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funds, assets, or property have been embezzled, willfully misapplied, stolen, or obtained by fraud, shall be subject to the same penalties provided in paragraph (a) of this section.

(Sec. 10(a), Pub. L. 95-627, 92 Stat. 3623 (42 U.S.C. 1760); sec. 14, Pub. L. 95-627, 92 Stat. 3625-3626)

[Amdt. 14, 44 FR 37901, June 29, 1979, as amended at 64 FR 50744, Sept. 20, 1999]

**§ 245.13 Information collection/record-keeping—OMB assigned control numbers.**

7 CFR section where requirements are described	Current OMB control number
245.3 (a), (b) .....	0584-0026
245.4 .....	0584-0026
245.5 (a), (b) .....	0584-0026
245.6 (a), (b), (c), (e) .....	0584-0026
245.7(a) .....	0584-0026
245.9 (a), (b), (c) .....	0584-0026
245.10 (a), (d), (e) .....	0584-0026
245.11 (a), (a-1), (b), (c), (d), (f) .....	0584-0026
245.13(a)-(c) .....	0584-0026

[50 FR 53258, Dec. 31, 1985. Redesignated at 64 FR 50744, Sept. 20, 1999]

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

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AUTHORITY: 42 U.S.C. 1786.

SOURCE: 50 FR 6121, Feb. 13, 1985, unless otherwise noted.

EDITORIAL NOTE: For nomenclature changes to part 246 see 59 FR 11498, Mar. 11, 1994.

**Subpart A—General**

**§ 246.1 General purpose and scope.**

This part announces regulations under which the Secretary of Agriculture shall carry out the Special Supplemental Nutrition Program for Women, Infants and Children (WIC Program). Section 17 of the Child Nutrition Act of 1966, as amended, states in part that the Congress finds that substantial numbers of pregnant, postpartum and breastfeeding women, infants and young children from families with inadequate income are at special risk with respect to their physical and mental health by reason of inadequate nutrition or health care, or both. The purpose of the Program is to provide supplemental foods and nutrition education through payment of cash grants to State agencies which administer the Program through local agencies at no cost to eligible persons. The Program shall serve as an adjunct to good health care during critical times of growth and development, in order to prevent the occurrence of health problems, including drug and

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

[50 FR 6121, Feb. 13, 1985, as amended at 54 FR 51294, Dec. 14, 1989; 58 FR 11506, Feb. 26, 1993]

### § 246.2 Definitions.

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

*Affirmative Action Plan* means that portion of the State Plan which describes how the Program will be initiated and expanded within the State's jurisdiction in accordance with § 246.4(a).

*A-130* means Office of Management and Budget Circular A-130, which provides guidance for the coordinated development and operation of information systems.

*Applicants* means pregnant women, breastfeeding women, postpartum women, infants, and children who are applying to receive WIC benefits, and the breastfed infants of applicant breastfeeding women. Applicants include individuals who are currently participating in the program but are re-applying because their certification period is about to expire.

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

*Breastfeeding women* means women up to one year postpartum who are breastfeeding their infants.

*Categorical eligibility* means persons who meet the definitions of pregnant women, breastfeeding women, postpartum women, or infants or children.

*Certification* means the implementation of criteria and procedures to assess and document each applicant's eligibility for the Program.

*Children* means persons who have had their first birthday but have not yet attained their fifth birthday.

*Clinic* means a facility where applicants are certified.

*Competent professional authority* means an individual on the staff of the local agency authorized to determine nutritional risk and prescribe supplemental foods. The following persons are the only persons the State agency may authorize to serve as a competent professional authority: Physicians, nutritionists (bachelor's or master's degree in Nutritional Sciences, Community Nutrition, Clinical Nutrition, Dietetics, Public Health Nutrition or Home Economics with emphasis in Nutrition), dieticians, registered nurses, physician's assistants (certified by the National Committee on Certification of Physician's Assistants or certified by the State medical certifying authority), or State or local medically trained health officials. This definition also applies to an individual who is not on the staff of the local agency but who is qualified to provide data upon which nutritional risk determinations are made by a competent professional authority on the staff of the local agency.

*Competitive bidding* means a procurement process under which FNS or the State agency selects a single source (such as a single infant formula manufacturer offering the lowest price), as determined by the submission of sealed bids, for a product for which bids are sought for use in the Program.

*Contract brand infant formula* means all infant formulas (except exempt infant formulas) produced by the manufacturer awarded the infant formula cost containment contract. If under a single solicitation the manufacturer subcontracts for soy-based infant formula, then all soy-based infant formulas covered by the subcontract are also considered contract brand infant formulas (see § 246.16a(c)(1)(i)). If a State agency elects to solicit separate bids for milk-based and soy-based infant formulas, all infant formulas issued under each contract are considered the contract brand infant formula (see § 246.16a(c)(1)(ii)). For example, all of the milk-based infant formulas issued by a State agency that are produced by the manufacturer that was awarded the milk-based contract are considered contract brand infant formulas. Similarly, all of the soy-based

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infant formulas issued by a State agency that are produced by the manufacturer that was awarded the soy-based contract are also considered to be contract brand infant formulas. Contract brand infant formulas also include all infant formulas (except exempt infant formulas) introduced after the contract is awarded.

*Cost containment measure* means a competitive bidding, rebate, direct distribution, or home delivery system implemented by a State agency as described in its approved State Plan of operation and administration.

*CSFP* means the Commodity Supplemental Food Program administered by the Department, authorized by section 5 of the Agriculture and Consumer Protection Act of 1973, as amended, and governed by part 247 of this title.

*Days* means calendar days.

*Department* means the U.S. Department of Agriculture.

*Discount* means, with respect to a State agency that provides Program foods to participants without the use of retail grocery stores (such as a State agency that provides for the home delivery or direct distribution of supplemental food), the amount of the price reduction or other price concession provided to any State agency by the manufacturer or supplier of the particular food product as the result of the purchase of Program food by each such State agency, or its representative, from the manufacturer or supplier.

*Disqualification* means the act of ending the Program participation of a participant, authorized food vendor, or authorized State or local agency, whether as a punitive sanction or for administrative reasons.

*Documentation* means the presentation of written documents which substantiate statements made by an applicant or participant or a person applying on behalf of an applicant.

*Drug* means:

- (a) A beverage containing alcohol;
- (b) A controlled substance (having the meaning given it in section 102(6) of the Controlled Substance Act (21 U.S.C. 802(6)); or
- (c) A controlled substance analogue (having the meaning given it in section 102(32) of the Controlled Substance Act (21 U.S.C. 802(32))).

*Dual participation* means simultaneous participation in the Program in one or more than one WIC clinic, or participation in the Program and in the CSFP during the same period of time.

*Exempt infant formula* means an infant formula that meets the requirements for an exempt infant formula under section 412(h) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 350a(h)) and the regulations at 21 CFR parts 106 and 107.

*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.

*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.

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

*Food costs* means the costs of supplemental foods, determined in accordance with §246.14(b).

*Food delivery system* means the method used by State and local agencies to provide supplemental foods to participants.

*Food instrument* means a voucher, check, electronic benefits transfer card (EBT), coupon or other document which is used by a participant to obtain supplemental foods.

*Health services* means ongoing, routine pediatric and obstetric care (such as infant and child care and prenatal and postpartum examinations) or referral for treatment.

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

*Homeless individual* means a woman, infant or child:

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(a) Who lacks a fixed and regular nighttime residence; or

(b) Whose primary nighttime residence is:

(1) A supervised publicly or privately operated shelter (including a welfare hotel, a congregate shelter, or a shelter for victims of domestic violence) designated to provide temporary living accommodation;

(2) An institution that provides a temporary residence for individuals intended to be institutionalized;

(3) A temporary accommodation of not more than 365 days in the residence of another individual; or

(4) A public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

*IHS* means the Indian Health Service of the U.S. Department of Health and Human Services.

*Individual with disabilities* means a handicapped person as defined in 7 CFR 15b.3.

*Infant formula* means a food that meets the definition of an infant formula in section 201(z) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(z)) and that meets the requirements for an infant formula under section 412 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 350a) and the regulations at 21 CFR parts 106 and 107.

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

*Infants* means persons under one year of age.

*Local agency* means: (a) A public or private, nonprofit health or human service agency which provides health services, either directly or through contract, in accordance with §246.5; (b) an IHS service unit; (c) an Indian tribe, band or group recognized by the Department of the Interior which operates a health clinic or is provided health services by an IHS service unit; or (d) an intertribal council or group that is an authorized representative of Indian tribes, bands or groups recognized by the Department of the Interior, which operates a health clinic or is provided health services by an IHS service unit.

*Members of populations* means persons with a common special need who do not necessarily reside in a specific geographic area, such as off-reservation Indians or migrant farmworkers and their families.

*Migrant farmworker* means an individual whose principal employment is in agriculture on a seasonal basis, who has been so employed within the last 24 months, and who establishes, for the purposes of such employment, a temporary abode.

*Net price* means the difference between an infant formula manufacturer's lowest national wholesale price per unit for a full truckload of infant formula and the rebate level or the discount offered or provided by the manufacturer under an infant formula cost containment contract.

*Non-contract brand infant formula* means all infant formula, including exempt infant formula, that is not covered by an infant formula cost containment contract awarded by that State agency.

*Nonprofit agency* means a private agency which is exempt from income tax under the Internal Revenue Code of 1954, as amended.

*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.

*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.

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*Nutritional risk* means: (a) Detrimental or abnormal nutritional conditions detectable by biochemical or anthropometric measurements; (b) Other documented nutritionally related medical conditions; (c) Dietary deficiencies that impair or endanger health; (d) Conditions that directly affect the nutritional health of a person, including alcoholism or drug abuse; or (e) Conditions that predispose persons to inadequate nutritional patterns or nutritionally related medical conditions, including, but not limited to, homelessness and migrancy.

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

*Other harmful substances* means other substances such as tobacco, prescription drugs and over-the-counter medications that can be harmful to the health of the WIC population, especially the pregnant woman and her fetus.

*Participants* means pregnant women, breastfeeding women, postpartum women, infants and children who are receiving supplemental foods or food instruments under the Program, and the breastfed infants of participant breastfeeding women.

*Participation* means the sum of the number of persons who have received supplemental foods or food instruments during the reporting period and the number of infants breastfed by participant breastfeeding women (and receiving no supplemental foods or food instruments) during the reporting period.

*Postpartum women* means women up to six months after termination of pregnancy.

*Poverty income guidelines* means the poverty income guidelines prescribed by the Department of Health and Human Services. These guidelines are adjusted annually by the Department of Health and Human Services, with each annual adjustment effective July 1 of each year. The poverty income guidelines prescribed by the Department of Health and Human Services shall be used for all States, as defined in this section, except for Alaska and Hawaii. Separate poverty income guidelines are prescribed for Alaska and Hawaii.

*Pregnant women* means women determined to have one or more embryos or fetuses in utero.

*Program* means the Special Supplemental Nutrition Program for Women, Infants and Children (WIC) authorized by section 17 of the Child Nutrition Act of 1966, as amended.

*Rebate* means the amount of money refunded under cost containment procedures to any State agency from the manufacturer of the particular food product as the result of the purchase of the supplemental food with a voucher or other purchase instrument by a participant in each State agency's program. Such rebates shall be payments made subsequent to the exchange of a food instrument for food.

*Secretary* means the Secretary of Agriculture.

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

*7 CFR part 3016* means the Department's Uniform Federal Assistance Regulations. Part 3016 implements the policies established by the Office of Management and Budget (OMB) in Circulars A-21, A-87, A-102, A-110, and A-122, as well as OMB Guidance on Implementation of the Federal Grant and Cooperative Agreement Act of 1977.

*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).

*State* means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Marianas Islands, and the Trust Territory of the Pacific Islands.

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State agency means 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 IHS.

State Plan means a plan of Program operation and administration that describes the manner in which the State agency intends to implement and operate all aspects of Program administration within its jurisdiction in accordance with § 246.4.

Supplemental foods means those foods containing nutrients determined to be beneficial for pregnant, breastfeeding, and postpartum women, infants and children, as prescribed by the Secretary in § 246.10.

WIC-eligible medical foods means certain enteral products that are specifically formulated to provide nutritional support for individuals with a diagnosed medical condition, when the use of conventional foods is precluded, restricted, or inadequate. Such WIC-eligible medical foods may be nutritionally complete or incomplete, but they must serve the purpose of a food, provide a source of calories and one or more nutrients, and be designed for enteral digestion via an oral or tube feeding. WIC-eligible medical foods include many, but not all, products that meet the definition of medical food in Section 5(b)(3) of the Orphan Drug Act (21 U.S.C. 360ee(b)(3)).

[50 FR 6121, Feb. 13, 1985; 50 FR 8098, Feb. 28, 1985, as amended at 52 FR 25189, July 2, 1987; 54 FR 51294, Dec. 14, 1989; 55 FR 9717, Mar. 15, 1990; 58 FR 11506, Feb. 26, 1993; 58 FR 47022, Sept. 7, 1993; 59 FR 11498, Mar. 11, 1994; 63 FR 63973, Nov. 18, 1998; 64 FR 13322, Mar. 18, 1999; 64 FR 56674, Oct. 21, 1999; 65 FR 3378, Jan. 21, 2000; 65 FR 53527, Sept. 5, 2000; 65 FR 51222, Aug. 23, 2000]

EFFECTIVE DATE NOTE 1: At 65 FR 77249, Dec. 11, 2000, § 246.2 was amended by adding the definition of Remote Indian or Native village, effective January 10, 2001. For the convenience of the user the added text is set forth as follows:

§ 246.2 Definitions.

\* \* \* \* \*

Remote Indian or Native village means an Indian or Native village that is located in a rural area, has a population of less than 5,000 inhabitants, and is not accessible year-round by means of a public road (as defined in 23 U.S.C. 101).

\* \* \* \* \*

EFFECTIVE DATE NOTE 2: At 65 FR 83277, Dec. 29, 2000, § 246.2 was amended by adding the definitions of Authorized supplemental foods, Compliance buy, High-risk vendor, Home food delivery contractor, Inventory audit, Participant violation, Price adjustment, Proxy, Routine monitoring, Vendor, Vendor authorization, Vendor limiting criteria, Vendor overcharge, Vendor selection criteria, Vendor violation, and WIC, effective February 27, 2001. For the convenience of the user, the added text is set forth as follows:

§ 246.2 Definitions.

\* \* \* \* \*

Authorized supplemental foods means those supplemental foods authorized by the State or local agency for issuance to a particular participant.

\* \* \* \* \*

Compliance buy means a covert, on-site investigation in which a representative of the Program poses as a participant, parent or caretaker of an infant or child participant, or proxy, transacts one or more food instruments, and does not reveal during the visit that he or she is a program representative.

\* \* \* \* \*

High-risk vendor means a vendor identified as having a high probability of committing a vendor violation through application of the criteria established in § 246.12(j)(3) and any additional criteria established by the State agency.

Home food delivery contractor means a sole proprietorship, partnership, cooperative association, corporation, or other business entity that contracts with a State agency to deliver authorized supplemental foods to the residences of participants under a home food delivery system.

\* \* \* \* \*

Inventory audit means the examination of food invoices or other proofs of purchase to determine whether a vendor has purchased

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sufficient quantities of supplemental foods to provide participants the quantities specified on food instruments redeemed by the vendor during a given period of time.

\* \* \* \* \*

*Participant violation* means any intentional action of a participant, parent or caretaker of an infant or child participant, or proxy that violates Federal or State statutes, regulations, policies, or procedures governing the Program. Participant violations include intentionally making false or misleading statements or intentionally misrepresenting, concealing, or withholding facts to obtain benefits; exchanging food instruments or supplemental foods for cash, credit, non-food items, or unauthorized food items, including supplemental foods in excess of those listed on the participant's food instrument; threatening to harm or physically harming clinic or vendor staff; and dual participation.

\* \* \* \* \*

*Price adjustment* means an adjustment made by the State agency, in accordance with the vendor agreement, to the purchase price on a food instrument after it has been submitted by a vendor for redemption to ensure that the payment to the vendor for the food instrument complies with the State agency's price limitations.

\* \* \* \* \*

*Proxy* means any person designated by a woman participant, or by a parent or caretaker of an infant or child participant, to obtain and transact food instruments or to obtain supplemental foods on behalf of a participant. The proxy must be designated consistent with the State agency's procedures established pursuant to §246.12(r)(1). Parents or caretakers applying on behalf of child and infant participants are not proxies.

\* \* \* \* \*

*Routine monitoring* means overt, on-site monitoring during which program representatives identify themselves to vendor personnel.

\* \* \* \* \*

*Vendor* means a sole proprietorship, partnership, cooperative association, corporation, or other business entity operating one or more stores authorized by the State agency to provide authorized supplemental foods to participants under a retail food delivery system. Each store operated by a business entity constitutes a separate vendor and must be authorized separately from other stores operated by the business entity. Each

store must have a single, fixed location, except when the authorization of mobile stores is necessary to meet the special needs described in the State agency's State Plan in accordance with §246.4(a)(14)(xiv).

*Vendor authorization* means the process by which the State agency assesses, selects, and enters into agreements with stores that apply or subsequently reapply to be authorized as vendors.

*Vendor limiting criteria* means criteria established by the State agency to determine the maximum number and distribution of vendors it authorizes pursuant to §246.12(g)(2).

*Vendor overcharge* means intentionally or unintentionally charging the State agency more for authorized supplemental foods than is permitted under the vendor agreement. It is not a vendor overcharge when a vendor submits a food instrument for redemption and the State agency makes a price adjustment to the food instrument.

*Vendor selection criteria* means the criteria established by the State agency to select individual vendors for authorization consistent with the requirements in §246.12(g)(3).

*Vendor violation* means any intentional or unintentional action of a vendor's current owners, officers, managers, agents, or employees (with or without the knowledge of management) that violates the vendor agreement or Federal or State statutes, regulations, policies, or procedures governing the Program.

*WIC* means the Special Supplemental Nutrition Program for Women, Infants and Children authorized by section 17 of the Child Nutrition Act of 1966, 42 U.S.C. 1786.

\* \* \* \* \*

**§ 246.3 Administration.**

(a) *Delegation to FNS.* Within the Department, FNS shall act on behalf of the Department in the administration of the Program. Within FNS, SFPD and the Regional Offices are responsible for Program administration. FNS shall provide assistance to State and local agencies and evaluate all levels of Program operations to ensure that the goals of the Program 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 Program in accordance with the requirements of this part; the Department's regulations governing non-discrimination (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. The State agency shall provide guidance to local agencies on all aspects of Program operations.

(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.

(d) *State agency eligibility.* A State agency shall be ineligible to participate in the WIC Program if State or local sales tax is collected on WIC food purchases in the area in which it administers the program, except that, if sales tax is collected on WIC food purchases by sovereign Indian entities which are not State agencies, the State agency shall remain eligible if any vendors collecting such tax are disqualified.

(e) *State staffing standards.* Each State agency shall ensure that sufficient staff is available to administer an efficient and effective Program including, but not limited to, the functions of nutrition education, certification, food delivery, fiscal reporting, monitoring, and training. Based on the June participation of the previous fiscal year, each State agency, as a minimum, shall employ the following staff:

(1) A full-time or equivalent administrator when the monthly participation level exceeds 1,500, or a half-time or equivalent administrator when the monthly participation exceeds 500.

(2) At least one full-time or equivalent Program specialist for each 10,000 participants above 1,500, but the State agency need not employ more than eight Program specialists unless the

State agency considers it necessary. Program specialists should be utilized for providing fiscal management and technical assistance, monitoring vendors, reviewing local agencies, training, and nutritional services, or other Program duties as assigned by the State agency.

(3) For nutrition-related services, one full-time or equivalent nutritionist when the monthly participation is above 1,500, or a half-time or equivalent nutritionist when the monthly participation exceeds 500. The nutritionist shall be named State WIC Nutrition Coordinator and shall meet State personnel standards and qualifications in paragraphs (e)(3) (i), (ii), (iii), (iv), or (v) of this section and have the qualifications in paragraph (e)(3)(vi) of this section. Upon request, an exception to these qualifications may be granted by FNS. The State WIC Nutrition Coordinator shall—

(i) Hold a Master's degree with emphasis in food and nutrition, community nutrition, public health nutrition, nutrition education, human nutrition, nutrition science or equivalent and have at least two years responsible experience as a nutritionist in education, social service, maternal and child health, public health, nutrition, or dietetics; or

(ii) Be registered or eligible for registration with the American Dietetic Association and have at least two years experience; or

(iii) Have at least a Bachelor of Science or Bachelor of Arts degree, from an accredited four-year institution, with emphasis in food and nutrition, community nutrition, public health nutrition, nutrition education, human nutrition, nutrition science or equivalent and have at least three years of responsible experience as a nutritionist in education, social service, maternal and child health, public health nutrition, or dietetics; or

(iv) Be qualified as a Senior Public Health Nutritionist under the Department of Health and Human Services guidelines; or

(v) Meet the IHS standards for a Public Health Nutritionist; and

(vi) Have at least one of the following: Program development skills, education background and experience

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in the development of educational and training resource materials, community action experience, counseling skills or experience in participant advocacy.

(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.

(5) The State agency shall enforce hiring practices which comply with the nondiscrimination criteria set forth in §246.8. The hiring of minority staff is encouraged.

(f) *Delegation to local agency.* The local agency shall provide Program benefits to participants in the most effective and efficient manner, and shall comply with this part, the Department's regulations governing non-discrimination (7 CFR parts 15, 15a, 15b), the Department's regulations governing the administration of grants (7 CFR part 3016), Office of Management and Budget Circular A-130, and State agency and FNS guidelines and instructions.

[50 FR 6121, Feb. 13, 1985; 50 FR 8098, Feb. 28, 1985, as amended at 52 FR 21236, June 4, 1987; 59 FR 11499, Mar. 11, 1994]

EFFECTIVE DATE NOTE: At 65 FR 83277, Dec. 29, 2000, §246.3 was amended by redesignating (e)(5) as (e)(6) and by adding a new (e)(5), eff. Feb. 7, 2001. For the convenience of the user, the added text is set forth as follow:

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\* \* \* \* \*

(e) \* \* \*

(5) A staff person designated for food delivery system management. The person to whom the State agency assigns this responsibility may perform other duties as well.

\* \* \* \* \*

**Subpart B—State and Local Agency Eligibility**

**§ 246.4 State plan.**

(a) *Requirements.* By August 15 of each year, each State agency shall submit to FNS for approval a State Plan for

the following fiscal year as a prerequisite to receiving funds under this section. The State agency may submit the State Plan in the format provided by FNS guidance. Alternatively, the State agency may submit the Plan in combination with other federally required planning documents or develop its own format, provided that the information required below is included. FNS requests advance notification that a State agency intends to use an alternative format. 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 of receipt. Within 15 days after FNS receives an incomplete Plan, FNS will notify the State agency that additional information is needed to complete the Plan. Any disapproval will be accompanied by a statement of the reasons for the disapproval. After receiving approval of the State Plan, each State agency shall only submit to FNS for approval substantive changes in the State Plan. A complete and approved Plan shall include:

(1) An outline of the State agency's goals and objectives for improving Program operations.

(2) A budget for nutrition services and administration funds, and an estimate of food expenditures.

(3) An estimate of Statewide participation for the coming fiscal year by category of women, infants and children.

(4) The State agency staffing pattern.

(5) An Affirmative Action Plan which includes—

(i) A list of all areas and special populations, in priority order based on relative need, within the jurisdiction of the State agency, the State agency's plans to initiate or expand operations under the Program in areas most in need of supplemental foods, including plans to inform nonparticipating local agencies of the availability and benefits of the Program and the availability of technical assistance in implementing the Program, and a description of how the State agency will take all reasonable actions to identify potential local agencies and encourage

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agencies to implement or expand operations under the Program within the following year in the neediest one-third of all areas unserved or partially served;

(ii) An estimate of the number of potentially eligible persons in each area and a list of the areas in the Affirmative Action Plan which are currently operating the Program and their current participation, which participant priority levels as specified in §246.7 are being reached in each of these areas, and which areas in the Affirmative Action Plan are currently operating CSFP and their current participation; and

(iii) A list of the names and addresses of all local agencies.

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

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

(8) A description of how the State agency plans to coordinate program operations with other services or programs that may benefit participants in, or applicants for, the program.

(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.

(10) For Indian State or local agencies that wish to apply for the alternate income determination procedure in accordance with §246.7(d)(2)(vii), documentation that the majority of Indian household members have incomes below eligibility criteria.

(11) A copy of the procedure manual developed by the State agency for guidance to local agencies in operating the Program. The manual shall include—

(i) Certification procedures, including a list of the specific nutritional risk criteria by priority level which cites conditions and indices to be used to determine a person's nutritional risk, hematological data requirements including timeframes for the collection of such data, the State agency's income guidelines for Program eligibility, and any adjustments to the participant priority system made pursuant to §246.7(e)(4) to accommodate high-risk postpartum women or the addition of Priority VII;

(ii) Methods for providing nutrition education, including drug and other harmful substance abuse information, to participants, including homeless individuals;

(iii) Instructions concerning all food delivery operations performed at the local level;

(iv) Instructions for providing all records and reports which the State agency requires local agencies to maintain and submit; and

(v) Instructions on coordinating operations under the program with drug and other harmful substance abuse counseling and treatment services.

(12) A description of the State agency's financial management system.

(13) A description of how the State agency will distribute nutrition services and administration funds, including start-up funds, to local agencies operating under the Program.

(14) A description of the food delivery system as it operates at the State agency level, including—

(i) All food delivery systems in use within the State agency's jurisdiction;

(ii) Vendor selection criteria;

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(iii) A sample form for the written agreement between the food vendor and the State or local agency;

(iv) The system for monitoring food vendors to ensure compliance and prevent fraud, waste and abuse, and the State agency's plans for improvement in the coming year;

(v) The option exercised by the State agency to sanction vendors pursuant to § 246.12(k)(1)(i).

(vi) Where food instruments are used, a facsimile of the food instrument, and the system for control and reconciliation of the food instruments;

(vii) The procedures used to pay food vendors;

(viii) The names of companies, excluding authorized food vendors, with whom the State agency has contracted to participate in the operation of the food delivery system;

(ix) For State agencies applying for authority to convert food funds to nutrition services and administration funds under § 246.16(g), a full description of their proposed cost-cutting system or system modification;

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

(xi) A description of any cost containment system. A State agency must submit a State Plan or Plan amendment if it is attempting to structure and justify a system that is not a single-supplier competitive bidding system for infant formula in accordance with § 246.16a(d); is requesting a waiver for an infant formula cost containment system under § 246.16a(e); or, is planning to change or modify its current system or implement a system for the first time. The amendment must be submitted at least 90 days before the proposed effective date of the system change. The plan amendment must include documentation for requests for waivers based on interference with efficient or effective program operations; a cost comparison analysis conducted under § 246.16a(d)(2); and a description of the proposed cost containment system. If FNS disputes supporting plan amendment documentation, it will deem the Plan amendment incomplete under this paragraph (a), and will provide the State agency with a statement

outlining disputed issues within 15 days of receipt of the Plan amendment. The State agency may not enter into any infant formula cost containment contract until the disputed issues are resolved and FNS has given its consent. If necessary, FNS may grant a postponement of implementation of an infant formula cost containment system under § 246.16a(f). If at the end of the postponement period issues remain unresolved the State agency must proceed with a cost containment system judged by FNS to comply with the provisions of this part. If the State agency does not comply, it will be subject to the penalties set forth in § 246.16a(i).

(15) Plans to prevent and detect dual participation. In States where the Program and the CSFP operate in the same area, or where an Indian State agency operates a Program in the same area as a geographic State agency, a copy of the written agreement between the State agencies for the detection and prevention of dual participation shall be submitted.

(16) A description of the procedures the State will use to comply with the civil rights requirements described in § 246.8, including the processing of discrimination complaints.

(17) A copy of the State agency's fair hearing procedures for participants and the administrative appeal procedures for local agencies and food vendors.

(18) The State agency's plan to reach and enroll migrants, and eligible women in the early months of pregnancy.

(19) The State agency's plan to establish, to the extent practicable, that homeless facilities, and institutions if it chooses to make the Program available to them, meet the conditions established in § 246.7(n)(1)(i) of this part, if residents of such accommodations are to be eligible to receive WIC Program benefits.

(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

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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. 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.

(b) *Public comment.* The State agency shall establish a procedure under which members of the general public are provided an opportunity to comment on the development of the State agency plan.

(c) *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 Program is operated in accordance with the State Plan.

(d) *Retention of copy.* A copy of the approved State Plan or the WIC portion of the State's composite plan of operations shall be kept on file at the State agency for public inspection.

[50 FR 6121, Feb. 13, 1985, as amended at 52 FR 21236, June 4, 1987; 53 FR 25314, July 6, 1988; 54 FR 51294, Dec. 14, 1989; 55 FR 9717, Mar. 15, 1990; 57 FR 34506, Aug. 5, 1992; 58 FR 11506, Feb. 26, 1993; 59 FR 11499, Mar. 11, 1994; 63 FR 63973, Nov. 18, 1998; 64 FR 13322, Mar. 18, 1999; 64 FR 70177, Dec. 16, 1999; 65 FR 53527, Sept. 5, 2000; 65 FR 51223, Aug. 23, 2000]

EFFECTIVE DATE NOTE: At 65 FR 83277, Dec. 29, 2000, § 246.4 was amended by adding a heading to paragraph (a)(14)(i), in paragraph (a)(14)(v) by adding a heading and removing the reference to “§246.12(k)(1)(i)” and adding a reference to “§246.12(l)(1)(i)” in its place, by revising paragraphs (a)(14)(ii), through

(vi), by removing paragraph (a)(14)(vii) and redesignating paragraphs (a)(14)(viii) through (a)(14)(xi) as paragraphs (a)(14)(vii) through (a)(14)(x), respectively, in newly redesignated paragraph (a)(14)(vii), by adding a heading and removing the words “food vendors” and adding “vendors” in its place, in newly redesignated paragraph (a)(14)(viii), adding a heading, in newly redesignated paragraphs (a)(14)(ix) and (a)(14)(x), by adding headings and removing the periods at the end and adding semicolons in their place, by adding new paragraphs (a)(14)(xi) through (a)(14)(xiv), by revising the first sentence of paragraph (a)(15), and in paragraph (a)(21), by removing the reference to “§246.12(r)(8)” and adding a reference to “§246.12(r)(4)” in its place, effective February 27, 2001. For the convenience of the user the revisions and additions are set forth as follows:

§ 246.4 State plan.

(a) \* \* \*

(14) \* \* \*

(i) *Type of system.* \* \* \*

(ii) *Vendor limiting and selection criteria.* Vendor limiting criteria, if used by the State agency, and the vendor selection criteria established by the State agency consistent with the requirements in § 246.12(g)(3);

(iii) *Vendor agreement.* A sample vendor agreement, including the sanction schedule, which may be incorporated as an attachment or, if the sanction schedule is in the State agency's regulations, through citation to the regulations. State agencies that intend to delegate signing of vendor agreements to local agencies must describe the State agency supervision and instruction that will be provided to ensure the uniformity and quality of local agency activities;

(iv) *Vendor monitoring.* The system for monitoring vendors to ensure compliance and prevent fraud, waste, and program non-compliance, and the State agency's plans for improvement in the coming year in accordance with § 246.12(j). The State agency must also include the criteria it will use to determine which vendors will receive routine monitoring visits. State agencies that intend to delegate any aspect of vendor monitoring responsibilities to a local agency or contractor must describe the State agency supervision and instruction that will be provided to ensure the uniformity and quality of vendor monitoring;

(v) *Options regarding trafficking convictions.* \* \* \*

(vi) *Food instruments.* A facsimile of the food instrument, if used, and a description of the system the State agency will use to account for the disposition of food instruments in accordance with § 246.12(q);

(vii) *Names of contractors.* \* \* \*

(viii) *Nutrition services and administration funds conversion.* \* \* \*

(ix) *Homeless participants.* \* \* \*

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(x) *Cost containment systems.* \* \* \*

(xi) *Vendor training.* The procedures the State agency will use to train vendors in accordance with §246.12(i). State agencies that intend to delegate any aspect of training to a local agency, contractor, or vendor representative must describe the State agency supervision and instruction that will be provided to ensure the uniformity and quality of vendor training;

(xii) *Food instrument security.* A description of the State agency's system for ensuring food instrument security in accordance with §246.12(p);

(xiii) *Participant access determination criteria.* A description of the State agency's participant access determination criteria consistent with §246.12(1); and

(xiv) *Mobile stores.* The special needs necessitating the authorization of mobile stores, if the State agency chooses to authorize such stores.

(15) The State agency's plans to prevent and identify dual participation in accordance with §246.7(1)(1)(i) and (1)(1)(ii). \* \* \*

\* \* \* \* \*

**§ 246.5 Selection of local agencies.**

(a) *General.* This section sets forth the procedures the State agency shall perform in the selection of local agencies and the expansion, reduction, and disqualification of local agencies already in operation. In making decisions to initiate, continue, and discontinue the participation of local agencies, the State agency shall give consideration to the need for Program benefits as delineated in the Affirmative Action Plan.

(b) *Application of local agencies.* The State agency shall require each agency, including subdivisions of the State agency, which desires approval as a local agency, to submit a written local agency application. After the receipt of an incomplete application, the State agency shall provide written notification to the applicant agency of the additional information needed. After the receipt of a complete application, the State agency shall notify the applicant agency in writing of the approval or disapproval of its application. When an application is disapproved, the State agency shall advise the applicant agency of the reasons for disapproval and of the right to appeal as set forth in §246.18. When an agency submits an application and there are no funds to serve the area, the applicant agency

shall be notified that there are currently no funds available for Program initiation or expansion. The applicant agency shall be notified by the State agency when funds become available.

(c) *Program initiation and expansion.* The State agency shall meet the following requirements concerning Program initiation and expansion:

(1) The State agency shall fund local agencies serving those areas or special populations most in need first, in accordance with their order of priority as listed in the Affirmative Action Plan described in §246.4(a)(5). The selection criteria cited in paragraph (d)(1) of this section shall be applied to each area or special population before eliminating that area from consideration and serving the next area of special population. The State agency shall consider the number of participants in each priority level being served by existing local agencies in determining when it is appropriate to move into additional areas in the Affirmative Action Plan or to expand existing operations in an area. Additionally, the State agency shall consider the total number of people potentially eligible in each area compared to the number being served. Expansion of existing operations shall be in accordance with the Affirmative Action Plan and may be based on the percentage of need being met in each participant priority level.

(2) The State agency shall provide a written justification to FNS for not funding an agency to serve the highest priority area or special population. Such justification may include its inability to administer the Program, lack of interest expressed for operating the Program, or for those areas or special populations which are under consideration for expansion of an existing operation, a determination by the State agency that there is a greater need for funding an agency serving an area or special population not operating the Program. The State agency shall use the participant priority system in §246.7 as a measurement of greater need in such determination.

(3) The State agency may fund more than one local agency to serve the same area or special population as long

as more than one local agency is necessary to serve the full extent of need in that area or special population.

(d) *Local agency priority system.* The State agency shall establish standards for the selection of new local agencies. Such standards shall include the following considerations:

(1) The State agency shall consider the following priority system, which is based on the relative availability of health and administrative services, in the selection of local agencies:

(i) First consideration shall be given to a public or a private nonprofit health agency that will provide ongoing, routine pediatric and obstetric care and administrative services.

(ii) Second consideration shall be given to a public or a private nonprofit health or human service agency that will enter into a written agreement with another agency for either ongoing, routine pediatric and obstetric care or administrative services.

(iii) Third consideration shall be given to a public or private nonprofit health agency that will enter into a written agreement with private physicians, licensed by the State, in order to provide ongoing, routine pediatric and obstetric care to a specific category of participants (women, infants or children).

(iv) Fourth consideration shall be given to a public or private nonprofit human service agency that will enter into a written agreement with private physicians, licensed by the State, to provide ongoing, routine pediatric and obstetric care.

(v) Fifth consideration shall be given to a public or private nonprofit health or human service agency that will provide ongoing, routine pediatric and obstetric care through referral to a health provider.

(2) When seeking new local agencies, the State agency shall publish a notice in the media of the area next in line according to the Affirmative Action Plan, unless the State agency has received an application from a public or nonprofit private health agency in that area which can provide adequate health and administrative services. The notice shall include a brief explanation of the Program, a description of the local agency priority system cited in this

paragraph and a request that potential local agencies notify the State agency of their interest. In addition, the State agency shall contact all potential local agencies in the area to ensure that they are aware of the opportunity to apply for participation under the Program. If no agency submits an application within 30 days, the State agency may then proceed with the selection of a local agency in the area next in line according to the Affirmative Action Plan. If sufficient funds are available, a State agency shall give notice and consider applications in more than one area at the same time but shall fund new local agencies in conformance with the sequential ranking of the Affirmative Action Plan.

(e) *Disqualification of local agencies.* (1) The State agency may disqualify a local agency—

(i) When the State agency determines noncompliance with Program regulations;

(ii) When the State's Program funds are insufficient to support the continued operation of all its existing local agencies at their current participation level; or

(iii) When the State agency determines, following a review of local agency credentials in accordance with paragraph (f) of this section, that another local agency can operate the Program more effectively and efficiently.

(2) The State agency may establish its own criteria for disqualification of local agencies. The State agency shall notify the local agency of any State-established criteria. In addition to any State established criteria, the State agency shall consider, at a minimum—

(i) The availability of other community resources to participants and the cost efficiency and cost effectiveness of the local agency in terms of both food and nutrition services and administration costs;

(ii) The percentages of participants in each priority level being served by the local agency and the percentage of need being met in each participant category;

(iii) The relative position of the area or special population served by the local agency in the Affirmative Action Plan;

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(iv) The local agency's place in the priority system in paragraph (d)(1) of this section; and

(v) The capability of another local agency or agencies to accept the local agency's participants.

(3) When disqualifying a local agency under the Program, the State agency shall—

(i) Make every effort to transfer affected participants to another local agency without disruption of benefits;

(ii) Provide the affected local agency with written notice not less than 60 days in advance of the pending action which includes an explanation of the reasons for disqualification, the date of disqualification, and, except in cases of the expiration of a local agency's agreement, the local agency's right to appeal as set forth in § 246.18; and

(iii) Ensure that the action is not in conflict with any existing written agreements between the State and the local agency.

(f) *Periodic review of local agency qualifications.* The State agency may conduct periodic reviews of the qualifications of authorized local agencies under its jurisdiction. Based upon the results of such reviews the State agency may make appropriate adjustments among the participating local agencies, including the disqualification of a local agency when the State agency determines that another local agency can operate the Program more effectively and efficiently. In conducting such reviews, the State agency shall consider the factors listed in paragraph (e)(2) of this section in addition to whatever criteria it may develop. The State agency shall implement the procedures established in paragraph (e)(3) of this section when disqualifying a local agency.

[50 FR 6121, Feb. 13, 1985; 50 FR 8098, Feb. 28, 1985; 65 FR 53527, Sept. 5, 2000]

### § 246.6 Agreements with local agencies.

(a) *Signed written agreements.* The State agency shall enter into a signed written agreement with each local agency, including subdivisions of the State agency, which sets forth the local agency's responsibilities for Program operations as prescribed in this part. Copies of the agreement shall be

kept on file at both the State and local agencies for purposes of review and audit in accordance with §§ 246.19 and 246.20. Neither the State agency nor the local agency has an obligation to renew the agreement. The expiration of an agreement is not subject to appeal. The State agency shall provide local agencies with advance written notice of the expiration of an agreement as required under §§ 246.5(e)(3)(i) and 246.18(b)(1).

(b) *Provisions of agreement.* The agreement between the State agency and each local agency shall ensure that the local agency—

(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;

(2) Has a competent professional authority on the staff of the local agency and the capabilities necessary to perform the certification procedures;

(3) Makes available appropriate health services to participants and informs applicants of the health services which are available;

(4) Prohibits smoking in the space used to carry out the WIC Program during the time any aspect of WIC services are performed;

(5) Has a plan for continued efforts to make health services available to participants at the clinic or through written agreements with health care providers when health services are provided through referral;

(6) Provides nutrition education services to participants, in compliance with § 246.11 and FNS guidelines and instructions;

(7) Implements a food delivery system prescribed by the State agency pursuant to § 246.12 and approved by FNS;

(8) Maintains complete, accurate, documented and current accounting of all Program funds received and expended;

(9) Maintains on file and has available for review, audit, and evaluation

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all criteria used for certification, including information on the area served, income standards used, and specific criteria used to determine nutritional risk; and

(10) Does not discriminate against persons on the grounds of race, color, national origin, age, sex or handicap; and compiles data, maintains records and submits reports as required to permit effective enforcement of the non-discrimination laws.

(c) *Indian agencies.* Each Indian State agency shall ensure that all local agencies under its jurisdiction serve primarily Indian populations.

(d) *Health and human service agencies.* When a health agency and a human service agency comprise the local agency, both agencies shall together meet all the requirements of this part and shall enter into a written agreement which outlines all Program responsibilities of each agency. The agreement shall be approved by the State agency during the application process and shall be on file at both the State and local agency. No Program funds shall be used to reimburse the health agency for the health services provided. However, costs of certification borne by the health agency may be reimbursed.

(e) *Health or human service agencies and private physicians.* When a health or human service agency and private physician(s) comprise the local agency, all parties shall together meet all of the requirements of this part and shall enter into a written agreement which outlines the inter-related Program responsibilities between the physician(s) and the local agency. The agreement shall be approved by the State agency during the application process and shall be on file at both agencies. The local agency shall advise the State agency on its application of the name(s) and address(es) of the private physician(s) participating and obtain State agency approval of the written agreement. A competent professional authority on the staff of the health or human service agency shall be responsible for the certification of participants. No Program funds shall be used to reimburse the private physician(s) for the health services provided. However, costs of certification data pro-

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vided by the physician(s) may be reimbursed.

(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.

[50 FR 6121, Feb. 13, 1985, as amended at 59 FR 11500, Mar. 11, 1994; 63 FR 63974, Nov. 18, 1998]

### Subpart C—Participant Eligibility

#### § 246.7 Certification of participants.

(a) *Integration with health services.* To lend administrative efficiency and participant convenience to the certification process, whenever possible, Program intake procedures shall be combined with intake procedures for other health programs or services administered by the State and local agencies. Such merging may include verification procedures, certification interviews, and income computations. Local agencies shall maintain and make available for distribution to all pregnant, postpartum, and breastfeeding women and to parents or caretakers of infants and children applying for and participating in the Program a list of local resources for drug and other harmful substance abuse counseling and treatment.

(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 provide each local WIC agency with materials showing the maximum income limits, according to family size, applicable to pregnant women, infants, and children

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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.

(2) State agencies shall provide WIC services at community and migrant health centers, Indian Health Services facilities, and other federally health care supported facilities established in medically underserved areas to the extent feasible.

(3) Local agencies may 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.

(c) *Eligibility criteria.* (1) To be certified as eligible for the Program, infants, children, and pregnant, postpartum, and breastfeeding women shall:

(i) In all State agencies except for Indian State agencies, meet the requirement that the applicant reside within the jurisdiction of the State. Indian State agencies may establish the requirement that applicants reside within their jurisdiction. All State agencies may determine a service area for any local agency, and may require that an applicant reside within the service area. However, the State agency may not use length of residency as an eligibility requirement.

(ii) Meet the income criteria specified in paragraph (d) of this section.

(iii) Meet the nutritional risk criteria specified in paragraph (e) of this section.

(2) A State, a State agency, and an Indian Tribal Organization (including, an Indian tribe, band, or group recognized by the Department of the Interior; or 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) serving as a State agency, may limit WIC participation to United States citizens, nationals, and qualified aliens as these terms are defined in the Immigration and Nationality Laws (8 U.S.C. 1101 *et seq.*). State agencies that implement this option shall inform FNS of their intentions and provide copies of the procedures they will establish regarding the limitation of WIC services to United States citizens, nationals, and qualified aliens.

(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 may implement revised guidelines concurrently with the implementation of income guidelines under the Medicaid program established under Title XIX of the Social Security Act (42 U.S.C. 1396 *et seq.*). The State agency shall ensure that conforming adjustments are made, if necessary, in local agency income guidelines. The local agency shall implement (revised) guidelines not

later than 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

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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

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

(v) *Are applicants required to document income eligibility?* (A) *Adjunctively/automatically income eligible applicants.* The State or local agency must require applicants determined to be adjunctively or automatically income eligible to document their eligibility for the program that makes them income eligible as set forth in paragraph (d)(2)(vi) of this section.

(B) *Other applicants.* The State or local agency must require all other applicants to provide documentation of family income at certification.

(C) *Exceptions.* The income documentation requirement does not apply to an individual for whom the necessary documentation is not available or an individual such as a homeless woman or child for whom the agency determines the income documentation requirement would present an unreasonable barrier to participation. Examples of individuals for whom the necessary documentation is not available include those with no income or no proof of income (such as an applicant or applicant's parent who is a migrant farmworker or other individual who works for cash). These are the only exceptions that may be used. When using these exceptions, the State or local agency must require the applicant to sign a statement specifying why he/she cannot provide documentation of income. Such a statement is not required when there is no income.

(D) *Verification.* The State or local agency may require verification of information 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 Temporary Assistance for Needy Families (TANF) under Part A of Title IV of the Social Security Act or Medical Assis-

tance (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 TANF, 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 pregnant women.* A pregnant woman who is ineligible for participation in the program because she does not meet income guidelines shall be considered to have satisfied the income guidelines if the guidelines would be met by increasing the number of individuals in her family by the number of embryos or fetuses in utero. The same increased family size may also be used for any of the pregnant woman's categorically eligible family members. The State agency shall allow applicants to waive this increase in family size.

(viii) *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.

(ix) *Are instream migrant farmworkers and their family members required to document income eligibility?* Certain instream migrant farmworkers and their family members with expired Verification of Certification cards shall be declared to satisfy the State agency's income standard and income documentation requirements. Such cases include when income of that instream migrant farmworker is determined at least once every 12 months. Such families 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. The determination can occur 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.

(e) *Nutritional risk.* To be certified as eligible for the Program, applicants who meet the Program's eligibility standards specified in paragraph (c) of this section must be determined to be at nutritional risk. A competent professional authority on the staff of the local agency shall determine if a person is at nutritional risk through a medical and/or nutritional assessment. This determination may be based on referral data submitted by a competent professional authority not on the staff of the local agency. Nutritional risk data shall be documented in the participant's file and shall be used to assess an applicant's nutritional status and risk, tailor the food package to address nutritional needs, design appropriate nutrition education, and make referrals to health and social services for follow-up, as necessary and appropriate.

Except as stated in paragraph (e)(1)(v) of this section, at least one determination of nutritional risk must be documented at the time of certification in order for an income eligible applicant to receive WIC benefits.

(1) *Determination of nutritional risk.* (i) *Required nutritional risk data.* (A) At a minimum, height or length and weight

measurements shall be performed and/or documented in the applicant's file at the time of certification. In addition, a hematological test for anemia such as a hemoglobin, hematocrit, or free erythrocyte protoporphyrin test shall be performed and/or documented at certification for applicants with no other nutritional risk factor present. For applicants with a qualifying nutritional risk factor present at certification, such test shall be performed and/or documented within 90 days of the date of certification. However, for breastfeeding women 6-12 months postpartum, such hematological tests are not required if a test was performed after the termination of their pregnancy. In addition, such hematological tests are not required, but are permitted, for infants under nine months of age. All infants nine months of age and older (who have not already had a hematological test performed or obtained, between the ages of six and nine months), shall have a hematological test performed between nine and twelve months of age or obtained from referral sources. This hematological test does not have to occur within 90 days of the date of certification. Only one test is required for children between 12 and 24 months of age, and this test should be done 6 months after the infant test, if possible. At the State or local agency's discretion, the hematological test is not required for children ages two and older who were determined to be within the normal range at their last certification. However, the hematological test shall be performed on such children at least once every 12 months. Hematological test data submitted by a competent professional authority not on the staff of the local agency may be used to establish nutritional risk. However, such referral hematological data must:

(1) Be reflective of a woman applicant's category, meaning the test must have been taken for pregnant women during pregnancy and for postpartum or breastfeeding women following termination of pregnancy;

(2) Conform to the anemia screening schedule for infants and children as outlined in paragraph (e)(1)(ii)(B) of this section; and

(3) Conform to recordkeeping requirements as outlined in paragraph (i)(4) of this section.

(B) Height or length and weight measurements and, with the exceptions specified in paragraph (e)(1)(v) of this section, hematological tests, shall be obtained for all participants, including those who are determined at nutritional risk based solely on the established nutritional risk status of another person, as provided in paragraphs (e)(1)(iv) and (e)(1)(v) of this section.

(ii) *Timing of nutritional risk data.* (A) *Weight and height or length.* Weight and height or length shall be measured not more than 60 days prior to certification for program participation.

(B) *Hematological test for anemia.* (1) For pregnant, breastfeeding, and postpartum women, and child applicants, the hematological test for anemia shall be performed or obtained from referral sources at the time of certification or within 90 days of the date of certification. The hematological test for anemia may be deferred for up to 90 days from the time of certification for applicants who have at least one qualifying nutritional risk factor present at the time of certification. If no qualifying risk factor is identified, a hematological test for anemia must be performed or obtained from referral sources (with the exception of presumptively eligible pregnant women).

(2) Infants nine months of age and older (who have not already had a hematological test performed, between six and nine months of age, by a competent professional authority or obtained from referral sources), shall between nine and twelve months of age have a hematological test performed or obtained from referral sources. Such a test may be performed more than 90 days after the date of certification.

(3) For pregnant women, the hematological test for anemia shall be performed during their pregnancy. For persons certified as postpartum or breastfeeding women, the hematological test for anemia shall be performed after the termination of their pregnancy. For breastfeeding women who are 6–12 months postpartum, no additional blood test is necessary if a test was performed after

the termination of their pregnancy. The participant or parent/guardian shall be informed of the test results when there is a finding of anemia, and notations reflecting the outcome of the tests shall be made in the participant's file. Nutrition education, food package tailoring, and referral services shall be provided to the participant or parent/guardian, as necessary and appropriate.

(iii) *Breastfeeding dyads.* A breastfeeding woman may be determined to be a nutritional risk if her breastfed infant has been determined to be a nutritional risk. A breastfed infant can be certified based on the mother's medical and/or nutritional assessment. A breastfeeding mother and her infant shall be placed in the highest priority level for which either is qualified.

(iv) *Infants born to WIC mothers or women who were eligible to participate in WIC.* An infant under six months of age may be determined to be at nutritional risk if the infant's mother was a Program participant during pregnancy or of medical records document that the woman was at nutritional risk during pregnancy because of detrimental or abnormal nutritional conditions detectable by biochemical or anthropometric measurements or other documented nutritionally related medical conditions.

(v) *Presumptive eligibility for pregnant women.* A pregnant woman who meets the income eligibility standards may be considered presumptively eligible to participate in the program, and may be certified immediately without an evaluation of nutritional risk for a period up to 60 days. A nutritional risk evaluation of such woman shall be completed not later than 60 days after the woman is certified for participation. A hematological test for anemia is not required to be performed within the 60-day period, but rather within 90 days, unless the nutritional risk evaluation performed does not identify a qualifying risk factor. If no qualifying risk factor is identified, a hematological test for anemia must be performed or obtained from referral sources before the 60-day period elapses. Under the subsequent determination process, if

the woman does not meet any qualifying nutritional risk criteria, including anemia criteria, the woman shall be determined ineligible and may not participate in the program for the reference pregnancy after the date of the determination. Said applicant may subsequently reapply for program benefits and if found to be both income eligible and at qualifying nutritional risk may participate in the program. Persons found ineligible to participate in the program under this paragraph shall be advised in writing of the ineligibility, of the reasons for the ineligibility, and of the right to a fair hearing. The reasons for the ineligibility shall be properly documented and shall be retained on file at the local agency. In addition, if the nutritional risk evaluation is not completed within the 60-day timeframe, the woman shall be determined ineligible.

(vi) *Regression.* A participant who has previously been certified eligible for the Program may be considered to be at nutritional risk in the next certification period if the competent professional authority determines there is a possibility of regression in nutritional status without the supplemental foods. The State agency may limit the number of times and circumstances under which a participant may be certified due to the possibility of regression.

(2) *Nutritional risk criteria.* The following are examples of nutritional risk conditions which may be used as a basis for certification. These examples include—

(i) Detrimental or abnormal nutritional conditions detectable by biochemical or anthropometric measurements, such as anemia, underweight, overweight, abnormal patterns of weight gain in a pregnant woman, low birth weight in an infant, or stunting in an infant or child;

(ii) Other documented nutritionally related medical conditions, such as clinical signs of nutritional deficiencies, metabolic disorders, pre-eclampsia in pregnant women, failure to thrive in an infant, chronic infections in any person, alcohol or drug abuse or mental retardation in women, lead poisoning, history of high risk pregnancies or factors associated with high risk pregnancies (such as smoking;

conception before 16 months postpartum; history of low birth weight, premature births, or neonatal loss; adolescent pregnancy; or current multiple pregnancy) in pregnant women, or congenital malformations in infants or children, or infants born of women with alcohol or drug abuse histories or mental retardation.

(iii) Dietary deficiencies that impair or endanger health, such as inadequate dietary patterns assessed by a 24-hour dietary recall, dietary history, or food frequency checklist; and

(iv) Conditions that predispose persons to inadequate nutritional patterns or nutritionally related medical conditions, such as homelessness or migrancy.

(3) *Nutritional risk priorities.* In determining nutritional risk, the State agency shall develop and include in its State Plan, specific risk conditions by priority level with indices for identifying these conditions. The criteria shall be used statewide and in accordance with the priority system as set forth in paragraph (e)(4) of this section.

(4) *Nutritional risk priority system.* The competent professional authority shall fill vacancies which occur after a local agency has reached its maximum participation level by applying the following participant priority system to persons on the local agency's waiting list. Priorities I through VI shall be utilized in all States. The State agency may, at its discretion, expand the priority system to include Priority VII. The State agency may set income or other sub-priority levels within any of these seven priority levels. The State agency may expand Priority III, IV, or V to include high-risk postpartum women. The State agency may place pregnant or breastfeeding women and infants who are at nutritional risk solely because of homelessness or migrancy in Priority IV; children who are at nutritional risk solely because of homelessness or migrancy in Priority V; and postpartum women who are at nutritional risk solely because of homelessness or migrancy in Priority VI, *OR*, the State agency may place pregnant, breastfeeding or postpartum women, infants, and children who are at nutritional risk solely because of

homelessness or migrancy in Priority VII.

(i) *Priority I.* Pregnant women, breastfeeding women and infants at nutritional risk as demonstrated by hematological or anthropometric measurements, or other documented nutritionally related medical conditions which demonstrate the need for supplemental foods.

(ii) *Priority II.* Except those infants who qualify for Priority I, infant up to six months of age of Program participants who participated during pregnancy, and infants up to six months of age born of women who were not Program participants during pregnancy but whose medical records document that they were at nutritional risk during pregnancy due to nutritional conditions detectable by biochemical or anthropometric measurements or other documented nutritionally related medical conditions which demonstrated the person's need for supplemental foods.

(iii) *Priority III.* Children at nutritional risk as demonstrated by hematological or anthropometric measurements or other documented medical conditions which demonstrate the child's need for supplemental foods.

(iv) *Priority IV.* Pregnant women, breastfeeding women, and infants at nutritional risk because of an inadequate dietary pattern.

(v) *Priority V.* Children at nutritional risk because of an inadequate dietary pattern.

(vi) *Priority VI.* Postpartum women at nutritional risk.

(vii) *Priority VII.* Individuals certified for WIC solely due to homelessness or migrancy and, at State agency option, and in accordance with the provisions of paragraph (e)(1)(iii) of this section, previously certified participants who might regress in nutritional status without continued provision of supplemental foods.

(f) *Processing standards.* The local agencies shall process applicants within the following timeframes:

(1) *Waiting lists.* When the local agency is serving its maximum caseload, the local agency shall maintain a waiting list of individuals who visit the local agency to express interest in receiving Program benefits and who are likely to be served. However, in no case

shall an applicant who requests placement on the waiting list be denied inclusion. State agencies may establish a policy which permits or requires local agencies to accept telephone requests for placement on the waiting list. The waiting list shall include the person's name, address or phone number, status (e.g., pregnant, breastfeeding, age of applicant), and the date he or she was placed on the waiting list. Individuals shall be notified of their placement on a waiting list within 20 days after they visit the local agency during clinic office hours to request Program benefits. For those State agencies establishing procedures to accept telephone requests for placement on a waiting list, individuals shall be notified of their placement on a waiting list within 20 days after contacting the local agency by phone. The competent professional authority shall apply the participant priority system as specified in paragraph (e)(4) of this section to the waiting list to ensure that the highest priority persons become Program participants first when caseload slots become available.

(2) *Timeframes for processing applicants.* (i) When the local agency is not serving its maximum caseload, the local agency shall accept applications, make eligibility determinations, notify the applicants of the decisions made and, if the applicants are to be enrolled, issue food or food instruments. All of these actions shall be accomplished within the timeframes set forth below.

(ii) The processing timeframes shall begin when the individual visits the local agency during clinic office hours to make an oral or written request for Program benefits. To ensure that accurate records are kept of the date of such requests, the local agency shall, at the time of each request, record the applicant's name, address and the date. The remainder of the information necessary to determine eligibility shall be obtained by the time of certification. Medical data taken prior to certification may be used as provided in paragraph (g)(4) of this section.

(iii) The local agency shall act on applications within the following timeframes:

(A) Special nutritional risk applicants shall be notified of their eligibility or ineligibility within 10 days of the date of the first request for Program benefits; except that State agencies may provide an extension of the notification period to a maximum of 15 days for those local agencies which make written request, including a justification of the need for an extension. The State agency shall establish criteria for identifying categories of persons at special nutritional risk who require expedited services. At a minimum, however, these categories shall include pregnant women eligible as Priority I participants, and migrant farmworkers and their family members who soon plan to leave the jurisdiction of the local agency.

(B) All other applicants shall be notified of their eligibility or ineligibility within 20 days of the date of the first request for Program benefits.

(iv) Each local agency using a retail purchase system shall issue a food instrument(s) to the participant at the same time as notification of certification. Such food instrument(s) shall provide benefits for the current month or the remaining portion thereof and shall be redeemable immediately upon receipt by the participant. Local agencies may mail the initial food instrument(s) with the notification of certification to those participants who meet the criteria for the receipt of food instruments through the mail, as provided in § 246.12(r)(8).

(v) Each local agency with a direct distribution or home delivery system shall issue the supplemental foods to the participant within 10 days of issuing the notification of certification.

(g) *Certification periods.* (1) Program benefits shall be based upon certifications established in accordance with the following timeframes:

(i) Pregnant women shall be certified for the duration of their pregnancy and for up to six weeks postpartum.

(ii) Postpartum women shall be certified for up to six months postpartum.

(iii) Breastfeeding women shall be certified at intervals of approximately six months and ending with the breastfed infant's first birthday.

(iv) Infants shall be certified at intervals of approximately six months, except that the State agency may permit local agencies under its jurisdiction to certify infants under six months of age for a period extending up to the first birthday provided the quality and accessibility of health care services are not diminished.

(v) Children shall be certified at intervals of approximately six months and ending with the end of the month in which a child reaches the fifth birthday.

(2) The State agency may authorize local agencies under its jurisdiction to establish shorter certification periods than outlined in paragraph (g)(1) of this section on a case-by-case basis. If the State agency exercises this option, it shall issue guidance for use by local agencies in establishing the shorter periods.

(3) In cases where there is difficulty in appointment scheduling for persons referenced in paragraphs (g)(1) (iii), (iv) and (v) of this section, the certification period may be shortened or extended by a period not to exceed 30 days.

(h) *Actions affecting participation in mid-certification.* (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) (I) 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 TANF, Medicaid, Food Stamps, or another qualified State-administered program or are no longer a member of a family which contains an TANF 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

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may authorize local agencies to disqualify an individual during the certification period for the following reasons:

(i) Participant abuse, including, but not limited to the infractions listed in § 246.12(k)(2); or

(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.

(2) If a State agency experiences funding shortages, it may be necessary to discontinue Program benefits to a number of certified participants. Such action may be taken only after the State agency has explored alternative actions. If taken, the action should affect the least possible number of participants and should affect participants whose nutritional and health status would be least impaired by withdrawal of Program benefits. The State may discontinue benefits by—

(i) Disqualifying a group of participants; and/or

(ii) Withholding benefits of a group with the expectation of providing benefits again when funds are available.

(3) When a State agency elects to discontinue benefits to a number of certified participants due to insufficient funds for a period of time, it shall not enroll new participants during that period.

(i) *Certification forms.* All certification data for each person certified shall be recorded on a form (or forms) which are provided by the State agency. The information on the forms shall include—

(1) Name and address;

(2) Date of initial visit to apply for participation;

(3) An indication of whether the applicant was physically present at certification and, if not, the reason why an exception was granted or a copy of the document(s) in the file which explains the reason for the exception;

(4) A description of the document(s) used to determine residency and iden-

tity or a copy of the document(s) used or the applicant's written statement when no documentation exists;

(5) Information regarding income eligibility for the Program as specified in paragraph (d) of this section as follows:

(i) A description of the document(s) used to determine income eligibility or a copy of the document(s) in the file;

(ii) An indication that no documentation is available and the reason(s) why or a copy of the applicant's written statement explaining such circumstances; or

(iii) An indication that the applicant has no income.

(6) The date of certification and the date nutritional risk data were taken if different from the date of certification;

(7) Height or length, weight, and hematological test results;

(8) The specific nutritional risk conditions which established eligibility for the supplemental foods. Documentation should include health history when appropriate to the nutritional risk condition, with the applicant's or applicant's parent's or caretaker's consent;

(9) The signature and title of the competent professional authority making the nutritional risk determination, and, if different, the signature and title of the administrative person responsible for determining income eligibility under the Program; and

(10) The following statement with a space for the signature of the applicant, parent, or caretaker to sign after reading or being read the following statement:

I have been advised of my rights and obligations under the Program. I certify that the information I have provided for my eligibility determination is correct, to the best of my knowledge. This certification form is being submitted in connection with the receipt of Federal assistance. Program officials may verify information on this form. I understand that intentionally making a false or misleading statement or intentionally misrepresenting, concealing, or withholding facts may result in paying the State agency, in cash, the value of the food benefits improperly issued to me and may subject me to civil or criminal prosecution under State and Federal law.

(11) In States exercising the authority to disclose information pursuant to § 246.26(d)(2), a statement, to be added

to the statement required under paragraph (i)(8) of this section, acknowledging that the chief State health officer (or in the case of Indian State agencies, the governing authority) may authorize disclosure of information provided by the applicant or participant to representatives of public organizations, designated by such chief State officer or governing authority, which administer health or welfare programs that serve persons categorically eligible for the WIC Program. This statement shall also indicate that such information can be used by the recipient organizations only to determine the eligibility of WIC applicants and participants for programs administered by such organizations, and to conduct outreach for such programs.

(j) *Notification of participant rights and responsibilities.* In order to inform applicants and participants or their parents or caretakers of Program rights and responsibilities, the following information shall be provided. Where a significant number or proportion of the population eligible to be served needs the information in a language other than English, reasonable steps shall be taken to provide the information in appropriate languages to such persons, considering the scope of the Program and the size and concentration of such population.

(1) During the certification procedure, every Program applicant, parent or caretaker shall be informed of the illegality of dual participation.

(2) At the time of certification, each Program participant, parent or caretaker shall read, or have read to him or her, the statement provided in paragraph (i)(8) of this section and the following sentences:

(i) "Standards for eligibility and participation in the WIC Program are the same for everyone, regardless of race, color, national origin, age, handicap, or sex."

(ii) "You may appeal any decision made by the local agency regarding your eligibility for the Program."

(iii) "The local agency will make health services and nutrition education available to you, and you are encouraged to participate in these services."

(3) If the State agency implements the policy of disqualifying a partici-

pant for not picking up supplemental foods or food instruments in accordance with paragraph (h)(1)(ii) of this section, it shall provide notice of this policy and of the importance of regularly picking up food instruments or supplemental foods to each participant, parent or caretaker at the time of each certification.

(4) At least during the initial certification visit, each participant, parent or caretaker shall receive an explanation of how the local food delivery system operates and shall be advised of the types of health services available, where they are located, how they may be obtained and why they may be useful.

(5) Persons found ineligible for the Program during a certification visit shall be advised in writing of the ineligibility, of the reasons for the ineligibility, and of the right to a fair hearing. The reasons for ineligibility shall be properly documented and shall be retained on file at the local agency.

(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. Such notification shall include the reasons for this action, and the participant's right to a fair hearing. Further, such notification need not be provided to persons who will be disqualified for not picking up supplemental foods or food instruments in accordance with paragraph (h)(1)(ii) of this section.

(7) When a State or local agency pursues collection of a claim pursuant to § 246.23(c) against an individual who has been improperly issued benefits, the person shall be advised in writing of the reason(s) for the claim, the value of the improperly issued benefits which must be repaid, and of the right to a fair hearing.

(8) Each participant, parent or caretaker shall be notified not less than 15 days before the expiration of each certification period that certification for the Program is about to expire.

(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.

(k) *Transfer of certification.* (1) Each State agency shall ensure issuance of a Verification of Certification card to every participant who is a member of a family in which there is a migrant farmworker or any other participant who is likely to be relocating during the certification period. Certifying local agencies shall ensure that Verification of Certification cards are fully completed.

(2) The State agency shall require the receiving local agency to accept Verification of Certification cards from participants, including participants who are migrant farmworkers or members of their families, who have been participating in the Program in another local agency within or outside of the jurisdiction of the State agency. A person with a valid Verification of Certification card shall not be denied participation in the receiving State because the person does not meet that State's particular eligibility criteria.

(3) The Verification of Certification card is valid until the certification period expires, and shall be accepted as proof of eligibility for Program benefits. If the receiving local agency has waiting lists for participation, the transferring participant shall be placed on the list ahead of all waiting applicants.

(4) The Verification of Certification card shall include the name of the participant, the date the certification was performed, the date income eligibility was last determined, the nutritional risk condition of the participant, the date the certification period expires, the signature and printed or typed name of the certifying local agency official, the name and address of the certifying local agency and an identification number or some other means of accountability. The Verification of Certification card shall be uniform throughout the jurisdiction of the State agency.

(l) *Dual participation.* (1) The State agency shall be responsible for the following:

(i) In conjunction with the local agency, the prevention and detection of dual participation within each local agency and between local agencies.

(ii) In areas where local agency serves the same population as an Indian State agency or a CSFP agency, entering into an agreement with the CSFP or Indian State agency for the detection and prevention of dual participation. The agreement must be made prior to operation within the same area and must be in writing.

(iii) Immediate disqualification from one of the programs or clinics for participants found in violation due to dual participation. Where deliberate misrepresentation is involved, the participant may be disqualified from participation in both programs or clinics as specified in § 246.12(k)(2).

(2) At certification, the State or local agency must require each applicant to present proof of residency (i.e., location or address where the applicant routinely lives or spends the night) and proof of identity. The State or local agency must also check the identity of participants, or in the case of infants or children, the identity of the parent or guardian, or proxies when issuing food or food instruments. The State agency may authorize the certification of applicants when no proof of residency or identity exists (such as when an applicant or an applicant's parent is a victim of theft, loss, or disaster, a homeless individual, or a migrant farmworker). In these cases, the State or local agency must require the applicant to confirm in writing his/her residency or identity.

(m) *Certification without charge.* The certification procedure shall be performed at no cost to the applicant.

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

(i) Establish, to the extent practicable, that the homeless facility meets the following conditions with respect to resident WIC participants:

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

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

(C) The homeless facility places no constraints on the ability of the participant to partake of the supplemental foods and nutrition education available under the Program;

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

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

(2) The State agency may authorize or require local agencies to make the Program available to applicants who meet the requirements of paragraph (c) of this section, but who reside in institutions which meet the conditions of paragraphs (n)(1)(i)(A)-(C) of this section with respect to resident WIC participants.

(3) The State or local agency shall attempt to establish to the best of its ability, whether a homeless facility or institution complies with the conditions of paragraphs (n)(1)(i) (A)-(C) of this section with respect to WIC participants. If caseload slots are available, full certification periods shall be provided to the following:

(i) Participants who are residents of a homeless facility or institution which has been found to be in compliance with the conditions of paragraph (n)(1)(i)(A)-(C) of this section;

(ii) Participants who are residents of a homeless facility or institution whose compliance with the conditions of paragraphs (n)(1)(i)(A)-(C) of this section has not yet been established; and

(iii) Participants for whom no other shelter alternative is available in the local agency's service delivery area.

(4) If a homeless facility or institution has been determined to be non-compliant during the course of a participant's initial certification period, participants applying for continued

benefits may be certified again, but the State agency shall discontinue issuance of WIC foods, except infant formula, to the participant in such accommodation until the accommodation's compliance is achieved or alternative shelter arrangements are made. If certified, such participants shall continue to be eligible to receive all other WIC benefits, such as nutrition education and health care referral services.

(5) The State agency shall continue to the end of their certification periods the participation of residents of a homeless facility or institution which ceases to comply with the conditions of paragraphs (n)(1)(i)(A)-(C) of this section.

(6) As soon as the State or local agency determines that a homeless facility/institution does not meet the conditions of paragraphs (n)(1)(i) (A)-(C) of this section, it shall refer all participants using such accommodation to any other accommodations in the area which meet these conditions.

(o) *Drug and other harmful substance abuse screening.* When a State agency determines that screening is necessary to fulfill the referral requirements in this part, the State agency must require screening for the use of drugs and other harmful substances. When such screening is required, it shall:

(1) Be limited to the extent the State agency deems necessary to fulfill the referral requirement of § 246.4(a)(8) of this part and the drug and other harmful substance abuse information requirement of § 246.11(a)(3) of this part; and

(2) Be integrated into certification process as part of the medical or nutritional assessment.

(p) *Are applicants required to be physically present at certification?* (1) *In general.* The State or local agency must require all applicants to be physically present at each WIC certification.

(2) *Exceptions.—(i) Disabilities.* The State or local agency must grant an exception to applicants who are qualified individuals with disabilities and are unable to be physically present at the WIC clinic because of their disabilities or applicants whose parents or

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caretakers are individuals with disabilities that meet this standard. Examples of such situations include:

(A) A medical condition that necessitates the use of medical equipment that is not easily transportable;

(B) A medical condition that requires confinement to bed rest; and

(C) A serious illness that may be exacerbated by coming in to the WIC clinic.

(ii) *Receiving ongoing health care.* The State agency may exempt from the physical presence requirement, if being physically present would pose an unreasonable barrier, an infant or child who was present at his/her initial WIC certification *and* has documented ongoing health care from a health care provider other than the WIC local agency.

(iii) *Working parents or caretakers.* The State agency may exempt from the physical presence requirement an infant or child who was present at his/her initial WIC certification *and* was present at a WIC certification or recertification determination within the 1-year period ending on the date of the most recent certification or recertification determination *and* is under the care of one or more working parents or one or more primary working caretakers whose working status presents a barrier to bringing the infant or child in to the WIC clinic.

(q) *Certification of qualified aliens.* In those cases where a person sponsors a qualified alien, (as the term is defined in the Immigration and Nationality Laws (8 U.S.C.1101 *et seq.*)), *i.e.*, signs an affidavit of support, the sponsor's income, including the income of the sponsor's spouse, shall not be counted in determining the income eligibility of the qualified alien except when the alien is a member of the sponsor's family or economic unit. Sponsors of qualified aliens are not required to reimburse the State or local agency or the Federal government for WIC Program benefits provided to sponsored aliens. Further, qualified aliens are eligible for the WIC Program without regard to

the length of time in the qualifying status.

[50 FR 6121, Feb. 13, 1985, as amended at 52 FR 21236, June 4, 1987; 53 FR 35301, Sep. 13, 1988; 54 FR 51295, Dec. 14, 1989; 55 FR 3387, Feb. 1, 1990; 57 FR 34506, Aug. 5, 1992; 58 FR 11506, Feb. 26, 1993; 59 FR 11500, Mar. 11, 1994; 60 FR 19490, Apr. 19, 1995; 63 FR 63974, Nov. 18, 1998; 64 FR 70177, Dec. 16, 1999; 65 FR 3378, Jan. 21, 2000; 65 FR 53527, Sept. 5, 2000]

EFFECTIVE DATE NOTE: At 65 FR 77249, Dec. 11, 2000, § 246.7 was amended by revising paragraphs, (d)(2)(iv)(A) and (1)(2), effective January 10, 2001. For the convenience of the user the revised text is set forth as follows:

**§ 246.7 Certification of participants.**

\* \* \* \* \*

(d) \* \* \*

(2) \* \* \*

(iv) \* \* \*

(A) In determining income eligibility, the State agency may exclude from consideration as income any:

(1) Basic allowance for housing received by military services personnel residing off military installations; and

(2) Cost-of-living allowance provided under 37 U.S.C. 405, to a member of a uniformed service who is on duty outside the contiguous states of the United States.

\* \* \* \* \*

(1) \* \* \*

(2) At certification, the State or local agency must require each applicant to present proof of residency (*i.e.*, location or address where the applicant routinely lives or spends the night) and proof of identity. The State or local agency must also check the identity of participants, or in the case of infants or children, the identity of the parent or guardian, or proxies when issuing food or food instruments. The State agency may authorize the certification of applicants when no proof of residency or identity exists (such as when an applicant or an applicant's parent is a victim of theft, loss, or disaster, a homeless individual, or a migrant farmworker). In these cases, the State or local agency must require the applicant to confirm in writing his/her residency or identity. Further, an individual residing in a remote Indian or Native village or an individual served by an Indian tribal organization and residing on a reservation or pueblo may establish proof of residency by providing the

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State agency their mailing address and the name of the remote Indian or Native village.

\* \* \* \* \*

EFFECTIVE DATE NOTE: At 65 FR 83278, Dec. 29, 2000, § 246.7 was amended in paragraph (f)(2)(iv) by removing the reference to “§ 246.12(r)(8)” and adding a reference to “§ 246.12(r)(4)” in its place, in paragraph (h)(1)(i), by removing the reference to “§ 246.12(k)(2)” and adding the words “the definition of *Participant violation* in § 246.2” in its place, and by revising paragraph (l)(1), effective February 27, 2001. For the convenience of the user, the revised text is set forth as follows:

**§ 246.7 Certification of participants.**

\* \* \* \* \*

(1) \* \* \*

(1) The State agency is responsible for the following:

(i) In conjunction with WIC local agencies, the prevention and identification of dual participation within each local agency and between local agencies under the State agency’s jurisdiction, including actions to identify suspected instances of dual participation at least semiannually. The State or local agency must take follow-up action within 120 days of detecting instances of suspected dual participation;

(ii) In areas where a local agency serves the same population as an Indian State agency or a CSFP agency, and in areas where geographical or other factors make it likely that participants travel regularly between contiguous local service areas located across State agency borders, entering into an agreement with the other agency for the detection and prevention of dual participation. The agreement must be made in writing and included in the State Plan;

(iii) Immediate termination from participation in one of the programs or clinics for participants found in violation due to dual participation; and

(iv) In cases of dual participation resulting from intentional misrepresentation, the collection of improperly issued benefits in accordance with § 246.23(c)(1) and disqualification from both programs in accordance with § 246.12(u)(2).

**§ 246.8 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

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Agriculture regulations on nondiscrimination (7 CFR parts 15, 15a and 15b), and FNS instructions to ensure that no person shall, on the grounds of race, color, national origin, age, sex or handicap, be excluded from participation in, be denied benefits of, or be otherwise subjected to discrimination under the Program. 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 participants and potentially eligible persons;

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

(3) Collection and reporting of racial and ethnic participation data as required by title VI of the Civil Rights Act of 1964, which prohibits discrimination in federally assisted programs on the basis of race, color, or national origin; and

(4) Establishment of grievance procedures for handling 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 or local agencies which allege discrimination based on race, color, national origin, or age shall be referred to the Secretary of Agriculture or Director, Office of Equal Opportunity. A State or local agency may process complaints which allege discrimination based on sex or handicap if grievance procedures are in place.

(c) *Non-English materials.* Where a significant number or proportion of the population eligible to be served needs service or information in a language other than English in order effectively to be informed of or to participate in the Program, the State agency shall

take reasonable steps considering the size and concentration of such population, to provide information in appropriate languages to such persons. This requirement applies with regard to required Program information except certification forms which are used only by local agency staff. The State agency shall also ensure that all rights and responsibilities listed on the certification form are read to these applicants in the appropriate language.

**§ 246.9 Fair hearing procedures for participants.**

(a) *Availability of hearings.* The State agency shall provide a hearing procedure through which any individual may appeal a State or local agency action which results in a claim against the individual for repayment of the cash value of improperly issued benefits or results in the individual's denial of participation or disqualification from the Program.

(b) *Hearing system.* The State agency shall provide for either a hearing at the State level or a hearing at the local level which permits the individual to appeal a local agency decision to the State agency. The State agency may adopt local level hearings in some areas, such as those with large case-loads, and maintain only State level hearings in other areas.

(c) *Notification of appeal rights.* At the time of a claim against an individual for improperly issued benefits or at the time of participation denial or of disqualification from the Program, the State or local agency shall inform each individual in writing of the right to a fair hearing, of the method by which a hearing may be requested, and that any positions or arguments on behalf of the individual may be presented personally or by a representative such as a relative, friend, legal counsel or other spokesperson. Such notification is not required at the expiration of a certification period.

(d) *Request for hearing.* A request for a hearing is defined as any clear expression by the individual, the individual's parent, caretaker, or other representative, that he or she desires an opportunity to present his or her case to a higher authority. The State or local agency shall not limit or inter-

fere with the individual's freedom to request a hearing.

(e) *Time limit for request.* The State or local agency shall provide individuals a reasonable period of time to request fair hearings; provided that, such time limit is not less than 60 days from the date the agency mails or gives the applicant or participant the notice of adverse action.

(f) *Denial or dismissal of request.* The State and local agencies shall not deny or dismiss a request for a hearing unless—

(1) The request is not received within the time limit set by the State agency in accordance with paragraph (e) of this section;

(2) The request is withdrawn in writing by the appellant or a representative of the appellant;

(3) The appellant or representative fails, without good cause, to appear at the scheduled hearing; or

(4) The appellant has been denied participation by a previous hearing and cannot provide evidence that circumstances relevant to Program eligibility have changed in such a way as to justify a hearing.

(g) *Continuation of benefits.* Except for participants whose certification period has expired, participants who appeal the termination of benefits within the 15 days advance adverse notice period provided by § 246.7(j)(6) shall continue to receive Program benefits until the hearing official reaches a decision or the certification period expires, whichever occurs first. Applicants who are denied benefits at initial certification or because of the expiration of their certification may appeal the denial, but shall not receive benefits while awaiting the hearing.

(h) *Rules of procedure.* State and local agencies shall process each request for a hearing under uniform rules of procedure and shall make these rules of procedure available for public inspection and copying. At a minimum, such rules shall include: The time limits for requesting and conducting a hearing; all advance notice requirements; the rules of conduct at the hearing; and the rights and responsibilities of the appellant. The procedures shall not be unduly complex or legalistic.

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(i) *Hearing official.* Hearings shall be conducted by an impartial official who does not have any personal stake or involvement in the decision and who was not directly involved in the initial determination of the action being contested. The hearing official shall—

(1) Administer oaths or affirmations if required by the State;

(2) Ensure that all relevant issues are considered;

(3) Request, receive and make part of the hearing record all evidence determined necessary to decide the issues being raised;

(4) Regulate the conduct and course of the hearing consistent with due process to ensure an orderly hearing;

(5) Order, where relevant and necessary, an independent medical assessment or professional evaluation from a source mutually satisfactory to the appellant and the State agency; and

(6) Render a hearing decision which will resolve the dispute.

(j) *Conduct of the hearing.* The State or local agency shall ensure that the hearing is accessible to the appellant and is held within three weeks from the date the State or local agency received the request for a hearing. The State or local agency shall provide the appellant with a minimum of 10 days advance written notice of the time and place of the hearing and shall enclose an explanation of the hearing procedure with the notice. The State or local agency shall also provide the appellant or representative an opportunity to—

(1) Examine, prior to and during the hearing, the documents and records presented to support the decision under appeal;

(2) Be assisted or represented by an attorney or other persons;

(3) Bring witnesses;

(4) Advance arguments without undue interference;

(5) Question or refute any testimony or evidence, including an opportunity to confront and cross-examine adverse witnesses; and

(6) Submit evidence to establish all pertinent facts and circumstances in the case.

(k) *Fair hearing decisions.* (1) Decisions of the hearing official shall be based upon the application of appro-

priate Federal law, regulations and policy as related to the facts of the case as established in the hearing record. The verbatim transcript or recording of testimony and exhibits, or an official report containing the substance of what transpired at the hearing, together with all papers and requests filed in the proceeding, constitute the exclusive record for a final decision by hearing official. The State or local agency shall retain the hearing record in accordance with §246.25 and make these records available, for copying and inspection, to the appellant or representative at any reasonable time.

(2) The decision by the hearing official shall summarize the facts of the case, specify the reasons for the decision, and identify the supporting evidence and the pertinent regulations or policy. The decision shall become a part of the record.

(3) Within 45 days of the receipt of the request for the hearing, the State or local agency shall notify the appellant or representative in writing of the decision and the reasons for the decision in accordance with paragraph (k)(2) of this section. If the decision is in favor of the appellant and benefits were denied or discontinued, benefits shall begin immediately. If the decision concerns disqualification and is in favor of the agency, as soon as administratively feasible, the local agency shall terminate any continued benefits, as decided by the hearing official. If the decision regarding repayment of benefits by the appellant is in favor of the agency, the State or local agency shall resume its efforts to collect the claim, even during pendency of an appeal of a local-level fair hearing decision to the State agency. The appellant may appeal a local hearing decision to the State agency, provided that the request for appeal is made within 15 days of the mailing date of the hearing decision notice. If the decision being appealed concerns disqualification from the Program, the appellant shall not continue to receive benefits while an appeal to the State agency of a decision rendered on appeal at the local level is pending. The decision of a hearing official at the local level is binding on the local agency and the State agency unless it is appealed to the State

level and overturned by the State hearing official.

(4) The State and local agency shall make all hearing records and decisions available for public inspection and copying; however, the names and addresses of participants and other members of the public shall be kept confidential.

(1) *Judicial review.* If a State level decision upholds the agency action and the appellant expresses an interest in pursuing a higher review of the decision, the State agency shall explain any further State level review of the decision and any State level rehearing process. If these are either unavailable or have been exhausted, the State agency shall explain the right to pursue judicial review of the decision.

[50 FR 6121, Feb. 13, 1985, as amended at 52 FR 21236, June 4, 1987; 59 FR 11503, Mar. 11, 1994]

#### Subpart D—Participant Benefits

##### § 246.10 Supplemental foods.

(a) *General.* This section prescribes the requirements for providing supplemental foods to participants.

(b) *State agency responsibilities.* State agencies shall—

(1) Identify foods which are acceptable for use under the Program in accordance with the requirements of this section and provide to local agencies a list of acceptable foods and their maximum monthly quantities as specified in paragraph (c) of this section; and

(2) Ensure that local agencies—

(i) Make available at least one food from each group in each food package listed in paragraph (c) of this section. However, this does not mean that the local agency must provide each participant with a food from each food group;

(ii) Make available to participants the supplemental foods, as authorized in paragraph (c) of this section; and

(iii) Designate a competent professional authority to prescribe types of supplemental foods in quantities appropriate for each participant, taking into consideration the participant's age and dietary needs. The amounts of supplemental foods shall not exceed the maximum quantities specified in this section.

(c) *Food packages.* There are seven food packages available under the Program which may be provided to participants. The authorized supplemental foods shall be prescribed from food packages according to the category and nutritional need of the participant. The food packages are as follows:

NOTE: The metric units given are mathematical conversions. If packaging practices change, the authorized food quantities will be revised accordingly.

(1) *Food Package I—Infants 0 Through 3 Months.* (i) *Iron-fortified infant formula—requirements and routine issuance.* Except as specified in paragraphs (c)(1)(iii) through (c)(1)(v) of this section, local agencies must issue a contract brand infant formula that meets the requirements of paragraph (c)(1)(i) of this section. The supplemental food for this food package is an iron-fortified infant formula that is not an exempt infant formula. The iron-fortified infant formula must be nutritionally complete, not requiring the addition of any ingredients other than water prior to being served in a liquid state. It also must contain at least 10 milligrams of iron per liter at standard dilution and supply 67 kilocalories per 100 milliliters (i.e., approximately 20 kilocalories per fluid ounce of infant formula) at standard dilution. Medical documentation is not required for any contract brand infant formula authorized for issuance by the State agency, including the soy-based contract brand of infant formula. However, the State agency may require medical documentation for any contract brand infant formula even though it meets these requirements and may decide that some contract brand infant formulas may not be issued under any circumstances.

(ii) *Physical forms.* Local agencies must issue all WIC formulas (WIC formula means all infant formulas, including exempt infant formulas, and WIC-eligible medical foods) in concentrated liquid or powdered physical forms. Ready-to-feed WIC formulas may be authorized when the competent professional authority determines and documents that the participant's household has an unsanitary or restricted water supply or poor refrigeration, the participant or person caring for the participant may have difficulty

in correctly diluting concentrated forms or reconstituting powdered forms, or the WIC formula is only available in ready-to-feed form.

(iii) *WIC formulas requiring medical documentation.* Local agencies may issue the following WIC formulas, but only with medical documentation:

(A) Any contract brand infant formula that does not meet the requirements of paragraph (c)(1)(i) of this section (e.g., low-iron, low-calorie, or high-calorie infant formulas);

(B) Any non-contract brand infant formula (even if it meets the requirements for an iron-fortified infant formula in paragraph (c)(1)(i) of this section);

(C) Any exempt infant formula; and

(D) Any WIC-eligible medical food.

(iv) *Religious eating patterns exception.* Local agencies may issue a non-contract brand infant formula that meets the requirements of paragraph (c)(1)(i) of this section without medical documentation in order to meet religious eating patterns. However, if the non-contract brand infant formula does not meet the requirements of paragraph (c)(1)(i) of this section, medical documentation must be provided. Documentation of the basis of the substitution must be kept on file at the local clinic.

(v) *Medical documentation.* (A) *Determination.* For purposes of this food package, medical documentation means a determination by a licensed health care professional authorized to write medical prescriptions under State law. A licensed health care professional must make a medical determination that an infant has a medical condition that dictates the use of the following: a contract brand infant formula that does not meet the requirements of paragraph (c)(1)(i) of this section; a non-contract brand infant formula; an exempt infant formula; or a WIC-eligible medical food. These conditions include, but are not limited to: those that contraindicate the use of iron-fortified infant formula, metabolic disorders, inborn errors of amino acid metabolism, gastrointestinal disorders, malabsorption syndromes, and food allergies. Low-calorie WIC formulas may not be issued solely for the purpose of managing body weight.

(B) *Technical requirements.* Medical documentation must include the brand name of the WIC formula prescribed; medical diagnosis warranting the issuance of WIC formula; length of time the prescribed WIC formula is medically required by the participant; and signature or name (if the initial medical documentation was received by telephone) of the requesting health care professional. Medical documentation may be provided as an original written document, electronically, or by facsimile. Medical documentation also may be provided by telephone to a competent professional authority who must promptly document the information which must be kept on file at the local clinic. However, this method may only be used until written confirmation is received and only when absolutely necessary on an individual participant basis to prevent undue hardship to a participant or to prevent a delay in the provision of infant formula that would place the participant at increased nutritional risk. The local clinic must obtain written confirmation of the medical documentation within a reasonable amount of time (i.e., one or two weeks' time) after accepting the initial medical documentation by telephone. The written documentation must be kept on file with the initial telephone documentation.

(vi) *Quantities and types of supplemental foods.* The quantities and types of supplemental foods prescribed shall be appropriate for the participant taking into consideration the participant's age and dietary needs. The maximum quantity of supplemental foods authorized per month is as follows:

Food	Quantity
Formula: Concentrated liquid formula. or Powdered formula .. or Ready-to-feed formula.	403 fluid oz. (11.9 L).  May be substituted at the rate of 8 lbs. (3.6 kg) per 403 fluid oz. (11.9 L) of concentrated liquid formula.  May be substituted at the rate of 26 fluid oz. (.8 L) per 13 fluid oz. (.4 L) of concentrated liquid formula.

(2) *Food Package II—Infants 4 through 12 Months.* (i) Infant formula as specified in paragraphs (c)(1)(i) through (c)(1)(v) of this section.

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(ii) Infant cereal which contains a minimum of 45 milligrams of iron per 100 grams of dry cereal.

(iii) Single strength fruit juice which contains a minimum of 30 milligrams of vitamin C per 100 milliliters; or frozen concentrated fruit juice which contains a minimum of 30 milligrams of vitamin C per 100 milliliters of reconstituted juice; or infant juice which contains a minimum of 30 milligrams of vitamin C per 100 milliliters. Issuance prior to the time when the infant can drink from a cup is discouraged. The competent professional authority shall instruct the participant's parent or guardian to feed the juice to the participant from a cup to prevent "bottle caries."

(iv) The quantities and types of supplemental foods prescribed shall be appropriate for the participant taking into consideration the participant's age and dietary needs. The maximum quantity of supplemental foods authorized per month is as follows:

Food	Quantity
Formula:	
Concentrated liquid formula.	403 fluid oz. (11.9 L).
or	
Powdered formula ..	May be substituted at the rate of 8 lb. (3.6 kg) per 403 fluid oz. (11.9 L) of concentrated liquid formula.
or	
Ready-to-feed formula.	May be substituted at the rate of 26 fluid oz. (.8 L) per 13 fluid oz. (.4 L) of concentrated liquid formula.
Infant cereal .....	24 oz. dry (.7 kg).
Juice: <sup>1</sup>	
Single strength adult juice.	92 fluid oz. (2.7 L).
or	
Frozen concentrated juice.	96 fluid oz. reconstituted (2.8 L).
or	
Infant juice .....	May be substituted at the rate of 63 fluid oz. (1.9 L) of infant juice per 92 fluid oz. (2.7 L) of single strength adult juice.

<sup>1</sup>Combinations of single strength or frozen concentrated juice may be issued as long as the total volume of juice does not exceed the amount specified for single strength juice.

(3) *Food Package III—Children/Women with Special Dietary Needs.* Local agencies may issue this food package to women and children only with medical documentation. The supplemental foods in Food Package III are set forth in paragraphs (c)(3)(i) through (c)(3)(iv) of this section. For purposes of this food package, medical documentation means a determination by a licensed

health care professional authorized to write medical prescriptions under State law that the child or woman has a medical condition that dictates the use of a WIC formula (WIC formula means all infant formulas, including exempt infant formulas, and WIC-eligible medical foods) because the use of conventional foods is precluded or restricted. These medical conditions include, but are not limited to, metabolic disorders, inborn errors of amino acid metabolism, gastrointestinal disorders, malabsorption syndromes and food allergies. This food package may not be issued solely for the purpose of enhancing nutrient intake or managing body weight. Medical documentation for WIC formulas must meet the technical requirements described in paragraph (c)(1)(v)(B) of this section.

(i) WIC formulas (i.e., an infant formula, exempt infant formula, or WIC-eligible medical food).

(ii) Cereal (hot or cold) which contains a minimum of 28 milligrams of iron per 100 grams of dry cereal and not more than 21.2 grams of sucrose and other sugars per 100 grams of dry cereal (6 grams per ounce).

(iii) Single strength fruit juice or vegetable juice, or both, which contains a minimum of 30 milligrams of vitamin C per 100 milliliters; or frozen concentrated fruit or vegetable juice, or both, which contains a minimum of 30 milligrams of vitamin C per 100 milliliters of reconstituted juice.

(iv) The quantities and types of supplemental foods prescribed shall be appropriate for the participant taking into consideration the participant's age and special dietary needs. The maximum quantity of supplemental foods authorized per month is as follows:

Food	Quantity
Formula:	
Concentrated liquid formula.	403 fluid oz. (11.9 L).
Addition <sup>1</sup> .....	52 fluid oz. (1.5 L).
or	
Powdered formula ..	May be substituted at a rate of 8 lb. (3.6 kg) per 403 fluid oz. (11.9 L) of concentrated liquid formula.
Addition <sup>1</sup> .....	1 lb. (.4 kg).
or	
Ready-to-feed formula.	May be substituted at the rate of 26 fluid oz. (.8 L) per 13 fluid oz. (.4 L) of concentrated liquid formula.
Addition <sup>1</sup> .....	104 fluid oz. (3.1 L).

Food	Quantity
Cereal (hot or cold) ....	36 oz. dry (1 kg).
Juice: <sup>2</sup> Single strength juice	138 fluid oz. (4.1 L).
or Frozen concentrated juice.	144 fluid oz. reconstituted (4.3 L).

<sup>1</sup> Additional formula may be issued on an individual basis provided the need is demonstrated and documented in the individual's certification file by the competent professional authority.

<sup>2</sup> Combinations of single strength and frozen concentrated juice may be issued as long as the total volume does not exceed the amount specified for single strength juice.

(4) *Food Package IV—Children 1 to 5 Years.* (i) Pasteurized fluid whole milk which is flavored or unflavored and which contains 400 International Units of vitamin D per quart (.9 liter); or pasteurized fluid skim or lowfat milk which is flavored or unflavored and which contains 400 International Units of vitamin D and 2000 International Units of vitamin A per fluid quart (.9 liter); or pasteurized cultured buttermilk which contains 400 International units of vitamin D and 2000 International Units of vitamin A per fluid quart (.9 liter); or evaporated whole milk which contains 400 International Units of vitamin D per reconstituted quart (.9 liter); or evaporated skimmed milk which contains 400 International Units of vitamin D and 2000 International Units of vitamin A per reconstituted quart (.9 liter); or nonfat or lowfat dry milk which contains 400 International Units of vitamin D and 2000 International Units of vitamin A per reconstituted quart (.9 liter); or domestic cheese (pasteurized process American, Monterey Jack, Colby, natural Cheddar, Swiss, Brick, Muenster, Provolone, Mozzarella Part-Skim or Whole).

(ii) Adult cereal (hot or cold) which contains a minimum of 28 milligrams of iron per 100 grams of dry cereal and not more than 21.2 grams of sucrose and other sugars per 100 grams of dry cereal (6 grams per ounce).

(iii) Single strength fruit juice or vegetable juice, or both, which contains a minimum of 30 milligrams of vitamin C per 100 milliliters; or frozen concentrated fruit or vegetable juice, or both, which contains a minimum of 30 milligrams of vitamin C per 100 milliliters of reconstituted juice.

(iv) Eggs or dried egg mix.  
(v) Peanut butter or mature dry beans or peas, including but not limited to, lentils, black, navy, kidney, garbanzo, soy, pinto, and mung beans, crowder, cow, split and black-eyed peas.

(vi) The quantities and types of supplemental foods prescribed shall be appropriate for the participant taking into consideration the participant's age and dietary needs. The maximum quantity of supplemental foods authorized per month is as follows:

Food	Quantity
Milk:	
Fluid whole milk .....	24 qt. (22.7 L).
or Fluid skim or low fat milk.	May be substituted for fluid whole milk on a quart-for-quart (.9 L) basis.
or Cultured buttermilk	May be substituted for fluid whole milk on a quart-for-quart (.9 L) basis.
or Evaporated whole milk.	May be substituted for fluid whole milk at the rate of 13 fluid oz. (.4 L) per qt. (.9 L) of fluid whole milk.
or Evaporated skimmed milk.	May be substituted for fluid whole milk at the rate of 13 fluid oz. (.4 L) per qt. (.9 L) of fluid whole milk.
or Dry whole milk .....	May be substituted for fluid whole milk at the rate of 1 lb. (.4 kg) per 3 qt. (2.8 L) of fluid whole milk.
or Nonfat or lowfat dry milk.	May be substituted for fluid whole milk at the rate of 1 lb. (.4 kg) per 5 qt. (4.7 L) of fluid whole milk.
or Cheese .....	May be substituted for fluid whole milk at the rate of 1 lb. (.4 kg) per 3 qt. (2.8 L) of fluid whole milk. 4 lbs. (1.8 kg) is the maximum amount which may be substituted. <sup>1</sup>
Eggs:	
Eggs .....	2 doz. or 2½ doz.
or Dried egg mix .....	May be substituted at the rate of 1.5 lb. (.7 kg) egg mix per 2 doz. fresh eggs or 2 lb. (.9 kg) egg mix per 2½ doz. fresh eggs.
Cereals (hot or cold) ..	36 oz. dry (1 kg).
Juice: <sup>2</sup>	
Single strength juice	276 fluid oz. (8.2 L).
or Frozen concentrated juice.	288 fluid oz. reconstituted (8.5 L).
Legumes:	
Dry beans or peas	1 lb. (.4 kg).
or Peanut butter .....	18 oz. (.5 kg).

<sup>1</sup> Additional cheese may be issued on an individual basis in cases of lactose intolerance, provided the need is documented in the participant's file by the competent professional authority.

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<sup>2</sup>Combinations of single strength and frozen concentrated juice may be issued as long as the total volume does not exceed the amount specified for single strength juice.

(5) *Food Package V—Pregnant and Breastfeeding Women (Basic)*. (i) Pasteurized fluid whole milk which is flavored or unflavored and which contains 400 International Units of Vitamin D per quart (.9 liter) or pasteurized fluid skim or lowfat milk which is flavored or unflavored and which contains 400 International Units of vitamin D and 2000 International Units of vitamin A per fluid quart (.9 liter); or pasteurized cultured buttermilk which contains 400 International Units of vitamin D and 2000 International Units of vitamin A per fluid quart (.9 liter); or evaporated whole milk which contains 400 International Units of vitamin D per reconstituted quart (.9 liter); or evaporated skimmed milk which contains 400 International Units of vitamin D and 2000 International Units of vitamin A per reconstituted quart (.9 liter); or dry whole milk which contains 400 International Units of vitamin D per reconstituted quart (.9 liter); or nonfat or lowfat dry milk which contains 400 International Units of vitamin D and 2000 International Units of vitamin A per reconstituted quart (.9 liter); or domestic cheese (pasteurized process American, Monterey Jack, Colby, natural Cheddar, Swiss, Brick, Muenster, Provolone, Mozzarella Part-Skim or Whole).

(ii) Adult cereal (hot or cold) which contains a minimum of 28 milligrams of iron per 100 grams of dry cereal and not more than 21.2 grams of sucrose and other sugars per 100 grams of dry cereal (6 grams per ounce).

(iii) Single strength fruit juice or vegetable juice, or both, which contains a minimum of 30 milligrams of vitamin C per 100 milliliters; or frozen concentrated fruit or vegetable juice, or both, which contains a minimum of 30 milligrams of vitamin C per 100 milliliters of reconstituted juice.

(iv) Eggs or dried egg mix.

(v) Peanut butter or mature dry beans or peas, including but not limited to lentils, black, navy, kidney, garbanzo, soy, pinto and mung beans, crowder, cow, split and black-eyed peas.

(vi) The quantities and types of supplemental foods prescribed shall be ap-

propriate for the participant taking into consideration the participant's age and dietary needs. The maximum quantity of supplemental foods authorized per month is as follows:

Food	Quantity
Milk:	
Fluid whole milk .....	28 qt. (26.5 L).
or	
Fluid skim or lowfat milk.	May be substituted for fluid whole milk on a quart-for-quart (.9 L) basis.
or	
Cultured buttermilk	May be substituted for fluid whole milk on a quart-for-quart (.9 L) basis.
or	
Evaporated whole milk.	May be substituted for fluid whole milk at the rate of 13 fluid oz. (.4 L) per qt. (.9 L) of fluid whole milk.
or	
Evaporated skimmed milk.	May be substituted for fluid whole milk at the rate of 13 fluid oz. (.4 L) per qt. (.9 L) of fluid whole milk.
or	
Dry whole milk .....	May be substituted for fluid whole milk at the rate of 1 lb. (.4 kg) per 3 qt. (2.8 L) of fluid whole milk.
or	
Nonfat or lowfat dry milk.	May be substituted for fluid whole milk at the rate of 1 lb. (.4 kg) per 5 qt. (4.7 L) of fluid whole milk.
or	
Cheese .....	May be substituted for fluid whole milk at the rate of 1 lb. (.4 kg) per 3 qt. (2.8 L) of fluid whole milk. 4 lbs. (1.8 kg) is the maximum amount which may be substituted. <sup>1</sup>
Eggs:	
Eggs .....	2 doz. or 2½ doz.
or	
Dried egg mix .....	May be substituted at the rate of 1.5 lb. (.7 kg) egg mix per 2 doz. fresh eggs, or 2 lb. (.9 kg) egg mix per 2½ doz. fresh eggs.
Cereals (hot or cold) ..	36 oz. dry (1 kg).
Juice: <sup>2</sup>	
Single strength juice	276 fluid oz. (8.2 L).
or	
Frozen, concentrated juice.	288 fluid oz. reconstituted (8.5 L).
Legumes:	
Dry beans or peas	1 lb. (.4 kg).
or	
Peanut butter .....	18 oz. (.5 kg).

<sup>1</sup> Additional cheese may be issued on an individual basis in cases of lactose intolerance, provided the need is documented in the participant's file by the competent professional authority.

<sup>2</sup>Combinations of single strength or frozen concentrated juice may be issued as long as the total volume does not exceed the amount specified for single strength juice.

(6) *Food Package VI—Non-breastfeeding Postpartum Women*. (i) Pasteurized fluid whole milk which is flavored or unflavored and which contains 400 International Units of vitamin D per quart (.9 liter); or pasteurized fluid skim or lowfat milk which is flavored

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or unflavored and which contains 400 International Units of vitamin D and 2000 International Units of vitamin A per fluid quart (.9 liter); or pasteurized cultured buttermilk which contains 400 International Units of vitamin D and 2000 International Units of vitamin A per fluid quart (.9 liter); or evaporated whole milk which contains 400 International Units of vitamin D per reconstituted quart (.9 liter); or evaporated skimmed milk which contains 400 International Units of vitamin D and 2000 International Units of vitamin A per reconstituted quart (.9 liter); or dry whole milk which contains 400 International Units of vitamin D per reconstituted quart (.9 liter); or nonfat or lowfat dry milk which contains 400 International Units of Vitamin D and 2000 International Units of vitamin A per reconstituted quart (.9 liter); or domestic cheese (pasteurized process American, Monterey Jack, Colby, natural Cheddar, Swiss, Brick, Muenster, Provolone, Mozzarella Part-Skim or Whole).

(ii) Cereal (hot or cold) which contains a minimum of 28 milligrams of iron per 100 grams of dry cereal and not more than 21.1 grams of sucrose and other sugars per 100 grams of dry cereal (6 grams per 1 ounce).

(iii) Single strength fruit juice or vegetable juice, or both, which contains a minimum of 30 milligrams of vitamin C per 100 milliliters; or concentrated fruit or vegetable juice, or both, which contains a minimum of 30 milligrams of vitamin C per 100 milliliters of reconstituted juice.

(iv) Eggs or dried egg mix.

(v) The quantities and types of supplemental foods prescribed shall be appropriate for the participant taking into consideration the participant's age and dietary needs. The maximum quantity of supplemental foods authorized per month is as follows:

Food	Quantity
Milk:	
Fluid whole milk .....	24 qt. (22.7 L).
or	
Fluid skim or lowfat milk.	May be substituted for fluid whole milk on a quart-for-quart (.9 L ) basis.
or	
Cultured buttermilk	May be substituted for fluid whole milk on a quart-for-quart (.9 L ) basis.

Food	Quantity
or	
Evaporated whole milk.	May be substituted for fluid whole milk at the rate of 13 fluid oz. (.4 L) per qt. (.9 L) of fluid whole milk.
or	
Evaporated skimmed milk.	May be substituted for fluid whole milk at the rate of 13 fluid oz. (.4 L) per qt. (.9 L) of fluid whole milk.
or	
Dry whole milk .....	May be substituted for fluid whole milk at the rate of 1 lb. (.4 kg) per 3 qt. (2.8 L) of fluid whole milk.
or	
Nonfat or lowfat dry milk.	May be substituted for fluid whole milk at the rate of 1 lb. (.4 kg) per 5 qt. (4.7 L) of fluid whole milk.
or	
Cheese .....	May be substituted for fluid whole milk at the rate of 1 lb. (.4 kg) per 3 qt. (2.8 L) of fluid whole milk. 4 lbs. (1.8 kg) is the maximum amount which may be substituted. <sup>1</sup>
Eggs:	
Eggs .....	2 doz. or 2½ doz.
or	
Dried egg mix .....	May be substituted at the rate of 1.5 lb. (.7 kg) egg mix per 2 doz. fresh eggs of 2 lb. (.9 kg) egg mix per 2½ doz. fresh eggs.
Cereal (hot or cold) ....	36 oz. dry (1 kg).
Juice: <sup>2</sup>	
Single strength juice	184 fluid oz. (5.4 L).
or	
Frozen concentrated juice.	192 fluid oz. reconstituted (5.7 L).

<sup>1</sup> Additional cheese may be issued on an individual basis in cases of lactose intolerance, provided the need is documented in the participant's file by the competent professional authority.

<sup>2</sup> Combinations of single strength or frozen concentrated juice may be issued as long as the total volume does not exceed the amount specified for single strength juice.

(7) *Food Package VII—Breastfeeding Women (Enhanced)*. (i) Pasteurized fluid whole milk which is flavored or unflavored and which contains 400 International Units of Vitamin D per quart (.9 liter) or pasteurized fluid skim or lowfat milk which is flavored or unflavored and which contains 400 International Units of vitamin D and 2000 International Units of vitamin A per fluid quart (.9 liter); or pasteurized cultured buttermilk which contains 400 International Units of vitamin D and 2000 International Units of vitamin A per fluid quart (.9 liter); or evaporated whole milk which contains 400 International Units of vitamin D per reconstituted quart (.9 liter); or evaporated skim milk which contains 400 International Units of vitamin D and 2000 International Units of vitamin A per reconstituted quart (.9 liter); or dry

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whole milk which contains 400 International Units of vitamin D per reconstituted quart (.9 liter); or nonfat or lowfat dry milk which contains 400 International Units of vitamin D and 2000 International Units of vitamin A per reconstituted quart (.9 liter); or domestic cheese (pasteurized process American, Monterey Jack, Colby, natural Cheddar, Swiss, Brick, Muenster, Provolone, Mozzarella Part-Skim or Whole).

(ii) Domestic cheese (pasteurized process American, Monterey Jack, Colby, natural Cheddar, Swiss, Brick, Muenster, Provolone, Mozzarella Part-Skim or Whole).

(iii) Adult cereal (hot or cold) which contains a minimum of 28 milligrams of iron per 100 grams of dry cereal and not more than 21.2 grams of sucrose and other sugars per 100 grams of dry cereal (6 grams per ounce).

(iv) Single strength fruit juice or vegetable juice, or both, which contains a minimum of 30 milligrams of vitamin C per 100 milliliters; or frozen

concentrated fruit or vegetable juice, or both, which contains a minimum of 30 milligrams of vitamin C per 100 milliliters of reconstituted juice.

(v) Eggs or dried egg mix.

(vi) Peanut butter.

(vii) Mature dry beans or peas, including but not limited to lentils, black, navy, kidney, garbanzo, soy, pinto and mung beans, crowder, cow, split and black-eyed peas.

(viii) Tuna: Canned white, light, dark or blended tuna packed in water or oil, including solid and solid pack; chunk, chunks and chunk style; flake and flakes; and grated.

(ix) Carrots: Raw, canned or frozen. Mature raw; canned and frozen carrots containing only the mature root of the carrot plant packed in water.

(x) The quantities and types of supplemental foods prescribed shall be appropriate for the participant taking into consideration the participant's age and dietary needs. The maximum quantity of supplemental foods authorized per month is as follows:

Food	Quantity
<b>Milk:</b>	
Fluid whole milk or .....	28 qt. (26.5 L).
Cheese or .....	May be substituted for fluid whole milk at the rate of 1 lb. (.4 kg) per 3 qt. (2.8 L) of fluid whole milk. 4 lbs. (1.8 kg) is the maximum amount which may be substituted.
	Additional cheese may be issued on an individual basis in cases of lactose intolerance, provided the need is documented in the participant's file by the competent professional authority.
Fluid skim or lowfat milk or .....	May be substituted for fluid whole milk on a quart-for-quart (.9 L) basis.
Cultured buttermilk or .....	May be substituted for fluid whole milk on a quart-for-quart (.9 L) basis.
Evaporated whole milk or .....	May be substituted for fluid whole milk at the rate of 13 fluid oz. (.4 L) per qt. (.9 L) of fluid whole milk.
Evaporated skimmed milk or .....	May be substituted for fluid whole milk at the rate of 13 fluid oz. (.4 L) per qt. (.9 L) of fluid whole milk.
Dry whole milk or .....	May be substituted for fluid whole milk at the rate of 1 lb. (.4 kg) per 3 qt. (2.8 L) of fluid whole milk.
Nonfat or lowfat dry milk .....	May be substituted for fluid whole milk at the rate of 1 lb. (.4 kg) per 5 qt. (4.7 L) of fluid whole milk.
<b>Cheese:</b>	
Cheese .....	1 lb. (.4 kg).
<b>Eggs:</b>	
Eggs or .....	2 doz. or 2½ doz.
Dried egg mix .....	May be substituted at the rate of 1.5 lb. (.7 kg) egg mix per 2 doz. fresh eggs, or 2 lb. (.9 kg) egg mix per 2½ doz. fresh eggs.
<b>Cereals:</b>	
Cereals (hot or cold) .....	36 oz. dry (1 kg).
<b>Juice:</b>	
Single strength juice or .....	322 fluid oz. (9.6 L).
Frozen concentrated juice .....	336 fluid oz. reconstituted (10.0 L).
	Combinations of single strength or frozen concentrated juice may be issued as long as the total volume does not exceed the amount specified for single strength juice.
<b>Legumes:</b>	
Dry beans or peas and .....	1 lb. (.4 kg). May be substituted for peanut butter at the rate of 1 lb. of dry beans or peas per 18 oz. of peanut butter.
Peanut butter .....	18 oz. (.5 kg). Peanut butter may not be substituted for mature dry beans or peas at any rate.

Food	Quantity
Fish:	
Tuna .....	26 oz. (.8 kg).
Vegetable:	
Raw carrots or .....	2 lb. (.9 kg).
Frozen carrots or .....	May be substituted for fresh at the rate of 1 lb. frozen per 1 lb. fresh.
Canned carrots .....	May be substituted for fresh at the rate of 1 16-20 ounce can of carrots per 1 lb. fresh.

(d) *Use of commodity foods.* (1) At the request of a State agency, the Department will purchase commodity foods for the State agency using funds allocated to the State agency. The commodity foods purchased and made available to the State agency shall be equivalent to the foods specified in paragraph (c) of this section.

(2) The State agency shall—

(i) Distribute the commodity foods to the local agency or participant;

(ii) Ensure satisfactory storage conditions for the commodity foods, including documentation of proper insurance; and

(iii) Ensure that there are proper storage facilities for commodity foods.

(e) *Plans for substitutions or eliminations.* (1) The State agency may submit to FNS a plan for substitution of food(s) acceptable for use in the Program to allow for different cultural eating patterns and substitution or elimination of a category of foods to accommodate the special needs of homeless persons, and/or residents of institutions if the State agency chooses to serve such persons under § 246.7(m)(2) of this part. The plan shall provide the State agency's justification, including a specific explanation of the cultural eating pattern or the homeless situation which requires the proposed alteration and other information necessary for FNS to evaluate the plan as specified in paragraph (e)(2) of this section for cultural substitutions and in paragraph (e)(3) of this section for homeless substitutions or eliminations.

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

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

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

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

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

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

(f) *Infant formula manufacturer registration.* Infant formula manufacturers supplying formula to the WIC Program shall register with the Secretary of Health and Human Services under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321 *et seq.*). Such manufacturers wishing to bid for a State contract to supply infant formula to the program shall first certify with the State health department that their formulas comply with the Federal Food, Drug, and Cosmetic Act and regulations issued pursuant to the Act.

[50 FR 6121, Feb. 13, 1985; 50 FR 8098, Feb. 28, 1985, as amended at 51 FR 13208, Apr. 18, 1986; 51 FR 16155, May 1, 1986; 53 FR 25314, July 6, 1988; 54 FR 51295, Dec. 14, 1989; 57 FR 34506, Aug. 5, 1992; 57 FR 56240, Nov. 27, 1992; 65 FR 51223, Aug. 23, 2000]

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### § 246.11 Nutrition education.

(a) *General.* (1) Nutrition education shall be considered a benefit of the Program, and shall be made available at no cost to the participant. Nutrition education shall be designed to be easily understood by participants, and it shall bear a practical relationship to participant nutritional needs, household situations, and cultural preferences including information on how to select food for themselves and their families. Nutrition education shall be thoroughly integrated into participant health care plans, the delivery of supplemental foods, and other Program operations.

(2) The State agency shall ensure that nutrition education is made available to all participants. Nutrition education may be provided through the local agencies directly, or through arrangements made with other agencies. At the time of certification, the local agency shall stress the positive, long-term benefits of nutrition education and encourage the participant to attend and participate in nutrition education activities. However, individual participants shall not be denied supplemental foods for failure to attend or participate in nutrition education activities.

(3) As an integral part of nutrition education, the State agency shall ensure that local agencies provide drug and other harmful substance abuse information to all pregnant, postpartum, and breastfeeding women and to parents or caretakers of infants and children participating in the program. Drug and other harmful substance abuse information may also be provided to pregnant, postpartum, and breastfeeding women and to parents or caretakers of infants and children participating in local agency services other than the Program.

(b) *Goals.* Nutrition education shall be designed to achieve the following two broad goals:

(1) Stress the relationship between proper nutrition and good health with special emphasis on the nutritional needs of pregnant, postpartum, and breastfeeding women, infants and children under five years of age, and raise awareness about the dangers of using drugs and other harmful substances

during pregnancy and while breastfeeding.

(2) Assist the individual who is at nutritional risk in achieving a positive change in food habits, resulting in improved nutritional status and in the prevention of nutrition-related problems through optimal use of the supplemental foods and other nutritious foods. This is to be taught in the context of the ethnic, cultural and geographic preferences of the participants and with consideration for educational and environmental limitations experienced by the participants.

(c) *State agency responsibilities.* The State agency shall perform the following activities in carrying out nutrition education responsibilities:

(1) Develop and coordinate the nutrition education component of Program operations with consideration of local agency plans, needs and available nutrition education resources.

(2) Provide in-service training and technical assistance for professional and para-professional personnel involved in providing nutrition education to participants at local agencies. 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.

(4) Develop and implement procedures to ensure that nutrition education is offered to all adult participants and to parents and guardians of infant or child participants, as well as child participants, whenever possible.

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

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(6) Establish standards for participant contacts that ensure adequate nutrition education in accordance with paragraph (e) of this section.

(7) 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.

(d) *Local agency responsibilities.* Local agencies shall perform the following activities in carrying out their nutrition education responsibilities:

(1) Make nutrition education available or enter into an agreement with another agency to make nutrition education available to all adult participants, and to parents or caretakers of infant and child participants, and whenever possible, to child participants. Nutrition education may be provided through the use of individual or group sessions. Educational materials designed for Program participants may be utilized to provide education to pregnant, postpartum, and breastfeeding women and to parents or caretakers of infants and children participating in local agency services other than the program.

(2) Develop an annual local agency nutrition education plan consistent with the State's nutrition education component of Program operations and in accordance with this part and FNS guidelines. The local agency shall submit its nutrition education plan to the State agency by a date specified by the State agency.

(e) *Participant contacts.* (1) The nutrition education contacts shall be made available through individual or group

sessions which are appropriate to the individual participant's nutritional needs. All pregnant participants shall be encouraged to breastfeed unless contraindicated for health reasons.

(2) During each six-month certification period, at least two nutrition contacts shall be made available to all adult participants and the parents or caretakers of infant and child participants, and wherever possible, the child participants themselves.

(3) Nutrition education contacts shall be made available at a quarterly rate, but not necessarily taking place within each quarter, to parents or caretakers of infant participants certified for a period in excess of six months.

(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.

(5) An individual care plan shall be provided for a participant based on the need for such plan as determined by the competent professional authority, except that any participant, parent, or caretaker shall receive such plan upon request.

(6) Contacts shall be designed to meet different cultural and language needs of Program participants.

[50 FR 6121, Feb. 13, 1985; 50 FR 8098, Feb. 28, 1985, as amended at 58 FR 11507, Feb. 26, 1993; 59 FR 11503, Mar. 11, 1994; 65 FR 53528, Sept. 5, 2000]

**Subpart E—State Agency Provisions**

**§ 246.12 Food delivery systems.**

(a) *General.* This section sets forth design and operational requirements

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for State and local agency food delivery systems.

(1) The State agency is responsible for the fiscal management of, and accountability for, food delivery systems under its jurisdiction.

(2) The State agency shall design all food delivery systems to be used by local agencies under its jurisdiction.

(3) FNS may, for a stated cause and by written notice, require revision of a proposed or operating food delivery system and will allow a reasonable time for the State agency to effect such a revision.

(4) All contracts or agreements entered into by the State or local agency for the management or operation of food delivery systems shall be in conformance with the requirements of 7 CFR part 3016.

(b) *Uniform food delivery systems.* The State agency may operate up to three types of food delivery systems—retail purchase, home delivery or direct distribution. Each system shall be procedurally uniform within the jurisdiction of the State agency. When used, food instruments shall be uniform within each type of system.

(c) *Free of charge.* Participants shall receive the Program's supplemental foods free of charge.

(d) *Compatibility of food delivery system.* The State agency shall ensure that the food delivery system is compatible with delivery of health and nutrition education services to the participants.

(e) *Authorization of food vendors.* Only food vendors authorized by the State agency may redeem food instruments or otherwise provide supplemental foods to participants.

(1) There shall be a documented on-site visit prior to, or at the time of, initial authorization of a new vendor. However, vendors authorized prior to the date of State implementation of the amendment to Program regulations published at 47 FR 23626 need not have a documented visit.

(2) The State agency shall authorize an appropriate number and distribution of food vendors in order to assure adequate participant convenience and access and to assure that State or local officials can effectively manage review of authorized food vendors in their jurisdiction. The State agency may es-

tablish criteria to limit the number of authorized food vendors in its jurisdiction.

(3) The State agency is encouraged to consider the impact of authorization decisions on small businesses.

(f) *Food vendor agreements.* The State agency shall ensure that all participating food vendors enter into written contracts or agreements with the State or local agency. The food vendor contract or agreement shall be signed by a representative who has legal authority to obligate the food vendor. When the food vendor is obligating more than one outlet, all outlets shall be specified in the contract or agreement. When more than one outlet is specified in the contract or agreement, an individual outlet may be added or deleted without affecting the remainder of outlets. Neither the State or local agency nor the vendor has an obligation to renew the vendor contract or agreement. The State or local agency shall provide vendors with not less than 15 days advance written notice of the expiration of a contract or agreement.

(1) In the retail purchase system, a standard vendor contract or agreement shall be used statewide, though exceptions may be made with the approval of the State agency.

(2) The food vendor contract or agreement shall contain the following specifications, although the State agency may determine the exact wording to be used:

(i) In providing supplemental foods to the participants, the food vendor shall only provide the supplemental foods specified on the food instrument.

(ii) The food vendor shall provide supplemental foods at the current price or at less than the current price charged to other customers.

(iii) When food instruments are used, the food vendor shall submit those food instruments for payment within the allowed time period and accept food instruments from a participant only within the allowed time period.

(iv) The State agency has the right to demand refunds for charges of more than the actual purchase price for supplemental foods.

(v) The State agency may deny payment to the food vendor for improper

food instruments or may demand refunds for payments already made on improper food instruments.

(vi) The food vendor shall not seek restitution from participants for food instruments not paid by the State or local agency.

(vii) The manager of the store or an authorized representative such as the head cashier shall agree to accept training on Program procedures.

(viii) The food vendor shall inform and train cashiers or other staff on Program requirements.

(ix) The food vendor shall be accountable for actions of employees in the utilization of food instruments or provision of supplemental foods.

(x) The food vendor shall offer Program participants the same courtesies as offered to other customers.

(xi) The food vendor may be monitored for compliance with Program rules.

(xii) During a monitoring visit of a retail vendor, the food vendor shall provide access to food instruments negotiated the day of the review at the request of the reviewer.

(xiii) Retail vendors shall provide access to shelf price records, if available.

(xiv) A vendor who commits fraud or abuse of the Program is liable to prosecution under applicable Federal, State or local laws. Under §246.23 of the regulations, those who have willfully misapplied, stolen or fraudulently obtained program funds shall be subject to a fine of not more than \$10,000 or imprisonment for not more than five years or both, if the value of the funds is \$100 or more. If the value is less than \$100, the penalties are a fine of not more than \$1,000 or imprisonment for not more than one year or both.

(xv) The food vendor shall comply with the nondiscrimination provisions of Departmental regulations (7 CFR parts 15, 15a and 15b).

(xvi) Neither the State agency nor the food vendor has an obligation to renew the vendor contract or agreement.

(xvii) Either the State agency or the vendor may terminate the contract or agreement for cause after providing advance written notice, of a period of not less than 15 days to be specified by the State agency.

(xviii) The State agency may disqualify a vendor or impose a civil money penalty in lieu of disqualification for reasons of program abuse. The State agency does not have to provide the vendor with prior warning that violations were occurring before imposing such sanctions. The vendor has the right to appeal a State agency decision pertaining to disqualification, denial of application to participate, or other adverse actions that affect participation during the contract or agreement performance period; except that, expiration of a contract or agreement with a vendor, disqualification of a vendor as a result of disqualification from the Food Stamp Program, and the State agency's determination regarding participant access are not subject to review.

(xix) The State agency shall disqualify a vendor who has been disqualified from the Food Stamp Program. However, if the State agency determines that disqualification of the vendor would result in inadequate participant access, the State agency shall impose a civil money penalty in lieu of WIC disqualification.

(xx) The State agency shall permanently disqualify a vendor convicted of trafficking in food instruments or selling firearms, ammunition, explosives, or controlled substances (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) in exchange for food instruments. A vendor shall not be entitled to receive any compensation for revenues lost as a result of such violation. If reflected in its State Plan, the State agency shall impose a civil money penalty in lieu of a disqualification for this violation when it determines, in its sole discretion, and documents (in accordance with paragraph (k)(8) of this section) that—

(A) Disqualification of the vendor would result in inadequate participant access; or

(B) The vendor had, at the time of the violation, an effective policy and program in effect to prevent trafficking; and the ownership of the vendor was not aware of, did not approve of, and was not involved in the conduct of the violation.

(xxi) The State agency shall disqualify a vendor for the mandatory

sanctions listed in paragraphs (k)(1)(ii) through (k)(1)(iv) of this section. However, if the State agency determines that disqualification of the vendor would result in inadequate participant access, the State agency shall impose a civil money penalty in lieu of disqualification, except that, as provided in paragraph (k)(1)(vi) of this section, the State agency shall not impose a civil money penalty in lieu of disqualification for third or subsequent sanctions for violations in paragraphs (k)(1)(ii) through (k)(1)(iv) of this section.

(xxii) Disqualification from the WIC Program may result in disqualification as a retailer in the Food Stamp Program. Such disqualification may not be subject to administrative or judicial review under the Food Stamp Program.

(xxiii) The food vendor shall notify the State agency when the vendor ceases operations or ownership changes. The contract or agreement is null and void if the ownership changes.

(xxiv) The food vendor shall not collect sales tax on WIC food purchases.

(3) Other provisions shall be added to the contracts or agreements to implement State agency options in paragraphs (k)(1)(iii), (k)(1)(iv), and (s)(5)(iv) of this section.

(3) Other provisions shall be added to the contracts or agreements to implement the State agency options in paragraphs (k)(2)(i), (k)(2)(ii), and (r)(5)(iv) of this section.

(g) *Periodic review of food vendor qualifications.* The State agency shall conduct a periodic review of the qualifications of all authorized food vendors under its jurisdiction, at least once every two years. The State agency shall establish criteria used to assess the adequacy of all food vendor qualifications. Based upon the results of such reviews the State agency shall make appropriate adjustments among the participating food vendors, such as termination of agreements.

(h) *Food vendor training and guidelines.* The State agency shall ensure that training is provided by the State or local agency for participating food vendors. The training shall be designed to prevent Program errors or abuse and to improve Program service.

(1) When vendor training is delegated to the local agency, the State agency

shall provide training to local agency staff on effective vendor training methods.

(2) Food vendors shall be provided with pertinent Program information and guidance concerning the authorized supplemental foods, including a list of acceptable brand name products.

(i) *Monitoring of food vendors.* The State agency shall be responsible for the monitoring of food vendors within its jurisdiction. If the State agency chooses to delegate all or part of this responsibility to local agencies, the State agency shall provide training to local agency staff in effective methods of vendor monitoring.

(1) The State agency shall design and implement a system to identify high risk vendors and ensure on-site monitoring, further investigation, and sanctioning of such vendors as appropriate. Criteria for identifying high risk vendors may include such considerations as level and/or severity of suspected overcharges in redeemed food instruments, errors in redeemed food instruments, or participant complaints.

(2) The State agency shall design and implement a system to conduct on-site monitoring visits to at least 10 percent of authorized food vendors per year, selected on a representative basis, in order to survey the types and levels of abuse and errors among participating food vendors and to take corrective action, as appropriate. The State agency may submit an alternate representative vendor monitoring plan, based on statistical sampling methods, for FNS approval.

(3) A summary of the results of the monitoring of high risk and representative food vendors and of the review of food instruments shall be submitted annually to FNS and within four months after the end of each fiscal year. Plans for improvement in the coming year shall be included in the State Plan, in accordance with §246.4.

(4) The following shall be documented for all on-site vendor monitoring visits, at a minimum: Names of both vendor and reviewer; date of review; nature of problem(s) detected or the observation that the vendor appears to be in compliance with Program requirements; how the vendor plans to correct deficiencies detected;

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and the signature of the reviewer. Methods of on-site monitoring visits may include, but are not limited to: compliance purchases, review of cashier check-out procedures, review of inventory records, and review of the availability and prices of Program supplemental foods.

(5) The State agency shall have the capability to conduct compliance purchases to collect evidence of improper vendor practices, or shall arrange for this responsibility to be assumed by the proper State or local authorities.

(j) *Participant and vendor complaints.* The State agency shall have procedures which document the handling of complaints by participants and vendors. Complaints of civil rights discrimination shall be handled in accordance with § 246.8(b).

(k) *Participant and vendor sanctions.*

(1) *Mandatory vendor sanctions.*

(i) *Permanent disqualification.* The State agency shall permanently disqualify a vendor convicted of trafficking in food instruments or selling firearms, ammunition, explosives, or controlled substances (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) in exchange for food instruments. A vendor shall not be entitled to receive any compensation for revenues lost as a result of such violation. If reflected in its State Plan, the State agency shall impose a civil money penalty in lieu of a disqualification for this violation when it determines, in its sole discretion, and documents (in accordance with paragraph (k)(8) of this section) that—

(A) Disqualification of the vendor would result in inadequate participant access; or

(B) The vendor had, at the time of the violation, an effective policy and program in effect to prevent trafficking; and the ownership of the vendor was not aware of, did not approve of, and was not involved in the conduct of the violation.

(ii) *Six-year disqualification.* The State agency shall disqualify a vendor for six years for: one incidence of buying or selling food instruments for cash (trafficking); or one incidence of selling firearms, ammunition, explosives, or controlled substances as defined in 21

U.S.C. 802, in exchange for food instruments.

(iii) *Three-year disqualification.* The State agency shall disqualify a vendor for three years for:

(A) One incidence of the sale of alcohol or alcoholic beverages or tobacco products in exchange for food instruments; or

(B) A pattern of claiming reimbursement for the sale of an amount of a specific supplemental food item which exceeds the store's documented inventory of that supplemental food item for a specific period of time; or

(C) A pattern of charging participants more for supplemental food than non-WIC customers or charging participants more than the current shelf or contract price; or

(D) A pattern of receiving, transacting and/or redeeming food instruments outside of authorized channels, including the use of an unauthorized vendor and/or an unauthorized person; or

(E) A pattern of charging for supplemental food not received by the participant; or

(F) A pattern of providing credit or non-food items, other than alcohol, alcoholic beverages, tobacco products, cash, firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802, in exchange for food instruments.

(iv) *One-year disqualification.* The State agency shall disqualify a vendor for one year for a pattern of providing unauthorized food items in exchange for food instruments, including charging for supplemental food provided in excess of those listed on the food instrument.

(v) *Second mandatory sanction.* When a vendor, who previously has been assessed a sanction for any of the violations in paragraphs (k)(1)(ii) through (k)(1)(iv) of this section, receives another sanction for any of these violations, the State agency shall double the second sanction. Civil money penalties may only be doubled up to the limits allowed under paragraph (k)(1)(x)(C) of this section.

(vi) *Third or subsequent mandatory sanction.* When a vendor, who previously has been assessed two or more

sanctions for any of the violations listed in paragraphs (k)(1)(ii) through (k)(1)(iv) of this section, receives another sanction for any of these violations, the State agency shall double the third sanction and all subsequent sanctions. The State agency shall not impose civil money penalties in lieu of disqualification for third or subsequent sanctions for violations listed in paragraphs (k)(1)(ii) through (k)(1)(iv) of this section.

(vii) *Disqualification based on a Food Stamp Program disqualification.* The State agency shall disqualify a vendor who has been disqualified from the Food Stamp Program. The disqualification shall be for the same length of time as the Food Stamp Program disqualification, may begin at a later date than the Food Stamp Program disqualification, and shall not be subject to administrative or judicial review under the WIC Program.

(viii) *Voluntary withdrawal or non-renewal of agreement.* The State agency shall not accept voluntary withdrawal of the vendor from the Program as an alternative to disqualification for the violations listed in paragraphs (k)(1)(i) through (k)(1)(iv) of this section, but shall enter the disqualification on the record. In addition, the State agency shall not use nonrenewal of the vendor agreement as an alternative to disqualification.

(ix) *Participant access determinations.* Prior to disqualifying a vendor for a Food Stamp Program disqualification pursuant to paragraph (k)(1)(vii) of this section or for any of the violations listed in paragraphs (k)(1)(ii) through (k)(1)(iv) of this section, the State agency shall determine if disqualification of the vendor would result in inadequate participant access. The participant access determination shall be made in accordance with paragraph (k)(8) of this section. If the State agency determines that disqualification of the vendor would result in inadequate participant access, the State agency shall impose a civil money penalty in lieu of disqualification. However, as provided in paragraph (k)(1)(vi) of this section, the State agency shall not impose a civil money penalty in lieu of disqualification for third or subsequent sanctions for violations in paragraphs

(k)(1)(ii) through (k)(1)(iv) of this section. The State agency shall include documentation of its participant access determination and any supporting documentation in the file of each vendor who is disqualified or receives a civil money penalty in lieu of disqualification.

(x) *Civil money penalty formula.* For each violation subject to a mandatory sanction, the State agency shall use the following formula to calculate a civil money penalty imposed in lieu of disqualification:

(A) Determine the vendor's average monthly redemptions for at least the 6-month period ending with the month immediately preceding the month during which the notice of administrative action is dated;

(B) Multiply the average monthly redemptions figure by 10 percent (.10);

(C) Multiply the product from paragraph (k)(1)(x)(B) of this section by the number of months for which the store would have been disqualified. This is the amount of the civil money penalty, provided that the civil money penalty shall not exceed \$10,000 for each violation. For a violation that warrants permanent disqualification, the amount of the civil money penalty shall be \$10,000. When during the course of a single investigation the State agency determines a vendor has committed multiple violations, the State agency shall impose a CMP for each violation. The total amount of civil money penalties imposed for violations investigated as part of a single investigation shall not exceed \$40,000.

(xi) *Notification to FNS.* The State agency shall provide the appropriate FNS office with a copy of the notice of administrative action and information on vendors it has either disqualified or imposed a civil money penalty in lieu of disqualification for any of the violations listed in paragraphs (k)(1)(i) through (k)(1)(iv) of this section. This information shall include the name of the vendor, address, identification number, the type of violation(s), and the length of disqualification or the length of the disqualification corresponding to the violation for which the civil money penalty was assessed, and shall be provided within 15 days after the vendor's opportunity to file

for a WIC administrative review has expired or all of the vendor's WIC administrative reviews have been completed.

(xii) *Multiple violations during a single investigation.* When during the course of a single investigation the State agency determines a vendor has committed multiple violations (which may include violations subject to State agency sanctions), the State agency shall disqualify the vendor for the period corresponding to the most serious mandatory violation. However, the State agency shall include all violations in the notice of administration action. If a mandatory sanction is not upheld on appeal, then the State agency may impose a State agency-established sanction.

(2) *State agency vendor sanctions.*

(i) The State agency may impose sanctions for violations that are not specified in paragraphs (k)(1)(i) through (k)(1)(iv) of this section as long as such violations and sanctions are included in the vendor agreement. State agency sanctions may include disqualifications, civil money penalties assessed in lieu of disqualification, and fines. The total period of disqualification imposed for State agency violations investigated as part of a single investigation may not exceed one year. A civil money penalty or fine shall not exceed \$10,000 for each violation. The total amount of civil money penalties imposed for violations investigated as part of a single investigation shall not exceed \$40,000.

(ii) The State agency may disqualify a vendor who has been assessed a civil money penalty for hardship in the Food Stamp Program, as provided under 7 CFR 278.6. The length of such disqualification shall correspond to the period for which the vendor would otherwise have been disqualified in the Food Stamp Program. If a State agency decides to exercise this option, the State agency shall:

(A) Include notification that it will take such disqualification action in its vendor agreement, in accordance with paragraph (f)(3) of this section; and

(B) Determine if disqualification of the vendor would result in inadequate participant access in accordance with paragraph (k)(8) of this section. If the State agency determines that disquali-

fication of the vendor would result in inadequate participant access, the State agency shall not disqualify the vendor or impose a civil money penalty in lieu of disqualification. The State agency shall include documentation of its participant access determination and any supporting documentation in each vendor's file.

(3) *Prior warning.* The State agency does not have to provide the vendor with prior warning that violations were occurring before imposing any of the sanctions in this paragraph (k).

(4) *Appeal procedures.* The State agency shall provide adequate procedures for vendors to appeal a disqualification from participation under the Program as specified in § 246.18.

(5) *Installment plans.* The State agency may use installment plans for the collection of civil money penalties and fines.

(6) *Failure to pay a civil money penalty.* If a vendor does not pay, only partially pays, or fails to timely pay a civil money penalty assessed in lieu of disqualification, the State agency shall disqualify the vendor for the length of the disqualification corresponding to the violation for which the civil money penalty was assessed (for a period corresponding to the most serious violation in cases where a mandatory sanction included the imposition of multiple civil money penalties as a result of a single investigation).

(7) *Actions in addition to sanctions.* Vendors may be subject to actions in addition to the sanctions in this section, such as claims for improper or overcharged food instruments and penalties outlined in § 246.23, in the case of deliberate fraud.

(8) *Participant access determination criteria.* When making participant access determinations, the State agency shall consider, at a minimum, the availability of other authorized vendors in the same area as the violative vendor and any geographic barriers to using such vendors.

(9) *Participant sanctions.* The State agency shall establish procedures designed to control participant abuse of the Program. Participant abuse includes, but is not limited to, intentionally making false or misleading

statements or intentionally misrepresenting, concealing or withholding facts to obtain benefits; sale of supplemental foods or food instruments to, or exchange with, other individuals or entities; receipt from food vendors of cash or credit toward purchase of unauthorized food or other items of value in lieu of authorized supplemental foods; and physical abuse, or threat of physical abuse, of clinic or vendor staff. The State agency shall establish sanctions for participant abuse. Such sanctions may, at the discretion of the State agency, include disqualification from the Program for a period up to three months. Warnings may be given prior to the imposition of sanctions. Before a participant is disqualified from the Program for alleged abuse, that participant shall be given full opportunity to appeal a disqualification as set forth in § 246.9.

(10) *Referral for prosecution.* The State agency shall refer food vendors and participants who abuse the Program to Federal, State or local authorities for prosecution under applicable statutes, where appropriate.

(l) *Control of food instruments.* The State agency shall control and provide accountability for the receipt and issuance of supplemental foods and food instruments. The State agency shall ensure that there is secure transportation and storage of unissued food instruments.

(m) *Payment to food vendors.* The State agency shall ensure that food vendors are promptly paid for food costs. Payments for valid food instruments shall be made within 60 days after receipt of the food instruments. Actual payment to food vendors may be made by local agencies.

(n) *Reconciliation of food instruments.* The State agency shall identify disposition of all food instruments as: Validly redeemed, lost or stolen, expired, duplicate, voided or not matching issuance records. Reconciliation of food instruments shall entail reconciliation of each food instrument issued with food instruments redeemed and adjustment of previously reported financial obligations to account for actual redemptions and other changes in the status of food instruments.

(1) Reconciliation of food instruments shall be performed within 150 days of the first valid date for participant use and shall be in accordance with the financial management requirements of § 246.13.

(2) The State agency shall be able to demonstrate to FNS its capability to reconcile a given redeemed food instrument to valid certification records.

(o) *Recipients of food instruments.* The State agency shall ensure that each participant or representative signs a receipt for supplemental foods or food instruments. This requirement shall not pertain to systems which deliver food instruments by alternate means pursuant to paragraph (r)(8) of this section, such as by mailing. The State agency shall establish uniform procedures which allow proxies designated by participants to act on their behalf. In determining whether an individual participant should be allowed to designate a proxy or proxies, there shall be consideration of whether there are adequate measures for the provision of nutrition education and health services to that participant.

(p) *Instructions to recipients.* The State agency shall ensure that participants and their proxies receive instructions on the proper use of food instruments, or on the procedures for receiving supplemental foods. Participants and their proxies shall also be notified that they have the right to complain about improper vendor practices with regard to Program responsibilities.

(q) *Conflict of interest.* The State agency shall ensure that no conflict of interest exists between any local agency and the food vendor or vendors within the local agency's jurisdiction.

(r) *Retail purchase systems.* Retail purchase food delivery systems are systems in which participants obtain supplemental foods by submitting a food instrument to local retail outlets. All retail purchase food delivery systems shall meet the following requirements:

(1) The State agency shall use uniform food instruments within its jurisdiction. The State agency is responsible for the design and printing of the uniform food instruments, and their serialization.

(2) Each food instrument shall clearly bear on its face the following information:

(i) The first date on which the food instrument may be used by the participant to obtain supplemental foods.

(ii) The last date by which the participant may use the food instrument to obtain supplemental foods. This date shall be a minimum of 30 days from the date specified in paragraph (r)(2)(i) of this section or, for the participant's first month of issuance, it may be the end of the month or cycle for which the food instrument is valid. Rather than entering a specific expiration date on each instrument, all instruments may be printed with a notice that the participant must transact them within a specified number of days after the first date on which the instrument may be used.

(iii) An expiration date by which the food vendor is required to submit the food instrument for payment. This date shall be no more than 90 days from the date specified in paragraph (r)(2)(i) of this section. If the date is less than 90 days, then the State agency shall ensure that the food vendor is able to submit food instruments for redemption within the required time limit without undue burden. This date may otherwise be printed as being no more than 90 days after the date in paragraph (r)(2)(i) of this section.

(iv) A unique and sequential serial number.

(v) At the discretion of the State agency, a maximum purchase price which is higher than the price of the food for which it will be used, but low enough to be a reasonable protection against potential losses of funds. When the maximum value is shown, the space for the actual value of the supplemental foods purchased shall be clearly distinguishable. For example, the words "actual amount of sale" could be printed larger and in a different area of the food instrument than the maximum value.

(3) The State agency shall implement requirements to ensure that the actual purchase price of the supplemental foods is recorded at the time of purchase. For example, the State agency may require that the food vendor write the purchase price on the food instru-

ment prior to the signature of the participant.

(4) The State agency shall implement procedures to ensure that every redeemed food instrument can be identified to the food vendor which redeemed the food instrument. If the vendor utilizes outlets, all outlets participating in the Program shall be identified. For example, the State agency may require that all authorized food vendors stamp their names on all redeemed food instruments prior to submission.

(5) The State agency shall establish procedures to ensure the propriety of redeemed food instruments.

(i) The State agency shall design and implement a system of review of food instrument to detect suspected overcharges and to identify food vendors with high levels of suspected overcharges.

(ii) The State agency shall design and implement a system of review of food instruments to detect errors, including, at least, purchase price missing, participant signature missing, vendor identification missing, redemption by vendor outside of the valid date and, as appropriate, altered prices. The State agency shall implement procedures to reduce the number of errors, where possible.

(iii) When payment for a food instrument is denied or delayed, or a claim for reimbursement is assessed, the affected food vendor shall have an opportunity to correct or justify the overcharge or error. For example, if the actual price is missing, the vendor may demonstrate what price should have been included. If the State agency is satisfied with the correction or justification, then it shall provide payment, or adjust the payment or claim to the vendor accordingly.

(iv) If a claim is assessed against a food vendor after the problem food instrument has been paid, the State agency may offset future payments to the food vendor for the amount of the claim. If a State agency chooses to utilize this option, it shall include a provision to this effect in its vendor agreement, in accordance with paragraph (f) of this section.

(6) With justification and documentation, State agencies may reimburse

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food vendors for food instruments submitted after the expiration date. If the total value of the food instruments submitted at one time exceeds \$200.00, reimbursement may not be made without the approval of the FNS Regional Office.

(7) The State agency shall ensure that no more than a three-month supply of food instruments is issued to any participant at one time and that nutrition education and health services are frequently made available to the participant.

(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.

(s) *Home food delivery systems.* Home food delivery systems are systems in which food is delivered to the participant's home. Systems for home delivery of food shall provide for—

(1) Uniform food instruments, where applicable, which comply with the appropriate requirements set forth in paragraph (s) of this section;

(2) Procurement of supplemental foods in accordance with §246.24, which may entail measures such as the purchase of food in bulk lots by the State agency and the use of discounts that are available to States. The selection

of home delivery vendors that are given exclusive contracts to an area shall conform to requirements of 7 CFR part 3016; and

(3) The accountable delivery of supplemental foods to participants. The State agency shall ensure that—

(i) Home delivery vendors are paid only after the delivery of supplemental foods to the participants;

(ii) There exists a routine procedure to verify the actual delivery of supplemental foods to participants. At a minimum, such verification must occur at least once a month; and

(iii) There is retention of records of delivery of supplemental foods and bills sent or payments received for such supplemental foods for at least three years and access of State, local and/or Federal authorities to such records.

(t) *Direct distribution systems.* Direct distribution food delivery systems are systems in which participants pick up food from storage facilities operated by the State or local agency. Systems for direct distribution of food shall provide for—

(1) Uniform food instruments, where applicable, which comply with the appropriate requirements set forth under paragraph (s) of this section;

(2) Adequate storage and insurance coverage that minimizes the danger of loss due to theft, infestation, fire, spoilage, or other causes;

(3) Adequate inventory control of food received, in stock, and issued;

(4) Procurement of supplemental foods in accordance with §246.24, which may entail measures such as purchase of food in bulk lots by the State agency and the use of discounts that are available to States;

(5) The availability of Program benefits to participants and potential participants who live at great distance from storage facilities; and

(6) The accountable delivery of supplemental foods to participants.

[50 FR 6121, Feb. 13, 1985, as amended at 52 FR 21237, June 4, 1987; 53 FR 35301, Sept. 13, 1988; 54 FR 51295, Dec. 14, 1989; 59 FR 11503, Mar. 11, 1994; 64 FR 13322, Mar. 18, 1999]

EFFECTIVE DATE NOTE: At 65 FR 83278, Dec. 29, 2000, §246.12 was revised effective February, 27, 2001. For the convenience of the user, the revised text is set forth as follows:

**§ 246.12 Food delivery systems.**

(a) *General.* This section sets forth design and operational requirements for food delivery systems. In recognition of emergent electronic benefits transfer (EBT) technology, FNS may, on a case-by-case basis, modify regulatory provisions to the extent FNS determines the particular EBT system provides adequate safeguards that serve the purpose of the provisions being modified.

(1) *Management.* The State agency is responsible for the fiscal management of, and accountability for, food delivery systems under its jurisdiction. The State agency may permit only authorized vendors, home food delivery contractors, and direct distribution sites to accept food instruments.

(2) *Design.* The State agency must design all food delivery systems to be used by its local agencies.

(3) *FNS oversight.* FNS may, for a stated cause and by written notice, require revision of a proposed or operating food delivery system and will allow a reasonable time for the State agency to effect such a revision.

(4) *Part 3016.* All contracts or agreements entered into by the State or local agency for the management or operation of food delivery systems must conform to the requirements of Part 3016 of this title.

(b) *Uniform food delivery systems.* The State agency may operate up to three types of food delivery systems under its jurisdiction—retail, home delivery, or direct distribution. Each system must be procedurally uniform throughout the jurisdiction of the State agency and must ensure adequate participant access to supplemental foods. When used, food instruments must be uniform within each type of system.

(c) *No charge for authorized supplemental foods.* The State agency must ensure that participants receive their authorized supplemental foods free of charge.

(d) *Compatibility of food delivery system.* The State agency must ensure that the food delivery system(s) selected is compatible with the delivery of health and nutrition education services to participants.

(e) *Retail food delivery systems: General.* Retail food delivery systems are systems in which participants, parents or caretakers of infant and child participants, and proxies obtain authorized supplemental foods by submitting a food instrument to an authorized vendor.

(f) *Retail food delivery systems: Food instrument requirements.* (1) *General.* State agencies using retail food delivery systems must use food instruments that comply with the requirements of paragraph (f)(2) of this section.

(2) *Printed food instruments.* Each printed food instrument must clearly bear on its face the following information:

(i) *Authorized supplemental foods.* The supplemental foods authorized to be obtained with the food instrument;

(ii) *First date of use.* The first date on which the food instrument may be used to obtain supplemental foods;

(iii) *Last date of use.* The last date on which the food instrument may be used to obtain authorized supplemental foods. This date must be a minimum of 30 days from the first date on which it may be used, except for the participant's first month of issuance, when it may be the end of the month or cycle for which the food instrument is valid. Rather than entering a specific last date of use on each instrument, all instruments may be printed with a notice that the participant must transact them within a specified number of days after the first date on which the food instrument may be used;

(iv) *Redemption period.* The date by which the vendor must submit the food instrument for redemption. This date must be no more than 90 days from the first date on which the food instrument may be used. If the date is fewer than 90 days, then the State agency must ensure that the allotted time provides the vendor sufficient time to submit the food instrument for redemption without undue burden;

(v) *Serial number.* A unique and sequential serial number;

(vi) *Purchase price.* A space for the purchase price to be entered. At the discretion of the State agency, a maximum price may be printed on the food instrument that is higher than the expected purchase price of the authorized supplemental foods for which it will be used, but that is low enough to protect against potential loss of funds. When a maximum price is printed on the food instrument, the space for the purchase price must be clearly distinguishable from the maximum price. For example, the words "purchase price" or "actual amount of sale" could be printed larger and in a different area of the food instrument than the maximum price; and

(vii) *Signature space.* A space where participants, parents or caretakers of infant or child participants, or proxies must sign.

(3) *Vendor identification.* The State agency must implement procedures to ensure each food instrument submitted for redemption can be identified by the vendor that submitted the food instrument. Each vendor operated by a single business entity must be identified separately. The State agency may identify vendors by requiring that all authorized vendors stamp their names and/or enter a vendor identification number on all food instruments prior to submitting them for redemption.

(g) *Retail food delivery systems: Vendor authorization.* (1) *General.* The State agency must authorize an appropriate number and distribution of vendors in order to ensure adequate participant access to supplemental foods and to ensure effective State agency

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management, oversight, and review of its authorized vendors.

(2) *Vendor limiting criteria.* The State agency may establish criteria to limit the number of stores it authorizes. The State agency must apply its limiting criteria consistently throughout its jurisdiction. Any vendor limiting criteria used by the State agency must be included in the State Plan in accordance with § 246.4(a)(14)(ii).

(3) *Vendor selection criteria.* The State agency must develop and implement criteria to select stores for authorization. The State agency must apply its selection criteria consistently throughout its jurisdiction. The State agency may reassess any authorized vendor at any time during the vendor's agreement period using the vendor selection criteria in effect at the time of the reassessment and must terminate the agreements with those vendors that fail to meet them. The vendor selection criteria must include the following categories and requirements and must be included in the State Plan in accordance with § 246.4(a)(14)(ii).

(i) *Competitive price and price limitations.* The State agency must consider the prices a vendor applicant charges for supplemental foods as compared to the prices charged by other vendor applicants and authorized vendors. The State agency may evaluate a vendor applicant based on its shelf prices or on the prices it bids for supplemental foods, which may not exceed its shelf prices. The State agency must also establish price limitations on the amount that it will pay vendors. The price limitations must be designed to ensure that the State agency does not pay a vendor at a level that would otherwise make the vendor ineligible for authorization. The State agency may establish different competitive price requirements and price limitations for different vendor peer groups, may include a factor to reflect fluctuations in wholesale prices in its price limitations, and may exempt pharmacy vendors that supply only exempt infant formula and/or WIC-eligible medical foods from both the competitive price selection criterion and the price limitations.

(ii) *Minimum variety and quantity of supplemental foods.* The State agency must establish minimum requirements for the variety and quantity of supplemental foods that a vendor applicant must stock to be authorized. The State agency may not authorize a vendor applicant unless it determines that the vendor applicant meets these minimums. The State agency may establish different minimums for different vendor peer groups.

(iii) *Business integrity.* The State agency must consider the business integrity of a vendor applicant. In determining the business integrity of a vendor applicant, the State agency may rely solely on facts already known to it and representations made by the vendor applicant on its vendor appli-

cation. The State agency is not required to establish a formal system of background checks for vendor applicants. Unless denying authorization of a vendor applicant would result in inadequate participant access, the State agency may not authorize a vendor applicant if during the last six years the vendor applicant or any of the vendor applicant's current owners, officers, or managers have been convicted of or had a civil judgment entered against them for any activity indicating a lack of business integrity. Activities indicating a lack of business integrity include fraud, antitrust violations, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, and obstruction of justice. The State agency may add other types of convictions or civil judgments to this list.

(iv) *Current Food Stamp Program disqualification or civil money penalty for hardship.* Unless denying authorization of a vendor applicant would result in inadequate participant access, the State agency may not authorize a vendor applicant that is currently disqualified from the Food Stamp Program or that has been assessed a Food Stamp Program civil money penalty for hardship and the disqualification period that would otherwise have been imposed has not expired.

(4) *On-site preauthorization visit.* The State agency must conduct an on-site visit prior to or at the time of a vendor's initial authorization.

(5) *Sale of store to circumvent WIC sanction.* The State agency may not authorize a vendor applicant if the State agency determines the store has been sold by its previous owner in an attempt to circumvent a WIC sanction. The State agency may consider such factors as whether the store was sold to a relative by blood or marriage of the previous owner(s) or sold to any individual or organization for less than its fair market value.

(6) *Impact on small businesses.* The State agency is encouraged to consider the impact of authorization decisions on small businesses.

(7) *Application periods.* The State agency may limit the periods during which applications for vendor authorization will be accepted and processed, except that applications must be accepted and processed at least once every three years. The State agency must develop procedures for processing vendor applications outside of its timeframes when it determines there will be inadequate participant access unless additional vendors are authorized.

(8) *Data collection at authorization.* At the time of application, the State agency must collect the vendor applicant's Food Stamp Program authorization number if the vendor applicant is authorized in that program. In addition, the State agency must collect the

vendor applicant's current shelf prices for supplemental foods.

(h) *Retail food delivery systems: Vendor agreements.* (1) *General.* (i) *Entering into agreements.* The State agency must enter into written agreements with all authorized vendors. The agreements must be for a period not to exceed three years. The agreement must be signed by a representative who has legal authority to obligate the vendor and a representative of the State agency. When the vendor representative is obligating more than one vendor, the agreement must specify all vendors covered by the agreement. When more than one vendor is specified in the agreement, the State agency may add or delete an individual vendor without affecting the remaining vendors. The State agency must require vendors to reapply at the expiration of their agreements and must provide vendors with not less than 15 days advance written notice of the expiration of their agreements.

(ii) *Delegation to local agencies.* The State agency may delegate to its local agencies the authority to sign vendor agreements if the State agency indicates its intention to do so in its State Plan in accordance with §246.4(a)(14)(iii). In such cases, the State agency must provide supervision and instruction to ensure the uniformity and quality of local agency activities.

(2) *Standard vendor agreement.* The State agency must use a standard vendor agreement throughout its jurisdiction, although the State agency may make exceptions to meet unique circumstances provided that it documents the reasons for such exceptions.

(3) *Vendor agreement provisions.* The vendor agreement must contain the following specifications, although the State agency may determine the exact wording to be used:

(i) *Acceptance of food instruments.* The vendor may accept food instruments only from participants, parents or caretakers of infant and child participants, or proxies.

(ii) *No substitutions, cash, credit, refunds, or exchanges.* The vendor may provide only the authorized supplemental foods listed on the food instrument. The vendor may not provide unauthorized food items, non-food items, cash, or credit (including rainchecks) in exchange for food instruments. The vendor may not provide refunds or permit exchanges for authorized supplemental foods obtained with food instruments, except for exchanges of an identical authorized supplemental food item when the original authorized supplemental food item is defective, spoiled, or has exceeded its "sell by," "best if used by," or other date limiting the sale or use of the food item. An identical authorized supplemental food item means the exact brand and size as the original authorized supplemental food item obtained and returned by the participant.

(iii) *Treatment of participants, parents/caretakers, and proxies.* The vendor must offer program participants, parents or caretakers of infant or child participants, and proxies the same courtesies offered to other customers.

(iv) *Time periods for transacting food instruments.* The vendor may accept a food instrument only within the specified time period.

(v) *Purchase price on food instruments.* The vendor must ensure that the purchase price is entered on food instruments in accordance with the procedures described in the vendor agreement. The State agency has the discretion to determine whether the vendor or the participant enters the purchase price. The purchase price must include only the authorized supplemental food items actually provided and must be entered on the food instrument before it is signed.

(vi) *Signature on food instruments.* For printed food instruments, the vendor must ensure the participant, parent or caretaker of an infant or child participant, or proxy signs the food instrument in the presence of the cashier. In EBT systems, a Personal Identification Number (PIN) may be used in lieu of a signature.

(vii) *Sales tax prohibition.* The vendor may not collect sales tax on authorized supplemental foods obtained with food instruments.

(viii) *Food instrument redemption.* The vendor must submit food instruments for redemption in accordance with the redemption procedures described in the vendor agreement. The vendor may redeem a food instrument only within the specified time period. As part of the redemption procedures, the State agency may make price adjustments to the purchase price on food instruments submitted by the vendor for redemption to ensure compliance with the price limitations applicable to the vendor.

(ix) *Vendor claims.* When the State agency determines the vendor has committed a vendor violation that affects the payment to the vendor, the State agency will delay payment or establish a claim. The State agency may delay payment or establish a claim in the amount of the full purchase price of each food instrument that contained the vendor overcharge or other error. The State agency will provide the vendor with an opportunity to justify or correct a vendor overcharge or other error. The vendor must pay any claim assessed by the State agency. In collecting a claim, the State agency may offset the claim against current and subsequent amounts to be paid to the vendor. In addition to denying payment or assessing a claim, the State agency may sanction the vendor for vendor overcharges or other errors in accordance with the State agency's sanction schedule.

(x) *No charge for authorized supplemental foods or restitution from participants.* The vendor may not charge participants, parents or

caretakers of infant and child participants, or proxies for authorized supplemental foods obtained with food instruments. In addition, the vendor may not seek restitution from these individuals for food instruments not paid or partially paid by the State agency.

(xi) *Training.* At least one representative of the vendor must participate in training annually. Annual vendor training may be provided by the State agency in a variety of formats, including newsletters, videos, and interactive training. The State agency will have sole discretion to designate the date, time, and location of all interactive training, except that the State agency will provide the vendor with at least one alternative date on which to attend such training.

(xii) *Vendor training of staff.* The vendor must inform and train cashiers and other staff on program requirements.

(xiii) *Accountability for owners, officers, managers, and employees.* The vendor is accountable for its owners, officers, managers, agents, and employees who commit vendor violations.

(xiv) *Monitoring.* The vendor may be monitored for compliance with program requirements.

(xv) *Recordkeeping.* The vendor must maintain inventory records used for Federal tax reporting purposes and other records the State agency may require for the period of time specified by the State agency in the vendor agreement. Upon request, the vendor must make available to representatives of the State agency, the Department, and the Comptroller General of the United States, at any reasonable time and place for inspection and audit, all food instruments in the vendor's possession and all program-related records.

(xvi) *Termination.* The State agency will immediately terminate the agreement if it determines that the vendor has provided false information in connection with its application for authorization. Either the State agency or the vendor may terminate the agreement for cause after providing advance written notice of a period of not less than 15 days to be specified by the State agency.

(xvii) *Change in ownership or location or cessation of operations.* The vendor must provide the State agency advance written notification of any change in vendor ownership, store location, or cessation of operations. In such instances, the State agency will terminate the vendor agreement, except that the State agency may permit vendors to move short distances without terminating the agreement. The State agency has the discretion to determine the length of advance notice required for vendors reporting changes under this provision, whether a change in location qualifies as a short distance, and whether a change in business structure constitutes a change in ownership.

(xviii) *Sanctions.* In addition to claims collection, the vendor may be sanctioned for vendor violations in accordance with the State agency's sanction schedule. Sanctions may include administrative fines, disqualification, and civil money penalties in lieu of disqualification. The State agency does not have to provide the vendor with prior warning that violations were occurring before imposing such sanctions.

(xix) *Conflict of interest.* The State agency will terminate the agreement if the State agency identifies a conflict of interest, as defined by applicable State laws, regulations, and policies, between the vendor and the State agency or its local agencies.

(xx) *Criminal penalties.* A vendor who commits fraud or abuse in the Program is liable to prosecution under applicable Federal, State or local laws. Those who have willfully misapplied, stolen or fraudulently obtained program funds will be subject to a fine of not more than \$10,000 or imprisonment for not more than five years or both, if the value of the funds is \$100 or more. If the value is less than \$100, the penalties are a fine of not more than \$1,000 or imprisonment for not more than one year or both.

(xxi) *Not a license/property interest.* The vendor agreement does not constitute a license or a property interest. If the vendor wishes to continue to be authorized beyond the period of its current agreement, the vendor must reapply for authorization. If a vendor is disqualified, the State agency will terminate the vendor's agreement, and the vendor will have to reapply in order to be authorized after the disqualification period is over. In all cases, the vendor's new application will be subject to the State agency's vendor selection criteria and any vendor limiting criteria in effect at the time of the reapplication.

(xxii) *Compliance with vendor agreement, statutes, regulations, policies, and procedures.* The vendor must comply with the vendor agreement and Federal and State statutes, regulations, policies, and procedures governing the Program, including any changes made during the agreement period.

(xxiii) *Nondiscrimination regulations.* The vendor must comply with the nondiscrimination provisions of Departmental regulations (Parts 15, 15a and 15b of this title).

(xxiv) *Compliance with vendor selection criteria.* The vendor must comply with the vendor selection criteria throughout the agreement period, including any changes to the criteria. Using the current vendor selection criteria, the State agency may reassess the vendor at any time during the agreement period. The State agency will terminate the vendor agreement if the vendor fails to meet the current vendor selection criteria.

(xxv) *Reciprocal Food Stamp Program disqualification for WIC Program disqualifications.* Disqualification from the WIC Program may

result in disqualification as a retailer in the Food Stamp Program. Such disqualification may not be subject to administrative or judicial review under the Food Stamp Program.

(4) *Purchase price and redemption procedures.* The State agency must describe in the vendor agreement its purchase price and redemption procedures. The redemption procedures must ensure that the State agency does not pay a vendor more than the price limitations applicable to the vendor.

(5) *Sanction schedule.* The State agency must include its sanction schedule in the vendor agreement or as an attachment to it. The sanction schedule must include all mandatory and State agency vendor sanctions and must be consistent with paragraph (1) of this section. If the sanction schedule is in State law or regulations or in a document provided to the vendor at the time of authorization, the State agency instead may include an appropriate cross-reference in the vendor agreement.

(6) *Actions subject to administrative review and review procedures.* The State agency must include the adverse actions a vendor may appeal and those adverse actions that are not subject to administrative review. The State agency also must include a copy of the State agency's administrative review procedures in the vendor agreement or as an attachment to it or must include a statement that the review procedures are available upon request and the applicable review procedures will be provided along with an adverse action subject to administrative review. These items must be consistent with § 246.18. If these items are in State law or regulations or in a document provided to the vendor at the time of authorization, the State agency instead may include an appropriate cross-reference in the vendor agreement.

(7) *Notification of program changes.* The State agency must notify vendors of changes to Federal or State statutes, regulations, policies, or procedures governing the Program before the changes are implemented. The State agency should give as much advance notice as possible.

(i) *Retail food delivery systems: Vendor training.* (1) *General requirements.* The State agency must provide training annually to at least one representative of each vendor. Prior to or at the time of a vendor's initial authorization, and at least once every three years thereafter, the training must be in an interactive format that includes a contemporaneous opportunity for questions and answers. The State agency must designate the date, time, and location of the interactive training and the audience (e.g., managers, cashiers, etc.) to which the training is directed. The State agency must provide vendors with at least one alternative date on which to attend interactive training. Examples of acceptable vendor training include on-site cashier training, off-site classroom-style train-the-train-

er or manager training, a training video, and a training newsletter. All vendor training must be designed to prevent program errors and noncompliance and improve program service.

(2) *Content.* The annual training must include instruction on the purpose of the Program, the supplemental foods authorized by the State agency, the minimum varieties and quantities of authorized supplemental foods that must be stocked by vendors, the procedures for transacting and redeeming food instruments, the vendor sanction system, the vendor complaint process, the claims procedures, and any changes to program requirements since the last training.

(3) *Delegation.* The State agency may delegate vendor training to a local agency, a contractor, or a vendor representative if the State agency indicates its intention to do so in its State Plan in accordance with § 246.4(a)(14)(xi). In such cases, the State agency must provide supervision and instruction to ensure the uniformity and quality of vendor training.

(4) *Documentation.* The State agency must document the content of and vendor participation in vendor training.

(j) *Retail food delivery systems: Monitoring vendors and identifying high-risk vendors.* (1) *General requirements.* The State agency must design and implement a system for monitoring its vendors for compliance with program requirements. The State agency may delegate vendor monitoring to a local agency or contractor if the State agency indicates its intention to do so in its State Plan in accordance with § 246.4(a)(14)(iv). In such cases, the State agency must provide supervision and instruction to ensure the uniformity and quality of vendor monitoring.

(2) *Routine monitoring.* The State agency must conduct routine monitoring visits on a minimum of five percent of the number of vendors authorized by the State agency as of October 1 of each fiscal year in order to survey the types and levels of abuse and errors among authorized vendors and to take corrective actions, as appropriate. The State agency must develop criteria to determine which vendors will receive routine monitoring visits and must include such criteria in its State Plan in accordance with § 246.4(a)(14)(iv).

(3) *Identifying high-risk vendors.* The State agency must identify high-risk vendors at least once a year using criteria developed by FNS and/or other statistically-based criteria developed by the State agency. FNS will not change its criteria more frequently than once every two years and will provide adequate advance notification of changes prior to implementation. The State agency may develop and implement additional criteria. All State agency-developed criteria must be approved by FNS.

(4) *Compliance investigations.* (i) *High-risk vendors.* The State agency must conduct compliance investigations of a minimum of five percent of the number of vendors authorized by the State agency as of October 1 of each fiscal year. The State agency must conduct compliance investigations on all high-risk vendors up to the five percent minimum. The State agency may count toward this requirement a compliance investigation of a high-risk vendor conducted by a Federal, State, or local law enforcement agency. The State agency also may count toward this requirement a compliance investigation conducted by another WIC State agency provided that the State agency implements the option to establish State agency sanctions based on mandatory sanctions imposed by the other WIC State agency, as specified in paragraph (1)(2)(iii) of this section. A compliance investigation of a high-risk vendor may be considered complete when the State agency determines that a sufficient number of compliance buys have been conducted to provide evidence of program noncompliance, when two compliance buys have been conducted in which no program violations are found, or when an inventory audit has been completed.

(ii) *Randomly selected vendors.* If fewer than five percent of the State agency's authorized vendors are identified as high-risk, the State agency must randomly select additional vendors on which to conduct compliance investigations sufficient to meet the five-percent requirement. A compliance investigation of a randomly selected vendor may be considered complete when the State agency determines that a sufficient number of compliance buys have been conducted to provide evidence of program noncompliance, when two compliance buys are conducted in which no program violations are found, or when an inventory audit has been completed.

(iii) *Prioritization.* If more than five percent of the State agency's vendors are identified as high-risk, the State agency must prioritize such vendors so as to perform compliance investigations of those determined to have the greatest potential for program noncompliance and/or loss of funds.

(5) *Monitoring report.* For each fiscal year, the State agency must send FNS a summary of the results of its vendor monitoring containing information stipulated by FNS. The report must be sent by February 1 of the following fiscal year. Plans for improvement in the coming year must be included in the State Plan in accordance with § 246.4(a)(14)(iv).

(6) *Documentation.*

(i) *Monitoring visits.* The State agency must document the following information for all monitoring visits, including routine monitoring visits, inventory audits, and compliance buys:

(A) the date of the monitoring visit, inventory audit, or compliance buy;

(B) the name(s) and signature(s) of the reviewer(s); and

(C) the nature of any problem(s) detected.

(ii) *Compliance buys.* For compliance buys, the State agency must also document:

(A) the date of the buy;

(B) a description of the cashier involved in each transaction;

(C) the types and quantities of items purchased, current shelf prices or prices charged other customers, and price charged for each item purchased, if available. Price information may be obtained prior to, during, or subsequent to the compliance buy; and

(D) the final disposition of all items as destroyed, donated, provided to other authorities, or kept as evidence.

(k) *Retail food delivery systems: Vendor claims.* (1) *System to review food instruments.*

The State agency must design and implement a system to review food instruments submitted by vendors for redemption to ensure compliance with the applicable price limitations and to detect questionable food instruments, suspected vendor overcharges, and other errors. This review must examine either all or a representative sample of the food instruments and may be done either before or after the State agency makes payments on the food instruments. The review must include a price comparison or other edit designed to ensure compliance with the applicable price limitations and to assist in detecting vendor overcharges. For printed food instruments, the system also must detect the following errors: purchase price missing; participant, parent/caretaker, or proxy signature missing; vendor identification missing; food instruments transacted or redeemed after the specified time periods; and, as appropriate, altered purchase price. The State agency must take follow-up action within 120 days of detecting any questionable food instruments, suspected vendor overcharges, and other errors and must implement procedures to reduce the number of errors when possible.

(2) *Delaying payment and establishing a claim.* When the State agency determines the vendor has committed a vendor violation that affects the payment to the vendor, the State agency must delay payment or establish a claim. Such vendor violations may be detected through compliance investigations, food instrument reviews, or other reviews or investigations of a vendor's operations. The State agency may delay payment or establish a claim in the amount of the full purchase price of each food instrument that contained the vendor overcharge or other error.

(3) *Opportunity to justify or correct.* When payment for a food instrument is delayed or a claim is established, the State agency must provide the vendor with an opportunity to justify or correct the vendor overcharge

or other error. If satisfied with the justification or correction, the State agency must provide payment or adjust the proposed claim accordingly.

(4) *Timeframe and offset.* The State agency must deny payment or initiate claims collection action within 90 days of either the date of detection of the vendor violation or the completion of the review or investigation giving rise to the claim, whichever is later. Claims collection action may include offset against current and subsequent amounts owed to the vendor.

(5) *Food instruments redeemed after the specified period.* With justification and documentation, the State agency may pay vendors for food instruments submitted for redemption after the specified period for redemption. If the total value of such food instruments submitted at one time exceeds \$500.00, the State agency must obtain the approval of the FNS Regional Office before payment.

(1) *Retail food delivery systems: Vendor sanctions—(1) Mandatory vendor sanctions—(i) Permanent disqualification.* The State agency must permanently disqualify a vendor convicted of trafficking in food instruments or selling firearms, ammunition, explosives, or controlled substances (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) in exchange for food instruments. A vendor is not entitled to receive any compensation for revenues lost as a result of such violation. If reflected in its State Plan, the State agency may impose a civil money penalty in lieu of a disqualification for this violation when it determines, in its sole discretion, and documents that:

(A) Disqualification of the vendor would result in inadequate participant access; or

(B) The vendor had, at the time of the violation, an effective policy and program in effect to prevent trafficking; and the ownership of the vendor was not aware of, did not approve of, and was not involved in the conduct of the violation.

(ii) *Six-year disqualification.* The State agency must disqualify a vendor for six years for:

(A) One incidence of buying or selling food instruments for cash (trafficking); or

(B) One incidence of selling firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802, in exchange for food instruments.

(iii) *Three-year disqualification.* The State agency must disqualify a vendor for three years for:

(A) One incidence of the sale of alcohol or alcoholic beverages or tobacco products in exchange for food instruments;

(B) A pattern of claiming reimbursement for the sale of an amount of a specific supplemental food item which exceeds the store's documented inventory of that supplemental food item for a specific period of time;

(C) A pattern of vendor overcharges;

(D) A pattern of receiving, transacting and/or redeeming food instruments outside of authorized channels, including the use of an unauthorized vendor and/or an unauthorized person;

(E) A pattern of charging for supplemental food not received by the participant; or

(F) A pattern of providing credit or non-food items, other than alcohol, alcoholic beverages, tobacco products, cash, firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802, in exchange for food instruments.

(iv) *One-year disqualification.* The State agency must disqualify a vendor for one year for a pattern of providing unauthorized food items in exchange for food instruments, including charging for supplemental foods provided in excess of those listed on the food instrument.

(v) *Second mandatory sanction.* When a vendor, who previously has been assessed a sanction for any of the violations in paragraphs (1)(1)(ii) through (1)(1)(iv) of this section, receives another sanction for any of these violations, the State agency must double the second sanction. Civil money penalties may only be doubled up to the limits allowed under paragraph (1)(1)(x)(C) of this section.

(vi) *Third or subsequent mandatory sanction.* When a vendor, who previously has been assessed two or more sanctions for any of the violations listed in paragraphs (1)(1)(ii) through (1)(1)(iv) of this section, receives another sanction for any of these violations, the State agency must double the third sanction and all subsequent sanctions. The State agency may not impose civil money penalties in lieu of disqualification for third or subsequent sanctions for violations listed in paragraphs (1)(1)(ii) through (1)(1)(iv) of this section.

(vii) *Disqualification based on a Food Stamp Program disqualification.* The State agency must disqualify a vendor who has been disqualified from the Food Stamp Program. The disqualification must be for the same length of time as the Food Stamp Program disqualification, may begin at a later date than the Food Stamp Program disqualification, and is not subject to administrative or judicial review under the WIC Program.

(viii) *Voluntary withdrawal or nonrenewal of agreement.* The State agency may not accept voluntary withdrawal of the vendor from the Program as an alternative to disqualification for the violations listed in paragraphs (1)(1)(i) through (1)(1)(iv) of this section, but must enter the disqualification on the record. In addition, the State agency may not use nonrenewal of the vendor agreement as an alternative to disqualification.

(ix) *Participant access determinations.* Prior to disqualifying a vendor for a Food Stamp Program disqualification pursuant to paragraph (1)(1)(vii) of this section or for any of

the violations listed in paragraphs (1)(1)(ii) through (1)(1)(iv) of this section, the State agency must determine if disqualification of the vendor would result in inadequate participant access. The State agency must make the participant access determination in accordance with paragraph (1)(8) of this section. If the State agency determines that disqualification of the vendor would result in inadequate participant access, the State agency must impose a civil money penalty in lieu of disqualification. However, as provided in paragraph (1)(1)(vi) of this section, the State agency may not impose a civil money penalty in lieu of disqualification for third or subsequent sanctions for violations in paragraphs (1)(1)(ii) through (1)(1)(iv) of this section. The State agency must include documentation of its participant access determination and any supporting documentation in the file of each vendor who is disqualified or receives a civil money penalty in lieu of disqualification.

(x) *Civil money penalty formula.* For each violation subject to a mandatory sanction, the State agency must use the following formula to calculate a civil money penalty imposed in lieu of disqualification:

(A) Determine the vendor's average monthly redemptions for at least the 6-month period ending with the month immediately preceding the month during which the notice of adverse action is dated;

(B) Multiply the average monthly redemptions figure by 10 percent (.10);

(C) Multiply the product from paragraph (1)(1)(x)(B) of this section by the number of months for which the store would have been disqualified. This is the amount of the civil money penalty, provided that the civil money penalty shall not exceed \$10,000 for each violation. For a violation that warrants permanent disqualification, the amount of the civil money penalty shall be \$10,000. When during the course of a single investigation the State agency determines a vendor has committed multiple violations, the State agency must impose a CMP for each violation. The total amount of civil money penalties imposed for violations investigated as part of a single investigation may not exceed \$40,000.

(xi) *Notification to FNS.* The State agency must provide the appropriate FNS office with a copy of the notice of adverse action and information on vendors it has either disqualified or imposed a civil money penalty in lieu of disqualification for any of the violations listed in paragraphs (1)(1)(i) through (1)(1)(iv) of this section. This information must include the name of the vendor, address, identification number, the type of violation(s), and the length of disqualification or the length of the disqualification corresponding to the violation for which the civil money penalty was assessed, and must be provided within 15 days after the vendor's

opportunity to file for a WIC administrative review has expired or all of the vendor's WIC administrative reviews have been completed.

(xii) *Multiple violations during a single investigation.* When during the course of a single investigation the State agency determines a vendor has committed multiple violations (which may include violations subject to State agency sanctions), the State agency must disqualify the vendor for the period corresponding to the most serious mandatory violation. However, the State agency must include all violations in the notice of administration action. If a mandatory sanction is not upheld on appeal, then the State agency may impose a State agency-established sanction.

(2) *State agency vendor sanctions.* (i) *General requirements.* The State agency may impose sanctions for vendor violations that are not specified in paragraphs (1)(1)(i) through (1)(1)(iv) of this section as long as such vendor violations and sanctions are included in the State agency's sanction schedule. State agency sanctions may include disqualifications, civil money penalties assessed in lieu of disqualification, and administrative fines. The total period of disqualification imposed for State agency violations investigated as part of a single investigation may not exceed one year. A civil money penalty or fine may not exceed \$10,000 for each violation. The total amount of civil money penalties and administrative fines imposed for violations investigated as part of a single investigation may not exceed \$40,000.

(ii) *Food Stamp Program civil money penalty for hardship.* The State agency may disqualify a vendor that has been assessed a civil money penalty for hardship in the Food Stamp Program, as provided under § 278.6 of this chapter. The length of such disqualification must correspond to the period for which the vendor would otherwise have been disqualified in the Food Stamp Program. If a State agency decides to exercise this option, the State agency must:

(A) Include notification that it will take such disqualification action in its sanction schedule; and

(B) Determine if disqualification of the vendor would result in inadequate participant access in accordance with paragraph (1)(8) of this section. If the State agency determines that disqualification of the vendor would result in inadequate participant access, the State agency may not disqualify the vendor or impose a civil money penalty in lieu of disqualification. The State agency must include documentation of its participant access determination and any supporting documentation in each vendor's file.

(iii) *A mandatory sanction by another WIC State agency.* The State agency may disqualify a vendor that has been disqualified or assessed a civil money penalty in lieu of disqualification by another WIC State agency

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for a mandatory vendor sanction. The length of the disqualification must be for the same length of time as the disqualification by the other WIC State agency or, in the case of a civil money penalty in lieu of disqualification assessed by the other WIC State agency, for the same length of time for which the vendor would otherwise have been disqualified. The disqualification may begin at a later date than the sanction imposed by the other WIC State agency. If a State agency decides to exercise this option, the State agency must:

(A) Include notification that it will take such action in its sanction schedule; and

(B) Determine if disqualification of the vendor would result in inadequate participant access in accordance with paragraph (1)(8) of this section. If the State agency determines that disqualification of the vendor would result in inadequate participant access, the State agency must impose a civil money penalty in lieu of disqualification, except that the State agency may not impose a civil money penalty in situations in which the vendor has been assessed a civil money penalty in lieu of disqualification by the other WIC State agency. Any civil money penalty in lieu of disqualification must be calculated in accordance with paragraph (1)(2)(x) of this section. The State agency must include documentation of its participant access determination and any supporting documentation in each vendor's file.

(3) *Prior warning.* The State agency does not have to provide the vendor with prior warning that violations were occurring before imposing any of the sanctions in paragraph (1) of this section.

(4) *Administrative reviews.* The State agency must provide administrative reviews of sanctions to the extent required by § 246.18.

(5) *Installment plans.* The State agency may use installment plans for the collection of civil money penalties and administrative fines.

(6) *Failure to pay a civil money penalty.* If a vendor does not pay, only partially pays, or fails to timely pay a civil money penalty assessed in lieu of disqualification, the State agency must disqualify the vendor for the length of the disqualification corresponding to the violation for which the civil money penalty was assessed (for a period corresponding to the most serious violation in cases where a mandatory sanction included the imposition of multiple civil money penalties as a result of a single investigation).

(7) *Actions in addition to sanctions.* Vendors may be subject to actions in addition to the sanctions in this section, such as claims pursuant to paragraph (k) of this section and the penalties set forth in § 246.23(c) in the case of deliberate fraud.

(8) *Participant access determination criteria.* The State agency must develop participant access criteria. When making participant ac-

cess determinations, the State agency must consider the availability of other authorized vendors in the same area as the violative vendor and any geographic barriers to using such vendors.

(9) *Termination of agreement.* When the State agency disqualifies a vendor, the State agency must also terminate the vendor agreement.

(m) *Home food delivery systems.* Home food delivery systems are systems in which authorized supplemental foods are delivered to the participant's home. Home food delivery systems must provide for:

(1) *Procurement.* Procurement of supplemental foods in accordance with § 246.24, which may entail measures such as the purchase of food in bulk lots by the State agency and the use of discounts that are available to States.

(2) *Accountability.* The accountable delivery of authorized supplemental foods to participants. The State agency must ensure that:

(i) Home food delivery contractors are paid only after the delivery of authorized supplemental foods to participants;

(ii) A routine procedure exists to verify the correct delivery of authorized supplemental foods to participants, and, at a minimum, such verification occurs at least once a month after delivery; and

(iii) Records of delivery of supplemental foods and bills sent or payments received for such supplemental foods are retained for at least three years. Federal, State, and local authorities must have access to such records.

(n) *Direct distribution food delivery systems.* Direct distribution food delivery systems are systems in which participants, parents or caretakers of infant or child participants, or proxies pick up authorized supplemental foods from storage facilities operated by the State agency or its local agencies. Direct distribution food delivery systems must provide for:

(1) *Storage and insurance.* Adequate storage and insurance coverage that minimizes the danger of loss due to theft, infestation, fire, spoilage, or other causes;

(2) *Inventory.* Adequate inventory control of supplemental foods received, in stock, and issued;

(3) *Procurement.* Procurement of supplemental foods in accordance with § 246.24, which may entail measures such as purchase of food in bulk lots by the State agency and the use of discounts that are available to States;

(4) *Availability.* The availability of program benefits to participants and potential participants who live at great distance from storage facilities; and

(5) *Accountability.* The accountable delivery of authorized supplemental foods to participants.

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(o) *Participant, parent/caretaker, proxy, vendor, and home food delivery contractor complaints.* The State agency must have procedures to document the handling of complaints by participants, parents or caretakers of infant or child participants, proxies, vendors, home food delivery contractors, and direct distribution contractors. Complaints of civil rights discrimination must be handled in accordance with §246.8(b).

(p) *Food instrument security.* The State agency must develop standards for ensuring the security of food instruments from the time the food instruments are created to the time they are issued to participants, parents/caretakers, or proxies. For pre-printed food instruments, these standards must include maintenance of perpetual inventory records of food instruments throughout the State agency's jurisdiction; monthly physical inventory of food instruments on hand throughout the State agency's jurisdiction; reconciliation of perpetual and physical inventories of food instruments; and maintenance of all food instruments under lock and key, except for supplies needed for immediate use. For EBT and print-on-demand food instruments, the standards must provide for the accountability and security of the means to manufacture and issue such food instruments.

(q) *Food instrument disposition.* The State agency must account for the disposition of all food instruments as either issued or voided, and as either redeemed or unredeemed. Redeemed food instruments must be identified as validly issued, lost, stolen, expired, duplicate, or not matching valid enrollment and issuance records. In an EBT system, evidence of matching redeemed food instruments to valid enrollment and issuance records may be satisfied through the linking of the Primary Account Number (PAN) associated with the electronic transaction to valid enrollment and issuance records. This process must be performed within 150 days of the first valid date for participant use of the food instruments and must be conducted in accordance with the financial management requirements of §246.13. The State agency will be subject to claims as outlined in §246.23(a)(4) for redeemed food instruments that do not meet the conditions established in paragraph (q) of this section.

(r) *Issuance of food instruments and authorized supplemental foods.* The State agency must:

(1) *Parents/caretakers and proxies.* Establish uniform procedures that allow parents and caretakers of infant and child participants and proxies to obtain and transact food instruments or obtain authorized supplemental foods on behalf of a participant. In determining whether a particular participant or parent/caretaker should be allowed to designate a proxy or proxies, the State agency must require the local agency or clinic to

consider whether adequate measures can be implemented to provide nutrition education and health care referrals to that participant or, in the case of an infant or child participant, to the participant's parent or caretaker;

(2) *Signature requirement.* Ensure that the participant, parent or caretaker of an infant or child participant, or proxy signs for receipt of food instruments or authorized supplemental foods, except as provided in paragraph (r)(4) of this section;

(3) *Instructions.* Ensure that participants, parents or caretakers of infant and child participants, and proxies receive instructions on the proper use of food instruments, or on the procedures for obtaining authorized supplemental foods when food instruments are not used. The State agency must also ensure that participants, parents or caretakers of infant and child participants, and proxies are notified that they have the right to complain about improper vendor and home food delivery contractor practices with regard to program responsibilities;

(4) *Food instrument pick up.* Require participants, parents and caretakers of infant and child participants, and proxies to pick up food instruments in person 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 through an alternative means such as EBT or mailing, unless FNS determines that such actions would jeopardize the integrity of program services or program accountability. If a State agency opts to mail food instruments, it must provide justification, as part of its alternative issuance system in its State Plan, as required in §246.4(a)(21), for mailing food instruments to areas where food stamps are not mailed. State agencies that opt to mail food instruments must establish and implement a system that ensures the return of food instruments to the State or local agency if a participant no longer resides or receives mail at the address to which the food instruments were mailed; and

(5) *Maximum issuance of food instruments.* Ensure that no more than a three-month supply of food instruments or a one-month supply of authorized supplemental foods is issued at any one time to any participant, parent or caretaker of an infant or child participant, or proxy.

(s) *Payment to vendors and home food delivery contractors.* The State agency must ensure that vendors and home food delivery contractors are paid promptly. Payment must be made within 60 days after valid food instruments are submitted for redemption. Actual payment to vendors and home food delivery contractors may be made by local agencies.

(t) *Conflict of interest.* The State agency must ensure that no conflict of interest exists, as defined by applicable State laws, regulations, and policies, between the State agency and any vendor or home food delivery contractor, or between any local agency and any vendor or home food delivery contractor under its jurisdiction.

(u) *Participant violations and sanctions.* (1) *General requirements.* The State agency must establish procedures designed to control participant violations. The State agency also must establish sanctions for participant violations. Participant sanctions may include disqualification from the Program for a period of up to one year.

(2) *Mandatory disqualification.* (i) *General.* Except as provided in paragraphs (u)(2)(ii) and (u)(2)(iii) of this section, whenever the State agency assesses a claim of \$100 or more, assesses a claim for dual participation, or assess a second or subsequent claim of any amount, the State agency must disqualify the participant for one year.

(ii) *Exceptions to mandatory disqualification.* The State agency may decide not to impose a mandatory disqualification if, within 30 days of receipt of the letter demanding repayment, full restitution is made or a repayment schedule is agreed on, or, in the case of a participant who is an infant, child, or under age 18, the State or local agency approves the designation of a proxy.

(iii) *Terminating a mandatory disqualification.* The State agency may permit a participant to reapply for the Program before the end of a mandatory disqualification period if full restitution is made or a repayment schedule is agreed upon or, in the case of a participant who is an infant, child, or under age 18, the State or local agency approves the designation of a proxy.

(3) *Warnings before sanctions.* The State agency may provide warnings before imposing participant sanctions.

(4) *Fair hearings.* At the time the State agency notifies a participant of a disqualification, the State agency must advise the participant of the procedures to follow to obtain a fair hearing pursuant to §246.9.

(5) *Referral to law enforcement authorities.* When appropriate, the State agency must refer vendors, home food delivery contractors, and participants who violate program requirements to Federal, State, or local authorities for prosecution under applicable statutes.

#### §246.13 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 Program. This shall include an accounting for all property and other as-

sets and all Program funds received and expended each fiscal year.

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

(c) *Record of expenditures.* The State agency shall maintain records which adequately identify the source and use of funds expended for Program 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 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 Program 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) *Use of minority- and women-owned banks.* Consistent with the national goals of expanding opportunities for minority business enterprises, State and local agencies are encouraged to use minority- and women-owned banks.

(h) *Reconciliation of food instruments.* The State agency shall reconcile food instruments in accordance with §246.12(n).

(i) *Transfer of cash.* The State agency shall have controls to minimize the time elapsing between receipt of Federal funds from the U.S. Department of Treasury and the disbursements of these funds for Program costs. In the Letter of Credit system, the State agency shall make drawdowns from the U.S. Department of Treasury's Regional Disbursing Office as close as

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possible to the actual date that disbursement of funds is made. Advances made by the State agency to local agencies shall also conform to these same standards.

(j) *Local agency financial management.* The State agency shall ensure that all local agencies develop and implement a financial management system consistent with requirements prescribed by FNS and the State agency pursuant to the requirements of this section.

[50 FR 6121, Feb. 13, 1985; 50 FR 8098, Feb. 28, 1985]

EFFECTIVE DATE NOTE: At 65 FR 83286, Dec. 29, 2000, in §246.13 paragraph (h) was revised, eff. Feb. 27, 2001. For the convenience of the user, the revised text is set forth as follows:

**§ 246.13 Financial management system.**

\* \* \* \* \*

(h) *Adjustment of expenditures.* The State agency must adjust projected expenditures to account for redeemed food instruments and for other changes as appropriate.

**§ 246.14 Program costs.**

(a) *General.* (1) The two kinds of allowable costs under the Program are "food costs" and "nutrition services and administration costs." In general, costs necessary to the fulfillment of Program objectives are to be considered allowable costs. The two types of nutrition services and administration costs are:

(i) Direct costs. Those direct costs that are allowable under 7 CFR part 3016.

(ii) Indirect costs. Those indirect costs that are allowable under 7 CFR part 3016. When computing indirect costs, food costs may not be used in the base to which the indirect cost rate is applied. In accordance with the provisions of 7 CFR part 3016, a claim for indirect costs shall be supported by an approved allocation plan for the determination of allowable indirect costs.

(2) Except as provided in paragraph (e) of this section and §§246.16(g) and 246.16(h) of this part, funds allocated by FNS for food purchases may not be used to pay nutrition services and administration costs. However, nutrition services and administration funds may be used to pay for food costs.

(b) *What costs may I charge to the food grant?*

(1) The State agency may use food funds for costs of:

(i) Acquiring supplemental foods provided to State or local agencies or participants, whichever receives the supplemental food first;

(ii) Warehousing supplemental foods; and

(iii) Purchasing and renting breast pumps.

(2) For costs to be allowable, the State agency must ensure that food costs do not exceed the vendor's customary sales price. For example, in retail purchase systems, food costs may not exceed the shelf price of the supplemental food provided.

(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 its proportionate share of the national minimum expenditure for breastfeeding promotion and support activities. The amount to be spent on nutrition education shall be computed by taking one-sixth of the total fiscal year NSA expenditures. The amount to be spent by a State agency on breastfeeding promotion and support activities shall be an amount that is equal to at least its proportionate share of the national minimum breastfeeding promotion expenditure as specified in paragraph (c)(1) of this section. The national minimum expenditure for breastfeeding promotion and support activities shall be equal to \$21 multiplied by the number of pregnant and breastfeeding women in the Program, based on the average of the last three months for which the Department has final data. On October 1, 1996 and each October 1 thereafter, the \$21 will be adjusted annually using the

same inflation percentage used to determine the national administrative grant per person. If the State agency's total reported nutrition education and breastfeeding promotion and support expenditures are less than the required amount of expenditures, FNS will issue a claim for the difference. The State agency may request prior written permission from FNS to spend less than the required portions of its NSA grant for either nutrition education or for breastfeeding promotion and support activities. FNS will grant such permission if the State agency has sufficiently 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 (c)(1). However, food costs used to purchase or rent breast pumps may not be used for this purpose. 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.

(2) The cost of Program certification, nutrition assessment and procedures and equipment used to determine nutritional risk, including the following:

(i) Laboratory fees incurred for up to two hematological tests for anemia per individual per certification period. The first test shall be to determine anemia status. The second test may be performed only in follow up to a finding of anemia when deemed necessary for health monitoring as determined by the WIC State agency;

(ii) Expendable medical supplies;

(iii) Medical equipment used for taking anthropometric measurements, such as scales, measuring boards, and skin fold calipers; and for blood analysis to detect anemia, such as spectrophotometers, hematofluorometers and centrifuges; and

(iv) Salary and other costs for time spent on nutrition assessment and certification.

(3) The cost of outreach services.

(4) The cost of administering the food delivery system, including the cost of transporting food.

(5) The cost of translators for materials and interpreters.

(6) The cost of fair hearings, including the cost of an independent medical

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assessment of the appellant, if necessary.

(7) The cost of transporting rural participants to clinics when prior approval for using Program funds to provide transportation has been granted by the State agency and documentation that such service is considered essential to assure Program access has been filed at the State agency. Direct reimbursement to participants for transportation cost is not an allowable cost.

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

(9) The cost, exclusive of laboratory tests, of screening for drug and other harmful substance use and making referrals for counseling and treatment services.

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

(d) *Costs allowable with approval.* The following costs are allowable only with the prior approval of FNS:

(1) Automated information systems which are required by a State or local agency except for those used in general management and payroll, including acquisition of automatic data processing hardware or software whether by outright purchase, rental-purchase agreement or other method of acquisition. Approval shall be granted by FNS if the proposed system meets the requirements of this part, A-130, and 7 CFR part 3016. At the time the State agency decides to seek computerization, except for use in general management or payroll, it shall inform FNS and seek approval, if required.

(2) Capital expenditures over \$2,500.00, such as the cost of facilities, equipment, including medical equipment, other capital assets and any repairs that materially increase the value of useful life of capital assets.

(3) Management studies performed by agencies or departments other than the State or local agency or those performed by outside consultants under contract with the State or local agency.

(e) *How and when may I use my funds recovered from vendors and participants?*

(1) The State agency may keep funds collected through the recovery of claims assessed against food vendors or participants. Recovered funds include

those withheld from a vendor as a result of reviews of food instruments prior to payment. Recovered funds may be used for either food or NSA costs.

(2) These recovered funds may be used in the fiscal year:

(i) In which the initial obligation was made;

(ii) In which the claim arose;

(iii) In which the funds are collected; or

(iv) after the funds are collected.

(3) The State agency may not credit any recoveries until:

(i) In the case of a vendor claim, the vendor has had the opportunity to correct or justify the error or apparent overcharge in accordance with § 246.12(r)(5)(iii); or

(ii) In the case of a participant, any administrative hearing requested in accordance with § 246.9 has been completed.

(4) The State agency must report vendor and participant recoveries to FNS through the normal reporting process;

(5) The State agency must keep documentation supporting the amount and use of these vendor and participant recoveries.

[50 FR 6121, Feb. 13, 1987, as amended at 52 FR 21237, June 4, 1987; 53 FR 25314, July 6, 1988; 54 FR 18091, Apr. 27, 1989; 58 FR 11507, Feb. 26, 1993; 59 FR 11503, Mar. 11, 1994; 63 FR 63974, Nov. 18, 1998; 64 FR 67999, Dec. 6, 1999; 64 FR 70178, Dec. 16, 1999]

EFFECTIVE DATE NOTE: At 65 FR 83286, Dec. 29, 2000, § 246.14 was amended by revising paragraph (b)(2) and in paragraph (e)(3)(i), by removing the reference to “§ 246.12(r)(5)(iii)” and adding a reference to “§ 246.12(k)(3)” in its place, effective February 27, 2001. For the convenience of the user, the revised text is set forth as follows:

**§ 246.14 Program costs.**

\* \* \* \* \*

(b) \* \* \*

(2) For costs to be allowable, the State agency must ensure that food costs do not exceed the customary sales price charged by the vendor, home food delivery contractor, or supplier in a direct distribution food delivery system. In addition, food costs may not exceed the price limitations applicable to the vendor.

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### § 246.15 Program income other than grants.

(a) *Interest earned on advances.* Interest earned on advances of Program funds at the State and local levels shall be treated in accordance with the provisions of 31 CFR Part 205, which implement the requirements of the Cash Management Improvement Act of 1990. However, State agencies will not incur an interest liability to the Federal government on rebate funds for infant formula or other foods, *provided* that all interest earned on such funds is used for program purposes.

(b) *Other Program income.* The State agency may use current Program income for costs incurred in the current fiscal year and, with the approval of FNS, for costs incurred in previous or subsequent fiscal years. With the approval of FNS, Program income may be used for costs which are in addition to the allowable costs of the Program but which nevertheless further the objectives of the law authorizing the Program. Provided that the costs supported by the income further the broad objectives of the Program, they need not be a kind that would be permissible as charges to Federal funds. Money received by the State agency as a result of civil money penalties or fines assessed against a vendor and any interest charged in the collection of these penalties and fines shall be considered as program income.

[50 FR 6121, Feb. 13, 1985, as amended at 63 FR 63974, Nov. 18, 1998; 64 FR 13324, Mar. 18, 1999]

### § 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  $\frac{1}{3}$  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  $\frac{1}{4}$  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 reports on program participant characteristics, and administering

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pilot projects, including projects designed to meet the special needs of migrants, Indians, rural populations, and to carry out technical assistance and research evaluation projects for the WIC Farmers' Market Nutrition Program.

(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) *When may I transfer funds from one fiscal year to another?*

(i) *Back spend authority.* The State agency may back spend into the prior fiscal year up to an amount equal to one percent of its current year food grant and one percent of its current year NSA grant. Food funds spent back may be used only for food costs incurred during the prior fiscal year. NSA funds spent back may be used for either food or NSA costs incurred during the prior fiscal year. With prior FNS approval, the State agency may also back spend food funds up to an amount equal to three percent of its current year food grant in a fiscal year for food costs incurred in the prior fiscal year. FNS will approve such a request only if FNS determines there has been a significant reduction in infant formula cost containment savings that

affected the State agency's ability to maintain its participation level.

(ii) *Spend forward authority.* (A) The State agency may spend forward NSA funds up to an amount equal to one percent of their total grant (NSA plus food grants) in any fiscal year. These NSA funds spent forward may be used only for NSA costs incurred in the next fiscal year. Any food funds that the State agency converts to NSA funds pursuant to paragraph (f) of this section (based on projected or actual participation increases during a fiscal year) may not be spent forward into the next fiscal year. With prior FNS approval, the State agency may spend forward additional NSA funds up to an amount equal to one-half of one percent of its total grant. These funds are to be used in the next fiscal year for the development of a management information system, including an electronic benefit transfer system.

(B) Funds spent forward will not affect the amount of funds allocated to the State agency for any fiscal year. Funds spent forward must be the first funds expended by the State agency for costs incurred in the next fiscal year.

(iii) *Reporting requirements.* In addition to obtaining prior FNS approval for certain spend forward/back spending options, the State agency must report to FNS the amount of all funds it already has or intends to back spend and spend forward. The spending options must be reported at closeout.

(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 formula 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).

(2) *How is the amount of NSA funds determined?* The funds available for allocation to State agencies for NSA for each fiscal year must be sufficient to

guarantee a national average per participant NSA grant, adjusted for inflation. The amount of the national average per participant grant for NSA for any fiscal year will be an amount equal to the national average per participant grant for NSA issued for the preceding fiscal year, adjusted for inflation. The inflation adjustment will be equal to the percentage change between two values. The first is the value of the index for State and local government purchases, as published by the Bureau of Economic Analysis of the Department of Commerce, for the 12-month period ending June 30 of the second preceding fiscal year. The second is the best estimate that is available at the start of the fiscal year of the value of such index for the 12-month period ending June 30 of the previous fiscal year. Funds for NSA costs will be allocated according to the following procedure:

(i) *Fair share target funding level determination.* For each State agency, FNS will establish, using all available NSA funds, an NSA fair share target funding level which is based on each State agency's average monthly participation level for the fiscal year for which grants are being calculated, as projected by FNS. Each State agency receives an adjustment to account for the higher per participant costs associated with small participation levels and differential salary levels relative to a national average salary level. The formula shall be adjusted to account for these cost factors in the following manner: 90 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 FNS, and 10 percent of available funds shall provide compensation based on differential salary levels, as determined by FNS.

(ii) *Base funding level.* To the extent funds are available and subject to the provisions of paragraph (c)(2)(iv) of this section, each State agency shall receive an amount equal to 100 percent of the final formula-calculated NSA grant of the preceding fiscal year, prior to any operational adjustment funding allocations made under paragraph (c)(2)(iv) of this section. If funds are not available to provide all State agencies with their base funding level, all

State agencies shall have their base funding level reduced by a pro-rata share as required by the shortfall of available funds.

(iii) *Fair share allocation.* Any funds remaining available for allocation for NSA after the base funding level required by paragraph (c)(2)(ii) of this section has been completed and subject to the provisions of paragraph (c)(2)(iv) of this section shall be allocated to bring each State agency closer to its NSA fair share target funding level. FNS shall make fair share allocation funds available to each State agency based on the difference between the NSA fair share target funding level and the base funding level, which are determined in accordance with paragraphs (c)(2)(i) and (c)(2)(ii) of this section, respectively. Each State agency's difference shall be divided by the sum of the differences for all State agencies, to determine the percent share of the available fair share allocation funds each State agency shall receive.

(iv) *Operational adjustment funds.* Each State agency's final NSA grant shall be reduced by up to 10 percent, and these funds shall be aggregated for all State agencies within each FNS region to form an operational adjustment fund. The Regions shall allocate these funds to State agencies according to national guidelines and shall consider the varying needs of State agencies within the region.

(v) *Operational level.* The sum of each State agency's stability, residual and operational adjustment 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 of food benefit funds.* In any fiscal year, any amounts remaining from amounts appropriated for such fiscal year and amounts appropriated from the preceding fiscal year

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after making allocations under paragraph (a)(6) of this section and allocations for nutrition services and administration (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) *Fair share target funding level determination.* (A) For each State agency, FNS will establish a fair share target funding level which shall be an amount of funds proportionate to the State agency's share of the national aggregate population of persons who are income eligible to participate in the Program based on the 185 percent of poverty criterion. The Department will determine each State agency's population of persons categorically eligible for WIC which are at or below 185% of poverty, through the best available, nationally uniform, indicators as determined by the Department. If the Commodity Supplemental Food Program (CSFP) also operates in the area served by the WIC State agency, the number of participants in such area participating in the CSFP but otherwise eligible to participate in the WIC Program, as determined by FNS, shall be deducted from the WIC State agency's population of income eligible persons.

(B) The Department may adjust the respective amounts of food funds that would be allocated to a State agency which is outside the 48 contiguous states and the District of Columbia when the State agency can document that economic conditions result in higher food costs for the State agency. Prior to any such adjustment, the State agency must demonstrate that it has successfully implemented voluntary cost containment measures, such as improved vendor management practices, participation in multi-state agency infant formula rebate contracts or other cost containment efforts. The Department may use the Thrifty Food Plan amounts used in the Food Stamp Program, or other available data, to formulate adjustment factors for such State agencies.

(ii) *Prior year grant level allocation.* To the extent funds are available, each State agency shall receive a prior year

grant allocation equal to its final authorized grant level as of September 30 of the prior fiscal year. If funds are not available to provide all State agencies with their full prior year grant level allocation, all State agencies shall have their full prior year grant level allocation reduced by a pro-rata share as required by the shortfall of available funds.

(iii) *Inflation/fair share allocation.* (A) If funds remain available after the allocation of funds under paragraph (c)(3)(ii) of this section, the funds shall be allocated as provided in this paragraph (c)(3)(iii). First, FNS will calculate a target inflation allowance by applying the anticipated rate of food cost inflation, as determined by the Department, to the prior year grant funding level. Second, FNS will allocate 80 percent of the available funds to all State agencies in proportionate shares to meet the target inflation allowance. Third, FNS will allocate 20 percent of the available funds to each State agency which has a prior year grant level allocation, as determined in paragraph (c)(3)(ii) of this section and adjusted for inflation as determined in this paragraph (c)(3)(iii), which is still less than its fair share target funding level. The amount of funds allocated to each State agency shall be based on the difference between its prior year grant level allocation plus target inflation funds and the fair share funding target level. Each State agency's difference shall be divided by the sum of the differences for all such State agencies, to determine the percentage share of the 20 percent of available funds each State agency shall receive. In the event a State agency declines any of its allocation under either this paragraph (c)(3)(iii) or paragraph (c)(3)(ii) of this section, the declined funds shall be reallocated in the percentages and manner described in this paragraph (c)(3)(iii). Once all State agencies receive allocations equal to their full target inflation allowance, any remaining funds shall be allocated or reallocated, in the manner described in this paragraph (c)(3)(iii), to those State agencies still under their fair share target funding level.

(B) In the event funds still remain after completing the distribution in

paragraph (c)(3)(iii)(A) of this section, these funds shall be allocated to all State agencies including those with a stability allocation at, or greater than, their fair share allocation. Each State agency which can document the need for additional funds shall receive additional funds based on the difference between its prior year grant level and its fair share allocation. State agencies closest to their fair share allocation shall receive first consideration.

(iv) *Migrant services.* At least ¼ of one percent of appropriated funds for each fiscal year shall be available first to assure service to eligible members of migrant populations. For those State agencies serving migrants, a portion of the grant shall be designated to each State agency for service to members of migrant populations based on that State agency's prior year reported migrant participation. The national aggregate amount made available first for this purpose shall equal ¼ of one percent of all funds appropriated each year for the Program.

(v) *Special provisions for Indian State agencies.* The Department may choose to adjust the allocations and/or eligibles data among Indian State agencies, or among Indian State agencies and the geographic State agencies in which they are located when eligibles data for the State agencies' population is determined to not fairly represent the population to be served. Such allocations may be redistributed from one State agency to another, based on negotiated agreements among the affected State agencies approved by FNS.

(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 quarterly 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 as they are submitted 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

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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) The amount allocated to any State agency for food benefits in the current fiscal year shall be reduced if such State agency's food expenditures for the preceding fiscal year do not equal or exceed 97 percent of the amount allocated to the State agency for such costs. Such reduction shall equal the difference between the State agency's preceding year food expenditures and the performance expenditure standard amount. 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 under the spendback provision in paragraph (b)(3)(i) of this section or conversion authority in paragraph (g) of this section. Temporary waivers of the performance standard may be granted at the discretion of the Department.

(ii) *Reduction of NSA grant.* FNS will reduce the State agency's NSA grant for the next fiscal year if the State agency's current fiscal year per participant NSA expenditure is more than 10 percent higher than its per participant NSA grant. To avoid a reduction to its NSA grant level, the State agency may submit a "good cause" justification explaining why it exceeded the applicable limit on excess NSA expenditures. This justification must be submitted at the same time as the close-out report for the applicable fiscal year. Good cause may include dramatic and unforeseen increases in food costs, which would prevent a State agency from meeting its projected participation level.

(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) *How do I qualify to convert food funds to NSA funds based on increased participation?* (1) *Requirements.* The State agency qualifies to convert food funds to NSA funds based on increased participation in any fiscal year in two ways:

(i) *Approved plan.* A State agency may submit a plan to FNS to reduce average food costs per participant and to increase participation above the FNS-projected level for the State agency. If approved, the State agency may use funds allocated for food costs to pay NSA costs.

(ii) *Participation increases achieved.* The State agency may also convert food funds to NSA funds in any fiscal year if it achieves, through acceptable measures, increases in participation in excess of the FNS-projected level for the State agency. Acceptable measures include use of cost containment measures, curtailment of vendor abuse, and breastfeeding promotional activities. FNS will disallow the State agency's conversion of food funds to NSA funds in accordance with paragraph (h) of this section if:

(A) The State agency increases its participation level through measures that are not in the nutritional interests of participants; or

(B) It is not otherwise allowable under program regulations.

(2) *Limitation.* The State agency may convert food funds only to the extent that the conversion is necessary—

(i) To cover NSA expenditures in the current fiscal year that 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; and

(ii) To ensure that the State agency maintains the level established for the per participant NSA grant for the current fiscal year.

(3) *Maximum amount.* The maximum amount the State agency may convert equals the State agency's conversion rate times the projected or actual participation increase, as applicable. The conversion rate is the same as the per participant NSA grant and is determined by dividing the State agency's NSA grant by the FNS-projected participation level. The NSA grant used in

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the calculation equals the initial allocation of current year funds plus the operational adjustment funding allocated to the State agency for that fiscal year.

(g) *How do I qualify to convert food funds to NSA funds for service to remote Indian or Native villages?* (1) *Eligible State agencies.* Only State agencies located in noncontiguous States containing a significant number of remote Indian or Native villages qualify to convert food funds to NSA funds under this paragraph (g) in any fiscal year.

(2) *Limitation.* In the current fiscal year, food funds may be converted only to the extent necessary to cover expenditures incurred:

(i) In providing services (including the full cost of air transportation and other transportation) to remote Indian or Native villages; and

(ii) To provide breastfeeding support in those areas that 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) *What happens at the end of the fiscal year in which food funds are converted?* 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 paragraphs (f) and (g) 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) *How do converted funds affect the calculation of my prior year food grant and base NSA grant?* For purposes of establishing a State agency's prior year food grant and base NSA grant under paragraphs (c)(2)(i) and (c)(3)(i) of this section, respectively, amounts converted from food funds to NSA funds under paragraphs (f) and (g) of this section and §246.14(e) during the preceding

fiscal year will be treated as though no conversion had taken place.

[50 FR 6121, Feb. 13, 1985, as amended at 52 FR 21237, June 4, 1987; 52 FR 25190, July 2, 1987; 53 FR 2221, Jan. 27, 1988; 53 FR 25315, July 6, 1988; 54 FR 18091, Apr. 27, 1989, 54 FR 19486, May 5, 1989; 55 FR 9717, Mar. 15, 1990; 55 FR 11109, Mar. 26, 1990; 58 FR 47022, Sept. 7, 1993; 58 FR 51568, Oct. 4, 1993; 59 FR 11504, Mar. 11, 1994; 59 FR 50823, Oct. 6, 1994; 63 FR 63974, Nov. 18, 1998; 64 FR 56674, Oct. 21, 1999; 64 FR 61016, Nov. 9, 1999; 64 FR 68000, Dec. 6, 1999; 65 FR 53528, Sept. 5, 2000; 65 FR 51224, Aug. 23, 2000; 65 FR 77771, Dec. 13, 2000]

EFFECTIVE DATE NOTE: At 65 FR 80281, Dec. 21, 2000, §246.16(c)(3)(i)(A) was amended by adding a new sentence at the end of the paragraph, effective Jan. 22, 2001. For the convenience of the user, the added text is set forth as follows:

**§246.16 Distribution of funds.**

\* \* \* \* \*

(c) \* \* \*

(3) \* \* \*

(i) \* \* \*

(A) \* \* \* If the State agency chooses to exercise the option in §246.7(c)(2) to limit program participation to U.S. citizens, nationals, and qualified aliens, FNS will reduce the State agency's population of income eligible persons to reflect the number of aliens the State agency declares no longer eligible.

\* \* \* \* \*

**§246.16a Infant formula cost containment.**

(a) *Who must use cost containment procedures for infant formula?* All State agencies must continuously operate a cost containment system for infant formula that is implemented in accordance with this section except:

(1) State agencies with home delivery or direct distribution food delivery systems;

(2) Indian State agencies with 1,000 or fewer participants in April of any fiscal year, which are exempt for the following fiscal year;

(3) State agencies granted a waiver under paragraph (e) of this section; and

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(4) State agencies granted a postponement under paragraph (f) of this section.

(b) *What cost containment procedures must be used?* State agencies must use either a single-supplier competitive system as outlined in paragraph (c) of this section, or an alternative cost containment system as outlined in paragraph (d) of this section.

(c) *What is the single-supplier competitive system?* Under the single-supplier competitive system, a State agency solicits sealed bids from infant formula manufacturers to supply and provide a rebate for infant formulas. The State agency must conduct the procurement in a manner that maximizes full and open competition consistent with the requirements of this section.

(1) *How must a State agency structure the bid solicitation?* (i) *Single solicitation.* Under the single solicitation system, the State agency's bid solicitation must require the winning bidder to supply and provide a rebate on all infant formulas it produces that the State agency chooses to issue, except exempt infant formulas. Rebates must also be paid on any new infant formulas that are introduced after the contract is awarded. The solicitation must require bidders that do not produce a soy-based infant formula to subcontract with another manufacturer to supply a soy-based infant formula under the contract. In this case, the bid solicitation must require that the winning bidder pay the State agency a rebate on the soy-based infant formula supplied by the subcontractor that is issued by the State agency. The bid solicitation must require all rebates (including those for soy-based in-

fant formula supplied by a subcontractor) to be calculated in accordance with paragraph (c)(5) of this section. All of these infant formulas are called contract brand infant formulas.

(ii) *Separate solicitations.* Under the separate solicitation system, a State agency issues two bid solicitations. The first solicitation must require the winning bidder to supply and provide a rebate on all milk-based infant formulas it produces that the State agency chooses to issue, except exempt infant formulas. Rebates must also be paid on any new milk-based infant formulas that are introduced by the manufacturer after the contract is awarded. These infant formulas are considered to be contract brand infant formulas. The second bid solicitation must require the winning bidder to supply and provide a rebate on all soy-based infant formulas it produces that the State agency chooses to issue. Rebates must also be paid on any new soy-based infant formulas that are introduced by the manufacturer after the contract is awarded. These infant formulas are also considered to be contract brand infant formulas.

(2) *On what types and physical forms of infant formula must bids be solicited?* The bid solicitation must require bidders to specify a rebate for each of the types and physical forms of infant formulas specified in the following chart. These rebates apply proportionally to other infant formulas produced by the winning bidder(s) (see paragraph (c)(5) of this section). For purposes of this section the infant formula on which bids are solicited is the primary contract brand infant formula.

Type of infant formula	Physical forms of infant formula	Infant formula requirements
<b>(i) For a single solicitation, the solicitation must require bidders to specify a rebate amount for the following:</b>		
A single milk-based infant formula (primary contract brand infant formula); bidders must specify the brand name of the milk-based infant formula for which the rebate is being specified.	Concentrated liquid, powdered, and ready-to-feed.	Meets requirements under § 246.10(c)(1)(i) and suitable for routine issuance to the majority of generally healthy, full-term infants.
<b>(ii) For separate solicitations, the solicitation must require bidders to specify a rebate amount for the following:</b>		
(A) A single milk-based infant formula (primary contract brand infant formula); bidders must specify the brand name of the milk-based infant formula for which the rebate is being specified.	Concentrated liquid, powdered, and ready-to-feed.	Meets requirements under § 246.10(c)(1)(i) and suitable for routine issuance to the majority of generally healthy, full-term infants.

Type of infant formula	Physical forms of infant formula	Infant formula requirements
(B) A single soy-based infant formula (primary soy-based contract brand infant formula); bidders must specify the brand name of the soy-based infant formula for which the rebate is being specified.	Concentrated liquid, powdered, and ready-to-feed.	Meets requirements under § 246.10(c)(1)(i).

(3) *How are contracts awarded?* A State agency must award the contract(s) to the responsive and responsible bidder(s) offering the lowest total monthly net price for infant formula or the highest monthly rebate (subject to paragraph (c)(3)(ii) of this section) for a standardized number of units of infant formula. The State agency must calculate the lowest net price using the lowest national wholesale cost per unit for a full truckload of the infant formula on the date of the bid opening.

(i) *Calculating the standardized number of units of infant formula.* The State agency must specify a standardized number of units (e.g., cans) of infant formula by physical form (e.g., concentrated liquid, powdered, and ready-to-feed) to be bid upon. The standardized number of units must contain the equivalent of the total number of ounces by physical form needed to give the maximum allowance to the average monthly number of infants using each form. The number of infants does not include infant participants who are exclusively breastfed and those who are issued exempt infant formula. The average monthly number of infant using each physical form must be based on at least 6 months of the most recent participation and issuance data. In order to calculate the standardized number of units of infant formula by form to be bid upon, the average monthly number of infants using each physical form is multiplied by the maximum monthly allowable number of ounces for each form (as allowed under § 246.10(c)(1)(vi)), and divided by the corresponding unit size (i.e., number of ounces per unit being bid). In order to compare bids, total cost is calculated by multiplying this standardized number of units by the net price for each physical form. Alternative calculations that arrive at a mathematically equivalent result are acceptable.

(ii) *Determining the lowest total monthly net price or highest rebate.* To determine the lowest total monthly net price a State agency must multiply the net price per unit by the established standardized amount of infant formula to be bid upon as calculated in paragraph (c)(3)(i) of this section. If the bid evaluation is based on highest rebate offered, the State agency must multiply the rebate offered by the established amount of infant formula to be bid upon as calculated in paragraph (c)(3)(i) of this section.

(iii) *Highest rebate limitation.* Before issuing the bid solicitation, a State agency that elects to evaluate bids by highest rebate must demonstrate to FNS' satisfaction that the weighted average retail prices for different brands of infant formula in the State vary by 5 percent or less. The weighted average retail price must take into account the prices charged for each type and physical form of infant formula by authorized vendors or, if a State agency elects, it may include stores that do not participate in the WIC program in the State. The State agency must also base calculations on the proportion of each type and physical form of infant formula the State agency issues based on the data provided to bidders pursuant to paragraph (c)(4) of this section.

(4) *What data must be provided to bidders?* The State agency must provide as part of the bid solicitation the participation and infant formula usage data and the standardized number of ounces by physical form of infant formula to be used in evaluating bids as described in paragraph (c)(3) of this section. The State agency must notify bidders that the participation and infant formula usage data does not necessarily reflect the actual issuance and redemption that will occur under the contract.

(5) *How is the rebate to be calculated on all other contract brand infant formulas?*

All bids must specify the rebates offered by each bidder for the primary contract brand infant formula(s). After the contract is awarded, the State agency must calculate the percentage discount for all other contract brand infant formulas (*i.e.*, all other infant formulas produced by the bidder other than exempt infant formulas) approved for issuance by the State agency. The State agency must use the following method in calculating the rebates:

(i) *Calculation of percentage discounts.* Rebates for contract brand infant formulas, other than the primary contract brand infant formula(s) for which bids were received, must be calculated by first determining the percentage discount for each physical form (*e.g.*, concentrated liquid, powdered, and ready-to-feed) of the primary contract brand infant formula(s). The percentage discount must be calculated by dividing the rebate for the primary contract brand infant formula by the manufacturer's lowest national wholesale price per unit, as of the date of the bid opening, for a full truckload of the primary contract infant formula. The percentage discounts must be used to determine the rebate for all other contract brand infant formulas approved for issuance by the State agency.

(ii) *Calculation of rebate amount.* The rebate for each type and form of all other contract brand infant formulas must be calculated by multiplying the percentage discount by the manufacturer's lowest national wholesale price per unit, as of the date of the bid opening, for a full truckload of the other contract brand infant formula. The percentage discount used for each of the other contract brand infant formulas depends on the physical form of the infant formula. For example, if the percentage discount provided for the primary contract brand powdered infant formula is 80 percent of its wholesale price, the same percentage discount must be applied to all other contract brand powdered infant formulas. The rebate for any types or forms of contract brand infant formulas that are introduced during the contract period must be calculated using the wholesale prices of these new contract brand infant formulas at the time the

infant formulas are approved for issuance by the State agency.

(iii) *Calculation of rebates during contract term.* The rebates resulting from the application of the percentage discount must remain the same throughout the contract period except for the inflation adjustments required in paragraph (c)(5)(iv) of this section.

(iv) *Inflation provisions.* Bid solicitations must require the manufacturer to adjust for price changes subsequent to the bid opening. The inflation provision may require either a cent-for-cent increase in the rebate amounts whenever there is any change in the lowest national wholesale price for a full truckload of the particular infant formula, or may require another equally effective cost adjustment mechanism for inflation as established by the State agency in the bid solicitation.

(6) *Does a State agency have to approve the issuance of all contract brand infant formulas?* No, the State agency may choose to approve for issuance, in addition to the primary contract brand infant formula(s), none, some, or all of the winning bidder's other infant formula(s). In addition, the State agency may require medical documentation before issuing any contract brand infant formula (see §246.10(c)(1)(i)) and must require medical documentation before issuing any WIC formula covered by §246.10(c)(1)(iii).

(d) *What is an alternative cost containment system?* Under an alternative cost containment system, a State agency elects to implement an infant formula cost containment system of its choice. The State agency may only implement an alternative system if such a system provides a savings equal to or greater than a single-supplier competitive system. A State agency must conduct a cost comparison demonstrating such savings as described in paragraphs (d)(1) and (d)(2) of this section.

(1) *How must the State agency structure the bid solicitation?* The State agency must solicit bids simultaneously using the single-supplier competitive system described in paragraph (c) of this section and the alternative cost containment system(s) the State agency has selected. The State agency may prescribe standards of its choice for the alternative cost containment system(s),

provided that conditions established for each system addressed in the bid solicitation include identical bid specifications for the contract period length and the types and forms of infant formula(s) to be included in the systems. In addition, the alternative cost containment system must cover the types and forms of infant formulas routinely issued to the majority of generally healthy, full-term infants. The State agency must use the procedure outlined in paragraph (d)(2) of this section in conducting a cost comparison to determine which system offers the greatest savings over the entire contract period specified in the bid solicitation.

(2) *How does the State agency conduct the cost comparison?* (i) *Establishing infant formula cost containment savings.* (A) *Savings under the single-supplier competitive system.* The State agency must project food cost savings in the single-supplier competitive system based on the lowest monthly net price or highest monthly rebate, as described in paragraph (c)(3) of this section.

(B) *Savings under an alternative cost containment system.* The State agency must project food cost savings under alternative cost containment systems based on the lowest monthly net cost or highest monthly rebate, as described in paragraph (c)(3) of this section. Food cost savings must be based on the standardized amount of infant formula expected to be issued as calculated for a single-supplier competitive system, prorated by the percentage of anticipated total infant formula purchases attributable to each manufacturer. The State agency must use the aggregate market share of the manufacturers submitting bids in calculating its cost savings estimate.

(C) *General.* In establishing the potential food cost savings under each system, the State agency must take into consideration in its estimate of savings any inflation factors which would affect the amount of savings over the life of the contract. Further, the State agency must not subtract any loss of payments which would occur under the terms of a current contract as a result of any State agency action to be effective after expiration of the contract.

(ii) *Nutrition services and administration cost adjustment.* The State agency

must deduct from the food cost savings projected for each system under this paragraph (d) the nutrition services and administration costs associated with developing and implementing—but not operating—each cost containment system. This includes any anticipated costs for modifying its automated data processing system or components of its food delivery system(s), and of training participants, local agencies, vendors, and licensed health care professionals on the purpose and procedures of the new system. For contracts of two years or less, such costs must be proportionately distributed over at least a two year period. The State agency must not deduct any costs associated with procurement. The State agency must itemize and justify all nutrition services and administration cost adjustments as necessary and reasonable for the development and implementation of each system.

(iii) *Final cost comparison.* The State agency must calculate the food costs savings and deduct the appropriate nutrition services and administration costs for each system for which bids were received. The State agency must implement the single-supplier competitive system, unless its comparative cost analysis shows that, over the length of the contract stipulated in the bid solicitation, an alternative cost containment system offers savings at least equal to, or greater than, those under the competitive single-supplier system. If the comparative cost analysis permits selection of the alternative cost containment system and the State agency wishes to implement that system, it must first submit a State Plan amendment with the calculations and supporting documentation for this cost analysis to FNS for approval. Only after the calculations are approved by FNS may the State agency award the contract or contracts under the alternative cost containment system.

(e) *How does a State agency request a waiver of the requirement for a single-supplier competitive system?* A State agency which, after completing the cost comparison in paragraphs (d)(2)(i) through (d)(2)(iii) of this section, is required to implement the single-supplier competitive cost containment

system for infant formula procurement, may request a waiver from FNS to permit it to implement an alternative system. State agencies must support all waiver requests with documentation in the form of a State Plan amendment as required under § 246.4(a)(14)(xi) and may submit such requests only in either of the following circumstances:

(1) The difference between the single-supplier competitive system and the alternative cost containment system is less than 3 percent of the savings anticipated under the latter system and not more than \$100,000 per annum.

(2) The single-supplier competitive system would be inconsistent with the efficient or effective operation of the program. Examples of justifications FNS will not accept for a waiver, include, but are not limited to: preservation of participant preference for otherwise nutritionally equivalent infant formulas; maintenance of health care professionals' prerogatives to prescribe otherwise nutritionally equivalent infant formulas for non-medical reasons; potential loss of free or otherwise discounted materials to WIC clinics and other health care facilities; potential inability of a manufacturer selected in accordance with applicable State procurement procedures to supply contractually-specified amounts of infant formula; and the possibility of interrupted infant formula supplies to retail outlets as a consequence of entering into a contract with a single manufacturer.

(f) *How does a State agency request a postponement of the requirement for a continuously operated cost containment system for infant formula?* A State agency may request a postponement of the requirement to continuously operate a cost containment system for infant formula that has been implemented in accordance with this section. However, a State agency may only request a postponement when it has taken timely and responsible action to implement a cost containment system before its current system expires but has been unable to do so due to procurement delays, disputes with FNS concerning cost containment issues during the State Plan approval process or other circumstances beyond its control. The

written postponement request must be submitted to FNS before the expiration of the current system. The postponement period may be no longer than 120 days. If a postponement is granted, the State agency may extend, renew or otherwise continue an existing system during the period of the postponement.

(g) *May a State agency implement cost containment systems for other supplemental foods?* Yes, when a State agency finds that it is practicable and feasible to implement a cost containment system for any WIC food other than infant formula, the State agency must fully implement that system in accordance with the time frames established by the State agency and notification must be given to FNS by means of the State agency's State Plan.

(h) *What are the implementation time frames for Indian State agencies that lose their exemption from the infant formula cost containment requirement?* If an Indian State agency operating a retail food delivery system expands its program participation above 1000 and thereby loses its exemption from the requirements of paragraph (a) of this section regarding the method of cost containment for infant formula, then the Indian State agency must begin compliance with paragraph (a) of this section in accordance with time frames established by FNS.

(i) *What are the penalties for failure to comply with the cost containment requirements?* Any State agency that FNS determines to be out of compliance with the cost containment requirements of this part must not draw down on or obligate any Program grant funds, nor will FNS make any further Program funds available to such State agency, until it is in compliance with these requirements.

(j) *What provisions are prohibited to be included in cost containment contracts?* A State agency may not issue bid solicitations or enter into contracts which:

(1) Prescribe conditions that would void, reduce the savings under or otherwise limit the original contract if the State agency solicited or secured bids for, or entered into, a subsequent cost containment contract to take effect after the expiration of the original contract;

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(2) Does not include the registration and certification requirements in § 246.10(f); or

(3) Require infant formula manufacturers to submit bids on more than one of the systems specified in the invitation for bids.

(k) *What are the requirements for the national cost containment bid solicitation and selection for infant formula?* FNS will solicit and select bids for infant formula rebates on behalf of State agencies with retail food delivery systems based on the following guidelines:

(1) FNS will solicit bids and select the winning bidder(s) for infant formula cost containment contracts only if two or more State agencies with retail food delivery systems request FNS to conduct bid solicitation and selection on their behalf. FNS will conduct the bid solicitation and selection process only and will not award or enter into any infant formula cost containment contract on behalf of the individual State agencies. Each State agency will individually award and enter into infant formula cost containment contract(s) with the winning bidder(s). State agencies must obtain the rebates directly from the infant formula manufacturer(s). FNS will conduct the bid solicitation in accordance with this paragraph (k) and the competitive bidding procurement procedures of the State agency with the highest infant participation in the bid group on whose behalf bids are being solicited. Any bid protests and contractual disputes are the responsibility of the individual State agencies to resolve.

(2) FNS will make a written offer to all State agencies to conduct bid solicitation and selection on their behalf at least once every 12 months. FNS will send State agencies a copy of the draft Request for Rebates when making the offer to State agencies. Only State agencies that provide the information required by this paragraph (k)(2) in writing, signed by a responsible State agency official, by certified mail, return receipt requested or by hand delivery with evidence of receipt within 15 days of receipt of the offer will be included in the national bid solicitation and selection process. Each interested State agency must provide:

(i) A statement that the State agency requests FNS to conduct bid solicitation and selection on its behalf;

(ii) A statement of the State agency's minimum procurement procedures applicable to competitive bidding (as defined in § 246.2) for infant formula cost containment contracts and supporting documentation;

(iii) A statement of any limitation on the duration of infant formula cost containment contracts and supporting documentation;

(iv) A statement of any contractual provisions required to be included in infant formula cost containment contracts by the State agency;

(v) The most recent available average monthly number of infant participants less those infant participants who are exclusively breastfed and those who are issued exempt infant formula. The average monthly participation level must be based on at least 6 months of participation data.

(vi) Infant formula usage rates by type (e.g., milk-based or soy-based), form (e.g., concentrated, powdered, ready-to-feed), container size, and supporting documentation;

(vii) A statement of the termination date of the State agency's current infant formula cost containment contract; and

(viii) Any other related information that FNS may request.

(3) If FNS determines that the number of State agencies making the request provided for in paragraph (k)(2) of this section so warrants, FNS may, in consultation with such State agencies, divide such State agencies into more than one group and solicit bids for each group. These groups of State agencies are referred to as "bid groups". In determining the size and composition of the bid groups, FNS will, to the extent practicable, take into account the need to maximize the number of potential bidders so as to increase competition among infant formula manufacturers and the similarities in the State agencies' procurement and contract requirements (as provided by the State agencies in accordance with paragraphs (k)(2)(ii), (k)(2)(iii) and (k)(2)(iv) of this section). FNS reserves the right to exclude a

State agency from the national bid solicitation and selection process if FNS determines that the State agency's procurement requirements or contractual requirements are so dissimilar from those of the other State agencies in any bid group that the State agency's inclusion in the bid group could adversely affect the bids.

(4) For each bid group formed pursuant to paragraphs (k)(2) and (k)(3) of this section, FNS will use for soliciting bids the competitive bidding procurement procedures of the State agency in the group with the highest infant participation. To the extent not inconsistent with the requirements of this paragraph (k), FNS will use that set of procedures in soliciting the bids for that bid group of State agencies. FNS will notify each State agency in the bid group of the choice and provide them each a copy of the procurement procedures of the chosen State agency. Each State agency must provide FNS a written statement, signed by a responsible State agency official, by certified mail, return receipt requested or by hand delivery with evidence of receipt stating whether that State agency is legally authorized to award an infant formula cost containment contract pursuant to that set of procedures within 10 days of the receipt of the notification. If the State agency determines it is not legally authorized to award an infant formula cost containment contract pursuant to those procedures, that State agency may not continue in that round of the national bid solicitation and selection.

(5) At a minimum, in soliciting bids FNS will address the following:

(i) Unless FNS determines that doing so would not be in the best interest of the Program, bids will be solicited for either:

(A) A single contract for each State agency under which the winning bidder will be required to supply and provide rebates on all infant formulas produced by that manufacturer (except exempt infant formulas) that are issued by the State agency. If that manufacturer does not produce a soy-based infant formula, the winning bidder will be required to subcontract with another manufacturer for a soy-based infant formula and the winning bidder will be

required to pay a rebate on the soy-based infant formula; or

(B) Two separate contracts for each State agency. Under the first contract, the winning bidder will supply and provide a rebate on all the milk-based infant formulas the winning bidder produces (except exempt infant formulas) that are issued by the State agency and under the second contract the winning bidder will supply and provide a rebate on all the soy-based infant formulas the winning bidder produces (except exempt infant formulas) that are issued by the State agency.

(ii) The infant formula cost containment contract(s) to be entered into by the State agencies and infant formula manufacturers must provide for a constant net price for infant formula for the full term of the infant formula cost containment contract(s).

(iii) The duration of the infant formula cost containment contracts for each bid group will be determined by FNS in consultation with the State agencies. The term will be for a period of not less than 2 years, unless the law applicable to a State agency regarding the duration of infant formula cost containment contracts is more restrictive than this paragraph (k)(5)(iii). In such cases, the term of the contract for only that State agency will be for one year, with the option provided to the State agency to extend the contract for a specified number of additional years (to be determined by FNS in consultation with the State agency). The date on which the individual State agencies' current infant formula cost containment contracts terminate may vary, so the infant formula cost containment contracts awarded by the State agencies within a bid group may begin on different dates.

(iv) FNS will not prescribe conditions that are prohibited under paragraph (j) of this section.

(v) FNS will solicit bids for rebates only from infant formula manufacturers. FNS may limit advertising to contacting in writing each infant formula manufacturer which has registered with the Secretary of Health and Human Services under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321 *et seq.*).

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(6) FNS will select the winning bidder(s). The winning bidder(s) will be the responsive and responsible bidder(s) meeting the specifications and all bid terms and conditions which offers the lowest net price weighted to take into account infant formula usage rates and infant participation. In all instances the winning bidder(s) will be those which singly or in combination yield the greatest aggregate savings based on the net price weighted to take into account the infant formula usage rates. To break a tie between 2 equally low bids, FNS will select the bidder to be awarded the infant formula cost containment contract by a drawing by lot limited to the bidders which submitted those bids.

(7) Once FNS has conducted bid selection, a State agency may decline to award the infant formula cost containment contract(s) only if the State agency determines that awarding the contract(s) would not be in the best interests of its Program, taking into account whether the national bid solicitation and selection would achieve a lower aggregate savings.

(8) As soon as practicable after selecting the winning bid(s), FNS will notify the affected State agencies in writing of the bid results, including the name(s) of the winning bidder(s). If a State agency chooses to request approval to decline to award the infant formula cost containment contract(s) in accordance with paragraph (k)(7) of this section, it must notify FNS in writing, signed by a responsible State agency official, together with supporting documentation, by certified mail, return receipt requested or by hand delivery with evidence of receipt within 10 days of the State agency's receipt of this notification of bid results.

(9) If FNS approves any State agency's request to decline to award the infant formula cost containment contract(s) in accordance with paragraphs (k)(7) and (k)(8) of this section, FNS will notify the bidders of the decision. If two or more State agencies remain in the group, FNS will require the bidders to indicate in writing whether they wish to withdraw or modify their bids within 5 days of receipt of this notification. FNS will again permit State agencies to decline to award the infant

formula cost containment contract(s) in accordance with paragraphs (k)(7) and (k)(8) of this section. If FNS approves these additional State agency requests to decline contract awards, FNS may conduct a resolicitation of bids in accordance with this paragraph (k).

[65 FR 51224, Aug. 23, 2000]

**§ 246.17 Closeout procedures.**

(a) *General.* State agencies shall submit preliminary and final closeout reports for each fiscal year. All obligations shall be liquidated before closure of a fiscal year grant. Obligations shall be reported for the fiscal year in which they occur.

(b) *Fiscal year closeout reports.* State agencies—

(1) Shall submit to FNS, within 30 days after the end of the fiscal year, preliminary financial reports which show cumulative actual expenditures and obligations for the fiscal year, or part thereof, for which Program funds were made available;

(2) Shall submit to FNS, within 150 days after the end of the fiscal year, final fiscal year closeout reports;

(3) May submit revised closeout reports. FNS will reimburse State agencies for additional costs claimed in a revised closeout report up to the State's original grant level, if costs are properly justified and if funds are available for the fiscal year pertaining to the request. FNS will not be responsible for reimbursing State agencies for unreported expenditures later than one year after the end of the fiscal year in which they were incurred.

(c) *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 Program, in whole or in part, or take such remedies as may be legal and 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. A State

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agency shall disqualify a local agency by written notice whenever it is determined by FNS or the State agency that the local agency has failed to comply with the requirements of the Program.

(2) FNS or the State agency may disqualify the State agency or restrict its participation in the Program when both parties agree that continuation under the Program would not produce beneficial results commensurate with the further expenditure of funds. The State agency or the local agency may disqualify the local agency or restrict its participation in the Program under the same conditions. The two parties shall agree upon the conditions of disqualification, including the effective date thereof, and, in the case of partial disqualification, the portion to be disqualified.

(3) Upon termination of a grant, the affected agency shall not incur new obligations for the disqualified portion after the effective date, 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 the local agency.

(4) A grant closeout shall not affect the retention period for, or Federal rights of access to, grant records as specified in §246.25. The closeout of a grant does not affect the State or local agency's responsibilities regarding property or with respect to any Program income for which the State or local 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 the State or local auditors. Audits performed in accordance with §246.20 may serve as final audits providing such audits meet the needs of requesting agencies. If the grant is closed out without the audit, FNS reserves the right to disallow and recover an appro-

priate amount after fully considering any recommended disallowances resulting from an audit which may be conducted later.

### **§ 246.18 Administrative appeal of State agency decisions.**

(a) *Requirements.* The State agency shall provide a hearing procedure whereby a food vendor or local agency adversely affected by a State or local agency action may appeal the action.

(1) The right of appeal shall be granted when a local agency's or a vendor's application to participate is denied or, during the course of the contract or agreement, when a local agency or vendor is disqualified or any other adverse action which affects participation is taken. The following are exceptions to this provision:

(i) Expiration of a contract or agreement with a vendor and the State agency's determination regarding participant access shall not be subject to administrative review; and

(ii) Disqualification of a vendor as a result of disqualification from the Food Stamp Program shall not be subject to administrative or judicial review.

(2) The adverse action affecting a participating local agency shall be postponed until a hearing decision is reached.

(3) Except for disqualifications assessed under §246.12(k)(1)(i), which shall be made effective on the date of receipt of the notice of administrative action, the State agency may take adverse action against a vendor after the 15-day advance notification period mandated by paragraph (b)(1) of this section has elapsed. In deciding whether or not to postpone adverse action until a hearing decision is rendered, the State agency shall consider whether participants would be unduly inconvenienced and may consider other relevant criteria, determined by the State agency.

(b) *Procedure.* The State agency hearing procedure shall at a minimum provide the local agency or vendor with the following:

(1) Written notification of the administrative action, the procedures to file for an administrative review, if any, the cause(s) for and the effective date

of the action. Such notification shall be provided to participating vendors not less than 15 days in advance of the effective date of the action. When a vendor is disqualified due in whole or in part to violations specified in § 246.12(k)(1), such notification shall include the following statement: “This disqualification from WIC may result in disqualification as a retailer in the Food Stamp Program. Such disqualification may not be subject to administrative or judicial review under the Food Stamp Program.” In the case of disqualification of local agencies, the State agency shall provide not less than 60 days advance notice of pending action.

(2) The opportunity to appeal the adverse action within a time period 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, 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 or local agency’s action shall rest solely on the evidence presented at the hearing and the statutory and regulatory provisions governing the Program. 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 concerning the appeal, within 60 days from the date of receipt of the request for a hearing by the State agency.

(c) *Continuing responsibilities.* Appealing an action does not relieve a local agency, or a food vendor permitted to continue in the Program while its ap-

peal is in process, from the responsibility of continued compliance with the terms of any written agreement or contract with the State or local agency.

(d) *Judicial review.* If a State level decision is rendered against the local agency or food vendor and the appellant expresses an interest in pursuing a higher 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.

[50 FR 6121, Feb. 13, 1985, as amended at 64 FR 13324, Mar. 18, 1999]

EFFECTIVE DATE NOTE: At 65 FR 83286, Dec. 29, 2000, § 246.18 was revised, effective February 27, 2001. For the convenience of the user, the revised text is set forth as follows:

**§ 246.18 Administrative review of State agency actions.**

(a) *Adverse actions subject to administrative reviews.* (1) *Vendor appeals.* (i) *Adverse actions subject to full administrative reviews.* Except as provided elsewhere in paragraph (a)(1) of this section, the State agency must provide full administrative reviews to vendors that appeal the following adverse actions:

(A) denial of authorization based on the vendor selection criteria for competitive price or for minimum variety and quantity of authorized supplemental foods (§ 246.12(g)(3)(i) and (g)(3)(ii)) or on a determination that the vendor is attempting to circumvent a sanction (§ 246.12(g)(4));

(B) termination of an agreement for cause;

(C) disqualification; and

(D) imposition of a fine or a civil money penalty in lieu of disqualification.

(ii) *Adverse actions subject to abbreviated administrative reviews.* The State agency must provide abbreviated administrative reviews to vendors that appeal the following adverse actions, unless the State agency decides to provide full administrative reviews for any of these types of adverse actions:

(A) denial of authorization based on the vendor selection criteria for business integrity or for a current Food Stamp Program disqualification or civil money penalty for hardship (§ 246.12(g)(3)(iii) and (g)(3)(iv));

(B) denial of authorization based on a State agency-established vendor selection criterion if the basis of the denial is a WIC vendor sanction or a Food Stamp Program withdrawal of authorization or disqualification;

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(C) denial of authorization based on the State agency's vendor limiting criteria (§246.12(g)(2));

(D) denial of authorization because a vendor submitted its application outside the timeframes during which applications are being accepted and processed as established by the State agency under §246.12(g)(7);

(E) termination of an agreement because of a change in ownership or location or cessation of operations (§246.12(h)(3)(xvii));

(F) disqualification based on a trafficking conviction (§246.12(1)(1)(i));

(G) disqualification based on the imposition of a Food Stamp Program civil money penalty for hardship (§246.12(1)(2)(ii)); and

(H) disqualification or a civil money penalty imposed in lieu of disqualification based on a mandatory sanction imposed by another WIC State agency (§246.12(1)(2)(iii)).

(iii) *Actions not subject to administrative reviews.* The State agency may not provide administrative reviews pursuant to this section to vendors that appeal the following actions:

(A) the validity or appropriateness of the State agency's vendor limiting or selection criteria (§246.12(g)(2) and (g)(3));

(B) the validity or appropriateness of the State agency's participant access criteria and the State agency's participant access determinations;

(C) the State agency's determination whether a vendor had an effective policy and program in effect to prevent trafficking and that the ownership of the vendor was not aware of, did not approve of, and was not involved in the conduct of the violation (§246.12(1)(1)(i)(B));

(D) denial of authorization if the State agency's vendor authorization is subject to the procurement procedures applicable to the State agency;

(E) the expiration of a vendor's agreement;

(F) disputes regarding food instrument payments and vendor claims (other than the opportunity to justify or correct a vendor overcharge or other error, as permitted by §246.12(k)(3); and

(G) disqualification of a vendor as a result of disqualification from the Food Stamp Program (§246.12(1)(1)(vii)).

(2) *Effective date of adverse actions against vendors.* The State agency must make denials of authorization and disqualifications imposed under §246.12(1)(1)(i) effective on the date of receipt of the notice of adverse action. The State agency must make all other adverse actions effective no earlier than 15 days after the date of the notice of the adverse action and no later than 90 days after the date of the notice of adverse action or, in the case of an adverse action that is subject to administrative review, no later than the date the vendor receives the review decision.

(3) *Local agency appeals.* (i) *Adverse actions subject to full administrative reviews.* Except as provided in paragraph (a)(3)(ii) of this sec-

tion, the State agency must provide full administrative reviews to local agencies that appeal the following adverse actions:

(A) denial of a local agency's application;

(B) disqualification of a local agency; and

(C) any other adverse action that affects a local agency's participation.

(ii) *Actions not subject to administrative reviews.* The State agency may not provide administrative reviews pursuant to this section to local agencies that appeal the following actions:

(A) expiration of the local agency's agreement; and

(B) denial of a local agency's application if the State agency's local agency selection is subject to the procurement procedures applicable to the State agency;

(iii) *Effective date of adverse actions against local agencies.* The State agency must make denials of local agency applications effective immediately. The State agency must make all other adverse actions effective no earlier than 60 days after the date of the notice of the adverse action and no later than 90 days after the date of the notice of adverse action or, in the case of an adverse action that is subject to administrative review, no later than the date the local agency receives the review decision.

(b) *Full administrative review procedures.* The State agency must develop procedures for a full administrative review of the adverse actions listed in paragraphs (a)(1)(i) and (a)(3) of this section. At a minimum, these procedures must provide the vendor or local agency with the following:

(1) Written notification of the adverse action, the procedures to follow to obtain a full administrative review and the cause(s) for and the effective date of the action. When a vendor is disqualified due in whole or in part to violations in §246.12(1)(1), such notification must include the following statement: "This disqualification from WIC may result in disqualification as a retailer in the Food Stamp Program. Such disqualification is not subject to administrative or judicial review under the Food Stamp Program."

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

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

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

(5) The opportunity to cross-examine adverse witnesses. When necessary to protect the identity of WIC Program investigators,

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such examination may be conducted behind a protective screen or other device (also referred to as an “in camera” examination).

(6) The opportunity to be represented by counsel.

(7) The opportunity to examine prior to the review the evidence upon which the State agency’s action is based.

(8) An impartial decision-maker, whose determination is based solely on whether the State agency has correctly applied Federal and State statutes, regulations, policies, and procedures governing the Program, according to the evidence presented at the review. The State agency may appoint a reviewing official, such as a chief hearing officer or judicial officer, to review appeal decisions to ensure that they conform to approved policies and procedures.

(9) Written notification of the review decision, including the basis for the decision, within 90 days from the date of receipt of a vendor’s request for an administrative review, and within 60 days from the date of receipt of a local agency’s request for an administrative review. These timeframes are only administrative requirements for the State agency and do not provide a basis for overturning the State agency’s adverse action if a decision is not made within the specified timeframe.

(c) *Abbreviated administrative review procedures.* Except when the State agency decides to provide full administrative reviews for the adverse actions listed in paragraph (a)(1)(ii) of this section, the State agency must develop procedures for an abbreviated administrative review of the adverse actions listed in paragraph (a)(1)(ii) of this section. At a minimum, these procedures must provide the vendor with the following:

(1) Written notification of the adverse action, the procedures to follow to obtain an abbreviated administrative review, the cause(s) for and the effective date of the action, and an opportunity to provide a written response; and

(2) A decision-maker who is someone other than the person who rendered the initial decision on the action and whose determination is based solely on whether the State agency has correctly applied Federal and State statutes, regulations, policies, and procedures governing the Program, according to the information provided to the vendor concerning the cause(s) for the adverse action and the vendor’s response; and

(3) Written notification of the review decision, including the basis for the decision, within 90 days of the date of receipt of the request for an administrative review. This timeframe is only an administrative requirement for the State agency and does not provide a basis for overturning the State agency’s adverse action if a decision is not made within the specified timeframe.

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(d) *Continuing responsibilities.* Appealing an action does not relieve a local agency or a vendor that is permitted to continue program operations while its appeal is in process from the responsibility of continued compliance with the terms of any written agreement with the State agency.

(e) *Finality and effective date of decisions.* The State agency procedures must provide that review decisions rendered under both the full and abbreviated review procedures are the final State agency action. If the adverse action under review has not already taken effect, the State agency must make the action effective on the date of receipt of the review decision by the vendor or the local agency.

(f) *Judicial review.* If the review decision upholds the adverse action against the vendor or local agency, the State agency must inform the vendor or local agency that it may be able to pursue judicial review of the decision.

## Subpart F—Monitoring and Review

### § 246.19 Management evaluation and reviews.

(a) *Management evaluations and reviews.* (1) FNS and each State agency shall establish a management evaluation system in order to assess the accomplishment of Program objectives as provided under this part, FNS guidelines, instructions, and the Federal-State agreement with the Department. FNS will provide assistance to States in discharging this responsibility, establish standards and procedures to determine how well the objectives of this part are being accomplished, and implement sanction procedures as warranted by State Program performance.

(2) If FNS determines through a management evaluation or other means that the State agency has failed, without good cause, to demonstrate efficient and effective administration of its Program or has failed to comply with the requirements contained in this part or the State Plan, FNS may withhold an amount up to 100 percent of the State agency’s nutrition services and administration funds.

(3) 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 § 246.22. Before carrying out any sanction against a

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State agency, the following procedures will be followed:

(i) FNS will notify the Chief State Health Officer or equivalent in writing of the deficiencies found and of FNS' intention to withhold nutrition services and administration funds unless an acceptable corrective action plan is submitted by the State agency to FNS within 60 days after mailing of notification.

(ii) The State agency shall develop a corrective action plan with a schedule according to which the State agency shall accomplish various actions to correct the deficiencies and prevent their future recurrence.

(iii) If the corrective action plan is acceptable, FNS will notify the Chief State Health Officer or equivalent in writing within 30 days of receipt of the plan. The letter approving the corrective action plan will describe the technical assistance that is available to the State agency to correct the deficiencies. The letter will also advise the Chief State Health Officer or equivalent 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 as been taken, FNS will assess such action, and, if necessary, will 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.

(v) If an acceptable corrective action plan is not submitted within 60 days, or if corrective action is not completed according to the schedule established in the corrective action plan, FNS may withhold nutrition services and administration funds through a reduction of the State agency Letter of Credit or by assessing a claim against the State agency. FNS will notify the Chief State Health Officer or equivalent of this action.

(vi) If compliance is achieved before the end of the fiscal year in which the nutrition services and administration funds are withheld, the funds withheld shall be restored to the State agency's

Letter of Credit. FNS is not required to restore funds withheld if compliance is not achieved until the subsequent fiscal year. If the 60-day warning period ends in the fourth quarter of a fiscal year, FNS may elect not to withhold funds until the next fiscal year.

(b) *State agency responsibilities.* (1) The State agency shall establish an ongoing management evaluation system which includes at least the monitoring of local agency operations, the review of local agency financial and participation reports, the development of corrective action plans to resolve Program deficiencies, the monitoring of the implementation of corrective action plans, and on-site visits. The results of such actions shall be documented.

(2) Monitoring of local agencies shall encompass, but not be limited to, evaluation of management, certification, nutrition education, civil rights compliance, accountability, financial management systems, and food delivery systems. In accordance with §246.12(i), the State agency shall ensure that State or local agency personnel conduct the necessary on-site monitoring of high risk and representative vendors. If the State agency delegates vendor monitoring to local agencies, it shall evaluate the effectiveness of these monitoring visits.

(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.

(4) The State agency shall develop a corrective action process which includes: prompt notification of deficiencies to the local agency, timely development of corrective action plans, and monitoring of local agency implementation of such plans.

(5) When required by FNS, the State agency shall provide special reports on Program activities and act to correct deficiencies in Program operations.

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(6) The State agency shall require local agencies to establish management evaluation systems to review their operations and those of associated clinics or contractors.

[50 FR 6121, Feb. 13, 1985, as amended at 59 FR 11508, Mar. 11, 1994]

EFFECTIVE DATE NOTE: At 65 FR 83288, Dec. 29, 2000, §246.19 was amended by revising its title and paragraphs (a)(2), (b)(2), (4) and (5), effective February 27, 2001. For the convenience of the user, the revised text is set forth as follows:

§ 246.19 Management evaluation and monitoring reviews.

(a) \* \* \*

(2) The State agency must submit a corrective action plan, including implementation timeframes, within 60 days of receipt of an FNS management evaluation report containing a finding that the State agency did not comply with program requirements. If FNS determines through a management evaluation or other means that during a fiscal year the State agency has failed, without good cause, to demonstrate efficient and effective administration of its program, or has failed to comply with its corrective action plan, or any other requirements contained in this part or the State Plan, FNS may withhold an amount up to 100 percent of the State agency's nutrition services and administration funds for that year.

\* \* \* \* \*

(b) \* \* \*

(2) Monitoring of local agencies must encompass evaluation of management, certification, nutrition education, participant services, civil rights compliance, accountability, financial management systems, and food delivery systems. If the State agency delegates the signing of vendor agreements, vendor training, or vendor monitoring to a local agency, it must evaluate the local agency's effectiveness in carrying out these responsibilities.

\* \* \* \* \*

(4) The State agency must promptly notify a local agency of any finding in a monitoring review that the local agency did not comply with program requirements. The State agency must require the local agency to submit a corrective action plan, including implementation timeframes, within 60 days of receipt of a State agency report of a monitoring review containing a finding of program non-compliance. The State agency must monitor local agency implementation of corrective action plans.

(5) As part of the regular monitoring reviews, FNS may require the State agency to conduct in-depth reviews of specified areas of local agency operations, to implement a standard form or protocol for such reviews, and to report the results to FNS. No more than two such areas will be stipulated by FNS for any fiscal year and the areas will not be added or changed more often than once every two fiscal years. These areas will be announced by FNS at least six months before the beginning of the fiscal year.

§ 246.20 Audits.

(a) Federal audit responsibilities. (1) OIG reserves the right to perform audits of State and local agencies and other organizations involved in the Program as determined by OIG to be necessary. In performing such audits, OIG will rely to the extent feasible on audit work performed by other Federal and non-Federal auditors.

(2) 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 a proposed corrective action plan regarding the findings. A proposed corrective action plan developed and submitted by the State agency shall include specific timeframes for its implementation and for completion of correction of deficiencies and their causes.

(3) FNS will determine whether Program deficiencies 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.

(b) State audit responsibilities. (1) State agencies shall comply with the provisions of 7 CFR part 3016 regarding independent organization-wide audits of financial operations. In conformance with 7 CFR part 3016, State agencies shall arrange for independent audits of financial operations, including compliance with appropriate provisions of Federal laws and regulations, and shall ensure that audits are made on an organization-wide basis rather than on a program basis. When organization-wide audits are done the State agency shall cause procedures to be established which ensure that FNS programs are included in the universe of Federal awards from which a sample is drawn.

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(2) Such organization-wide audits shall be used to determine whether—

(i) Financial operations are conducted properly;

(ii) Financial statements are presented fairly;

(iii) State and local agencies are complying with the laws, regulations and administrative requirements that affect the expenditure of Federal funds;

(iv) State and local agencies have established internal procedures to meet the financial management objectives of federally assisted programs; and

(v) State and local agencies are providing accurate and reliable information to the Federal government. If such agencies fail to arrange for the required audits at the appropriate frequency or fail to ensure that an acceptable audit is performed at the appropriate frequency, the respective cognizant audit agencies may arrange for the performance of the required audits. If the cognizant audit agencies arrange for the required audits because of these circumstances, the State agencies shall reimburse the respective cognizant audit agencies for the pro rata cost of their organization-wide audits.

(3) Each State agency shall make all State or local agency sponsored audit reports of Program operations under its jurisdiction available for the Department's review upon request. The cost of these audits shall be considered a part of nutrition services and administration costs and may be funded from the State or local agency nutrition services and administration funds, as appropriate. For purposes of determining the Program's pro rata share of indirect costs associated with organization-wide audits, the cost of food shall not be considered in the total dollar amount of the Program.

### § 246.21 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 or 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 or local agency has failed to comply with the requirements of this part.

(b) *Confidentiality.* No State or local agency, participant, 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

#### § 246.22 Administrative appeal of FNS decisions.

(a) *Right to appeal.* When FNS asserts a sanction against a State agency under the provisions of § 246.19, the State agency may appeal and must be afforded a hearing or review by an FNS Administrative Review Officer. The right of appeal shall not apply to claims for repayment assessed by FNS against the State agency under § 246.23(a). A State agency shall have the option of requesting a hearing to present its position or a review of pertinent documents and records including any additional written submission prepared by the State agency.

(1) FNS will send a written notice by Certified Mail-Return Receipt Requested to the state agency or otherwise ensure receipt of such notice by the agency when asserting a sanction against a State agency as specified in § 246.19(a).

(2) A State agency aggrieved by a sanction asserted against it may file a written request with the Director, Administrative Review Division, U.S. Department of Agriculture, Food and Nutrition Service, 3101 Park Center Drive, Alexandria, Va. 22302, for a hearing or a review of the record. Such request shall be sent by Certified Mail-Return Receipt Requested and postmarked within 30 days of the date of receipt of the

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sanction notice. The envelope containing the request shall be prominently marked "REQUEST FOR REVIEW OR HEARING." The request shall clearly identify the specific FNS sanction(s) being appealed and shall include a photocopy of the FNS notice of sanction. If the State agency does not request a review of hearing within 30 days of receipt of the notice, the administrative decision on the sanctions will be considered final.

(b) *Acknowledgment of request.* Within 15 days of receipt by the Director of the Administrative Review Division of a request for review or hearing, the Director will provide the State agency with a written acknowledgment of the request.

(1) The acknowledgment will include the name and address of the FNS Administrative Review Officer to review the sanction;

(2) The acknowledgment will also notify the State agency that within 30 days of the receipt of the acknowledgment, the State agency shall submit three sets of the following information to the Administrative Review Officer—

(i) A clear, concise identification of the issue(s) in dispute;

(ii) The State agency's position with respect to the issue(s) in dispute;

(iii) The pertinent facts and reasons in support of the State agency's position with respect to the issue(s) in dispute and a copy of the specific sanction notice provided by FNS;

(iv) All pertinent documents, correspondence and records which the State agency believes are relevant and helpful toward a more thorough understanding of the issue(s) in dispute;

(v) The relief sought by the State agency;

(vi) The identity of the person(s) presenting the State agency's position when a hearing is involved; and

(vii) A list of prospective State agency witnesses when a hearing is involved.

(c) *FNS action.* (1) When a hearing is requested pursuant to this section, the Administrative Review Officer will, within 60 days after receipt of the State agency's information, schedule and conduct the hearing. The State agency will be advised of the time, date

and location of the hearing at least 10 days in advance.

(2) When a hearing is requested, the FNS Administrative Review Officer will make a final determination within 30 days after the hearing, and the final determination will take effect upon delivery of the written notice of this final decision to the State agency.

(3) When a review is requested, the FNS Administrative Review Officer will review information presented by a State agency and will make a final determination within 30 days after receipt of that information. The final determination will take effect upon delivery of the written notice of this final decision to the State agency.

**§ 246.23 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 Program funds provided to a State agency for supplemental foods or nutrition services and administration purposes were, through State or local agency negligence or fraud, misused or otherwise diverted from Program 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 nutrition services and administration funds or the value of supplemental foods or food instruments so misused or diverted.

(2) If FNS determines that any part of the Program funds received by a State agency; or supplemental foods, either purchased or donated commodities; or food instruments, were lost as a result of thefts, embezzlements, 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 supplemental foods or food instruments 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 food instruments. When a

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State agency can demonstrate that all reasonable management efforts have been devoted to reconciliation and 99 percent or more of the food instruments 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 Program, the State agency shall provide the funds necessary to maintain Program operations at the grant level authorized by FNS.

(c) *Claims against participants.* If a State agency determines that food benefits have been improperly issued under the Program as the result of a participant, guardian, or caretaker intentionally making a false or misleading statement or intentionally misrepresenting, concealing, or withholding facts, the State agency shall recover, in cash, from such participant, guardian, or caretaker an amount that the State agency determines is equal to the value of the overissued food benefits, unless the State agency determines that the recovery of the benefits would not be cost-effective. The State agency shall establish standards, based on a cost benefit review, for determining when recovery is cost-effective and maintain on file documentation of the disposition of all cases of improperly issued benefits. All such cases shall be pursued to the fullest extent possible, consistent with the State agency's cost-effectiveness standards. The State agency may delegate to its local agencies the responsibility for the collection of such claims in accordance with the State agency's standards.

(d) *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.

[50 FR 6121, Feb. 13, 1985, as amended at 52 FR 21238, June 4, 1987]

EFFECTIVE DATE NOTE: At 65 FR 83288, Dec. 29, 2000, §246.23 was amended by revising paragraphs (a)(4) and (c), effective February 27, 2001. For the convenience of the user, the revised text is set forth as follows:

**§ 246.23 Claims and penalties.**

(a) \* \* \*

(4) FNS will establish a claim against any State agency that has not accounted for the disposition of all redeemed food instruments and taken appropriate follow-up action on all redeemed food instruments that cannot be matched against valid enrollment and issuance records, including cases that may involve fraud, unless the State agency has demonstrated to the satisfaction of FNS that it has:

- (i) Made every reasonable effort to comply with this requirement;
- (ii) Identified the reasons for its inability to account for the disposition of each redeemed food instrument; and
- (iii) Provided assurances that, to the extent considered necessary by FNS, it will take appropriate actions to improve its procedures.

\* \* \* \* \*

(c) *Claims.* (1) *Claims against participants.* (i) *Procedures.* If the State agency determines that program benefits have been obtained or disposed of improperly as the result of a participant violation, the State agency must establish a claim against the participant for the full value of such benefits. For all claims, the State agency must issue a letter demanding repayment. If full restitution is not made or a repayment schedule is not agreed on within 30 days of receipt of the letter, the State agency must take additional

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collection actions until restitution is made or a repayment schedule is agreed on, unless the State agency determines that further collection actions would not be cost-effective. The State agency must establish standards, based on a cost benefit analysis, for determining when collection actions are no longer cost-effective. At the time the State agency issues the demand letter, the State agency must advise the participant of the procedures to follow to obtain a fair hearing pursuant to §246.9 and that failure to pay the claim may result in disqualification. In addition to establishing a claim, the State agency must determine whether disqualification is required by §246.12(u)(2).

(ii) *Types of restitution.* In lieu of financial restitution, the State agency may allow participants or parents or caretakers of infant or child participants for whom financial restitution would cause undue hardship to provide restitution by performing in-kind services determined by the State agency. Restitution may not include offsetting the claim against future program benefits, even if agreed to by the participant or the parent or caretaker of an infant or child participant.

(iii) *Disposition of claims.* The State agency must document the disposition of all participant claims.

(2) *Claims against the State agency.* FNS will assert a claim against the State agency for losses resulting from program funds improperly spent as a result of dual participation, if FNS determines that the State agency has not complied with the requirements in §246.7(1)(1).

(3) *Delegation of claims responsibility.* The State agency may delegate to its local agencies the responsibility for collecting participant claims.

## § 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.

(b) *Contractual responsibilities.* The standards contained in A-130 and 7 CFR part 3016 do not relieve the State or

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local 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 Program. 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 or local agency may use its own procurement regulations which reflect applicable State and local regulations, provided that procurements made with Program funds adhere to the standards set forth in A-130 and 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, including automated data processing equipment, acquired in whole or in part with Program funds.

[50 FR 6121, Feb. 13, 1985, as amended at 59 FR 11508, Mar. 11, 1994]

## § 246.25 Records and reports.

(a) *Recordkeeping requirements.* Each State and local agency shall maintain full and complete records concerning Program 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, food delivery systems, food instrument issuance and redemption, equipment purchases and inventory, certification, nutrition education, civil rights and fair hearing procedures.

(2) All records shall be retained for a minimum of three 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 three-year period, the records shall be kept until all issues are resolved, or until the end

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of the regular three-year period, whichever is later. If FNS deems any of the Program records to be of historical interest, it may require the State or local agency to forward such records to FNS whenever either agency is disposing of them.

(3) Records for nonexpendable property acquired in whole or in part with Program funds shall be retained for three years after its final disposition.

(4) All records, except medical case records of individual participants (unless they are the only source of certification data), 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 participation reports*—(1) *Monthly reports*. State agencies shall submit financial and program performance data on a monthly basis as specified by FNS. Such information may include, but shall not be limited to, actual and projected participation, the number of persons on waiting lists, and itemized nutrition services and administration funds expenditures. State agencies shall require local agencies to report such financial and participation information as is necessary for the efficient management of food and nutrition services and administration funds. When considered necessary and feasible by FNS, State agencies may be required to:

(i) Show in the “Remarks” section of the Financial and Participation Report the amount of cash allowances exceeding three days need being held by their local agencies or contractors; and

(ii) Provide short narrative explanations of actions taken by the State agency to reduce such excess balances.

(2) *Quarterly reports*. Quarterly, on dates specified by FNS, State agencies shall report the number of persons participating in the Program by category (i.e., pregnant, breastfeeding, and postpartum women, infants and children) within each priority level as established in § 246.7(e)(4).

(3) *Program Participant Characteristic reports*. State and local agencies shall provide such information as may be required by FNS to prepare reports on

participant characteristics which includes, at a minimum, information on breastfeeding incidence and duration, income and nutritional risk characteristics of participants, and participation in the Program by members of families of migrant farmworkers.

(c) *Civil rights*. The State agency shall ensure that each local agency participating under the Program submits a report of racial and ethnic participation data to the State agency, at a frequency prescribed by FNS.

(d) *Source documentation*. To be acceptable for audit purposes, all financial and Program performance reports shall be traceable to source documentation.

(e) *Certification of reports*. Financial and Program reports shall be certified as to their completeness and accuracy by the person given that responsibility by the State agency.

(f) *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, Program 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 its objectives.

(g) *Extension of reporting deadline*. FNS may extend the due date for any Financial and Participation Report upon receiving a justified request from the State agency. The State agency should not wait until the due date if an extension is to be requested, but should submit the request as soon as the need is known. Failure by a State agency to submit a report by its due date may result in appropriate enforcement actions by FNS in accordance with § 246.19(a)(2), including withholding of further grant payments, suspension or termination of the grant.

[50 FR 6121, Feb. 13, 1985, as amended at 52 FR 21238, June 4, 1987; 53 FR 15653, May 3, 1988; 59 FR 11508, Mar. 11, 1994; 65 FR 53528, Sept. 5, 2000]

### § 246.26 Other provisions.

(a) *No aid reduction*. The value of benefits or assistance available under the

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Program shall not be considered as income or resources of participants 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.

(b) *Statistical information.* FNS reserves the right to use information obtained under the Program in a summary, statistical or other form which does not identify particular individuals.

(c) *Medical information.* FNS may require the State or local agencies to supply medical data and other information collected under the Program in a form that does not identify particular individuals, to enable the Secretary or the State agencies to evaluate the effect of food intervention upon low-income individuals determined to be at nutritional risk.

(d) *Confidentiality.* The State agency shall restrict the use or disclosure of information obtained from program applicants and participants to:

(1) Persons directly connected with the administration or enforcement of the program, including persons investigating or prosecuting violations in the WIC Program under Federal, State or local authority;

(2) Representatives of public organizations designated by the chief State health officer (or, in the case of Indian State agencies, the governing authority) which administer health or welfare programs that serve persons categorically eligible for the WIC Program. The State agency shall execute a written agreement with each such designated organization:

(i) Specifying that the receiving organization may employ WIC Program information only for the purpose of establishing the eligibility of WIC applicants and participants for health or welfare programs which it administers and conducting outreach to WIC applicants and participants for such programs, and

(ii) Containing the receiving organization's assurance that it will not, in turn, disclose the information to a third party; and

(3) The Comptroller General of the United States for audit and examination authorized by law.

[50 FR 6121, Feb. 13, 1985, as amended at 53 FR 35301, Sept. 13, 1988]

EFFECTIVE DATE NOTE: At 65 FR 83288, Dec. 29, 2000, §246.26 was amended by revising the heading of paragraph (d), and adding paragraphs (e), (f), and (g), effective February 27, 2001. For the convenience of the user the revised and added text is set forth as follows:

§ 246.26 Other provisions.

\* \* \* \* \*

(d) *Confidentiality of applicant and participant information.* \* \* \*

(e) *Confidentiality of vendor information.* Confidential vendor information is any information about a vendor (whether it is obtained from the vendor or another source) that individually identifies the vendor, except for vendor's name, address and authorization status. Except as otherwise permitted by this section, the State agency must restrict the use or disclosure of confidential vendor information to:

(1) Persons directly connected with the administration or enforcement of the WIC Program or the Food Stamp Program who the State agency determines have a need to know the information for purposes of these programs. These persons may include personnel from its local agencies and other WIC State and local agencies and persons investigating or prosecuting WIC or Food Stamp Program violations under Federal, State, or local law;

(2) Persons directly connected with the administration or enforcement of any Federal or State law. Prior to releasing the information to one of these parties (other than a Federal agency), the State agency must enter into a written agreement with the requesting party specifying that such information may not be used or redisclosed except for purposes directly connected to the administration or enforcement of a Federal, or State law; and

(3) A vendor that is subject to an adverse action, including a claim, to the extent that the confidential information concerns the vendor subject to the adverse action and is related to the adverse action.

(f) *Confidentiality of Food Stamp Program retailer information.* Except as otherwise provided in this section, the State agency must restrict the use or disclosure of information about Food Stamp Program retailers obtained from the Food Stamp Program, including information provided pursuant to Section 9(c) of the Food Stamp Act of 1977 (7 U.S.C. 2018(c)) and §278.1(q) of this chapter,

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to persons directly connected with the administration or enforcement of the WIC Program.

(g) *USDA and the Comptroller General.* The State agency must provide the Department and the Comptroller General of the United States access to all WIC Program records, including confidential vendor information, pursuant to §246.25(a)(4).

**§ 246.27 Program 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 02222-1066.

(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.

(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.

[50 FR 6121, Feb. 13, 1985; 50 FR 8098, Feb. 28, 1985, as amended at 59 FR 11508, Mar. 11, 1994]

**§ 246.28 OMB control numbers.**

The following control numbers have been assigned to the information collection requirements in 7 CFR part 246 by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96-511.

7 CFR part 246 section where requirements are described	Current OMB control no.
.4(a) (8), (9), (11) .....	0584-0386
.5 .....	0584-0043
.6 .....	0584-0043
.7(a) .....	0584-0386
.7(e), (h), (j) .....	0584-0043
.7(n) .....	0584-0386
.7(i) .....	0584-A536
.10 .....	0584-A536
.11(a)(3) .....	0584-0386
.11(d) .....	0584-0043
.12(f), (i), (i)(3), (j) .....	0584-0043
.14(d)(1) .....	0584-0043
.16(c) .....	0584-0043
.17(c)(1) .....	0584-0043
.19 .....	0584-0043
.20(a) .....	0584-0043
.25(a), (b) .....	0584-0043,
	0584-0347

[50 FR 6121, Feb. 13, 1985, as amended at 53 FR 15653, May 3, 1988; 54 FR 51295, Dec. 14, 1989; 58 FR 11507, Feb. 26, 1993]

**PART 247—COMMODITY SUPPLEMENTAL FOOD PROGRAM**

- Sec.
- 247.1 General purpose and scope.
- 247.2 Definitions.
- 247.3 Administration.
- 247.4 Donation of supplemental foods.
- 247.5 State agency plan of program operation and administration.
- 247.6 Selection of local agencies.
- 247.7 Certification.
- 247.8 Nutrition education.
- 247.9 Financial management systems.
- 247.10 Caseload assignment and administrative funding.
- 247.11 Administrative costs.
- 247.12 Program income.
- 247.13 Records and reports.
- 247.14 Procurement and property management standards.
- 247.15 Audits.
- 247.16 Investigations.
- 247.17 Claims.
- 247.18 Closeout procedures.
- 247.19 Nondiscrimination.