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DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 246

RIN 0584–ACO2

Special Supplemental Nutrition Program for Women, Infants and Children (WIC): Implementation of WIC Mandates of Public Law 103–448, the Healthy Meals for Healthy Americans Act of 1994 and Public Law 103–227, the Pro-Children Act of 1994

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule amends regulations governing the Special Supplemental Nutrition Program for Women, Infants and Children (WIC) to incorporate certain nondiscretionary provisions of the Healthy Meals for Healthy Americans Act of 1994, enacted on November 2,1994, the Pro-Children Act of 1994, enacted on August 31, 1994, the Cash Management Improvement Act of 1990, enacted on October 24, 1990, and the Personal Work Responsibility and Reconciliation Act of 1996, enacted on August 22, 1996. The provisions in this final rule include: prohibiting smoking in WIC facilities; increasing by one the family size of an otherwise income ineligible pregnant woman for purposes of determining WIC eligibility; allowing State agencies to deem income eligible pregnant women presumptively eligible (for a period not to exceed 60 days) without a determination of nutritional risk; increasing the national breastfeeding promotion and support expenditure; and providing WIC services at more Community and Migrant Health Centers and Indian Health Service facilities. These provisions are intended to strengthen services to participants, increase State agency flexibility and promote good health practices.

DATES: This rule is effective January 19, 1999.

FOR FURTHER INFORMATION CONTACT: Barbara Hallman, Supplemental Food Programs Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Room 542, Alexandria, Virginia 22302, (703) 305–2730.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

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

Regulatory Flexibility Act

This final rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612). Pursuant to that review, Shirley R. Watkins, Under Secretary for Food, Nutrition and Consumer Services, has certified that this rule will not have a significant economic impact on a substantial number of small entities. This rule provides State and local agencies with greater flexibility: (1) in a certification process, (2) in the use of funds recovered as a result of violations in the food delivery system, and (3) the administration of their infant formula rebate contracts and management of their food funds. However, the economic impact on program operations will not be significant.

Paperwork Reduction Act

This final rule imposes no new reporting or recordkeeping requirements that are subject to OMB for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). The information collection burden for this final rule was previously approved under OMB #0584–0043.

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

Executive Order 12988

This final 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 unless so specified in the **DATES** paragraph of this preamble. Prior to any judicial challenge to the application of the provisions of this rule, all applicable administrative procedures must be exhausted.

Public Law 104–4

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub.L. 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 Food and Nutrition Service generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, or tribal governments, in the aggregate, or to the private sector of $100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires the Food and Nutrition Service to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule.

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

Background

Section 204 of Public Law 103–448, the Healthy Meals for Healthy Americans Act of 1994, enacted on November 2, 1994, reauthorized the Special Supplemental Nutrition Program for Women, Infants and Children (WIC). The statutory authorities for a wide range of WIC Program functions in areas such as income eligibility determinations,

program outreach, referral and access, coordination, breastfeeding promotion, program operations, and cost containment were amended by section 204. In addition, section 1043 of Pub.L. 103–227, the Pro-Children Act of 1994, enacted on August 31, 1994, prohibits smoking within any indoor facility owned or leased or contracted for by an entity that receives Federal funds for the provision of regular or routine health care or day care, or early childhood development (Head Start) services. WIC Program clinics are included among the services covered by this legislation. These provisions serve the interests of the President and Congress by improving coordination among programs, promoting positive pregnancy outcomes and healthy babies, and reducing administrative burdens for State and local agencies. In addition, section 724(e)(1)(B)(i) of Pub.L. 104–193, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, made a further amendment regarding coordination with other programs and section 4 of Pub.L. 101–453, the Cash Management Improvement Act of 1990, made a change requiring States to pay the United States interest on advances of Federal funds. These provisions are all nondiscretionary. Further, State agencies have already been informed that these provisions may be implemented prior to the issuance of amendments to the program regulations. For these reasons, the Under Secretary for Food, Nutrition and Consumer Services has determined that, in accordance with 5 U.S.C. 553 prior notice and comment is unnecessary and contrary to the public interest. Since this rule merely codifies the cited statutory provisions, it also constitutes an interpretive rule for which notice and comment are not required by 5 U.S.C. 553.

1. Definition of Nutritional Risk—246.2

Section 204(a) of Public Law 103–448 amended section 17(b)(8)(B) of the Child Nutrition Act of 1966 (42 U.S.C. 1786(b)(8)(B)) (CNA) to change the legislative categorization of alcoholism and drug abuse from predisposing nutritional risk conditions to conditions that directly affect the nutritional health of a person. This reclassification is consistent with new nutrition and health knowledge, and better represents the classification of these conditions currently used by States. As a result, homelessness and migrancy now become the only specific legislative examples of conditions that predispose persons to inadequate dietary patterns or nutritionally related medical conditions in the CNA. Accordingly, the definition of nutritional risk in Section 246.2 has been revised to reflect these changes.

2. Prohibition on Smoking in WIC Clinics Provision—246.6(b)(4)

Sections 1043 (b) and (d) of Pub. L. 103–227, the Pro-Children Act of 1994, require that after December 26, 1994, smoking shall not be permitted in any indoor facility, or portion thereof, that is owned, leased, or contracted for by any person that receives Federal funds for children's services funded under certain programs administered by the U.S. Department of Health and Human Services, the U.S. Department of Education, and the U.S. Department of Agriculture. Section 1042(2) of the Act defines ''children's services'' as: the provision on a routine or regular basis of health, day care, education, or library services; WIC clinics are specifically identified in the Act as ''children's services''. The definition of ''person'' includes State and local agencies as well as corporations and individuals. Additionally, fiscal year 1996, 1995 and 1994 appropriations acts for the WIC Program contained provisions prohibiting the use of appropriated funds to pay administrative expenses of WIC clinics that had no announced policy prohibiting smoking within the space used to carry out the Program. The no-smoking provision in Pub. L. 103–227 is intended to protect children under the age of 18 from exposure to environmental tobacco smoke while they are receiving education, library, day care, health care, and early childhood development services in indoor facilities. The Administration's goal in implementing this legislative requirement reflects a strong health protection policy regarding smoking and environmental tobacco smoke exposure.

In response to the legislative provisions contained in Pub. L. 103–227, section 246.6 is amended to require all local agency agreements to contain a provision prohibiting smoking in the space used to carry out the WIC Program during the time any aspect of WIC services are performed. The smoking prohibition applies to the portion of the facility used for WIC Program services. If that portion of the building is simultaneously used for other purposes, such as community activities or privately sponsored events, smoking must be prohibited at these other events as well. This change to the regulations merely formalizes the current policy directive, which all State agencies have been operating under since fiscal year 1994. That directive prohibits the allocation of nutrition service and administrative funds to any WIC clinic that does not prohibit smoking within the space used for WIC services during the time the services are being performed. This regulation therefore merely codifies the current policy, and places no additional burden on State or local agencies.

3. Service to Pregnant Women Provisions—246.7(d)(1)(iv), 246.7(d)(1)(v), 246.7(d)(2)(vii), 246.7(e)(1)(iii)

a. Family Size Provision

Section 204(c)(1) of Pub. L. 103–448 amended Section 17(d) of the CNA to add a new subparagraph section 17(d)(2)(C), which extends WIC eligibility for certain pregnant women. The provision stipulates that an income-ineligible pregnant woman satisfies income guidelines if the guidelines would be met by increasing the number of individuals in her family by one individual. Although the law states that the family size of the pregnant woman is to be increased by ''one,'' we do not believe, in cases where the pregnant woman is expecting multiple births, that Congress intended to totally preclude counting such multiple births. As such, section 246.7(d)(2)(vii) is amended to allow the family size of a pregnant woman to be increased by the number of embryos or fetuses in utero. This provision allows the WIC Program to use the same definition of family size currently used by the Department of Health and Human Services' (DHHS) Medicaid Bureau, thereby improving coordination between the WIC and Medicaid Programs. It also results in certain women having access to the health benefits of WIC during pregnancy who previously would have had to wait for the birth of their babies to be eligible.

The legislation does not specifically address whether the same income eligibility determination process can be used for the pregnant woman's other family members, who may also apply for WIC services. However, it is impractical and administratively burdensome to require two different income-screening procedures, based on categorical status, for one family. To do so forces a WIC local agency to activate the adjunctive eligibility process unnecessarily because the local agency would have to first refer the family members to the Medicaid Program for certification, and then ask the family members to return to the WIC Program so that they may be determined as adjunctively income eligible for WIC. Therefore, in situations where the family size has been increased for a

pregnant woman, the same increased family size may also be used for any of her categorically eligible family members.

In rare instances, the consideration of unborn children in this manner may conflict with an applicant's cultural, personal, or religious beliefs. In recognition of these issues, the regulation requires State agencies to allow such applicants to waive the automatic increase in family size.

b. Certification Prior to Documentation of Nutritional Risk

Program regulations permit categorically eligible applicants to be certified for WIC benefits only if, in addition to meeting residency and income requirements, they are determined to be at nutritional risk. In order to determine nutritional risk, height, weight, and bloodwork must be obtained. Many State agencies have expressed concerns regarding the availability of bloodwork data for pregnant women at the time of their application. In some cases, State or local agencies may not have the essential equipment or staff onsite to perform the bloodwork assessment. In these situations, the agencies usually have to contract out for that service, or refer the women to health centers and/or providers to obtain the necessary data. State agencies also reported that the bloodwork data requirement has resulted in barriers to participation for pregnant women. They also reported that this requirement could, in fact, be an impediment to enrollment of eligible pregnant women early in pregnancy. Early enrollment is an important program objective, as well as a legislative requirement.

In response to concerns related to improved and expedited access to program benefits for pregnant women, section 204(c)(2) of Pub.L. 103–448, amended section 17(d)(3)(B) of the CNA to allow State agencies to consider pregnant women who are income eligible for the WIC Program to be presumed to be nutritionally at risk and thus eligible to participate in the program. These women may be certified immediately without the results of a nutritional risk evaluation. The law requires that a nutritional risk evaluation be completed, however, not later than 60 days from the date the pregnant woman is certified for participation. The law stipulates that, if the subsequent assessment determines that the woman does not meet nutritional risk criteria, her certification terminate on the date of the determination. The joint statement of explanation accompanying S.1614 (Congressional Record, October 6, 1994, S14454) clarifies the positions of the Senate Committee on Agriculture, Nutrition and Forestry and the House Committee on Education and Labor on this provision concerning presumptive eligibility for pregnant women. The Committees expressed their view that the dietary risk assessment be performed before—or as soon as possible after—the presumptively eligible pregnant woman begins receiving WIC benefits. Local agencies thus should strive to complete the dietary assessment at certification. Ideally, local agencies should complete the full nutrition risk assessment at certification or at the earliest possible date thereafter. This allows the WIC staff to begin to offer appropriate counseling on program nutrition and diet, as well as complete, appropriate health care referrals at the earliest opportunity. This information also is invaluable in developing an appropriate food package.

While the law uses the word ''terminate'' in connection with the necessary action when a pregnant woman is later found not to meet the nutritional risk criteria, what is really happening is that the pregnant woman is being found ineligible for the program. Accordingly, this action will be treated like an initial determination. That is, while the pregnant woman must be given an opportunity to appeal the action, as required under section 246.7(j)(5), there is no requirement of 15 days notice of the action as for suspensions and most disqualifications (under section 246.7(j)(6)) and for the expiration of certification periods (under section 246.7(j)(8)). Nor will the pregnant woman be able to receive benefits while awaiting the fair hearing decision. Section 246.9(g) will continue to require benefits pending resolution of the fair hearing only for those participants who timely appeal an action under section 246.7(j)(6).

Further, if the nutritional risk evaluation is not completed within the 60-day timeframe, the pregnant woman's participation may not be extended beyond the initial 60-day certification period. However, as set forth in section 246.7(j)(8) for all cases of the expiration of a certification period, the pregnant woman must be notified not less than 15 days before the expiration of the period that the certification period is about to expire. Similarly, pregnant women who appeal the expiration of their certification may not receive WIC benefits while awaiting the fair hearing decision. The regulations are amended at section 246.7(e)(1)(iii) to reflect these legislative provisions.

4. Coordination of WIC and Medicaid Program Provisions—246.4(a)(8)

Section 204(e) of Pub.L. 103–448 amended section 17(f)(1)(C)(iii) of the CNA to require coordination between the WIC Program and State Medicaid Programs, including Medicaid programs that use coordinated care providers under a contract entered into under section 1903(m) or a waiver granted under section 1915 (b) of the Social Security Act (42 U.S.C. 1396 b(m) or 1396n(b)).

Soon after enactment of Pub.L. 103–448, section 729(e)(1)(B)(i) of Pub.L. 104–193, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub.L. 104–193), amended section 17(f)(1)(C)(iii) of the CNA to replace the listing of specific programs with which WIC must coordinate with a plan to coordinate WIC operations with other services or program that may benefit participants in, or applicants for, the program. As such, the State agency now determines which services or programs it will coordinate with to meet the specific needs of its participants and applicants. Section at 246.4(a)(8) is amended to reflect this later change. Although no longer required by law, the Department strongly encourages State agencies to continue to coordinate with Medicaid managed-care providers to ensure that WIC participants have access to medical benefits, thereby improving their health status.

5. WIC Services at Community and Migrant Health Centers—246.4(a)(8) and 246.7(b)(3)

Section 204(u) of Pub.L. 103–448 amended section 17(j) of the CNA to require that the Secretary of Agriculture and the Secretary of the Department of Health and Human Services establish and carry out an initiative to provide WIC services at substantially more community and migrant health centers. The legislation stipulates that the initiative shall include: (1) Activities to improve the coordination of WIC and health care services at facilities funded by the Indian Health Service (IHS); and (2) the development and implementation of strategies to ensure that, to the maximum extent feasible, new community and migrant health centers and other federally-supported health care facilities established in medically underserved areas provide WIC services. The law further stipulates that the initiative may also include: (1) Outreach and technical assistance for State and local agencies and the facilities named above; (2)

demonstration projects in selected States or local areas; and (3) other activities as the Secretaries find appropriate.

This mandate also reinforces opportunities for the WIC Program, community and migrant health centers and IHS facilities to further implement mutual objectives that are consistent with this legislation. The objectives are: (1) To increase coordination and co-location of WIC with Community and Migrant Health Centers and with IHS facilities; (2) to ensure that newly constructed, federally supported health facilities are coordinated with WIC State agencies to maximize service integration; improve access to health care for participants of all three programs, especially underserved, vulnerable, and hard-to-reach potential eligibles; and (3) to enlist the support of primary care personnel at health centers and IHS clinics and WIC personnel to reinforce health messages such as breastfeeding promotion, immunization screening and delivery, drug abuse education and referrals. The WIC Program will benefit from this initiative through improved access to health care for WIC participants as well as by expansion of opportunities for newly co-located clinic sites to accommodate rapidly increasing WIC participation levels. Projected participation levels are more likely to be met with increased facility infrastructure capacity for WIC. In addition, community and migrant health centers and IHS facilities may benefit from increased co-location and coordination with WIC by enhancing service utilization by clients seeking a one-stop, health care shopping opportunity. In compliance with this legislative provision, this rule amends section 246.7(b)(3) to require that, where feasible, State agencies provide WIC services at community and migrant health centers, Indian Health Services facilities, and other federally supported health care facilities established in medically underserved areas.

These changes are intended to improve access to health care for WIC participants, and will make WIC more accessible to high-risk populations served at community and migrant health centers, IHS facilities and other federally supported health care facilities established in medically underserved areas provide supplemental foods and nutrition education under the special supplemental nutrition program. The Department will supplement these regulatory requirements with numerous other promotional activities designed to facilitate increased co-location and coordination between WIC and these service providers. These efforts include a cataloging of site locations, the development of a best practices guide, and continued provision of infrastructure and other funding and support that facilitate improved WIC access to eligible persons also being served in IHS facilities, community and migrant health centers, and other federally health care supported facilities established in medically underserved areas provide supplemental foods and nutrition education under the special supplemental nutrition program.

6. Income Eligibility Guidelines Provision Section—246.7(d)(1)(iii)

Section 204(g) of Pub.L. 103–448 amended Section 17(f)(18) of the CNA to allow State agencies to implement annual WIC income eligibility guidelines concurrently with the implementation of annual income eligibility guidelines under the Medicaid Program established under Title XIX of the Social Security Act (42 U.S.C. 1396 et seq.). Section 17(f)(18) was subsequently redesignated as section 17(f)(17) by section 729(e)(10) of Pub.L. 104–193. Congress' purpose in allowing this concurrent implementation is to facilitate closer coordination between the programs and ease Program access for applicants. Section 246.7(d)(1)(iii) is amended accordingly. State agencies that choose not to coordinate implementation with the Medicaid guidelines must implement the amended WIC income eligibility guidelines not later than July 1 of each year.

7. Priority Consideration for Migrant Populations—246.7(f)(2)(iii)(A)

Section 204(f) of Pub.L. 103–448 amended section 17(f)(3) of the CNA to require State agencies to ensure local agencies provide priority consideration to serving migrant participants who are residing in the State for a limited period of time. Current WIC regulations already address this legislative change at section 246.7(f)(2)(iii)(A).

8. Breastfeeding Promotion and Support Activities—246.14(c)(1)

Section 123(a)(6) of Pub.L. 101–147 amended section 17(h)(3) of the CNA to earmark $8 million annually in State agency Nutrition Services and Administration (NSA) grants for the promotion and support of breastfeeding among WIC mothers. Section 204(l) of Pub.L. 103–448 further amended section 17(h)(3) to establish a new formula for determining the minimum national breastfeeding promotion and support expenditure. The new formula increased the national annual minimum expenditure from $8 million to an amount equal to $21 per pregnant and breastfeeding woman participating in the WIC Program nationwide, based on the average number of pregnant women and breastfeeding women participating during the last three months for which the Department has final data. Beginning on October 1, 1996, and each October 1 thereafter, this per participant amount will be adjusted for inflation using the same index that is used for NSA funds. The Department applauds Congress' support for breastfeeding as the optimal method of infant feeding.

To ease transition in fiscal year 1995, section 17(h)(3)(F) provided that State agencies could spend the same amount it expended for breastfeeding promotion and support expenditures in fiscal year 1994, in lieu of meeting the $21 per pregnant and breastfeeding woman minimum. This provision allowed those State agencies that were unable to meet the $21 per pregnant and breastfeeding woman target immediately to gradually move in that direction.

Section 17(h)(3)(G) provided a similar allowance for fiscal year 1996, except that the State agency must expend more than the amount expended in fiscal year 1995 for breastfeeding promotion and support and must have the Secretary's approval. All State agencies were required to expend the minimum $21 per pregnant and breastfeeding woman for breastfeeding promotion and support expenditure beginning in fiscal year 1997. Because the transition period is now past and the new formula is mandatory, this final rule only reflects the new formula and not the transition period exceptions for fiscal years 1995 and 1996. This rule amends section 246.14(c)(1) to reflect the new formula.

9. Standards for the Collection of Breastfeeding Data—246.25(b)(3)

Section 204(m) of Pub.L. 103–448 and section 729(g)(1)(A) of Pub.L. 104–193 amended section 17(h)(4) of the CNA to require the development of standards for the collection of breastfeeding data. The legislation requires that not later than 1 year after the date of enactment, the Secretary must develop uniform requirements for collection of data regarding the incidence and duration of breastfeeding among participants in the program. The Department, after consulting with the National Association of WIC Directors, has developed the breastfeeding data specifications. This information will be collected as part of the biennial reporting in section 246.25(b)(3).

10. Use of Recovered Program Funds in Year Collected—246.14(e)

Section 246.14(e) of the WIC regulations allows the State agency to retain funds collected through (a) the recovery of claims assessed against food vendors or (b) funds not paid to food vendors as a result of reviews of food instruments prior to payment. However, Federal guidelines on refunds limited State agencies in their use and retention of vendor collections (Title 7, section 5.4.B.1., of the General Accounting Office's Manual for the Guidance of Federal Agencies). This guidance provides that ''unless otherwise authorized by law, refunds should be deposited to the credit of the appropriation account initially charged with the overpayment.'' This prohibition from using vendor collections to offset food costs in a year other than the year of the initial obligation was problematic. State agencies reported that they frequently did not receive funds collected from vendors until after closeout of the year in which the initial obligation of funds occurred. As a result, they were required to remit most of their vendor collections to FNS for reallocation rather than receiving the opportunity to use these funds to offset their own WIC Program's food costs. Section 204(h) of Pub.L. 103–448 amended section 17(f) of the CNA of 1966 to provide that ''a State agency may use funds recovered as a result of violations in the food delivery system in the year in which the funds are collected for the purpose of carrying out the program.'' This legislative provision overrides the General Accounting Office's guidance, and permits State agencies to use vendor collections received after the source fiscal year is closed out to offset program expenditures from the year in which collected. In addition, the legislation expands the purposes for which vendor collections may be used to include any program cost, rather than being restricted to food costs. Regulations at 246.14(e) are amended to reflect these legislative changes.

11. Prohibition on Interest Liability to Federal Government on Rebate Funds—246.15(a)

Section 4 of the Cash Management Improvement Act of 1990 (CMIA) (Pub.L. 101–453) amended 31 U.S.C. 6503(c) to require States to pay the United States interest on advances of Federal funds. This change became effective November 1992. Section 6503(d) of Title 31 of the U.S. Code and implementing regulations at 31 CFR Part 205 require an annual reconciliation of interest earned by States on advances of Federal funds and interest lost to States as a result of being forced to use their own funds in anticipation of receiving Federal funds. Congress, through Pub.L. 103–448, has provided an exception to this requirement, however, for receipts earned by WIC State agencies for rebates from infant formula and other foods. Section 204(p) of Pub.L. 103–448 amended section 17(h)(8)(J) of the CNA to stipulate that State agencies shall not incur any interest liability to the Federal government on rebate funds from infant formula and other foods, provided that all interest earned by the State is used for program purposes. Section 246.15(a) is revised to conform with the applicable provisions of the CMIA, and the specific WIC exemptions of the Pub.L. 103–448.

12. Funds for Technical Assistance and Research Evaluation Projects—246.16(a)(6)

Section 17(g)(5) of the CNA, as reflected at section 246.16(a)(6) of the WIC regulations, states that up to one-half of 1 percent of the sums appropriated for each fiscal year, not to exceed $5,000,000, shall be available to the Secretary for evaluating program performance, evaluating health benefits, providing technical assistance to improve State agency administrative systems, preparing the biennial Participation Report to Congress described in section 246.25(b)(3), and administering pilot projects, including projects designed to meet the special needs of migrants, Indians, and rural populations. Section 204(k) of Pub.L. 103–448 amended 17(g)(5) of the CNA to expand the purposes to include technical assistance and research projects of the programs under section 17. The effect of adding the reference to ''programs under this section'' was to extend the permissible use of these funds to listed activities as they relate to the WIC Farmers' Market Nutrition Program authorized under section 17(m) of the CNA. Section 246.16(a)(6) is amended accordingly to reflect this legislative change.

13. Spendback Funds—246.16(b)(3)(i)

Section 246.16(b)(3)(i) of the WIC regulations reflects the provision in section 17(i)(3)(A)(i) of the CNA that not more than 1 percent of the funds allocated to a State agency for food costs incurred in any fiscal year may be expended by the State agency for food costs incurred in the preceding fiscal year. Section 204(s) of Pub.L. 103–448 amended sections 17(i)(3)(A)(i) and 17(i)(3)(H) of the CNA to increase the maximum spendback authority from 1 percent of the total food funds to 3 percent of the total food funds, with the Secretary's approval. A State agency may be permitted to expend not more than 3 percent of the amount of funds allocated to a State for supplemental foods for a fiscal year for expenses incurred for supplemental foods during the preceding fiscal year, if the Secretary determines that there was a significant reduction in the State's infant formula cost containment savings that resulted in the State not being able to at least maintain its level of participation. Section 246.16(b)(3)(i) is amended to reflect the increase in the percentage of spendback authority as per this provision.

List of Subjects in 7 CFR Part 246

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

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

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

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

Authority: 42 U.S.C. 1786.

2. In § 246.2, the definition of *Nutritional risk* is revised to read as follows:

§ 246.2 Definitions.

* * * * *

Nutritional risk means:

(a) Detrimental or abnormal nutritional conditions detectable by biochemical or anthropometric measurements;

(b) Other documented nutritionally related medical conditions;

(c) Dietary deficiencies that impair or endanger health;

(d) Conditions that directly affect the nutritional health of a person, including alcoholism or drug abuse; or

(e) Conditions that predispose persons to inadequate nutritional patterns or nutritionally related medical conditions, including, but not limited to, homelessness and migrancy.

* * * * *

3. In § 246.4, paragraph (a)(8) is revised to read as follows:

§ 246.4 State Plan.

(a) * * *

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

* * * * *

4. In § 246.6, paragraphs (b)(4) through (b)(9) are redesignated as (b)(5) through (b)(10). A new paragraph (b)(4) is added to read as follows:

§ 246.6 Agreements with local agencies.

* * * * *

(b) * * *

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

* * * * *

5. In § 246.7:

a. Paragraphs (b)(3) through (b)(5) are redesignated as paragraphs (b)(4) through (b)(6), and a new paragraph (b)(3) is added;

b. Paragraph (d)(1)(iii) is revised;

c. Paragraphs (d)(2)(vii) and (d)(2)(viii) are redesignated as paragraphs (d)(2)(viii) and (d)(2)(ix), and a new paragraph (d)(2)(vii) is added;

d. Paragraph (e)(1)(iii) is redesignated as paragraph (e)(1)(iv), and a new paragraph (e)(1)(iii) is added.

The revisions and additions read as follows:

§ 246.7 Certification of participants.

* * * * *

(b) * * *

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

* * * * *

(d) * * *

(1) * * *

(iii) *Implementation of the income guidelines.* On or before July 1 each year, each State agency shall announce and transmit to each local agency the State agency's family size income guidelines, unless changes in the poverty income guidelines issued by the Department of Health and Human Services do not necessitate changes in the State or local agency's income guidelines. The State agency may implement revised guidelines concurrently with the implementation of income guidelines under the Medicaid program established under Title XIX of the Social Security Act (42 U.S.C. 1396 of *et seq.*). The State agency shall ensure that conforming adjustments are made, if necessary, in local agency income guidelines. The local agency shall implement (revised) guidelines not later than July 1 of each year for which such guidelines are issued by the State.

(2) * * *

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

* * * * *

(e) * * *

(1) * * *

(iii) A pregnant woman who meets income eligibility standards may be considered presumptively eligible to participate in the program, and may be certified immediately without an evaluation of nutritional risk for a period up to 60 days. A nutritional risk evaluation of such woman shall be completed not later than 60 days after the woman is certified for participation. Under this subsequent determination process, if the woman does not meet nutritional risk criteria, the woman shall be determined ineligible and may not participate in the program after the date of the determination. Notification of the ineligibility determination shall be given in accordance with paragraph (j)(5) of this section. In addition, if the nutritional risk evaluation is not completed within the 60 day timeframe, the woman's participation shall end when her initial certification period expires. As set forth in paragraph (j)(8) of this section, notification must be given prior to any expiration of the certification period.

* * * * *

6. In § 246.14:

a. The second through the fifth sentences of the introductory text of paragraph (c)(1) are revised, the sixth through the ninth sentences are removed, and a new sixth sentence is added;

b. Paragraph (e) is revised.

The revisions read as follows:

§ 246.14 Program costs.

* * * * *

(c) * * *

(1) * * * During each fiscal year, each State agency shall expend, for nutrition education activities and breastfeeding promotion and support activities, an aggregate amount that is not less than the sum of one-sixth of the amount expended by the State agency for costs of NSA and an amount equal to its proportionate share of the national minimum expenditure for breastfeeding promotion and support activities. The amount to be spent on nutrition education shall be computed by taking one-sixth of the total fiscal year NSA expenditures. The amount to be spent by a State agency on breastfeeding promotion and support activities shall be an amount that is equal to at least its proportionate share of the national minimum breastfeeding promotion expenditure as specified in paragraph (c)(1) of this section. The national minimum expenditure for breastfeeding promotion and support activities shall be equal to $21 multiplied by the number of pregnant and breastfeeding women in the Program, based on the average of the last three months for which the Department has final data. On October 1, 1996 and each October 1 thereafter, the $21 will be adjusted annually using the same inflation percentage used to determine the national administrative grant per person. * * *

* * * * *

(e) *Recovery of vendor claims.* The State agency may retain funds collected through the recovery of claims assessed against food vendors or funds not paid to food vendors as a result of reviews of food instruments prior to payment. The State agency may use funds recovered from vendors for food and/or nutrition services and administration costs. Funds recovered as a result of violations in the food delivery system of the program may be used for costs incurred in the year in which the funds are collected, or in the year in which the initial obligation of funds incurred. The State agency shall not credit any vendor recoveries until after the vendor has had full opportunity to correct or justify the error or apparent overcharge in accordance with § 246.12(r)(5)(iii). The State agency shall report vendor collections to FNS through routine reporting procedures. The State agency shall maintain documentation to support the amount and use of funds retained under this paragraph by the State agency.

7. In § 246.15, paragraph (a) is revised to read as follows:

§ 246.15 Program income other than grants.

(a) *Interest earned on advances.* Interest earned on advances of Program funds at the State and local levels shall be treated in accordance with the provisions of 31 CFR Part 205, which

implement the requirements of the Cash Management Improvement Act of 1990. However, State agencies will not incur an interest liability to the Federal government on rebate funds for infant formula or other foods, *provided* that all interest earned on such funds is used for program purposes.

* * * * *

8. In § 246.16, paragraphs (a)(6) and (b)(3)(i) are revised to read as follows:

§ 246.16 Distribution of funds.

(a) * * *

(6) Up to one-half of 1 percent of the sums appropriated for each fiscal year, not to exceed $5,000,000 shall be available to the Secretary for the purpose of evaluating program performance, evaluating health benefits, providing technical assistance to improve State agency administrative systems preparing the biennial Participation Report to Congress described in § 246.25(b)(3), and administering pilot projects, including projects designed to meet the special needs of migrants, Indians, rural populations, and to carry out technical assistance and research evaluation projects of this program and the WIC Farmers' Market Nutrition Program.

(b) * * *

(3) * * *

(i) Not more than 1 percent of the amount of funds allocated to a State agency for supplemental foods for a fiscal year may be expended by the State agency for food costs incurred in the preceding fiscal year. FNS may authorize a State agency to expend not more than 3 percent of the amount of funds allocated to the State agency for supplemental foods for a fiscal year for expenses incurred for supplemental foods during the preceding fiscal year, if FNS determines that there has been a significant reduction in infant formula cost containment savings that affected the State agency's ability to at least maintain its participation level;

* * * * *

Dated: November 14, 1998.

Shirley R. Watkins,

Under Secretary for Food, Nutrition, and Consumer Services.

[FR Doc. 98–30753 Filed 11–17–98; 8:45 am]

BILLING CODE 3410–30–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97–NM–141–AD; Amendment 39–10888; AD 98–24–01]

RIN 2120–AA64

Airworthiness Directives; British Aerospace (Jetstream) Model 4101 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain British Aerospace (Jetstream) Model 4101 airplanes, that requires repetitive detailed visual inspections to detect cracking or other damage of certain diaphragm support structures of the forward equipment compartment; and repair, if necessary. This amendment is prompted by the issuance of mandatory continuing airworthiness information by a foreign civil airworthiness authority. The actions specified by this AD are intended to detect and correct failure of the two diaphragms that support the upper structure of the forward equipment compartment, which could accelerate fatigue damage in adjacent structure and result in reduced structural integrity of the airframe.

DATES: Effective December 23, 1998.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of December 23, 1998.

ADDRESSES: The service information referenced in this AD may be obtained from AI(R) American Support, Inc., 13850 Mclearen Road, Herndon, Virginia 20171. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Norman B. Martenson, Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2110; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain British Aerospace (Jetstream) Model 4101 airplanes was published in the **Federal Register** on January 8, 1998 (63 FR 1074). That action proposed to require repetitive detailed visual inspections to detect cracking or other damage of certain diaphragm support structures of the forward equipment compartment; and repair, if necessary.

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

Request To Allow Flight With Known Cracks

One commenter, the manufacturer, requests that the proposed AD be revised to allow operators to continue operation of an unrepaired airplane for up to 300 flight cycles following detection of cracking of certain diaphragm support structures of the forward equipment compartment. The commenter states that, during full-scale fatigue testing, failure of both diaphragms occurred, and the test continued for another 24,000 flight cycles before either of the diaphragms was replaced. The commenter further states that, during the period between detection of the cracking and replacement of the diaphragms, no damage was detected that would cause concern regarding the structural integrity of the airplane. In light of these fatigue testing data, the commenter notes that the compliance time of 300 flight cycles after detection of cracking, as specified in the service bulletin, is already a very conservative threshold.

The FAA does not concur. It is the FAA's policy to require repair of known cracks prior to further flight, except in certain cases of unusual need, as discussed below.

This policy is based on the fact that such damaged airplanes do not conform to the FAA-certificated type design and, therefore, are not airworthy until a properly approved repair is incorporated. The FAA's policy regarding flight with known cracks does allow deferral of repairs in certain cases, if there is an unusual need for a temporary deferral. Unusual needs include such circumstances as legitimate difficulty in acquiring parts to accomplish repairs. Because the FAA is not aware of any unusual need for repair deferral in regard to this AD, the FAA has determined that any subject diaphragm that is found to be cracked must be repaired prior to further flight in accordance with a method approved by the FAA. However, operators may request approval of an alternative method of compliance if data are