circular A–130 in 1986. Accordingly, the Department had proposed to delete a reference to OMB Circular A–90 in § 246.24(a). However, OMB Circular A–130 continues to reference requirements on state information systems. Therefore, references to the new circular must be included in the WIC regulations and all references to OMB Circular A–90 in Part 246 have been revised to reference OMB Circular A–130 by this final rule.

22. Corrections to Program Information (Section 246.27) and Updating of Information in § 246.7(d)(2)(iv)(C)

As proposed, this final rule makes technical revisions to § 246.27 of the WIC Program regulations to reflect address changes or corrections for the Northeast, Mid-Atlantic, Southeast, and Midwest Regional Offices of the Food and Nutrition Service.

In addition, this final rule updates the non-inclusive list of payments or benefits provided under other federal programs or acts which are specifically excluded as income for WIC purposes and moves the list to § 246.7(d)(2)(iv)(C). It was formerly found in § 246.7(c)(2)(v).

List of Subjects in 7 CFR Part 246

Food assistance programs, Food donations, Grant programs—social programs, Indians, Infants and children, Maternal and child health, Nutrition, Nutrition education, Public assistance programs, WIC, Women.

For the reasons set forth in the preamble, 7 CFR part 246 is amended to read 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: 42 U.S.C. 1786.

2. In part 246, all references to "7 CFR part 3015" are revised to read "7 CFR part 3016".

3. In part 246, all references to "OMB Circular A–90" are revised to read "OMB Circular A–130".

4. In part 246, all references to "administrative and program services" are revised to read "nutrition services and administration".

5. In § 246.2:

a. Definitions of "Breastfeeding", "7 CFR part 3017", "7 CFR part 3018", and "Nutrition Services and Administration (NSA) Costs" are added in alphabetical order; and,

b. The definition of "Administrative and Program Services Costs" is removed.

The additions read as follows:

§ 246.2 Definitions.

* * * * *

Breastfeeding means the practice of feeding a mother's breastmilk to her infant(s) on the average of at least once a day.

* * * * *

Nutrition Services and Administration (NSA) Costs means those direct and indirect costs, exclusive of food costs, as defined in § 246.14(c), which State and local agencies determine to be necessary to support Program operations. Costs include, but are not limited to, the costs of Program administration, start-up,

monitoring, auditing, the development of and accountability for food delivery systems, nutrition education and breastfeeding promotion and support, outreach, certification, and developing and printing food instruments.

* * * * *

7 CFR part 3017 means the Department's Common Rule regarding Governmentwide Debarment and Suspension (Non-procurement) and Governmentwide Requirements for Drug-Free Workplace. Part 3017 implements the requirements established by Executive Order 12549 (February 18, 1986) and sections 5151–5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100–690).

7 CFR part 3018 means the Department's Common Rule regarding Governmentwide New Restrictions on Lobbying. Part 3018 implements the requirements established by section 319 of the 1990 Appropriations Act for the Department of Interior and Related Agencies (Pub. L. 101–121).

* * * * *

6. In § 246.3:

a. The first sentence of paragraph (b) is revised.

b. The text of paragraph (c) is redesignated as paragraph (c)(1) and is revised;

c. A new paragraph (c)(2) is added;

d. Paragraph (e)(4) is redesignated as paragraph (e)(5); and,

e. A new paragraph (e)(4) is added.

The revisions and additions read as follows:

§ 246.3 Administration.

* * * * *

(b) *Delegation to State agency.* The State agency is responsible for the effective and efficient administration of the Program in accordance with the requirements of this part; the Department's regulations governing nondiscrimination (7 CFR parts 15, 15a and 15b); governing administration of grants (7 CFR part 3016); governing nonprocurement debarment/suspension and drug-free workplace (7 CFR part 3017); and governing restrictions on lobbying (7 CFR part 3018); FNS guidelines; and, instructions issued under the FNS Directives Management System. * * *

(c) *Agreement and State Plan.* (1) Each State agency desiring to administer the Program shall annually submit a State Plan and enter into a written agreement with the Department for administration of the Program in the jurisdiction of the State agency in accordance with the provisions of this part.

(2) The written agreement shall include a certification/assurance regarding drug-free workplace as required by 7 CFR part 3017, and, if applicable, a certification regarding lobbying and a disclosure of lobbying activities as required by 7 CFR part 3018.

* * * * *

(e) * * *

(4) A designated breastfeeding promotion coordinator, to coordinate breastfeeding promotion efforts identified in the State plan in accordance with the requirement of § 246.4(a)(9) of this part. The person to whom the State agency assigns this responsibility may perform other duties as well.

* * * * *

7. In § 246.4:

a. In paragraph (a)(2) and (a)(13), reference to "administrative funds" is revised to read "nutrition services and administration funds";

b. The first sentence of paragraph (a)(7) is revised;

c. Paragraphs (a)(8) and (a)(9) are revised;

d. In paragraph (a)(10), reference to "§ 246.7(c)(2)(vi)" is revised to read "§ 246.7(d)(2)(vii)";

e. In paragraph (a)(11)(i), reference to "§ 246.7(d)(4)" is revised to read "§ 246.7(e)(4)";

f. In paragraph (a)(19), an incorrect reference to "§ 246.7(m)(1)(i)" is revised to read "§ 246.7(n)(1)(i)"; and,

g. New paragraphs (a)(20)–(a)(23) are added.

The revisions and additions read as follows:

§ 246.4 State plan.

(a) * * *

(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(n)(1)(i) of this part, with emphasis on reaching and enrolling eligible women in the early months of pregnancy and migrants. * * *

(8) A description of how the State agency plans to coordinate program operations with special counseling services and other programs, including, but not limited to, the Expanded Food and Nutrition Education Program (7 U.S.C. 343(d) and 3175), the Food Stamp Program (7 U.S.C. 2011 *et seq.*), the Early and Periodic Screening, Diagnosis, and Treatment Program (Title XIX of the Social Security Act), the Aid to Families with Dependent Children (AFDC) Program (42 U.S.C. 601–615), the Maternal and Child Health (MCH) Program (42 U.S.C. 701–709), the Medicaid Program (42 U.S.C. 1396 *et seq.*), family planning, immunization, prenatal care, well-child care, drug and other harmful substance abuse counseling, treatment and education programs, child abuse counseling, and local programs for breastfeeding promotion.

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

* * * * *

(20) A plan to provide program benefits to unserved infants and children under the care of foster parents, protective services, or child welfare authorities, including infants exposed to drugs perinatally.

(21) A plan to improve access to the program for participants and prospective applicants who are employed or who reside in rural areas, by addressing their special needs through the adoption or revision of procedures and practices to minimize the time participants and applicants must spend away from work and the distances participants and applicants must travel. This shall include at least one of the following procedures: appointment scheduling, adjustment of clinic hours and/or locations, or the mailing of food instruments, provided, however, that all State agencies shall include appointment scheduling for employed adult individuals applying or reapplying for themselves or on behalf of others if such appointments are not currently provided. The State agency shall also describe any plans for issuance of food instruments to employed or rural participants, or to any other segment of the participant population, through means other than direct participant pick-up, pursuant to § 246.12(r)(8). Such description shall also include measures to ensure the integrity of program services and fiscal accountability.

(22) Assurance that each local agency and any subgrantees of the State agency and/or local agencies are in compliance with the requirements of 7 CFR part 3017 regarding nonprocurement debarment/suspension.

(23) A description of the State agency's plans to provide and maintain a drug-free workplace.

* * * * *

8. In § 246.6:

a. Paragraph (b)(1) is revised;
b. A new paragraph (f) is added.
The revision and addition read as follows:

§ 246.6 Agreements with local agencies.

* * * * *

(b) * * *

(1) Complies with all the fiscal and operational requirements prescribed by the State agency pursuant to this part, 7 CFR part 3016, the debarment and suspension requirements of 7 CFR part 3017, if applicable, the lobbying restrictions of 7 CFR part 3018, and FNS guidelines and instructions, and provides on a timely basis to the State agency all required information regarding fiscal and Program information;

* * * * *

(f) *Outreach/Certification In Hospitals.* The State agency shall ensure that each local agency operating the program within a hospital and/or that has a cooperative arrangement with a hospital:

(1) Advises potentially eligible individuals that receive inpatient or outpatient prenatal, maternity, or postpartum services, or that accompany a child under the age of 5 who receives well-child services, of the availability of program services; and

(2) To the extent feasible, provides an opportunity for individuals who may be eligible to be certified within the hospital for participation in the WIC Program.

9. In § 246.7:

a. Paragraphs (b)–(n) are redesignated as paragraphs (c)–(o) and all references to these paragraphs within § 246.7 are redesignated accordingly.
b. A new paragraph (b) is added;
c. Newly redesignated paragraph (d) is revised;
d. In newly redesignated paragraph (f)(2)(iv), an incorrect reference to "§ 246.12(s)(8) (i) and (ii)" is revised to read § 246.12(r)(8)";
e. The introductory text of newly redesignated paragraph (h)(1) is revised;
f. Newly redesignated paragraph (h)(1)(ii) is revised;
g. The first sentence of newly redesignated paragraph (j)(6) is revised; and
h. A new paragraph (j)(9) is added.
The additions and revisions read as follows:

§ 246.7 Certification of participants.

* * * * *

(b) *Program referral and access.* State and local agencies shall provide WIC Program applicants and participants or their designated proxies with information on other health-related and public assistance programs, and when appropriate, shall refer applicants and participants to such programs.

(1) The State agency shall ensure that written information concerning the Food Stamp Program, the program for Aid to Families with Dependent Children under Title IV–A of the Social Security Act (AFDC), and the Child Support Enforcement Program under Title IV–D of the Social Security Act, is provided on at least one occasion to adult participants and adult individuals applying for the WIC Program for themselves or on behalf of others.

(2) The State agency shall provide each local WIC agency with materials showing the maximum income limits, according to family size, applicable to pregnant women, infants, and children up to age 5 under the medical assistance program established under Title XIX of the Social Security Act (in this section, referred to as the "Medicaid Program"). The local agency shall, in turn, provide to adult individuals applying or reapplying for the WIC Program for themselves or on behalf of others, written information about the Medicaid Program. If such individuals are not currently participating in Medicaid but appear to have family income below the applicable maximum income limits for the program, the local agency shall also refer these individuals to Medicaid, including the referral of infants and children to the appropriate entity in the area authorized to determine eligibility for early and periodic screening, diagnostic, and treatment (EPSDT) services, and, the referral of pregnant women to the appropriate entity in the area authorized to determine presumptive eligibility for the Medicaid Program, if such determinations are being offered by the State.

(3) Local agencies shall provide information about other potential sources of food assistance in the local area to adult individuals applying or reapplying in person for the WIC Program for themselves or on behalf of others, when such applicants cannot be served because the Program is operating at capacity in the local area.

(4) Each local agency that does not routinely schedule appointments shall schedule appointments for employed adult individuals seeking to apply or reapply for participation in the WIC Program for themselves or on behalf of others so as to minimize the time such individuals are absent from the workplace due to such application.

(5) Each local agency shall attempt to contact each pregnant woman who misses her first appointment to apply for participation in the Program in order to reschedule the appointment. At the time of initial contact, the local agency shall request an address and telephone number where the pregnant woman can be reached.

* * * * *

(d) *Income criteria and income eligibility determinations.* The State agency shall establish, and provide local agencies with, income guidelines, definitions, and procedures to be used in determining an applicant's income eligibility for the Program.

(1) *Income eligibility guidelines.* The State agency may prescribe income guidelines either equaling the income guidelines established under section 9 of the National School Lunch Act for reduced-price school meals or identical to State or local guidelines for free or reduced-price health care. However, in conforming Program income guidelines to health care guidelines, the State agency shall not establish Program guidelines which exceed the guidelines for reduced-price school meals or are less than 100 percent of the revised poverty income guidelines issued annually by the Department of Health and Human Services. Program applicants who meet the requirements established by paragraph (d)(2)(vi)(A) of this section shall not be subject to the income limits established by State agencies under this paragraph.

(i) *Local agency income eligibility guidelines.* Different guidelines may be prescribed for different local agencies within the State provided that the guidelines are the ones used by the local agencies for determining eligibility for free or reduced-price health care.

(ii) *Annual adjustments in the income guidelines.* On or before June 1 each year, FNS will announce adjustments in the income guidelines for reduced-price meals under section 9 of the National School Lunch Act, based on annual adjustments in the revised poverty income guidelines issued by the Department of Health and Human Services.

(iii) *Implementation of the income guidelines.* On or before July 1 each year, each State agency shall announce and transmit to each local agency the State agency's family size income guidelines unless changes in the poverty income guidelines issued by the Department of Health and Human Services do not necessitate changes in the State or local agency's income guidelines. The State agency shall ensure that conforming adjustments are made, if necessary, in local agency income guidelines. The local agency shall implement (revised) guidelines effective July 1 of each year for which such guidelines are issued by the State.

(2) *Income eligibility determinations.* The State agency shall ensure that local agencies determine income through the use of a clear and simple application form provided or approved by the State agency.

(i) *Timeframes for determining income.* In determining the income eligibility of an applicant, the State agency may instruct local agencies to consider the income of the family during the past 12 months and the family's current rate of income to determine which indicator more accurately reflects the family's status. However, persons from families with adult members who are unemployed shall be eligible based on income during the period of unemployment if the loss of income causes the current rate of income to be less than the State or local agency's income guidelines for Program eligibility.

(ii) *Definition of "Income".* If the State agency uses the National School Lunch reduced-priced meal income guidelines, as specified in paragraph (d)(1) of this section, it shall use the following definition of income: Income for the purposes of this part means gross cash income before deductions for income taxes, employees' social security taxes, insurance premiums, bonds, etc. Income includes the following—

(A) Monetary compensation for services, including wages, salary, commissions, or fees;

(B) Net income from farm and non-farm self-employment;

(C) Social Security benefits;

(D) Dividends or interest on savings or bonds, income from estates or trusts, or net rental income;

(E) Public assistance or welfare payments;

(F) Unemployment compensation;

(G) Government civilian employee or military retirement or pensions or veterans' payments;

(H) Private pensions or annuities;

(I) Alimony or child support payments;

(J) Regular contributions from persons not living in the household;

(K) Net royalties; and

(L) Other cash income. Other cash income includes, but is not limited to, cash amounts received or withdrawn from any source including savings, investments, trust accounts and other resources which are readily available to the family.

(iii) *Use of a State or local health care definition of "Income".* If the State agency uses State or local free or reduced-price health care income guidelines, as it is authorized to do in paragraph (d)(1) of this section, it may use the State or local definition or definitions of income used for the health care eligibility determinations. The State agency shall ensure, however, that the State or local agency's definition of income does not count the value of in-kind housing and other in-kind benefits and payments or benefits listed in paragraph (d)(2)(iv) of this section as income for Program purposes, and that families with gross income, as defined in paragraph (d)(2)(ii) of this section, in excess of 185 percent of the Federal guidelines specified under paragraph (d)(1) of this section are not rendered eligible for Program benefits, except that persons who meet the requirements of paragraph (d)(2)(vi) of this section shall not be subject to limitations established under this paragraph.

(iv) *Income exclusions.* (A) In determining income eligibility, the State agency may exclude from consideration as income any basic allowance for quarters received by military services personnel residing off military installations. State agencies which choose to exercise this option shall implement it uniformly with respect to all Program applicants from military families.

(B) The value of inkind housing and other inkind benefits, shall be excluded from consideration as income in determining an applicant's eligibility for the program.

(C) Payments or benefits provided under certain Federal programs or acts are excluded from consideration as income by legislative prohibition. The payments or benefits which must be excluded from consideration as income include, but are not limited to:

(*1*) Reimbursements from the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Pub. L. 91–646, sec. 216, 42 U.S.C. 4636);

(*2*) Any payment to volunteers under Title I (VISTA and others) and Title II (RSVP, foster grandparents, and others) of the Domestic Volunteer Service Act of 1973 (Pub. L. 93–113, sec. 404(g), 42 U.S.C. 5044(g)) to the extent excluded by that Act;

(*3*) Payment to volunteers under section 8(b)(1)(B) of the Small Business Act (SCORE and ACE) (Pub. L. 95–510, sec. 101, 15 U.S.C. 637(b)(1)(D));

(*4*) Income derived from certain submarginal land of the United States which is held in trust for certain Indian tribes (Pub. L. 94–114, sec. 6, 25 U.S.C. 459e);

(*5*) Payments received under the Job Training Partnership Act (Pub. L. 97–300, sec. 142(b), 29 U.S.C. 1552(b));

(*6*) Income derived from the disposition of funds to the Grand River Band of Ottawa Indians (Pub. L. 94–540, sec. 6);

(*7*) Payments received under the Alaska Native Claims Settlement Act (Pub. L. 100–241, sec. 15, 43 U.S.C. sec. 1626(c));

(*8*) The value of assistance to children or their families under the National School Lunch Act, as amended (Pub. L. 94–105, sec. 9(d), 42 U.S.C. sec. 1760(e)), the Child Nutrition Act of 1966 (Pub. L. 89–642, sec. 11(b), 42 U.S.C. sec. 1780(b)), and the Food Stamp Act of 1977 (Pub. L. 95–113, sec. 1301, 7 U.S.C. sec. 2017(b));

(*9*) Payments by the Indian Claims Commission to the Confederated Tribes and Bands of the Yakima Indian Nation or the Apache Tribe of the Mescalero Reservation (Pub. L. 95–433, sec. 2, 25 U.S.C. 609c–1);

(*10*) Payments to the Passamaquoddy Tribe and the Penobscot Nation or any of their members received pursuant to the Maine Indian Claims Settlement Act of 1980 (Pub. L. 96–420, sec. 6, 9(c), 25 U.S.C. 1725(i), 1728(c));

(*11*) Payments under the Low-income Home Energy Assistance Act, as amended (Pub. L. 99–125, sec. 504(c), 42 U.S.C. sec. 8624(f));

(*12*) Student financial assistance received from any program funded in whole or part under Title IV of the Higher Education Act of 1965, including the Pell Grant, Supplemental Educational Opportunity Grant, State Student Incentive Grants, National Direct Student Loan, PLUS, College Work Study, and Byrd Honor Scholarship programs, which is used for costs described in section 472 (1) and (2) of that Act (Pub. L. 99–498, section 479B, 20 U.S.C. 1087uu). The specified costs set forth in section 472 (1) and (2) of the Higher Education Act are tuition and fees normally assessed a student carrying the same academic workload as determined by the institution, and including the costs for rental or purchase of any equipment, materials, or supplies required of all students in the same course of study; and an allowance for books, supplies. transportation, and miscellaneous personal expenses for a student attending the institution on at least a half-time basis, as determined by the institution. The specified costs set forth in section 472 (1) and (2) of the Act are those costs which are related to the costs of attendance at the educational institution and do not include room and board and dependent care expenses;

(*13*) Payments under the Disaster Relief Act of 1974, as amended by the Disaster Relief and Emergency Assistance Amendments of 1989 (Pub.

L. 100–707, sec. 105(i), 42 U.S.C. sec. 5155(d));

(*14*) Effective July 1, 1991, payments received under the Carl D. Perkins Vocational Education Act, as amended by the Carl D. Perkins Vocational and Applied Technology Education Act Amendments of 1990 (Pub. L. 101–392, sec. 501, 20 U.S.C. sec. 2466d);

(*15*) Payments pursuant to the Agent Orange Compensation Exclusion Act (Pub. L. 101–201, sec. 1);

(*16*) Payments received for Wartime Relocation of Civilians under the Civil Liberties Act of 1988 (Pub. L. 100–383, sec. 105(f)(2), 50 App. U.S.C. sec. 1989b–4(f)(2));

(*17*) Value of any child care payments made under section 402(g)(1)(E) of the Social Security Act, as amended by the Family Support Act (Pub. L. 100–485, sec. 301, 42 U.S.C. sec. 602 (g)(1)(E));

(*18*) Value of any "at-risk" block grant child care payments made under section 5081 of Pub. L. 101–508, which amended section 402(i) of the Social Security Act;

(*19*) Value of any child care provided or paid for under the Child Care and Development Block Grant Act, as amended (Pub. L. 102–586, Sec. 8(b)), 42 U.S.C. 9858q);

(*20*) Mandatory salary reduction amount for military service personnel which is used to fund the Veteran's Educational Assistance Act of 1984 (GI Bill), as amended (Pub. L. 99–576, sec. 303(a)(1), 38 U.S.C. sec. 1411 (b));

(*21*) Payments received under the Old Age Assistance Claims Settlement Act, except for per capita shares in excess of $2,000 (Pub. L. 98–500, sec. 8, 25 U.S.C. sec. 2307);

(*22*) Payments received under the Cranston-Gonzales National Affordable Housing Act, unless the income of the family equals or exceeds 80 percent of the median income of the area (Pub. L. 101–625, sec. 522(i)(4), 42 U.S.C. sec. 1437f nt);

(*23*) Payments received under the Housing and Community Development Act of 1987, unless the income of the family increases at any time to not less than 50 percent of the median income of the area (Pub. L. 100–242, sec. 126(c)(5)(A), 25 U.S.C. sec. 2307);

(*24*) Payments received under the Sac and Fox Indian claims agreement (Pub. L. 94–189, sec. 6);

(*25*) Payments received under the Judgment Award Authorization Act, as amended (Pub. L. 97–458, sec. 4, 25 U.S.C. sec. 1407 and Pub. L. 98–64, sec. 2(b), 25 U.S.C. sec. 117b(b));

(*26*) Payments for the relocation assistance of members of Navajo and Hopi Tribes (Pub. L. 93–531, sec. 22, 22 U.S.C. sec. 640d-21);

(*27*) Payments to the Turtle Mountain Band of Chippewas, Arizona (Pub. L. 97–403, sec. 9);

(*28*) Payments to the Blackfeet, Grosventre, and Assiniboine tribes (Montana) and the Papago (Arizona) (Pub. L. 97–408, sec. 8(d));

(*29*) Payments to the Assiniboine Tribe of the Fort Belknap Indian community and the Assiniboine Tribe of the Fort Peck Indian Reservation (Montana) (Pub. L. 98–124, sec. 5);

(*30*) Payments to the Red Lake Band of Chippewas (Pub. L. 98–123, sec. 3);

(*31*) Payments received under the Saginaw Chippewa Indian Tribe of Michigan Distribution of Judgment Funds Act (Pub. L. 99–346, sec. 6(b)(2)); and

(*32*) Payments to the Chippewas of Mississippi (Pub. L. 99–377, sec. 4(b)).

(v) *Verification of information.* A State or local agency may require verification of information which it determines necessary to confirm income eligibility for Program benefits.

(vi) *Adjunct or automatic income eligibility.* (A) The State agency shall accept as income-eligible for the Program any applicant who documents that he/she is:

(*1*) Certified as fully eligible to receive food stamps under the Food Stamp Act of 1977, or certified as fully eligible, or presumptively eligible pending completion of the eligibility determination process, to receive Aid to Families with Dependent Children (AFDC) under Part A of Title IV of the Social Security Act or Medical Assistance (i.e., Medicaid) under Title XIX of the Social Security Act; or

(*2*) A member of a family that is certified eligible to receive assistance under AFDC, or a member of a family in which a pregnant woman or an infant is certified eligible to receive assistance under Medicaid.

(*B*) The State agency may accept, as evidence of income within Program guidelines, documentation of the applicant's participation in State-administered programs not specified in this paragraph that routinely require documentation of income, provided that those programs have income eligibility guidelines at or below the State agency's Program income guidelines.

(C) Persons who are adjunctively income eligible, as set forth in paragraphs (d)(2)(vi)(A) of this section, shall not be subject to the income limits established under paragraph (d)(1) of this section.

(vii) *Income eligibility of Indian applicants.* If an Indian State agency (or a non-Indian State agency which acts on behalf of a local agency operated by an Indian organization or the Indian Health Service) submits census data or other reliable documentation demonstrating to FNS that the majority of the Indian households in a local agency's service area have incomes at or below the State agency's income eligibility guidelines, FNS may authorize the State agency to approve the use of an income certification system under which the local Indian agency shall inform each Indian applicant household of the maximum family income allowed for that applicant's family size. The local agency shall ensure that the applicant, or the applicant's parent or caretaker, signs a statement that the applicant's family income does not exceed the maximum. The local agency may verify the income eligibility of any Indian applicant.

(viii) *Income eligibility of instream migrant farmworkers and their family members.* Instream migrant farmworkers and their family members with expired Verification of Certification cards shall be declared to satisfy the State agency's income standard; Provided, however, that the income of that instream migrant farmworker family is determined at least once every 12 months. Any determination that members of an instream migrant farmworker family have met the income standard, either in the migrant's home base area before the migrant has entered the stream for a particular agricultural season, or in an instream area during the agricultural season, shall satisfy the income criteria in any State for any subsequent certification while the migrant is instream during the 12-month period following the determination.

* * * * *

(h) * * *

(1) The State agency shall ensure that local agencies disqualify an individual during a certification period if, on the basis of a reassessment of Program eligibility status, the individual is determined ineligible; provided, however, that an individual determined adjunctively income eligible under paragraph (d)(2)(vi)(A) (*1*) or (*2*) of this section or income eligible under paragraph (d)(2)(vi)(B) of this section is not disqualified solely on the basis of a determination they no longer participate in AFDC, Medicaid, Food Stamps, or another qualified State-administered program or are no longer a member of a family which contains an AFDC recipient or a pregnant woman or an infant receiving Medicaid. The State agency shall ensure that local agencies disqualify such an individual during a certification period, if on the basis of a reassessment of Program eligibility, the individual is no longer deemed income

eligible under paragraph (d)(2)(vi) (A) or (B) of this section and does not meet the income eligibility requirements of paragraph (d)(1) of this section. The State agency may authorize local agencies to disqualify an individual during the certification period for the following reasons:

* * * * *

(ii) Failure to obtain food instruments or supplemental foods for a number of consecutive months, as specified by the State agency, evidenced by indicators such as failure to pick up supplemental foods or food instruments, nonreceipt of food instruments as evidenced by return of mailed instruments, or failure to have an electronic benefit transfer card revalidated to authorize the purchase of supplemental foods.

* * * * *

(j) * * *

(6) A person who is about to be suspended or disqualified from program participation at any time during the certification period shall be advised in writing not less than 15 days before the suspension or disqualification. * * *

* * * * *

(9) If a State agency must suspend or terminate benefits to any participant during the participant's certification period due to a shortage of funds for the Program, it shall issue a notice to such participant in advance, as stipulated in paragraph (j)(6) of this section. Such notice shall also include the categories of participants whose benefits are being suspended or terminated due to such shortage.

* * * * *

§ 246.9 [Amended]

10. In § 246.9(g), reference to "§ 246.7(i)(6)" is revised to read "§ 246.7(j)(6)".

11. In § 246.11:

a. A new sentence is added at the end of paragraph (c)(2);

b. Paragraphs (c)(3), (c)(5), and (c)(6) are revised;

c. A new paragraph (c)(8) is added; and

d. Paragraph (e)(4) is revised.

The additions and revisions read as follows:

§ 246.11 Nutrition education.

* * * * *

(c) * * *

(2) * * * The State agency shall also provide training on the promotion and management of breastfeeding to staff at local agencies who will provide information and assistance on this subject to participants.

(3) Identify or develop resources and educational materials for use in local agencies, including breastfeeding promotion and instruction materials, taking reasonable steps to include materials in languages other than English in areas where a significant number or proportion of the population needs the information in a language other than English, considering the size and concentration of such population and, where possible, the reading level of participants.

* * * * *

(5) Annually perform and document evaluations of nutrition education and breastfeeding promotion and support activities.

The evaluations shall include an assessment of participants' views concerning the effectiveness of the nutrition education and breastfeeding promotion and support they received.

(6) Monitor local agency activities to ensure compliance with provisions set forth in paragraphs (c)(8), (d), and (e) of this section.

* * * * *

(8) Establish standards for breastfeeding promotion and support which include, at a minimum, the following:

(i) A policy that creates a positive clinic environment which endorses breastfeeding as the preferred method of infant feeding;

(ii) A requirement that each local agency designate a staff person to coordinate breastfeeding promotion and support activities;

(iii) A requirement that each local agency incorporate task-appropriate breastfeeding promotion and support training into orientation programs for new staff involved in direct contact with WIC clients; and

(iv) A plan to ensure that women have access to breastfeeding promotion and support activities during the prenatal and postpartum periods.

* * * * *

(e) * * *

(4) The local agency shall document in each participant's certification file that nutrition education has been given to the participant in accordance with State agency standards, except that the second or any subsequent nutrition education contact during a certification period that is provided to a participant in a group setting may be documented in a masterfile. Should a participant miss a nutrition education appointment, the local agency shall, for purposes of monitoring and further education efforts, document this fact in the participant's file, or, at the local agency's discretion, in the case of a second or subsequent missed contact where the nutrition education was offered in a group setting, document this fact in a master file.

* * * * *

12. In § 246.12:

a. In paragraph (o), reference to "paragraph (s)(8)" is revised to read "paragraph (r)(8)";

b. In paragraph (r)(2) (ii) and (iii), all references to "paragraph (s)(2)(i)" are revised to read "paragraph (r)(2)(i)"; and,

c. Paragraph (r)(8) is revised.

The revision reads as follows:

§ 246.12 Food delivery systems.

* * * * *

(r) * * *

(8) Participants or their authorized proxies shall personally pick up food instruments when scheduled for nutrition education or for an appointment to determine whether participants are eligible for a second or subsequent certification period. However, in all other circumstances the State agency may provide for issuance of food instruments through an alternative means, such as electronic benefit transfer (EBT) or mailing, unless FNS determines that such action would jeopardize the integrity of program services or program accountability. If a State agency opts to mail WIC food instruments, it must provide justification, as part of the description of its alternative issuance system in its State plan, as required in § 246.4(a)(21), for mailing WIC food instruments to areas where food stamps are not mailed.

State agencies which opt to mail food instruments must establish and implement a system which ensures the return of food instruments to the State or local agency if the participant no longer resides or receives mail at the address to which the food instruments were mailed.

* * * * *

13. In § 246.14:

a. The heading and introductory text of paragraph (c) and paragraph (c)(l) are revised;

b. A new paragraph (c)(10) is added.

The revision and addition read as follows:

§ 246.14 Program costs.

* * * * *

(c) *Specified allowable nutrition services and administration costs.* Allowable nutrition services and administration (NSA) costs include the following:

(1) The cost of nutrition education and breastfeeding promotion and support which meets the requirements of § 246.11. During each fiscal year, each State agency shall expend for nutrition education activities and breastfeeding

promotion and support activities, an aggregate amount that is not less than the sum of one-sixth of the amount expended by the State agency for costs of NSA, and an amount equal to a proportionate share of $8 million targeted specifically for breastfeeding promotion and support activities. Each State agency's share of the $8 million shall be determined on the basis of the average monthly number of pregnant and breastfeeding women served by a WIC State agency as a percentage of the average monthly number of pregnant and breastfeeding women served by all WIC State agencies. The amount to be spent on nutrition education shall be computed by taking one-sixth of the total fiscal year NSA expenditures. The amount spent by a State agency on breastfeeding promotion and support activities shall be at least an amount that is equal to its proportionate share of the $8 million as specified in this paragraph. If the State agency's total reported nutrition education and breastfeeding promotion and support expenditures are less than the required amount of expenditures, the Department will issue a claim for the difference. The State agency may also request prior written permission from the Department to spend less than the required portions of its NSA grant for either nutrition education or for breastfeeding promotion and support activities. The Department may grant such permission if the State agency has documented that other resources, including in-kind resources, will be used to conduct these activities at a level commensurate with the requirements of this paragraph. Such requests should be submitted to the appropriate FNS regional office for approval. Nutrition education costs are limited to activities which are distinct and separate efforts to help participants understand the importance of nutrition to health. The cost of dietary assessments for the purpose of certification, the cost of prescribing and issuing supplemental foods, the cost of screening for drug and other harmful substance use and making referrals to drug and other harmful substance abuse services, and the cost of other health-related screening shall not be applied to the expenditure requirement for nutrition education and breastfeeding promotion and support activities. The Department shall advise State agencies regarding methods for minimizing documentation of the nutrition education and breastfeeding promotion and support expenditure requirement. Costs to be applied to the one-sixth minimum amount required to be spent on nutrition education and the target share of funds required to be spent on breastfeeding promotion and support include, but need not be limited to—

(i) Salary and other costs for time spent on nutrition education and breastfeeding promotion and support consultations whether with an individual or group;

(ii) The cost of procuring and producing nutrition education and breastfeeding promotion and support materials including handouts, flip charts, filmstrips, projectors, food models or other teaching aids, and the cost of mailing nutrition education or breastfeeding promotion and support materials to participants;

(iii) The cost of training nutrition or breastfeeding promotion and support educators, including costs related to conducting training sessions and purchasing and producing training materials;

(iv) The cost of conducting evaluations of nutrition education or breastfeeding promotion and support activities, including evaluations conducted by contractors;

(v) Salary and other costs incurred in developing the nutrition education and breastfeeding promotion and support portion of the State Plan and local agency nutrition education and breastfeeding promotion and support plans; and

(vi) The cost of monitoring nutrition education and breastfeeding promotion and support activities.

* * * * *

(10) The cost of breastfeeding aids which directly support the initiation and continuation of breastfeeding.

* * * * *

14. In § 246.16:

a. Paragraphs (a) through (i) are revised and paragraphs (j) through (k) are removed;

b. Paragraphs (l) through (q) are redesignated as paragraphs (j) through (o); and,

c. In newly redesignated paragraphs (k)(2) (ii) and (iii), all references to "administrative" are revised to read "nutrition services and administration".

The revisions read as follows:

§ 246.16 Distribution of funds.

(a) *General.* This paragraph describes the timeframes for distribution of appropriated funds by the Department to participating State agencies and the authority for the Secretary to use appropriated funds for evaluation studies and demonstration projects.

(1) Authorized appropriations to carry out the provisions of this section may be made not more than 1 year in advance of the beginning of the fiscal year in which the funds shall become available for disbursement to the State agencies. The funds shall remain available for the purposes for which appropriated until expended.

(2) In the case of appropriations legislation providing funds through the end of a fiscal year, the Secretary shall issue to State agencies an initial allocation of funds provided under such legislation not later than the expiration of the 15-day period beginning on the date of the enactment and subsequent allocation of funds shall be issued not later than the beginning of each of the second, third and fourth quarters of the fiscal year.

(3) Allocations of funds pursuant to paragraph (a)(2) of this section shall be made as follows: The initial allocation of funds to State agencies shall include not less than ⅓ of the appropriated amounts for the fiscal year. The allocation of funds to be made not later than the beginning of the second and third quarters shall each include not less than ¼ of the appropriated amounts for the fiscal year.

(4) In the case of legislation providing funds for a period that ends prior to the end of a fiscal year, the Secretary shall issue to State agencies an initial allocation of funds not later than the expiration of the 10-day period beginning on the date of enactment. In the case of legislation providing appropriations for a period of not more than 4 months, all funds must be allocated to State agencies except those reserved by the Secretary to carry out paragraph (a)(6) of this section.

(5) In any fiscal year unused amounts from a prior fiscal year that are identified by the end of the first quarter of the fiscal year shall be recovered and reallocated not later than the beginning of the second quarter of the fiscal year. Unused amounts from a prior fiscal year that are identified after the end of the first quarter of the fiscal year shall be recovered and reallocated on a timely basis.

(6) Up to one-half of one percent of the sums appropriated for each fiscal year, not to exceed $5,000,000, shall be available to the Secretary for the purpose of evaluating program performance, evaluating health benefits, providing technical assistance to improve State agency administrative systems preparing the biennial Participation Report to Congress described in § 246.25(b)(3) of this part, and administering pilot projects, including projects designed to meet the special needs of migrants, Indians, and rural populations.

(b) *Distribution and application of grant funds to State agencies.*

Notwithstanding any other provision of law, funds made available to the State agencies for the Program in any fiscal year will be managed and distributed as follows:

(1) The State agency shall ensure that all Program funds are used only for Program purposes. As a prerequisite to the receipt of funds, the State agency shall have executed an agreement with the Department and shall have received approval of its State Plan.

(2) Notwithstanding any other provision of law, all funds not made available to the Secretary in accordance with paragraph (a)(6) of this section shall be distributed to State agencies on the basis of funding formulas which allocate funds to all State agencies for food costs and NSA costs incurred during the fiscal year for which the funds had been made available to the Department. Final State agency grant levels as determined by the funding formula and State agency breastfeeding promotion and support expenditure targets will be issued in a timely manner.

(3) A State agency may transfer funds allocated to it for one fiscal year to another fiscal year under the following conditions:

(i) Not more than 1 percent of the funds allocated to a State agency for food costs incurred in any fiscal year may be expended by the State agency for food costs incurred in the preceding fiscal year;

(ii) Not more than 1 percent of the total funds allocated to a State agency for food costs and for NSA costs in any fiscal year may be spent forward and expended by the State agency for such costs incurred in the subsequent fiscal year, except that State agencies which converted food funds to NSA funds under paragraph (f) of this section during a fiscal year shall not spend NSA funds forward into the following fiscal year.

(iii) The total amount of funds transferred from any fiscal year under paragraphs (b)(3)(i) and (b)(3)(ii) of this section shall not exceed 1 percent of the funds allocated to a State agency for the fiscal year.

(iv) A State agency which has implemented an acceptable cost containment measure(s) resulting in increased annual food cost savings of more than 5 percent of its food grant, may spend forward into the fiscal year following the fiscal year of implementation a maximum of 5 percent of the funds allocated to the State agency for food costs for the fiscal year of implementation of such system, less any food funds backspent into the prior fiscal year under paragraph (b)(3)(i) of this section and any food and NSA funds spent forward into the succeeding fiscal year under paragraph (b)(3)(ii) of this section.

(v) Any State agency entering the second fiscal year following the fiscal year of implementation of, or a significant change to, any cost containment measure may, at its discretion, spend forward up to 3 percent of the funds allocated to such State agency for food costs for such fiscal year, less any food funds backspent under paragraph (b)(3)(i) of this section and any food and NSA funds spent forward from the fiscal year under paragraph (b)(3)(ii) of this section.

(vi) The State agency shall specify in writing to the Department the amount of funds it intends to backspend under paragraph (b)(3)(i) of this section and to spend forward under paragraphs (b)(3)(ii), (iv) and (v) of this section not later than March 1 of the fiscal year following the fiscal year from which funds are to be transferred.

(vii) Food funds transferred by the State agency from one fiscal year to another shall be used by the State agency only for food costs in the subsequent fiscal year and, in accordance with § 246.14(a)(2) of this part, shall not be used to cover NSA costs. Any funds spent forward by the State agency for expenditure in the subsequent fiscal year shall not affect the amount of funds allocated to such State agency for the subsequent fiscal year. The Department shall presume that any funds spent forward are the first funds expended by such State agency for costs incurred in the subsequent fiscal year.

(4) Any State agency using an approved cost containment measure as defined in § 246.2 of this part (rebates, competitive bidding, home delivery and direct distribution), may temporarily borrow amounts made available to the State agency for the first quarter of a fiscal year to defray expenses for costs incurred during the final quarter of the preceding fiscal year. Any State agency that uses this authority shall restore or reimburse such borrowed amounts when the State agency receives payment as a result of its cost containment measures for such expenses.

(5) Each State agency's funds will be provided by means of a Letter of Credit unless another funding method is specified by the Department. State agencies shall use funds to cover those allowable and documented Program costs, as defined in § 246.14, which are incurred by the State agency and participating local agencies within their jurisdictions.

(c) *Allocation formula.* State agencies shall receive grant allocations according to the formulas described in this paragraph. To accomplish the distribution of funds under the allocation formulas, State agencies shall furnish the Department with any necessary financial and Program data.

(1) *Use of participation data in the formula.* Wherever the formulas set forth in paragraphs (c)(2) and (c)(3) of this section require the use of participation data, the Department shall use participation data reported by State agencies according to § 246.25(b) of this part; *Provided, however,* that prior to using such participation data in any such formula the Department shall adjust such data as necessary to impute the number of persons in each participant category that are in each nutritional risk priority group; *Provided, further,* that the Department shall use data reflecting participation supported by the aggregate of Federal and State funds for any State agency whose State has budgeted funds from State sources for the Program, if such State agency requests the Department to do so in accordance with a deadline prescribed by the Department.

(2) *Allocation for nutrition services and administration.* The funds available for allocation to State agencies for NSA for each fiscal year shall be an amount sufficient to guarantee a national average per participant grant, as adjusted for inflation. The amount of the national average per participant grant for NSA for any fiscal year will be $8.24, the amount of the national average per participant grant for NSA allocated for Fiscal Year 1987, annually adjusted for inflation. This inflation adjustment will be made by revising the $8.24 to reflect the percentage change in the value of the index for State and local government purchases, calculated using the implicit price deflator, as published by the Bureau of Economic Analysis of the Department of Commerce. The percentage change shall be calculated based upon the change between (x) the base year, and (y) the most recent estimate that is available as of the start of the current fiscal year of the value of such index for the 12-month period ending June 30 of the previous fiscal year. The base year is the value of such index for the 12-month period ending June 1986. Funds for NSA costs will be allocated according to the following procedure:

(i) *Allocation of stability funds.* To the extent funds are available, and subject to the provisions of paragraph (c)(2)(iii) of this section, each State agency shall, at a minimum, receive an amount equal

to the final amount of funds received for NSA in the preceding fiscal year.

(ii) *Allocation of residual funds.* Subject to the provisions of paragraph (c)(2)(iii) of this section, any funds remaining available for allocation for NSA after the stability allocation required by paragraph (c)(2)(i) of this section has been completed shall be allocated as residual funds.

(A) The Department shall allocate residual funds to each State agency according to a method that determines the higher of an amount equalling the stability funds which are allocated in accordance with paragraph (c)(2)(i) of this section plus an amount commensurate with the projected increase in participation from the preceding year as determined by the Department or the amount of funds generated by the formula set forth in paragraph (c)(2)(ii)(B) of this section.

(B) The formula shall calculate the amount of funds each State agency would receive if all available NSA funds were allocated on the basis of the average monthly participation levels, as projected by the Department. Each State agency's projected participation level shall be adjusted to account for the higher (per participant) costs associated with small participation levels, differential salary levels relative to a national average salary level, and service to Priority I participants relative to the national average service to Priority I participants. The formula shall be adjusted to account for these costs factors in the following manner: 80 percent of available funds shall provide compensation based on rates which are proportionately higher for the first 15,000 or fewer participants, as projected by the Department, and 20 percent of available funds shall provide compensation based on differential salary levels and service to Priority I participants, as determined by the Department.

(iii) *Discretionary funds.* Each State agency's final NSA grant shall be reduced by 10 percent, and these funds shall be aggregated for all State agencies within each FNS region to form a discretionary fund. The Department shall distribute these funds according to guidelines which shall be established nationally each year and which shall consider the varying needs of State agencies within the region.

(iv) *Operational level.* The sum of each State agency's stability, residual and discretionary funds shall constitute the State agency's operational level. This operational level shall remain unchanged for such year even if the number of Federally-supported participants in the program at such State agency is lower than the Federally-projected participation level. However, if the provisions of paragraph (e)(2)(ii) of this section are applicable, a State agency will have its operational level for NSA reduced in the immediately succeeding fiscal year.

(3) *Allocation for food costs.* In any fiscal year, any amounts remaining from amounts appropriated for such fiscal year and amounts appropriated for the preceding fiscal year after making any allocations under paragraph (a)(6) of this section and allocations for NSA as required by paragraph (c)(2) of this section shall be made available for food costs. Allocations to State agencies for food costs will be determined according to the following procedure:

(i) *Allocation of stability funds.* Each State agency shall receive for food costs a base amount of stability funds equal to the sum of all funds allocated to such State agency for all food costs during the preceding fiscal year minus fifty (50) percent of any food funds voluntarily returned by such State agency prior to July 16 of the preceding fiscal year. This base amount shall be adjusted by the cumulative effect of the following operations.

(A) *Inflation adjustment.* The base amount shall be increased by an inflation factor. The inflation factor shall be obtained by dividing the State agency's imputed participation in Priorities I, II and III by its total participation and multiplying the resulting quotient by the anticipated rate of inflation as determined by FNS. *Provided, however,* that the sum of the stability funds and residual funds allocated to any Indian State agency for food costs shall not be less than such State agency's base amount increased by the anticipated rate of inflation.

(B) *Migrant set-aside.* Each State agency's base amount, as adjusted for inflation, shall be further adjusted in order to make funds available for services to eligible members of migrant populations. The national aggregate amount of funds made available for this purpose shall not be less than nine-tenths of one percent of the sums appropriated for the applicable fiscal year. To the extent that this amount exceeds the amount required to maintain each State agency's existing level of service to migrants, as determined by the Department, funds shall be deducted on a proportional basis from every State agency's base amount as adjusted for inflation. The funds made available thereby shall be added to the amounts awarded to those State agencies that had served migrant populations in the immediately preceding fiscal year. The basis for determining each such State agency's share of these funds shall be its proportionate share of the anticipated cost, as determined by the Department, of supplemental foods to be provided to eligible migrants in the applicable fiscal year.

(ii) *Allocation of residual funds.* Any funds remaining available for allocation for food costs after the allocation of stability food funds required by paragraph (c)(3)(i) of this section has been completed shall be allocated as follows.

(A) Fifty (50) percent of such food funds shall be allocated on the basis of the State agency's imputed participation in Priority I. Of the funds available for allocation on this basis, the percent allocated to each State agency shall be the percent such State agency's imputed Priority I participation is of the national aggregate imputed Priority I participation.

(B) Fifty (50) percent of such food funds shall be allocated on the basis of the extent to which the total amount of funds each State agency receives through the allocations required by paragraphs (c)(3)(i) and (c)(3)(ii)(A) of this section falls short of the amount such State agency would receive for food costs if all funds available for food were allocated solely on the basis of each State agency's proportionate share of the national aggregate population of persons potentially eligible to participate in the Program. Each State agency's population of potentially eligible persons shall be determined through poverty and health indicators selected by FNS. If the CSFP also operates in the State, the number of persons in such State participating in the CSFP but otherwise eligible to participate in the Program, as determined by FNS, shall be deducted from such State agency's population of potentially eligible persons. For purposes of this allocation, the respective amounts of food funds that would be allocated to Alaska, the Virgin Islands, Hawaii, Guam, and any Indian State agencies located within the borders of these States, on the basis of their respective shares of the potentially eligible population, shall be adjusted on the basis of appropriate Thrifty Food Plan amounts used in the Food Stamp Program. The adjusting factor for each such State agency shall be the quotient obtained by dividing the Thrifty Food Plan amount used in the applicable State by the Thrifty Food Plan amount used in the 48 contiguous States and the District of Columbia; *Provided, however,* that the "Urban Alaska" Thrifty Food Plan amount shall be used to determine the adjusting factor for the Alaska State

Agency; and the adjusting factor for any Indian State agency located within the State of Alaska shall be determined from whichever "Rural Alaska" Thrifty Food Plan amount is used in the locality served by such Indian State agency.

(4) *Adjustment for new State agencies.* Whenever a State agency that had not previously administered the program enters into an agreement with the Department to do so during a fiscal year, the Department shall make any adjustments to the requirements of this section that are deemed necessary to establish an appropriate initial funding level for such State agency.

(d) *Distribution of funds to local agencies.* The State agency shall provide to local agencies all funds made available by the Department, except those funds necessary for allowable State agency NSA costs and food costs paid directly by the State agency. The State agency shall distribute the funds based on claims submitted at least monthly by the local agency. Where the State agency advances funds to local agencies, the State agency shall ensure that each local agency has funds to cover immediate disbursement needs, and the State agency shall offset the advances made against incoming claims each month to ensure that funding levels reflect the actual expenditures reported by the local agency. Upon receipt of Program funds from the Department, the State agency shall take the following actions:

(1) Distribute funds to cover expected food cost expenditures and/or distribute caseload targets to each local agency which are used to project food cost expenditures.

(2) Allocate funds to cover expected local agency NSA costs in a manner which takes into consideration each local agency's needs. For the allocation of NSA funds, the State agency shall develop an NSA funding procedure, in cooperation with representative local agencies, which takes into account the varying needs of the local agencies. The State agency shall consider the views of local agencies, but the final decision as to the funding procedure remains with the State agency. The State agency shall take into account factors it deems appropriate to further proper, efficient and effective administration of the program, such as local agency staffing needs, density of population, number of persons served, and availability of administrative support from other sources.

(3) The State agency may provide in advance to any local agency any amount of funds for NSA deemed necessary for the successful commencement or significant expansion of program operations during a reasonable period following approval of a new local agency, a new cost containment measure, or a significant change in an existing cost containment measure.

(e) *Recovery and reallocation of funds.* (1) Funds may be recovered from a State agency at any time the Department determines, based on State agency reports of expenditures and operations, that the State agency is not expending funds at a rate commensurate with the amount of funds distributed or provided for expenditures under the Program. Recovery of funds may be either voluntary or involuntary in nature. Such funds shall be reallocated by the Department through application of appropriate formulas set forth in paragraph (c) of this section.

(2) *Performance standards.* The following standards shall govern expenditure performance.

(i) *95 Percent standard.* The amount allocated to any State agency for food benefits in any fiscal year shall be reduced if such State agency's food expenditures for the preceding fiscal year were less than 95 percent of the amount allocated to such State agency for such benefits. Such reduction shall equal the difference between the State agency's preceding year food expenditures and 95 percent of the amount allocated to the State agency for such benefits. If a State agency has incurred a food funds recovery, the 95 percent standard will be calculated based on the amount of its grant prior to the recovery. For purposes of determining the amount of such reduction, the amount allocated to the State agency for food benefits for the preceding fiscal year shall not include food funds expended for food costs incurred in the second preceding fiscal year in accordance with paragraph (b)(3)(i) of this section, food funds spent forward from the preceding fiscal year in accordance with paragraph (b)(3)(ii) of this section, or allowable adjustments related to rebate savings or funds conversions discussed in paragraph (f) of this section. The Department shall recover the amount of food funds by which the amount allocated to any State agency is reduced pursuant to this paragraph. Temporary waivers of this 95 percent performance standard may be granted at the discretion of the Department.

(ii) *Reduction of NSA operational level.* If a State agency's per participant expenditure for NSA is more than 15 percent higher than its per participant grant for NSA without good cause, the Secretary shall reduce such State agency's operational level for costs of NSA in the next fiscal year. Circumstances that may meet the good cause criterion include, but are not limited to, dramatic and unforeseen increase in food costs, which result in the inability to reach Federally-projected participation levels. To avoid a reduction, the State agency must submit to and receive approval from the Department, justification for exceeding the 15 percent limit on excess NSA expenditures under the "good cause" allowance. The justification must be submitted at the time it submits its closeout report for the applicable fiscal year.

(iii) *Spend forward funds.* If any State agency notifies the Department of its intent to spend forward a specific amount of funds for expenditure in the subsequent fiscal year, in accordance with paragraph (b)(3)(ii) of this section, such funds shall not be subject to recovery by the Department.

(f) *Conversion of food funds.* In any fiscal year that a State agency achieves, through use of acceptable measures (including, but not limited to, use of cost containment measures, curtailment of vendor abuse, and breastfeeding promotional activities), increased Federal participation that exceeds its current year Federally-projected participation level as determined by the allocation in the second quarter, such State agency may convert food funds to NSA funds. The conversion rate (per participant administrative grant) will be determined after the initial allocation (excluding partial year appropriations) by dividing the current year's administrative grant, inclusive of regional discretionary funds, by the current year's Federally-projected participation level. This conversion is allowable to the extent that the funds are necessary to cover allowable NSA expenditures in such fiscal year and the State agency does not exceed the per participant grant for NSA established by the funding procedure in paragraph (c)(2) in this section. If a State agency increases its participation level through measures that are not in the nutritional interests of participants or not otherwise allowable under program regulations (such as reducing the quantities of foods provided for reasons not related to nutritional need), the State agency may not convert amounts allocated for food benefits to defray costs of NSA and the expenditure of such funds for NSA purposes will be disallowed in accordance with paragraph (h) of this section.

(g) *Expenditure of converted food funds.* The State agency may convert food funds to NSA funds under paragraph (f) of this section only to the extent necessary to cover allowable NSA

costs which exceed the State agency's NSA grant for the current fiscal year and any NSA funds which the State agency has spent forward into the current fiscal year.

(h) *Limits on converted food funds.* At the end of the fiscal year, the Department will determine the amount of food funds which the State agency was entitled to convert to NSA funds under paragraph (f) of this section. In the event that the State agency has converted more than the permitted amount of funds, the Department will disallow the amount of excess conversion.

(i) *Converted funds in relation to grants.* For purposes of establishing a State agency's stability food grant and stability NSA grant under paragraphs (c)(2)(i) and (c)(3)(i) of this section, respectively, amounts converted from food funds to NSA funds under paragraph (f) of this section and § 246.14(e) of this part during the preceding fiscal year shall be treated as though no conversion had taken place.

* * * * *

15. In § 246.19, paragraph (b)(3) is revised to read as follows:

§ 246.19 Management evaluation and reviews.

* * * * *

(b) * * *

(3) The State agency shall conduct monitoring reviews of each local agency at least once every two years. Such reviews shall include on-site reviews of a minimum of 20 percent of the clinics in each local agency or one clinic, whichever is greater. The State agency may conduct such additional on-site reviews as the State agency determines to be necessary in the interest of the efficiency and effectiveness of the program.

* * * * *

16. In § 246.24, paragraph (a) is revised to read as follows:

§ 246.24 Procurement and property management.

(a) *Requirements.* State and local agencies shall ensure that subgrantees comply with the requirements of 7 CFR part 3016, the nonprocurement debarment/suspension requirements of 7 CFR part 3017, and if applicable, the lobbying restrictions as required in 7 CFR part 3018 concerning the procurement and allowability of food in bulk lots, supplies, equipment and other services with Program funds. These requirements are adopted to ensure that such materials and services are obtained for the Program in an effective manner and in compliance with the provisions of applicable law and executive orders.

* * * * *

§ 246.25 [Amended]

17. In § 246.25(b)(2), reference to "§ 246.7(d)(4)" is revised to read "§ 246.7(e)(4)".

18. In § 246.27, paragraphs (a)–(d) and (f) are revised to read as follows:

§ 246.27 Program information.

* * * * *

(a) Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, Vermont: U.S. Department of Agriculture, FNS, Northeast Region, 10 Causeway Street, room 501, Boston, Massachusetts 02222–1066.

(b) Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Puerto Rico, Virginia, Virgin Islands, West Virginia: U.S. Department of Agriculture, FNS, Mid-Atlantic Region, Mercer Corporate Park, 300 Corporate Boulevard, Robbinsville, New Jersey 08691–1598.

(c) Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee: U.S. Department of Agriculture, FNS, Southeast Region, 77 Forsyth Street, SW., suite 112, Atlanta, Georgia 30303.

(d) Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin: U.S. Department of Agriculture, FNS, Midwest Region, 77 West Jackson Boulevard—20th Floor, Chicago, Illinois 60604–3507.

* * * * *

(f) Colorado, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah, Wyoming: U.S. Department of Agriculture, FNS, Mountain Plains Region, 1244 Speer Boulevard, suite 903, Denver, Colorado 80204.

* * * * *

Dated: March 2, 1994.

William E. Ludwig,

Administrator, Food and Nutrition Service.

[FR Doc. 94–5569 Filed 3–10–94; 8:45 am]

BILLING CODE 3410–30–U

---

7 CFR Part 248

RIN 0584–AB43

WIC Farmers' Market Nutrition Program

AGENCY: Food and Nutrition Service, USDA.

ACTION: Interim rule.

SUMMARY: This interim rule implements the mandates of the WIC Farmers' Market Nutrition Act of 1992, enacted on July 2, 1992, which establishes the WIC Farmers' Market Nutrition Program (FMNP or Program). The purposes of the FMNP are to provide resources to women, infants, and children who are nutritionally at risk, in the form of fresh, nutritious, unprepared foods (such as fruits and vegetables) from farmers' markets; to expand the awareness and use of farmers' markets; and, to increase sales at such markets.

In accordance with the WIC Farmers' Market Nutrition Act of 1992, this rulemaking establishes the requirements for the operation and management of the FMNP. In addition to the requirements of the Act, these rules were developed based on the results of the Farmers' Market Coupon Demonstration Project.

EFFECTIVE DATES: March 11, 1994, except for §§ 248.4, 248.9, 248.10(a), 248.10(b), 248.10(e), 248.10(f), 248.11, 248.14(h), 248.17(b)(2)(ii), and 248.18(b) which contain information collection requirements which are not effective until approved by OMB. When approval is received, the agency will publish a notice in the **Federal Register** announcing the effective date.

To be assured of consideration, comments on this rule must be received on or before July 11, 1994.

ADDRESSES: Comments may be mailed to Barbara Hallman, Chief, Policy and Program Development Branch, Supplemental Food Programs Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, room 540, Alexandria, Virginia, 22302, (703) 305–2730. 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 or Debra Whitford, Supplemental Food Programs Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, room 540, Alexandria, Virginia 22302, (703) 305–2730.

SUPPLEMENTARY INFORMATION:

Classification

Executive Order 12866

This interim rule is issued in conformance with Executive Order 12866. It has been designated "not significant" and did not require clearance by the Office of Management and Budget.

Executive Order 12372

This program 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)).

Executive Order 12778

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full implementation. This rule is not intended to have retroactive effect unless so specified in the "Effective Date" paragraph 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 WIC Farmers' Market Nutrition Program, the administrative procedures are as follows: (1) Local agencies, farmers, and farmers' markets—State agency hearing procedures issued pursuant to 7 CFR 248.16; (2) applicants and participants—State agency hearing procedures issued pursuant to 7 CFR 248.16; and (3) sanctions against State agencies (but not claims for repayment assessed against a State agency) pursuant to 7 CFR 248.17—administrative appeal in accordance with 7 CFR 248.19; and (4) procurement by State or local agencies—administrative appeal to the extent required by 7 CFR 3016.36.

Regulatory Flexibility Act

The Department has also reviewed this rule in relation to the requirements of the Regulatory Flexibility Act of 1980 (Pub. L. 96–354, 94 Stat. 1164, September 19, 1980). The Administrator of the Food and Nutrition Service has certified that this interim rule does not have a significant economic impact on a substantial number of small entities. Participating farmers and farmers' markets will be affected by the FMNP requirements and increased sales generated by FMNP participants. In addition, participating State and local agencies will be affected by FMNP administration requirements.

Paperwork Reduction Act

The reporting requirements established by this rulemaking in § 248.23 have been reviewed by the Office of Management and Budget, in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3507). The reporting and recordkeeping requirements established by this rulemaking in §§ 248.4, 248.9, 248.10(a), 248.10(b), 248.10(e), 248.10(f), 248.11, 248.14(h), 248.17(b)(2)(ii), 248.18(b), and 248.23(b) are pending review by the Office of Management and Budget.

ESTIMATED ANNUAL REPORTING AND RECORDKEEPING BURDEN

Section of regulations	Annual No. of respondents	Annual frequency	Average burden per response	Annual burden hours
Reporting:				
248.4	11	1	50	550
248.10(a) (2) & (3)	500	1	2	1,000
248.10(b)	250	1	2	500
248.10(e)	50	1	10	500
248.14(h)	11	1	1	11
248.17(b)(2)(ii)	2	1	20	40
248.18(b)	11	1	15	165
248.23(b)	11	2	6.5	143
Total	511			6,802
Recordkeeping:				
248.9	11	1	1	11
248.10(e)	50	1	1	50
248.10(f)	11	1	5	55
248.11	11	1	12	132
Total	61	1		289.75
Total Reporting & Recordkeeping Burden				7,091.75

This interim rule implements legislative mandates of Public Law 102–314, which was enacted on July 2, 1992, and became effective retroactive to October 1, 1991. Because the FMNP is already operating in several States, further delay of these rules for notice and comment would serve no useful purpose. Accordingly, the Administrator of the Food and Nutrition Service has certified that it is unnecessary and contrary to the public interest to have prior opportunity for comment. For the same reasons, the Administrator has found that it would be impracticable and contrary to the public interest to delay the effective date of this interim rule. Accordingly, it is effective upon publication. The Department believes, however, that the rule may be improved by public comment. Therefore, comments are being solicited on this rule until July 11, 1994. All comments received will be analyzed, and any appropriate changes in the rule will be incorporated in the subsequent publication of a final rule.

Background

Demonstration Projects

Section 501 of the Hunger Prevention Act of 1988 (Pub. L. 100–435), enacted on September 19, 1988, amended the Child Nutrition Act of 1966 (CNA), 42 U.S.C. 1771 *et. seq.*, to add a new subsection 17(m) which authorized up to 10 Farmers' Market Coupon Demonstration Projects (demonstration projects) for a 3-year period. The purpose of the demonstration projects was twofold: (1) To provide fresh, nutritious, unprepared foods (such as fruits and vegetables) from farmers' markets to persons at nutritional risk, and (2) to expand the awareness and use of farmers' markets.

Under the authority of Public Law 100–435, participants in the Special Supplemental Food Program for Women, Infants, and Children (WIC) in selected areas of Connecticut, Iowa, Maryland, Massachusetts, Michigan, New York, Pennsylvania, Texas, Vermont, and Washington were provided coupons that could be redeemed for fresh fruits and vegetables

at authorized farmers' markets, in addition to their regular WIC benefits. The 10 States were selected through a competitive grant application process which was based on criteria set forth in the law as well as additional criteria developed by the Department to ensure accountability and to maximize benefits for farmers and recipients.

Basic features of the initial demonstration projects included: (1) Only persons currently participating in the WIC Program (excluding infants 4 months of age or younger) were eligible for Federal benefits under the demonstration projects.

(2) States could impose other eligibility requirements or priorities for receiving coupons as they saw appropriate (e.g., most States limited distribution to specific geographic areas, and some gave priority to pregnant or breastfeeding women).

(3) The annual value of the Federal share of the benefit could not be less than $10 or more than $20. If the coupon face value exceeded the purchase price, farmers were not allowed to give change.

(4) Most recipients received some form of nutrition education explaining how to buy and prepare fresh fruits and vegetables.

(5) The State grantees were required to provide matching funds for the demonstration project in an amount equal to not less than 30 percent of the total cost of the demonstration project in the State. The match could be satisfied by contributions to similar projects operating in the State.

(6) State grantees were allowed to use up to 12 percent of project funds for administration.

(7) Each year the availability of demonstration project grant money was subject to the Federal appropriations process. For Fiscal Year 1989, up to $2 million for demonstration project grants was appropriated. The Fiscal Year 1990 appropriation was also up to $2 million. The Fiscal Year 1991 appropriation was increased to $2.75 million, providing some expansion over the Fiscal Year 1990 appropriation.

(8) Although authorization for the demonstration projects expired at the end of Fiscal Year 1991, as part of the Rural Development, Agriculture, and Related Agency Appropriations Act for Fiscal Year 1992 (Pub. L. 102–142), Congress appropriated up to $3 million to carry on the projects. As a result, on January 6, 1992, the Food and Nutrition Service (FNS) announced grant levels totaling $3 million to State grantees to carry out the demonstration projects another year, through Fiscal Year 1992.

Evaluation

Public Law 100–435 also amended section 17(m)(9)(A) of the CNA to mandate an evaluation of the demonstration projects, which was conducted in two phases. Phase One examined the general management and accountability of the demonstration projects during their first season in 1989. It was found that they were generally well-run, particularly in the areas of accountability, benefit delivery, and overall project management. Phase Two of the evaluation process assessed the impact of the demonstration projects and their effectiveness in accomplishing the legislative goals. Surveys were also completed to obtain information on the food consumption and purchasing patterns of demonstration project coupon recipients, and on sales and food purchases at participating farmers' markets as compared to control groups. Findings from Phase Two suggested that the demonstration projects may have had a modest positive effect on farmers' incomes, and on the consumption of fruits and vegetables by the surveyed women who received demonstration project coupons. In addition it was found that participating farmers and WIC recipients strongly supported the demonstration projects. The results of both phases of the evaluation were submitted in a report to Congress in April 1991.

WIC Farmers' Market Nutrition Program

History

Based largely on the success of the demonstration projects, Public Law 102–314 amended section 17(m) of the CNA (42 U.S.C. 1786(m)) to authorize the FMNP as an independent program. Amended section 17(m)(1) instructs the Secretary to award grants to States that submit State Plans for the establishment or maintenance of programs designed to provide recipients of assistance through the WIC Program, or those who are on a waiting list to receive WIC benefits, with coupons that may be exchanged for fresh, nutritious, unprepared foods at farmers' markets. In order to be eligible for grants, the State Plan must first be approved by the Secretary. Pursuant to section 17(m)(2) of the CNA, the Chief Executive Officer of the State or Indian Tribal Organization (i.e., the Governor or Principal Chief) shall designate the appropriate State agency or agencies to administer the FMNP in conjunction with the appropriate nonprofit organizations, and shall ensure coordination among the appropriate agencies and organizations.

Difference Between Demonstration Project and Program

The newly created FMNP is very similar to the demonstration projects which operated for 4 years. For example, the annual Federal value of the coupons issued to FMNP recipients is still restricted to not less than $10 and not more than $20 per recipient per year, and each State agency administering the FMNP must provide matching funds in an amount equal to not less than 30 percent of the total cost of the program's operation and administration. However, five significant differences are also included in the authorizing legislation: (1) Persons who are on a waiting list for WIC Program participation, as well as current WIC participants, may receive FMNP coupons;

(2) The State agency cap for administrative funds to operate the FMNP has been increased to 15 percent of the total amount of program funds, and the Department may permit up to an additional 2 percent, upon a showing by the State agency of financial need.

(3) During the first year for which a State receives assistance, a State shall be permitted to use not more than 2 percent of the total program funds for administration of the FMNP in addition to the 15 percent already established;

(4) A State agency may use not more than 5 percent of its current year funds during a subsequent fiscal year or to cover expenses incurred during the prior fiscal year; and

(5) There is no longer a 10-state limit on the number of State agencies that can administer the Program.

States With Demonstration Projects

Section 17(m)(6)(A) of the CNA effectively authorizes the State agencies that have operated demonstration projects to continue under the new FMNP, by stipulating that each State which received Federal funding in a fiscal year ending before October 1, 1991 (i.e., before Fiscal Year 1992) shall receive benefits under the new FMNP, provided that the State agency complies with the requirements established by Public Law 102–314, as determined by the Secretary. The funding distribution formula for new State agencies, State agencies currently participating in the demonstration projects, and requirements for reallocation will be described in detail in the Distribution of Funds section of this Preamble. Because the FMNP will operate as an adjunct to WIC and will utilize standard operating procedures of WIC, this preamble will only discuss in detail individual provisions of this interim rulemaking that are unique to the FMNP.

1. Definitions (§ 248.2)

"Administrative costs." In the FMNP, "administrative costs" are all allowable costs as defined in § 248.12(b). This includes costs for developing, printing and distributing coupons; costs associated with managing and monitoring markets; training and authorizing farmers; preparing materials for recipients such as coupon guidelines and market guides; and providing nutrition education. It does not include the value of the coupons themselves.

"Compliance buy." Participating State agencies have the option to conduct compliance buys, which are defined as covert, on-site investigations in which a FMNP representative poses as a FMNP recipient and transacts one or more FMNP food coupons. Because the busy, informal atmosphere of a farmers' market makes it difficult to detect program violations, compliance buys can provide an objective measure of whether farmers are following FMNP rules such as not providing change, and selling only authorized foods to FMNP recipients.

"Coupon." In order to distinguish them from the negotiable financial instruments called "food instruments", used in the WIC Program, the FMNP will use the term "coupon" to identify the negotiable financial instrument by which FMNP benefits are transferred. Both coupons and checks were used by States as demonstration project instruments. Some States used negotiable checks that could be deposited at a bank. While the term "coupon" will be used exclusively in this rulemaking, it should be noted that other terms may be used in some States participating in the FMNP.

"Demonstration project." In 1988, Congress authorized grant funding for 3-year demonstration projects in 10 States under which food coupons would be issued, in addition to normal food package benefits, to WIC recipients for purchases of fresh, nutritious, unprepared foods at farmers' markets (Public Law 100–435). The 10 States awarded grants to operate projects were Connecticut, Iowa, Maryland, Massachusetts, Michigan, New York, Pennsylvania, Texas, Vermont, and Washington. For Fiscal Year 1992, Public Law 102–142 allowed for an appropriation of up to $3 million dollars to carry on the projects another year through 1992. This interim rule distinguishes the previously administered "demonstration projects" from the permanent WIC Farmers' Market Nutrition Program by using the term FMNP or Program when referring to the permanent program.

"Eligible foods." Under the FMNP, eligible foods are defined as fresh, nutritious, unprepared, domestically grown fruits, vegetables and herbs for human consumption. Eligible foods may not be processed or prepared beyond their natural state except for usual harvesting and cleaning processes.

Section 2 of the WIC Farmers' Market Act of 1992 states that one of the purposes of the Act is to provide women, infants and children at nutritional risk with "fresh nutritious unprepared foods (such as fruits and vegetables)." The Department notes that a broad variety of foods are available at farmers' markets that are not fresh and unprepared, including jams and jellies, baked goods, maple syrup, cider and fruit juices, and cheese. Accordingly, such foods are not eligible foods for the FMNP.

Among the remaining food choices which meet the fresh, nutritious and unprepared criteria, the Department has decided to limit eligible foods to fresh fruits, vegetables and herbs. This is consistent with the emphasis on fruits and vegetables contained in section 2 of the Act, as noted above, and in section 3 (section 17(m)(8)(D) of the CNA) which requires State agencies to report to the Department information on the "change in consumption of fresh fruits and vegetables" resulting from participation in FMNP. As a result, although some foods in addition to fruits, vegetables and herbs may be considered "fresh, nutritious, and unprepared," they are excluded as eligible foods. These include honey, as well as protein foods, such as eggs, raw seeds and nuts, meats, fish and seafood. In addition to the fact that it is not a fruit or vegetable, the exclusion of honey is also consistent with the recommendation by the American Academy of Pediatrics that infants under 12 months of age not consume honey due to the risk of infant botulism. American Academy of Pediatrics, Pediatric Nutrition Handbook, 1993 Edition, (p.17). The Department believes that this exclusion is necessary given the FMNP's relationship to the WIC Program, and the likelihood that some FMNP participants will be infants. The exclusion of the protein foods is consistent with their generally high cost relative to the limited annual benefit of the FMNP, and the fact that FMNP in most cases will supplement WIC packages which already contain significant amounts of protein foods.

Consistent with the WIC Program, and other food assistance programs administered by the Department, the FMNP values its partnership with American agriculture and therefore promotes the use of FMNP coupons to purchase domestically grown produce at participating farmers' markets. Because the Department intends that the FMNP benefit local or State farmers, most States participating in the demonstration projects prohibited the use of coupons to purchase foods grown outside of the State. Two States in the demonstration project defined locally grown to include counties outside but adjacent to the State boundary. States may want to consider the advantages of establishing "locally grown" guidelines for the purpose of improving marketing opportunities for local farmers.

"Farmer." Although authorizing legislation refers to "producer", the term "farmer" will be used in this rulemaking for clarification, to identify an individual authorized to sell produce at participating farmers' markets. Individuals who exclusively sell produce grown by someone else, such as wholesale distributors, cannot be authorized to participate in the FMNP. This is consistent with the Department's belief that the FMNP should benefit smaller, local farmers.

"Farmers' market." Pursuant to section 2 of Public Law 102–314, one of the purposes of the WIC Farmers' Market Nutrition Act of 1992 is to, "expand the awareness and use of farmers' markets and increase sales at such markets". The Department therefore proposes that "farmers' market" for the FMNP be defined as "an association of local farmers who assemble for the purpose of selling their produce directly to consumers." In most cases, the Department makes a distinction between an established farmers' market (one that has community roots, such as a permanent location, and good support from non-FMNP sales), and a farmstand. A farmstand is a location at which an individual farmer sells his or her produce directly to consumers. A farmstand set up near a WIC clinic would not be eligible to participate. Since WIC participants cannot rely on the continued existence of such farmstands, they do little to promote the sustained patronage of farmers' markets. In contrast, most eligible farmers' markets have a sufficient number of sellers to provide some measure of stability, and a wider selection of products so as to create a competitive environment, which discourages higher prices. In addition, their stable existence increases the likelihood of continued patronage by recipients or former recipients, and is more conducive to compliance monitoring. It should be noted that farmstands may be authorized in those cases where

recipient access to farmers' markets is an issue and where FNS has granted prior approval. For example, in an urban area where recipient access to farmers' markets is limited, a farmstand providing locally grown produce and overseen by a nonprofit agency could be approved for authorization with the prior consent of FNS.

"Household." Household under the FMNP has the same definition as that of "family" defined in § 246.2 of this chapter. Each such family shall constitute a separate household for FMNP benefit issuance purposes. As permitted by section 17(m)(11)(c) of the CNA, a recipient may be either a person or a household, at the State agency's option. This distinction is discussed in detail in section 5 of this preamble

"Local agency." Under the FMNP, a local agency includes any nonprofit entity or local government location where recipients are issued FMNP coupons or are provided with nutrition education or information on other operational aspects of the Program. This may include the WIC local agency or any other location authorized by the administering State agency to provide the services indicated above to recipients.

"Matching requirement." All participating FMNP States are required to provide non-Federal matching funds equal to not less than 30 percent of the total FMNP cost. The calculation for total FMNP cost and minimum State match is as follows:

- Divide the total Federal funds by 0.7. This establishes the total FMNP cost including both Federal funds and minimum State match from non-Federal sources.
- Multiply the total FMNP cost by 0.3. This establishes the required State match based on the Federal funding request.

The match may be satisfied through State, local or private contributions for the FMNP or State, local or private contributions for similar farmers' market programs which operate at the same time as the FMNP. Similar programs include other farmers' market programs which serve women, infants, and children (who need not be WIC participants or on the waiting list for WIC), as well as other categories of recipients such as, but not limited to, elderly persons.

"Nutrition education." Nutrition education means individual or group education sessions, and the provision of information and educational materials, designed to improve health status, achieve positive change in dietary habits, and to emphasize relationships between nutrition and health, all in keeping with the individual's personal, cultural, and socioeconomic preferences.

"Recipient." Recipient means a person chosen by the State agency to receive FMNP benefits. Public Law 102–314 modified the definition of eligible persons which was used in the demonstration projects to include persons on the waiting list to receive benefits under the WIC Program, as well as persons actually participating in WIC. Accordingly, this interim rule expands the definition of those eligible to participate (§ 248.6(a)) to include the following, individually or in combination: Women, infants over four months of age, or children who receive assistance under the WIC Program, or are on the waiting list to receive benefits under the WIC Program. As permitted by section 17(m)(11)(c) of the CNA, a recipient may be either a person or a household, at the State agency's option. This distinction is discussed in detail in section 5 of this preamble.

As set forth in § 248.6 of this interim rule, State agencies may impose other eligibility requirements or priorities for receiving FMNP coupons as may be necessary. For instance, most States limit distribution to specific geographic areas, and some give priority to pregnant or breastfeeding women. States may preclude WIC "waiting list" persons on the basis of their potentially lower priority status. State agencies must identify in their State Plan the groups/categories of WIC or WIC waiting list participants to whom FMNP coupons will be issued or restricted. Based on the Department's Evaluation Report of the demonstration projects conducted in 1989, most States distributed coupons to all categories of eligible WIC participants. Approximately two-thirds of the coupons were distributed to infants and children participating in WIC, with the remaining one-third distributed to women. Three States focused their distribution efforts more heavily on women participating in WIC because they were considered to be at highest risk nutritionally.

"Similar programs." Similar programs means other farmers' market projects or programs which serve women, infants and children, as well as other categories of recipients, such as, but not limited to, elderly persons. Based on language in section 3 of Public Law 102–314, amending sections 17(m)(6)(F) (i) and (ii) of the CNA, in selecting States to participate in the FMNP, the Secretary shall give favorable consideration to States that have prior experience operating similar programs.

"State agency." Section 3 of Public Law 102–314 amends section 17(m)(2)(A) of the CNA to state that the Chief Executive Officer of the State shall designate the appropriate State agency or agencies to administer the FMNP in conjunction with the appropriate nonprofit organizations. State agency means the agriculture department, the health department or comparable agency; an appropriate Indian agency as specified in § 248.2.

"State Plan." "State Plan" means a plan of FMNP operation and administration that describes the manner in which the State agency intends to implement and operate all aspects of the Program within its jurisdiction in accordance with § 248.4 of this regulation. Prior to the receipt of Federal funds to operate the FMNP, a State agency (including those that participated in the demonstration projects), must submit for approval a State Plan of Operation each November 15, for operation in the next fiscal year. New FMNP State agencies will be selected competitively based on State Plans submitted to and approved by the Food and Nutrition Service and the specific ranking criteria set forth in section 17(m)(6)(F) of the CNA and § 248.5 of the regulations.

2. Administration (§ 248.3)

FNS is responsible for the administration of the FMNP within the Department, and will provide assistance to State agencies and evaluate all levels of Program operations to ensure that the goals of the Program are effectively and efficiently achieved. The Supplemental Food Programs Division and the FNS Regional offices are responsible for administration within FNS. Each State agency is responsible for the effective and efficient administration of the FMNP within that State, and shall provide guidance to cooperating WIC State and local agencies on all aspects of FMNP operations. State FMNP contacts are to communicate with the designated FMNP contacts in the appropriate FNS Regional office regarding FMNP operations.

The grant funds will be provided to the administering State agency or agencies designated by the Chief Executive Officer of the State or Indian Tribal Organization. A State agency may be the agriculture department, the health department or comparable agency; an Indian tribe, band or group recognized by the Department of the Interior; an intertribal council or group which is an authorized representative of Indian tribes, bands or groups recognized by the Department of the Interior and which has an ongoing

relationship with such tribes, bands or groups for other purposes and has contracted with them to administer the Program; or the appropriate area office of the Indian Health Service of the Department of Health and Human Services.

The Chief Executive Officer of the State shall ensure coordination between the agency designated to administer the FMNP, and the WIC State agency if different, by requiring that a written agreement is entered into by the two agencies. Because eligibility for the FMNP is limited to WIC participants or persons on the waiting list for WIC services, thorough coordination between agencies is necessary for the successful operation of the Program. In order to further ensure successful operation, State agencies shall ensure that there are sufficient staff available to administer an efficient and effective Program and shall provide an outline of administrative staff and job descriptions for staff whose salaries will be provided from FMNP funds. An increase in administrative funding (compared with the demonstration projects) to 15 percent (see § 248.14(g) of this rulemaking) will aid the staffing and general administrative process as well.

3. State Plan Provisions (§ 248.4)

In establishing the FMNP as a permanent program, Congress established basic standards and requirements for its operation. Pursuant to section 17(m)(6)(D)(i) of the CNA, each State agency that desires to receive an FMNP grant, including State agencies previously participating in the demonstration projects, must submit a State Plan for approval by the Department. Section 248.4 requires submission of State Plans by November 15 of each year.

The State plan process replaces the grant application process that was used for the demonstration projects. Sections 17(m)(6)(D) (ii) and (iii) of the CNA require that each State Plan submitted to the Secretary contain the following:

- The estimated cost of the FMNP;
- The estimated number of individuals to be served by the FMNP;
- A description of the State's plan for complying with the requirements of section 17(m)(5) of the CNA; and
- The criteria developed by the State with respect to authorization of farmers to participate in the FMNP. Such criteria shall require any authorized farmer to sell fresh, nutritious, unprepared fruits, vegetables or herbs to recipients, in exchange for coupons.

A complete listing of State Plan requirements is contained in § 248.4.

4. Selection of State Agencies (§ 248.5)

Pursuant to section 3 of Public Law 102–314, each State agency that received assistance under the demonstration projects in a fiscal year prior to October 1, 1991, and which complies with matching requirements for funding and other program requirements as determined by the Department, shall receive assistance under the FMNP. New State agencies wishing to participate in the FMNP will have their State plans approved and ranked based on objective criteria consistent with the requirements established in section 17(m)(6)(F) of the CNA as set forth in § 248.5.

5. Recipient Eligibility (§ 248.6)

Individuals who are eligible to receive Federal benefits under the FMNP are WIC participants, excluding infants four months of age or younger, or individuals on the waiting list to receive WIC benefits. Infants under four months of age are excluded from eligibility in the FMNP based on the recommendation of the American Academy of Pediatrics that such infants are not able to consume solids due to the level of development of their gastrointestinal tract. State agencies have the option to prioritize WIC participants who will receive FMNP benefits. For example, a State agency may choose to provide benefits to all eligible pregnant and breastfeeding women. Section 248.2 defines recipient as a person chosen by the State agency to receive benefits under the FMNP. This definition permits State agencies to allocate the quantity of benefits on a household basis, meaning that the household could receive fewer benefits as a unit than it otherwise would if benefits were allocated to individual household members. For example, in a household where four members of that household are categorically eligible, the State may choose to allocate benefits on the basis of fewer than four eligibles. A State agency making the decision to issue benefits on a household basis would be choosing to spread fewer benefits among more recipients. State agencies that chose this option in the demonstration projects have argued that by bringing in more recipients, they addressed expanding the awareness and use of farmers' markets for a greater number of households, consistent with one of the mandated purposes of the FMNP set forth in section (2) of Public Law 102–314. A State agency allocating benefits on a household basis shall not issue more benefits to a household than it otherwise would if benefits were allocated to individual recipients within the household. For those State agencies issuing FMNP benefits on a household basis, each family as defined in § 246.2 of the WIC Program regulations shall constitute a separate household. For example, if two pregnant women (and their children) are living together and WIC has identified them all as one family (a single economic unit with one participant identification), then they should all be classified as one household in the FMNP, if the State agency is allocating benefits on a household basis. Likewise, if WIC has identified the two pregnant women (and their children) as two families (two economic units with two participant identifications), then they should be classified as two households in the FMNP. State agencies making the decision to issue benefits by household must do so on a Statewide basis. That is, the same State agency may not simultaneously issue benefits on both an individual and household basis. Recognizing that the food benefit has been issued to certain high-risk individuals to address nutritional needs, it is not intended that food benefits from the FMNP be shared with non-FMNP recipients residing in the FMNP recipient household.

If a State agency elects to issue benefits on a household basis, data concerning number and type of recipients must still be provided as required by section 17(m)(8)(A) of the CNA.

6. Nondiscrimination (§ 248.7)

Because racial and ethnic participation data (as required by title VI of the Civil Rights Act of 1964) are collected at the time women, infants, and children are certified for participation in the WIC Program, the Department has determined that the WIC data collection effort is sufficient to fulfill the racial/ethnic data collection requirement for the FMNP. Therefore, no additional data collection is required.

7. Recipient Benefits (§ 248.8)

While this interim rule defines eligible foods as fresh, nutritious, unprepared fruits, vegetables and herbs, States must specifically identify in their State plans, which of these foods may be purchased (§ 248.4(a)(10)(vi)). The value of the Federal benefits received by any recipient under the FMNP may not be less than $10 per year or more than $20 per year. Most States participating in the demonstration projects found that the most practical distribution of coupons for the FMNP is in booklets made up of $1 and $2 denominations. If the FMNP coupon face value exceeds the purchase

price of produce, farmers are prohibited from giving cash change to recipients. Instead, this difference may be made up by providing recipients with extra eligible foods in the approximate value of the difference.

In the interest of enhancing local revenues, the Department recognizes a State agency's option in allowing only locally grown produce, as defined by the State agency, to be purchased by FMNP coupon recipients. Since States are required to match 30 percent of the total cost of the FMNP with State or non-Federal contributions, some States may consider this an attractive option for ensuring that FMNP benefits remain in the State. State agencies also have the option to define what they consider to be "locally grown". For instance, some State agencies for various reasons, such as availability of an adequate volume and variety of produce, may consider produce grown in adjacent States as locally grown. At the same time, other State agencies may define locally grown to be produce grown within the State boundaries.

8. Nutrition Education (§ 248.9)

Because most FMNP recipients are also WIC participants, in most cases relevant nutrition education will be delivered to FMNP recipients by WIC nutritionists at WIC clinics. The Department views the FMNP as an excellent opportunity to reinforce messages delivered to WIC participants on the benefits of consuming fresh fruits and vegetables. When the consumption of fruits and vegetables is included as part of the regular nutrition education lesson provided by the WIC clinic to WIC participants who are also FMNP recipients, this may be deemed to have fulfilled the nutrition education requirement for the FMNP. The WIC clinic may not seek reimbursement from the administering FMNP State agency for this service since it is an ongoing and vital component of the WIC Program. In these situations, the administering FMNP State agency shall include the provision of nutrition education by the WIC clinic as part of the cooperative agreement with WIC agencies required by § 248.3(e) and § 248.9 of these regulations.

If in specific situations FMNP recipients do not receive relevant nutrition education at WIC clinics, the administering State agency is responsible for arranging alternative methods for the provision of relevant nutrition education, which is an allowable cost under the FMNP. At the option of the FMNP State agency, the nutrition education provided by WIC to recipients may be supplemented by additional FMNP nutrition education. The additional FMNP enhancement may be considered an allowable administrative cost of the FMNP State agency. Provision of such nutrition education enhancements and reinforcements would be legitimate justification for the additional 2 percent administrative funds that are available upon approval by the Department. In addition, the administering FMNP State agency is responsible for providing information to recipients on the use of FMNP coupons and the purpose of the program as required by § 248.4(a)(9)(iii). The costs of providing this information must be provided by the FMNP and not the WIC agencies which may be performing this service for the FMNP.

Section 17(m)(8)(D) of the CNA requires the Secretary to collect from each State that receives a grant under the FMNP, information relating to, when practicable, the impact of the FMNP on the nutritional status of recipients by determining the change in consumption of fresh fruits and vegetables by FMNP coupon recipients. Because of this requirement, State agencies shall develop minimally burdensome procedures such as surveys to assess the impact on the nutritional status of FMNP recipients by obtaining information on the change in their consumption of fresh fruits and vegetables. This nutritional information shall be submitted as an addendum to the State Plan as set forth in § 248.4(a)(15), at such a date specified by the Secretary. Coordination with the WIC Program will reduce costs and minimize duplication of effort on this data collection element.

Section 17(m)(8)(E) of the CNA requires that States receiving a grant under the FMNP submit information on the effects of the FMNP on the use of farmers' markets and the marketing of agricultural products at such markets and when practicable, the effects of the FMNP on recipients' awareness regarding farmers' markets. Pursuant to § 248.4(a) (16) and (17) of these interim regulations, State agencies shall submit in their State Plans the methods they will use to assess this information and shall submit the actual information as an addendum to the State Plan at such a date specified by the Secretary.

9. Coupon and Market Management (§ 248.10)

The State agency is responsible for the fiscal management of, and accountability for farmers/farmers' markets. Farmers' markets are authorized by the State agency which may administer the FMNP directly or through a sub-agency such as a farmers' market association. Each State agency may authorize individual farmers, farmers' markets or both. When the State agency authorizes farmers' markets, the farmers' markets may authorize the farmers within the market to accept FMNP coupons. The demonstration projects revealed that market managers often play an important role in the day-to-day management of the FMNP, such as in the receipt of coupon batches from farmers and the reimbursement to farmers. According to the demonstration project's evaluation report, the strongest markets appeared to be those where the market manager had an active role in farmer training, compliance monitoring, reimbursing farmers, and redeeming coupons. Farmers at these markets were more likely to have a sound understanding of the demonstration project, and to comply strictly with guidelines. In contrast, where the market manager's role in the demonstration projects was limited, there was usually greater misunderstanding among participating farmers about demonstration project operations. Demonstration project participation was typically lower at markets with only nominal market manager involvement.

Monitoring techniques varied widely from State to State for the demonstration projects. All States met the grant requirement to visit every authorized market at least once during operations, and peer monitoring was common and effective in most market settings. Peer monitoring is a system in which farmers watch what their neighbors are doing, and make complaints to the market manager about suspected infractions in an effort to prevent competitors from getting an unfair advantage. State agencies have broad discretion in developing systems for FMNP coupon and market management. They should keep in mind, however, that it is the State agency that is ultimately responsible for the fiscal management of, and accountability for farmers and farmers' markets. The State agency is responsible for establishing the number of, and criteria for, the authorization of farmers and/or farmers' markets as provided by section 17(m)(6)(D)(iii) of the CNA and § 248.10(a) of these regulations. Because the Department believes that the FMNP is intended to help small, local farmers, State agencies may limit the foods eligible for purchase under the FMNP to those locally grown, as defined by the State. To further support this objective, individuals who exclusively sell produce grown by someone else (such as wholesale

distributors), are not eligible to participate in the FMNP. This requirement does not apply to individuals which an authorized farmer may have employed to sell his produce at the farmers' market or to individuals hired by a nonprofit organization to sell produce at urban farmstands on behalf of local farmers.

When FMNP coupon reimbursement is delegated to farmers' market managers or farmers' market associations or non-profit organizations, State agencies may establish appropriate bonding procedures for farmers' market managers, associations or non-profit organizations. The State agency may determine the best procedure to put in place for bonding. Costs of such bonding are not reimbursable administrative expenses. Additional criteria and requirements for authorizing farmers and farmers markets are identified in § 248.10 of this interim rule.

Section 248.10(b) of this interim rule outlines the contents of the farmers' market agreement. These agreements may be between the State agency and an authorized farmer or an authorized farmers' market, and shall be no more than 3 years in duration. Among its provisions, the agreement shall require that a farmer or farmers' market shall not issue cash change for purchases that are in an amount less than the value of the FMNP coupon(s). Since it is recommended that FMNP coupons be in $1 or $2 denominations, the difference between the purchase price and the value of the coupon should be less than $2. The Department, therefore, encourages farmers to adjust for any difference by adding more produce to the purchase.

Pursuant to § 248.10(d), State agencies shall conduct annual training for farmers and farmers' market managers. State agencies have discretion in determining the method used for training purposes. Training shall include, at a minimum, dissemination of information concerning eligible foods, and proper FMNP coupon redemption procedures, including deadlines for submission of coupons for payment. Other points which must be covered in training include the following:

- Equitable treatment of FMNP recipients, including the availability of produce to FMNP recipients that is of the same quality and cost as that sold to other customers;
- Civil rights compliance guidelines;
- Guidelines for storing FMNP coupons safely; and
- Guidelines for cancelling FMNP coupons, such as punching holes or rubber stamping.

Although these regulations permit State agency discretion in determining the method of annual training, the State agency is required to conduct a documented on-site visit prior to, or at the time of authorization, which shall include at a minimum, information concerning eligible foods and proper coupon redemption procedures. For example, in a State with a 3-year agreement, a State agency may conduct an in-person training prior to or at the time of authorization, and if reauthorization is granted three years later, conduct another in-person training at least once during the next 3-year grant agreement period. Other less comprehensive forms of training such as information handouts may be more appropriate for State agencies in the second or third years of operation for a grant agreement.

State agencies are required to conduct on-site monitoring visits to at least 10 percent of authorized farmers, starting with the highest risk farmers and working down, and 10 percent of farmers' markets, starting with the highest risk farmers' markets and working down. Mandatory high risk indicators are a proportionately high volume of FMNP coupons redeemed within a farmers' market (as compared to other farmers within the market or within the State) and recipient complaints. Participating State agencies have the option to conduct compliance buys and the Department encourages such activity when practicable. A State agency may be required to conduct compliance buys as a follow-up measure when a farmer/farmers' market in a State is found to be out of compliance during an FNS management evaluation.

Compliance activity can provide an objective measure of whether farmer training is adequate and whether farmers are following FMNP rules such as not providing change, selling only authorized foods to FMNP recipients, and ensuring participation only by authorized farmers. In addition to this, compliance buys can induce compliance and provide a justification for sanctions and removal of non-complying farmers.

As set forth in § 248.10(h), the State agency shall identify the disposition of all FMNP coupons as validly redeemed, lost or stolen, expired, or not matching issuance records. This identification shall be determined on a one-to-one reconciliation basis. Validly redeemed coupons are those that are issued to an authorized recipient and redeemed by an authorized farmers' market/farmer before the expiration date. Coupons that are redeemed but cannot be traced to an authorized recipient or authorized farmer will be subject to claims action in accordance with § 248.20 of this interim rule. A State agency has the option to replace lost, stolen, or damaged coupons, and must describe its system for doing so in the State Plan. A State agency shall use uniform FMNP coupons within its jurisdiction, which must include at a minimum, the following information as required by § 248.10(h)(3):

- The last date by which the recipient can use the coupon. This date shall be no later than November 30 of each year.
- A date by which the farmer/farmers' market must submit the coupon for payment. When establishing this date, State agencies shall take into consideration the date financial statements are due to the FNS, and allow time for the corresponding coupon reconciliation that must be done by the State agency prior to submission of financial statements. Currently SF–269 financial statements are due to FNS by January 30.
- A unique and sequential serial number.
- A denomination (dollar amount).
- For each redeeming farmers' market, a farmer identifier on each coupon and market identifier on the cover of the batched coupons. For each redeeming farmer, a farmer identifier on each coupon.

Inclusion of individual farmer identifiers on all FMNP coupons is a requirement in the FMNP, in order to trace coupon redemption to an authorized farmer, as required by section 17(m)(5)(E)(i) of the CNA. States have the option to directly authorize either farmers' markets, individual farmers or both. However, if the State directly authorizes farmers' markets, and not farmers, an individual farmer identifier must be included on the coupon and a farmers' market identifier included on the batched set of coupons submitted by the farmers' market manager for reimbursement. Those State agencies which have agreements directly with farmers and not markets must include individual farmer identifiers on each redeemed coupon. This is a change from the demonstration projects which required that only a market identifier be included on the coupon. A farmer identifier will provide protection for the farmers' market, since it is the individual farmer who may be identified and penalized for abuse rather than the entire market, if appropriate.

Each FMNP recipient shall receive instructions on the proper use of coupons, including, but not limited to:

- A list of names and addresses of authorized farmers' markets and/or authorized farmers at which FMNP coupons may be redeemed.
- A description of eligible foods, and the prohibition against cash change.
- Notification that they have the right to complain about improper farmer/farmers' market practices with regard to FMNP responsibilities, and the process for doing so.

10. Financial Management System. (§ 248.11)

The demonstration projects served as an effective model for the FMNP in the area of financial management systems. Based on the evaluation report conducted for the demonstration projects and submitted to Congress in April 1991, good controls were in place to account for advanced funds, and effective systems were in place to recoup leftover funds. Two States used negotiable checks in lieu of coupons, and six States advanced funds to payment intermediaries to pay authorized farmers or markets for coupons they had accepted. Payment intermediaries included market managers, private banks, and various contracted organizations and associations.

Pursuant to § 248.11(d) of this interim rule, participating State agencies must implement procedures which ensure prompt and accurate payment of allowable costs, and ensure the allowability and allocability of costs in accordance with the cost provisions set forth in § 248.11 of this rule, 7 CFR part 3016, and FNS guidelines and Instructions.

11. FMNP Costs (§ 248.12)

FMNP costs consist of food and administrative costs. Administrative costs are those costs associated with providing benefits and services to recipients. Allowable administrative costs include costs associated with the provision of nutrition education which meets the requirements of § 248.9 of this rule. In addition, other allowable administrative costs include, but are not limited to, the costs of administering the coupon and market management system, including printing, issuing and reconciling coupons; and, authorizing, training and monitoring markets, as well as FMNP outreach, recordkeeping and reporting costs.

12. Distribution of Funds (§ 248.14)

As a prerequisite to the receipt of funds, State agencies must agree to contribute from non-Federal sources at least 30 percent of the total cost of the FMNP, which may also be satisfied from State contributions that are made for similar programs which operate during the same period as the FMNP. Similar programs include other farmers' market projects or programs which serve women, infants, and children, as well as other categories of recipients such as, but not limited to, elderly persons.

Section 17(m)(6)(A) of the CNA, subject to certain limitations and requirements, provides for authorization of State agencies that received assistance under the demonstration projects. It stipulates that each State which received Federal funding in a fiscal year ending before October 1, 1991 (i.e. before Fiscal Year 1992) shall receive benefits under the new FMNP, provided that the State complies with the requirements established by the Act, as determined by the Secretary. Section (17)(m)(6)(B) mandates that, if sufficient funds are appropriated by Congress, no State shall receive less Federal funds than it did in the most recent fiscal year in which it received assistance, as long as the State continues to provide the requisite matching funds.

If amounts appropriated for any fiscal year for grants under the FMNP are not sufficient to maintain prior year funding levels for each State authorized under section 17(m)(6)(A) of the CNA, each State's grant shall be ratably reduced, except that, if sufficient funds are available, each State shall receive at least $50,000 or the amount that the State received for the prior fiscal year if that amount is less than $50,000.

Once funds have been set aside to satisfy this requirement, section 17(m)(6)(G) requires that any remaining funds shall be allocated as follows: (1) An amount equal to 45 to 55 percent shall be made available to States participating in the FMNP that wish to serve additional FMNP recipients, and whose State plan to do so is approved by the Department. If this amount is greater than that necessary to satisfy approved expansion requests from participating State agencies, the unallocated amount shall be made available to State agencies that have not participated in the FMNP in the prior fiscal year, and whose State Plans have been approved by the Department.

(2) An amount equal to 45 to 55 percent shall be made available to States that have not participated in the FMNP in the prior fiscal year, and whose State Plans have been approved by the Department. If this amount is greater than that necessary to satisfy the approved State Plans for new State agencies, the unallocated amount shall be applied toward satisfying any unmet need of States that desire to serve additional recipients, and whose State Plans have been approved by the Department.

State agencies must return to FNS any unexpended funds made available for a fiscal year, by February 1 of the following fiscal year, except that each State agency may retain not more than 5 percent of the funds made available to the State agency for the fiscal year to reimburse expenses incurred during the preceding fiscal year or to reimburse expenses expected to be incurred during the succeeding fiscal year. The spend forward or carry back provisions are contained in § 248.14(h) of this interim rule. Any funds that remain available after satisfying paragraphs (1) and (2) above, shall be reallocated in accordance with the appropriate method determined by the Secretary.

Subject to requirements of section 17(m)(6) described above, the Secretary is instructed in section 17(m)(4) to establish a formula for determining amounts to be awarded to each State with an approved plan according to the number of recipients proposed to participate as specified in the State Plan. In determining the amount to be awarded to new States, the Secretary is further instructed to rank the State Plans according to the following criteria set forth in section 17(m)(6)(F) of the CNA. The Secretary shall:

(1) Favorably consider a State's prior experiences with this or similar programs;

(2) Favorably consider a State's operation of a similar program with State or local funds that can present data concerning the value of that program;

(3) Require that if a State receiving funds under the FMNP applies the Federal grant to a similar program operated in the previous fiscal year with State or local funds, the State shall not reduce the amount of such State or local funds previously made available to the similar program below the level at which the similar program was funded in the year prior to obtaining FMNP funding.

(4) Give precedence to State Plans that would serve areas in the State having—

(a) The highest concentration of eligible persons;

(b) The greatest access to farmers' markets;

(c) A broad geographical area;

(d) The greatest number of recipients in the broadest geographical area within the State; and

(e) Any other characteristics, as determined appropriate by the

Secretary, that maximize the availability of benefits to eligible persons; and

(5) Take into consideration the amount of funds available and the minimum amount needed by each applicant State to successfully operate the FMNP.

In providing funds to serve additional recipients in a State that received assistance under the FMNP in the previous fiscal year, section 17(m)(6)(C) of the Act requires the Secretary to consider:

(1) The availability of any such assistance not spent by the State during the FMNP year for which the assistance was received;

(2) Documentation that justifies the need for an increase in participation; and

(3) Demonstrated ability to satisfactorily operate the existing FMNP.

The Secretary will review State agency requests for expansion funds on a case-by-case basis in the evaluation process as set forth in § 248.14(e). The Secretary shall consider if State agencies requesting expansion funds have demonstrated their ability to spend at least 80 percent of their prior year food grant (exclusive of the 5 percent carry forward). In those instances where State agencies are requesting funds for expansion but have excessive unspent funds, as determined by the Secretary, during the FMNP year for which the assistance was received, the State agency may still be eligible for expansion funds if the Secretary determines there was good cause for the excessive unspent funds, such as severe weather conditions and other factors such as unanticipated decreases in participant caseload in the WIC Program.

Administrative funds are limited by section 17(m)(5)(F) of the Act and cannot exceed 15 percent, (or 17 percent for a State's first year of operation or in approved cases thereafter), of the total FMNP funds. This is consistent with House report No. 102–540(I), page 192, accompanying Public Law 102–314, which states that the 15-percent administrative cost allowance is designed to more realistically reflect the costs of administering the FMNP than the 12 percent permitted under the demonstration projects. Section 17(m)(5)(F) of the CNA also allows for an additional 2-percent allowance for a State's first year of operation (i.e. in Fiscal Year 1993, States which did not operate a demonstration project prior to October 1, 1992), to cover start-up costs such as determining which local WIC sites will be utilized; recruiting farmers to participate in the program; preparing contracts for farmers and local WIC providers; developing a data processing system for redemption and reconciliation of food coupons; designing program training and informational materials; and planning program implementation and coordination of responsibilities between State agriculture and health departments.

Section 17(m)(5)(F)(ii) of the Act states that after the first fiscal year of operation, upon a showing by the State of financial need, the Secretary may permit the State to use up to an additional 2 percent of the total FMNP funds for administration. In determining financial need, the Secretary shall take into consideration the State agency's unique circumstances and proposed enhancements to its operations. Examples of FMNP enhancements are upgraded nutritional education and instructional materials, automation of coupon issuance, and micro-encoding checks. As set forth in § 248.14(g)(3), State agencies wishing to request the additional 2 percent administration allowance must submit written justification to FNS for approval as part of the annual State Plan. Such requests must be resubmitted each year, since approval of the additional 2 percent allowance one year does not mean that the additional amount will be granted in subsequent years.

It is up to the State agency to determine what mix of funds (Federal, State, or both) will be used for the administrative portion, as long as the administrative funds do not exceed 15 (or 17, where approved) percent of the total of Federal and State funds allocated. This means that a State agency can choose to utilize some of the Federal funds allocated for administrative costs or it can use all of the Federal funds for food costs. The following example illustrates two options available to State agencies to provide flexibility regarding administrative funds within the 30 percent matching requirement:

	Total	Food	Administration
Federal Dollars Allocated	$70	$59.50	$10.50
Minimum State Match	30	25.50	4.50
Total FMNP Cost	100	85.00	15.00
Option:			
Federal Dollars	70	70.00	0.00
Minimum State Match	30	15.00	15.00
Total FMNP Cost	100	85.00	15.00

In summary, a State agency may not use more than 15 (or 17) percent of the total (Federal and State) amount of funds for administrative costs. If a State agency provides funds in excess of the 30 percent matching requirement, the limit on the use of funds for administration shall not apply to the funds contributed above the matching requirement.

List of Subjects in 7 CFR Part 248

Food assistance programs, Food donations, Grant programs, Social programs, Infants and children, maternal and child health, Nutrition education, Public assistance programs, WIC, Women.

Accordingly, 7 CFR part 248 is added to read as follows:

PART 248—WIC Farmers' Market Nutrition Program (FMNP)

Subpart A—General

Sec.

248.1 General purpose and scope.
248.2 Definitions.
248.3 Administration.

Subpart B—State Agency Eligibility

248.4 State Plan.
248.5 Selection of new State agencies.

Subpart C—Recipient Eligibility

248.6 Recipient eligibility.
248.7 Nondiscrimination.

Subpart D—Recipient Benefits

248.8 Level of benefits and eligible foods.
248.9 Nutrition education.

Subpart E—State Agency Provisions

248.10 Coupon and market management.
248.11 Financial management system.
248.12 FMNP costs.
248.13 FMNP income.
248.14 Distribution of funds.
248.15 Closeout procedures.
248.16 Administrative appeal of State agency decisions.

Subpart F—Monitoring and Review of State Agencies

248.17 Management evaluations and reviews.
248.18 Audits.
248.19 Investigations.

Subpart G—Miscellaneous Provisions

248.20 Claims and penalties.
248.21 Procurement and property management.
248.22 Nonprocurement debarment/suspension, drug-free workplace, and lobbying restrictions.
248.23 Records and reports.
248.24 Other provisions.
248.25 FMNP information.
248.26 OMB control numbers.

Authority: 42 U.S.C. 1786.

Subpart A—General

§ 248.1 General purpose and scope.

This part announces regulations under which the Secretary of Agriculture shall carry out the WIC Farmers' Market Nutrition Program. The dual purposes of the FMNP are: (a) To provide resources in the form of fresh, nutritious, unprepared foods (fruits and vegetables) from farmers' markets to women, infants, and children who are nutritionally at risk and who are participating in the Special Supplemental Food Program for Women, Infants and Children (WIC) or are on the waiting list for the WIC Program; and

(b) To expand the awareness, use of and sales at farmers' markets.

This will be accomplished through payment of cash grants to approved State agencies which administer the FMNP and deliver benefits at no cost to eligible persons. The FMNP shall be supplementary to the food stamp program carried out under the Food Stamp Act of 1977 (7 U.S.C. 2011 *et seq.*) and to any other Federal or State program under which foods are distributed to needy families in lieu of food stamps.

§ 248.2 Definitions.

For the purpose of this part and all contracts, guidelines, instructions, forms and other documents related hereto, the term:

Administrative costs means those direct and indirect costs, exclusive of food costs, as defined in § 248.12(b), which State agencies determine to be necessary to support FMNP operations. Administrative costs include, but are not limited to, the costs of administration, start-up, training, monitoring, auditing, the development of and accountability for coupon and market management, nutrition education, outreach, eligibility determination, and developing, printing, and distributing coupons.

Compliance buy means a covert, on-site investigation in which a FMNP representative poses as a FMNP participant and transacts one or more FMNP food coupons.

Coupon means a coupon, voucher, or other negotiable financial instrument by which benefits under the FMNP are transferred to recipients.

Days means calendar days.

Demonstration project means the Farmers' Market Coupon Demonstration Project authorized by section 17(m) of the Child Nutrition Act of 1966 (CNA), (42 U.S.C. 1786(m)), as amended by section 501 of the Hunger Prevention Act of 1988 (Pub. L. 100–435), enacted September 19, 1988. Public Law 102–314 authorized the Secretary to competitively award, subject to the availability of funds, a 3-year grant (which was subsequently extended for an additional year by Public Law 102–142) to up to 10 States that submitted applications that were approved for the establishment of demonstration projects designed to provide WIC participants with coupons that could be exchanged for fresh, nutritious, unprepared foods at farmers' markets. Those States are: Connecticut, Iowa, Maryland, Massachusetts, Michigan, New York, Pennsylvania, Texas, Vermont, and Washington.

Department means the U.S. Department of Agriculture.

Eligible foods means fresh, nutritious, unprepared, domestically grown fruits, vegetables and herbs for human consumption. Eligible foods may not be processed or prepared beyond their natural state except for usual harvesting and cleaning processes. Honey, maple syrup, cider, nuts, seeds, eggs meat, cheese and seafood are examples of foods not eligible for purposes of the FMNP.

Farmer means an individual authorized to sell produce at participating farmers' markets. Individuals who exclusively sell produce grown by someone else, such as wholesale distributors, cannot be authorized to participate in the FMNP. For purposes of this part, the term "farmer" shall mean "producer" as that term is used in section 17(m)(6)(D) of the CNA (42 U.S.C. 1786(m)(6)(D)). A participating State agency has the option to authorize individual farmers or farmers' markets.

Farmers' market means an association of local farmers who assemble for the purpose of selling their produce directly to consumers. In cases where recipient access to farmers' markets is an issue, with prior FNS approval this definition may be expanded at the State agency's option to include farmstands at which authorized farmers sell their produce.

Farmstand means a location at which a single, individual farmer sells his/her produce directly to consumers. This is in contrast to a group or association of farmers selling their produce at a farmers' market. With prior FNS approval, a State agency may authorize a farmstand or a nonprofit organization operating a farmstand to participate in the FMNP, where necessary to ensure adequate recipient access to farmers' markets.

Fiscal year means the period of 12 calendar months beginning October 1 of any calendar year and ending September 30 of the following calendar year.

FMNP funds means Federal grant funds provided for the FMNP, plus the required non-Federal match.

FNS means the Food and Nutrition Service of the U.S. Department of Agriculture.

Food costs means the cost of eligible supplemental foods.

Household has the same definition as that of "family" defined in § 246.2 of this chapter. Each such family shall constitute a separate household for FMNP benefit issuance purposes.

Local agency means any nonprofit entity or local government agency which issues FMNP coupons, and provides nutrition education and/or information on operational aspects of the FMNP to FMNP recipients.

Matching requirement means non-Federal cash outlays in an amount equal to, but not less than, 30 percent of the total FMNP costs for the fiscal year. The match may be satisfied through non-Federal cash expenditures for the FMNP or for similar farmers' market programs which operate during the same period as the FMNP. Similar programs include other farmers' market programs which serve women, infants and children (who may or may not be WIC participants or on the waiting list for WIC services), as well as other categories of recipients, such as, but not limited to, elderly persons.

Nonprofit agency means a private agency which is exempt from income tax under the Internal Revenue Code of 1986, as amended, (26 U.S.C. 1 *et. seq.*).

Nutrition education means individual or group education sessions and the

provision of information and educational materials designed to improve health status, achieve positive change in dietary habits, and emphasize relationships between nutrition and health, all in keeping with the individual's personal, cultural, and socioeconomic preferences.

OIG means the Department's Office of the Inspector General.

Program or FMNP means the WIC Farmers' Market Nutrition Program authorized by section 17(m) of the CNA (42 U.S.C. 1786(m)), as amended by Public Law 102–314, the WIC Farmers' Market Nutrition Act of 1992, enacted on July 2, 1992.

Recipient means a person chosen by the State agency to receive FMNP benefits. Such person must be a woman, infant over 4 months of age, or child, who receives benefits under the WIC Program or is on the waiting list to receive benefits under the WIC Program.

SFPD means the Supplemental Food Programs Division of the Food and Nutrition Service of the U.S. Department of Agriculture.

Similar programs means other farmers' market projects or programs which serve women, infants and children, or other categories of recipients, such as, but not limited to, elderly persons.

State agency means the agriculture department; the health department or comparable agency of each State; an Indian tribe, band or group recognized by the Department of the Interior; an intertribal council or group which is an authorized representative of Indian tribes, bands or groups recognized by the Department of the Interior and which has an ongoing relationship with such tribes, bands or groups for other purposes and has contracted with them to administer the Program; or the appropriate area office of the Indian Health Service (IHS), a division of the Department of Health and Human Services.

State Plan means a plan of FMNP operation and administration that describes the manner in which the State agency intends to implement, operate and administer all aspects of the FMNP within its jurisdiction in accordance with § 248.4.

Total FMNP costs means the sum of all allowable costs incurred for FMNP purposes, whether funded from the Federal or the State matching share of total FMNP funds.

Total FMNP funds means the sum of the Federal funds provided to the State agency and non-Federal contributions provided by the State agency for FMNP purposes.

WIC means the Special Supplemental Food Program for Women, Infants and Children authorized by section 17 of the Child Nutrition Act of 1966, as amended (42 U.S.C. 1771 *et. seq.*).

§ 248.3 Administration.

(a) *Delegation to FNS.* Within the Department, FNS shall act on behalf of the Department in the administration of the FMNP. Within FNS, SFPD and the FNS Regional Offices are responsible for FMNP administration. FNS shall provide assistance to State agencies and evaluate all levels of FMNP operations to ensure that the goals of the FMNP are achieved in the most effective and efficient manner possible.

(b) *Delegation to State agency.* The State agency is responsible for the effective and efficient administration of the FMNP in accordance with the requirements of this part; the requirements of the Department's regulations governing nondiscrimination (7 CFR parts 15, 15a and 15b), administration of grants (7 CFR part 3016), nonprocurement debarment/suspension (7 CFR part 3017), drug-free workplace (7 CFR part 3017), and lobbying (7 CFR part 3018); and, Office of Management and Budget Circular A–130, FNS guidelines, and Instructions issued under the FNS Directives Management System. The State agency shall provide guidance to cooperating WIC State and local agencies on all aspects of FMNP operations. Pursuant to section 17(m)(2) of the CNA, State agencies may operate the FMNP locally through nonprofit organizations or local government entities and must ensure coordination among the appropriate agencies and organizations.

(c) *Agreement and State Plan.* Each State agency desiring to administer the FMNP shall annually submit a State Plan and enter into a written agreement with the Department for administration of the Program in the jurisdiction of the State agency in accordance with the provisions of this part.

(d) *State agency ineligibility.* A State agency shall be ineligible to participate in the FMNP if State or local sales tax is collected on Program food purchases in the area in which it administers the Program, except that, if sales tax is collected on Program food purchases by sovereign Indian entities which are not State agencies, the State agency shall remain eligible so long as any farmers' markets collecting such tax are disqualified.

(e) *Coordination with WIC agency.* The Chief Executive Officer of the State shall ensure coordination between the designated administering State agency and the WIC State agency, if different, by ensuring that the two agencies enter into a written agreement. Such coordination between agencies is necessary for the successful operation of the FMNP, because WIC participants or persons on the waiting list for WIC services are the only persons eligible to receive Federal benefits under the FMNP. The written agreement shall delineate the responsibilities of each agency, describe any compensation for services, and shall be signed by the designated representative of each agency. This agreement shall be submitted each year along with the State Plan.

(f) *State staffing standards.* Each State agency shall ensure that sufficient staff is available to efficiently and effectively administer the FMNP. This shall include, but not be limited to, sufficient staff to provide nutrition education in coordination with the WIC Program, coupon and market management, fiscal reporting, monitoring, and training. The State agency shall provide an outline of administrative staff and job descriptions for staff whose salaries will be paid from program funds in their State Plans.

Subpart B—State Agency Eligibility

§ 248.4 State Plan.

(a) *Requirements.* By November 15 of each year, each applying or participating State agency shall submit to FNS for approval a State Plan for the following year as a prerequisite to receiving funds under this section. The State Plan shall be signed by the State designated official responsible for ensuring that the Program is operated in accordance with the State Plan. FNS will provide written approval or denial of a completed State Plan or amendment within 30 days. Portions of the State Plan which do not change annually need not be resubmitted. However, the State agency shall provide the title of the sections that remain unchanged, as well as the year of the last Plan in which the sections were submitted. At a minimum, the Plan must address the following areas in sufficient detail to demonstrate the State agency's ability to meet the requirements of the FMNP: (1) A copy of the agreement between the designated administering State agency and the WIC State agency, if different, for services such as nutrition education, and documentation of coordinated efforts as required in § 248.3(e), as well as copies of agreements with agencies other than the WIC State agency.

(2) Estimated number of recipients for the fiscal year, and proposed months of operation.

(3) Estimated cost of the FMNP, including a minimum amount necessary to operate the FMNP.

(4) Description of how the Program will achieve its dual purposes of providing a nutritional benefit to WIC (or waiting list) participants and expanding the awareness and use of farmers' markets.

(5) Outline of administrative staff and job descriptions.

(6) Detailed description of the recordkeeping system including, but not limited to, the system for maintaining records pertaining to financial operations, coupon issuance and redemption, and FMNP participation.

(7) Detailed description of the financial management system, including, but not limited to documentation of how the State will meet the matching requirement and procedures for obligating funds.

(8) Detailed description of the service area including: (i) The number and addresses of participating markets and area WIC clinics including a map outlining the service area and proximity of markets to clinics; and

(ii) Estimated number of WIC participants and persons on the WIC waiting list that will receive FMNP coupons.

(9) Description of the coupon issuance system including: (i) How the State agency will target areas with highest concentrations of eligible persons and greatest access to farmers' markets within the broadest possible geographic area;

(ii) Annual benefit amount per recipient;

(iii) Method for instructing recipients on the proper use of FMNP coupons and the purpose of the FMNP; and

(iv) Method for ensuring that FMNP coupons are only issued to eligible recipients.

(10) Detailed description of the coupon and farmers' market management system including: (i) criteria for authorizing farmers' markets;

(ii) Procedures for training farmers and market managers, at authorization, and annually thereafter;

(iii) Procedures for monitoring farmers' markets;

(iv) Description of system for identifying high risk farmers and farmers' markets and procedures for sanctioning farmers and farmers' markets;

(v) Facsimile of the FMNP coupon;

(vi) Identification of the fresh, nutritious, unprepared fruits, vegetables, and herbs which are eligible for purchase under the Program;

(vii) Description of FMNP coupon replacement policy;

(viii) Procedures for handling recipient and farmer/farmers' market complaints.

(11) Detailed description of the FMNP coupon redemption process including:

(i) Procedures for ensuring the secure transportation and storage of FMNP coupons;

(ii) System for identifying and reconciling FMNP coupons;

(iii) Timeframes for FMNP coupon redemption by recipients; submission for payment by markets, and payment by the State agency;

(12) System for ensuring that FMNP coupons are redeemed only by authorized farmers/farmers' markets and only for eligible foods.

(13) System for identifying FMNP coupons which are redeemed or submitted for payment outside valid dates or by unauthorized farmers/farmers' markets.

(14) A copy of the written agreement to be used between the State agency and authorized farmers/farmers' markets. In those States which authorize farmers' markets, but not individual farmers, this agreement shall specify in detail the role of and procedures to be used by farmers' markets for monitoring and sanctioning farmers, and the appropriate procedures to be used by a farmer to appeal a sanction or disqualification imposed by a farmers' market.

(15) When practicable, information on the impact on the nutritional status of recipients by determining the change in their consumption of fresh fruits and vegetables. This information shall be submitted as an addendum to the State Plan and shall be submitted at such a date specified by the Secretary.

(16) The method the State agency will use to assess the effects of the FMNP on the use of farmers' markets, the marketing of agricultural products, and when practicable the effects of the FMNP on recipients' awareness regarding farmers' markets.

(17) Information on the effects of the FMNP on the use of farmers' markets and marketing of agricultural products at such markets and when practicable, the effects of the FMNP on recipients' awareness regarding farmers' markets. This information shall be submitted as an addendum to the State Plan and shall be submitted at such a date specified by the Secretary.

(18) A description of the procedures the State agency will use to comply with the civil rights requirements described in § 248.7(a), including the processing of discrimination complaints.

(19) State agencies which have not previously participated in the FMNP, shall provide the following additional information: (i) A statement assuring that if the State agency receives Federal funds, as specified under § 248.14 to operate the FMNP, and applies those funds to similar programs operated in the previous fiscal year with State or local funds, the amount of State and local funds that were available to similar programs in the fiscal year preceding the first year of operation shall not be reduced. The State agency shall include data in the State Plan showing that it did not reduce the amount of State and local funds available to the similar program in the preceding fiscal year.

(ii) A capability statement which includes a summary description of any prior experience with farmers' market projects or programs, including information and data describing the attributes of such projects or programs.

(20) For States making expansion requests, documentation which meets the following requirements: (i) Justifies the need for an increase in participation;

(ii) Demonstrates the State agency's ability to satisfactorily operate the existing FMNP;

(iii) Identifies the management capabilities of the State to expand.

(b) *Amendments.* At any time after approval, the State agency may amend the State Plan to reflect changes. The State agency shall submit the amendments to FNS for approval. The amendments shall be signed by the State designated official responsible for ensuring that the FMNP is operated in accordance with the State Plan.

(c) *Retention of copy.* A copy of the approved State Plan shall be kept on file at the State agency for public inspection.

§ 248.5 Selection of new State agencies.

In selecting new State agencies, the Department shall rank State Plans submitted in accordance with § 248.4, using the following criteria in making this ranking: (a) Prior experience of the State with the demonstration project or similar farmers' market programs;

(b) Prior operation, by the State of a similar program with State or local funds and ability to present data concerning the beneficial attributes of such program;

(c) Emphasis on service to areas in the State that have: (1) The highest concentration of eligible persons;

(2) The greatest access to farmers' markets;

(3) Broad geographic areas;

(4) The greatest number of recipients in the broadest geographical area within the State; and

(5) Any other characteristics the Department determines that maximize the availability of benefits to eligible persons.

(d) Consideration of the amount of funds necessary to successfully operate the FMNP in the State compared with other States and with the total amount of funds available to the FMNP.

(e) Approval of a State Plan does not equate to an obligation on the part of the Secretary to fund the FMNP within that State.

Subpart C—Recipient Eligibility

§ 248.6 Recipient eligibility.

(a) *Eligibility for certification.* Individuals who are eligible to receive Federal benefits under the FMNP are those, excluding infants 4 months of age or younger, who are currently receiving benefits under WIC or who are on the waiting list to receive benefits from WIC.

(b) *Limitations on certification.* If necessary to limit the number of recipients, State agencies may impose additional eligibility requirements, such as limiting participant certification to certain geographic areas, or to high priority WIC participants such as pregnant and breastfeeding women. States may also preclude groups of low priority persons, such as persons on the waiting list for WIC. Each State agency must specifically identify these limitations on certification in its State Plan.

(c) *Recipient or household benefit allocation.* On a Statewide basis, State agencies shall elect to allocate and issue benefits either to recipients or households. A State agency allocating benefits on a household basis shall not issue more benefits to a household than it otherwise would if benefits were allocated to individual recipients within the household. For those State agencies issuing FMNP benefits on a household basis, each family as defined in § 246.2 of this chapter shall constitute a separate household. Foods provided, regardless of method of issuance, are intended for the sole benefit of FMNP recipients and are not intended to be shared with other non-participating household members. If a State agency issues benefits on a household basis, data concerning number and type of recipients must still be provided as required by § 248.23(b). Recipients shall receive FMNP benefits free of charge.

§ 248.7 Nondiscrimination.

(a) *Civil rights requirements.* The State agency shall comply with the requirements of title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, Department of Agriculture regulations on nondiscrimination (7 CFR parts 15, 15a and 15b), and applicable FNS Instructions to ensure that no person shall, on the grounds of race, color, national origin, age, sex or handicap, be excluded from participation, be denied benefits, or be otherwise subjected to discrimination, under the FMNP. Because racial and ethnic participation data (as required by title VI of the Civil Rights Act of 1964) are collected at the time women, infants, and children are certified for participation in the WIC Program, the Department has determined that the WIC data collection effort is sufficient to fulfill the racial/ethnic data collection requirement for the FMNP. Therefore, no additional data collection is required. Compliance with title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and regulations and instructions issued thereunder shall include, but not be limited to: (1) Notification to the public of the nondiscrimination policy and complaint rights of recipients and potentially eligible persons, which may be satisfied through the Department's required nondiscrimination statement on brochures and publications;

(2) Review and monitoring activity to ensure FMNP compliance with the nondiscrimination laws and regulations;

(3) Establishment of grievance procedures for handling recipient complaints based on sex and handicap.

(b) *Complaints.* Persons seeking to file discrimination complaints may file them either with the Secretary of Agriculture, or the Director, Office of Equal Opportunity, USDA, Washington, DC 20250 or with the office established by the State agency to handle discrimination grievances or complaints. All complaints received by State agencies which allege discrimination based on race, color, national origin, or age shall be referred to the Secretary of Agriculture or the Director of the Office of Equal Opportunity, USDA. A State agency may process complaints which allege discrimination based on sex or handicap if grievance procedures are in place.

Subpart D—Recipient Benefits

§ 248.8 Level of benefits and eligible foods.

(a) *General.* State agencies shall identify in the State Plan the fresh, nutritious, unprepared fruits, vegetables and herbs which are eligible for purchase under the FMNP. Honey, maple syrup, cider, nuts and seeds, eggs, cheese, meat and seafood are not eligible foods for purposes of the FMNP. State agencies may limit the eligible foods to those that are locally grown, as defined by the State.

(b) *The value of the Federal benefits received.* The value of the Federal share of the FMNP benefits received by each recipient, or by each family within a household in those States which elect to issue benefits on a household basis under § 248.6(c) may not be less than $10 per year or more than $20 per year.

§ 248.9 Nutrition education.

(a) *Goals.* Nutrition education shall emphasize the relationship of proper nutrition to the total concept of good health, including the importance of consuming fresh fruits and vegetables.

(b) *Requirement.* The State agency shall integrate nutrition education into FMNP operations and may satisfy nutrition education requirements through coordination with other agencies within the State. Such other agencies may include the WIC Program which routinely offers nutrition education to participants and which may wish to use the opportunity of the FMNP to reinforce nutrition messages. State agencies wishing to coordinate nutrition education with WIC shall enter into a written cooperative agreement with WIC agencies to offer nutrition education relevant to the use and nutritional value of foods available to FMNP recipients. In cases where relevant WIC nutrition education sessions are used to meet this requirement, reimbursement to the WIC local agency shall not be permitted. In cases where FMNP recipients are not receiving relevant nutrition education from the WIC Program, the State agency shall arrange alternative methods for the provision of such nutrition education which is an allowable cost under the FMNP.

Subpart E—State Agency Provisions

§ 248.10 Coupon and market management.

(a) *General.* This section sets forth State agency responsibilities regarding the authorization of farmers/farmers' markets. The State agency is responsible for the fiscal management of, and accountability for farmers/farmers' markets. Each State agency may decide whether to authorize farmers individually, farmers' markets, or both farmers and farmers' markets. All contracts or agreements entered into by the State agency for the management or operation of farmers/farmers' markets shall conform with the requirements of 7 CFR part 3016, Uniform Administrative Requirements for Grants

and Cooperative Agreements to State and Local Governments.

(1) Only farmers' markets authorized by the State agency may redeem FMNP coupons. Only farmers authorized by the State agency or that have a valid agreement with an authorized farmers' market, may redeem coupons.

(2) The State agency shall establish criteria for the authorization of individual farmers and/or farmers' markets. Any authorized farmer/farmers' market must agree to sell recipients only those foods identified as eligible by the State agency, in exchange for FMNP coupons. Individuals who exclusively sell produce grown by someone else, such as wholesale distributors, cannot be authorized to participate in the FMNP, except individuals employed by a farmer otherwise qualified under these regulations, or individuals hired by a nonprofit organization to sell produce at urban farmstands on behalf of local farmers.

(3) The State agency shall ensure that an appropriate number of farmers/farmers' markets are authorized for adequate recipient convenience and access in the area(s) proposed to be served and for effective management of the farmers/farmers' markets by the State agency. The State agency may establish criteria to limit the number of authorized farmers/farmers' markets.

(4) The State agency shall conduct a documented on-site visit prior to, or at the time of, authorization of a farmers' market or individual farmer. The on-site visit shall include at a minimum, provision of information concerning eligible foods and proper FMNP coupon redemption procedures.

(5) Authorized farmers shall display a sign stating that they are authorized to redeem FMNP coupons.

(6) Authorized farmers/farmers' markets shall comply with the requirements of Title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, Department of Agriculture regulations on nondiscrimination (7 CFR parts 15, 15a and 15b), and FNS Instructions as outlined in § 248.7.

(7) The State agency shall ensure that there is no conflict of interest between the State or local agency and any participating farmer/farmers' market.

(b) *Farmers' market agreements.* The State agency shall ensure that all participating farmers' markets enter into written agreements with the State agency. State agencies which authorize individual farmers shall also enter into written agreements with the individual farmers. The agreement shall be signed by a representative who has legal authority to obligate the farmers/farmers' market. Agreements shall include a description of sanctions for noncompliance with FMNP requirements and shall contain at a minimum, the following specifications, although the State agency may determine the exact wording to be used:

(1) The farmer/farmers' market shall:

(i) Provide such information as the State agency may require for its periodic reports to FNS;

(ii) Assure that FMNP coupons are redeemed only for eligible foods;

(iii) Provide eligible foods at the current price or less than the current price charged to other customers;

(iv) Accept FMNP coupons within the dates of their validity and submit such coupons for payment within the allowable time period established by the State agency;

(v) In accordance with a procedure established by the State agency, mark each transacted coupon with a farmer identifier. In those cases where the agreement is between the State agency and the farmer, each transacted FMNP coupon shall contain a farmer identifier and shall be batched for reimbursement under that identifier. In those cases where the agreement is between the State agency and the farmers' market, each transacted FMNP coupon shall contain a farmer identifier and be batched for reimbursement under a farmers' market identifier.

(vi) Accept training on FMNP procedures and provide training to farmers and any employees with FMNP responsibilities on such procedures;

(vii) Agree to be monitored for compliance with FMNP requirements, including both overt and covert monitoring;

(viii) Be accountable for actions of farmers or employees in the provision of foods and related activities;

(ix) Pay the State agency for any coupons transacted in violation of this agreement;

(x) Offer FMNP recipients the same courtesies as other customers;

(xi) Comply with the nondiscrimination provisions of USDA regulations as provided in § 248.7; and

(xii) Notify the State agency if any farmer or farmers' market ceases operation prior to the end of the authorization period.

(2) The farmers' market/farmer shall not: (i) Collect sales tax on FMNP coupon purchases;

(ii) Seek restitution from FMNP recipients for coupons not paid by the State agency;

(iii) Issue cash change for purchases that are in an amount less than the value of the FMNP coupon(s).

(3) Neither the State agency nor the farmer/farmers' market has an obligation to renew the agreement. Either the State agency or the farmer/farmers' market may terminate the agreement for cause after providing advance written notification.

(4) The State agency may deny payment to the farmer/farmers' market for improperly redeemed FMNP coupons and may demand refunds for payments already made on improperly redeemed coupons.

(5) The State agency may disqualify a farmer/farmers' market for FMNP abuse. The farmer/farmers' market has the right to appeal a denial of an application to participate, a disqualification, or a FMNP sanction by the State agency. Expiration of a contract or agreement with a farmer/farmers' market, and claims actions under § 248.20, are not appealable.

(6) A farmer or farmers' market which commits fraud or engages in other illegal activity is liable to prosecution under applicable Federal, State or local laws.

(7) Agreements may not exceed 3 years.

(c) *Farmer agreements for State agencies which do not authorize farmers.* Those State agencies which authorize farmers' markets but not individual farmers shall require authorized farmers' markets to enter into a written agreement with each farmer within the market that is participating in FMNP. The State agency shall set forth the required terms for the agreement and provide a sample agreement which may be used.

(d) *Annual training for farmers/farmers' market managers.* State agencies shall conduct annual training for farmers/farmers' market managers participating in the FMNP. State agencies have discretion in determining the method used for training purposes. At a minimum, training shall include instruction emphasizing:

(1) Eligible food choices;

(2) Proper FMNP coupon redemption procedures, including deadlines for submission of coupons for payment;

(3) Equitable treatment of FMNP recipients, including the availability of produce to FMNP recipients that is of the same quality and cost as that sold to other customers;

(4) Civil rights compliance and guidelines;

(5) Guidelines for storing FMNP coupons safely; and

(6) Guidelines for cancelling FMNP coupons, such as punching holes or rubber stamping.

(e) *Monitoring and review of farmers/farmers' markets and local agencies.* The State agency shall be responsible for the monitoring of farmers/farmers' markets, and local agencies within its jurisdiction. This shall include developing a system for identifying high risk farmers/farmers' markets and ensuring on-site monitoring, conducting further investigation, and sanctioning of such farmers/farmers' markets as appropriate.

(1) Where coupon reimbursement responsibilities are delegated to farmers' market managers, farmers' market associations, or nonprofit organizations, the State agency may establish bonding requirements for these entities. Costs of such bonding are not reimbursable administrative expenses.

(2) Each State agency shall rank participating farmers and farmers' markets by risk factors, and shall conduct annual, on-site monitoring of at least 10 percent of farmers and 10 percent of farmers' markets beginning with those farmers and markets identified as being the highest-risk. Mandatory high-risk indicators are a proportionately high volume of FMNP coupons redeemed by a farmer as compared to other farmers within the farmers' market and within the State, and recipient complaints. States are encouraged to formally establish other high risk indicators for identifying potential problems. If additional high risk indicators are established, they shall be set forth in the farmers/farmers' market agreement and in the State Plan.

(3) The following shall be documented for all on-site farmers and farmers' markets monitoring visits, at a minimum: Names of both farmer/farmers' market and reviewer; date of review; nature of problem(s) detected or the observation that the farmer/farmers' market appears to be in compliance with FMNP requirements; record of interviews with recipients, market managers and/or farmers; and signature of the reviewer. Reviewers are not required to notify the farmer/farmers' market of the monitoring visit during, or immediately after the visit. The State agency shall do so after a reasonable delay when necessary to protect the identity of the reviewer(s) or the integrity of the investigation. After the farmer/farmers' market has been informed of any deficiencies detected by the monitoring visit, and instances where the farmer/farmers' market will be permitted to continue participation, the farmer/farmers' market shall provide plans as to how the deficiencies will be corrected.

(4) At least every 2 years, the State agency shall review all local agencies within its jurisdiction. Reviews of FMNP practices at the WIC local agency may be included in the overall WIC local agency review conducted by the WIC State agency.

(f) *Control of FMNP coupons.* (1) The State agency shall control and provide accountability for the receipt and issuance of FMNP coupons.

(2) The State agency shall ensure that there is secure transportation and storage of unissued FMNP coupons.

(3) The State agency shall design and implement a system of review of FMNP coupons to detect errors. At a minimum, the errors the system must detect are a missing recipient signature, a missing farmer and/or market identification, and redemption by a farmer outside of the valid date. The State agency shall implement procedures to reduce the number of errors in transactions, where possible.

(g) *Payment to farmers/farmers' markets.* The State agency shall ensure that farmers/ farmers' markets are promptly paid for food costs.

(h) *Reconciliation of FMNP coupons.* The State agency shall identify the disposition of all FMNP coupons as validly redeemed, lost or stolen, expired, or not matching issuance records. Validly redeemed FMNP coupons are those that are issued to a valid recipient and redeemed by an authorized farmers/farmers' market within valid dates. FMNP coupons that were redeemed but cannot be traced to a valid recipient or authorized farmer/farmers' market shall be subject to claims action in accordance with § 248.20.

(1) If the State agency elects to replace lost, stolen or damaged FMNP coupons, it must describe its system for doing so in the State Plan.

(2) The State agency shall use uniform FMNP coupons within its jurisdiction.

(3) FMNP coupons must include, at a minimum, the following information:

(i) The last date by which the recipient may use the coupon. This date shall be no later than November 30 of each year.

(ii) A date by which the farmer or farmers' market must submit the coupon for payment. When establishing this date, State agencies shall take into consideration the date financial statements are due to the FNS, and allow time for the corresponding coupon reconciliation that must be done by the State agency prior to submission of financial statements. Currently, financial statements are due to FNS by January 30.

(iii) A unique and sequential serial number.

(iv) A denomination (dollar amount).

(v) A farmer identifier for the redeeming farmer when agreements are between the State agency and the farmer.

(vi) In those instances where State agencies have agreements with farmers' markets, there must be a farmer identifier on each coupon and a market identifier on the cover of coupons which are batched by the market manager for reimbursement.

(i) *Instructions to recipients.* Each recipient shall receive instructions on the proper use and redemption of the FMNP coupons, including, but not limited to: (1) A list of names and addresses of authorized farmers/farmers' markets at which FMNP coupons may be redeemed.

(2) A description of eligible foods and the prohibition against cash change.

(3) An explanation of their right to complain about improper farmer/farmers' market practices with regard to FMNP responsibilities and the process for doing so.

(j) *Recipients and farmer/farmers' market complaints.* The State agency shall have procedures which document the handling of complaints by recipients and farmers/farmers' markets. Complaints of civil rights discrimination shall be handled in accordance with § 248.7(b).

(k) *Recipients and farmer/farmers' market sanctions.* The State agency shall establish policies which determine the type and level of sanctions to be applied against recipients and farmers/farmers' markets, based upon the severity and nature of the FMNP violations observed, and such other factors as the State agency determines appropriate, such as whether repeated offenses have occurred over a period of time. Farmers/farmers' markets may be sanctioned, disqualified, or both, when appropriate. Sanctions may include fines for improper FMNP coupon redemption procedures and the penalties outlined in § 248.20, in case of deliberate fraud. In those instances where compliance purchases are conducted, the results of covert compliance purchases can be a basis for farmer/farmers' market sanctions. A farmer/farmers' market committing fraud or other unlawful activities is liable to prosecution under applicable Federal, State or local laws. State agency policies shall ensure that a farmer that is disqualified from the FMNP at one market shall not participate in the FMNP at any other farmers' market in

the State's jurisdiction during the disqualification period.

§ 248.11 Financial management system.

(a) *Disclosure of expenditures.* The State agency shall maintain a financial management system which provides accurate, current and complete disclosure of the financial status of the FMNP. This shall include an accounting for all property and other assets and all FMNP funds received and expended each fiscal year.

(b) *Internal controls.* The State agency shall maintain effective controls over and accountability for all FMNP funds. The State agency must have effective internal controls to ensure that expenditures financed with FMNP funds are authorized and properly chargeable to the FMNP.

(c) *Record of expenditures.* The State agency shall maintain records which adequately identify the source and use of funds expended for FMNP activities. These records shall contain, but are not limited to, information pertaining to authorization, receipt of funds, obligations, unobligated balances, assets, liabilities, outlays, and income.

(d) *Payment of costs.* The State agency shall implement procedures which ensure prompt and accurate payment of allowable costs, and ensure the allowability and allocability of costs in accordance with the cost principles and standard provisions of this part, 7 CFR part 3016, and FNS guidelines and Instructions.

(e) *Identification of obligated funds.* The State agency shall implement procedures which accurately identify obligated FMNP funds at the time the obligations are made.

(f) *Resolution of audit findings.* The State agency shall implement procedures which ensure timely and appropriate resolution of claims and other matters resulting from audit findings and recommendations.

(g) *Reconciliation of food instruments.* The State agency shall reconcile FMNP coupons in accordance with § 248.10(f).

(h) *Transfer of cash.* The State agency shall establish the timing and amounts of its cash draws against its Letter of Credit in accordance with 31 CFR part 205.

§ 248.12 FMNP costs.

(a) *General.*—(1) *Composition of allowable costs.* In general, a cost item will be deemed allowable if it is reasonable and necessary for FMNP purposes and otherwise satisfies allowability criteria set forth in 7 CFR 3016.22 and this part. FMNP purposes include the administration and operation of the FMNP. Program costs supported by State matching contributions must meet the same criteria for allowability as costs supported by Federal funds. Allowable FMNP costs may be classified as follows:

(i) *Food costs and administrative costs.* Food costs are the costs of food benefits provided to FMNP recipients. Administrative costs are the costs associated with providing FMNP benefits and services to recipients and generally administering the FMNP. Specific examples of allowable administrative costs are listed in paragraph (b) of this section. Except as provided in § 248.14(g) of this part, a State agency's administrative costs under the FMNP may not exceed 15 percent of its total FMNP costs. Any costs incurred for food and/or administration above the Federal grant level will be the State agency's responsibility.

(ii) *Direct and indirect costs.* Direct costs are food and administrative costs incurred specifically for the FMNP. Indirect costs are administrative costs that benefit multiple programs or activities, and cannot be identified to any one without effort disproportionate to the results achieved. In accordance with the provisions of 7 CFR part 3015, a claim for reimbursement of indirect costs shall be supported by an approved allocation plan for the determination of such costs. An indirect cost rate developed through such an allocation plan may not be applied to a base that includes food costs.

(2) *Costs allowable with prior approval.* A State or local agency must obtain prior approval in accordance with 7 CFR 3016.22 before charging to the FMNP any capital expenditures and other cost items designated by 7 CFR 3016.22 as requiring such approval.

(3) *Unallowable costs.* Costs that are not reasonable and necessary for FMNP purposes, or that do not otherwise satisfy the cost principles of 7 CFR 3016.22, are unallowable. Notwithstanding any other provision of part 3016 or this part, the cost of constructing or operating a farmers' market is unallowable. Unallowable costs may never be claimed for Federal reimbursement or counted toward the State matching requirement.

(b) *Specified allowable administrative costs.* Allowable administrative costs include the following: (1) The costs associated with the provision of nutrition education which meets the requirements of § 248.9 of this part.

(2) The costs of FMNP coupon issuance, or recipient education covering proper coupon redemption procedures.

(3) The cost of outreach services.

(4) The costs associated with the food delivery process, such as printing FMNP coupons, processing redeemed coupons, and training market managers on the food delivery system.

(5) The cost of monitoring and reviewing Program operations.

(6) The cost of FMNP training.

(7) The cost of required reporting and recordkeeping.

§ 248.13 FMNP income.

Program income means gross income the State agency earns from grant supported activities. It includes fees for services performed and receipts from the use or rental of real or personal property acquired with Federal grant funds, but does not include proceeds from the disposition of such property. The State agency shall retain Program income earned during the agreement period and use it for Program purposes in accordance with the addition method described in 7 CFR 3016.25(g)(2). Fines, penalties or assessments paid by local agencies or farmers/farmers' markets are also deemed to be FMNP income. The State agency shall ensure that the sources and applications of Program income are fully documented.

§ 248.14 Distribution of funds.

(a) *Conditions for receipt of Federal funds.*—(1) *Matching of funds—(i) Match amount.* As a prerequisite to the receipt of Federal funds, a State agency must agree to contribute from non-Federal sources at least 30 percent of its total FMNP cost. The State agency may contribute more than this minimum amount. Non-federal contributions for similar programs as defined in § 248.2 may satisfy the State matching requirement. If a State receiving funds under the FMNP applies the Federal grant to a similar program operated in the previous fiscal year solely with State or local funds, the State shall not reduce in any fiscal year the amount of State or local funds made available to the similar program below the level at which the similar program was funded in the year prior to obtaining FMNP funding.

(ii) *Sources of matching contributions.* A State agency may count any form of cash contribution authorized by 7 CFR 3016.24(a)(1) toward the State matching requirement.

(iii) *Failure to match.* A State agency's failure to meet the State matching requirement will result in the establishment of a claim for the amount of Federal grant funds not matched. The matching requirement will be considered satisfied if State or other non-Federal matching contributions reported on the final closeout report

required by § 248.15(a) of this part amount to at least 30 percent of the total FMNP costs.

(2) *State Plan and agreement.* A State agency shall have its State Plan approved and shall execute an agreement with the Department in accordance with § 248.3(c) of this part.

(b) *Distribution of FMNP funds to previously participating State agencies.* Provided that sufficient FMNP funds are available, each State agency that participated in the FMNP in the previous year or in the case of Fiscal Year 1993 operations, in a demonstration project, shall receive not less than the amount of funds the State agency received in the most recent fiscal year in which it received funding, if it otherwise complies with the requirements established in this part.

(c) *Ratable reduction.* If amounts appropriated for any fiscal year for grants under the FMNP are not sufficient to pay to each previously participating State agency at least an amount as identified in paragraph (b) of this section, each State agency's grant shall be ratably reduced, except that, if sufficient funds are available, each State agency shall receive at least $50,000 or the amount that the State agency received for the prior fiscal year if that amount is less than $50,000.

(d) *Expansion of participating State agencies and establishment of new State agencies.* Any FMNP funds remaining for allocation after meeting the requirements of paragraph (b) of this section shall be allocated in the following manner: (1) An amount not less than 45 percent and not more than 55 percent of the remaining funds shall be made available to State agencies already participating in the FMNP that wish to serve additional recipients. If this amount is greater than that necessary to satisfy all State plans approved for additional recipients, the unallocated amount shall be applied toward satisfying any unmet need in paragraph (d)(2) of this section.

(2) An amount not less than 45 percent and not more than 55 percent of the remaining funds shall be made available to State agencies that have not participated in the FMNP in the prior fiscal year. If this amount is greater than that necessary to satisfy the approved State Plans for new States, the unallocated amount shall be applied toward satisfying any unmet need in paragraph (d)(1) of this section. The Department reserves the right not to fund every State agency with an approved State Plan.

(3) In any fiscal year, any FMNP funds that remain unallocated after satisfying the requirements of paragraphs (d) (1) and (2) of this section, shall be reallocated in accordance with paragraph (j) of this section.

(e) *Expansion for current State agencies.* In providing funds to serve additional recipients in State agencies that participated in the FMNP in the previous fiscal year, the Department shall consider on a case-by-case basis, the following: (1) Whether a State agency utilized at least 80 percent of its prior year food grant (exclusive of the 5 percent carry forward). States that did not spend at least 80 percent of their prior year food grant (exclusive of the 5 percent carry forward), may still be eligible for expansion funding if, in the judgment of the Department, good cause existed which was beyond the management control of the State, such as severe weather conditions, or unanticipated decreases in participant caseload in the WIC Program.

(2) Documentation that justifies the need for an increase in participation. This documentation must be set forth in the State Plan as outlined in § 248.4(a)(20).

(3) Demonstrated ability to satisfactorily operate the existing FMNP. Supporting documentation must be set forth in the State Plan as outlined in § 248.4(a)(20).

(4) Documentation that identifies the management capabilities of the State to expand. This documentation must be set forth in the State Plan as outlined in § 248.4(a)(20).

(f) *Funding of new State agencies.* Funds will be awarded to new State agencies in accordance with § 248.5.

(g) *Administrative funding.* A State agency may convert administrative funds into food funds, but may not convert food funds into administrative funds. The State agency may determine what mix of funds (Federal, State, or both) will be used for the administrative portion. A State agency shall have available for administrative costs an amount not greater than 15 percent of total FMNP funds, except that: (1) a State agency shall be authorized to use up to an additional 2 percent of total FMNP funds for administrative costs incurred during the first year in which it receives a grant under this part. The additional 2 percent is intended to cover start up costs to new States such as, but not limited to: (i) Determining which local WIC sites will be utilized;

(ii) Recruiting and authorizing farmers/farmers' markets to participate in the FMNP;

(iii) Preparing contracts for farmers/farmers' markets and local WIC providers;

(iv) Developing a data processing system for redemption and reconciliation of FMNP coupons;

(v) Designing program training and informational materials;

(vi) Conducting FMNP training; and

(vii) Coordinating FMNP implementation responsibilities between designated administering agencies.

(2) After the first year in which a State agency receives a grant under this part, and upon showing by the State agency of financial need, the Secretary may permit the State agency to use up to an additional 2 percent of the total of FMNP funds toward FMNP administration. In determining financial need, the Secretary shall take into consideration any circumstances unique to the State agency, and any proposed enhancements to its operations.

(3) State agencies wishing to request the additional 2 percent administration allowance in paragraph (g)(2) of this section must submit written justification to FNS for approval as part of the annual State Plan. Approvals, if granted, are only valid for one year.

(4) A State agency's failure to effectively and efficiently manage the FMNP within the 15 percent administrative allowance shall not be an appropriate justification for authorizing the additional 2 percent increase in administrative funding.

(5) The 15 percent administrative cost limitation, and the provisions of paragraphs (g)(1) and (2) of this section shall not apply to any funds that a State agency may contribute in excess of its minimum matching requirement. A State agency may use any non-Federal contributions over the 30 percent matching requirement for food and/or administrative costs.

(h) *Transfer of funds.* A State agency may use not more than 5 percent of the Federal FMNP funds made available for the fiscal year to reimburse expenses incurred by the FMNP during a preceding fiscal year, or to reimburse expenses expected to be incurred by the FMNP during the succeeding fiscal year. The State agency shall provide such justification for its request to carry forward or spend back funds under this paragraph as FNS may require.

(i) *Recovery of unused funds.* State agencies shall return to FNS any unexpended funds made available for a fiscal year, by February 1 of the following fiscal year, except as provided in paragraph (h) of this section.

(j) *Reallocation of funds.* Any funds recovered under paragraphs (d)(3) and (i) of this section will be reallocated in accordance with the appropriate method determined by FNS.

§ 248.15 Closeout procedures.

(a) *General.* State agencies shall submit to FNS a final closeout report for the fiscal year on a form prescribed by FNS on a date specified by FNS.

(b) *Grant closeout procedures.* When grants to State agencies are terminated, the following procedures shall be performed in accordance with 7 CFR part 3016.

(1) FNS may disqualify a State agency's participation under the FMNP, in whole or in part, or take such remedies as may be appropriate, whenever FNS determines that the State agency failed to comply with the conditions prescribed in this part, in its Federal-State Agreement, or in FNS guidelines and instructions. FNS will promptly notify the State agency in writing of the disqualification together with the effective date.

(2) FNS may disqualify the State agency or restrict its participation in the FMNP when both parties agree that continuation under the FMNP would not produce beneficial results commensurate with the further expenditure of funds.

(3) Upon termination of a grant, the affected agency shall not incur new obligations after the effective date of the disqualification, and shall cancel as many outstanding obligations as possible. FNS will allow full credit to the State agency for the Federal share of the noncancellable obligations properly incurred by the State agency prior to disqualification, and the State agency shall do the same for farmers/farmers' markets.

(4) A grant closeout shall not affect the retention period for, or Federal rights of access to, FMNP records as specified in § 248.24(b) and (c). The closeout of a grant does not affect the responsibilities of the State agency regarding property or with respect to any FMNP income for which the State agency is still accountable.

(5) A final audit is not a required part of the grant closeout and should not be needed unless there are problems with the grant that require attention. If FNS considers a final audit to be necessary, it shall so inform OIG. OIG will be responsible for ensuring that necessary final audits are performed and for any necessary coordination with other Federal cognizant audit agencies or State or local auditors. Audits performed in accordance with § 248.18 may serve as final audits providing such audits meet the needs of requesting agencies. If the grant is closed out without an audit, FNS reserves the right to disallow and recover an appropriate amount after fully considering any recommended disallowances resulting from an audit which may be conducted later.

§ 248.16 Administrative appeal of State agency decisions.

(a) *Requirements.* The State agency shall provide a hearing procedure whereby recipients, local agencies and farmers/farmers' markets adversely affected by certain actions of the State agency may appeal those actions. A recipient may appeal disqualification/suspension of FMNP benefits. A local agency may appeal an action of the State agency disqualifying it from participating in the FMNP. A farmer/farmers' market may appeal an action of the State agency denying its application to participate, imposing a sanction, or disqualifying it from participating in the FMNP. Expiration of a contract or agreement shall not be subject to appeal.

(b) *Postponement pending decision.* An adverse action may, at the State agency's option, be postponed until a decision in the appeal is rendered.

(1) In a case where an adverse action affects a local agency or farmer/farmers' market, a postponement is appropriate where the State agency finds that recipients would be unduly inconvenienced by the adverse action. In addition, the State agency may determine other relevant criteria to be considered in deciding whether or not to postpone an adverse action.

(2) In a case where a recipient appeals the termination of benefits, that recipient shall continue to receive FMNP benefits until the hearing official reaches a decision or the expiration of the current FMNP season, whichever occurs first. Applicants who are denied benefits may appeal the denial, but shall not receive benefits while awaiting the decision.

(c) *Procedure.* The State agency hearing procedure shall at a minimum provide the recipient, local agency or farmer/farmers' market with the following:

(1) Written notification of the adverse action, the cause(s) for the action, and the effective date of the action, including the State agency's determination of whether the action shall be postponed under paragraph (b) of this section if it is appealed, and the opportunity for a hearing. Such notification shall be provided within a reasonable timeframe established by the State agency and in advance of the effective date of the action.

(2) The opportunity to appeal the action within the time specified by the State agency in its notification of adverse action.

(3) Adequate advance notice of the time and place of the hearing to provide all parties involved sufficient time to prepare for the hearing.

(4) The opportunity to present its case and at least one opportunity to reschedule the hearing date upon specific request. The State agency may set standards on how many hearing dates can be scheduled, provided that a minimum of two hearing dates is allowed.

(5) The opportunity to confront and cross-examine adverse witnesses.

(6) The opportunity to be represented by counsel, or in the case of a recipient appeal, by a representative designated by the recipient, if desired.

(7) The opportunity to review the case record prior to the hearing.

(8) An impartial decision maker, whose decision as to the validity of the State agency's action shall rest solely on the evidence presented at the hearing and the statutory and regulatory provisions governing the FMNP. The basis for the decision shall be stated in writing, although it need not amount to a full opinion or contain formal findings of fact and conclusions of law.

(9) Written notification of the decision in the appeal, within 60 days from the date of receipt of the request for a hearing by the State agency.

(d) *Continuing responsibilities.* Appealing an adverse action does not relieve a farmer/farmers' market or local agency permitted to continue in the FMNP while its appeal is pending, from responsibility for continued compliance with the terms of the written agreement or contract with the State agency.

(e) *Judicial review.* If a State level decision is rendered against the recipient, local agency or farmer/farmers' market and the appellant expresses an interest in pursuing a further review of the decision, the State agency shall explain any further State level review of the decision and any available State level rehearing process. If neither is available or both have been exhausted, the State agency shall explain the right to pursue judicial review of the decision.

(f) *Additional appeals procedures for State agencies which authorize farmers' markets and not individual farmers.* A State agency which authorizes farmers' markets and not individual farmers shall establish procedures to be used when a farmer seeks to appeal an action of a farmers' market denying the farmer's application to participate, or sanctioning or disqualifying the farmer. The procedures shall be set forth in the State Plan and in the agreements entered by the State agency and the farmers' market and the farmers' market and the farmer.

Subpart F—Monitoring and Review of State Agencies

§ 248.17 Management evaluations and reviews.

(a) *General.* FNS and each State agency shall establish a management evaluation system in order to assess the accomplishment of FMNP objectives as provided under these regulations, the State Plan, and the written agreement with the Department. FNS will provide assistance to State agencies in discharging this responsibility, and will establish standards and procedures to determine how well the objectives of this part are being accomplished, and implement sanction procedures as warranted by State FMNP performance.

(b) *Responsibilities of FNS.* FNS shall establish evaluation procedures to determine whether State agencies carry out the purposes and provisions of this part, the State Plan, and the written agreement with the Department. As a part of the evaluation procedure, FNS shall review audits to ensure that the FMNP has been included in audit examinations at a reasonable frequency. These evaluations shall also include a review of each local agency, and on-site reviews of selected farmers/farmers' markets. These evaluations will measure the State agency's progress toward meeting the objectives outlined in its State Plan and the State agency's compliance with these regulations.

(1) If FNS determines that the State agency has failed, without good cause, to demonstrate efficient and effective administration of its FMNP or has failed to comply with the requirements contained in this section or the State Plan, FNS may withhold an amount up to 100 percent of the State agency's administrative grant.

(2) Sanctions imposed upon a State agency by FNS in accordance with this section (but not claims for repayment assessed against a State agency) may be appealed in accordance with the procedures established in § 248.20. Before carrying out any sanction against a State agency, the following procedures will be followed: (i) FNS will notify the chief departmental officer of the administering agency in writing of the deficiencies found and of FNS' intention to withhold administrative funds unless an acceptable corrective action plan is submitted by the State agency to FNS within 45 days after mailing of notification.

(ii) The State agency shall develop a corrective action plan, including timeframes for implementation to address the deficiencies and prevent their future recurrence.

(iii) If the corrective action plan is acceptable, FNS will notify the chief departmental officer of the administering agency in writing within 30 days of receipt of the plan. The letter will advise the State agency of the sanctions to be imposed if the corrective action plan is not implemented according to the schedule set forth in the approved plan.

(iv) Upon notification from the State agency that corrective action has been taken, FNS will assess such action, and, if necessary, perform a follow-up review to determine if the noted deficiencies have been corrected. FNS will then advise the State agency of whether the actions taken are in compliance with the corrective action plan, and whether the deficiency is resolved or further corrective action is needed. Compliance buys can be required if during FNS management evaluations by regional offices, a State agency is found to be out of compliance with its responsibility to monitor and review farmers/farmers' markets.

(v) If an acceptable corrective action plan is not submitted within 45 days, or if corrective action is not completed according to the schedule established in the corrective action plan, FNS may withhold the award of FMNP administrative funds. If the 45-day warning period ends in the fourth quarter of a fiscal year, FNS may elect not to withhold funds until the next fiscal year. FNS will notify the chief departmental officer of the administering State agency.

(vi) If compliance is achieved before the end of the fiscal year in which the FMNP administrative funds are withheld, the funds withheld may be restored to the State agency. FNS is not required to restore funds withheld beyond the end of the fiscal year for which the funds were initially awarded.

(c) *Responsibilities of State agencies.* The State agency is responsible for meeting the following requirements: (1) The State agency shall establish evaluation and review procedures and document the results of such procedures. The procedures shall include, but are not limited to: (i) Annual monitoring reviews of participating farmers/farmers' markets, including on-site reviews of a minimum of 10 percent of farmers and 10 percent of farmers' markets, starting with the highest risk farmers and farmers' markets and working down. More frequent reviews may be performed as the State agency deems necessary.

(ii) Conducting monitoring reviews of all local agencies within the State agency's jurisdiction at least once every 2 years. Monitoring of local agencies shall encompass, but not be limited to, evaluation of management, accountability, certification, nutrition education, financial management systems, and coupon management systems.

(iii) Instituting the necessary follow-up procedures to correct identified problem areas.

(2) On its own initiative or when required by FNS, the State agency shall provide special reports on FMNP activities, and take positive action to correct deficiencies in FMNP operations.

§ 248.18 Audits.

(a) *Federal access to information.* The Secretary, the Comptroller General of the United States, or any of their duly authorized representatives, or duly authorized State auditors shall have access to any books, documents, papers, and records of the State agency and their contractors, for the purpose of making surveys, audits, examinations, excerpts, and transcripts.

(b) *State agency response.* The State agency may take exception to particular audit findings and recommendations. The State agency shall submit a response or statement to FNS as to the action taken or planned regarding the findings. A proposed corrective action plan developed and submitted by the State agency shall include specific time frames for its implementation and for completion of the correction of deficiencies and problems leading to the deficiencies.

(c) *Corrective action.* FNS shall determine whether FMNP deficiencies identified in an audit have been adequately corrected. If additional corrective action is necessary, FNS shall schedule a follow-up review, allowing a reasonable time for such corrective action to be taken.

(*d*) *State sponsored audits.* State and local agencies shall conduct independent audits in accordance with 7 CFR part 3015, 3016.26 or part 3051, as applicable. A State or local agency may elect to obtain either an organization-wide audit or an audit of the Program if it qualifies to make such an election under applicable regulations.

§ 248.19 Investigations.

(a) *Authority.* The Department may make an investigation of any allegation of noncompliance with this part and FNS guidelines and instructions. The investigation may include, where appropriate, a review of pertinent practices and policies of any State and local agency, the circumstances under which the possible noncompliance with

this part occurred, and other factors relevant to a determination as to whether the State and local agency has failed to comply with the requirements of this part.

(b) *Confidentiality.* No State or local agency, recipient, or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege under this part because that person has made a complaint or formal allegation, or has testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The identity of every complainant shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conducting of any investigation, hearing, or judicial proceeding.

Subpart G—Miscellaneous Provisions

§ 248.20 Claims and penalties.

(a) *Claims against State agencies.* (1) If FNS determines through a review of the State agency's reports, program or financial analysis, monitoring, audit, or otherwise, that any FMNP funds provided to a State agency for food or administrative purposes were, through State agency negligence or fraud, misused or otherwise diverted from FMNP purposes, a formal claim will be assessed by FNS against the State agency. The State agency shall pay promptly to FNS a sum equal to the amount of the administrative funds or the value of coupons so misused or diverted.

(2) If FNS determines that any part of the FMNP funds received by a State agency; or coupons, were lost as a result of theft, embezzlement, or unexplained causes, the State agency shall, on demand by FNS, pay to FNS a sum equal to the amount of the money or the value of the FMNP coupons so lost.

(3) The State agency shall have full opportunity to submit evidence, explanation or information concerning alleged instances of noncompliance or diversion before a final determination is made in such cases.

(4) FNS is authorized to establish claims against a State agency for unreconciled FMNP coupons. When a State agency can demonstrate that all reasonable management efforts have been devoted to reconciliation and 99 percent or more of the FMNP coupons issued have been accounted for by the reconciliation process, FNS may determine that the reconciliation process has been completed to satisfaction.

(b) *Interest charge on claims against State agencies.* If an agreement cannot be reached with the State agency for payment of its debts or for offset of debts on its current Letter of Credit within 30 days from the date of the first demand letter from FNS, FNS will assess an interest (late) charge against the State agency. Interest accrual shall begin on the 31st day after the date of the first demand letter, bill or claim, and shall be computed monthly on any unpaid balance as long as the debt exists. From a source other than the FMNP, the State agency shall provide the funds necessary to maintain FMNP operations at the grant level authorized by FNS.

(c) *Penalties.* In accordance with section 12(g) of the National School Lunch Act, whoever embezzles, willfully misapplies, steals or obtains by fraud any funds, assets or property provided under section 17 of the Child Nutrition Act of 1966, as amended, whether received directly or indirectly from USDA, or whoever receives, conceals or retains such funds, assets or property for his or her own interest, knowing such funds, assets or property have been embezzled, willfully misapplied, stolen, or obtained by fraud shall, if such funds, assets or property are of the value of $100 or more, be fined not more than $10,000 or imprisoned not more than five years, or both, or if such funds, assets or property are of a value of less than $100, shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

§ 248.21 Procurement and property management.

(a) *Requirements.* State agencies shall comply with the requirements of 7 CFR part 3016 for procurement of supplies, equipment and other services with FMNP funds. These requirements are adopted by FNS to ensure that such materials and services are obtained for the FMNP in an effective manner and in compliance with the provisions of applicable law and executive orders.

(b) *Contractual responsibilities.* The standards contained in 7 CFR part 3016 do not relieve the State agency of the responsibilities arising under its contracts. The State agency is the responsible authority, without recourse to FNS, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in connection with the FMNP. This includes, but is not limited to, disputes, claims, protests of award, source evaluation, or other matters of a contractual nature. Matters concerning violation of law are to be referred to such local, State or Federal authority as may have proper jurisdiction.

(c) *State regulations.* The State agency may use its own procurement regulations which reflect applicable State and local regulations, provided that procurements made with FMNP funds adhere to the standards set forth in 7 CFR part 3016.

(d) *Property acquired with program funds.* State and local agencies shall observe the standards prescribed in 7 CFR part 3016 in their utilization and disposition of real property and equipment acquired in whole or in part with FMNP funds.

§ 248.22 Nonprocurement debarment/suspension, drug-free workplace, and lobbying restrictions.

The State agency shall ensure compliance with the requirements of the Department's regulations governing nonprocurement debarment/suspension (7 CFR part 3017), drug-free workplace (7 CFR part 3017), and the Department's regulations governing restrictions on lobbying (7 CFR part 3018), where applicable.

§ 248.23 Records and reports.

(a) *Recordkeeping requirements.* Each State agency shall maintain full and complete records concerning FMNP operations. Such records shall comply with 7 CFR part 3016 and the following requirements: (1) Records shall include, but not be limited to, information pertaining to financial operations, FMNP coupon issuance and redemption, equipment purchases and inventory, nutrition education, and civil rights procedures.

(2) All records shall be retained for a minimum of 3 years following the date of submission of the final expenditure report for the period to which the report pertains. If any litigation, claim, negotiation, audit or other action involving the records has been started before the end of the 3-year period, the records shall be kept until all issues are resolved, or until the end of the regular 3-year period, whichever is later. If FNS deems any of the FMNP records to be of historical interest, it may require the State agency to forward such records to FNS whenever the State agency is disposing of them.

(3) Records for nonexpendable property acquired in whole or in part with FMNP funds shall be retained for three years after its final disposition.

(4) All records shall be available during normal business hours for representatives of the Department of the Comptroller General of the United States to inspect, audit, and copy. Any reports resulting from such

examinations shall not divulge names of individuals.

(b) *Financial and recipient reports.* State agencies shall submit financial and FMNP performance data on a yearly basis as specified by FNS and required by section 17(m)(8) of the CNA. Such information shall include, but shall not be limited to:

(1) Number and type of recipients (Federal and non-Federal).

(2) Value of coupons issued.

(3) Value of coupons redeemed.

(c) *Source documentation.* To be acceptable for audit purposes, all financial and FMNP performance reports shall be traceable to source documentation.

(d) *Certification of reports.* Financial and FMNP reports shall be certified as to their completeness and accuracy by the person given that responsibility by the State agency.

(e) *Use of reports.* FNS will use State agency reports to measure progress in achieving objectives set forth in the State Plan, and this part, or other State agency performance plans. If it is determined, through review of State agency reports, FMNP or financial analysis, or an audit, that a State agency is not meeting the objectives set forth in its State Plan, FNS may request additional information including, but not limited to, reasons for failure to achieve these objectives.

§ 248.24 Other provisions.

(a) *No aid reduction.* The value of benefits or assistance available under the FMNP shall not be considered as income or resources of recipients or their families for any purpose under Federal, State, or local laws, including, but not limited to, laws relating to taxation, welfare and public assistance programs. Section 17(m)(7)(B) of the CNA provides that any programs for which a grant is received under this subsection shall be supplementary to the food stamp program carried out under the Food Stamp Act of 1977 as amended (7 U.S.C. 2011 *et seq.*) and to any other Federal or State program under which foods are distributed to needy families in lieu of food stamps.

(b) *Statistical information.* FNS reserves the right to use information obtained under the FMNP in a summary, statistical or other form which does not identify particular individuals.

(c) *Confidentiality.* The State agency shall restrict the use or disclosure of information obtained from FMNP applicants and recipients to persons directly connected with the administration or enforcement of the WIC Program or the FMNP, including persons investigating or prosecuting violations in the WIC Program or FMNP under Federal, State or local authority.

§ 248.25 FMNP information.

Any person who wishes information, assistance, records or other public material shall request such information from the State agency, or from the FNS Regional Office serving the appropriate State as listed below:

(a) Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, Vermont: U.S. Department of Agriculture, FNS, Northeast Region, 10 Causeway Street, room 501, Boston, Massachusetts 02222–1068.

(b) Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Puerto Rico, Virginia, Virgin Islands, West Virginia: U.S. Department of Agriculture, FNS, Mid-Atlantic Region, Mercer Corporate Park, 300 Corporate Boulevard, Robbinsville, New Jersey, 08691–1598.

(c) Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee: U.S. Department of Agriculture, FNS, Southeast Region, 77 Forsyth Street, SW., suite 112, Atlanta, Georgia 30303.

(d) Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin: U.S. Department of Agriculture, FNS, Midwest Region, 77 West Jackson Boulevard—20th floor, Chicago, Illinois 60604–3507.

(e) Arkansas, Louisiana, New Mexico, Oklahoma, Texas: U.S. Department of Agriculture, FNS, Southwest Region, 1100 Commerce Street, room 5–C–30, Dallas, Texas 75242.

(f) Colorado, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah, Wyoming: U.S. Department of Agriculture, FNS, Mountain Plains Region, 1244 Speer Boulevard, suite 903, Denver, Colorado 80204.

(g) Alaska, American Samoa, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon, Trust Territory of the Pacific Islands, the Northern Mariana Islands, Washington: U.S. Department of Agriculture, FNS, Western Region, 550 Kearny Street, room 400, San Francisco, California 94108.

§ 248.26 OMB control number.

The collecting of information requirements of § 248.23(b) have been approved by the Office of Management and Budget and assigned OMB control number 0584–0477. The collecting of information requirements in §§ 248.4, 248.9, 248.10(a), 248.10(b), 248.10(e), 248.10(f), 248.11, 248.14(h), 248.17(b)(2)(ii), and 248.18(b) are pending approval by the Office of Management and Budget.

Dated: March 2, 1994.

William E. Ludwig,

Administrator, Food and Nutrition Service.

[FR Doc. 94–5568 Filed 3–10–94; 8:45 am]

BILLING CODE 3410–30–U

Agricultural Marketing Service

7 CFR Parts 944, 980 and 999

[Docket Nos. FV93–944–3IFR, FV93–980–1IFR and FV93–999–1IFR]

Exemptions From Import Regulations for Specified Commodities; Reopening of Comment Period on Interim Final Rules

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Reopening of comment period.

SUMMARY: This rule reopens the periods for filing written comments on two interim final rules. The rules established exemptions from import requirements for various fruit, vegetable and specialty crop commodities. The rules added exemptions from grade, size, quality and maturity requirements for the commodities imported for use in certain specified outlets such as processing, livestock feed and donation to charity. The rules also implemented safeguard provisions to assure that such imports are utilized in a specified exempt outlet. The interim final rules were published in the **Federal Register** on December 30, 1993. A correction to the interim final rule on fruit exemptions was published on January 31, 1994.

DATES: Comments must be received by April 11, 1994.

ADDRESSES: Interested persons are invited to submit written comments concerning the interim final rules. Comments must be sent in triplicate to the Docket Clerk, Marketing Order Administration Branch, F&V, AMS, USDA, room 2523–S, P.O. Box 96456, Washington, DC 20090–6456, FAX Number (202) 720–5698. Comments should reference the docket numbers, the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours.

FOR FURTHER INFORMATION CONTACT: Tom Tichenor, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, room 2536–S, P.O. Box 96456, Washington, DC 20090–6456; telephone: (202) 720–1509, or FAX (202) 720–6862.