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## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

#### 7 CFR Part 246

RIN 0584-AC77

#### Special Supplemental Nutrition Program for Women, Infants and Children (WIC): Non-Discretionary Funding Provisions of the William F. Goodling Child Nutrition Reauthorization Act of 1998

**AGENCY:** Food and Nutrition Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule incorporates into the WIC program regulations numerous non-discretionary funding provisions mandated in the William F. Goodling Child Nutrition Reauthorization Act of 1998. This rule revises and expands backspend and spendforward authority, conversion of funds, multipurpose/infrastructure grants and the use of food funds for the purchase of breast pumps. The rule also revises nutrition services and administration expenditure standards and expands the timing for the use of vendor and participant collections. The provisions in this rule provide greater flexibility for State agencies in the operation of WIC program relating to funds management.

**EFFECTIVE DATE:** This rule is effective October 1, 1998.

**FOR FURTHER INFORMATION CONTACT:** Patricia Daniels, (703) 305-2746.

**SUPPLEMENTARY INFORMATION:**

#### Background

On October 31, 1998, the President signed Public Law 105-336, the William F. Goodling Child Nutrition Reauthorization Act of 1998 (the Reauthorization Act), which included several non-discretionary funding provisions pertaining to the WIC

program. The Reauthorization Act expands the use of funds recovered from vendors and participants, authorizes the use of food funds to purchase or rent breast pumps, reduces the nutrition services and administration (NSA) expenditure standard from 15 to 10 percent, provides a new option for converting food funds to nutrition services and administration funds, and adjusts the formula for grants for infrastructure, special projects, and breastfeeding promotion and support activities. The Reauthorization Act also authorizes back spending NSA funds, eliminates the spend forward authority for food funds, and expands the spend forward authority for NSA funds. We have also taken this opportunity to rewrite the affected provisions in a question and answer format to improve readability.

#### Good Cause Determination

The provisions in this rule provide greater flexibility for State agencies in the operation of WIC program relating to funds management. All of these provisions are also non-discretionary. Because of the non-discretionary nature of these legislative provisions, the Administrator of the Food and Nutrition Service (FNS) has determined that, in accordance with 5 U.S.C. 553, prior notice and comment is unnecessary and contrary to the public interest.

#### Effective Date

These provisions of the Reauthorization Act became effective October 1, 1998. Therefore, we are making this rule effective retroactively to October 1, 1998.

#### Use of Recoveries From Vendors and Participants

General appropriations principles permit collected claims to be used only in the fiscal year in which the initial obligation was made. In 1994 Public Law 103-448, the Healthy Meals for Healthy Americans Act of 1994, amended section 17(f)(21) of the Child Nutrition Act of 1966 (CNA) (42 U.S.C. 1786(f)(21)) to permit funds recovered as a result of violations in the food delivery system to be used in the year in which they are collected as well. Section 203(d) of the Reauthorization Act further amended section 17(f)(21) of the CNA to expand this authority further and to allow funds recovered from vendors and participants as a

result of a claim to be used in the fiscal year in which the claim arose, the fiscal year in which the funds are collected, or the fiscal year after collection. This is in addition to the general rule permitting use in the year in which the initial obligation was made. This rule amends section 246.14(e) of the WIC regulations to reflect this change and to make clear that State agencies may not credit funds recovered from participants until any administrative hearings held pursuant to section 246.9 have been completed.

#### Use of Food Funds To Purchase Breast Pumps

Section 203(h) of the Reauthorization Act amended section 17(h)(1)(C) of the CNA (42 U.S.C. 1786(h)(1)(C)) to allow food funds to be used to purchase breast pumps. State agencies may now use either NSA or food funds to purchase breast pumps. State and local agencies are not required to purchase breast pumps as they are not a required program benefit like supplemental foods or nutrition education. However, breast pumps are aids that a State or local agency may choose to offer certain WIC participants to facilitate breastfeeding. The option now available to State agencies to use food funds to purchase breast pumps will allow greater flexibility in funding sources for breast pump purchases.

The option to use food funds to rent breast pumps was not specifically mentioned in the Reauthorization Act. However, State and local agencies frequently find that renting breast pumps is more cost effective than purchasing them. Representative Goodling, Chairman on the House Committee on Education and the Workforce, has indicated that the omission of specific mention of breast pump rental was not intended to preclude the use of food funds for this purpose. Consequently, in drafting this provision we have interpreted the word "purchase" in section 203(h) of the Reauthorization Act to include both the acquisition of an absolute ownership interest in breast pumps by State agencies and the securing by State agencies of the contractual right to the exclusive use of breast pumps for a finite period of time (i.e., the rental of breast pumps). In both situations, a State agency "purchases" the exclusive right to use a breast pump, either forever or for a limited time period. Therefore,

this rule amends section 246.14(b) of the WIC program regulations to permit both the purchase and the rental of breast pumps with food funds.

State agencies should note that any food funds expended to purchase or rent breast pumps will not count towards a State agency's nutrition education and breastfeeding promotion and support expenditure requirement. Although sections 17(h)(3) (B) and (C) continue to provide that a State agency may request approval to count the expenditure of other funds for the purpose of meeting the nutrition education and breastfeeding promotion and support activities, we do not interpret the phrase "other funds" to include food funds used to purchase or rent of breast pumps. This view is supported by the Senate report for the Reauthorization Act that states: "the Committee intends that food funds used to provide breast pumps shall be in addition to a State's minimum required nutrition services and administration expenditure for breast-feeding support and promotion." (Senate Report Number 105-243, p. 35.) NSA grant expenditures for breast pumps continue to count towards these expenditure requirements.

However, we recently discovered that the November 18, 1998 final rule concerning the non-discretionary provisions of Public Law 103-448 and Public Law 103-227 (63 FR 63969) inadvertently removed the regulatory provisions in section 246.14(c)(1) concerning the use of other funds to meet the nutrition education and breastfeeding promotion and support expenditure requirements. This rule amends section 246.14(c)(1) to reinstate these provisions and to make clear that food costs to purchase or rent breast pumps may not be counted toward the expenditure requirements.

#### **Nutrition Services and Administration Expenditure Standard**

Section 203(i)(3) of the Reauthorization Act amended section 17(h)(2)(B)(ii) of the CNA (42 U.S.C. 1786(h)(2)(B)(ii)) by lowering from 15 percent to 10 percent the maximum allowable percent a State agency's per participant NSA expenditures may exceed its per participant NSA grant without potentially suffering a reduction in its NSA grant. Prior to the Reauthorization Act, State agencies were held to the 15 percent standard. Section 17(h)(2)(B)(ii) of the CNA continues to permit the Secretary to lower a State agency's NSA grant if the State agency's per participant NSA expenditure exceeds the per participant NSA grant without good cause. This rule amends section 246.16(e)(2)(ii) of

the WIC program regulations to reflect this change.

One of the primary reasons for this change was the revision of the conversion authority by the Reauthorization Act. Under the revised conversion authority, a State agency may now convert food funds to NSA funds based on *projected* increases in participation instead of just *actual* participation increases. The NSA expenditure standard was reduced to 10 percent to improve accountability for the new conversion authority and to prevent this expanded conversion authority from being used to substantially shift food money to NSA spending without increased cost containment savings and participation. We discuss this change to the conversion authority in more detail below.

#### **Conversion of Food Funds to Nutrition Services and Administration Funds**

Section 203(i)(5) of the Reauthorization Act amended section 17(h)(5)(A) of the CNA (42 U.S.C. 1786(h)(5)(A)) to allow a State agency to convert food funds to NSA funds in any fiscal year in which it submits a plan to reduce average food costs per participant and to increase participation above the FNS-projected level for the State agency. Before converting any funds, the State agency must obtain the Secretary's approval of the plan. The CNA continues to require that a State agency may convert food funds to NSA funds only to the extent necessary to (1) cover allowable expenditures in the fiscal year in which the conversion takes place, and (2) ensure that the State agency maintains the level established for the per participant NSA grant for that fiscal year.

Prior to the Reauthorization Act, State agencies were allowed to convert food funds to NSA funds only after participation increases were actually achieved through acceptable measures. ("Acceptable measures" is defined in section 17(h)(5)(C) of the CNA and section 246.16(f) of the current WIC regulations.) If actual participation levels exceeded the FNS-projected level, the State agency was permitted to convert a corresponding amount of food funds to cover actual NSA expenditures. The Reauthorization Act provides greater flexibility to State agencies by allowing conversion based on *projected* increases in participation. We will also continue to allow conversions based on actual participation increases. In these cases, State agencies do not need to submit a plan. This rule amends section 246.16(f) of the WIC regulations to reflect this change.

#### **Grants for Infrastructure, Special Projects, and Breastfeeding Promotion and Support Activities**

Section 203(n)(2)(A) of the Reauthorization Act amended section 17(h)(10)(A) of the CNA (42 U.S.C. 1786(h)(10)(A)) to require that the amount of funding for infrastructure, special projects, and breastfeeding promotion and support activities equal the total amount of NSA and food funds for the prior fiscal year that has not been obligated or \$10 million, whichever is less. In the past, the amount of funding available for this purpose was equal to the lesser of \$10 million or the amount of unobligated NSA funds from the prior fiscal year. This provision helps to ensure the earlier identification of the total amount of funds available for this purpose because the total amount of unobligated funds has traditionally exceeded \$10 million.

The current regulations do not contain the formula for these grants and we do not see the need to add the revised formula to the regulations now. However, we did want to inform interested parties of the statutory change in methodology made by the Reauthorization Act.

#### **NSA Back Spend Provisions**

Section 203(n)(1)(B) of the Reauthorization Act amended section 17(i)(3)(A) of the CNA (42 U.S.C. 1786(i)(3)(A)) to allow a State agency to back spend NSA funds in an amount not more than one percent of the amount allocated for NSA from the current fiscal year to cover allowable expenses incurred in the prior fiscal year. To allow for greater flexibility, the law permits NSA funds spent back under this provision to be used for either food or NSA costs incurred in the prior year. There was no change in the provision allowing food funds to be spent back to cover allowable food expenses (but not NSA expenses) incurred in the prior year. State agencies may now back spend funds equal to one percent of their respective food grant and/or NSA grant.

This rule amends section 246.16(b)(3) of the WIC regulations to reflect these changes. This rule also amends section 246.16(b)(3) to delete the cap on the combined amount of funds that could be spent forward and back in any fiscal year, consistent with the change made by section 203(n)(1)(B) of the Reauthorization Act.

#### **Spend Forward Provisions**

Section 203(n)(1)(B) of the Reauthorization Act also amended section 17(i)(3)(A) of the CNA (42 U.S.C.

1786(i)(3)(A)) to (1) expand the spend forward authority for NSA funds, and (2) eliminate the spend forward authority for food funds. Under this provision, State agencies may spend forward NSA funds up to an amount equal to one percent of their total grant for each fiscal year to cover allowable NSA expenses in the next fiscal year. Additionally, the Reauthorization Act permits State agencies, with prior approval, to spend forward NSA funds up to an amount equal to one-half of one percent of their total grant for the development of management information systems, including electronic benefit transfer systems. Therefore, State agencies may now spend forward NSA funds up to an amount equal to one and one-half percent of their total grant (NSA plus food grants).

State agencies may both back spend and spend forward funds in any given fiscal year. Therefore, both one percent of the total grant may be back spent *and* one and one-half of the total grant may be spent forward. State agencies should note varying limitations on the amount, the type of funds that may be spent back (both NSA and food funds) or spent forward (NSA funds only), and the use of the funds that are spent back or spent forward.

This rule amends sections 246.16(b)(3)(ii) of the WIC regulations to reflect these changes in the spend forward authority.

#### **Executive Order 12866**

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

#### **Public Law 104-4**

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1531 *et seq.*) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA (2 U.S.C. 1532), FNS generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, or tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA (2 U.S.C. 1535) generally requires FNS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome

alternative that achieves the objectives of the rule.

This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments or the private sector of \$100 million or more in any one year. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

#### **Regulatory Flexibility Act**

This final rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601-612). Samuel Chambers, Jr., Administrator of the Food and Nutrition Service, has certified that this rule will not have a significant economic impact on a substantial number of small entities. This rule provides additional flexibility in funds management and operations for WIC State agencies, which are not small entities under the Regulatory Flexibility Act.

#### **Paperwork Reduction Act**

This final rule does not contain reporting or record keeping requirements subject to approval by the Office of Management and Budget under section 3507 of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-20).

#### **Executive Order 12372**

The Special Supplemental Nutrition Program for Women, Infants and Children (WIC) is listed in the Catalog of Federal Domestic Assistance Programs under No. 10.557. For the reasons set forth in the final rule in 7 CFR 3015, Subpart V, and related Notice (48 FR 29114), this program is included in the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

#### **Executive Order 12988**

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to have a 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 applications of its provisions, all applicable administrative procedures must be exhausted (7 U.S.C 6912(e)).

#### **Executive Order 13132**

We have reviewed this final rule under the criteria of Executive Order 13132, Federalism. As noted above, all of the provisions in this rule are required by law. Therefore, we have not prepared a federalism summary impact statement for this rule.

#### **List of Subjects in 7 CFR Part 246**

Administrative practice and procedure, Civil Rights, Food and Nutrition Service, Food assistance programs, Grant programs—health, Grant programs—Social programs, Indians, Infants and children, Maternal and child health, Nutrition, Nutrition education, Penalties, Reporting and recordkeeping requirements, Public assistance programs, WIC, Women.

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

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

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

**Authority:** 42 U.S.C. 1786.

2. In § 246.14:

- a. revise paragraph (b);
- b. add four new sentences to paragraph (c)(1) introductory text after the sixth sentence; and
- c. revise paragraph (e).

The revisions and addition read as follows:

#### **§ 246.14 Program 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) \* \* \*

(1) \* \* \* 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. \* \* \*

(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.

3. In § 246.16, revise paragraphs (b)(3), (e)(2)(ii) and (f) to read as follows:

**§ 246.16 Distribution of funds.**

\* \* \* \* \*

(b) \* \* \*

(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.

\* \* \* \* \*

(e) \* \* \*

(2) \* \* \*

(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.

\* \* \* \* \*

(f) *How do I qualify to convert food funds to NSA funds? (1) Requirements.* The State agency qualifies to convert food funds to NSA funds 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; 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 the calculation equals the initial allocation of current year funds plus the operational adjustment funding allocated to the State agency for that fiscal year.

\* \* \* \* \*

Dated: November 26, 1999.

**Samuel Chambers Jr.,**

*Administrator, Food and Nutrition Service.*

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**BILLING CODE 3410-30-P**