DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 246

RIN 0584–AB10

Special Supplemental Nutrition Program for Women, Infants, and Children (WIC): Miscellaneous Provisions

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule amends a number of existing provisions in the WIC Program regulations. In response to issues raised by WIC State agencies and other members of the WIC community, the United States Department of Agriculture (the Department) proposes two principal changes. First, this rulemaking would streamline the Federal requirements for financial and participation reporting by State agencies. Second, it would clarify the rules on confidentiality of WIC information in order to strengthen coordination with organizations and private physicians, and to provide guidance to State agencies on responding to subpoenas and other court-ordered requests for confidential information.

These two provisions are intended to strengthen services to WIC participants, improve Program administration, and increase State agency flexibility in managing the Program. The other provisions in this rule have been designed to improve program administration or to incorporate program policies that have been in effect for some time into regulations.

DATES: To be assured of consideration, comments must be postmarked on or before April 1, 2003.

ADDRESSES: Comments should be sent to Patricia N. Daniels, Director, Supplemental Food Programs Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Room 520, Alexandria, VA 22302. All written comments will be available for public inspection during regular business hours (8:30 a.m. to 5 p.m., Monday through Friday), at the above address.

FOR FURTHER INFORMATION CONTACT: Debra R. Whitford, Chief of the Policy and Program Development Branch, Supplemental Food Programs Division, at the address indicated in the **ADDRESSES** section or at (703) 305–2730, during regular business hours (8:30 a.m. to 5 p.m.) Monday through Friday.

SUPPLEMENTARY INFORMATION:

Background

1. Definitions of ''Sign or Signature'' and ''Electronic Signature'' (§ 246.2)

This rule proposes to amend § 246.2 to add new definitions of ''sign or signature'' and ''electronic signature.'' These definitions would give State agencies the option to use electronic signatures in their administration of the WIC Program. WIC regulations require signatures in various contexts. For example, § 246.7(i)(9) requires the ''signature'' of the competent professional authority (CPA) who determined that the applicant is at nutritional risk and the ''signature'' of the administrative person who determined that the applicant meets WIC income eligibility requirements. In addition, § 246.7(i)(10) requires the ''signature'' of the applicant, parent, or caretaker as part of the WIC application/certification process, and § 246.12(r)(2) requires participants and their representatives to ''sign'' when they receive WIC supplemental foods or food instruments. Currently, the terms ''sign'' or ''signature'' throughout part 246 could be interpreted to exclude the use of electronic signatures. With advancements in technology, we do not want to limit State agencies' authority to use such tools. Many State agencies are using or implementing automated management information systems whereby all information collected from applicants is typed into an electronic record/data system at the time of application. As part of the move to automated records and paperless systems, some State agencies are interested in using electronic signatures.

While new technologies continue to emerge, currently, electronic signatures include a broad range of signature types. For example, an applicant could sign his/her name on a device similar to a note pad, called a digital pen and pad. The signature becomes digitized and is stored in the data system as an exact replica of the applicant's signature. Other types of electronic signature devices allow for the collection of an applicant's signature with the digital pen and pad and the signature is subsequently converted and stored as a unique series of digits or numbers. For administrative purposes, an electronic signature could be a unique key and/or personal identification number assigned by staff that is authorized to determine a WIC applicant's nutrition risk or income eligibility. Depending on its application, a combination of electronic signature tools may be necessary to address appropriately the reliability and integrity of the technology and/or security of the State agency's system.

This rule would define ''electronic signature'' in the same way as it is defined in the Electronic Signatures in Global and National Commerce Act (Pub. L. 106–229, signed June 30, 2000), also known as ESIGN. ESIGN covers the use of electronic signatures in most business, consumer, and commercial transactions, but does not generally cover ''governmental'' transactions. However, we believe the broad application of ESIGN will make the definition of ''electronic signature'' the standard. Therefore, we propose to adopt the ESIGN definition of ''electronic signature'' for WIC purposes.

This rule would make clear that electronic signatures may be used only if the State agency ensures the reliability and integrity of the technology used and the security and confidentiality of electronic signatures collected in accordance with sound management practices and WIC Program regulations concerning confidentiality. State agencies interested in using electronic signatures will need to assess the suitability of electronic signatures for various applications, security issues, and cost implications. Interested State agencies should explore available technology, including off-the-shelf software that may meet WIC's needs at a reasonable price. This rule would not require the use of electronic signatures.

2. Selection of Local Agencies (§ 246.5)

The Department proposes to remove the requirement in §§ 246.5(c)(1) and (d)(2) of the regulations for WIC State agencies to fund new local agencies in areas based on the sequential order of neediest areas listed in the Affirmative Action Plans that are part of each State agency's Plan of Operation. This change is intended to give State agencies more flexibility in using their WIC Program grants as efficiently and practically as possible to best meet the needs of program participation. In order to do this, it may not always be practical to adhere strictly to the sequential order of neediest areas when funding local WIC agencies for expansion.

At §§ 246.5(c)(1) and (d)(2), emphasis is placed on expanding the Program through the selection of local agencies that are next in line on the basis of need as established by the State agency's Affirmative Action Plan. Although State agencies should continue to consider the relative need of certain areas for program expansion as identified in the Affirmative Action Plan when selecting new local agencies, we are aware that there are certain practical considerations in expanding program operations that may override the choice

of a local agency in an area that is next in line according to the Plan. For example, while it remains important to expand operations in the ''neediest one-third of all areas unserved or partially served'', as required in § 246.4(a)(5)(i), it may be impossible to do so at a particular point in time because of lack of funding. An inadequate health care system infrastructure (public or private) to provide health-related services to support the opening of a local agency is a common situation that State agencies often face in attempting to expand in remote areas. The cost of opening new WIC clinics in such areas, even if those areas happen to be ''next in line'' for expanded services may exceed the funds that the State agency has available for caseload growth. By comparison, it may be more cost-effective and expeditious to expand caseload in other areas that are also underserved, but possess the health care infrastructure to support additional WIC services.

3. Mid-Certification Actions (§ 246.7(h))

The Department proposes several revisions to this section. The most significant proposed change would require local agencies to reassess a participant's *income* eligibility (including household composition) during the certification period if information is received about a change in circumstances, indicating possible ineligibility. Although many State agencies require reassessment of income eligibility based on receipt of information indicating a change, current regulations do not mandate such reassessments. This proposal would strengthen Federal requirements for local agencies to act on information about changes in household circumstances that affect only the income eligibility of participants, not the nutrition risk eligibility.

Income Eligibility Reassessments

Currently, WIC program regulations (§ 246.7(h)(1)) require local agencies to disqualify an individual in the middle of a certification period if, on the basis of a reassessment of Program eligibility status, the individual is found to be ineligible. Because of the ambiguity in the reference to reassessment of ''Program eligibility'' during certification periods, the Department wishes to exercise its interpretive discretion to specify that mid-certification reassessments pertain to *income* eligibility, not to the participant's nutrition risk status.

This proposed interpretation is consistent with the Department's policy about mid-certification reassessments. Many State agencies already specify in their formal policies that disqualifications due to reassessments are appropriate only in response to information that establishes ineligibility based on income. It has not been the Department's position that local agencies should reassess nutrition risk status during the certification period or disqualify a participant based on a learned improvement in nutrition risk status. Provided that the individual remains *income-eligible* for WIC benefits, the Department believes that enrollment in the Program generally entails a commitment to the participant for a full certification period. This policy regarding nutrition risk status recognizes the preventive nature of the WIC Program.

However, the Department also believes that local agencies *should* follow up on information that a change in income or household size may make a participant ineligible to continue to receive WIC benefits. Current regulations only require State agencies to ensure that local agencies disqualify participants who are found to be ineligible only *if* a reassessment of program eligibility is conducted. The regulations do not currently mandate that any reassessment be performed. This proposed change would require that local agencies reassess income eligibility when information is received indicating that a change in income eligibility has occurred. Local agencies would not be required to seek out information. However, if information comes to their attention, either from the participant or from other sources, which suggests ineligibility, this would trigger the regulatory requirement to reassess WIC income eligibility.

For an adjunctively income-eligible participant, the trigger action for income reassessment within a certification period would be *confirmation* that the individual or other eligible family member is no longer participating in any of the programs forming the basis for adjunctive income eligibility. This proposed provision would require local agencies to ask the adjunctively income-eligible participant for proof of current eligibility to participate in another qualifying program only when that local agency has reason to believe that the original program participation has ended. If, on the basis of the reassessment, the participant is no longer eligible to receive WIC benefits because of income, then disqualification proceedings would be initiated.

Disqualification based on a reassessment of income ineligibility also applies to other household members currently receiving WIC benefits. When one household member is reassessed for income eligibility and determined ineligible based on household size and income, in effect all participating members of that household have been reassessed and are equally ineligible. Therefore, the regulations have been revised to require that if one member of a household is reassessed for income eligibility and determined ineligible, all other participating household members in the economic unit must be disqualified. This provision applies to normal income screenings as well as to proof that a participant is no longer receiving benefits under another program that confers adjunctive income eligibility.

The Department is not interested in limiting State agency flexibility in this area, but is establishing clear Federal requirements that are both reasonable and responsible. The Department understands that many State agencies already have similar or even more stringent policies in place regarding reassessing income eligibility during the certification period. State agency policy need not be changed as long as State requirements meet the minimum Federal requirements.

The Department is aware that some State agencies oppose both reassessment of income eligibility and program disqualification based on such reassessment during a certification period. Some of the arguments offered to FNS include the disparity of treatment among participants according to their willingness to report income changes, and the consideration that financial situations of many participants are tenuous and subject to fluctuations. Another concern is the fact that other family members who are also WIC participants will be disqualified if a reassessment reveals the family to be over the income standard.

The philosophical issue underlying the arguments for or against mid-certification reassessments and disqualifications for income ineligibility is whether WIC's commitment to improving an individual's nutritional status during a period of time (*e.g.,* during a 6-month certification period) is more or less important than ensuring the integrity of income eligibility standards. The Department can find no statutory justification for allowing known income ineligible persons to continue to receive WIC benefits. The Department agrees with the rationale that because nutritional status may take at least a full certification period to improve, a commitment to the participant is implied. However, that commitment may not be extended to persons who no longer meet the basic income eligibility requirements set forth

in the Child Nutrition Act. A participant whose household income clearly exceeds the income standards used by the State agency is no longer eligible for WIC benefits. Federal policy should be unequivocal regarding the ineligibility of known over-income participants.

Again, the Department is not requiring local agencies to seek out information about the income status of participants during the certification period. Rather, if information regarding a change in income and/or family size is brought to the attention of the local agency, action must be taken to reassess the participant's income eligibility for program benefits. The proposed language represents a reasonable approach that balances responsible action against unnecessary paperwork burden.

The Department also proposes to indicate clearly the mandatory or optional nature of other mid-certification actions addressed in this section. As proposed, *mandatory* mid-certification actions would include reassessment of income eligibility based on information received and disqualification of participants, including family members, if found to be over-income. *Optional* mid-certification disqualification actions would include those necessitated by funding shortages or the failure to pick up food instruments or supplemental foods for a number of consecutive months as established by the State.

4. Requesting Pregnancy Tests, Checking Identification and Other Basic Certification Procedures (§ 246.7(c))

We propose to expand § 246.7(c) to address several basic certification procedures, along with the delineation of eligibility criteria, in an effort to highlight the importance of certain procedures, such as providing proof of residency and proof of identity, and ensuring that applicants are not charged for certification. To accomplish this, the following changes are being made:

(a) The provisions currently found at §§ 246.7 (l)(2) and (m), addressing proof of residency/proof of identity, and program certification without charge to the applicant, respectively, are being moved to more prominent positions in the regulations;

(b) A new provision concerning pregnancy tests is proposed; and

(c) A reference is made to the application processing standards contained in paragraph (f) of this section.

Pregnancy Tests

In response to questions that have arisen in recent years, we are proposing basic guidelines that State and local agencies must observe if documentation of pregnancy is part of the certification process. Some State and local agencies have expressed an interest in requiring proof of pregnancy to stem possible abuse from ineligible applicants claiming categorical eligibility as pregnant women. We realize that pregnancy in its very early stages may not be immediately apparent. We also understand why a local agency may wish to obtain confirmation of the pregnancy before it issues WIC benefits, especially if incidents of possible fraud have been reported. For these reasons, we are proposing in a new paragraph (c)(2)(ii) that State agencies may issue benefits to applicants who claim to be pregnant (assuming that all other eligibility criteria are met) but who do not have documented proof of pregnancy at the time of the certification interview and determination. The State agency should then allow a reasonable period of time, not to exceed 60 days, for the applicant to provide the requested documentation. If such documentation is not provided as requested, the local agency would then be justified in terminating the woman's WIC participation in the middle of a certification period.

5. Determining Income Eligibility (§ 246.7(d))

The Department proposes several changes to this section of the regulations.

A. Use of State or Local Income Health Care Guidelines to Determine Income Eligibility for WIC

The first proposed revision, at paragraph (d)(2)(iii) would require State agencies using State or local income guidelines for free or reduced-price health care to base the income eligibility determinations of WIC applicants on the income and family definition and exclusions outlined in paragraphs (d)(2)(iii) and (d)(2)(iv), respectively. This change would continue to allow variation among the State agencies only with regard to the actual income guidelines used (*i.e.*, the percent of gross income above the Federal poverty income guidelines, up to a maximum of 185 percent), but not with the definition of income, family, or exclusions from income. This proposed revision would continue the WIC Program's current policy of excluding from these requirements persons who are determined adjunctively or automatically income eligible.

We are proposing this change for two reasons:

1. The number of WIC State agencies that use State or local free or reduced-price income guidelines has declined over the years. At this time, all 88 WIC State agencies use income guidelines which are set at 185 percent of the Federal poverty income guidelines, established and updated annually by the Department of Health and Human Services.

2. Current WIC Program regulations at § 246.7(d)(2)(iii) allow State agencies using State or local free or reduced-price health care income guidelines to use the State or local definition of income, provided that the values of in-kind housing or other in-kind benefits are not counted toward an applicant's income determination and that no one with gross income over 185 percent of the Federal poverty income guidelines is determined eligible for WIC. Because the local agency must ensure that the applicant's income is within the Federal guidelines after applying the State or local income definition, procedurally it would be simpler for local agencies to apply the WIC income definition and exclusions outlined in the regulations to all applicants rather than apply two sets of income guidelines and family definitions and exclusions.

B. Consideration of Loans as Income

Finally, this proposal would specify that funds from loans are excluded from consideration as income when determining an applicant's income eligibility. Program regulations have not specifically addressed this issue; however, FNS Instruction 803–3, Rev. 1, clarifies that funds from loans are not to be counted as income because they are only temporarily available and must be repaid.

6. Limitation on the Use of Possibility of Regression as a Nutrition Risk Criterion (§ 246.7(e)(1)(vi)

Historically, program regulations have permitted WIC participants to remain on the program due to the possibility of regression, *i.e.*, previously certified participants who might regress in nutritional status if they are not allowed to continue to receive WIC benefits. The possibility of regression has been allowed as a nutrition risk criterion in order to prevent the ''revolving door'' situation in which individuals improve their nutritional status as the result of participation in the WIC Program and are therefore removed, only to deteriorate in nutritional status at a later date and have to re-enter the program.

It has always been the Department's position, however, that the possibility of regression should not be used excessively as a nutrition risk criterion,

because this practice may result in participants with no current nutrition risk condition continuing to be served while other eligible applicants who do have current nutritionally-related medical conditions or deficient diets go unserved. To encourage the limited use of regression, the Department confirmed the State agency's authority to limit the number of times and circumstances under which a participant may be certified for possible regression in a final rule published on February 13, 1985 (50 FR 6108).

The use of regression as a basis for certification has continued to cause concern, particularly as the Department has intensified its efforts to encourage State agencies to target benefits to those persons at greatest nutritional risk. Therefore, the Department issued further guidance on the use of regression in FNS Instruction 803–2, Rev. 1, which recommends that possibility of regression be employed as a reason for certification one time at most. The Instruction also clarifies that certification based on possible regression for Priority II infants is generally inappropriate, because the infant's certification is based upon the mother's nutrition risk condition, and there is no prior condition on which to base the infant's supposed regression.

While the possibility of regression can be a legitimate basis for certification, a regulatory limit on its use would ensure that possibility of regression is not employed repeatedly as a basis of continued program participation by persons who are not currently at nutritional risk. Such a limit is consistent with the Department's efforts to target benefits to those persons in greatest need and at greatest nutritional risk. Further, a limit on the use of possibility of regression as a basis for certification is logical because the term itself implies that there must be a prior nutrition risk condition on which the regression would be based. Therefore, it follows that once a participant has been certified one time for possible regression to a prior condition, there is no longer a prior nutrition risk condition to justify an additional certification on this basis.

In view of these concerns, we propose to prohibit the use of possibility of regression as the basis of nutrition risk eligibility for *consecutive* certifications.

Example: A child might be initially certified for WIC based on iron-deficiency anemia; at the end of that 6-month certification period, s/he might have improved just enough to be barely outside the definition of anemia established by the Centers for Disease Control and Prevention (CDC), and could legitimately be certified for another 6 months based on the possibility of regression to his/her earlier anemic condition. At the end of this second certification period, if this child does not exhibit some other condition that is an allowed nutrition risk, s/he would no longer be eligible to receive WIC benefits.

State agencies who elect to use the possibility of regression as a basis for WIC certification would be expected to certify the WIC participant either at the same priority level for which s/he was initially certified (based on a specific medical, anthropometric, or dietary condition) or at the Priority VII level (if the State agency is using Priority VII). State agencies should also keep in mind that in those situations where a waiting list must be used because funding levels are limited, the certification of an applicant based on the possibility of regression to a prior condition can exclude the certification of another applicant who may be at greater nutritional risk, and should make their decisions about the use of regression (as well as the priority levels to which it applies) very carefully.

Commenters should note that this proposal would not place an absolute limit on the number of times that regression can be used as the nonconsecutive basis for certification. This provision would not restrict, for example, the certification of a child on the basis of possibility of regression several times during the years that s/he is categorically eligible. The Department believes that this provision places a reasonable limit on the use of possibility of regression but, at the same time, recognizes instances in which a subsequently developed nutrition risk condition may warrant an additional certification period based on the real possibility of regression to that condition. Finally, the provision in no way infringes upon the State agency's authority to limit the *circumstances* under which a participant may be certified for possible regression, as long as the condition in question is one to which an individual can actually regress. Because it is not possible for a woman who has been receiving WIC benefits as a pregnant woman to regress to that pregnancy once it has ended, it would not be appropriate to certify her as a postpartum woman based on a condition that was caused by or unique to her pregnancy, such as hyperemesis gravidum (morning sickness) or pregnancy-induced hypertension.

7. Certification Periods (§ 246.7(g)(1))

In response to concerns cited by Congress, State agencies, and the National WIC Association (NWA) (formerly known as the National Association of WIC Directors (NAWD)), the Department proposes to modify the timeframes for certification periods in order to make them more consistent across participant categories. Current regulations establish the following timeframes for certification:

A/an:	Is currently certified:
Pregnant woman	For the duration of her pregnancy, and up to 6 weeks after the infant is born or the pregnancy is ended.
Postpartum woman	Up to 6 months after the baby is born or the pregnancy is ended (postpartum).
Breastfeeding woman	Every 6 months ending with the infant's first birthday.
Infant	Approximately every 6 months. The State agency may permit its local agencies to certify infants under 6 months of age up to the last day of the month in which the infant turns 1 year old, provided the quality and accessibility of health care services are not diminished.
Child	Approximately every sixth month ending with the last day of the month in which a child reaches his/her fifth birthday.

Some State agencies have expressed concern that the timeframes for establishing certification periods are complicated and administratively burdensome. These State agencies contend that current regulations require the frequent proration of monthly food benefits and special data processing capabilities to accommodate specific cut-off dates. NWA/NAWD has also expressed concern about the lack of consistency in certification period timeframes.

The Department fully supports greater simplicity and consistency in this area. Therefore, the Department proposes to adopt the recommendation made by NWA/NAWD to allow certification periods for all participant categories to be extended to the end of the month.

Specifically, the following maximum certification periods are proposed in § 246.7(g)(1):

A/an:	Will be certified:
Pregnant woman	For the duration of her pregnancy, and up to the last day of the month in which the infant becomes 6 weeks old. (For example, if the infant is born June 4, 6 weeks after birth would be July 16, and certification would end July 31.)
Postpartum woman	Up to the last day of the sixth month after the baby is born (postpartum).
Breastfeeding woman	Approximately every 6 months ending with the last day of the month in which the infant turns 1 year old.
Infant	Approximately every 6 months. The State agency may permit its local agencies to certify infants under 6 months of age up to the last day of the month in which the infant turns 1 year old, provided the quality and accessibility of health care services are not diminished.
Child	Approximately every sixth month ending with the last day of the month in which a child reaches his/her fifth birthday. (No change from current regulations)

The Department believes that these proposed timeframes will alleviate concerns voiced by State agencies. However, we want to emphasize that State and local agencies should continue to exercise good judgment in assigning certification periods, particularly in the case of pregnant participants. The current regulatory provision, which limits the certification period for pregnant women to up to 6 weeks postpartum, was designed to facilitate the scheduling of the mother's and infant's visit to the clinic soon after delivery and to encourage the prompt reassessment of continued program eligibility. Scheduling the postpartum clinic visit within this timeframe best serves the health care needs of the mother and the infant, and strengthens the program's tie to health services. Commenters should note that this proposed change would have the effect of extending a woman's certification under the pregnant woman category to up to 9 weeks postpartum. Some State and local agencies may not want to extend the certification periods for these women, preferring instead to concentrate their resources on women who are in the early months of pregnancy.

Finally, the proration of program benefits for all participant categories continues to be an effective means of targeting benefits and managing program costs. State agencies should also be aware that these proposed regulations would not remove their authority to maintain current certification period lengths or to permit local agencies to shorten certification periods on a case-by-case basis. The Department encourages State agencies to exercise this authority as appropriate.

8. Certification Forms (§ 246.7(i))

The Department proposes to allow State agencies the option of substituting simpler language in order to make the ''rights and obligations'' statement contained in § 246.7(i)(10) clearer to applicants. State agencies would also have the option of modifying the language at § 246.7(j)(2)(i)–(iii), which must be read to or by the participant (or parent/caregiver of a participating infant or child) at the time of certification along with the statement of ''rights and obligations'' contained in paragraph (i)(10). Modification of the ''rights and obligations'' statements would be subject to FNS approval during the State Plan approval process. Approval of alternate language would be contingent upon whether the language substitutions convey the same meaning and intent as the existing regulatory text.

In addition, in § 246.7(i)(11), the required content of the certification form statement which acknowledges the potential disclosure of applicant and participant information would be revised to incorporate the changes proposed in § 246.26(d) pertaining to confidentiality and data sharing. These changes primarily pertain to expansion of the types of programs with which information can be shared. The proposed changes are discussed later in this preamble as part of a larger discussion about confidentiality.

9. Continuation of Benefits During Fair Hearings (§ 246.9(g))

It has come to the Department's attention that current provisions at § 246.9(g) allow for the continuation of benefits for a categorically ineligible participant who has appealed an adverse action to terminate benefits and is waiting for a fair hearing decision. The situation involves breastfeeding participants who continued to receive WIC benefits although they had discontinued breastfeeding and were more than 6 months postpartum. These participants, as postpartum non-breastfeeding women, are no longer categorically eligible for program benefits and should be terminated from the WIC Program. Under these circumstances, when a change in the participant's breastfeeding status becomes known to the WIC local agency and the participant is not eligible to continue receiving benefits as a postpartum participant, the agency would issue a notice of adverse action to terminate benefits. Such written notice must be issued not less than 15 days before the benefits are actually terminated. However, the language at paragraph (g) of this section technically allows the categorically ineligible individual to continue to receive WIC benefits during the appeal process. To correct this minor inconsistency, the Department proposes to revise paragraph (g) to prohibit any participants who have become categorically ineligible from continuing to receive benefits while a fair hearing decision is pending.

10. Prohibition Against the Use of Program Funds To Provide Retroactive Benefits (§ 246.14(a))

This proposed rule would specify that WIC Program funds may not be used to provide retroactive benefits to participants. Regulations have not previously addressed the issue of retroactive benefits, although it has been a long-standing policy in the WIC Program (based on fundamental principles of appropriation law) that such benefits are inappropriate. The WIC food package is designed to be consumed during specified periods when participants are undergoing critical growth and development. Providing WIC foods to persons after they have passed through such periods is not consistent with the nutritional goals of the WIC Program, nor is it appropriate to give participants more food than they can reasonably consume within a given period of time. In either case, it is not an effective use of program benefits. A regulatory prohibition against the use of program funds to provide retroactive benefits would clearly and formally establish the

inappropriateness of such benefits in WIC.

11. Transportation as Allowable Costs (§ 246.14(c)(7))

The Department has learned that a number of urban and suburban localities experience difficulties in serving needy program eligibles due to inadequate access to transportation by existing or potential WIC participants. Limited, expensive, or nonexistent transportation has been identified as a primary barrier that prevents or discourages potentially eligible persons and participants from getting to WIC clinics. To address this problem, several State agencies have purchased mobile vans to deliver WIC services to participants in ''non-rural'' areas. State agencies have also requested approval to purchase vans to transport participants to and from inner city and suburban clinics. Currently, however, the allowability of such transportation costs is limited to assisting *rural* participants. Because State agencies may purchase vans to bring WIC services to participants, it seems only reasonable to allow the transportation of WIC participants to WIC clinic sites in any situation, rural or non-rural, where access is a barrier. The Department wants to remove unnecessary barriers that prevent State and local agencies from reaching potentially eligible persons. Therefore, the Department proposes to revise § 246.14(c)(7) by removing the limiting word ''rural'' from the allowability of costs in transporting applicants and participants to clinics.

In developing policies to allow reimbursement to local agencies for transportation costs, State agencies should consider other competing demands for nutrition services and administration (NSA) funds. State and local agencies should note that alternatives to providing transportation to participants exist, such as establishing fixed-location satellite clinics in strategic locations with sufficient access to public transportation. State agencies may want to limit approvals to those areas where transportation is urgently needed to ensure access and where they stand to get the biggest return in terms of increased participation. Finally, State agencies should be aware that approving local use of NSA funds for transportation of some participants may raise issues of fairness and civil rights concerns; participants residing in areas where transportation to and from the WIC clinic is not provided may argue that they too qualify or deserve such a service given their circumstances. This underscores the need for State agencies to develop a carefully-structured rationale for allowing the provision of transportation assistance to certain participants that cannot be perceived as a discriminatory policy.

Local agencies seeking to provide transportation must obtain prior approval from the State agency, and must document that the transportation service is essential to assure program access. A fee may be charged for providing transportation services. The State agency must advise participants that the provision of transportation is offered as a convenience to the participant, and is not a condition of eligibility or a standard program benefit. Finally, the Department proposes to require that a State agency which elects to allow the provision of transportation to participants must include its policy for approving such costs in the portion of the State Plan that describes the State agency's plans to provide program benefits to eligible persons most in need of such benefits. Section 246.4(a)(21) would be revised accordingly to reflect this requirement.

12. Capital Expenditures Which Require Agency Approval (§ 246.14(d))

The Department proposes three revisions to this section: A. Paragraph (d)(1) would be deleted because the purchase of automated information systems constitutes a capital expenditure and therefore is subject to the requirements for prior approval from FNS. This modification simplifies prior approval requirements.

B. Paragraph (d)(3) would also be deleted. Current WIC regulations at § 246.14(d)(3) require prior FNS approval for management studies performed by agencies or departments other than the State or local agency or those performed by outside consultants under contract with the State or local agency. However, on May 17, 1995, the Office of Management and Budget (OMB) published a revision to its Circular A–87, Cost Principles for State, Local and Indian Tribal Governments. The revision no longer requires prior approval of the cost of management studies. To be consistent with revised OMB Circular A–87, prior approval of the cost of management studies is no longer required for WIC State agencies. State agencies were advised of this change through WIC Policy Memorandum 98–8, issued by FNS on September 30, 1998.

C. The third revision to this section redesignates paragraph (d)(2) as paragraph (d). The newly designated paragraph (d) would then be revised to eliminate the specific dollar threshold for capital expenditures above which State agencies must obtain the prior approval of FNS. The dollar threshold is being eliminated in recognition of a change in OMB Circular A–87 that allows Federal awarding agencies to waive prior approval requirements in regard to capital expenditures for equipment. Therefore, rather than specify a dollar threshold, newly designated paragraph (d) will be revised to say that State agencies must obtain prior approval for capital expenditures in accordance with FNS policy and guidance. Please note, however, that FNS waiver authority is applicable only to the requirement for prior approval. Equipment costs that do not meet requirements or tests for allowability (as determined by audits or other means) may still be disallowed.

The Department believes that these provisions are reasonable and will not compromise accountability.

13. Other Program Income (§ 246.15(b))

The Department proposes to revise paragraph (b) of this section to authorize the use of the addition method of applying program income. As required at 7 CFR 3016.25(g)(1) and (2), the deduction method of applying program income must be used unless the addition method is authorized through program regulations. If the addition method is authorized, program income may be added to the funds committed to the grant agreement by the Federal agency and the grantee. The following example describes the difference between the deduction and the addition methods of applying program income:

> If a State agency receives a WIC grant of $1 million and it generates program income of $5,000, the deduction method would allow the State to spend $1 million: $995,000 to be funded by the Federal grant, and $5,000 to be funded by the program income. The remaining $5,000 in Federal grant funds is returned to FNS for reallocation. Using the same amounts, under the addition method the State agency could spend a total of $1,005,000—its $1 million grant *plus* its program income of $5,000.

The Department believes that State agencies should be authorized to use the addition method of applying program income because the addition method encourages State agencies and clinics to make the best use of Program funds, including generating new revenues that are used for Program purposes.

14. Closeout Procedures (§ 246.17(b)(2), § 246.12(f)(2)(iv), and § 246.12(q))

To help ensure timely allocation of funds and closeout of WIC expenditures for the previous fiscal year, the Department proposes that the current 150-day reporting cycle, as described in

§ 246.17(b)(2), be reduced to 120 days. Under the current 150-day reporting cycle, the participant has 30 days to redeem the food instrument from the date it first becomes valid (as described in § 246.12(q)), and the vendor has a maximum of 90 days from the first valid date of the food instrument to submit it for payment (§ 246.12(f)(2)(iv)). Thus, in the first 90 days of the reporting cycle, if the participant uses his/her full 30 days to redeem the food instrument at an authorized vendor's place of business, that vendor still has 60 days to submit the food instrument to the State agency for payment. The State agency then has the remaining 60 days left in the 150-day cycle in which to review the food instrument for accuracy, approve payment to the vendor, bill appropriate companies, and receive payment of any negotiated rebates.

The Department notes that most State agencies are already reporting 99 percent of food outlays within 120 days or less. Conference Report language from the Agriculture Appropriations Act for Fiscal Year 1998 (House Report 105–825) specifically directs the Department to reduce to 120 days the time period in which States are required to report on monthly obligation of funds. To reduce the expenditure reporting cycle from 150 days to 120 days, the Department proposes to revise § 246.12(f)(2)(iv) to reduce the amount of time currently allowed for redemption of the food instrument by authorized vendors from 90 days to 60 days. This reduction would still allow the vendor a minimum of 30 days to submit a food instrument for payment, even if a participant took the entire allowable 30 days to redeem the food instrument. As it is in the vendor's interest to receive payment for the food instruments as soon as possible, the Department does not believe that this change would impose a burden on vendors. Comments are welcomed on the impact of the provision, and any specific problems that State agencies foresee in meeting a shorter reporting cycle.

15. State Audit Responsibilities (§§ 246.20(b)(1) and (2))

Proposed language at § 246.20(b)(1) would direct State agencies to the requirements of 7 CFR part 3052 for obtaining audits. State agencies would be required to instruct local agencies, including private nonprofit local agencies, that they must obtain audits in accordance with 7 CFR part 3052. Further, State agencies would inform local agencies that they may choose to obtain either an organization-wide audit or a WIC Program-specific audit if allowed to do so under the provisions of 7 CFR part 3052.

This proposed language is needed for two primary purposes:

First, it references Departmental audit requirements at 7 CFR part 3052. Second, the revised language establishes State agency responsibility for ensuring that local agencies are appropriately audited.

Consistent with the proposed revisions to paragraph (b)(1) of this section as described above, the Department further proposes to delete paragraph (b)(2). The references in paragraph (b)(1) to 7 CFR part 3052 which contain the requirements for organization-wide audits make the specific listing of those requirements in paragraph (b)(2) redundant.

16. State Agency Reporting Requirements (§§ 246.25(b) and (c))

The Department proposes a number of revisions to the State agency reporting requirements at §§ 246.25(b) and (c). A reporting system should yield useful management tools for both Federal and State program managers, and should be responsive to requests for program information from Congress and the general public. The objectives of the proposed revisions to § 246.25 in this rulemaking are to encourage faster reporting, better quality data, more efficient data collection, and a reduction in the current paperwork burden on State agencies.

Participation Reporting

Under the regulatory requirements as detailed in § 246.25, State agencies should report actual and projected participation and expenditure information on a monthly basis. In order to bring the regulatory language up to date with current reporting practices, the Department proposes several revisions to these monthly reporting requirements, listed in paragraph (b)(1).

A. The stated *purpose* for reporting monthly financial and program performance data is to support program management and funding decisions.

B. Most of the items specified in paragraph (b)(1) as currently requiring monthly reporting would be retained, except that the requirement to report itemized NSA expenditures would be dropped; instead, only the monthly totals of NSA expenditures would be reported.

C. Itemized NSA expenditures would be reported annually, as an addendum to the fiscal year closeout report.

D. State agencies would also report actual and projected food funds expenditures and available food and NSA funds, which would be listed by the funding source year. This information is necessary in order to improve monitoring of program expenditures as well as to keep FNS fully informed about State agency plans to use available funds. It is, in fact, the reporting of this data that alerts FNS to impending caseload management problems. Early warning and prudent action based on this information should avert the need for severe caseload fluctuations.

Section 17(i)(2) of the Child Nutrition Act of 1966 (CNA) as amended, requires the Secretary to reallocate funds periodically, if a State agency is unable to spend its full allocation. To fulfill this obligation, FNS must make funding determinations that involve continuous forecasting and reevaluation of State agencies' funding needs through the analysis of reported data. The Department would retain regulatory language at paragraphs (b)(1)(i) and (ii) of § 246.25, which specifies additional information that State agencies may be required to include in their monthly financial and participation reports. This information pertains to the amount of excess cash allowances held by local agencies and the actions taken by the State agency to reduce such excess balance.

The Department proposes to revise paragraph (b)(2) of this section to delete the quarterly report of participants by category (*i.e.*, pregnant women, breastfeeding women, postpartum women, infants, and children) and by priority level. This revision corresponds to reporting changes made in Fiscal Year 2001 to reduce paperwork. Additionally, the number of migrant participants, as well as itemized NSA funds expenditures, which current regulations require to be reported monthly, would be reduced to an annual reporting requirement.

Reporting quarterly on participation by priority and category became a requirement with the May 3, 1988, publication of revised program regulations. The Department's purpose in requiring State agencies to report this information four times a year was two-fold. First, it enabled FNS to determine how well State agencies were targeting limited program benefits to persons eligible within the highest priority groups. Second, the data were used in the formula for allocation of food funds. In Fiscal Year 1993, State agencies began reporting these data annually instead of quarterly. WIC funding formulas no longer utilize priority data and priority participation is relatively stable. Thus in Fiscal Year 2000, State agencies began reporting these data every other year instead of annually.

The regulatory language would be revised to reflect the current practice in which State agencies report participation by priority every other year. While State agencies continue to track participation by priority on a monthly basis for program management purposes, they only have to report the data to FNS once every other year.

As previously mentioned, the regulatory language would be revised to require that the itemized NSA expenditures are reported through an addendum to the annual closeout report. The itemized NSA expenditures are used to determine a State agency's compliance with the statutory requirements (section 17(h)(3)(A)(i)(I) and (II) of the CNA) to spend at least one-sixth of its NSA expenditures on nutrition education and its proportionate share of the national minimum breastfeeding promotion expenditures.

Section 17(g)(4) of the CNA requires that not less than nine-tenths of one percent of the annual WIC Program appropriation shall be available first for services to eligible members of migrant populations. In order to determine the migrant expenditure target amount each year, FNS needs documentation of each State agency's annual average migrant participation. To calculate each State's share of the migrant expenditure target, FNS uses a 12-month average of State migrant participation. Because a 12-month average is used for establishing the annual migrant expenditure target, yearly submission of the average of 12 months of data is sufficient.

Racial/Ethnic Group Reporting

The Department also proposes revisions to §§ 246.25(b)(3) and (c) to reflect current reporting practices that have reduced reporting of participant category by priority level and racial and ethnic participation data to a biennial basis. Prior to Fiscal Year 1993, racial and ethnic participation information had been collected and reported annually by all local agencies, through the State agencies, on the form FNS–191 (Racial/Ethnic Group Participation Report). Not only did the FNS–191 constitute a significant reporting burden, but it was also duplicative. Racial and ethnic data are captured by the Participant Characteristics (PC) Minimum Data Set (MDS), a comprehensive reporting format designed by FNS to provide information for the biennial report provided to the Secretary of Agriculture and to Congress on income and nutritional risk characteristics, migrant farmworker status, and other matters determined by the Secretary. Beginning with the 1992 PC report, WIC State agencies have provided an MDS using a census or a State-representative sample of WIC participants, making use of ongoing data collection routinely conducted as a component of WIC certification. The racial/ethnic group data collected on the MDS is identical to the data collected on the FNS–191. Therefore, the Department proposes the following revisions to the biennial reports at § 246.25(b)(3) that reflect the current reporting practices:

A. Add a new paragraph (b)(3)(i) that names and describes the participant characteristics reporting requirements;

B. Redesignate paragraph (c) of this section as paragraph (b)(3)(ii); and

C. Specify that racial and ethnic participation data submitted for the Report on Participant Characteristics will also be used to fulfill civil rights reporting requirements.

Finally, the Department proposes to add a new paragraph (c) to this section to collect data that were previously only reported on the FNS–191. In addition to racial/ethnic data provided by the FNS–191, the name, address, telephone number, and number of clinics of all WIC local agencies were reported. FNS has compiled this information into an annual directory of local agencies, and it has become an indispensable resource for program communications. The local agency directory has been used to provide referrals to participants inquiring about the availability of WIC Program services, to maintain continuity of program services for migrants and other transient participants, and to provide a cross-reference for the PC MDS data to ensure complete coverage of all local agencies. To prevent the loss of this valuable local agency information, the Department proposes to revise the regulatory language to require State agencies to submit additions and deletions of local agencies administering the WIC Program, as well as local agency address changes, when such changes occur.

17. Confidentiality of Participant Information (§§ 246.26(d) through (i)

The Department proposes several revisions to the participant confidentiality provisions in § 246.26(d) of the current regulations. This rule would completely revise paragraphs (d) and (g) and add new paragraphs (h) and (i) to address the use and disclosure of confidential information. The Department proposes these changes in order to remove barriers to coordination among programs caused by restrictions on sharing participant information, and to provide regulatory clarification and guidance on legal issues pertaining to the release of confidential applicant and participant information in connection with court proceedings, criminal investigations, or instances of known or suspected child abuse or neglect.

State agencies are reminded that under both the current and proposed confidentiality provisions, confidential applicant and participant information may be used or disclosed only to the extent permitted by those provisions. Any other use or disclosure is not permitted. Additionally, State agencies should be aware that information obtained from WIC applicants or participants is protected by these provisions regardless of the manner in which the information is recorded or stored. For example, confidential information that is written in a participant case file, confidential information that is stored on a magnetic medium, such as computer tape or disk, or as part of a general office record such as a sign-in sheet, are equally protected. State agencies must ensure that confidential information stored on computer disks or tapes will not be available to persons or programs that are not authorized to receive such data.

The additional flexibility afforded by this proposed rule would not disturb the balance between sharing information in the interest of enhanced services and safeguarding information so that barriers to Program participation are not created. We are fully committed to the principle that the integration of health care and social service programs must proceed with careful regard for an individual's right to privacy.

A. Definition of Confidential Applicant and Participant Information

Current Program regulations, at § 246.26(d), limit the use and disclosure of information obtained from applicants and participants. The current confidentiality provisions do not differentiate between the treatment of information about applicants and participants obtained from other sources or generated as a result of WIC application, certification, or participation. This rule would make clear in proposed § 246.26(d)(1) that confidential applicant and participant information is any information about an applicant or participant (whether it is obtained from the applicant or participant, another source, or generated as a result of WIC application, certification, or participation) that individually identifies those individuals and/or a family member(s).

B. Use in the Administration and Enforcement of the WIC Program

Presently, applicant/participant information may be used and disclosed to only the following:

1. Persons directly connected with the administration or enforcement of the WIC Program;

2. Representatives of public organizations designated by the chief State health officer (or the governing authority in the case of Indian State agencies) which administer health or welfare programs that serve persons categorically eligible for the WIC Program; and

3. The Comptroller General of the United States, for audit and examination.

In addition, current § 246.25(a)(4) requires State agencies to provide the Department and the Comptroller General of the United States access to all Program records, except medical care records of individual participants unless they are the only source of certification data.

This rule would clarify the scope of the first category by emphasizing that even when confidential applicant/participant information is used for the administration or enforcement of the WIC Program, it may only be used by persons who have a need to know the information. Confidential applicant/participant information may include sensitive financial and medical information and not all State agency or local agency personnel need access to this information. Also, the proposed rule makes clear that this information may be used for the administration and enforcement of *any* WIC Program, not just by the State agency or local agency where the applicant or participant is certified. This clarification is necessary to facilitate the transfer of participants from one State agency or local agency to another and for Program oversight.

C. Use and Disclosure for non-WIC purposes

Currently, State agencies choosing to disclose applicant/participant information to public organizations designated by the chief State health officer pursuant to the second category discussed above must execute a written agreement with each agency. The agreement must limit the use of the information by the receiving agency to establishing eligibility for their own programs and conducting outreach for such programs. The organizations must assure that WIC applicant/participant information will not be disclosed to a third party. Also, § 246.7(i)(9) in current regulations requires State agencies to inform WIC applicants on the WIC certification form that information they provide may be disclosed to public organizations that administer other health or welfare programs for purposes of determining eligibility and conducting outreach.

Although section 17 of the CNA does not address the confidentiality of WIC information, the current regulations at § 246.26(d) and the guidance provided in FNS Instruction 800–1 reflect the Department's commitment to maintaining the confidentiality of the financial and health information of WIC applicants and participants. The current narrow avenues of disclosure of confidential applicant/participant information reflect the Department's position that an individual's right to privacy interests should not be surrendered as a condition of Program participation. Even more fundamentally, the Department understands that individuals may refuse to apply or participate in the WIC Program if they fear that their privacy will not be safeguarded.

At the same time, the Department recognizes that there are legitimate reasons for disclosing confidential information, many of which directly benefit the applicant or participant. One important reason is to facilitate the delivery of health services and other benefits for which WIC applicants or participants are eligible. Coordination among programs and ''one-stop shopping'' represent a dynamic area of growth and development in public service delivery. Requests for access to WIC applicant and participant information as a practical means of facilitating services have increased as States and local agencies strengthen coordination efforts with other agencies or persons delivering benefits or services to WIC applicants/participants. Members of Congress have also encouraged greater coordination among health, education, and social service programs as an effective means of maximizing funds and reaching individuals who are eligible for several programs. Finally, there are indications that the ''users'' of public health, education, and social service programs desire a more convenient, coordinated, integrated system of service delivery.

The Department's goal is to facilitate these coordination efforts without sacrificing the privacy interests of applicants and participants. We are committed to maintaining the confidentiality of applicant/participant information as programs coordinate services and share information, although the task becomes more challenging. One way to control the access of confidential information while promoting coordination is through the use of a written agreement between programs, specifying how and with whom data may be disclosed, and the proposed use of such information.

For these reasons, the Department proposes to allow State agencies greater flexibility in determining organizations to which they may disclose confidential applicant/participant information pursuant to written agreements as well as the permissible uses of such information. Specifically, in proposed § 246.26(d)(2) the reference to ''health or welfare'' programs would be removed. This would provide State agencies greater latitude in choosing appropriate programs with which to coordinate and share information. Additionally, proposed § 246.26(h)(3)(i) would expand the permitted uses of confidential applicant/participant information to add three new categories. As noted above, currently applicant/participation information may be used by another public organization only for the purpose of establishing eligibility and conducting outreach for the programs administered by that organization. The three new categories of permissible use proposed by this rule are:

- Enhancing the health, education, or well-being of WIC applicants or participants;
- Streamlining administrative procedures in order to minimize burdens on staff and applicants or participants; and
- Assessing and evaluating a State's health system in terms of responsiveness to participants' health care needs and health care outcomes.

However, as a balance to this proposed expansion, the Department proposes a new § 246.4(a)(24) that would require State agencies to include in their State Plan a list of the programs with which the State agency or its local agency has or intends to execute written agreements for the disclosure and use of confidential applicant/participant information and planned use of the information, consistent with the uses authorized in proposed § 246.26(d). This rule includes a cross-reference to the State plan requirement in proposed § 246.26(h)(3). This list is to be included in the State Plan for informational purposes only; FNS does not need to approve State agencies' decisions in this matter as long as the reasons for sharing information are consistent with the authorized uses in the proposed rule.

This broader language would address some situations that State agencies have cited as examples of administrative inefficiency or as barriers to the health

and well-being of WIC applicants and participants resulting from the current confidentiality provisions. For example, these proposed changes would:

- Permit streamlining of duplicative administrative and health procedures among programs;
- Make it easier to coordinate with public educational programs, such as the Expanded Food and Nutrition Education Program (EFNEP), or with educational organizations that provide health services to WIC applicants or participants;
- Encourage sharing information with other programs in which WIC participants are currently enrolled, such as Head Start; and
- Permit sharing with child protective service programs certain information that is deemed to be critical to the health and well-being of WIC participants.

This proposed rule also would make clear in proposed §§ 246.26(d)(2) and (h)(3) that the conditions for disclosing confidential applicant/participant information extend to non-WIC use of the information by the State agency and its local agencies. In these cases, the written agreement would be between the WIC State agency or local agency and the unit of the WIC State agency or local agency that will be using the information for non-WIC purposes. The rule proposes to require a written agreement in these instances because the State or local agency personnel who will be using the information for non-WIC purposes may be unfamiliar with the limits on the use of the information. Requiring a written agreement in these cases provides an additional safeguard for this sensitive information.

Some State agencies have objected to the requirement of written agreements prior to disclosing applicant/participant information because of the amount of paperwork that can be involved, especially when programs are not administered at the State level. The Department agrees that written agreements may not always be practical for sharing information, and later in this preamble we discuss the situations in which release forms may be used. However, there are ways to limit the amount of paperwork involved in written agreements in some situations. For example, FNS Instruction 800–1 states that separate agreements do not have to be executed for each program. Instead, the chief State health officer (or his equivalent) may list in one agreement all of the programs with which information is to be disclosed. Responsible officials for each of the programs listed would then sign the written agreement. This rule would retain the requirement for written agreements between WIC and other program providers because such agreements establish accountability. They also provide a protocol for sharing data, thus protecting confidential information.

State agencies that choose to share information as authorized by Program regulations are not required to obtain a separate release form signed by the applicant or participant. However, this rule would require State and local agencies that choose not to use release forms to notify applicants and participants at the time of application or through a subsequent notice that information about their participation in the WIC Program may be used by State and local WIC agencies and public organizations in the administration of their programs that serve persons eligible for the WIC Program. This requirement is contained in proposed §§ 246.7(i)(11) and 246.26(h)(2) of this proposed rule.

D. Child Abuse and Neglect Reporting

In the past, questions have arisen about the disclosure of applicant/participant information to child protective services or other State or local officials in cases of known or suspected child abuse or neglect. The Department's current policy, as detailed in FNS Instruction 800–1, is determined by Federal and State law. The Department's policy stems from a requirement in Section 106 of the Child Abuse Prevention and Treatment Act (42 U.S.C. 5106a). This Act authorizes the Secretary of Health and Human Services to make grants to States to assist them in developing and implementing child abuse and neglect prevention and treatment programs. A State's statute must require that known or suspected child abuse or neglect be reported to specified persons in order for that State to receive such grants. Generally, the Department's regulations take precedence over State laws or regulations. However, in this case State laws requiring the reporting of suspected child abuse reflect federal statutory intent designed to safeguard the health and well-being of the nation's children.

If a State statute requires known or suspected child abuse or neglect to be reported, then WIC staff must report or release applicant/participant information to State or local officials who have requested such information. If State law does not require that known or suspected child abuse be reported by public programs, such as WIC, the guidance in FNS Instruction 800–1 encourages WIC State agencies to consult with State legal counsel to determine the appropriateness of reporting such information. The Department's position remains the same as that stated in guidance. However, we propose to codify the current policy as stated in FNS Instruction 800–1 in proposed § 246.26(d)(3).

In the absence of State reporting laws, the proposed language at § 246.26(h)(3)(i)(C) would allow State agencies the option to disclose such information if a written agreement has been executed between the WIC State or local agency and the appropriate child protective service organization. The written agreement could also be used to strengthen ties between WIC and agencies that provide child abuse counseling.

E. Release Forms

State agencies have requested latitude to allow medical information to be disclosed to private parties such as physicians treating WIC applicants or participants. After examining the issue, we concluded that permitting a general or blanket release form under which an applicant or participant would permit a local or State agency to release confidential information to unidentified parties would be inappropriately broad. At the same time, the Department recognizes that some increased flexibility in disclosing medical information can be beneficial to the applicant or participant, as well as the respective party.

As a result, this rule proposes in § 246.26(d)(4) to allow disclosure of confidential applicant/participant information when an applicant or participant signs a form authorizing disclosure and specifying the parties to which the information may be disclosed. In addition, the applicant or participant must be given the right to refuse to sign the release form and notified that consent is not a condition of WIC Program participation and that refusal to sign the release form will not affect the application or participation in the WIC Program. To underscore the voluntary nature of the release form, the proposed rule would permit only release forms authorizing disclosure to the applicant or participant's physicians or other health care providers at the time of application or certification for the WIC Program. All other requests for signature of release forms would be required to take place after the application and certification process is completed. In addition, to the extent that an applicant or participant voluntarily signs a release form, agreeing that confidential information may be disclosed, the restrictions in

proposed §§ 246.26(d) and (h) would not apply.

F. Access by Applicants and Participants

This rule would codify in proposed § 246.26(d)(5) the current policy of requiring State and local agencies to provide applicants and participants access to the information they provide. In the case of an applicant or participant who is an infant or child, the State or local agency would be required to provide access to the parent or guardian of the infant or child, assuming that any issues regarding custody of guardianship are resolved. This rule would not require State and local agencies to provide access to any other information concerning an applicant or participant, such as documentation of income provided by third parties and staff assessments of the participant's condition or behavior, unless required by Federal, State, or local law or policy or unless the information supports a State or local agency decision that is being appealed by the applicant or participant pursuant to § 246.9.

G. Access by the USDA and the Comptroller General of the United States

This rule would also revise paragraph (g) in § 246.26 to clarify that access to Program records by the Department and Comptroller General of the United States includes confidential applicant and participant information. This rule also proposes to amend § 246.25(a)(4) to require State and local agencies to make available to the Department and the Comptroller General all Program records, including confidential applicant and participant information. However, the proposed rule would prohibit any reports or other documents resulting from the examination of such records that are publicly released from including confidential applicant or participant information. We also want to point out that the provisions providing access to the Department and the Comptroller General extend to contractors and other agents of the Department or the Comptroller General who may be performing research or other activities on behalf of the Department, so long as those activities relate to the administration or enforcement of the WIC Program.

H. Subpoenas and Search Warrants

The Department additionally proposes to add a new paragraph (i) to § 246.26 that would specify the procedures State and local agencies must follow in responding to requests from courts for confidential information pertaining to WIC applicants, participants, and vendors. The Department proposes to add these procedures to the WIC regulations in response to an increase in instances in which State and local agencies are presented with subpoenas or search warrants for confidential applicant and participant information. This rule proposes step-by-step procedures that State and local agencies, in consultation with legal counsel, would be required to follow in handling these requests. The proposed procedures are intended to create a basic, standard approach that emphasizes the importance of preserving confidentiality within the scope of the Federal regulations governing the WIC Program. At the same time, these procedures would protect WIC staff from adverse legal action for refusals to release confidential information.

In proposed § 246.6(i), the Department proposes to identify the situations in which State or local agencies must release information: when served with a search warrant or when served with a subpoena which the court has already denied the State or local agency's attempt to quash or which the local agency and legal counsel have reviewed and determined not to attempt to quash. If the State or local agency fails to comply in these situations, WIC staff may face adverse legal action, including imprisonment.

This rule proposes different procedures for responding to subpoenas as opposed to search warrants in recognition of the differences between these legal documents. A subpoena is a written directive for information to be provided by an individual or entity. Generally, a subpoena directs an individual or entity to appear at a stated time and place and give information on a topic about which the individual or entity is knowledgeable. One type of subpoena is a ''subpoena *duces tecum*.'' A subpoena *duces tecum* is a written directive that orders the production and delivery of documents. Documents may be requested by type, *e.g.*, all records for participants of a certain age and gender, or by topic, *e.g.*, all documents which deal with immunization. The deadline for delivery, as well as the site for delivery, is generally specified. Search warrants are issued by the courts and are used by law enforcement officers to obtain information, and sometimes objects, from specific premises. Compliance with a search warrant is required at the time the search warrant is served.

Compared to a search warrant, with which State or local agency compliance must be immediate, a response to a subpoena may involve a process of several steps. This process, as outlined at proposed paragraph (i)(2), would allow State and local agencies, in consultation with legal counsel, to determine how to respond to a subpoena when it is initially received. However, if efforts to quash the subpoena (*i.e.*, receive court approval not to comply with the directive) have been denied by the court, then the State or local agency must comply.

Subpoenas *duces tecum* for information about Program participants have been the most common type of court-ordered directive. Subpoenas, whether directed to an individual or an entity, generally do not initially represent a court's ruling that a WIC State or local agency must release the requested information. However, subpoenas cannot be ignored. The Department proposes that the primary consideration in deciding how to respond to subpoenas follows the provisions of proposed § 246.26(i). Under the proposed procedures, State and local agencies, acting on the advice of legal counsel, would first determine whether the requested information is in fact confidential applicant or participant information prohibited from release under the federal regulations. If not, the state or local agency would provide the information requested. If so, however, we propose that the State or local agency, or legal counsel acting on its behalf, must proceed to attempt to quash the subpoena. In doing so, the State/local agency or legal counsel may be required to appear before the court to argue against the release of information. The Department further proposes that at a minimum in attempting to quash a subpoena, the State/local agency or legal counsel acting on its behalf must inform the court of the federal regulatory prohibitions against providing the requested information. If the court denies the motion to quash the subpoena and rules that the information must be released, then, as proposed in this rule, the State/local agency or legal counsel would attempt to limit the extent of the disclosure of confidential WIC Program information by:

- Ensuring that the information released is only what is essential to respond to the subpoena; and
- Limiting to the greatest extent possible the public access to the confidential WIC information disclosed.

Occasionally, State and local agencies have confronted serious dilemmas when requested confidential applicant or participant information was key to the solution of criminal investigations of felonies. Program regulations prohibited disclosure of the information, even

though Program interests would have been well served in furthering the investigations. The Department therefore proposes to recognize, in new § 246.26(i)(2)(iii), that in rare instances a State or local agency in consultation with legal counsel could decide that disclosing confidential applicant or participant information would be in the best interest of the Program. Because requests arising from investigations of this caliber and seriousness are rare, we expect State and local agencies to conclude only infrequently that such disclosure is necessary.

In § 246.26(i)(3), the Department proposes to set forth procedures for State and local agencies to follow when they are served with search warrants. As proposed, the State and local agency are required to:

- If a local agency, immediately notify the State agency;
- Immediately notify legal counsel;
- Comply with the search warrant;
- Inform the individual(s) producing the search warrant of the confidential nature of WIC information; and
- Review the search warrant and provide only the specific information requested in the warrant and no other information.

Search warrants differ from subpoenas in that generally, they are issued or approved by a court in criminal matters only when law enforcement officials have made an adequate showing of the need for the search. Failure to comply with a search warrant at the time it is served could result in the immediate imprisonment of WIC State or local agency staff. As stated above, State or local legal counsel should be alerted to the request for the provision of the information required in the search warrant immediately upon service of the warrant. WIC clinic staff should retain a copy of the search warrant for their files as evidence of the cause of the specific information's being released.

The proposed process for responding to court-ordered requests for confidential WIC Program information will assist State and local agencies in handling future requests. These proposed procedures are intended to achieve two objectives. First, the Department intends to clarify through regulations the primacy of Federal authority to limit disclosure of information in the interest of preserving the confidentiality of WIC applicant/participant information. The Department further intends to communicate a national, uniform approach to disclosure of WIC records that will assist the courts in handling matters related to the confidentiality of Program information. Because of variation in State law, however, the Department encourages legal counsel for State and local agencies to consider these proposed revisions carefully, and to provide comments that will assist the Department in issuing final regulations that are sufficiently flexible to accommodate State laws in this area.

18. Conflict of Interest

One of the recommendations included in an August 1999 Report by the General Accounting Office (GAO) addressing fraud and abuse in the WIC Program (''FOOD ASSISTANCE: Efforts to Control Fraud and Abuse in the WIC Program Can Be Strengthened'') stated that WIC State agencies should be required to have policies and procedures for addressing employee conflicts of interest at the local agency level. Conflicts of interest may arise when local agency employees who participate in the WIC Program are in a position to certify their own eligibility and issue their own benefits. They may also arise when there is no separation of duties within the local agency staff so that an employee can certify and issue benefits to the same individual. The GAO report indicated that 45 percent of the local WIC agencies do not have conflict-of-interest policies in place for employees who also receive WIC benefits. Furthermore, an estimated 30 percent of the local agencies do not separate duties within the certification process. In this latter case, employees could certify and issue WIC benefits to relatives and friends.

The Department realizes that in many local agencies, the WIC clinics do not have enough employees on site to separate these essential duties. However, GAO reminds the Department that even in such understaffed situations, prudent precautions can and should be taken. For example, one agency uses a separate agency number for issuing WIC benefits to employee participants. Another agency requires a supervisor's sign-off whenever an employee is going to both certify and issue benefits to the same individual because staffing levels are low.

Consistent with GAO's recommendation, a new paragraph (a)(25) would be added to § 246.4 to require that State agencies develop and implement reasonable policies and procedures to prevent conflicts of interest within the local agency staffs.

19. Participant and Employee Fraud and Abuse (§ 246.4(a))

The GAO study on fraud and abuse in the WIC Program also noted that consistent and reliable information regarding participant fraud and abuse—who is committing the fraud and how often, what types of fraud are being committed, and how much program funding is lost—is important in evaluating the effectiveness of both Federal and State agency efforts aimed at preventing and detecting these problems. Currently, State agencies do not collect information on the number and characteristics of participants who engage in participant fraud and abuse. In fact, nearly half of the states that were included in the GAO study reported that they do not maintain such data. Without this information, FNS is not able to assess the extent of participant fraud and abuse, evaluate State and local agencies' efforts to control it, or identify the changes needed to improve program integrity.

GAO suggests that not collecting such information may send an unintentional message to agency officials and other stakeholders that preventing and detecting participant/employee fraud and abuse is a low priority, thus damaging the public's trust in the WIC Program. Therefore, this rule proposes that State agencies include as part of the annual State Plan of Operation a description of the system(s) that are in place at the local agency level for collecting and maintaining information on cases of fraud and abuse by participants as well as by employees (including any violations caused by employee conflicts of interest described above). The information should include the nature of the fraud detected and the associated dollar losses that are the actual or estimated result of such fraud and abuse. This requirement would be added to § 246.4 of the regulations as a new paragraph (a)(26).

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

The proposed revisions described above will also require several changes to the State Plan. Therefore, § 246.4(a)(11)(i) would be revised to incorporate the following provisions:

(1) State agencies which allow local agencies the option of requesting documentation of pregnancy from applicants would specify in their State Plans the type of documentation that is requested, and would also provide assurance that the request for documentation will not constitute a barrier to participants.

(2) States would specify any alternate language, developed at their option, that will be used to inform WIC applicants of their rights and responsibilities, as provided in § 246.7(i)(10) of this proposed rule. The alternate language must be approved by FNS before it can be used by WIC local agencies.

(3) State agencies must describe their policies concerning the approval of local agency costs for transporting participants to and from WIC clinics, as provided in § 246.4(a)(18).

(4) A new paragraph (a)(24) would be added to this section to require that State agencies list all programs with which written agreements for sharing participant information have been or will be executed. State agencies would also be required to specify the reason(s), as specified by § 246.26(d)(2)(i), for sharing information with each program.

Procedural Matters

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 (OMB).

Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612). Pursuant to that review, Roberto Salazar, Administrator of the Food and Nutrition Service (FNS), has certified that this rule will not have a significant effect on a substantial number of small entities. State and local WIC agencies would be most affected because there are several additional program administration requirements. However, this rule also reduces considerably more program administration requirements. The net effect on State and local agencies is expected to result in reduced and streamlined administrative procedures. Participants and applicants would also be affected by changes in application processing, certification, and the disclosure of information.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, the Food and Nutrition Service (FNS) is submitting for public comment the change in the information collection burden that would result from the adoption of the proposals in this rule, as indicated below.

ESTIMATED ANNUAL REPORTING BURDEN

Section of regulations	Annual number of respondents	Annual frequency	Average burden per response	Annual burden hours
Reporting:				
246.4(a)(11)(i)	88	1	1.00	88.00
246.4(a)(11)(ii)	88	1	.50	44.00
246.4(a)(18)	88	1	1.00	88.00
246.4(a)(24)	88	1	1.00	88.00
Total Reporting Burden	88		3.50	308.00

Comments are invited on:

- Whether the proposed collection of information is necessary for the proper performance of the Agency's functions, including whether the information will have practical utility;
- The accuracy of the Agency's estimate of the proposed information collection burden, including the validity of the methodology and the information to be collected; and
- Ways to minimize the burden of information collection on those who are required to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

In addition to the proposed reporting requirements noted above, this rulemaking would also update regulatory language at section 246.25 regarding the State agency reporting requirements to reflect the current reporting requirements that began in Fiscal Year 1993. Revisions to the information collection burden associated with these reporting changes have been previously approved by OMB as follows:

- FNS–798 and –798A, WIC Financial Management and Participation Report with Addendum (OMB #0584–0045);
- FNS–648, WIC Local Agency Directory Report (OMB #0584–0431).

Comments may be sent to Laura Wittenberg, Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20503. (A copy may also be sent to Debra Whitford at the address below.) For further information, or for copies of the information collection, please contact Debra R. Whitford, Chief, Policy and Program Development Branch, Supplemental Food Programs Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 540, Alexandria, VA 22302, or telephone (703) 305–2730.

Comments and recommendations on the proposed information collection must be received by January 31, 2003. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

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

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. It 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 the preamble to the final rule. Prior to any judicial challenge to the application of the provisions of this rule, all applicable administrative procedures must be exhausted.

Public Law 104–4

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 10404, 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, the Food and Nutrition Service 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 generally requires the Food and Nutrition Service to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective, or least burdensome alternative that achieves the objectives of that rule.

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

List of Subjects in 7 CFR Part 246

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

For the reasons set forth in the preamble, 7 CFR part 246 is proposed to be 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 § 246.2, add new definitions of ''Electronic signature'' and ''Sign or signature'' in alphabetical order to read as follows:

§ 246.2 Definitions.

* * * * *

Electronic signature means an electronic sound, symbol, or process, attached to or associated with an application or other record and executed and or adopted by a person with the intent to sign the record.

* * * * *

Sign or signature means a handwritten signature on paper or an electronic signature. If the State agency chooses to use electronic signatures, the State agency must ensure the reliability and integrity of the technology used and the security and confidentiality of electronic signatures collected in accordance with sound management practices and the confidentiality requirements in § 246.26.

* * * * *

3. In § 246.4:

a. Revise paragraphs (a)(11)(i) and (a)(11)(ii);

b. Add a sentence to the end of paragraph (a)(21); and

c. Add new paragraphs (a)(24), (a)(25), and (a)(26).

The revision and additions read as follows:

§ 246.4 State plan.

(a) * * *

(11) * * *

(i) Certification procedures, including:

(A) a list of the specific nutritional risk criteria by priority level which explains how a person's nutritional risk is determined;

(B) hematological data requirements including timeframes for the collection of such data;

(C) the State agency's income guidelines for Program eligibility;

(D) adjustments to the participant priority system (*see* § 246.7(e)(4)) to accommodate high-risk postpartum women or the addition of Priority VII; and

(E) alternate language for the statement of rights and responsibilities which is provided to applicants, parents, or caretakers when applying for benefits as outlined in § 246.7(i)(10) and (j)(2)(i) through (j)(2)(iii). This alternate language must be approved by FNS before it can be used in the required statement.

(ii) Methods for providing nutrition education to participants, and criteria for deciding who will be offered individual care plans. Nutrition education will include drug abuse information. Participants will include homeless individuals.

* * * * *

(21) * * * The State agency will also describe its policy for approving transportation of participants to and from WIC clinics.

* * * * *

(24) A list of all organizations with which the State agency or its local agencies has executed or intends to execute a written agreement pursuant to § 246.26(h) authorizing the use and disclosure of confidential applicant and participant information for non-WIC purposes.

(25) The State agency's plan to prevent conflicts of interest at the local agency or clinic level. At a minimum, this plan must address situations in which local agency or clinic staff:

(i) are also WIC participants;

(ii) certify relatives or close friends; or

(iii) perform both certification and food instrument issuance functions.

(26) The State agency's plan for collecting and maintaining information on cases of participant and employee fraud and abuse. Such information should include the nature of the fraud detected and the associated dollar losses.

* * * * *

4. In § 246.5:

a. Revise the first sentence of paragraph (c)(1) and remove the last sentence; and

b. Revise paragraph (d)(2).

The revisions read as follows:

§ 246.5 Selection of local agencies.

* * * * *

(c) * * *

(1) The State agency will consider the Affirmative Action Plan (*see* § 246.4(a)(5)) when funding local agencies and expanding existing operations, and may consider how much of the current need is being met at each priority level. * * *

* * * * *

(d) * * *

(2) The State agency will, when seeking new local agencies, publish a notice in the local media (unless it has received an application from a local public or nonprofit private health agency which can provide adequate services). The notice will include a brief explanation of the Program, a description of the local agency priority system (outlined in this paragraph (d)), and a request that potential local agencies notify the State agency of their interest. In addition, the State agency will contact all potential local agencies to make sure they are aware of the opportunity to apply. If no agency submits an application in 30 days, the State agency may then select a local agency in another area. If sufficient funds are available, a State agency will give notice and consider applications outside the local area at the same time.

* * * * *

5. In § 246.7:

a. Revise the heading of paragraph (c) and revise paragraph (c)(1);

b. Redesignate paragraph (c)(2) as paragraph (c)(3) and add new paragraphs (c)(2) and (c)(4);

c. Revise paragraph (d)(2)(iii);

d. Redesignate paragraph (d)(2)(iv)(C) as paragraph (d)(2)(iv)(D) and add a new paragraph (d)(2)(iv)(C);

e. Revise paragraph (e)(1)(vi);

f. Revise paragraph (g)(1);

g. Revise paragraph (h);

h. Revise paragraph (i)(10) introductory text;

i. Revise paragraph (i)(11);

j. Revise paragraph (j)(2) introductory text;

k. Redesignate paragraph (l)(1) as paragraph (l) introductory text, and remove paragraph (l)(2);

l. Redesignate paragraphs (l)(1)(i) through (l)(1)(iv) as (l)(1) through (l)(4), respectively; and

m. Remove paragraph (m), and redesignate paragraphs (n), (o), (p), and

(q) as paragraphs (m), (n), (o), and (p), respectively.

The revisions and additions read as follows:

§ 246.7 Certification of participants.

* * * * *

(c) *Eligibility criteria and basic certification procedures.* (1) To qualify for the Program, infants, children, and pregnant, postpartum, and breastfeeding women must:

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

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

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

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

(ii) The State agency may issue benefits to applicants who claim to be pregnant (assuming that all other eligibility criteria are met) but who do not have documented proof of pregnancy at the time of the certification interview and determination. The State agency should then allow a reasonable period of time, not to exceed 60 days, for the applicant to provide the requested documentation. If such documentation is not provided as requested, the woman can no longer be considered categorically eligible, and the local agency would then be justified in terminating the woman's WIC participation in the middle of a certification period.

* * * * *

(4) The certification procedure shall be performed at no cost to the applicant.

(d) * * *

(2) * * *

(iii) *Use of a State or local health care definition of ''Income''.* If the State agency uses State or local free or reduced-price health care income guidelines, it will ensure that the definitions of income (*see* paragraph (d)(2)(ii) of this section), family (*see* § 246.2) and allowable exclusions from income (*see* paragraph (d)(2)(iv) of this section) are used uniformly to determine an applicant's income eligibility. This ensures that households with a gross income in excess of 185 percent of the Federal income guidelines (*see* paragraph (d)(1) of this section) are not eligible for Program benefits. The exception to this requirement is persons who are also income eligible under other programs (*see* paragraph (d)(2)(vi) of this section).

(iv) * * *

(C) Short term, unsecured loans that are expected to be repaid in a reasonably short period of time, and to which the applicant does not have constant or unlimited access.

* * * * *

(e) * * *

(1) * * *

(vi) *Regression.* A WIC participant who is reapplying for WIC benefits may be considered to be at nutritional risk in the next certification period if the competent professional authority determines that his/her nutritional status will worsen (regress) without supplemental foods. However, such participants may not be considered at nutritional risk for this reason (regression) for more than one certification period immediately following the initial certification. Individuals who are certified based on the possibility of regression should be placed either in the same priority for which they were initially certified, or in Priority VII, if the State agency is using that priority level.

* * * * *

(g) * * *

(1) Program benefits will be based upon certifications established in accordance with the following timeframes:

A/an:	Will be certified:
(i) Pregnant woman	For the duration of her pregnancy, and up to the last day of the month in which the infant becomes six weeks old or the pregnancy ends (for example, if the infant is born June 4, six weeks after birth would be July 16, and certification would end July 31).
(ii) Postpartum woman	Up to the last day of the sixth month after the baby is born or the pregnancy ends (postpartum).
(iii) Breastfeeding woman	Approximately every six months ending with the last day of the month in which the infant turns 1 year old.
(iv) Infant	Approximately every six months. The State agency may permit its local agencies to certify infants under six months of age up to the last day of the month in which the infant turns 1 year old, provided the quality and accessibility of health care services are not diminished.
(v) Child	Approximately every sixth months ending with the last day of the month in which a child reaches his/her fifth birthday.

* * * * *

(h) *Mid-certification period disqualifications.* Participants may be disqualified from the Program during a certification period for:

(1) *Income ineligibility.* If the local agency finds out that an individual's household income level has changed, the local agency will reassess the individual's income eligibility during the current certification period. The local agency will disqualify an individual and any other household members currently receiving WIC benefits determined ineligible based on the new information. However, adjunctively-eligible WIC participants (as defined in paragraphs (d)(2)(vi)(A) or (d)(2)(vi)(B) of this section) may not be disqualified from the WIC Program solely because they, or certain family members, no longer participate in one of

the other specified programs. The State agency will ensure that such persons, and other household members currently receiving WIC benefits, are disqualified during a certification period only after their income eligibility has been reassessed based on the income screening procedures used for applicants who are not adjunctively eligible.

(2) *Other (optional) reasons.* Local agencies may disqualify an individual during a certification period for the following reasons:

(i) Failure to obtain food instruments or supplemental foods for several consecutive months. Proof of such failure includes failure to pick up supplemental foods or food instruments, nonreceipt of food instruments (when mailed instruments are returned), or failure to have an electronic benefit transfer card revalidated for purchase of supplemental foods; or

(ii) If a State agency experiences funding shortages, it may be necessary to discontinue Program benefits to some certified participants. The State agency must explore alternatives (such as elimination of new certifications) before taking such action. Reduction of food benefit quantities for cost reasons is not an acceptable alternative action. In discontinuing benefits, the State agency will affect the least possible number of participants and those whose nutritional and health status would be least impaired by the action. When a State agency elects to discontinue benefits due to insufficient funds, it will not enroll new participants during that period. The State may discontinue benefits by:

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

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

(i) * * *

(10) A statement of the rights and obligations under the Program. The statement must contain a signature space, and must be read by or to the applicant, parent, or caretaker. It must contain the following language or alternate language as approved by FNS (see § 246.4(a)(11)(i)), and be signed by the applicant, parent, or caretaker after the statement is read:

* * * * *

(11) If the State agency exercises the authority to use and disclose confidential applicant and participant information for non-WIC purposes pursuant to § 246.26(d)(2), a statement that:

(i) Notifies applicants that the chief State health officer (or the governing authority, in the case of an Indian State agency) may authorize the use and disclosure of information about their participation in the WIC Program for non-WIC purposes;

(ii) Must indicate that such information will be used by State and local WIC agencies and public organizations only in the administration of their programs that serve persons eligible for the WIC Program; and

(iii) Will be added to the statement required under paragraph (i)(10) of this section. This statement must also indicate that such information can be used by the recipient organizations only for the following:

(A) To determine the eligibility of WIC applicants and participants for programs administered by such organizations;

(B) To conduct outreach for such programs;

(C) To enhance the health, education, or well-being of WIC applicants and participants currently enrolled in those programs;

(D) To streamline administrative procedures in order to minimize burdens on participants and staff; and

(E) To assess and evaluate a State's health system in terms of responsiveness to participants' health care needs and health care outcomes.

(j) * * *

(2) At the time of certification, each Program participant, parent or caretaker must read, or have read to him or her, the statement provided in paragraph (i)(10) of this section (or an alternate statement as approved by FNS). In addition, the following sentences (or alternate sentences as approved by FNS) must be read:

* * * * *

6. In § 246.9, revise paragraph (g) to read as follows:

§ 246.9 Fair hearing procedures for participants.

* * * * *

(g) *Continuation of benefits.* Participants who appeal the termination of benefits within the period of time provided under paragraph (e) of this section must continue to receive Program benefits until the hearing official reaches a decision or the certification period expires, whichever occurs first. This does not apply to applicants denied benefits at initial certification, participants whose certification period has expired or participants who become categorically ineligible for benefits. Applicants who are denied benefits at initial certification, or participants who become categorically ineligible during a certification (or whose certification period expires), may appeal the denial or termination, but must not receive benefits while awaiting the hearing.

* * * * *

§ 246.12 [Amended]

7. In § 246.12:

a. Amend paragraph (f)(2)(iv) by removing the words ''90 days'' wherever they appear and by adding in their place the words ''60 days''; and

b. Amend paragraph (q) by removing the words ''150 days'' and by adding in their place the words ''120 days''.

8. In § 246.14:

a. Add a new sentence at the beginning of paragraph (a)(2);

b. Amend the first sentence of paragraph (c)(7) by removing the word ''rural''; and

c. Revise paragraph (d).

The addition and revision read as follows:

§ 246.14 Program costs.

(a) * * *

(2) Program funds may not be used to pay for retroactive benefits. * * *

* * * * *

(d) *Costs allowable with approval.* The costs of capital expenditures exceeding the dollar threshold established in Agency policy and guidance are allowable only with the approval of FNS prior to the capital investment. These expenditures include the costs of facilities, equipment (including medical equipment), automated data processing (ADP) projects, other capital assets, and any repairs that materially increase the value or useful life of such assets.

* * * * *

9. In § 246.15, revise the first sentence of paragraph (b) to read as follows:

§ 246.15 Program income other than grants.

* * * * *

(b) *Other Program income.* The State agency may use current program income (applied in accordance with the addition method described in § 3016.25(g)(2) of this title) for costs incurred in the current fiscal year and, with the approval of FNS, for costs incurred in previous years or subsequent fiscal years. * * *

§ 246.17 [Amended]

10. In § 246.17, remove the words ''150 days'' in paragraph (b)(2), and add in their place the words ''120 days''.

11. In § 246.20:

a. Revise paragraph (b)(1); and

b. Remove paragraph (b)(2), and redesignate paragraph (b)(3) as paragraph (b)(2).

The revision reads as follows:

§ 246.20 Audits.

* * * * *

(b) * * * (1) State agencies must obtain annual audits in accordance with part 3052 of this title. In addition, States must require local agencies under their jurisdiction to obtain audits in accordance with part 3052 of this title.

* * * * *

12. In § 246.25, revise paragraphs (a)(4), (b) and (c) to read as follows:

§ 246.25 Records and reports.

(a) * * *

(4) All records shall be available during normal business hours for representatives of the Department and the Comptroller General of the United States to inspect, audit, and copy. Any reports or other documents resulting from the examination of such records that are publicly released may not include confidential applicant or participant information.

(b) *Financial and participation reports.*

(1) *Monthly reports.* (i) State agencies must submit financial and program performance data on a monthly basis, as specified by FNS, to support program management and funding decisions. Such information must include, but may not be limited to:

(A) Actual and projected participation;

(B) Actual and projected food funds expenditures;

(C) A listing by source year of food and NSA funds available for expenditure; and

(D) NSA expenditures.

(ii) State agencies must require local agencies to report such financial and participation information as is necessary for the efficient management of food and NSA funds expenditures. When considered necessary and feasible by FNS, State agencies may be required to:

(A) Show in the ''Remarks'' section of the WIC Financial Management and Participation Report the amount of cash allowances exceeding three days' need being held by their local agencies or contractors; and

(B) Provide short narrative explanations of actions taken by the State agency to reduce such excess balances.

(2) *Annual reports.* (i) Every year, State agencies must report to FNS the average number of migrant farmworker household members participating in the Program during a 12-month period of time specified by FNS.

(ii) State agencies must submit itemized NSA expenditure reports annually as an addendum to their WIC Program closeout reports, as required by § 246.17(b)(2).

(3) *Biennial reports.* (i) *Participant characteristics report.* State and local agencies must provide such information as may be required by FNS to provide a biennial participant characteristics report to Congress. This includes, at a minimum, information on income and nutritional risk characteristics of participants, information on breastfeeding incidence and duration, and participation in the Program by category (*i.e.*, pregnant, breastfeeding and postpartum women, infants and children) within each priority level (as established in § 246.7(e)(4)) and by migrant farmworker households.

(ii) *Civil rights report.* Racial and ethnic participation data contained in the participant characteristics report that is submitted biennially to Congress will also be used to fulfill civil rights reporting requirements.

(c) *Other reports.* State agencies must submit reports to reflect additions and deletions of local agencies administering the WIC Program and local agency address changes as these events occur.

* * * * *

13. In § 246.26, revise paragraphs (d) and (g) and add new paragraphs (h) and (i) to read as follows:

§ 246.26 Other provisions.

* * * * *

(d) *Confidentiality of applicant and participant information.*

(1) *WIC purposes.* Confidential applicant and participant information is any information about an applicant or participant (whether it is obtained from the applicant or participant, another source, or generated as a result of WIC application, certification, or participation) that individually identifies those individuals and/or a family member(s). Except as otherwise permitted by this section, the State agency must restrict the use and disclosure of confidential applicant and participant information to persons directly connected with the administration or enforcement of the WIC Program whom the State agency determines have a need to know the information for WIC Program purposes. These persons may include personnel from its local agencies and other WIC State and local agencies, persons under contract with the State agency to perform research regarding the WIC Program, and persons investigating or prosecuting WIC Program violations under Federal, State or local law.

(2) *Non-WIC purposes.* (i) *Use by WIC State and local agencies.* Any WIC State or local agency may use confidential applicant and participant information in the administration of its other programs that serve persons eligible for the WIC Program in accordance with paragraph (h) of this section.

(ii) *Disclosure to public organizations.* The State agency and its local agencies may disclose confidential applicant and participant information to public organizations for use in the administration of their programs that serve persons eligible for the WIC Program in accordance with paragraph (h) of this section.

(3) *Child abuse and neglect reporting.* Staff of the State agency and its local agencies who are required by State law to report known or suspected child abuse or neglect may disclose confidential applicant and participant information to the extent necessary to comply with such law.

(4) *Release forms.* Except in the case of subpoenas or search warrants (see paragraph (i) of this section), the State agency and its local agencies may disclose confidential applicant and participant information to individuals or entities not listed in this section only if the affected applicant or participant signs a release form authorizing the disclosure and specifying the parties to which the information may be disclosed. The State or local agency must permit applicants and participants to refuse to sign the release form and must notify the applicants and participants that signing the form is not a condition of eligibility and refusing to sign the form will not affect the applicant's or participant's application or participation in the WIC Program. Release forms authorizing disclosure to private physicians or other health care providers may be included as part of the WIC application or certification process. All other requests for applicants or participants to sign voluntary release forms must occur after the application and certification process is completed.

(5) *Access to information by applicants and participants.* The State or local agency must provide applicants and participants access to all information they have provided to the WIC Program. In the case of an applicant or participant who is an infant or child, the access may be provided to the parent or guardian of the infant or child, assuming that any issues regarding custody or guardianship have been settled. However, the State or local agency need not provide the applicant or participant (or the parent or guardian of an infant or child) access to any other information in the file or record such as documentation of income provided by third parties and staff assessments of the participant's condition or behavior, unless required by Federal, State, or local law or policy or unless the

information supports a State or local agency decision being appealed pursuant to § 246.9.

* * * * *

(g) *USDA and the Comptroller General.* The State agency must provide the Department and the Comptroller General of the United States access to all WIC Program records, including confidential vendor, applicant and participant information, pursuant to § 246.25(a)(4).

(h) *Requirements for use and disclosure of confidential applicant and participant information for non-WIC purposes.* The State or local agency must take the following steps before using or disclosing confidential applicant or participant information for non-WIC purposes pursuant to paragraph (d)(2) of this section.

(1) *Designation by chief State health officer.* The chief State health officer (or, in the case of an Indian State agency, the governing authority) must designate in writing the permitted non-WIC uses of the information and the names of the organizations to which such information may be disclosed.

(2) *Notice to applicants and participants.* The applicant or participant must be notified either at the time of application (in accordance with § 246.7(i)(11)) or through a subsequent notice that the chief State health officer (or, in the case of an Indian State agency, the governing authority) may authorize the use and disclosure of information about their participation in the WIC Program for non-WIC purposes. This statement must also indicate that such information will be used by State and local WIC agencies and public organizations only in the administration of their programs that serve persons eligible for the WIC Program.

(3) *Written agreement and State plan.* The State or local agency disclosing the information must enter into a written agreement with the other public organization or, in the case of a non-WIC use by a State or local WIC agency, the unit of the State or local agency that will be using the information. The State agency must also include in its State plan, as specified in § 246.4(a)(24), a list of all organizations (including units of the State agency or local agencies) with which the State agency or its local agencies has executed or intends to execute a written agreement. The written agreement must:

(i) Specify that the receiving organization may use the confidential applicant and participant information only for:

(A) Establishing the eligibility of WIC applicants or participants for the programs that the organization administers;

(B) Conducting outreach to WIC applicants and participants for such programs;

(C) Enhancing the health, education, or well-being of WIC applicants or participants who are currently enrolled in such programs, including the reporting of known or suspected child abuse or neglect that is not otherwise required by State law;

(D) Streamlining administrative procedures in order to minimize burdens on staff, applicants, or participants in either the receiving program or the WIC Program; and/or

(E) Assessing and evaluating the responsiveness of a State's health system to participants' health care needs and health care outcomes; and

(ii) Contain the receiving organization's assurance that it will not use the information for any other purpose or disclose the information to a third party.

(i) *Subpoenas and search warrants.* (1) *General.* The State agency may disclose confidential applicant, participant, or vendor information pursuant to a valid subpoena or search warrant only if it has been reviewed in accordance with this paragraph (i).

(2) *Subpoena procedures.* In determining how to respond to a subpoena duces tecum (*i.e.*, a subpoena for documents) or other subpoena for confidential information, the State or local agency must use the following procedures:

(i) Upon receiving the subpoena, immediately notify its State agency;

(ii) Consult with legal counsel for the State or local agency and determine whether the information requested is in fact confidential and prohibited by this section from being used or disclosed as stated in the subpoena;

(iii) If the State or local agency determines that the information is confidential and prohibited from being used or disclosed as stated in the subpoena, attempt to quash the subpoena unless the State or local agency determines that disclosing the confidential information is in the best interest of the Program. The determination to disclose confidential information without attempting to quash the subpoena should be made only infrequently; and

(iv) If the State or local agency seeks to quash the subpoena or decides that disclosing the confidential information is in the best interest of the Program, inform the court or the receiving party that this information is confidential and seek to limit the disclosure by:

(A) Providing only the specific information requested in the subpoena and no other information; and

(B) Limiting to the greatest extent possible the public access to the confidential information disclosed.

(3) *Search warrant procedures.* In responding to a search warrant for confidential information, the State or local agency must use the following procedures:

(i) Upon receiving the search warrant, immediately notify its State agency;

(ii) Immediately notify legal counsel for the State or local agency;

(iii) Comply with the search warrant; and

(iv) Inform the individual(s) serving the search warrant that the information being sought is confidential and seek to limit the disclosure by:

(A) Providing only the specific information requested in the search warrant and no other information; and

(B) Limiting to the greatest extent possible the public access to the confidential information disclosed.

14. In § 246.27, paragraph (c) is revised to read as follows:

§ 246.27 Program information.

* * * * *

(c) Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee: U.S. Department of Agriculture, FNS, Southeast Region, 61 Forsyth Street, SW., Room 8T36, Atlanta, Georgia 30303.

* * * * *

Dated: November 22, 2002.

Roberto Salazar,

Administrator, Food and Nutrition Service.

[FR Doc. 02–30223 Filed 11–29–02; 8:45 am]

BILLING CODE 3410–30–P