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: Final rule.

SUMMARY: This final rule amends a number of existing provisions in the WIC Program regulations to address issues raised by WIC State agencies, other members of the WIC community, and the United States Government Accountability Office (GAO). This final rule also incorporates recent legislation and certain longstanding program policies and State agency practices into the regulations. Further, the final rule also streamlines certain requirements in the regulations.

In particular, this rulemaking streamlines the Federal requirements for financial and participation reporting by State agencies, and clarifies the requirements pertaining to the confidentiality of WIC information in order to strengthen coordination with public organizations and private physicians. It also incorporates recent legislation which provided the WIC State agencies with the option to extend the certification period for breastfeeding women. Further, it incorporates longstanding program policies and State agency practices into the regulations regarding State agency responses to subpoenas and other court-ordered requests for confidential information. Other provisions in this final rule are designed to improve eligibility determinations, incorporating program policies and State agency practices that have been in effect for some time.

These changes are intended to reinforce program policies and State agency practices that strengthen services to WIC participants, improve Program administration, and increase State agency flexibility in managing the Program. Many of these provisions are options the State agency may choose to implement in operating the program.

DATES: *Effective Date:* This rule is effective November 27, 2006.

Implementation Date: State agencies must implement the provisions of this rule no later than March 27, 2007.

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SUPPLEMENTARY INFORMATION:

Executive Order 12866

This rule has been determined to be significant and was reviewed by the Office of Management and Budget under Executive Order 12866.

Regulatory Impact Analysis

As required for all rules that have been designated as Significant by the Office of Management and Budget, a Regulatory Economic Impact Analysis was developed for this final rule. A complete copy of the Impact Analysis appears in the appendix to this rule. The conclusions of this analysis are summarized below.

Need for Action

This action is needed to address issues raised by WIC State agencies and other members of the WIC community; address issues raised by the GAO; incorporate recent legislation; incorporate certain longstanding program policies and State agency practices into the regulations; and, streamline certain requirements in the regulations.

Two provisions in this final rule may have a notable financial impact. One of these provisions prohibits the use of possibility of regression to a previous nutrition risk as the basis for determining nutrition risk eligibility in consecutive certifications when this nutrition risk is not actually present.

The second provision which may have a notable financial impact provides WIC States agencies with the option to extend the certification period for all participant categories until the end of the last month of the certification period, and also provides the option to extend a breastfeeding woman's certification period up to her infant's first birthday or until the woman ceases to breastfeed. This provision incorporates recent legislation. Section 203(b)(1) of the Child Nutrition and WIC Reauthorization Act of 2004, Public Law 108–265, amended section 17(d)(3) of the Child Nutrition Act of 1966, 42 U.S.C. 1786, to allow WIC State agencies the option to certify a breastfeeding woman for up to one year postpartum, or until the woman stops breastfeeding, whichever occurs first. This option became effective on October 1, 2004, pursuant to Section 502(b)(2) of Public Law 108–265.

Benefits

This rule serves to streamline program administration and clarify program requirements, while minimizing economic and administrative burdens. As previously noted, one of this rule's provisions which may have a notable financial impact prohibits the use of the possibility of regression to a previous nutrition risk as the basis for determining nutrition risk eligibility in consecutive certifications when this nutrition risk is not actually present.

For example, this provision would permit use of the possibility of regression to anemia as the nutrition risk for a certification following a certification when anemia was actually present, but not for any subsequent certification. If all of the participants certified based on the possibility of regression as a nutrition risk criterion in 2004 were subsequently certified on this basis for one six-month certification period, then prohibiting use of this nutrition risk for consecutive certifications could save over $20 million and reduce participation by over 70,000 in that six-month period. However, given that possibility of regression is rarely used as the sole basis for determining nutrition risk, and that participants who had actually regressed to the previous nutrition risk would presumably be certified again, significant savings are unlikely.

Costs

Most of the provisions in this final rule are generally economically insignificant to the costs and overall operations of the WIC Program. Some of the provisions reflect the current practice of many WIC State agencies, while others are optional at the discretion of WIC State agencies.

As previously noted, one of this rule's provisions which may have a notable financial impact provides WIC State agencies with the option to extend the certification period for all participant categories until the end of the last month of the certification period, and also provides the option to extend a breastfeeding woman's certification period up to her infant's first birthday or until the woman ceases to breastfeed.

Since this provision is optional, the number of WIC State agencies which may choose to extend these certification periods is unknown. Also, most women who continue to breastfeed longer than six months are presumably certified for a second six-month period. Therefore, implementation of the option to extend the certification period of breastfeeding women is not likely to have a major impact on either program participation

among breastfeeding women or on program costs.

Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612). Kate Coler, Deputy Under Secretary, Food, Nutrition, and Consumer Services, has certified that this rule will not have a significant impact 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.

Unfunded Mandates Reform Act

Title II of the 1995 (UMRA), Public Law 104–4, 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 Department 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 Department 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 the rule.

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

Executive Order 12372

The Special Supplemental Nutrition Program for Women, Infants and Children (WIC) is listed in the Catalog of Federal Domestic Assistance Programs under No. 10.557. For reasons set forth in the final rule in 7 CFR Part 3015, Subpart V, and related Notice (48 FR 29115, June 24, 1983), this program is included in the scope of Executive Order 12372 that requires intergovernmental consultation with State and local officials.

Federalism Summary Impact Statement

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under section (6)(b)(2)(B) of Executive Order 13121. The Food and Nutrition Service (FNS) has considered the impact of this rule on State and local governments and has determined that this rule does not impose substantial or direct compliance costs on State and local governments, but that it does have Federalism implications because this rule preempts State law. Therefore, under section 6(b) of the Executive Order, a federalism summary impact statement is required.

Prior Consultation With State Officials

Prior to drafting the final rule, a comment period was provided to permit State and local agencies and the general public the opportunity to comment on the proposed changes. In addition, some of the proposed changes were as a result of input from State and local agencies such as changing certification periods and greater flexibility in sharing confidential WIC information. Further, because the WIC Program is a State-administered, Federally funded program, FNS regional offices have formal and informal discussions with State and local officials on an ongoing basis regarding program and policy issues. This arrangement allows State and local agencies to provide comments that form the basis for many discretionary decisions in this and other WIC Program rules. Comments on the proposed rule and other comments, concerns and recommendations by State and local agencies through other forums have been beneficial in ensuring this final rule reflects concerns raised by these entities.

Nature of Concerns and the Need To Issue This Rule

State agencies generally want greater flexibility in their implementation of program policy. As stated previously, this final rule provides State and local agencies greater flexibility in some areas such as certification periods and sharing WIC information. However, it was necessary in some areas to strengthen program accountability and integrity. Comments made by State and local agencies through the proposed rule process and through other forums assisted us in identifying areas of the regulations where greater flexibility can be afforded State and local agencies.

Extent to Which We Meet Those Concerns

FNS has considered the impact of the final rule on State and local agencies. This rule makes changes to improve the accountability and effectiveness of the WIC Program, and to provide State and local agencies with greater flexibility in how they operate the program. The effects on State agencies are minimal since some requirements such as obtaining proof of pregnancy are optional requirements, and other requirements are codifying existing policy that the majority of State agencies have already implemented.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full implementation. This rule is not intended to have retroactive effect. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted.

In the Special Supplemental Nutrition Program for Women, Infants and Children (WIC), the administrative procedures which must be exhausted are as follows. First, State agency hearing procedures pursuant to 7 CFR 246.9 must be exhausted for participants concerning denial of participation, disqualification, and claims. Second, State agency hearing procedures pursuant to 7 CFR 246.18(a)(1) must be exhausted for vendors concerning denial of authorization, termination of agreement, disqualification, civil money penalty or fine. Third, the State agency process for providing the vendor an opportunity to justify or correct the food instrument pursuant to 7 CFR 246.12(k)(3) must be exhausted for vendors concerning delaying payment for a food instrument or a claim. Fourth, State agency hearing procedures pursuant to 7 CFR 246.18(a)(3) must be exhausted for local agencies concerning denial of application, disqualification, or any other adverse action affecting participation. Fifth, FNS hearing procedures pursuant to 7 CFR 246.22 must be exhausted for State agencies concerning sanctions imposed by FNS. Sixth, administrative appeal to the

extent required by 7 CFR 3016.36 must be exhausted for vendors and local agencies concerning procurement decisions of State agencies.

Civil Rights Impact Analysis

FNS has reviewed this final rule in accordance with the Department Regulation 4300–4, ''Civil Rights Impact Analysis,'' to identify and address any major civil rights impacts the rule might have on minorities, women, and persons with disabilities. After a careful review of the rule's intent and provisions, and the characteristics of WIC Program applicants and participants, FNS has determined that there is no way to soften their effect on any of the protected classes. All data available to FNS indicate that protected individuals have the same opportunity to participate in the WIC Program as non-protected individuals. FNS specifically prohibits State and local agencies operating the WIC Program from engaging in actions that discriminate against any individual in any of the protected classes; see 7 CFR 246.8(a) for the non-discrimination policy of the WIC Program. Where State agencies have options, and they choose to implement a certain provision, they must implement it in such a way that it complies with the regulations at 7 CFR 246.8.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR part 1320) requires that the Office of Management and Budget (OMB) approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number. Information collections in this final rule have been previously approved under OMB #0584–0043, and no changes are needed as a result of this final rule.

E-Government Act Compliance

FNS is committed to compliance with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes. The new definitions of ''electronic signature'' and ''sign or signature'' are intended to facilitate paperless systems in all administrative activities of the program. The new State Plan requirements, as is the case with the entire State Plan, may be transmitted electronically by the State agency to FNS. Also, State agencies may share participant information electronically pursuant to a written agreement and consistent with Federal policy, including such information sharing based on the new non-WIC purposes provided in this final rule as well as the previously allowed non-WIC purposes.

Background

On December 2, 2002, the Department published a proposed rule at 67 FR 71774 concerning revisions of miscellaneous provisions of the WIC regulations. The comment period ended on April 1, 2003. Thirty-five letters were submitted to the Department to provide comments on the proposed revisions. We greatly appreciate these comments, all of which were carefully considered in the development of this final rule. Following is a discussion of each provision as proposed, the comments received, and an explanation of the provisions set forth in this final rule.

1. Definitions (§ 246.2)

The proposed rule included new definitions for ''sign or signature'' and ''electronic signature,'' to provide State agencies the option of using electronic signatures in their administration of the WIC Program. This definition of ''electronic signature'' was derived from the Electronic Signatures in Global and National Commerce Act (Pub. L. 106–229, signed June 30, 2000), also known as ESIGN. The Department sought to introduce these definitions to clarify that use of the terms ''sign'' or ''signature'' throughout 7 CFR Part 246 is not intended to exclude the use of electronic signatures. At the same time, we also wanted to 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, WIC Program regulations, and applicable Office of Management and Budget Circulars, including A–130, concerning confidentiality.

All of the commenters supported the new definitions. However, several commenters sought clarifications. One commenter questioned whether the new definitions constituted an endorsement of the ''paperless office'' concept, e.g., electronic certification forms. Similarly, another commenter asked whether the new definitions applied to vendor agreements. Finally, one commenter pointed to the need for protecting access to benefits in the event of a technology failure.

The Department did not intend to confine the use of electronic signatures to one part of WIC Program administration, such as certification, so that electronic signatures could not be used in other administrative activities of the program, such as vendor management. Indeed, as indicated in the preamble of the proposed rule, the new definitions were intended to facilitate paperless systems. We recognize the efficiencies and advantages of paperless systems, and encourage State agencies to implement such systems in all administrative activities of the program. Of course, as previously noted, the reliability and integrity of such systems is paramount; this would include safeguarding benefits in the event of a technology failure or disaster.

In addition, even though the Department supports the paperless office concept, this concept would not be mandated. This would be a State option, including the specific kind of technology adopted, as discussed in the preamble of the proposed rule. State agencies need to consider the costs, the views of participants, and the legal aspects of implementing this option. In this latter regard, State agencies should consult legal counsel on whether State law permits electronic signatures for certain kinds of documents, such as vendor agreements or contracts with local agencies. Accordingly, as set forth in the proposed rule, the definitions of ''sign or signature'' and ''electronic signature,'' as proposed, are retained in this final rule.

Recently, the Governmentwide Requirements for Drug-Free Workplace have been moved from 7 CFR part 3017 to 7 CFR part 3021 of the Departmental regulations. Therefore, this final rule includes a new definition of 7 CFR part 3021 to reference these requirements, and removes the reference to the drug-free requirements in the definition of 7 CFR part 3017. In addition, all other references to the drug-free workplace requirements in 7 CFR part 246 have been changed to reference Departmental regulations at 7 CFR part 3021. Further, unlike 7 CFR part 3017, 7 CFR part 3021 does not require a certification regarding a drug-free workplace; accordingly, this certification requirement has been deleted from § 246.3(c)(2). These changes are nondiscretionary, and do not require that the public be given an opportunity to comment.

In addition, in this final rule, the definition of ''State'' has been revised to reflect a change in the definition of ''State'' in section 15 of the Child Nutrition Act of 1966 (CNA), 42 U.S.C. 1786, which applies to all programs under the CNA, including the WIC Program. The CNA no longer refers to the Trust Territory of the Pacific Islands

since the Trust Territory no longer exists.

Therefore, the revision to the definition of ''State'' is included in this final rule.

Finally, we have added a definition of ''Employee fraud and abuse,'' as discussed in section 4 of this preamble.

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

We proposed a number of new State Plan provisions which would be required under § 246.4(a) of the WIC regulations. The comments on some of these State Plan provisions require more discussion than the comments on other proposed State Plan provisions. Therefore, these provisions are addressed in other sections of the preamble. Section 2 of this preamble addresses provisions and comments which do not require extensive discussion.

First, one commenter pointed out that we had not included a State Plan provision to provide State agencies the option to require applicants to provide proof of pregnancy in § 246.4(a) of the proposed rule. As indicated elsewhere in the proposed rule and its preamble, we had intended that a new State Plan provision would be added to § 246.4(a). However, this new provision was inadvertently omitted from the Proposed Rule. Accordingly, we have added it to this final rule.

Second, several commenters objected to the proposed State Plan requirement for listing all of the organizations with which the State agency or its local agencies had written agreements on the sharing of confidential participant information. One of these commenters pointed out that this provision could delay implementation of an information-sharing agreement if this agreement was executed after the annual submission of the State Plan. Another commenter stated that such a list in the State Plan would not constitute adequate notice to the applicant.

As noted under section 22–C of this preamble, the proposed State Plan provision for listing all programs that have information-sharing agreements with the State agency and its local agencies, and the uses of such information, are only intended for informational purposes. As proposed, FNS did not intend to approve State agencies' decisions in this matter as long as the reasons for sharing information were consistent with the authorized uses in the proposed rule. Therefore, State and local agencies can execute such agreements prior to submission in State Plans. The process of providing a list to FNS is not intended to create a barrier to entering into information sharing agreements. Further, such lists are not intended to serve as notice to WIC applicants and participants. As proposed, and as required in this final rule, State agencies are required to provide applicants and participants with notification at certification of public organizations that WIC intends to share confidential WIC information and the purposes for sharing such information.

Third, we have not included a revision to § 246.4(a)(11)(ii) in this final rule. The proposed revision in this paragraph referred to describing the criteria for deciding who will be offered individual care plans. This proposed change has not been included in this final rule since it was an inadvertent error; we did not intend to propose a change in this paragraph.

Finally, we have added a new sentence to § 246.4(a) to require the use of a Universal Identifier as part of State Plans. The Office of Management and Budget (OMB) requires entities applying for Federal grants to provide government agencies with a Universal Identifier. This requirement is set forth in an OMB Policy Directive, ''Use of a Universal Identifier by Grant Applicants,'' which was published in the **Federal Register** on June 27, 2003, at 68 FR 38402. The annual WIC Program State Plan submission is considered an application for a federal grant, and thus covered by this requirement. Currently, the Universal Identifier system in use is the Data Universal Numbering System (DUNS) identification number. FNS has issued guidance on how to obtain a DUNS number. FNS will address the submission of DUNS numbers as part of the WIC State Plan Guidance. It is not necessary for FNS to issue a proposed rule on this revision to the WIC Program regulations since the OMB Policy Directive is nondiscretionary and is already in effect. Also, as explained in the preamble of the OMB Policy Directive, OMB has determined that use of a DUNS number is not a significant burden under the Paperwork Reduction Act.

3. Conflict of Interest (§ 246.4(a))

The Department proposed a new State Plan requirement for addressing employee conflicts of interest at the local agency level, as recommended by an August 1999 Report by the Government Accountability Office (GAO), FOOD ASSISTANCE: Efforts to Control Fraud and Abuse in the WIC Program Can Be Strengthened. We proposed a new paragraph in § 246.4(a) to require that State agencies develop and implement policies and procedures to prevent conflicts of interest within the local agency staffs. Specifically, we wanted State agencies to develop policies and procedures concerning local agency employees certifying themselves, relatives or friends, and also concerning an employee both certifying and issuing food benefits to a participant, i.e., lack of separation of duties.

At the same time, we recognized in the preamble of the proposed rule that there may be practical circumstances, such as the availability of only one employee to conduct a clinic, which would preclude a strict prohibition on some practices. For such situations, we pointed out, an effective alternative policy or procedure would be needed, such as supervisory review of the records of the certifications and benefits issuance performed by such employees. As noted below in this section, we have added language to the proposed paragraph to recognize that effective alternative policies and procedures will be needed when strict prohibition is not possible.

Most of the commenters supported the proposed provision. (The 1999 GAO study found that most of the WIC State agencies had policies on conflicts of interest and separation of duties.) Commenters opposing the proposed provision based their position on the practical difficulties precluding a strict prohibition on conflicts of interest, arguing that sometimes no effective alternative policy or procedure would be possible. In this regard, one of the supporting commenters requested that the proposed provision itself require reasonable policies and procedures when actual separation of duties is not possible, instead of stating this only in the preamble. Also, one of the commenters opposing the provision stated that separation of duties is not violated when one staff member conducts part of the certification and also issues food instruments; for example, if one staff member determines income eligibility and issues food instruments, this should be deemed acceptable if another staff member determines nutrition risk.

As previously noted, we have added language to the proposed paragraph to permit effective alternative policies and procedures when strict prohibition is not possible. This additional language provides more explicit guidance than merely inserting the term ''reasonable.'' Also, we do not support the comment that there may be circumstances where no effective alternative policy or procedure is possible. State agencies should consult with the appropriate FNS Regional office and with legal

counsel for advice on alternative approaches to deal with difficult circumstances complicating strict compliance with the requirements regarding conflicts of interest and separation of duties.

We agree with the comment indicating that separation of duties is not violated if at least two WIC personnel are integral to the certification of a participant. The reason for the separation of duties concept is to ensure that one employee cannot both certify and issue benefits. The commenter opposing the provision correctly pointed out that this requirement is satisfied if two WIC employees are required to perform certification determinations even though one of them also issues food instruments, since the person issuing food instruments could not complete the certification process alone. Therefore, we have revised the proposed paragraph to require the State agency to prohibit one employee from being solely responsible for determining the eligibility of an applicant for all certification requirements and for issuing food instruments to that participant, or to provide effective alternative policies and procedures for situations when such prohibition is not possible. Moreover, this revision also applies to circumstances when an employee might be certifying herself or friends and relatives because no other staff is available.

Accordingly, in this final rule, the proposed paragraph has been added to § 246.4(a), revised as noted above.

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

Also in response to the GAO study on WIC fraud and abuse, the Department proposed to require a description in the State Plan of the State agency's plans for collecting and maintaining information on cases of participant and employee fraud and abuse, including the nature of the fraud detected and the associated dollar losses. As proposed, this requirement would be added to § 246.4(a).

Most of the commenters supported the proposed provision. In fact, the GAO study reflected that 30 of the 51 WIC State agencies responding to the GAO survey collected information on the number and characteristics of participants who engage in fraud and abuse. Commenters opposing the proposed provision stated that it was unnecessary because participant and employee fraud is minimal; one commenter stated that participant fraud and abuse should have declined as a result of the WIC Certification Integrity Rule (65 FR 77245, December 11, 2000), which requires applicants to provide proof of income, residency and identity.

We do not support these positions. It is not possible to determine the extent of potential fraud and abuse in the program when some State agencies may not be collecting data on this matter. Moreover, the documentation requirements of the Certification Integrity Rule are only one part of our efforts to detect and prevent fraud and abuse. Such requirements cannot be relied upon to prevent all fraud and abuse. Further, the Certification Integrity Rule did not address employee fraud and abuse.

Some commenters opposing the proposed provision also stated that collecting information on participant and employee fraud and abuse would be administratively burdensome. We recognize that such activity will involve some administrative burden, but we do not believe that collecting information on the nature and costs of participant and employee fraud and abuse is unduly burdensome. As previously noted, a majority of WIC State agencies are already collecting this data. Moreover, as indicated by GAO, failure to collect 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.

Some of the supportive commenters requested clarification on the meaning of several terms, including ''participant fraud and abuse,'' ''employee fraud and abuse,'' and ''dollar losses.'' Two of these terms have already been defined in the regulations and further clarified in a policy memorandum. Section 246.2 sets forth the definition of ''participant violation,'' which is the equivalent of ''participant fraud and abuse.'' Regarding dollar losses, § 246.23(c)(1)(i) requires a claim for the full value of benefits that have been obtained or disposed of improperly as the result of a participant violation. The full value of such benefits would be either the total purchase price of the food instruments involved or the total post-rebate food cost of the benefits involved, and would not include the nutrition services and administration (NSA) costs expended for the participant; see WIC Policy Memorandum #2002–1, Revision 1, Clarification of WIC Food Delivery Systems Final Rule Questions and Answers, June 10, 2003, page M–1, Question 1. Finally, we agree that ''employee fraud and abuse'' should be defined in the regulations. Accordingly, in this final rule, in § 246.2, we have added a definition of this term, based on the definition used in the GAO study.

Several supportive commenters raised other issues. Several commenters indicated that the State agency should collect the information on participant and employee fraud and abuse, instead of making local agencies responsible for collecting and maintaining the information. The preamble of the proposed rule indicated that this provision would require only a description of the State agency's plans for collecting this information.

Therefore, as set forth in the proposed rule, State agencies should track this information in order to detect trends and to allocate its investigative, audit, and technical assistance resources accordingly. Also, such information does not always originate at the local agency level, as when a State agency initiates an investigation based on an anonymous tip provided to the State agency indicating fraudulent activity involving a local agency. Therefore, a revision to the provision, as suggested, is not necessary.

Finally, we note that several comments expressed concern that the requirement for collecting information on participant and employee fraud and abuse would ultimately become a requirement for State agencies to report this information to FNS. The proposed rule did not include a requirement to report such information to FNS, and neither does this final rule. However, the aforementioned GAO study clearly pointed towards such a reporting requirement, finding that the absence of this data adversely impacts FNS' and State agencies' ability to manage the program. As explained in the study, GAO decided not to recommend such a reporting requirement because FNS had indicated that it would work with State agencies and the National WIC Association (NWA) to develop cost-effective strategies for reporting the data to FNS. FNS and NWA are currently working to identify such a strategy.

5. Selection of Local Agencies (§ 246.5)

The Department proposed to remove the requirement in the current § 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 was intended to provide State agencies with the flexibility to select a local agency in the neediest unserved area where practical circumstances permit, so that, for example, a local agency may be selected in an unserved needy area where a

health care infrastructure exists instead of a local agency in an area with greater need but without a health care infrastructure.

The majority of the commenters supported the proposed provision. However, a few commenters either opposed the proposed revision or expressed reservations. The opposing commenters stated that areas with the greatest need should continue to be the highest priority for selection of new local agencies. One of the commenters recommended that the provision specify that the selection of local agencies is contingent on the availability of funds, and another commenter recommended that the Affirmative Action Plan should be required until WIC services have been made available equally throughout all areas of the State.

It was not the intent of the proposed provision that State agencies ignore the Affirmative Action Plan. The proposed rule would have required the State agency to consider the Affirmative Action Plan, but not be bound by it. The Department believes that the State agency is in the best position to judge whether the practical circumstances should supersede the Affirmative Action Plan when selecting a new local agency. Also, it is not necessary to state in the regulations that selection of a new local agency is subject to the availability of funds. It is understood that the State agency is responsible for ensuring the availability of funds and applying this factor in the selection of local agencies.

Accordingly, as proposed, this final rule removes 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.

6. Requesting Proof of Pregnancy, Checking Identification and Other Basic Certification Procedures (§ 246.7(c))

The Department proposed 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, we proposed to move several provisions and to add a provision. We proposed to move the provision addressing proof of residency/proof of identity from § 246.7(l)(2) to § 246.7(c)(2)(i), and to move the provision requiring program certification without charge to the applicant from § 246.7(m) to § 246.7(c)(4). We also proposed a new provision addressing pregnancy tests.

Proof of Pregnancy

The Department proposed basic guidelines that State and local agencies must observe if the State agency chose to require documentation of pregnancy as part of the certification process. For these reasons, we proposed to add a new paragraph (c)(2)(ii) stating that State agencies may issue benefits to applicants who claim to be pregnant (assuming that all other eligibility criteria are met) but whose conditions (as pregnant) are not visibly noticeable and do not have documented proof of pregnancy at the time of the certification interview and determination. The State agency would then be allowed a reasonable period of time, not to exceed 60 days, for the applicant to provide the requested documentation. If such documentation was not provided as requested, the local agency would then be justified in terminating the woman's WIC participation during the certification period.

The majority of commenters supported the proposed provision, although some of these comments sought clarification on whether this provision would be optional. Some of the supportive commenters also recommended the provision apply only when fraud was suspected. Other supportive commenters recommended visual observation by a professional to confirm pregnancy instead of self-testing or testing by WIC. Also, one commenter recommended 90 days for the participant to provide proof, consistent with current WIC policy. Commenters opposing the proposed provisions stated that requiring proof of pregnancy would be a barrier to participation, potentially eroding prenatal care and leading to lower birth weights.

As indicated in the preamble of the proposed rule, the Department intends for proof of pregnancy to be a State option. Therefore, in response to commenters' concerns, we have revised the proposed paragraph to clarify this issue. State agencies concerned about proof of pregnancy becoming a barrier to participation could choose not to implement this option. Further, a State agency could choose to continue to use visual observation of pregnancy, and require proof only when the information is questionable and/or fraud is suspected.

The Department agrees with commenters who expressed concern about the cost of pregnancy tests. Proof of pregnancy is not a mandatory condition of eligibility for the WIC Program. As a result, the costs associated with obtaining such documentation are not allowable WIC nutrition services and administrative expenditures. Also, such costs cannot be borne by the participant since § 246.7(m) requires that the certification procedure shall be performed at no cost to the participant.

As noted above, some commenters recommended a 90-day timeframe for the participant to provide documentation of pregnancy, consistent with current WIC policy. This policy was issued in 1992. However, this policy was superseded by legislation. Section 17(d)(3)(B) of the CNA was added in 1994. The legislation specifies that an income-eligible pregnant woman may be considered presumptively eligible to participate in the WIC Program and may be certified immediately without an evaluation of nutritional risk for a period up to 60 days. Since the determination of nutrition risk requires knowledge of the participant's categorical status, i.e., her pregnancy, proof of pregnancy must be provided within 60 days after certification, assuming that the State agency has opted to require such proof.

Therefore, the provisions as proposed pertaining to proof of pregnancy remain unchanged in this final rule.

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

The Department proposed several changes to this section of the regulations, as discussed below.

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 set forth in §§ 246.7(d)(2)(ii), 246.2, and 246.7(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 proposed this change for two reasons. First, although § 246.7(d)(1) permits use of State or local free or reduced-price health care income guidelines, these guidelines cannot exceed 185 percent of the Federal poverty income guidelines; in fact, all WIC State agencies currently use 185 percent of the Federal poverty income guidelines. Second, 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 to ensure WIC eligibility requirements are met.

The majority of commenters supported this revision, although one supportive commenter suggested that the Department consider adopting the definition of ''family'' used by the Federal Department of Health and Human Services (HHS) to promote one-stop shopping. Similarly, one of the few opposing commenters stated that the revision would force the cessation of integrated applications for multiple programs because WIC income determinations would no longer be able to use the income definitions of other programs.

Use of the HHS definition of ''family'' could result in the exclusion of income potentially being shared by household members such as unrelated individuals who are living together. Such action would not represent actual household circumstances with regard to income eligibility. Further, by law, WIC income eligibility guidelines (185 percent of poverty) are those guidelines used for the National School Lunch Program (NSLP). Therefore, the rules and policies used for the NSLP are used for the WIC Program with regard to normal income screening procedures, including definition of family. As a result, the Department does not support this commenter's recommendation.

Accordingly, this final rule, in § 246.7(d)(2)(iii) retains the provisions as proposed.

B. Consideration of Loans as Income

The Department proposed to exclude short-term, unsecured loans from the WIC income determination process. Program regulations have not specifically addressed this issue; however, FNS Instruction 803–3, Rev. 1, WIC Program—Certification: Income Eligibility, dated April 1, 1988, clarifies that funds from loans are not to be counted as income because they are only temporarily available and must be repaid.

All of the commenters supported the revision. However, several commenters requested guidance on the meaning of the term ''short-term, unsecured,'' and guidance on the types of loans that would be excluded.

Accordingly, in § 246.7(d)(2)(iv)(C) of this final rule, the Department has decided to delete the term ''short-term, unsecured,'' and to delete the reference to the expectation that the loan will be repaid in a reasonably short period of time since these phrases are unnecessary. By definition, loans are only temporarily available and must be repaid, so that inclusion of loans as income would be inappropriate in the WIC income determination process. We have retained the term ''constant and unlimited access,'' since this explains why a loan would not constitute income. This is consistent with the term ''other cash income'' at § 246.7(d)(2)(ii)(L), which refers to resources which are easily accessible to the family.

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

As explained in the proposed rule, 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. This has been allowed as a nutrition risk criterion in order to prevent the revolving door situation whereby the nutrition risk status of individuals improves as a result of participation in the WIC Program and they are removed at the conclusion of a certification period, only to deteriorate in nutrition status at a later date, necessitating re-entry into the program.

It has always been the Department's position that the possibility of regression as a nutrition risk criterion should not be used excessively because it could result in situations where individuals with no current nutrition risk condition are served while eligible applicants who have current, documented risks go unserved. Therefore, in regulations, 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. Many State agencies have adopted limitations.

In an effort to ensure that all State agencies target benefits to those at greatest nutrition risk, the Department proposed to limit the use of regression as a nutrition risk criterion to only one time following a certification period. In other words, consecutive certification periods based on regression would not be allowable. In addition, as proposed, individuals who are certified based on the possibility of regression would be placed in either the same priority for which they were initially certified, or in Priority VII (for all participants certified based on regression), if the State agency is using that priority level.

The majority of commenters supported the proposed provisions. Those commenters opposing the limitation on the use of regression stated that WIC serves a vulnerable population that is food insecure, often spending scarce dollars on food last, after other expenses. Therefore, applicants denied certification due to lack of a nutrition risk would be certified shortly thereafter with a nutrition risk that may not have occurred had they remained on the program. Such commenters stated that this result would conflict with WIC's preventive role. However, the Department continues to believe that the repeated use of regression in consecutive certification periods undermines the Department's efforts to target benefits to those persons in greatest need and at greatest nutrition risk.

Further, some commenters cited the Institute of Medicine (IOM) report ''Dietary Risk Assessment in the WIC Program,'' March 2002, as supporting their position that the proposed provision would conflict with WIC's preventive role since some nutrition risks may require more than one regression certification period to be resolved. One commenter stated that the use of regression should not be limited since the IOM findings indicate that the tools to assess dietary adequacy are not valid.

The IOM report found that 96 percent of all individuals in the United States and a higher percentage of low-income individuals fail to consume the recommended number of daily servings specified by the Dietary Guidelines for Americans, and that there is no scientifically valid method to assess an individual's usual dietary intake. Concerning WIC eligibility, the report recommended a presumption of nutrition risk for all otherwise eligible women, and children 2 to 5 years old, based on failure to meet dietary guidelines. The IOM report did not include findings or recommendations specific to regression. The Department believes that prohibiting consecutive certification periods based on regression will not result in denying benefits to WIC applicants who are at nutrition risk based on dietary inadequacy.

Several supporting commenters recommended certain revisions to the

proposal. One commenter stated that the provision should allow an applicant to be certified for regression to a different priority, such as children to Priority V who had previously been certified at Priority III, consistent with § 246.7(e)(4). Another commenter sought clarification of the rule so that regression only applies to children and breastfeeding women. Finally, one commenter requested that the final rule clarify whether the provision to certify only once based on regression can actually be used more than once for the same participant as long as the occurrences are not consecutive.

The Department agrees with the suggestion that WIC agencies should be permitted to assign an applicant to a different priority level for regression other than the one used in the previous certification, or Priority VII, as long as it is a lower priority than the priority level assigned at the previous certification, consistent with § 246.7(e)(4). It is important to recognize that a participant certified for regression, without any currently-existing nutrition risk condition, could be placed in a higher priority level than a participant who has, for example, a dietary condition. In the event of funding limitations, this could result in the certification of one applicant based on regression while another applicant with an existing nutrition risk condition is denied benefits. To avoid this consequence, as we pointed out in the preamble of the proposed rule, the State agency should consider assigning a lower priority level for participants certified based on regression.

Accordingly, in § 246.7(e)(1)(vi) of this final rule, in addition to placing applicants certified based on regression in the same priority category used at initial certification, or in Priority VII, State agencies may also use another priority level lower than the priority level for which they were assigned at the previous certification, consistent with § 246.7(e)(4).

We have also clarified in this final rule that applicants shall not be certified for regression for consecutive certification periods. Therefore, participants could be certified for regression more than once during the time they actually participate in the program, as long as they are not certified based on regression for consecutive certification periods.

Based on commenters' concerns, the final rule also clarifies that when certifying participants for regression and assigning a priority category, the nutrition risk criterion of the participant during the previous certification period must be appropriate for the category of the participant for the subsequent certification. For instance, as pointed out in the preamble of the proposed rule, a postpartum woman should not be certified based on the possibility of regression to *hyperemesis gravidum* (morning sickness), since this condition is unique to pregnancy and cannot occur postpartum. As previously noted, a supporting commenter requested a prohibition on the use of regression as a nutrition risk criterion for pregnant women, infants and postpartum non-breastfeeding women since only one certification period is permitted for these categories. Actually, under the current § 246.7(g), a State agency may provide a six-month certification period for infants, but the commenter correctly indicates that certain nutrition risk conditions cannot cross over from one category to another.

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

In response to concerns cited by Congress, State agencies, and the NWA, the Department proposed to modify the timeframes for certification periods in order to make them more consistent across participant categories. Section 246.7(g)(1) of the current regulations establishes the following timeframes for certification:

A/an:	Is currently certified:
Pregnant woman	For the duration of her pregnancy, and up to six 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 six months ending with the infant's first birthday.
Infant	Approximately every six months. The State agency may permit its local agencies to certify infants under six months of age for a period extending up to the first birthday, provided the quality and accessibility of health care services are not diminished.
Child	Approximately every six months ending with the last day of the month in which a child reaches his/her fifth birthday.

Some State agencies expressed concern that the current timeframes for establishing certification periods are complicated and administratively burdensome, requiring the frequent proration of monthly food benefits and special data processing capabilities to accommodate specific cut-off dates. Also, NWA expressed concern about the lack of consistency in current certification period timeframes. In response, the Department proposed to allow certification periods for all participant categories to be extended to the end of the month. Specifically, the following maximum certification periods were 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 six weeks old. (For example, if the infant is born June 4, six 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 or the pregnancy ends (postpartum).
Breastfeeding woman	Approximately every six months ending with the last day of the month in which the infant turns 1 year old.
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.
Child	Approximately every six months ending with the last day of the month in which a child reaches his/her fifth birthday. (No change from current regulations).

Commenters overwhelmingly supported the proposed changes to the certification period. However, many of the supporters requested further revision of the certification period requirements to extend the current six-month certification periods for breastfeeding women to coincide with the option to certify breastfed infants up to the infant's 1st birthday, or until the women cease breastfeeding, whichever occurs first, and to establish 12-month certification periods for children.

Subsequent to publication of the proposed rule and receipt of comments, the certification period for breastfeeding women was addressed in Congress in Public Law 108–265, the Child Nutrition and WIC Reauthorization Act of 2004, enacted on June 30, 2004. Section 203(b)(1) of that Act amended section 17(d)(3) of the CNA to allow State agencies the option to certify a breastfeeding woman for up to one year postpartum, or until the woman stops breastfeeding, whichever occurs first. This provision became effective on October 1, 2004. FNS notified State agencies of the effective date of this provision on August 5, 2004. Consequently, there is no need to address the comments on the proposed rule concerning the certification period for breastfeeding women. Instead, we are using this final rule to revise § 246.7(g)(1)(iii) to codify the option set forth in legislation on the certification period for breastfeeding women.

However, we do not support the recommendation of some commenters to change the certification period for children from every 6 months to every 12 months. The current six-month certification period increases the likelihood that the child will receive a health assessment and that nutrition education or other nutrition intervention will be provided to the parent/caretaker. Assessing a child's nutritional and health status at six-month intervals is also consistent with the WIC Program's emphasis on preventing childhood obesity.

One commenter who opposed the proposed changes to the certification periods indicated that costly changes would be needed to an automated system that defaults to the 30th day even if a month ends on the 31st day. Another commenter who opposed the changes expressed concern about the need for partial food packages if the proposed rule would require that food packages could only be issued to the end of the month. Likewise, one commenter who supported the changes requested clarification on the implications of the proposed rule if the certification period ends on the first day of a month.

As noted in the preamble of the proposed rule and intended by this final rule, these new provisions would not remove the authority of State agencies to maintain current certification period lengths or to permit local agencies to shorten certification periods on a case-by-case basis. For example, some State agencies that certify all infants every six months, may choose to continue certifying breastfeeding women every six months and not implement the option to extend certification periods up to the end of the month in which infants turn one year old. Further, proration of program benefits continues to be an effective means of targeting benefits and managing program costs. Also, the final rule does not abridge the discretion of State agencies to maintain current certification periods or to prorate benefits in order to accommodate automated systems, although enhancement of such systems may be a more effective strategy to address certification periods. As indicated previously, State agencies are encouraged to contact the appropriate FNS regional office to identify potential sources of funds for this purpose in addition to the administrative funds provided as part of the WIC grant.

Accordingly, this final rule provides for the following certification periods 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 six weeks old. (For example, if the infant is born June 4, six 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 or the pregnancy ends (postpartum).
Breastfeeding woman	Approximately every six months. The State agency may permit its local agencies to certify a breastfeeding woman up to the last day of the month in which her infant turns 1 year old, or until the woman ceases breastfeeding, whichever occurs first.
Infant	Approximately every six months. The State agency may permit its local agencies to certify an infant 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.
Child	Approximately every six months, ending with the last day of the month in which a child reaches his/her fifth birthday. (No change from current regulations.)

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

The Department proposed several revisions to this section, the most significant of which would require local agencies to reassess a participant's income eligibility (including household composition) during the certification period when information is received about a change in circumstances, indicating possible income ineligibility. Many State agencies require reassessment of income eligibility based on receipt of information indicating a change in circumstances. However, current regulations do not mandate such assessments.

The Department proposed that reassessment of Program eligibility would apply only to income eligibility, not to the participant's nutrition risk status. In addition, the Department specified mandatory versus optional mid-certification actions. As proposed, mandatory mid-certification actions included 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 included those necessitated by funding shortages or the failure of a participant to pick up food instruments or supplemental foods for a number of consecutive months as established by the State agency.

The proposed change would require local agencies to 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 or automatically income-eligible participant, an income reassessment would be generated within a certification period if the local agency obtained/received confirmation that the individual or other eligible family member is no longer participating in any of the programs which are authorized/permitted to be used to deem an individual as income eligible for the WIC Program. Further, the Department proposed to require that the 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 household members have been reassessed and are ineligible.

The majority of commenters generally supported the proposed mid-certification income reassessment process. Several State agencies indicated that they already require such assessments. However, some commenters opposed the proposed requirement. One commenter indicated that enrollment entails a commitment to a full certification period. Another commenter stated that the core purpose of the WIC Program is to provide supplemental foods and nutrition education over a period of time. Further, as noted in the preamble to the proposed rule, a commitment to an entire certification period is implied because the entire certification period may be needed to improve the nutrition status of participants.

In the preamble of the proposed rule, the Department emphasized that the CNA does not permit WIC benefits for persons who no longer meet the basic income eligibility requirements set forth in the CNA. If information comes to the attention of the local agency suggesting that a participant may be income ineligible, an income reassessment is the only way to determine whether the participant meets the income eligibility requirements of the CNA. Moreover, in response to one commenter, there is no provision in the CNA permitting the continued receipt of WIC benefits for someone who is income ineligible on the basis that this continued receipt of benefits would be viewed as transitional assistance.

As previously noted, the proposed revision of § 246.7(h) would distinguish between mandatory mid-certification disqualifications of participants and those that are optional. At the same time, we also proposed to remove the reference to disqualification based on participant violations from § 246.7(h) because the process for sanctions and claims based on participant violations was set forth in § 246.12(u). However, in this final rule, we are retaining the reference to sanctions for participant violations in § 246.7(h) to ensure that such sanctions for participant violations are clearly understood to be mandatory, except as otherwise provided in § 246.12(u).

Several commenters indicated that disqualifying a participant based on unsolicited information is unfair since other potential income ineligible participants may not be disqualified because changes in income are not known or reported to the local agency. The Department recognizes the commenter's concern. However, all participants are potentially subject to reassessment of income during their certification periods, based on new information that may come from any source. Therefore, as noted in the preamble of the proposed rule, the proposed provision is a reasonable balance between responsible action and unnecessary paperwork.

Several commenters felt that the proposed mid-certification income reassessment would be unfair because the information triggering the reassessment would often originate from an unreliable or biased source. The Department recognizes that information may come from persons who are not aware of all of the facts, and that such persons may be providing the information because of personal animosity towards the participant. However, this does not necessarily mean that the information is false or without consequence. The only way to determine the validity of the information is to conduct an income reassessment.

Several commenters indicated that the proposed provision would conflict with other requirements, including the Verification of Certification (VOC) process and the State option to determine income eligibility based on assessing annual income as opposed to current income. The Department does not agree with this position. The VOC process at § 246.7(k) provides continuation of certification and benefits for a participant transferring from one local agency to another, without requiring reapplication at the new local agency; the VOC process does not prevent a reassessment of income if new information is made known to the new local agency after the transfer. Also, the State agency option to calculate income based on the past 12 months, at § 246.7(d), instead of using current income, applies at any time an income determination is made, including mid-certification; this provision does not conflict with reassessment of income mid-certification.

Several commenters asserted that reassessment of income mid-certification would result in frequent disqualifications followed by subsequent certifications, due to income fluctuations, as well as other administrative burdens such as an increased number of disqualification letters and appeals. Several commenters also asserted that information technology systems would need costly modifications, e.g., to be able to change income information in the system mid-certification.

The Department does not anticipate a significant increase in administrative activities as a result of mid-certification income reassessments. Over 56 percent of WIC participants are adjunctively income eligible for WIC based on their eligibility to receive Food Stamps, Medicaid, or Temporary Assistance for Needy Families (TANF). (See WIC Participant and Program Characteristics 2002, USDA Food and Nutrition Service, Report No. WIC–03–PC, September 2003.) Under § 246.7(d), adjunct or automatic WIC income eligibility is determined based on documentation of an individual's, or certain family members', eligibility to receive benefits in other programs such as Food Stamps, Medicaid and TANF. These programs screen for income eligibility and use maximum income limits at or below WIC income guidelines (185 percent of poverty). Therefore, the normal WIC income eligibility screening process is not used for a large majority of participants. Further, § 246.7(d) permits State agencies to designate other programs as establishing automatic income eligibility for WIC in a manner similar to adjunctive income eligibility. Thus, most mid-certification income reassessments may likely involve little more than reconfirming adjunctive or automatic WIC income eligibility.

In this regard, one commenter expressed concern about the administrative burden imposed on local agency staff and participants by income reassessments for postpartum WIC participants whose Medicaid eligibility ceases 60 days following birth. However, under § 246.7(d), adjunctive income eligibility extends not only to the WIC applicant who is certified for Medicaid, but also to a WIC applicant who is a member of a family in which a pregnant woman or infant is certified for Medicaid (or is a member of a family certified for TANF). Thus, assuming that the reassessment of the postpartum

woman is triggered only by her loss of Medicaid eligibility and that her infant is also a WIC participant, her reassessment would likely involve no more than confirming the infant's Medicaid eligibility, which would have already been done when the infant was determined eligible for the WIC Program. In fact, the reassessment of WIC income eligibility could be eliminated if the postpartum woman is determined to be income eligible at certification based on the eligibility of her infant for the Medicaid Program.

We recognize that some State agencies' management information systems may need enhancements in order for income reassessments to be processed mid-certification. Therefore, for this reason and others, we are providing an extended implementation period to accommodate, for example, any system revisions or enhancements that may be necessary. WIC State agencies that need to enhance their information systems to accommodate mid-certification income reassessments, or for other reasons, are encouraged to contact the appropriate FNS regional office to identify potential sources of funds for this purpose in addition to the administrative funds provided as part of the WIC grant.

Finally, the Department finds considerable merit in two other comments received regarding reassessment of income mid-certification. One of these comments pointed out that a participant, parent or guardian would have no incentive to cooperate with the reassessment process after receiving the last set of food instruments for the certification period. The other comment asserted that the participant, parent or guardian would need a reasonable amount of time to provide income documentation to the local agency.

The Department agrees that, if the food instruments for the last month of certification have already been provided to the participant, action to reassess income eligibility and all necessary follow-up action may be pointless. In addition, a sufficient period of time would be needed to contact the participant, reassess income eligibility, process any necessary disqualification action and allow sufficient time for potential appeal of the action by the participant, parent or guardian, as set forth in § 246.9(e), and to provide for continuation of benefits if an appeal is submitted within the 15-day advance notice period required by § 246.7(j). In addition, in some State agencies, two or three months of benefits are issued at one time (i.e., bi-monthly or tri-monthly issuance).

Therefore, § 246.7(h)(1) in this final rule remains as proposed, except as follows, based on commenters' concerns. The Department has provided an exception in this final rule to the requirement that local agencies reassess a participant's income eligibility during the certification period if new information indicates that the participant's household income may have changed. In this final rule, reassessment of income eligibility is not required in cases where sufficient time does not exist to effect the change. Recognizing the necessary action required ultimately to disqualify an individual, if necessary, ''sufficient time'' means 90 days or less before the expiration of the certification period.

11. Certification Forms (§§ 246.4(a) and 246.7(i))

The Department proposed to allow State agencies the option of substituting simpler language for the statements on rights and responsibilities required by § 246.7(i)(10) and § 246.7(j)(2)(i) through (j)(2)(iii), which must be provided in writing or read to the applicant (or parent/caregiver of a participating infant or child) at the time of certification. As proposed, such modified language would be subject to FNS approval during the State Plan approval process, contingent upon whether the language substitutions convey the same meaning and intent as the existing regulatory text. A new State Plan provision was proposed for this purpose.

All of the commenters supported the proposed revisions, although one commenter sought assurance that FNS would use its approval authority to ensure consistent language substitutions throughout the States. We will not. The purpose of this proposed provision is to provide each State agency with the flexibility to use language appropriate to its needs in order to convey the meaning of the statements required by the regulations.

Also, one commenter requested clarification on whether this language substitution process would also apply to joint application forms involving WIC and other programs. The same process would apply to joint application forms, if the regulatory language is not used. However, the State agency would be responsible for ensuring the language used also has the approval of other programs involved in the joint application form. The provision in the final rule is optional, so that a State agency could decide not to develop and submit substitute language.

Accordingly, the final rule remains as proposed. One technical amendment has been made, however, to paragraph (i)(11) of this section. In the first sentence, the reference to paragraph (i)(8) of this section has been changed to the correct reference, paragraph (i)(10) of this section.

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

The Department proposed to revise § 246.9(g) to prevent the continuation of benefits for a participant who has become categorically ineligible while awaiting a hearing decision on an appeal of an adverse action, such as a breastfeeding participant who continues to receive WIC benefits while awaiting the decision even though she had discontinued breastfeeding and was more than six months postpartum. The current language of paragraph (g) of this section technically permits the continuation of benefits in such cases.

Commenters overwhelmingly supported the proposed provision. However, one commenter recommended that benefits should be reinstated if the participant prevails on appeal. We do not support the commenter's recommendation. The reinstatement of benefits for a categorically ineligible person would mean that retroactive benefits would be provided. Historically, we have not permitted retroactive benefits in the WIC Program, as discussed below in section 16 of this preamble.

Another commenter stated that a participant should be immediately terminated based on documented fraud, subject to resumption should the participant prevail on appeal, but not retroactively. We do not support the commenter's recommendation. Although the participant may prevail on appeal, the individual would not be eligible for benefits based on a different categorical status, without reapplication, nor for retroactive benefits. Such benefits have historically not been permitted in the WIC Program, as discussed below in section 16 of this preamble. Further, prior to disqualifying any participant, the individual has the right to due process and a right to a fair hearing, as required by WIC regulations. We believe that the proper balance is to permit the continuation of benefits until a hearing decision is rendered, until the current certification period expires, or until categorical eligibility expires, whichever occurs first. Should the appeal be denied, a participant would be subject to a disqualification for up to one year, as well as a claim for the value of all benefits based on fraud, consistent with § 246.12(u). Therefore, the continuation of benefits prior to the appeal decision would not protect the

participant from the consequences of the fraudulent conduct.

Therefore, in § 246.9(g) in this final rule, the provision remains as proposed.

13. Technical Amendment (§ 246.11(c)(5))

This final rule makes a technical amendment to § 246.11(c)(5). In § 246.11(c)(5), we have changed the cross references to several paragraphs. References to paragraphs (c)(8), (d), and (e) have been changed to paragraphs (c)(7), (d), and (e).

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

In response to a Congressional directive contained in a report accompanying the Fiscal Year 1999 appropriations, (H. Rept. 825, 105th Cong., 2nd sess. (1998)), the Department proposed to reduce the timeframe for reporting closeout data for each reporting month from 150 to 120 days. The Department proposed to achieve the 120-day closeout cycle by reducing the time allowed for vendors to bill State agencies from 90 to 60 days from the first valid date of the food instrument. Efforts to get State agencies to voluntarily reduce the time used to report closeout data to 120 days have been underway for more than a decade. Currently, about 55 percent of State agencies voluntarily report closeout data at 120 days or less.

Of the 20 comments received, 12 supported and 8 opposed the proposed reduction to a 120-day closeout cycle. Concerns raised by two supporters as well as those opposing were that State agencies not already reporting closeout data within 120 days would need to reduce the time allowed for vendors to redeem food instruments, reprogram automated systems, and renegotiate the terms and cycles of support from centralized State and local accounting departments.

About 84 percent of State agencies have already reduced the redemption period for vendors from 90 to 60 days. Therefore, a provision requiring this reduction would impose a burden on vendors or State agencies. Over 65 percent of State agencies that require their vendors to redeem food instruments in 60 days have, in turn, used the reduced redemption period to achieve a 120-day closeout cycle. A 60-day redemption period benefits vendors with timely payments as well as provides State agencies with the opportunity to achieve a timely closeout.

Regarding the other issues raised, voluntary compliance with a 120-day closeout cycle by approximately 55 percent of State agencies demonstrates that all State agencies should be able to close out within 120 days without great difficulty. The Department maintains that advances in automated systems technology should readily provide timely data needed to improve the budgeting and funding process.

However, the Department agrees State agencies will need time to take the necessary actions. The proposed reduction to a 120-day closeout cycle remains, but with an implementation date of October 1, 2006 (Federal Fiscal Year 2007).

15. Penalties for Misuse or Illegal Use of Program Funds, Assets, or Property (§§ 246.12(h)(3)(xx) and 246.23(d))

Section 104(b) of Public Law 105–336, the William F. Goodling Child Nutrition Reauthorization Act of 1998, enacted October 31, 1998, amended section 12(g) of the Richard B. Russell National School Lunch Act (NSLA), 42 U.S.C. 1760(g), by increasing the maximum penalty for misuse or illegal use of funds, assets or property of a grant or other assistance under the NSLA, with a value of $100 or more, from $10,000 to $25,000. As set forth in section 12(g) of the NSLA, the maximum penalty also applies to programs under the CNA.

This change is nondiscretionary, and does not require that the public have an opportunity to comment. Therefore, in accordance with section 12(g) of the NSLA, the Department is amending §§ 246.12(h)(3)(xx) and 246.23(d) of the WIC regulations to reflect the increase in the maximum fine from $10,000 to $25,000, for misuse or illegal use of funds, assets or property of a grant or other assistance under the CNA, with a value of $100 or more.

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

The Department proposed to specify in regulations that WIC Program funds may not be used to provide retroactive benefits to participants. This has been long-standing policy in the WIC Program, but the regulations have not previously addressed this policy. The WIC food package is designed to be consumed during specified periods when participants are undergoing critical growth and development. Providing retroactive benefits is not an effective use of program benefits.

Commenters overwhelmingly supported this provision. The few commenters opposing the provision stated that providing retroactive benefits is the only fair way to remedy wrongful denial of benefits. We do not support this position. As noted previously, a participant may protect current benefits by requesting a hearing within 15 days of the advance notice of disqualification, which will guarantee the continuation of benefits until a hearing decision is rendered, expiration of the current certification period, or loss of categorical eligibility, whichever occurs first. Further, WIC benefits are intended to improve health status based on existing nutrition risk conditions at the time of application. 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 reasonable consume within a given period of time.

If a hearing decision is rendered which supports the participant, then he/she will be provided benefits prospectively, assuming the certification period has not expired or the individual is no longer categorically eligible. We recognize that this process may occasionally result in a successful appellant having gone without benefits during the appeal process. However, the WIC Program is a supplemental nutrition program. Providing retroactive benefits in such cases is not an effective use of program benefits.

Another commenter indicated support for the proposed provision only if it would not prohibit providing a full month's benefits, instead of pro-rating benefits, for a participant who misses an appointment but subsequently visits the local agency before the expiration of the 30-day period. The commenter expressed concern about the cost of enhancing an automated system, which does not currently provide for pro-rating benefits. FNS encourages the pro-ration of benefits for participants whose eligibility is effective late in the monthly issuance cycle or who are late picking up food instruments. Also, as with similar concerns discussed in previous sections of this preamble, we believe that enhancements to automated systems are an effective solution for such issues. However, we do not intend to mandate pro-ration of the current month's benefits. We do not view the provision of WIC benefits late in the same month as constituting retroactive benefits. However, providing WIC benefits in a subsequent month, which are intended for a previous month, constitutes retroactive benefits.

Accordingly, in this final rule, the provision remains as proposed.

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

The Department proposed to amend § 246.14(c)(7) by removing the limiting term ''rural'' from the allowability of costs in transporting applicants and participants to clinics, so that the existing State agency option for funding transportation in rural areas could also be applied to urban and suburban areas. Also, the Department proposed revising § 246.4(a)(21) 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.

Most of the commenters supported these proposed provisions. Some commenters stated that the proposed revisions would drain WIC nutrition services and administration funds (NSA), making WIC the source of funds for transportation of participants instead of Medicaid; create a welfare image for WIC; burden WIC with safety and liability issues; and, result in the transportation of non-WIC participants.

The Department proposed the aforementioned revisions because State agencies had been seeking approval to purchase vans for transporting participants to and from inner city and suburban clinics. Because State agencies could purchase vans with WIC NSA funds to bring WIC services to rural participants, it is reasonable to allow the use of WIC NSA funds for transportation of WIC participants to WIC clinic sites in any situation, rural or non-rural, where access is a barrier. At the same time, as noted in the preamble of the proposed rule, we were concerned with some of the same issues raised by commenters. As a result, we wanted to ensure that State agencies developed carefully structured rationales for use of NSA funds to transport participants. For this reason, we proposed revising the State Plan requirements of the regulations; a State agency would need to gain FNS approval for a State Plan amendment setting forth this rationale in order to use NSA funds for transporting participants. These safeguards are sufficient. Further, State agencies are not required to use NSA funds for transporting participants, urban or rural. Therefore, in this final rule, the provision remains as proposed.

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

The Department proposed revisions to this section to reflect current rather than dated prior approval requirements for capital expenditures. In advance of the proposed rulemaking, changes in OMB Circular A–87 allowed FNS to establish and implement policy and guidance reducing the paperwork burden associated with obtaining prior approval of capital expenditures. FNS policy and guidance is the current source for specific dollar thresholds above which State agencies must obtain prior approval from FNS for capital expenditures, including automated information systems, and was referenced as such. FNS policy that deleted the requirement to obtain prior approval of management studies was also reflected in the proposal.

All but one commenter supported the proposed revisions. Considering the reference to FNS policy and guidance vague, the opponent recommended setting a dollar threshold of $10,000. An across-the-board threshold of $10,000 is more restrictive than that found in current FNS policy and guidance for all capital expenditures but those for automation, would increase the current paperwork burden, and may become dated by future revisions in government-wide rules. For these reasons, we did not accept the commenter's suggestion. The revisions remain as proposed.

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

All comments supported using the addition method of applying program income, as proposed. The provision remains unchanged from the proposed rule.

20. State Audit Responsibilities (or Monetary Amount of the Food Not Received (§ 246.20(b)(1) and (b)(2))

The majority of comments fully supported the proposed revisions to this section. None opposed. However, a few supporters either did not fully understand the proposed revisions or expressed concern that the proposed revisions would result in changes to local agency audit requirements. Existing audit requirements remain unchanged by the proposed revisions. The revisions simply update this section to refer to government-wide audit requirements to which State and local agencies are already subject. State and local agencies are simply informed of their responsibility to obtain audits in accordance with Departmental regulations at 7 CFR 3052, which codifies the Office of Management and Budget (OMB) Circular A–133, Audits of States, Local Governments and Non-Profit Organizations.

A few comments expressed concern that local agencies might obtain program-specific audits. OMB Circular A–133 provides that a non-Federal entity, such as a local agency, operating only one Federal program may elect a program-specific instead of an organization-wide audit. However, most local agencies operate more than one Federal program and will, therefore, be required by OMB Circular A–133 to satisfy their audit requirement with an organization-wide audit. The revisions remain as proposed.

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

Participation Reporting

The Department proposed revisions to this section to reflect data collections currently approved by OMB. Revisions to this section will not change current State agency reporting requirements.

The majority of commenters supported the proposed revisions. Seven commenters opposed the revisions in whole or part. All but one of the seven expressed concern that the proposed revision would require State agencies to report State appropriated funds. The proposed revision does not require reporting of State appropriated funds. There is no data element for State funds on Program reports and the data element for participation supported by State appropriated funds was removed beginning with fiscal year 2001. However, we believe that State agencies should voluntarily continue to inform FNS each year of their appropriations, i.e., provide the amount, period of availability, and purpose (food or nutrition services and administration (NSA)). The availability of State appropriated funds impacts and helps to explain Federal funding spending patterns.

Other items causing concern or opposed by at least one of the commenters included reporting and defining cash allowances and excess balances; whether monthly NSA expenditures include unliquidated NSA obligations; the meaning of itemized annual NSA expenditure reports; reporting a food cost/outreach NSA funds ratio; reporting available food and NSA by source year; and, suggesting the reporting of migrants each year rather than every other year.

Only two modifications were made to the proposed revisions. The remainder of the revisions remain as proposed. First, the reference to a requirement to report cash allowances and excess balances was deleted. An old requirement to report cash allowances and excess balances has long since been eliminated. Second, unliquidated obligations were added to the monthly

reporting of NSA expenditures. Data collections currently approved by OMB require State agencies to report NSA unliquidated obligations as well as expenditures.

Clarification is provided regarding the following reporting requirements. Annual reporting of itemized NSA expenditures refers to an existing requirement to report NSA expenditures by functional category on the FNS–798A. There is no requirement to report a food cost/outreach funds ratio and no such requirement was proposed.

Federal funds are currently reported by source year on line 29 (report year formula grant) and on lines 30a and 38b (funds spent forward from prior year or back spent from following year) and 30b and 38a (funds back spent to prior year and funds spent forward to following year) of the FNS–798. Such data is readily available.

The annual reporting of migrant data is required to meet the requirement of section 17(g)(4) of the Child Nutrition Act of 1966, 42 U.S.C. 1786(g)(4), to make at least 9/10 of 1 percent available first for eligible members of migrant populations each year. Therefore, the existing annual migrant reporting requirement cannot be reduced to a biennial reporting requirement as it would be insufficient for monitoring compliance with the Act.

Racial/Ethnic Group and Local Agency Reporting

Most commenters supported the proposed revisions. Several commenters opposed reporting local agency changes as they occur. However, the current data collection for the local agency directory (FNS–648), which was initially approved by OMB in 1992, requires local agency address changes to be reported as they occur.

Current technology only provides for an annual publication of the directory. However, future automated systems upgrades will make it possible for State agencies to directly enter and access local agency address changes via an on-line Web-based local agency directory. The new technology will be very user-friendly, making updates easy.

Currently, many State agencies are not providing local agency updates until FNS pursues them as part of the annual local agency directory publication activities. However, the final rule should reflect the terms of the OMB approved data collection and the capabilities of future technology upgrades.

22. Confidentiality of Participant Information (§ 246.26(d) Through(i))

The Department proposed to revise § 246.26(d) and (g) of the current WIC regulations, and to add paragraphs (h) and (i) to § 246.26, to address the use and disclosure of confidential information. The Department proposed 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. WIC agencies continue to be accountable to all applicable requirements pertaining to the confidentiality of information.

As clarified in the preamble to the proposed rule, confidential applicant and participant information could only be used or disclosed to the extent permitted by these proposed provisions. Any other use or disclosure would not be permitted. Additionally, information obtained from WIC applicants or participants would be protected, in accordance with WIC regulations, regardless of the manner in which the information is recorded or stored, with access limited to those that have a need to know and shared only as permitted under these regulations.

The additional flexibility in the proposed rule was intended to maintain a 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. Treatment of Confidential Applicant and Participant Information

The Department proposed in 246.26(d)(1) to expand the concept of confidential applicant and participant information to include all information about applicants and participants, including information obtained from other sources, as well as information generated as a result of WIC application, certification, or participation. The majority of commenters overwhelmingly supported this proposed clarification.

One supporting commenter, however, recommended that in order to avoid confusion, the regulations should specify that in protecting the confidentiality of applicant and participant information in WIC files, WIC local agencies must comply with WIC regulations and applicable federal statutes, not the U.S. Department of Health and Human Services' (HHS) regulations implementing the Health Insurance Portability and Accountability Act (HIPAA). We agree with the commenter and have clarified this point in the final regulatory provision 246.26(d)(1).

As set forth in WIC regulations, WIC State and local agencies are required to comply with the regulations, instructions and other guidelines issued by the Department, including those focused on the protection of applicant and participant confidentiality. Applicant or participant information contained in WIC files may include information that originated in other federal, state or local program's files, which was subject to those respective programs' confidentiality provisions. However, once information is included in WIC's files, WIC confidentiality protections attach to the information, regardless of the original source and exclusive of previously applicable confidentiality provisions. Thus, WIC confidentiality protections, rather than HIPAA requirements or any other Federal, State or local programs' confidentiality provisions, attach to and take precedence in protecting applicant and participant information.[1]

Health departments, which operate many WIC local agencies, are affected by HIPAA requirements. In those instances and pursuant to HIPAA regulations, health departments may declare themselves ''hybrid entities''. Covered entities within a health department would then comply with HIPAA regulations, while the WIC local agency, as a non-covered entity, would continue to follow existing, applicable confidentiality requirements. Coordination of programs and services can continue, even when program confidentiality requirements differ.

We encourage State and local agencies to consult first with their legal counsel on issues regarding confidentiality, including issues pertaining to HIPAA. State agencies are encouraged to contact appropriate FNS Regional offices for

[1] HHS' HIPAA regulations establish standards to protect the privacy of individually identifiable health information and those standards apply to information maintained by health plans, health care clearinghouses and certain health care providers. In the preamble to the initial final rule published in the **Federal Register** by HHS on December 28, 2000, at 65 FR 82462, and in subsequent questions and answers issued by HHS on the HIPAA rules, respectively, HHS clarified that WIC agencies are not considered ''health plans'' for HIPAA purposes and that the HIPAA standards do not extend to WIC agencies.

assistance should unresolved issues remain after consultation.

Therefore, the final rule remains as proposed, with the addition of clarification that WIC confidentiality protections in relevant Federal and State authorities attach to applicant and participant information, regardless of the original source of that information and exclusive of previously applicable Federal, State or local confidentiality provisions.

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

The proposed provision sought to clarify in regulations those entities involved in the administration and enforcement of the WIC Program, by identifying the persons to whom confidential applicant/participant information may be disclosed based on their direct connection with the administration and enforcement of the WIC Program. The proposed provision clarified that such persons must have a need to know the confidential information for WIC Program purposes as determined by the State agency. Also, the provision clarified that such persons may include the staff of the State agency's local agencies, the staff of other State agencies and their local agencies, persons under contract with the State agency to conduct research concerning WIC, and persons investigating and prosecuting WIC Program violations under Federal, State, or local law.

All of the commenters were supportive of this proposed provision, although additional clarification was requested concerning the types of staff encompassed by the provision, and also concerning the meaning of the term ''need to know.''

The preamble of the proposed rule pointed out that all employees of a State or local agency do not need access to confidential participant information. In using the term ''need to know,'' we did not intend to introduce a new requirement, but rather to reinforce the requirement in the current regulations restricting access to staff directly connected with the administration or enforcement of the WIC program. Moreover, the listing in the provision of functions demonstrating a need to know was not intended to be all-inclusive, but rather to be illustrative. It is not possible to anticipate and list all of the staff positions or functions involved with administration and enforcement of the WIC Program. We agree, however, that the regulations should clearly indicate that the list of persons that have a need to know is not limited to those referenced in the regulations.

This specific listing is not necessary in the regulations. Instead, State agencies must apply the general principles provided by the regulatory language, in consultation with legal counsel. For instance, one commenter sought the specific inclusion of information technology staff. We recognize that such staff may be directly involved in the administration and enforcement of the program and have a need to know confidential participant information, but not necessarily all such staff. For example, it might be necessary for some technology staff to see confidential information when they are conducting data runs on WIC information or to assist WIC staff with computer equipment problems. However, it is unlikely that technology staff assigned to provide support and assistance only to other specified programs, and not WIC, would need such access. As indicated above, each State agency must define who is authorized access in accordance with general principles set forth in WIC regulations, in consultation with legal counsel.

We also did not intend to exclude State contract staff who are conducting audits of the WIC Program pursuant to 7 CFR part 3052, the Department's regulations implementing the Single Audit Act. Such staff would be considered as involved in the administration or enforcement of the program, and would need access to confidential information if, for instance, they want to sample certification records to ensure that income eligibility determinations have been correctly calculated during certifications. Likewise, staff of a bank under contract with a WIC State agency for food instrument processing will see the names of participants on WIC checks, and have a justifiable need to know. Contract terms and conditions should address the confidentiality of WIC information and the penalties for unauthorized sharing or access. Such contract entities perform programmatic functions on behalf of the WIC agencies and have a need to access confidential WIC information under the terms and conditions of the contract.

Another commenter suggested that the provision specifically allow for the disclosure of confidential participant information, without consent, to prevent multiple enrollments. Such a general statement is not needed since the term ''administration and enforcement of the WIC Program'' clearly encompasses the prevention of dual participation or multiple enrollments. The proposed rule clarified that individuals who have a need to know include personnel from local agencies and other WIC State or local agencies. As pointed out in the preamble of the proposed rule, this clarification was needed to facilitate the transfer of participants from one State agency or local agency to another and for program oversight; clearly, the term ''program oversight'' includes the prevention of dual participation. Thus applicant or participant consent is not needed for sharing confidential applicant or participant information between State or local agencies regarding the prevention or detection of multiple WIC enrollments as well as regarding the transfer of participants between State or local agencies. Such consent is not needed for sharing confidential information for any purpose properly within the meaning of the term ''administration and enforcement of the WIC Program,'' when the information is provided to staff with a need to know. With regard to sharing information with the Commodity Supplemental Food Program (CSFP) to detect or prevent dual participation, and/or for other coordination reasons, WIC and CSFP are required to enter into a written agreement.

Finally, as set forth in §§ 246.25(a)(4) and 246.26(g), the State agency must provide the Department and the Comptroller General with access to all records. The use of the term ''Department'' includes the Department's Office of Inspector General (OIG) and other USDA agencies or offices involved in the program such as FNS, and the Economic Research Service which is involved in conducting studies of the WIC Program. The Comptroller General is the head of the Government Accountability Office (GAO), which is an arm of Congress. The reference to the Comptroller General also includes other GAO staff such as those who conducted the previously mentioned survey on participant and employee fraud and abuse.

In general, confidential participant information may be used in connection with the appeal of adverse action taken against State or local WIC personnel. However, prior to such release, legal counsel should be consulted to provide advice on ways to share information with those that have a need to know while also protecting the confidentiality of information to those who do not have a need to know, *e.g.,* the judge could see the information but not the general public attending the hearing.

Accordingly, these provisions remain as proposed, except we have clarified in the final rule that the list of persons that have a need to know is not limited to those referenced.

C. Use and Disclosure for Non-WIC Purposes

The Department proposed 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, the Department proposed in § 246.26(d)(2) to remove the reference to sharing confidential WIC information only with public organizations that administer ''health or welfare'' programs that serve WIC participants. As proposed, this change would provide State agencies with 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 proposed, the three new categories of permissible uses were:

- 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.

Currently, State agencies choosing to disclose applicant/participant information to public organizations designated by the chief State health officer 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. Further, 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.

However, as a balance to the proposed expansion, the Department also proposed 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). In addition, the proposed rule included a cross-reference to the State plan requirement in proposed § 246.26(h)(3).

These changes were proposed as a result of State agency comments and concerns that they needed greater flexibility to share confidential information for administrative purposes and to benefit applicants and participants. Additional flexibility would eliminate, for example, barriers to coordination, enhance one-stop shopping by applicants who could apply for multiple programs, and improve access to other programs and services available to the population served by the WIC Program.

The proposed rule also clarified in § 246.26(d)(2) and (h)(3) that the conditions for disclosing confidential applicant/participant information would extend to non-WIC uses 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 would be using the information for non-WIC purposes. Further, the rule proposed to require a written agreement in these instances because the State or local agency personnel who would be using the information for non-WIC purposes might be unfamiliar with the limits on the use of the information. Requiring a written agreement in these cases would provide an additional safeguard for sensitive information.

As noted above, the proposed regulations continued the existing requirement that State agencies 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. Such notification would also be required when information is shared through written agreements for non-WIC purposes under §§ 246.7(i)(11) and 246.26(h)(2) of the proposed rule.

The majority of commenters supported the proposed provisions. Many commenters that supported the proposed provisions requested clarification or changes to certain portions of the proposal. Several commenters suggested a requirement for State agency oversight of local agency agreements. However, such a provision is unnecessary. Current regulations at § 246.26(h)(1) specify that the chief State health officer (or in the case of an Indian State agency, the governing authority) is required to designate the public organizations with which WIC agencies can enter into written agreements. The proposed rule reflects our intent to continue this requirement by further refining the provision. It would require the chief State health officer to designate in writing the permitted non-WIC uses of confidential WIC information and the names of the organizations with which such information will be shared. Therefore, State agency oversight of local agency agreements currently exists and is intended in the proposed rule.

Several commenters that supported the rule suggested that the term ''public organizations'' be defined to include Federal, State and local agencies and other government/tribal authorities. In general, this is the intended meaning of the term. It has never been the intent of the Department for State agencies to interpret this term so narrowly as to consider only State agency entities. However, as discussed below, this term is not intended to be interpreted broadly, for example, to include State or local law enforcement agencies. We do not believe, however, that the regulations should specifically define the term. Such action could potentially exclude or restrict State agency flexibility for the chief State health officer to identify and designate public organizations that may be appropriate to share WIC information. State agencies are encouraged to consult with legal counsel as they attempt to identify public organizations that they consider sharing confidential WIC information.

Several commenters that supported the provisions, as proposed, requested clarification on the extent to which independent researchers conducting general scientific research would be authorized to have access to confidentiality WIC information. This rule maintains the Department's longstanding position that independent researchers would not be considered public organizations. Therefore, confidential WIC information could not be shared with such entities through information-sharing agreements. The options for sharing WIC information with such researchers would be either through signed release forms from applicants and participants, or providing aggregate data, with no confidential identifiers.

A number of supportive commenters requested clarification on the permissibility of a public organization that receives WIC information through an information-sharing agreement to re-disclose such information to its

outreach contractors. We do not view such action as a re-disclosure of WIC information, but rather using the information in the administration and operation of its program, via the use of contractors, to identify potential individuals eligible for services provided by the organization. Therefore, such uses of WIC information would be permissible and not viewed as disclosing the information to a third party.

Other clarifications and suggestions by commenters supporting the proposed provisions covered a broad array of issues. Therefore, the following statements are intended to respond to most of these issues with respect to this final rule. WIC agencies are not required to enter into information-sharing agreements with public organizations and take on any added burden by this process. This is only one of several options for possible sharing of confidential WIC information. 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.

Another option for sharing confidential WIC information is obtaining signed release forms from applicants and participants, or sharing information in aggregate, with no identifiers. If signed release forms are used, applicants and participants must be given the right to refuse to the sharing of information. FNS Instruction 800–1 provides guidance on this issue.

WIC agencies are in the best position to determine which option(s) are best suited to their needs. Therefore, it would be inappropriate to mandate only one approach to sharing WIC information with other entities. Further, State agencies have the authority to decide what WIC information will be shared with other public organizations. It is not our intent for State/local agencies to share all WIC information about applicants and participants with other organizations, but rather only those data elements necessary for the receiving organization to, for example, contact the individual regarding potential services. Therefore, WIC agencies already have the authority to protect and not disclose highly sensitive WIC information such as that relative to AIDS/HIV and substance abuse.

The provisions pertaining to information-sharing agreements were not designed to permit an applicant or participant to refuse such sharing. It was designed to be a part of the WIC application process. By signing the rights and responsibilities statement and agreeing to participate in WIC, the individual agrees to the sharing of information with other public organizations that may provide needed services. Therefore, no additional applicant or participant consent is necessary for such information sharing.

The proposed State Plan provision for listing all programs that have information-sharing agreements with the State agency and its local agencies, and the uses of such information, are only intended for informational purposes. As proposed, FNS did not intend to approve State agencies' decisions in this matter as long as the reasons for sharing information were consistent with the authorized uses in the proposed rule. Therefore, State and local agencies can execute such agreements prior to submission of the information in State Plans. Any questions or issues about the appropriateness of sharing information should be directed to the respective FNS Regional office prior to execution of the agreement.

The process of providing a list to FNS is not intended to create a barrier to entering into information-sharing agreements. Further, such lists are not intended to serve as notice to WIC applicants and participants. State agencies are required to provide applicants and participants with notification at certification of public organizations that WIC intends to share confidential WIC information.

Several supportive commenters also requested clarification on the proposed provision that permits WIC agencies to enter into information-sharing agreements with Child Protective Services (CPS) to report known or suspected child abuse or neglect not otherwise required by State law. One commenter questioned whether WIC agencies can also share information based on inquiries from CPS to follow up on information received from other sources. Under this final rule, an information-sharing agreement between WIC and CPS, if a WIC agency is contacted by CPS to check its records for possible abuse and neglect, it may respond to CPS' inquiry.

A few commenters opposed the proposed provisions. One reason for opposition included an objection to the prohibition on the public organization receiving confidential WIC information to disclose it to a third party. The commenter stated that this precludes sharing with immunization registries, and recommended such sharing be permitted. However, 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 what data will be shared, how it will be shared, whether data may be subsequently disclosed, and the proposed use(s) of such information. With regard to most immunization registries, WIC agencies currently have the authority to share information with organizations administering immunization registries. WIC agencies may share confidential WIC information by obtaining written release forms from applicants and participants, and individuals can be informed about potential subsequent release of their information.

One commenter recommended deleting the proposed reference to executing written agreements for the purpose of streamlining administrative procedures in either the receiving program or WIC. Coordination among programs and ''one-stop shopping'' for applicants to access multiple programs' benefits has increased. This provision is intended to facilitate coordination of services among programs and minimize or eliminate duplication of efforts; thus, the reference to streamlining administrative procedures.

One commenter opposed the permissible use of sharing information to enhance the health, education or well-being of WIC applicants or participants, as set forth in the proposed rule. The commenter felt this provision was too broad. However, the intent of this provision was to provide State agencies with the flexibility to identify and designate programs with which to share information in order to truly benefit the WIC population. For example, State or local agencies could elect to enter into one written agreement with programs in the health department, including their Communicable Disease Program, to share confidential WIC information. In consultation with its legal counsel, we believe State agencies are in the best position to make these determinations. The purposes for sharing were expanded to accommodate State agencies' concerns that current purposes were too restrictive.

As indicated in the proposed rule, the Department is committed to maintaining the confidentiality of the financial and health information of WIC applicants

and participants. 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.

Therefore, the provisions set forth in § 246.26(h) of the proposed rule pertaining to sharing of WIC information for non-WIC purposes and entering into information-sharing agreements remain as proposed.

D. Child Abuse and Neglect Reporting

Encouraged by the Child Abuse Prevention and Treatment Act (42 U.S.C. 5106a), many States have enacted statutes requiring the reporting of known or suspected child abuse or neglect. Under current WIC policy, 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, as required by State law. In the proposed rule, we sought to codify current policy, as set forth in FNS Instruction 800–1. Currently, if State law does not require the reporting of known or suspected child abuse and neglect 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. In the proposed rule at § 246.26(h)(3)(i)(C), State agencies are provided the option to report known or suspected child abuse or neglect when not mandated by State statute if a written agreement has been executed between the WIC State or local agency and the appropriate child protective service organization.

All of the comments supported these proposed provisions, although some revisions or clarifications were requested. Several commenters requested that we clarify in the regulatory language that the participant's consent is not needed by the local agency in order to provide such information to the appropriate child protective authority. We agree that a participant's written consent to share such information is not required. WIC agencies are reminded that FNS Instruction 800–1 provides specific guidance on the use of information-sharing agreements and addresses this issue.

One commenter requested that we address the impact of the Indian Child Welfare Act (25 U.S.C. 1902), stating that it addresses abuse and neglect and takes precedence over State law. Based on consultation with HHS, the Indian Child Welfare Act does not include requirements for reporting child abuse and neglect. This law deals with custody proceedings and the placement of Indian children in foster care.

One other commenter suggested that the term ''best interests of the program,'' introduced in the proposed rule regarding subpoenas and search warrants, may be applicable to the disclosure of confidential participant information for substantiating child abuse allegations made by a third party. We do not support this position. As indicated in the proposed rule, State law governs such disclosures.

Accordingly, in this final rule, the provisions pertaining to reporting known or suspected child abuse and neglect in § 246.26(d)(3) and (h)(3)(C) remain as proposed.

E. Release Forms

State agencies have requested latitude to allow medical information to be disclosed to private physicians and other health care providers treating WIC applicants and participants. The Department recognizes that increased flexibility by WIC agencies to share such information can be beneficial to the applicant or participant, as well as the requesting health care providers. As a result, the Department proposed in § 246.26(d)(4) to permit the use of release forms authorizing disclosure to the applicant or participant's physician(s) or other health care provider(s) at the time of application or certification for the WIC Program. However, as proposed, to underscore the voluntary nature of the release form, all other requests of the applicant to sign release forms to share WIC information would continue to be required to take place after the application and certification process is completed. In using release forms, WIC agencies should be aware that such policies must include the right of the applicant/participant to refuse to sign the consent without affecting eligibility for Program participation. Current policy and guidance on the use of release forms is in FNS Instruction 800–1.

Most of the commenters supported the proposed provision. Several commenters asserted that releases to parties other than health care providers should also be allowed at certification. One of these commenters recommended such release forms be a part of the certification form to eliminate the need for a second form; the commenter stated that the participant's use of the release form would in fact be voluntary. We do not support this recommendation. The presentation and execution of such releases are required after the WIC certification process is complete, *i.e.,* the applicant is determined eligible for WIC benefits, because to do otherwise may create a barrier to WIC participation. The participant may perceive that signing the release is a condition of WIC program participation. Presenting a release form to WIC applicants for signature for all purposes, except to share information with physicians or other health care providers, can occur during the certification visit but must occur after the determination of WIC eligibility. The release form to share information with physicians or other health care providers may be a part of or attached to the WIC certification form. However, release forms for all other purposes must be separate from the WIC certification form.

Therefore, the provisions pertaining to participant release forms in § 246.26(d)(4) in this final rule remain as proposed.

F. Access by Applicants and Participants

The proposed rule sought to codify in § 246.26(d)(5) the current policy 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 or guardianship are resolved. Further, as proposed, State and local agencies would not be required 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.

All commenters supported the provisions as proposed. However, several of these commenters requested clarification such as the provision of guidelines for proof of custody, the provision of access by the parent or guardian of an infant or child who signed at certification, or whose signature is on file. All issues regarding custody and policy developed in this area must involve legal counsel since State law must be followed in handling such issues. Therefore, the provisions pertaining to applicant and participant access to WIC information at § 246.26(d)(5) in this final rule remain as proposed.

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

The proposed rule would have revised §§ 246.25(a)(4) and 246.26(g) to clarify that access to Program records by the Department and Comptroller General of the United States includes confidential applicant and participant information. However, the proposed rule prohibited any reports or other documents resulting from the examination of such records that are publicly released from including confidential applicant or participant information.

All of the commenters supported these proposed provisions, although one commenter requested that GAO and the Department's OIG be specifically referenced in the provision because both of these offices have become increasingly active in reviewing the program. This change is unnecessary since OIG is part of USDA and GAO is under the authority of the Comptroller General. Therefore, §§ 246.25(a)(4) and 246.26(g) in this final rule remain as proposed.

H. Subpoenas and Search Warrants

The Department proposed 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 proposed 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 seeking confidential applicant and participant information. The Department proposed 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 were 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.

Further, in § 246.6(i), the Department proposed to identify the situations in which State or local agencies must release information, for example, when served with a search warrant. As explained in the preamble to the proposed rule, if the State or local agency fails to comply in these situations, WIC staff may face adverse legal action, including imprisonment.

The proposed rule set forth 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.

The majority of commenters supported the provisions as proposed. However, some of these commenters also requested various clarifications or changes to some of the provisions. Some commenters felt that the provision was not clear that WIC agencies should protect participant confidentiality when served with a subpoena. The intent of the process set forth in the proposed rule is in fact to protect confidential WIC information. Therefore, consulting with legal counsel is set forth as one of the first steps. In general, subpoenas are merely requests for information and do not require the immediate surrender of information. On the other hand, failing to immediately comply with a search warrant could result in imprisonment of WIC State and local agency staff. Therefore, no change to the proposed process is necessary.

Several commenters requested clarification on whether State agencies would have sole or concurrent jurisdiction with local agencies to comply with subpoenas and search warrants. We believe that concurrent jurisdiction is warranted given that WIC State agencies are ultimately responsible for the administration and operation of the program within the State agency, including by its local agencies. Local agencies are under contract with the State agency to operate the program in accordance with Federal regulations. Therefore, State agencies should provide oversight authority for its local agencies in responding to subpoenas, search warrants and court orders.

As required in the proposed rule and this final rule, a local agency is required to notify its State agency when it is served with subpoenas and search warrants. This same policy should apply to court orders received by local agencies. In addition, copies of subpoenas, search warrants and court orders are considered records pertaining to WIC operations, and as such, must be retained on file by WIC agencies for a minimum of three years, as required by § 246.25(a)(2) of the regulations. In addition, such information provides documentation of action taken and supports the action to release confidential WIC information, if subsequent legal issues arise.

Several commenters requested that the regulations clarify access to WIC information by law enforcement officials. It would not be appropriate or necessary to include in the regulations an exhaustive list of all individuals that can or cannot access confidential WIC information. We can provide guidance in this preamble and through further guidance that FNS will issue to address a number of confidentiality issues raised by commenters on the proposed rule.

As set forth in current and proposed regulations, confidential WIC information can only be shared with individuals involved in the administration and enforcement of the WIC Program; through written agreement with public health organizations, and, as stated previously in this preamble, State agencies should not interpret this category to include law enforcement officials; through written consent from applicants/participants; and, in aggregate form. None of these options permit the sharing of confidential WIC information with law enforcement officials, except those involved in enforcing the WIC Program. Therefore, the avenue set forth in the proposed rule, which reflects current policy, is that such law enforcement officials must seek a court's decision to issue a subpoena or search warrant in order to access/attempt to access confidentiality WIC information. We believe the courts are in a better position to make determinations on whether such requests for information have merit and are warranted. As reflected in the proposed rule, even if a subpoena is issued by a court for WIC information, WIC agencies, or their representatives, have the right to argue their case before the courts and to clarify that WIC information must be kept confidential pursuant to Federal regulations. Ultimately, it is up to the courts to determine whether a specific

enunciated need to access such information overrides Federal requirements.

A number of commenters expressed concerns regarding quashing subpoenas, that is, appearing before a court to argue why confidential WIC information requested in a subpoena should not be released. Several commenters indicated that WIC agencies do not need to move to quash a subpoena if they informally convince the requesting party to withdraw the subpoena. We agree with commenters that in such a situation, moving to quash the subpoena would be mooted by its withdrawal. It would still be necessary for the State or local agency, in consultation with legal counsel for State or local agency counsel, to provide an appropriate response to the respective court in the matter. The language of the final rule is unchanged.

Other commenters were concerned with disclosing confidential information based on the best interest of the program. One commenter felt that this provision was too broad. Other commenters recommended that this standard be replaced to explicitly allow the disclosure of confidential information when participants verbally or physically abuse WIC staff or undertake any criminal activity on WIC premises. Again, when a subpoena is issued, we believe that WIC State agencies, in consultation with legal counsel, should have the flexibility to decide on a case-by-case basis whether the circumstances warrant release of the information, given the circumstances; that it is in the best interest of the program. As indicated in the preamble of the proposed rule, there may be rare instances in which 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. Therefore, this regulation cannot attempt to address all cases in which State agencies, or their representatives, should move to quash subpoenas or decide to disclose confidential information. State agencies and legal counsel should ultimately make these decisions on a case-by-case basis in conformance with State and Federal privacy requirements.

Beyond responding to subpoenas, WIC confidentiality rules do not prohibit WIC agencies from contacting law enforcement if applicants or participants become verbally or physically abusive to WIC staff or are suspected of stealing either WIC Program property or personal items from employees or other individuals. Legal counsel can assist State agencies in developing policies to follow in handling such cases, without breaching confidentiality. For example, a WIC employee could report to law enforcement what she/he knows about who may have taken a purse or WIC Program property, without providing information from the WIC record.

Several commenters requested that the regulations address the procedures to follow for responding to court orders to which they are not parties, and that along with subpoenas and search warrants, the same or similar steps should be followed. We agree with the commenter that the proposed procedures for responding to subpoenas and search warrants apply to those in which WIC is a direct or indirect party. As proposed, the regulations are general in their direction and intent on how to respond to subpoenas and search warrants, and do not specify that the procedures apply only when WIC is a direct party. Further, with regard to responding to court orders, State and local agencies should consult with its legal counsel on such matters. We anticipate that in most cases, State agencies will need to respond to court orders in a manner similar to the procedures for responding to search warrants.

The requirements in proposed Program regulations pertaining to subpoenas and search warrants are intended to clarify the primacy of Federal authority to limit disclosure of information in the interest of preserving the confidentiality of WIC applicant/participant information. In addition, the Department sought 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. Again, because of variation in State law, the Department sought to enunciate a regulatory framework that is sufficiently flexible to accommodate State laws in this area.

Accordingly, § 246.26(i) in this final rule remains as proposed, except that the entire section has been renumbered for clarity to include an introductory statement and two paragraphs.

23. Corrections to Program Information (§ 246.27)

This final rule makes technical revisions to § 246.27 to reflect address changes or corrections for the Southeast Regional Office and the Western Regional Office of the Food and Nutrition Service.

List of Subjects in 7 CFR Part 246

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

■ For the reasons set forth in the preamble, 7 CFR part 246 is amended 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:
■ a. Add new definitions of ''Electronic signature'', ''Employee fraud and abuse'', ''7 CFR part 3021'' and ''Sign or signature'', in alphabetical order;
■ b. Revise the definition of ''7 CFR part 3017''; and
■ c. Revise the definition of ''State''.

The revisions and additions 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.

Employee fraud and abuse means the intentional conduct of a State, local agency or clinic employee which violates program regulations, policies, or procedures, including, but not limited to, misappropriating or altering food instruments, entering false or misleading information in case records, or creating case records for fictitious participants.

* * * * *

7 CFR part 3017 means the Department's Common Rule regarding Governmentwide Debarment and Suspension (Non-procurement). Part 3017 implements the requirements established by Executive Order 12549 (February 18, 1986).

* * * * *

7 CFR part 3021 means the Department's Common Rule regarding Governmentwide Requirements for Drug-Free Workplace. Part 3021 implements the requirements established in section 5151–5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100–690).

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 applicable Federal law and policy, and the confidentiality requirements in § 246.26.

State means any of the fifty States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands.

* * * * *

■ 3. In § 246.3, revise paragraphs (b) and (c)(2) to read as follows:

§ 246.3 Administration.

* * * * *

(b) *Delegation to the State agency.* The State agency is responsible for the effective and efficient administration of the Program in accordance with the requirements of this part; the Department's regulations governing nondiscrimination (7 CFR parts 15, 15a, and 15b); governing administration of grants (7 CFR part 3016); governing nonprocurement debarment/suspension (7 CFR part 3017); governing restrictions on lobbying (7 CFR part 3018); and governing the drug-free workplace requirements (7 CFR 3021); FNS guidelines; and, instructions issued under the FNS Directives Management System. The State agency shall provide guidance to local agencies on all aspects of Program operations.

(c) * * *

(2) The written agreement shall include a certification regarding lobbying and, if applicable, a disclosure of lobbying activities, as required by 7 CFR part 3018.

* * * * *

■ 4. In § 246.4:

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

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

■ c. Amend paragraph (a)(23) by adding the words ''in compliance with requirements in 7 CFR part 3021'' at the end of the sentence; and

■ d. Add new paragraphs (a)(24) through (a)(27).

The revisions 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 procedures for requiring proof of pregnancy, consistent with § 246.7(c)(2)(ii), if the State agency chooses to require such proof;

(D) The State agency's income guidelines for Program eligibility;

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

(F) 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. Nutrition education will include information on drug abuse and other harmful substances. 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 policies and procedures for preventing conflicts of interest at the local agency or clinic level in a reasonable manner. At a minimum, this plan must prohibit the following WIC certification practices by local agency or clinic employees, or provide effective alternative policies and procedures when such prohibition is not possible:

(i) Certifying oneself;

(ii) Certifying relatives or close friends; or,

(iii) One employee determining eligibility for all certification criteria and issuing food instruments or supplemental food for the same participant.

(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.

(27) The State agency's Universal Identifier number.

* * * * *

■ 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 must, 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 that 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 an application is not submitted within 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. In paragraph (e)(4)(vii), remove the second ''and,'' and remove the reference to ''paragraph (e)(1)(iii)'' and add in its place ''paragraph (e)(1)(vi).''

■ g. Revise paragraph (g)(1);

■ h. Revise paragraph (h);

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

■ j. Revise paragraph (i)(11);
■ k. Revise paragraph (j)(2) introductory text;
■ l. Revise paragraph (l); 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) For a State agency opting to require proof of pregnancy, the State agency may issue benefits to applicants who claim to be pregnant (assuming that all other eligibility criteria are met) but whose conditions (as pregnant) are not visibly noticeable and 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) Loans, not including amounts to which the applicant has 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 the applicant's nutritional status may regress to the nutritional risk condition(s) certified for in the previous certification period without supplemental foods and/or WIC nutrition services, and if the nutritional risk condition(s) certified for in the previous certification period is/are appropriate to the category of the participant in the subsequent certification based on regression. However, such applicants shall not be considered at nutritional risk based on the possibility of regression for consecutive certification periods. Applicants who are certified based on the possibility of regression should be placed either in the same priority for which they were certified in the previous certification period; a priority level lower than the priority level assigned in the previous certification period, consistent with § 246.7(e)(4); 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. The State agency may permit its local agencies to certify a breastfeeding woman up to the last day of the month in which her infant turns 1 year old, or until the woman ceases breastfeeding, whichever occurs first.
(iv) Infant	Approximately every six months. The State agency may permit its local agencies to certify an infant 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 six months ending with the last day of the month in which a child reaches his/her fifth birthday.

* * * * *

(h) *Mandatory and optional mid-certification actions.* Mid-certification actions are either mandatory or optional as follows:

(1) *Mandatory reassessment of income eligibility mid-certification.* (i) The local agency must reassess a participant's income eligibility during the current certification period if the local agency receives information indicating that the participant's household income has changed. However, such assessments are not required in cases where sufficient time does not exist to effect the change. Sufficient time means 90 days or less before the expiration of the certification period.

(ii) *Mandatory disqualification mid-certification for income ineligibility.* The local agency must disqualify a participant and any other household members currently receiving WIC benefits who are determined ineligible based on the mid-certification income reassessment. 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 participants 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) *Mandatory sanctions or other actions for participant violations.* The local agency must impose disqualifications, or take other actions in accordance with the procedures set forth in § 246.12(u), in response to participant violations including, but not limited to, the violations listed in the definition of *Participant violation* in § 246.2.

(3) *Optional mid-certification actions.* A participant may be disqualified during a certification period for the following reasons:

(i) A State agency may allow local agencies to disqualify a participant for failure to obtain food instruments or supplemental foods for several consecutive months. As specified by the State agency, 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. 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 from 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:

* * * * *

(l) *Dual participation.* The State agency is responsible for the following:

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

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

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

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

* * * * *

■ 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 period (or whose certification period expires), may appeal the denial or termination, but must not receive benefits while awaiting the hearing.

* * * * *

§ 246.11 [Amended]

■ 7. In § 246.11(c)(5), remove the words ''paragraphs (c)(8), (d), and (e)'', and add in their place the words ''(c)(7), (d), and (e)''.

§ 246.12 [Amended]

■ 8. 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'';

■ b. Amend paragraph (h)(3)(xx) by removing the reference to ''$10,000'' and by adding in its place a reference to ''$25,000''; and

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

■ 9. 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.

* * * * *

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

§ 246.15 Program income other than grants.

* * * * *

(b) * * * 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]

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

■ 12. 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.

* * * * *

§ 246.23 [Amended]

■ 13. In § 246.23, amend paragraph (d) by removing the reference to ''$10,000,'' and by adding in its place a reference to ''$25,000.''

■ 14. 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 and unliquidated obligations.

(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.

(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. 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 biennial participant characteristics report 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.

* * * * *

■ 15. 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.*

(i) 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 an applicant or participant and/or family member(s). Applicant or participant information is confidential, regardless of the original source and exclusive of previously applicable confidentiality provided in accordance with other Federal, State or local law.

(ii) 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 determine have a need to know the information for WIC Program purposes. These persons may include, but are not limited to: personnel from its local agencies and other WIC State or 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 without the consent of the participant or applicant 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.* The State agency may disclose confidential applicant, participant, or vendor information pursuant to a valid subpoena or search warrant in accordance with the following procedures:

(1) *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.

(2) *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.

■ 16. In § 246.27, revise paragraphs (c) and (g) 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.

* * * * *

(g) Alaska, American Samoa, Arizona, California, the Commonwealth of the Northern Mariana Islands, Guam, Hawaii, Idaho, Nevada, Oregon, Washington: U.S. Department of Agriculture, FNS, Western Region, 550 Kearny Street, room 400, San Francisco, California 94108.

Dated: August 30, 2006.

Kate Coler,

Deputy Under Secretary, Food, Nutrition, and Consumer Services.

Note: This appendix will not be published in the Code of Federal Regulations.

Appendix:

Regulatory Impact Analysis

Title: 7 CFR 246: Special Supplemental Nutrition Program for Women, Infants and Children (WIC): Miscellaneous Provisions

a. *Nature:* Final Rule.

b. *Need:* This final rule amends a number of existing provisions in the WIC program regulations to (1) address issues raised by WIC State agencies and other members of the WIC community; (2) address recommendations made by the United States Government Accountability Office (GAO); (3) incorporate certain longstanding program policies and State agency practices into the regulations; and (4) streamline certain requirements in the regulations.

In particular, this rulemaking streamlines the Federal requirements for financial and participation reporting by State agencies, and clarifies the requirements pertaining to the confidentiality of WIC information in order to strengthen coordination with public organizations and private physicians. It also incorporates longstanding program policies and State agency practices into the regulations regarding State agency responses to subpoenas and other court-ordered requests for confidential information. Other provisions in this final rule are designed to improve eligibility determinations, incorporating program policies and State agency practices that have been in effect for some time.

These changes are intended to reinforce program policies and State agency practices that strengthen services to WIC participants, improve program administration, and increase State agency flexibility in managing the program. Many of these provisions are options the State agency may choose to implement in operating the program.

c. *Affected Parties:* The parties affected by this regulation are the USDA–FNS, State and local WIC agencies, WIC participants, and potentially eligible applicants.

Cost-Benefit Assessment: Most of the provisions in this rule are generally economically insignificant to the costs or overall operations of the WIC program. Some of the provisions are already current practice in many states, while others are presented as optional changes at the State level. The potential effects of these provisions are highlighted in the accompanying table. As a whole, this rule serves to streamline program administration and clarify program requirements while minimizing economic and administrative burdens.

Two provisions in this final rule may have a notable financial impact; both are found within § 246.7 Basic Certification Procedures:

(1) Prohibits the use of ''possibility of regression'' for consecutive certifications and clarifies priority level requirements based on regression:

Currently, State agencies are not required to limit the number of certifications per participant based on regression, although some States do have limits in place. According to data from the 2002 WIC Program and Participant Characteristics (PC) report, a maximum of 0.9% of all WIC participants are certified based on regression as their sole nutritional risk. Assuming that this is a relatively constant proportion of participants over time, approximately 74,000 WIC participants were certified based on regression in 2004. According to PC data, children comprise a majority of the participants who are certified with regression as the sole nutritional risk. We do not have any data to indicate how many participants are recertified on this basis.

If each of those 74,000 participants was certified with regression as the only nutritional risk factor for more than one consecutive certification period, the food and administrative costs to the WIC program could reach as high as $3.8 million for one month. Assuming that all of these participants would be recertified for a six-month period, the proposed rule could save over $20 million and reduce participation by over 70,000 in the six-month period. However, given that ''possibility of regression'' is rarely used as a sole basis of nutrition risk, and that if they do regress, participants would become certified again, significant savings are unlikely.

(2) Provides states with the option to extend certification periods for all participant categories until the end of the last month; also provides option to extend breastfeeding woman's certification period up to the infant's first birthday or until the woman ceases to breastfeed:

Currently, states may extend a child's certification period through the last day of the month in which the six-month certification ends. Certification periods for all other participant categories must end on various dates throughout the month, depending on the initial certification date. This provision will give states the option to extend certification periods for all participant categories through the last day of the month in which the certifications end.

This extension is offered in order to streamline administrative procedures and make certification periods for the various participant categories more consistent. States may incur an initial expense if their MIS systems are not compatible with this change; reliable data is not currently available on how many states may choose this option and/or how many states may need MIS upgrades as a result.

As certification periods are extended, food costs naturally increase. According to 2002

WIC PC data, this extension would add an average of 15 days worth of food benefits for each woman or infant participant. For this analysis, the assumption was made that this increased cost would be realized only when participants exit the program. The nonchildren categories most likely not to recertify (thus exiting the program) include: breastfeeding women; postpartum, non-breastfeeding women; and about 31% of infants [1]. Therefore, the extra food package costs for breastfeeding women, postpartum/non-breastfeeding women, and 31% of infants (*i.e.*) the infants who do not recertify as children) were calculated based on PC 2002 participation data and current food package cost estimates. The annual cost for the additional supplemental food benefits (approximately 15 days per participant) to the three categories of participants mentioned above totals over $25 million. The actual cost will likely be much lower, as this total assumes that all State agencies will adopt this optional provision.

Currently, states may certify breastfeeding women for intervals of six months, until the breastfed infant's first birthday. This provision would give State agencies the option to extend the certification period for one full year. Since this provision is entirely optional, the number of states who would change their certification procedures is unknown. It is assumed that most women who continue to breastfeed longer than six months are already being recertified for the second six-month period; therefore this extended certification period is not likely to have a major impact on either program participation among breastfeeding women or on program costs.

Current rule	Proposed rule	Final rule	Final rule effects on:	State agencies	Local agencies	Participants
			USDA–FNS			
Sec. 246.2 Definitions.	Sec. 246.2 Definitions.	Sec. 246.2 Definitions.				
No current provision on electronic signatures.	Adds new definitions of ''sign or signature'' and ''electronic signature''; State agencies may use electronic signatures if reliability and integrity assured.	Adds new definitions of ''sign or signature'' and ''electronic signature'' as proposed, but also adds ''employee fraud and abuse'' and ''7 CFR part 3017'' and ''State.''.	No effect	If electronic signatures are adopted, may assist with streamlining program operations and ease future transition to EBT. Several State agencies are already utilizing electronic signatures.	If electronic signatures are adopted, may reduce the burden of paper file storage in Local agency offices.	No effect.
Sec. 246.4(a) State Plan Requirements.	Sec. 246.4(a) State Plan Requirements.	Sec. 246.4(a) State Plan Requirements.				
No current provisions requiring State Plan amendments reflecting requirements of the new rule.	Technical requirements associated with changes described below.	Same as proposed and additional provisions on proof of pregnancy and universal identifiers; also added is language revising the proposed State Plan provisions on conflict of interest and separation of duties.	No effect	This provision will lead to a minimal increase in time necessary to revise the State plan. The increase will likely be a one-time event as state officials add the new provisions to the current State plan.	No effect	No effect.
Conflict of Interest ..	Sec. 246.4(a)(25) Conflict of Interest/Separation of Duties.	Sec. 246.4(a)(25) Conflict of Interest/Separation of Duties.				
No current provision, but 8/99 GAO report recommends policy on local agency staff conflict of interest.	Requires State agencies to implement policies and procedures to prevent conflicts of interest within local agency staffs, and to implement separation of duties.	Same as proposed and separation of duties clarified to permit a local agency employee to take part in the certification process and issue benefits if at least one other employee is involved in the process.	No effect	This provision may lead to an initial need for State officials to ensure that new rules are understood and are being implemented at the local level. Many State agencies already have a similar provision in place.	Compliance with this provision may require minor administrative/staffing changes at the local level. Many lcal agencies already have a plan for separation of duties and will not be affected.	No effect.

[1] Based on PC data and FNS administrative data from 1996–2002, approximately 31% of WIC infants do not recertify as children.

Current rule	Proposed rule	Final rule	Final rule effects on:	State agencies	Local agencies	Participants
			USDA–FNS			
Participant/Employee Fraud/Abuse.	Sec. 246.4(a)(26) Participant or Employee Fraud and Abuse.	Sec. 246.4(a)(26) Participant or Employee Fraud and Abuse.				
No current provision, but 8/99 GAO report recommends data collection on participant and staff fraud/abuse.	Requires the State agency assurance of a system(s) in place at the local level to collect information on fraud/abuse by employees and participants.	Same as proposed; also, definition of ''employee fraud and abuse'' added, as noted above.	No effect	This provision may lead to a minor increase in administrative effort on the State level to incorporate the tracking of fraud/abuse into current data collection mechanisms. This increased effort may be counterbalanced by more efficient handling of fraud/abuse cases and ultimately streamline program administration.	This provision may lead to a negligible increase in administrative effort at the local agency, due to formal reporting requirements to the State. In most cases, local agencies are already reporting cases of fraud/abuse to the State agency.	No effect.
Sec. 246.5 Selection of New Local Agency.	Sec. 246.5 Selection of New Local Agency.	Sec. 246.5 Selection of New Local Agency.				
Requires States to fund new local agencies only in the order of need.	Deletes requirement for states to fund new local agencies only in the order of need.	Same as proposed.	No effect	The provision will enhance State agency flexibility in funding new agencies.	This provision may allow new local agencies to be authorized more readily.	This provision may expedite the availability of services to populations in areas where need exists, but not at the highest level.
Sec. 246.7 Basic Certification Procedures.	Sec. 246.7 Basic Certification Procedures.	Sec. 246.7 Basic Certification Procedures.				
State agencies may use State or local income guidelines instead of the Federal guidelines.	State agencies must use the WIC regulatory income and family definitions and exclusions.	Same as proposed.	This provision will assist in streamlining WIC funding paperwork at the Federal level, particularly in USDA–FNS Regional Offices.	This provision may initially increase administrative burden in State agencies that are not currently following these guidelines. Any initial burden is expected to be short-lived. Many State agencies are already following these guidelines and will experience no effect.	This provision may necessitate that a few local agencies adopt/learn new standards for income certification. Most local agencies are in states where these guidelines are already in effect; thus no effect is expected in those agencies.	This provision will promote equal consideration of applicant eligibility nationwide.
No current provision in regulations on short-term, nonsecured loans.	Short-term, nonsecured loans are added to the list of income exclusions.	Excludes loans to which the applicant does not have constant or unlimited access.	No effect	No effect	No effect	This provision may allow a minor increase in participant eligibility for program benefits.

Current rule	Proposed rule	Final rule	Final rule effects on:	State agencies	Local agencies	Participants
			USDA–FNS			
No current provision on proof of pregnancy.	Provides State agencies the option to require proof of pregnancy.	Same as proposed except that proof may be required when the pregnancy is not visibly noticeable and no documentation of proof is available at certification.	No effect	This provision is optional for State agencies; thus some State agencies will experience no effect. For those State agencies choosing to adopt the provision, a minimal increase in effort may be necessary in providing guidance and monitoring the Local agencies.	Many Local agencies will experience no effect, since the provision is optional. If the provision is adopted at the state level, Local agencies may experience a minimal increase in time spent certifying pregnant applicants.	This provision will require pregnant applicants to the WIC program to provide proof of pregnancy, but only in States choosing to adopt this optional provision.
State agency not required to limit the number of certifications based on regression.	Prohibits the use of ''possibility of regression'' for consecutive certifications.	Same as proposed and priority levels clarified for certifications based on regression.	This provision could result in an estimated maximum decline of 0.9% of participation, equaling about 74,000 people. Given the 2004 average food and administrative cuts, this decline in participation could result in savings of approximately $20 million per year. Savings of this magnitude are highly unlikely, given the nearly impossible circumstances that must be met.	This provision will allow State WIC agency resources (funding, staff time) to be directed toward higher-risk participants. Many State agencies will experience no effect, since they already have this provision in place. Only about 0.9% (max.) of WIC participants are certified on regression, so an overall impact is relatively small.	This provision will allow Local WIC agency resources (funding, staff time) to be directed toward higher-risk participants. Many Local agencies will experience no effect since they already have this provision in place. Only about 0.9% (max.) of WIC participants are certified on regression alone, so an overall impact is relatively small.	This provision will limit benefits for WIC participants who do not maintain any nutrition risk factors beyond ''possibility of regression.''
Certification periods for some categories of participants—breastfeeding women and children—end at the end of a month; the certification periods for all other categories of participants may end at any time during a month, which may result in prorated benefits.	Certification periods for all participant categories are extended to the end of the last month.	Same as proposed and certification for breastfeeding women may be extended up to the infant's first birthday, or until the woman ceases to breastfeed, whichever occurs first.	These provisions will potentially increase annual program costs by over $25 million if every state chooses to extend benefits until the last day of the last month. These provisions are optional at the state level; thus the total financial impact may be limited.	These provisions will assist in streamlining program administration at the state level by providing State agencies the option to align certification periods for ease of tracking. States choosing to extend certification periods will experience increased food and administrative costs according to their caseloads.	If State agencies adopt these options, Local agencies will experience more streamlined certification procedures, due to the consistency of certification periods ending on the last day of the month. Local agencies will also not have to complete the paperwork necessary to recertify breastfeeding women at six-month intervals.	This provision relieves breastfeeding women of one recertification visit to the local WIC clinic. In addition, all participants may receive extra benefits, according to the proximity of their certification dates to the end of the month.

Current rule	Proposed rule	Final rule	Final rule effects on:	State agencies	Local agencies	Participants
			USDA–FNS			
Requires disqualification if reassessment of program eligibility is conducted mid-certification.	Requires reassessment of income eligibility mid-certification based on new information, and disqualification if over-income.	Same as proposed, except that the reassessment is not required if sufficient time does not exist to effect the change; ''sufficient time'' means 90 days prior to the expiration of the certification period.	This provision has the potential to reduce total program costs nationally by not providing benefits to ineligible participants. However, the dollar amount saved is likely to be minimal, given the limited number of people affected.	This provision may assist State agencies with directing resources toward participants with a higher need, rather than providing benefits to participants who are ineligible. This provision may also lead to a minimal increase in administrative burden at the state level.	This provision may assist Local agencies with directing resources toward participants with a higher need, rather than providing benefits to participants who are ineligible.	This provision will reduce benefits for those participants who become ineligible based on an increased income; however, information regarding changes in income level would have to be brought to the attention of WIC staff.
State agency may not deviate from the mandated Participant Rights and Responsibilities language.	State agencies are permitted to use simpler language.	Same as proposed.	No effect	This provision is optional; many State agencies will experience no effect. For those states choosing to use more simple language, a small amount of time will be necessary initially to develop, test, and disseminate the language.	This provision will enable Local agencies to have flexibility in communicating Rights and Responsibilities to participants. Since the provision is optional, many Local agencies will experience no effect.	This provision increases the likelihood that more participants will have a full understanding of their Rights and Responsibilities.
246.9(g) Continuation of Benefits.	Sec. 246.9(g) Continuation of Benefits.	Sec. 246.9(g) Continuation of Benefits.				
Does not prohibit the continuation of benefits when a participant becomes ineligible while awaiting a hearing decision on other matters.	Prohibits participants who become categorically ineligible from continuing to receive program benefits while awaiting a hearing decision.	Same as proposed.	This provision may result in very minimal food cost savings at the national level. Reliable estimates of these savings are not available because of limited information on the number of participants affected.	This provision allows State agencies to direct resources to eligible participants, rather than participants who may not be actually be eligible to receive benefits.	This provision allows Local agencies to direct resources to eligible participants, rather than participants who may not be actually be eligible to receive benefits.	Participants who become ineligible while awaiting a hearing decision will no longer receive benefits.
Sec. 246.12(h)(3)(xx) & 246.23(d) Claims/Penalties.	Sec. 246.12(h)(3)(xx) & 246.23(d) Claims/Penalties.	Sec. 246.12(h)(3)(xx) & 246.23(d) Claims/Penalties.				
Maximum fine for criminal fraud is $10,000.	No revision proposed.	Maximum fine for criminal fraud raised to $25,000 per non-discretionary requirement of an amendment to the National School Lunch Act.	No effect	No effect	No effect	No effect.

Current rule	Proposed rule	Final rule	Final rule effects on:	State agencies	Local agencies	Participants
			USDA–FNS			
Sec. 246.14 Use of Program Funds.	Sec. 246.14 Use of Program Funds.	Sec. 246.14 Use of Program Funds.				
No current provision on retroactive benefits.	Prohibits use of program funds to provide retroactive benefits to participants.	Same as proposed.	No effect	No effect is expected since it is not current practice to provide retroactive WIC benefits.	No effect	No effect.
Only allows use of program funds for transportation in rural area.	Allows use of program funds to provide transportation to and from WIC offices in non-rural as well as rural areas.	Same as proposed.	No effect	State agencies will need to balance Local agency requests for approval with the need for funds in other areas of program administration.	This provision will give Local agencies the flexibility to provide transportation to both urban and rural WIC clients, subject to prior approval of the State agency based on documentation that such service would be essential for program access.	This provision may allow greater access to WIC benefits for eligible persons in urban areas.
Sec. 246.14, 15, 17 Funding Issues.	Sec. 246.14, 15, 17 Funding Issues.	Sec. 246.14, 15, 17 Funding Issues.				
Sec. 246.14(d) requires prior approval for the costs of ADP systems and management studies.	Sec. 246.14(d) codifies the actual practice of deleting prior approval for costs of management studies. Continues the actual practice of requiring prior approval of capital expenditures exceeding the dollar threshold established in agency policy, including ADP.	Same as proposed.	This provision may decrease administrative burden by reducing time/paperwork involved in granting approval for the stated costs.	This provision may decrease administrative burden by reducing time/paperwork involved in requesting approval for the stated costs.	No effect	No effect.
Sec. 246.14(d) requires prior approval for capital expenditures over $2,500.	Dollar threshold for prior approval of capital expenditures is deleted from Sec. 246.14, designing FNS policy and guidance as the new reference for this, as per actual practice.	Same as proposed.	No effect, as FNS policy and guidance is current practice.	No effect, as FNS policy and guidance is current practice.	No effect	No effect.
Sec. 246.15(b) is currently silent on the addition method of applying program income, although 7 CFR 3016 allows this if stated in program regulations.	Sec. 246.15(b) codifies actual practice of using the addition method of applying program income.	Same as proposed.	No effect, as the addition method is current practice.	No effect, as the addition method is current practice.	No effect	No effect.

Current rule	Proposed rule	Final rule	Final rule effects on:	State agencies	Local agencies	Participants
			USDA–FNS			
Sec 246.17 provides for a 150-day reporting cycle.	Sec. 246.17(b)(2) reduces food instrument close-out cycle from 150 to 120 days.	Same as proposed.	This provision will provide greater efficiency in financial administrative at the regional and national level.	This provision will provide greater efficiency in financial administration at the state level.	No effect	No effect.
Sec. 246.20, 246.25 Audits/Reporting.	Sec. 246.20, 246.25 Audits/ Reporting.	Sec. 246.20, 246.25 Audits/ Reporting.				
Sec. 246.20(b)(1) refers to a dated citation.	Sec. 246.20(b)(1) refers to the current citation.	Same as proposed.	No effect	No effect	No effect	No effect.
Sec. 246.25(b)(1) requiems monthly reporting of certain information on participation, administrative funds, and local agencies.	Sec. 246.25(b)(1) no longer requires itemized NSA expenditures or the number of persons on wait lists to be reported on a monthly basis.	Same as proposed, except deletes proposed requirement for reporting on cash allowances exceeding three days.	This provision may streamline the process of information collection at the regional level.	This provision may reduce administrative burden by reducing the amount of information that must be formally submitted monthly.	This provision may reduce administrative burden by reducing the amount of information that must be formally submitted monthly.	No effect.
Under Sec. 246.25(b)(3) and (c), FNS required certain participation, Civil Rights, and local agency data on a quarterly basis.	Sec. 246.25(b)(2) codifies annual or biennial reporting of this data, but requires change of local agency information whenever such change occurs, as per actual practice.	Same as proposed.	No effects; the annual of biennial data reporting is current practice.	No effect; the annual or biennial data reporting is current practice.	No effect; the annual or biennial data reporting is current practice.	No effect.
Sec. 246.26 Confidentiality.	Sec. 246.26(d)–(i) Confidentiality.	Sec. 246.26(d)–(i) Confidentiality.				
Pertains only to information obtained from participants and applicants.	Clarifies that all information about a participant or applicant is protected.	Same as proposed.	No effect	No effect	No effect	No effect.
Information may be shared with persons directly administering or enforcing WIC, health and welfare programs, and the Comptroller General.	Clarifies that another State or local agency has access to confidential applicant or participant information.	Same as proposed; preamble clarifies that persons administering or enforcing WIC includes WIC IT staff, contract Single Audit staff, and WIC contractor bank staff.	No effect	This provision may enhance collaboration between programs at the state level.	This provision may enhance collaboration between programs at the local level.	This provision may allow participants to receive enhanced services through program collaboration.

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State option for information-sharing agreements with ''health or welfare'' programs; shared information may only be used for eligibility and outreach.	Allows information sharing with public organizations other than health and welfare, and for purposes other than eligibility in other programs and outreach; the additional allowed purposes include (1) enhancing the health, education and well-being of participants and applicants, (2) streamlining administrative procedures, and (3) evaluating the State's health system.	Same as proposed; preamble clarifies that MOU may permit information sharing with Child Protective Services upon request if WIC suspects abuse, and public organization includes non-WIC public agencies, but not law enforcement or researchers.	No effect	This provision may enhance collaboration between programs as the state level.	This provision may enhance collaboration between programs at the local level.	This provision may allow participants to receive enhanced services through program collaboration, while remaining assured that confidential information is not being misused.
Allows the sharing of WIC information through agreements with other programs administered by the State/local agency.	Allows a WIC State/local agency to share information through written agreements with its other programs.	Same as proposed.	No effect	No effect	No effect	No effect.
No current provision in regulations. FNS Instruction 800–1 requires that information to private parties such as physicians must be through written consent obtained after certification.	Allows the use of signed release forms from applicants and participants as part of the WIC application and certification process in order to share information with private doctors.	Same as proposed.	No effect	This provision may streamline and provide consistency to the consent process. This provision is optional at the state level.	This provision may streamline and provide consistency to the consent process.	No effect.
No current provision in regulations. FNS Instruction 800–1 permits reporting on child abuse.	Clarifies that State and local agency staffs are permitted to share information to comply with required reporting of known or suspected child.	Same as proposed; additional clarification added regarding information-sharing with Child Protective Authorities as noted above with respect to public organizations.	No effect	No effect; a current FNS instruction allows reporting of child abuse.	No effect; a current FNS instruction allows reporting of child abuse.	No effect; a current FNS instruction allows reporting of child abuse.
Required notification to participant/applicant at certification on how confidential information will be shared.	Requires notification to participant or applicant at certification or later on how confidential information will be shared for non-WIC purposes.	Same as proposed.	No effect	No effect	No effect	No effect.

Current rule	Proposed rule	Final rule	Final rule effects on:	State agencies	Local agencies	Participants
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No current provision in the regulations. Policy Memorandum 94–3 addresses subpoenas and search warrants.	Requires State/local agency to consult with legal counsel on subpoenas and comply with search warrants.	Same as proposed and clarifies in the final rule that no attempt is needed to quash a subpoena if it is withdrawn through the courts.	No effect	No effect	No effect	No effect.

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