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DEPARTMENT OF AGRICULTURE

Food and Consumer Service

7 CFR Part 248

RIN 0584-AB43

WIC Farmers' Market Nutrition Program

AGENCY: Food and Consumer Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule amends and finalizes an interim rule that was published on March 11, 1994 establishing requirements for the operation and management of the WIC Farmers' Market Nutrition Program (FMNP). The purposes of the FMNP are to provide resources to women, infants, and children who are nutritionally at risk, in the form of fresh, nutritious, unprepared foods (such as fruits and vegetables) from farmers' markets; to expand the awareness and use of farmers' markets; and to increase sales at such markets.

This rule also implements the nondiscretionary FMNP mandates of the

Healthy Meals for Healthy Americans Act of 1994, signed November 2, 1994.

EFFECTIVE DATE: This final rule is effective on October 1, 1995.

FOR FURTHER INFORMATION CONTACT: Barbara Hallman or Debra Whitford, Supplemental Food Programs Division, Food and Consumer Service, USDA, 3101 Park Center Drive, Room 540, Alexandria, Virginia 22302, (703) 305-2730.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This rule has been determined to be not significant for purposes of Executive Order 12866 and therefore has not been reviewed by the Office of Management and Budget.

Executive Order 12372

This program is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials (7 CFR part 3015, subpart V, and final rule-related notice published June 24, 1983 (48 FR 29114)).

Executive Order 12778

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full implementation. This rule is not intended to have retroactive effect unless so specified in the "Effective Date" paragraph of this preamble. Prior to any judicial challenge to the provisions of this rule or the

application of its provisions, all applicable administrative procedures must be exhausted.

Regulatory Flexibility Act

The Department has also reviewed this rule in relation to the requirements of the Regulatory Flexibility Act of 1980 (Pub. L. 96-354, 94 Stat. 1164, September 19, 1980). The Administrator of the Food and Consumer Service has certified that this final rule does not have a significant economic impact on a substantial number of small entities. Participating farmers and farmers' markets will be affected by the FMNP requirements and increased sales generated by FMNP recipients. In addition, participating State and local agencies will be affected by FMNP administration requirements. Participating State and local agencies receive Federal food and administrative funds to meet the requirements established in this rule. In addition, State agencies must contribute at least 30 percent of the cost of the program, except Indian Tribal Organizations which may receive a negotiated match contribution that is less than 30 percent but not less than 10 percent. Finally, there are no costs to farmers or farmers' markets for applying for the FMNP.

Paperwork Reduction Act

The reporting requirements established by this rulemaking have been reviewed and approved under Office of Management and Budget control number 0584-0477, in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3507).

ESTIMATED ANNUAL REPORTING AND RECORDKEEPING BURDEN

Section of regulations	Annual number of respondents	Annual frequency	Average burden per response	Annual burden hours
Reporting				
248.4	26	1	50	1,300
248.10(b)	550	1	2	1,100
248.17(b)(2)(ii)	4	1	10	40
248.18(b)	26	1	15	390
248.23(b)	26	2	4.5	234
Total	576			3,064
Recordkeeping				
248.9	26	1	1	26

ESTIMATED ANNUAL REPORTING AND RECORDKEEPING BURDEN—Continued

Section of regulations	Annual number of respondents	Annual frequency	Average burden per response	Annual burden hours
248.10(a) (2) (3)	1,100	1	2	2,200
248.10(e)	110	1	2	220
248.10(f)	26	1	5	130
248.11	26	1	12	312
Total	1,126	1	2,888
Total Reporting and Recordkeeping Burden	5,952

Good Cause Determinations

This final rule incorporates several new statutory requirements from the Healthy Meals for Healthy Americans Act of 1994 (Pub. L. 103-448) enacted on November 2, 1994 which became effective October 1, 1994. These provisions were not contained in the prior interim rule of March 11, 1994 and pertain primarily to funding issues. The provisions include the following: A 17 percent administrative cost reimbursement rate for all State agencies, authority to negotiate the matching requirement for Indian Tribal Organizations, expansion of the definition of State agency, change in the division of funds remaining after base grants have been allocated to 75 percent for current States for expansion and 25 percent to initiate new States, availability of up to 2 percent of total grant for market development, and elimination of carry forward authority. These resulting regulatory changes are non-discretionary, and accordingly, good cause exists for waiving prior notice and comment.

Background

Section 501 of the Hunger Prevention Act of 1988 (Pub. L. 100-435), enacted on September 19, 1988, amended the Child Nutrition Act of 1966 (CNA), 42 U.S.C. 1771 *et seq.*, to add a new subsection 17(m) which authorized up to 10 Farmers' Market Coupon Demonstration Projects (demonstration projects) for a 3-year period.

Although authorization for the demonstration projects expired at the end of Fiscal Year 1991, as part of the Rural Development, Agriculture, and Related Agency Appropriations Act for Fiscal Year 1992 (Pub. L. 102-142), Congress appropriated up to \$3 million to carry on the projects. As a result, the demonstration projects operated another year, through Fiscal Year 1992.

Based largely on the success of the demonstration projects, on July 2, 1992, the President signed the WIC Farmers' Market Nutrition Act of 1992 (Pub. L.

102-314). This Act amended section 17(m) of the CNA (42 U.S.C. 1786(m)) to authorize the FMNP as a permanent program. Therefore, on March 11, 1994, the Department published an interim rule (59 FR 11508) addressing the mandates of Pub. L. 102-314. Also included in the interim rule were references to requirements in Department-wide rules which apply to Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments (7 CFR part 3016), Governmentwide Debarment and Suspension (Non-Procurement) Requirements (7 CFR part 3017), Governmentwide Requirements for Drug-Free Workplace (7 CFR part 3017), Governmentwide Restrictions on Lobbying (7 CFR part 3018), Departmental regulations on nondiscrimination (7 CFR part 15, 15a, and 15b), 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 independent audit requirements in accordance with 7 CFR part 3015, 3016.26 or part 3051.

Summary of Comments Received on the Interim Rule

The March 11, 1994 interim rule provided for a 120-day comment period, which ended on July 11, 1994. Fifteen comment letters were received from a variety of sources, including FMNP State agencies, WIC State agencies, a public interest group, a governor's office, a Congressional office, and an orchard.

The Department has given all comments careful consideration in the development of this final rule and would like to thank all commenters who responded. Following is a discussion of each provision that received comments, and an explanation of the changes made in this final rule. Provisions on which no comments were received or no changes were made as a result of Public Law 103-448, are not addressed in the

preamble and remain as published in the interim rule.

Conceptual Framework for FMNP Policy Making (Outlined in Preamble Section of the Interim Rule Under WIC Farmers' Market Nutrition Program, States With Demonstration Projects)

The interim rule stated in the preamble section that because the FMNP will operate as an adjunct to WIC, the preamble would only discuss in detail individual provisions that are unique to the FMNP. Three commenters remarked that it was inappropriate for FCS to make the statement outlined above. These commenters suggested that the final rule reflect the distinctive differences between WIC and FMNP. This statement in the interim rule was merely intended to highlight the fact that since FMNP eligibility is limited to WIC participants or persons on the WIC waiting list, the programs are intended to operate in a complementary fashion. The focus of the interim rule and this final rule, however, are the distinct rules for operation of the FMNP. WIC Program regulations are not affected by this rule.

1. Definitions (§ 248.2)

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

Several commenters addressing this provision opposed or supported with modifications, the definition. Three commenters wanted apple cider included in the list of eligible foods because, as they indicated, "cider is not processed". Two commenters wanted herbs excluded from the definition because they believed herbs were not nutritious and were not specified in the law. Other commenters approved the

definition as long as "locally grown" replaced "domestically grown". These commenters expressed the view that this would preserve the unique identity and significance of the FMNP. They further stated that the Department should require that produce be locally grown. According to these same commenters, State agencies could then further clarify how they define locally grown.

In view of the concerns raised by commenters that "locally grown" be included in the definition of eligible foods and the Department's interpretation of the intent of Congress, we have replaced "domestically grown" with "locally grown" in the definition of eligible foods in the final rule, provided that in no instance can the State agency define "locally grown" to include foods grown outside of the United States and its territories. States shall generally consider locally grown to mean produce grown only within State borders but may define it to include areas in neighboring States adjacent to its borders.

After thorough consideration, we have determined that apple cider should remain excluded from the list of eligible food items. This conclusion was based on the Department's view that any food that has been altered from its naturally occurring state, except for usual harvesting and cleaning processes, is considered to be "processed" for purposes of the FMNP. The primary purpose of preventing FMNP coupon sales of processed foods is to prevent the value of the coupons from being expended on processing costs.

Regarding the comments concerning "herbs", the Department has retained them in the definition of eligible foods. The Department would like to point out, however, that State agencies have the ability to develop their own list of eligible foods within the regulatory definition, so a State agency may choose to exclude herbs if they wish to do so.

"Farmer" was defined as an individual authorized to sell produce at participating farmers' markets. Individuals who exclusively sell produce grown by someone else, such as wholesale distributors, cannot be authorized to participate in the FMNP. State agencies have the option to authorize individual farmers or farmers' markets.

About half of the commenters responding to this definition opposed the definition. Of those opposed, some stated that the Department should set a standard that a participating farmer must grow at least half of the produce that he/she sells at the market. Another commenter suggested that the Food and

Consumer Service (FCS) consult with the Agricultural Marketing Service and convene a taskforce of State FMNP directors to develop a definition of "farmer".

Of the commenters who supported this definition, they did so as long as "who locally grows fresh fruits and/or vegetables" is included in the definition.

The Department believes that the definition of "farmer" established in the interim rule provides each State agency with the broadest flexibility in authorizing farmers to meet the specific needs of its program. The definition allows State agencies, if they so desire, to set a standard for the amount of produce a participating farmer must grow. Therefore, the Department is retaining the definition of "farmer" as it was set forth in the interim rule.

Because the Department has included "locally grown" in the definition of eligible foods, it has not been repeated in the definition of "farmer".

"Farmers' market" was defined as an association of local farmers who assemble for the purpose of selling their produce directly to consumers. In cases where recipient access to farmers' markets is an issue, and with prior FCS approval, the definition of farmers' market may be expanded to include farmstands at which authorized farmers sell their produce.

The majority of commenters supported the definition as long as some of the issues regarding "farmstands" are modified. Some of these commenters suggested that FCS should not have to grant prior approval for every farmstand. Other commenters disagreed with the Department's discussion in the preamble which stated that farmstands are not as stable as markets. One other commenter suggested inserting "at a defined location" into the definition.

Two commenters opposed the definition. One of these commenters stated that farmstands should not be generally precluded from the FMNP. The commenter indicated that this is an example of the WIC Program focusing solely on the interests of the WIC population while ignoring the interests of the farmers' markets.

Based on the comments received, the Department has revised the definition of farmers' market by inserting "at a defined location" after the words "who assemble for the purpose of selling their produce directly to consumers". We have also clarified that prior FCS approval for farmstands may be obtained through the State Plan process.

"In-kind contributions" has been added in § 248.2 to accommodate its inclusion as an alternative for meeting

the match requirement. For purposes of the FMNP, in-kind contributions means property or services which benefit the FMNP and which are contributed by non-Federal sources without charge to the FMNP.

"Matching requirement" was defined in the interim rule as non-Federal cash outlays in an amount equal to not less than 30 percent of the total FMNP costs for the fiscal year. This match may be satisfied through non-Federal cash expenditures for the FMNP or for similar farmers' market programs which operate during the same period as the FMNP.

One commenter approved of the provision as stated and another commenter opposed it stating that the match should be reduced from 30 percent to 25 percent of the total cost of the Program.

As later explained in the definition of "similar programs", some commenters suggested that low-income be included when referencing other groups served by similar programs that are used to meet the matching requirement. Based on these comments, we have made this revision in the definition of "matching requirement" in the final rule.

The match requirement is set by statute. Section 204(v)(1) of Public Law 103-448 (November 2, 1994) amended section 17(m)(3) of the CNA (42 U.S.C. 1786(m)(3)) to allow the Secretary to negotiate a lower percentage of matching funds for Indian Tribal Organizations, but not lower than 10 percent of the total cost of the program. The negotiated match is authorized if the Indian State agency demonstrates to the Secretary financial hardship for the affected Indian tribe, band, group, or council. The final rule has been revised to reflect this new authority. The lower negotiated rate is only available to Indian Tribal Organizations.

The Department has further revised the definition in the final rule by removing the word "cash" from the definition. This adjustment was made in order to accommodate in-kind contributions which may be used to meet the match requirement. Finally, the wording in the first sentence of the definition has been slightly modified for clarity.

"Recipient" was defined as a person chosen by the State agency to receive FMNP benefits. Such a person must be a woman, infant over four months of age, or child, who receives benefits under the WIC Program or is on the waiting list to receive benefits under the WIC Program. Infants under four months of age are excluded from eligibility in the FMNP based on the recommendation of the American

Academy of Pediatrics (AAP) that such infants not consume solids due to the level of development of their gastrointestinal tract.

One commenter suggested omitting the clause which excludes infants four months of age or younger since this is understood and since it conflicts with the legislation that allows for the serving of households.

The Department believes the definition serves as a cautionary reminder of the AAP recommendation to participants and, accordingly, has decided to retain the definition as it was stated in the interim rule.

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

The majority of commenters supported this definition as long as it was modified to state that these similar programs must serve low-income people. One commenter suggested that a maximum income guideline should be established for non-WIC households, equal to that which is used in WIC, for those States utilizing the similar programs provision to meet the matching requirement.

In view of the comments received, the Department has inserted the words "low-income" before "women, infants and children" to clarify the types of similar programs that can be used to meet the matching requirement. A corresponding adjustment has also been made to the definition of "matching requirement."

"State" has been added in § 248.2 since it is referred to in the text of the regulation. "State" means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Marianas Islands.

"State agency." The interim rule defined "State agency" to be the agriculture, health or comparable department of each State. Section 204(v)(11) of Pub. L. 103-448 amended Section 17(m)(11)(D) of the CNA (42 U.S.C. 1786(m)(11)(D)), to expand the definition of State agency to include any other agency approved by the chief executive officer of the State. The Department wishes to clarify that, for purposes of this rule, when reference is made to, "State agencies that have not participated in the FMNP" or to "State agencies that are participating for the first time", this does not refer to a FMNP that has previously been administered by a different entity within the State. This final rule incorporates these revisions.

2. State Plan Requirements (§ 248.4(a))

a. Farmstand Locations. The interim regulations required that States wishing to authorize farmstands may do so only when recipient access to farmers' markets is an issue and with prior approval from FCS. Because the State Plan process is the vehicle States have for submitting their program plans for approval, we have clarified in § 248.4(a)(10)(ii) of this rule that State agencies desiring to authorize farmstands justify doing so through the State Plan process. For further clarification, the State Plan submission requirements in § 248.4(a)(8)(i) have been revised to include the number and location of farmstands and their proximity to clinics. The Department believes this will permit evaluation of whether recipient access to farmers' markets is at issue.

b. Requests for Market Development/ Technical Assistance Funds. As set forth in section 204(v)(2)(B) of Pub. L. 103-448 and clarified in § 248.14(h) of this rulemaking, States may use up to 2 percent of total program funds for market development or technical assistance if the Secretary determines that the State intends to promote the development of farmers' markets in socially or economically disadvantaged areas, or remote rural areas, where individuals eligible for participation in the program have limited access to locally grown fruits and vegetables. The Department believes that the State Plan process is the most efficient method for handling requests to direct program funding to market development or technical assistance. Accordingly, a new § 248.4(a)(20) is added to require State agencies desiring to fund such activities to request and to justify the need for such activities in the State Plan.

3. Data Collection (§§ 248.4 (a)(16) and (17))

The interim regulations required that State agencies submit, as an addendum to the State Plan, information on the change in consumption of fresh fruits and vegetables by recipients; and information on the effects of the FMNP on the use of farmers' markets, the marketing of agricultural products, and recipients' awareness regarding farmers' markets.

One commenter stated that the data collection requirement which assesses the effects of the FMNP on recipients and farmers is appropriate if it is cost effective and generates reliable information.

Section 204(v)(7) of Pub. L. 103-448 amended the information collection requirements as they pertain to the

collection of information on the change in consumption of fresh fruits and vegetables by recipients and the effects of the program on farmers' markets. The CNA now requires that such information shall only be collected if it is available. Sections 248.4(a) (15) and (16) of this final rule have been modified accordingly. In any data collection effort for the FMNP, the Department encourages the use of the most cost-efficient method that yields reliable information.

4. Recipient or Household Allocation of Benefits (§ 248.6(c))

This provision of the interim rule allows State agencies to allocate the quantity of benefits on an individual basis or a household basis. In situations where benefits are issued on a household basis, the household could receive fewer benefits as a unit than it otherwise would if benefits were allocated to individual household members. Under either allocation methodology, foods provided are intended for the sole benefit of FMNP recipients and are not intended to be shared with other non-participating household members.

One commenter approved of the provision as long as the statement that foods be approved for the sole use of WIC participants in the FMNP household be omitted. Other commenters indicated that since the CNA permits benefits to be issued on a household basis, it clearly suggests that the exclusion of any household member is not the intent of the FMNP.

One other commenter objected to the inclusion of a household benefit allocation option because, as was indicated, "it is not an equitable way to allocate benefits to participants".

The Department has decided to retain the definition as it was stated in the interim rule. As explained in the preamble to the interim rule, the Department believes State agencies should retain the option of reaching a greater number of households by allocating benefits on a household basis. The statement that the foods should be solely for use by FMNP participants is consistent with the FMNP's eligibility requirements.

5. Coupon and Market Management— Authorization/Training Visits (§ 248.10(a)(4))

The interim rule required that a State agency conduct a documented on-site training visit prior to, or at the time of, authorization of a farmer or farmers' market. The on-site visit shall include, at a minimum, provision of information

concerning eligible foods and proper FMNP coupon redemption procedures.

All commenters responding to this provision opposed the timeframe of the provision. These commenters stated that markets are not open prior to, or at the time of authorization, so it would be impossible to conduct on-site visits.

The primary reason for requiring the documented on-site training visit prior to, or at the time of, authorization was to ensure that farmers/farmers' markets were advised of critical program information concerning, at a minimum, eligible foods and proper FMNP coupon redemption procedures before they began accepting FMNP coupons. The Department is sensitive to the concerns raised by the commenters regarding the practical application of this provision. Therefore, based on the comments, the Department has revised the provision to read, "the State agency shall conduct face-to-face training for all newly authorized farmers and farmers' markets prior to their commencing participation in the FMNP." "Newly authorized" refers to those farmers/farmers' markets in their first year of participation in the FMNP. In addition, during their first year of participation, new farmers/farmers' markets must be considered "high-risk" and must be placed in the pool from which other high-risk farmers/farmers' markets are placed for selection of farmers/farmers' markets to monitor. Monitoring requirements are outlined in § 248.10(e).

The face-to-face training must include the minimum training requirements outlined in § 248.10(d). Face-to-face training prior to participation in the program provides safeguards to ensure that new farmers/farmers' markets are properly informed of program requirements prior to initiation of the program.

6. *Farmers' Markets Agreements* (§ 248.10(a))

The introductory paragraph of § 248.10(a) of the interim rule stated that the State agency is responsible for the fiscal management of, and accountability for, farmers/farmers' markets. Two of the commenters responding to this provision believed it created the impression that the State agency's FMNP oversight responsibilities are not just limited to FMNP-related activities. Accordingly, the introductory language in § 248.10(a) is amended by this final rule to clarify that in operating the FMNP, the State agency is only responsible for FMNP-related activities of the farmer/farmers' market, not their actions or activities in general.

The Department also wishes to clarify the face-to-face training requirements in § 248.10(d). In those State agencies that enter into authorization agreements with farmers' markets, the market managers may receive the face-to-face training and then, in turn, may provide such training to their participating farmers. This would fulfill the face-to-face training requirements of § 248.10(d). Alternatively, State agencies may meet this requirement by assuming responsibility for face-to-face training both for market managers and for participating farmers.

7. *Monitoring and Review of Farmers'/Farmers' Markets and Local Agencies and Sanctions—(§§ 248.10(e) (2) and (4))*

The interim regulations required that State agencies rank participating farmers and farmers' markets by risk factors, and that they conduct annual, on-site monitoring of at least 10 percent of farmers and 10 percent of farmers' markets beginning with those farmers and markets identified as being the highest risk. Mandatory high-risk indicators are a proportionately high volume of FMNP coupons redeemed by a farmer as compared to other farmers within the farmers' market and within the State, and recipient complaints. The interim rule also required that at least every 2 years, State agencies conduct a review of all local agencies within their jurisdiction.

Several commenters opposed these provisions. One commenter said that the transitory nature of farmers makes monitoring and sanctioning requirements not enforceable. Another commenter suggested eliminating the comparison of farmers for determination of which are high-risk, since as this commenter indicated, farmers' markets may be very small with only a low volume of coupons redeemed, and therefore, not inclined to abuse the Program.

Two commenters approved of the provisions as long as some adjustments to the provisions are made. One of these commenters suggested that it is impractical for administrative efficiency reasons, to conduct on-site monitoring of markets and farmers in strict rank order of risk.

Another commenter said that it is impractical to conduct WIC local agency reviews at the same time as the FMNP reviews, given the short amount of time (summer months) that the FMNP is being administered. The commenter suggested clarifying this section to accommodate the seasonal nature of the FMNP. One commenter stated that the 10 percent standard used for farmers

and farmers' markets should also be applied to local agencies, which the interim regulations also require to be reviewed every two years. This commenter went on to say that the requirement to review all local agencies every two years is unrealistic given staffing and budget constraints, plus the limited time FMNP coupons are actually being distributed at the local agency.

Based on some of the comments received, the Department has revised the provisions. First, we wish to clarify that even in farmers' markets where farmers are very small with a low volume of coupons redeemed, significant differences in redemption rates may indicate program abuse. Accordingly, the Department believes comparing redemption rates among farmers in each market and within the State represents a valid high-risk indicator. Although the final rule still requires State agencies to consider comparison of redemption rates among farmers in each market, the Department points out that State agencies are free to accord this factor whatever weight they deem appropriate in establishing the high-risk rankings.

The Department is further modifying the final rule to clarify that high-risk farmers and farmers' markets are not required to be visited in strict rank order of their risk. Rather, once State agencies have identified the highest risk farmers and farmers' markets to be monitored, the State agency can determine the schedule or order in which they will be visited based on location, staff resources and other factors. Accordingly, the phrase "beginning with" has been deleted from § 248.10(e)(2).

With regard to the monitoring requirements for farmers and farmers' markets contained at § 248.17(e)(1)(i), a State agency commenter suggested that the 10 percent minimum requirement targeted at farmers and markets determined to be "high-risk" was inadequate, and that it should be modified to include a monitoring visit for farmers and farmers' markets that have never previously participated in the FMNP. The Department has considered this comment and has determined that a monitoring visit to all farmers that have never previously participated in the FMNP may be excessive for some States during one FMNP season. The Department has however taken the comment into consideration and has modified § 248.10(e)(2) to require State agencies to include lack of previous participation in the FMNP, as a high-risk indicator along with the other high-risk indicators in § 248.10(e)(2). Accordingly, farmers in their first year of participation may

now be subject to monitoring visits. The final rule identifies three mandatory high-risk indicators: 1. a proportionately high volume of FMNP coupons redeemed by a farmer as compared to other farmers within the farmers' market and within the State; 2. recipient complaints; and 3. farmers and farmers' markets in their first year of FMNP operation.

The Department would like to clarify that the intent behind defining a farmer/farmers' market as high-risk in the FMNP is for purposes of identifying those farmers/farmers' markets that may be subject to a monitoring visit. It is in no way intended to stigmatize them with a label. Farmers participating in the FMNP for the first time are considered high-risk (and thus subject to monitoring) because they have not previously participated and so may not be as familiar with program operations.

If after application of the high-risk indicators, a State agency identifies fewer than 10 percent of its farmers and farmers' markets as high-risk, the State agency shall randomly select additional farmers and farmers' markets to monitor in order to meet the 10 percent minimum.

The high-risk indicators listed above generally apply to a State agency already participating in the FMNP. A State agency participating in the FMNP for the first time shall, in lieu of applying the high-risk criteria, randomly select 10 percent of its participating farmers and 10 percent of its participating farmers' markets for monitoring visits.

The Department also wishes to clarify that 10 percent of farmers and 10 percent of farmers' markets must be monitored, not 10 percent of farmers within a market selected for review. For example, if there are five farmers' markets in a participating State and 40 farmers, the State shall monitor at a minimum, one farmers' market and four farmers. These four farmers may or may not be participating within the one farmers' market being monitored.

With regard to local agency reviews, the Department encourages State agencies to conduct reviews of FMNP practices at WIC local agencies during the FMNP season. We have clarified that, when this is not practical, reviews of FMNP practices at the WIC local agency may be conducted any time during the year. Reviews conducted outside of the FMNP season would include a review of documents and procedural plans or practices of those items listed in § 248.17(c)(1)(ii). The final regulatory language at § 248.17(c)(1)(ii) has also been clarified to read as follows: "WIC State agency

reviews of WIC local agencies conducted for the WIC Program may contribute to meeting the FMNP requirement that all local agencies be reviewed once every two years if the reviews include reviews of FMNP practices."

8. FMNP Costs—Composition of Allowable Costs and Specified Allowable Administrative Costs (§ 248.12(a))

In § 248.12(a)(1)(ii) of the interim rule, the reference to "7 CFR part 3015" was in error. It has been changed to read "7 CFR part 3016" in the final rule.

Certain administrative costs associated with the first year of operating the FMNP were listed in § 248.14(g)(1) of the interim rule which concerns administrative funding. These items were previously listed as allowable start up costs eligible for the 2 percent additional administrative allowance for a State's first year of operation. Because Pub. L. 103-448 increased the general administrative allowance from 15 to 17 percent and removed the 2 percent allowance for start up expenses, these items have been consolidated with the list of general allowable administrative costs found at § 248.12(b)(8)-(13).

9. Matching Amount (§ 248.14(a)(1)(i))

Section 204(v)(1) of the Pub. L. 103-448 amended section 17(m)(3) of the Act to permit the Secretary to negotiate with an Indian State agency a lower percentage of matching funds than the 30 percent requirement, but not lower than 10 percent of the total cost of the program, if the Indian State agency demonstrates to the Secretary financial hardship for the affected Indian tribe, band group, or council. The final rule has been amended to reflect this change in the Law.

The Department has also provided for the allowance of in-kind contributions to be used to meet the state match requirement by revising § 248.14(a)(1)(ii) to read: "A State agency may count any form of contribution authorized by 7 CFR 3016.24 toward the State matching requirement, including in-kind contributions."

10. Distribution of Funds to Previously Participating State Agencies (§ 248.14(b))

The interim rule stated that provided sufficient FMNP funds are available, each State agency that participated in the FMNP in the prior fiscal year shall receive not less than the amount of funds the State agency received in the most recent year in which it received

funding, if it otherwise complies with program requirements.

One commenter opposed the provision stating that, because of the stability clause for participating States, the FMNP could be perceived as perpetuating inequities among States which have been participating in the program longer.

This provision was derived from Section 17(m)(6)(B)(i) of the CNA which states that as long as the appropriation is sufficient and the State agency provides the required matching funds, the State agency shall receive not less than the amount of funds it received in the most recent fiscal year in which it received funds. As such, § 248.14(b) is retained in this final rule, with minor editorial changes.

11. Ratable Reduction (§ 248.14(c))

The interim rule stated that if amounts appropriated for any fiscal year for grants under the FMNP are not sufficient to pay to each previously participating State agency at the level they received in the most recent fiscal year, each State agency's grant shall be ratably reduced, except that, if sufficient funds are available, each State agency shall receive at least \$50,000 or the amount that the State agency received for the prior fiscal year if that amount is less than \$50,000.

As one commenter emphasized, it is not the intent of the Law that the \$50,000 minimum funding level apply to all States wishing to participate in the FMNP. Rather, this funding level is intended to serve as the minimum funding level a State agency will receive if ratable funding reductions are necessary due to insufficient appropriations.

Pursuant to section 204(v)(4) of the Pub. L. 103-448, the insufficient funding reduction floor has been raised from \$50,000 to \$75,000. In addition, the analysis accompanying the bill clarifies that the \$75,000 threshold is not meant to serve as a minimum grant level for first-year requests from States. Section 248.14(c) has been revised to reflect the new level of \$75,000.

12. Expansion of Participating State Agencies (§ 248.14(d))

As required by section 17(m)(6)(G) of CNA, the interim rule provided that 45 to 55 percent of any funds that remained after funding States at the level they received in the most recent fiscal year of operation shall be allocated to current State agencies to fund new participants, with the remaining 45 to 55 percent made available to State agencies which have not previously participated. Any funds recovered will be reallocated in

accordance with the appropriate method determined by FCS.

Section 204(v)(6) of Pub. L. 103-448 amended section 17(m)(6)(G) of the CNA to change this ratio so that funds remaining after funding States at the level they received in the most recent fiscal year of operation shall be allocated on a ratio of 75 percent for existing States to expand their FMNP and to 25 percent for States to start new programs. Section 248.14(d) of the final regulation has been modified to reflect this change.

13. Administrative Funding and Market Development/Technical Assistance (§ 248.14(g))

Under the interim regulations, a State agency was limited to not more than 15 percent of the total FMNP funds for administration except that: (1) Up to an additional 2 percent of total FMNP funds could be used for the first year of operation to cover certain start-up costs and (2) after the first year of operation, with the Secretary's permission, up to an additional 2 percent of total FMNP funds could be used toward FMNP administrative expenses.

Most of the commenters opposed the provision because of the 15 percent limit, suggesting instead a 17 percent rate for all States. Section 204(v)(2) of Pub. L. 103-448 amended section 17(m)(5)(F) to permit FMNP State agencies to use up to 17 percent of the total amount of the Federal grant and the required State agency match for administrative expenses. The amendment eliminated the 2 percent add-ons for new State agencies or for existing State agencies which demonstrated "financial need." Section 204(v)(2)(B)(ii) of Pub. L. 103-448 also amended the CNA to now permit State agencies to use not more than 2 percent of total program funds for market development or technical assistance to farmers' markets if the Secretary determines that the State intends to promote the development of farmers' markets in socially or economically disadvantaged areas, or remote rural areas, where individuals eligible for participation in the program have limited access to locally grown fruits and vegetables. Section 248.14(g) has been revised to reflect these changes in the administrative funding level and the availability of funds for market development or technical assistance.

14. Carry Forward/Backspend (§ 248.14(i))

Section 204(v)(9) of Pub. L. 103-448 amended the CNA to eliminate the ability of FMNP State agencies to carry forward up to 5 percent of their Federal

grant. The CNA continues to permit FMNP State agencies to "backspend" up to 5 percent of their Federal grant. Accordingly, this change is reflected in § 248.14(i) of this final rule.

15. Appeals Procedures for Farmers (§ 248.17)

For purposes of clarification, § 248.17(f) is modified by this final rule. The change is made to clarify that, where a State agency does not authorize individual farmers, it shall specify the appropriate appeals procedure to be used by a farmer who is denied authorization, disqualified or sanctioned by the farmers' market or farmers' association.

16. Records and Reports (§ 248.23)

Under the interim rule, State agencies were required to submit to FCS, financial and FMNP performance data on a yearly basis as specified by FCS and required by section 17(m)(8) of the CNA. Program performance data include recipient data by category.

One commenter opposed the provision requiring the collection of recipient data by category when benefits are allocated by household, unless additional funds are made available to enable States to develop and design computer systems to accurately compile and report the data.

The Department is retaining the definition as set forth in the interim rule since such information collection is required by section 17(m)(8)(A) of the CNA.

List of Subjects in 7 CFR Part 248

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

Accordingly, the interim rule adding 7 CFR part 248 which was published at 59 FR 11517-11529 on March 11, 1994, is adopted as a final rule with the following changes.

PART 248—WIC FARMERS' MARKET NUTRITION PROGRAM (FMNP)

1. The authority citation for part 248 continues to read as follows:

Authority: 42 U.S.C. 1786.

2. In § 248.2:

a. Definitions of "In-kind contributions" and "State" are added in alphabetical order.

b. The first sentence in the definition of "Eligible foods" is revised and two new sentences are added at the end of the definition.

c. The first sentence in the definition of "Farmers' market" is revised.

d. The third sentence in the definition of "Farmstand" is revised.

e. The definition of "Matching requirement" is revised.

f. The definition of "Program or FMNP" is revised.

g. The definition of "Similar programs" is revised.

h. The definition of "State agency" is revised.

The revisions and additions read as follows:

§ 248.2 Definitions.

* * * * *

Eligible foods means fresh, nutritious, unprepared, locally grown fruits, vegetables and herbs for human consumption. * * * State agencies shall consider locally grown to mean produce grown only within State borders but may also define it to include areas in neighboring States adjacent to its borders. Under no circumstances can produce grown outside of the United States and its territories be considered eligible foods.

* * * * *

Farmers' market means an association of local farmers who assemble at a defined location for the purpose of selling their produce directly to consumers. * * *

Farmstand * * * With prior FCS approval, through the State Plan process, a State agency may authorize a farmstand or a nonprofit organization operating a farmstand to participate in the FMNP where necessary to ensure adequate recipient access to farmers' markets.

* * * * *

In-kind contributions mean property or services which benefit the FMNP and which are contributed by non-Federal parties without charge to the FMNP.

* * * * *

Matching requirement means non-Federal outlays in an amount equal to not less than 30 percent of the total FMNP costs for the fiscal year. The Secretary may negotiate with an Indian State agency a lower percentage of matching funds, but not lower than 10 percent of the total cost of the program, if the Indian State agency demonstrates to the Secretary financial hardship for the affected Indian tribe, band, group, or council. The match may be satisfied through non-Federal expenditures for the FMNP or for similar farmers' market programs which operate during the same period as the FMNP. Similar programs include other farmers' market programs which serve low-income women, infants and children (who may

or may not be WIC participants or on the waiting list for WIC services), as well as other categories of low-income recipients, such as, but not limited to, low-income elderly persons.

* * * * *

Program or FMNP * * * The Special Supplemental Nutrition Program for Women, Infants and Children (WIC) is authorized by section 17 of the Child Nutrition Act of 1966, as amended. Within section 17, section 17(m) authorizes the FMNP.

* * * * *

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

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

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

* * * * *

3. In § 248.4:

- a. Paragraph (a)(8)(i) is revised.
 - b. Paragraphs (a)(10)(ii) through (a)(10)(viii) are redesignated as paragraphs (a)(10)(iii) through (a)(10)(ix), respectively.
 - c. A new paragraph (a)(10)(ii) is added.
 - d. Paragraph (a)(15) is revised.
 - e. Paragraph (a)(16) is removed.
 - f. Paragraph (a)(17) is redesignated as paragraph (a)(16) and is revised.
 - g. Paragraphs (a)(18), (a)(19), and (a)(20) are redesignated as paragraphs (a)(17), (a)(18), and (a)(19), respectively.
 - h. A new paragraph (a)(20) is added.
- The additions and revisions read as follows:

§ 248.4 State Plan.

- (a) * * *
- (8) * * *

(i) The number and addresses of participating markets, farmstands and area WIC clinics including a map

outlining the service area and proximity of markets/farmstands to clinics; and

* * * * *

(10) * * *

(ii) For those State agencies desiring to authorize farmstands, justification for doing so.

* * * * *

(15) If available, information on the change in consumption of fresh fruits and vegetables by recipients. This information shall be submitted as an addendum to the State Plan and shall be submitted at such a date specified by the Secretary.

(16) If available, information on the effects of the program on farmers' markets. This information shall be submitted as an addendum to the State Plan and shall be submitted at such a date specified by the Secretary.

* * * * *

(20) For those State agencies requesting the extra 2 percent administrative rate for market development or technical assistance to promote such development in disadvantaged areas or remote rural areas, an explanation of their justification and plans for the use of such funds.

* * * * *

4. In § 248.8 paragraph (a) is revised to read as follows:

§ 248.8 Level of benefits and eligible foods.

(a) *General.* State agencies shall identify in the State Plan the fresh, nutritious, unprepared, locally grown fruits, vegetables and herbs which are eligible for purchase under the FMNP. Ineligible foods for the purpose of the FMNP include, but are not limited to: honey, maple syrup, cider, nuts and seeds, eggs, cheese, meat and seafood. Locally grown shall mean produce grown only within a State's borders but may be defined to include border areas in adjacent States. Under no circumstances can produce grown outside of the United States and its territories be considered eligible foods.

* * * * *

5. In § 248.10:

- a. The second sentence of paragraph (a) introductory text is revised.
- b. Paragraph (a)(4) is revised.
- c. The introductory text of paragraph (d) is revised.
- d. The first and second sentences of paragraph (e)(2) are revised.
- e. Two new sentences are added at the end of paragraph (e)(2).
- f. The last sentence of paragraph (e)(4) is revised.

The revisions and additions read as follows:

§ 248.10 Coupon and market management.

(a) *General.* * * * The State agency is responsible for the fiscal management of, and accountability for FMNP-related activities for farmers/farmers' markets.

* * *

(4) The State agency shall ensure that face-to-face training is conducted prior to start up of the first year of FMNP participation of a farmers' market and individual farmer. The face-to-face training shall include at a minimum those items listed in paragraph (d) of this section.

* * * * *

(d) *Annual training for farmers/farmers' market managers.* State agencies shall conduct annual training for farmers/farmers' market managers participating in the FMNP. The State agency shall conduct a face-to-face training for all farmers and farmers' market managers who have never previously participated in the program prior to their commencing participation in the FMNP. After a farmer/farmers' market manager's first year of FMNP operation, State agencies have discretion in determining the method used for annual training purposes. At a minimum, annual training shall include instruction emphasizing:

* * * * *

(e) *Monitoring and review of farmers/farmers' markets and local agencies.*

* * *

(2) Each State agency shall rank participating farmers and farmers' markets by risk factors, and shall conduct annual, on-site monitoring of at least 10 percent of farmers and 10 percent of farmers' markets which shall include those farmers and markets identified as being the highest-risk. Mandatory high-risk indicators are a proportionately high volume of FMNP coupons redeemed by a farmer as compared to other farmers within the farmers' market and within the State, recipient complaints, and farmers and farmers' markets in their first year of FMNP operation. * * * If application of the high-risk indicators results in fewer than 10 percent of farmers and farmers' markets as high-risk, the State agency shall randomly select additional farmers and farmers' markets to be monitored in order to meet the 10 percent minimum. The high-risk indicators listed above generally apply to a State agency already participating in the FMNP. A State agency participating in the FMNP for the first time shall, in lieu of applying the high-risk indicators, randomly select 10 percent of its participating farmers and 10 percent of

its participating farmers' markets for monitoring visits.

* * * * *

(4) * * * WIC State agency reviews of WIC local agencies, which include reviews of FMNP practices, may contribute to meeting the requirement that all local agencies be reviewed once every 2 years.

* * * * *

§ 248.11 [Amended]

6. In § 248.11, paragraph (g) is amended by removing the reference to "§ 248.10(f)" and adding, in its place, a reference to "§ 248.10(h)".

7. In § 248.12:

a. The fourth sentence of paragraph (a)(1)(i) is revised.

b. Paragraph (a)(1)(ii) is redesignated as paragraph (a)(1)(iii) and the third sentence is amended by removing the reference to "7 CFR part 3015" and adding in its place, a reference to "7 CFR part 3016".

c. A new paragraph (a)(1)(ii) is added.

d. New paragraphs (b)(8), (b)(9), (b)(10), (b)(11), (b)(12), (b)(13) and (b)(14) are added.

The additions and revisions read as follows:

§ 248.12 FMNP costs.

(a) *General.*—(1) *Composition of allowable costs.* * * *

(i) *Food Costs and administrative costs.* * * * Except as provided in § 248.14(g) of this part, a State agency's administrative costs under the FMNP may not exceed 17 percent of its total FMNP costs. * * *

(ii) *Market development or technical assistance costs.* Market development or technical assistance costs are those costs under § 248.14(h) incurred to promote the development of farmers' markets in socially or economically disadvantaged areas, or remote rural areas, where individuals eligible for participation in the program have limited access to locally grown fruits and vegetables. Subject to a determination by the Secretary under § 248.14(h), a State agency may, during any fiscal year, use not more than 2 percent of total program funds for such market development or technical assistance.

* * * * *

(b) *Specified allowable administrative costs.* * * *

(8) The cost of determining which local WIC sites will be utilized.

(9) The cost of recruiting and authorizing farmers/farmers' markets to participate in the FMNP.

(10) The cost of preparing contracts for farmers/farmers' markets and local WIC providers.

(11) The cost of developing a data processing system for redemption and reconciliation of FMNP coupons.

(12) The cost of designing program training and informational materials.

(13) The cost of coordinating FMNP implementation responsibilities between designated administering agencies.

8. In § 248.14:

a. A new sentence is added before the second sentence of paragraph (a)(1)(i).

b. Paragraph (a)(1)(ii) is revised.

c. A new sentence is added at the end of paragraph (a)(1)(iii).

d. Paragraph (b) is revised.

e. Paragraph (c) is revised.

f. The first sentence of paragraphs (d)(1) and (d)(2) are revised and paragraph (d)(3) is revised.

g. Paragraph (e)(1) is amended by removing the words "(exclusive of the 5 percent carry forward)" from the first and second sentences of that paragraph.

h. Paragraph (g) is revised.

i. Paragraphs (h), (i) and (j) are redesignated as paragraphs (i), (j) and (k) respectively.

j. A new paragraph (h) is added.

k. Newly redesignated paragraph (i) is revised.

l. Newly redesignated paragraph (j) is revised.

m. Newly redesignated paragraph (k) is revised.

The revisions and additions are as follows:

§ 248.14 Distribution of funds.

(a) *Conditions for receipt of Federal funds.*—(1) *Matching of funds.*

(i) *Match amount.* * * * The Secretary may negotiate a lower percentage of matching funds, but not lower than 10 percent of the total cost of the program, in the case of an Indian State agency that demonstrates to the Secretary financial hardship for the affected Indian tribe, band, group, or council. * * *

(ii) *Sources of matching contributions.* A State agency may count any form of contribution authorized by 7 CFR 3016.24 toward the State matching requirement including in-kind contributions.

(iii) *Failure to match.* * * * This match amount may be lower for those Indian State agencies that have demonstrated to the Secretary financial hardship as set forth in paragraph (a)(1)(i) of this section.

* * * * *

(b) *Distribution of FMNP funds to previously participating State agencies.* Provided that sufficient FMNP funds are available, each State agency that participated in the FMNP in any prior fiscal year, shall receive not less than

the amount of funds the State agency received in the most recent fiscal year in which it received funding, if it otherwise complies with the requirements established in this part.

(c) *Ratable reduction.* If amounts appropriated for any fiscal year for grants under the FMNP are not sufficient to pay to each previously participating State agency at least an amount as identified in paragraph (b) of this section, each State agency's grant shall be ratably reduced, except that, to the extent permitted by available funds, each State agency shall receive at least \$75,000 or the amount that the State agency received for the most recent prior fiscal year in which the State participated, if that amount is less than \$75,000.

(d) *Expansion of participating State agencies and establishment of new State agencies.* * * *

(1) Of the remaining funds, 75 percent shall be made available to State agencies already participating in the FMNP that wish to serve additional recipients. * * *

(2) Of the remaining funds, 25 percent shall be made available to State agencies that have not participated in the FMNP in any prior fiscal year. * * *

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

* * * * *

(g) *Administrative funding.* A State agency shall have available for administrative costs an amount not greater than 17 percent of total FMNP funds. The 17 percent administrative cost limitation shall not apply to any funds that a State agency may contribute in excess of its minimum matching requirement. A State agency may use any non-Federal contributions in excess of the 30 percent (or the negotiated percentage for those Indian State agencies that received a lower amount) matching requirement for food and/or administrative costs.

(h) *Market development.* A State agency shall be permitted to use not more than 2 percent of total program funds for market development or technical assistance to farmers' markets if the Secretary determines that the State intends to promote the development of farmers' markets in socially or economically disadvantaged areas, or remote rural areas, where individuals eligible for participation in the program have limited access to locally grown fruits and vegetables.

(i) *Transfer of funds.* A State agency may use not more than 5 percent of the

Federal FMNP funds made available for the fiscal year to reimburse expenses incurred by the FMNP during a preceding fiscal year. The State agency shall provide such justification for its request to spend back funds under this paragraph as FNS may require.

(j) *Recovery of unused funds.* State agencies shall return to FCS any unexpended funds made available for a fiscal year by February 1 of the following fiscal year.

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

9. In § 248.16 the second sentence in paragraph (f) is revised to read as follows:

§ 248.16 Administrative appeal of State agency decisions.

* * * * *

(f) *Additional appeals procedures for State agencies which authorize farmers' markets and not individual farmers.*

* * * A State agency which authorizes farmers' markets and not individual farmers shall ensure that procedures are in place to be used when a farmer seeks to appeal an action of a farmers' market or association denying the farmer's application to participate, or sanctioning or disqualifying the farmer.

10. In § 248.17:

a. The third sentence of the introductory text of paragraph (b) is revised.

b. The first sentence of paragraph (c)(1)(i) is revised.

c. Two new sentences are added at the end of paragraph (c)(1)(ii).

The revisions and additions read as follows:

§ 248.17 Management evaluations and reviews.

* * * * *

(b) *Responsibilities of FCS.* * * *

These evaluations shall also include reviews of selected local agencies, and on-site reviews of selected farmers'/farmers' markets. * * *

* * * * *

(c) *Responsibilities of State agencies.*

* * *

(1) * * *

(i) Annual monitoring reviews of participating farmers'/farmers' markets, including on-site reviews of a minimum of 10 percent of farmers and 10 percent of farmers' markets, which includes those farmers and markets identified as being the highest risk. First year of operation in the FMNP shall be considered a high-risk indicator. * * *

(ii) * * * WIC State agency reviews of local agencies conducted for the WIC

Program may contribute to meeting the FMNP requirement that all local agencies be reviewed once every two years if the reviews include reviews of FMNP practices. When the WIC State agency conducts a review of the local agency outside of the FMNP season, a review of documents and procedural plans of the FMNP, rather than actual FMNP activities, is acceptable.

* * * * *

11. In § 248.25, paragraph (a) is revised to read as follows:

§ 248.25 FMNP information.

* * * * *

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

* * * * *

12. Section 248.26 is revised to read as follows:

§ 248.26 OMB control number.

The collecting of information requirements for Part 248 have been approved by the Office of Management and Budget and assigned OMB control number 0584-0477.

Dated: September 20, 1995.
William E. Ludwig,
Administrator, Food and Consumer Service.
[FR Doc. 95-23950 Filed 9-26-95; 8:45 am]
BILLING CODE 3410-34-U

Agricultural Marketing Service

7 CFR Part 906

[Docket No. FV95-906-2-FIR]

Expenses and Assessment Rate for the Marketing Order Covering Oranges and Grapefruit Grown in the Lower Rio Grande Valley in Texas

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture (Department) is adopting as a final rule, with appropriate modifications, the provisions of an interim final rule that authorized expenses and established an assessment rate for the Texas Valley Citrus Committee (TVCC) under Marketing Order No. 906 for the 1995-96 fiscal year. Authorization of this budget enables the TVCC to incur expenses that are reasonable and necessary to administer this program. Funds to administer this program are derived from assessments on handlers.

DATES: Effective beginning August 1, 1995, through July 31, 1996.

FOR FURTHER INFORMATION CONTACT: Charles L. Rush, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2523-S, Washington, D.C. 20090-6456, telephone: (202) 690-3670; or Belinda G. Garza, McAllen Marketing Field Office, Fruit and Vegetable Division, AMS, USDA, 1313 East Hackberry, McAllen Texas 78501, telephone: (210) 682-2833.

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing Agreement and Order No. 906 (7 CFR part 906) regulating the handling of oranges and grapefruit grown in the Lower Rio Grande Valley in Texas. The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the Act.

The Department of Agriculture (Department) is issuing this rule in conformance with Executive Order 12866.

This final rule has been reviewed under Executive Order 12778, Civil Justice Reform. Under the marketing order provisions now in effect, Texas oranges and grapefruit are subject to assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable oranges and grapefruit handled during the 1995-96 fiscal year, which begins August 1, 1995, and ends July 31, 1996. This final rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and requesting a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after date of the entry of the ruling.

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA),