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DEPARTMENT OF AGRICULTURE

Food and Nutrition Service, USDA

7 CFR Part 246

RIN 0584–AC50

Special Supplemental Nutrition Program for Women, Infants and Children (WIC): WIC/Food Stamp Program (FSP) Vendor Disqualification

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 mandate uniform sanctions across State agencies for the most serious WIC Program vendor violations. The implementation of these mandatory sanctions is intended to curb vendor-related fraud and abuse in the WIC Program and to promote WIC and FSP coordination in the disqualification of vendors and retailers who violate program rules. This rule also implements a mandate of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which requires the disqualification of WIC vendors who are disqualified from the FSP.

DATES: This regulation is effective May 17, 1999. State agencies must fully implement the provisions of this rule no later than May 17, 2000, except that § 246.15 (concerning civil money penalties and fines as program income) must be implemented no later than October 1, 1999.

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SUPPLEMENTARY INFORMATION:

Executive Order 12866

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

Regulatory Flexibility Act

This final rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612). Samuel Chambers, Jr., Administrator of the Food and Nutrition Service (FNS), has certified that this rule will not have a significant impact on a substantial number of small entities. This rule will only impact WIC vendors who have committed fraud and abuse against the WIC Program or who have been disqualified from the FSP. While some of these vendors may be small entities, the number affected will not be substantial.

Paperwork Reduction Act

This final rule imposes no new reporting or recordkeeping requirements that are subject to OMB review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–20).

Executive Order 12372

The Special Supplemental Nutrition Program for Women, Infants and Children is listed in the Catalog of Federal Domestic Assistance Programs under 10.577. For reasons set forth in the final rule in 7 CFR part 3015, subpart V, and related notice (48 FR 29115), this program is included in the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to have 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 the final rule. Prior to any judicial challenge to the application of 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. Law (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, FNS generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local or tribal governments, in the aggregate, or 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 FNS 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, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Good Cause Determination

Most of the provisions in this final rule were subject to a 90-day public comment period that commenced on April 20, 1998 with the publication of a proposed rule in the **Federal Register**. In addition to the provisions proposed in the April 20, 1998 rule, this rule at § 246.12(k)(1)(i) implements the provisions in section 203(p)(1) of the William F. Goodling Child Nutrition Reauthorization Act of 1998, Pub. L. 105–336 (Goodling Act), concerning permanent disqualification of vendors convicted of trafficking or selling firearms, ammunition, explosives, or controlled substances in exchange for food instruments. Section 203(p)(2) of the Goodling Act requires the Secretary to publish a proposed rule to carry out these provisions no later than March 1, 1999 and a final rule no later than March 1, 2000.

Section 246.12(k)(1)(i) allows only minimal discretion in its implementation. Further, the substance of this provision overlaps and is intertwined with the issues proposed in

the April 20, 1998 rule. Therefore, to separately propose these provisions is unnecessary and contrary to public interest. The Administrator has determined pursuant to 5 U.S.C. 553(b) that there is good cause to publish the provisions of this rule concerning sanctions for convictions for trafficking and illegal sales without prior public comment.

Background

On April 20, 1998, the Department published a proposed rule at 63 FR 19415 to establish mandatory WIC sanctions for the most serious WIC Program violations. These WIC violations are deemed to be so serious that, under current FSP regulations, they also result in the loss of FSP authorization in response to the WIC Program disqualification. The April 20, 1998 rule also proposed to implement the requirement of section 729(j) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104–193 (PRWORA). As authorized by the law, the proposal would have required a WIC State agency to disqualify a WIC vendor who had been disqualified from the FSP, unless the State agency determined that such disqualification would create hardship for WIC participant access. In these situations, the State agency would have been required to impose a civil money penalty (CMP) in accordance with a formula established in the proposed rule. The rule also proposed the removal of the current three-year limit on WIC vendor disqualification, thus permitting permanent WIC vendor disqualification under specified circumstances.

A total of twenty-six comment letters were received during the comment period, which ended on July 20, 1998. The Department has given all comments careful consideration in the development of this final rule and would like to thank all commenters who responded to the proposal. Following is a discussion of each provision, as proposed, comments received, and an explanation of the provisions set forth in this final rule.

Implementation

As noted above, the amendment to § 246.15 (concerning civil money penalties and fines as program income) must be implemented no later than October 1, 1999. The Department has decided to require implementation no later than October 1, 1999 to coincide with fiscal year financial reporting for the WIC Program. In addition, this will give State agencies that have been using these funds in other ways the time to make the necessary budgeting adjustments.

The remaining amendments are effective May 17, 1999, but are not required to be implemented for a full year (by May 17, 2000). Establishing separate effective and implementation dates recognizes the variations among the operations of State agencies and gives them flexibility in implementation methods. For example, a State agency for which all vendor agreements are scheduled to be renewed in December 1999 might decide that it is most feasible and efficient to wait until then to implement the new sanction and appeal provisions. This way, the State agency could make the necessary changes to the new agreements without having to amend the current agreements. Another State agency that enters into agreements on a rolling basis may decide to amend the agreements as new ones are entered into, provided that agreements reflecting the new requirements are in place for all vendors prior to May 17, 2000, even if it means amending some agreements that will not expire prior to that date. Another approach would be to send a notice to all vendors informing them of the new provisions and offering them the option to either agree to the amendments to their agreements or to terminate their agreements. The year-long implementation period should give State agencies sufficient lead time to plan for an orderly replacement of any vendors that terminate their agreements because they do not agree to the new provisions.

The mandatory sanctions in this rule apply only to violations committed after the State agency has provided notice to a vendor of the new provisions, as discussed above. This means that if a vendor committed a trafficking violation prior to the time the State agency provided notice of the new six-year disqualification period for trafficking, the new mandatory sanction would not apply. Instead, the State agency would impose whatever sanction the State agency has previously imposed for trafficking. Furthermore, only mandatory sanctions imposed under the conditions of this final rule count toward the number of sanctions that trigger the doubling of sanctions, as provided under § 246.12(k)(1)(v) and (vi).

State agencies may implement, independent of the remainder of this rule, the provision concerning the disqualification of WIC vendors who have been disqualified from the FSP (§ 246.12(k)(1)(vii)) and the associated change to the WIC appeal procedures (§ 246.18(a)(1)(ii)). However, this provision may be implemented only if two conditions are met: (1) The FSP disqualification occurs after the effective date of this rule and (2) the vendor received notice prior to his opportunity to appeal the FSP disqualification that such disqualification may result in a WIC disqualification that is not be subject to administrative or judicial review under the WIC Program. The new provision limiting WIC appeals would not apply to any FSP or WIC appeals already in process.

Definition of Food Instrument

In recognition of emerging technology in the retail food delivery area relative to electronic benefits transfer (EBT), the Department proposed to revise the definition of ''food instrument'' to include an EBT transfer card. The proposed rule's definition read: ''Food instrument means a voucher, check, electronic benefits transfer card (EBT), coupon or other document which is used by a participant to obtain supplemental foods.'' One commenter was concerned that the reference to ''participant'' in this definition excluded the approved use of WIC food instruments by a participant's proxy or by an undercover agent. The commenter suggested that the phrase ''used by a participant'' be deleted from the definition of a food instrument. The commenter also suggested that the definition of ''participants'' be amended to include a WIC customer, proxy, or an undercover investigator posing as any of the above.

To avoid confusion, the Department has revised the definition of food instrument to remove the reference to participants. The Department does not, however, believe that it is necessary to revise the definition of ''participants'' to include a proxy or an undercover agent. Current regulations are already clear about the types of activities a proxy may perform on behalf of a participant. For example, current regulations at § 246.12(o) provide that a proxy may transact food instruments on behalf of a participant. Also, because undercover investigators are under the direction of the WIC State agency, there is no need to prescribe exactly the activities investigators may perform while posing as a participant.

Disqualification of WIC Vendors as a Result of FSP Disqualification

Current regulations at § 246.12(k)(1)(iii) give State agencies the option to disqualify a vendor who has been disqualified from another FNS program. Section 729(j) of the PRWORA amended section 17 of the Child

Nutrition Act of 1966 (CNA) (42 U.S.C. 1786) by adding a new section (n) that requires the Secretary to issue regulations providing criteria for the disqualification of WIC vendors who have been disqualified in the FSP. This provision states that the WIC disqualification shall be for the same length of time as the FSP disqualification, may begin at the same time or a later date than the FSP disqualification, and shall not be subject to administrative or judicial review. To implement this provision of the PRWORA and to strengthen program integrity, the proposed rule would have required mandatory disqualification of WIC vendors who had been disqualified from the FSP, unless the State agency determined that disqualification of the vendor would result in hardship for participant access. Commenters overwhelmingly supported this provision as proposed. Therefore, the proposal has been adopted with only technical changes to make clear that a WIC disqualification or CMP in lieu of disqualification based on an FSP disqualification is a mandatory sanction.

Disqualification of WIC Vendors as a Result of FSP Civil Money Penalties

Current program regulations (§ 246.12(k)(1)(iii) and (iv)) allow but do not require a State agency to disqualify a WIC vendor who is currently disqualified from any FNS program or who has been assessed an FSP CMP in lieu of disqualification. As noted above, the proposed rule would have required WIC State agencies to disqualify a vendor from WIC who has been disqualified from the FSP, unless such disqualification would result in hardship for participant access, in which case WIC State agencies would be required to impose a CMP. The proposed rule would have retained for WIC State agencies the option of disqualifying a vendor who had been assessed an FSP CMP in lieu of disqualification.

Several commenters requested that an FSP CMP be treated in the same manner as an FSP disqualification. That is, State agencies should be required to impose WIC Program disqualifications based on FSP CMPs and that such actions should not be subject to review under the WIC Program. Because the law only authorizes WIC disqualification without any administrative or judicial appeal for actions based specifically on an FSP disqualification, there is no legal basis to limit appeals for WIC actions based on FSP CMPs in the same manner as FSP disqualifications. However, the Department believes a violation that warrants disqualification under FSP rules is a serious violation, regardless of whether the FSP imposes a disqualification or a CMP in lieu of disqualification due to participant hardship. As such, this final rule retains the State agency option in § 246.12(k)(2)(ii) to disqualify a vendor against whom the FSP has assessed a CMP in lieu of disqualification due to participant hardship. Further, the Department wishes to note that an FSP participant hardship determination in no way obligates the WIC State agency to also conclude that disqualification of a vendor would result in inadequate WIC participant access. Although many WIC participants also participate in the FSP, the WIC Program and the FSP generally serve different populations. Consequently, there may be instances where disqualification would result in hardship for FSP participants but would not result in inadequate participant access for WIC participants. In these instances, the WIC State agency may choose to disqualify the violative vendor, provided the State agency documents its WIC participant access determination in the vendor's case file and provides prior notice to the vendor of the possibility of such disqualification in the vendor agreement.

In addition, this final rule makes clear that this provision only applies to FSP CMPs that are imposed in lieu of disqualification due to participant hardship. FSP CMPs imposed for other reasons may not be used as grounds to disqualify a WIC vendor. For example, an FSP transfer of ownership CMP would not warrant a WIC disqualification because these CMPs are imposed after a store has already been disqualified. In addition, a State agency may not disqualify a vendor for an FSP CMP imposed in lieu of a permanent disqualification for trafficking based on an FNS finding that the store has an effective compliance program.

The final rule clarifies that the option to impose a WIC disqualification based on an FSP CMP is considered a State agency-established sanction rather than a mandatory sanction.

The Department also wishes to clarify that WIC State agencies may not impose a WIC CMP in response to an FSP CMP. The only sanction available to the WIC State agency in response to an FSP CMP is WIC disqualification, as explained above, and that is permitted solely in cases where the FSP CMP is assessed due to FSP participant hardship.

A vendor may not request an administrative review of a WIC disqualification based on an FSP disqualification. However, a vendor may request an administrative review of a WIC disqualification based on an FSP CMP. The areas subject to review include: whether the vendor was assessed a CMP in lieu of disqualification by the FSP, whether the FSP CMP was imposed due to participant hardship, and whether the vendor agreement included the required notification that the vendor was potentially subject to WIC disqualification based on an FSP CMP. However, neither the FSP decision to impose a CMP in lieu of disqualification nor the State agency's WIC participant access determination are subject to administrative review under the WIC Program.

Length of Disqualification

The April 20, 1998 rule proposed to amend the current regulations to remove the three-year maximum disqualification period reflected in § 246.12(k)(1)(ii). This change was proposed in part to accommodate section 17(n) of the CNA (as amended by the PRWORA), which provides that a WIC disqualification based on an FSP disqualification shall be for the same length of time as the FSP disqualification and may begin at the same time or at a later date than the FSP disqualification. In addition, the change was proposed to accommodate the other WIC mandatory sanctions, which include disqualification for periods longer than three years. No negative comments were received on this change. Therefore, this rule removes the three-year limitation from the regulations. This permits both reciprocal permanent disqualification, as required by the PRWORA, and other mandatory sanctions that impose disqualification periods in excess of three years.

Mandatory WIC Vendor Sanctions

The proposed rule would have established nine program violations that warrant mandatory sanctions in addition to the mandatory reciprocal sanction requiring the disqualification of a WIC vendor as a result of an FSP disqualification. The WIC violations were based on the seven WIC Program violations that, pursuant to current § 278.1(o) of the FSP regulations, result in the loss of a retailer's FSP authorization. In the proposal, three modifications were made to the seven violations adopted from the current FSP regulations. Violations for ''trafficking'' and ''the sale of alcohol or alcoholic beverages or tobacco products in exchange for WIC food instruments'' were added to the list of violations that would result in a mandatory WIC sanction. The word ''cash'' was deleted

from the ''exchanging WIC food instruments for cash or credit'' violation, because exchanging food instruments for cash was already included in the proposed violation for trafficking.

Only one commenter opposed the establishment of uniform sanctions for serious violations. Although most commenters supported uniform sanctions, clarifications were requested on the difference between an investigation, a violation, and a sanction, and the number of incidences of each violation that trigger a mandatory sanction. For purposes of this final rule, an investigation is a method used by the State agency to determine if violations are occurring. A violation is an infraction of program regulations or other requirements. A sanction is an administrative action taken as a result of a violation. For a mandatory sanction, this rule requires a State agency to impose either a disqualification or a CMP in lieu of disqualification. Multiple violations detected during a single investigation may result in a mandatory sanction of either a disqualification for the most serious violation or multiple CMPs.

Regarding the number of incidences of each violation that trigger a mandatory sanction, the Department has determined that some violations are so serious that only one incidence warrants disqualification. For example, trafficking and the sale of alcohol or tobacco products are flagrant violations of program rules and completely undermine program goals. As such, this final rule requires a mandatory sanction for one incidence of either of these violations. All the other violations require a pattern of incidences to warrant a mandatory sanction. To set a specific number of incidences that constitutes a pattern for each violation would fail to account for the extent of the fraud or abuse being committed. For example, if a vendor overcharged $20 on a gallon of milk, the number of incidences required to demonstrate a pattern of the violation would be less than for a vendor who overcharged 5¢ on a gallon of milk. It is therefore left to the discretion of the State agency to determine the number of incidences that reflect a pattern, based on the type and severity of violation.

Finally, the Department proposed in § 246.12(k)(1)(iv) that the State agency would not have to provide the vendor with prior notice that violations were occurring and the possible consequences of the violations prior to implementing any of the mandatory sanctions. Two commenters opposed this provision. One commenter opposed this provision because it would be contrary to State legislative reform that includes a mandate to notify vendors of such violations and give them an opportunity to correct problems before imposing any sanctions. The other commenter suggested retention of current language that allows the State agency to provide a vendor with prior warning and an opportunity to correct the problem.

The Department decided to adopt the provision with minor modifications to distinguish between prior warning and prior notice. The State agency must provide a vendor with prior notice (i.e. the notice of administrative action) at least fifteen days prior to the effective date of a sanction, except for a disqualification imposed for the ''vendors convicted for trafficking/illegal sales'' violation, which is required by statute to be effective on the date of receipt of the notice of administrative action. The final rule at § 246.12(k)(3) reads: ''The State agency does not have to provide the vendor with prior warning that violations were occurring before imposing any of the sanctions in this paragraph (k).'' The location of the provision in the final rule clarifies that it applies to both mandatory and State agency-established sanctions. The provision clearly makes the use of prior warning a State agency option. However, such prior warning cannot be provided for the trafficking violations or ''the sale of alcohol or alcoholic beverages or tobacco products'' violation because these violations warrant a mandatory sanction for the first incidence. Also, while prior warning for other violations may be acceptable for the first incidence, continual use of such warning undermines the State agency's fraud and abuse investigation and prevention efforts.

Below is a chart illustrating the mandatory sanctions required by this final rule and a discussion of the WIC violations that warrant a mandatory sanction.

WIC violation*	Proposed rule sanction	Final rule sanction
Vendors convicted of trafficking/illegal sales	Not proposed/Non-discretionary.	Permanent.
Administrative finding of trafficking/illegal sales	Permanent	6 years.
Sale of alcoholic beverages or tobacco products	3 years	3 years.
Claiming reimbursement in excess of documented inventory	3 years	3 years.
Overcharging	3 years	3 years.
Outside of authorized channels, including unauthorized vendors or persons	3 years	3 years.
Supplemental food not received	3 years	3 years.
Credit or non-food items	1 year	3 years.
Unauthorized food items**	3 years	1 year
2nd mandatory sanction, excluding sanctions for trafficking convictions & FSP DQs	Double sanction	Double sanction.
3rd mandatory sanction, excluding sanctions for trafficking convictions & FSP DQs	Permanent	Double sanction & no CMP option.
Disqualification from FSP	Same as FSP DQ	Same as FSP DQ.

*All violations require a pattern of incidences to warrant a mandatory sanction, except the violations for ''vendors convicted of trafficking/illegal sales,'' an administrative finding of ''trafficking/illegal sales,'' and ''the sale of alcohol or alcoholic beverages or tobacco products,'' which only require one incidence to warrant a mandatory sanction.

**The violation for ''unauthorized food items'' was not a separate violation under the proposal. It would have been considered under the violation: ''Charging for food items not received by the WIC customer or for food provided in excess of those listed on the food instrument.''

I. Trafficking or Illegal Sales

On October 31, 1998, the President signed the Goodling Act, which includes a non-discretionary provision regarding the permanent disqualification of ''vendors convicted of trafficking or illegal sales.'' (Conviction means an action by a criminal court and not an administrative finding by the State agency or its review office.)

This provision has been included in the final rule with only minor revisions to make it consistent with current WIC

terminology. The law mandates that the permanent disqualification for convicted vendors shall be effective on the date of receipt of the notice of administrative action. Further, the law specifies that convicted vendors are not entitled to receive any compensation for revenues lost as a result of a disqualification which is later overturned. Finally, the law allows a State agency, at its discretion, to assess a CMP in lieu of permanent disqualification if: (1) The State agency determines that the disqualification would result in inadequate participant access; or (2) the State agency determines that the vendor had, at the time of the violation, an effective policy and program in place to prevent this type of violation, and the ownership of the vendor was not aware of, did not approve of, and was not involved in the conduct of the violation. State agencies may choose to implement one, both, or neither of the two options for assessing CMPs in lieu of disqualification based on a conviction for trafficking or illegal sales. The option(s) selected by the State agency must be reflected in the State Plan. These new provisions are at § § 246.12(k)(1)(i) and 246.4(a)(14)(v).

The inclusion of this legislative mandate necessitated modifications to the proposed rule with respect to two violations that would have resulted in permanent disqualification. First, the length of disqualification for an administrative finding of the trafficking violation has been reduced in the final rule from the proposed permanent disqualification to a six-year disqualification. (An administrative finding of trafficking is a trafficking violation that has not resulted in a conviction for trafficking by a court of law, either because the officials responsible for criminal prosecution have declined to prosecute the matter or because the criminal action is not complete.) In addition, the length of disqualification for a third mandatory sanction has been reduced in the final rule from the proposed permanent disqualification to a sanction equal to double the disqualification period for the current violation with no option to impose a CMP. These sanctions were modified to set them apart from the permanent disqualification required by the Goodling Act for vendors convicted of trafficking or illegal sales.

In the proposed rule, trafficking was defined as the ''buying or selling of WIC food instruments for cash or consideration other than eligible food.'' Twelve commenters indicated that this definition needs further clarification. Three commented that the phrase ''or consideration other than eligible food'' could be interpreted to include other less egregious violations, such as the violation for exchanging non-food items for food instruments. One commenter pointed out that, under the proposed rule, selling a non-WIC cereal (''other than eligible food'') could be considered trafficking. In response to these concerns, the Department has deleted the phrase ''or consideration other than eligible food'' from the definition of the trafficking violation in this final rule.

II. Sale of Alcoholic Beverages or Tobacco Products

Under the proposal, a vendor would have been disqualified for three years for the sale of alcohol or alcoholic beverages or tobacco products in exchange for food instruments. Commenters generally agreed with the proposal. One commenter suggested that selling alcohol is as intolerable as selling illicit drugs or firearms for food instruments, and because of the immediate danger alcohol poses to the fetus, a permanent disqualification is warranted. Another commenter suggested that lottery tickets and gasoline be added to this violation, because selling these non-food items is just as egregious as selling alcohol or tobacco products. In this final rule, the Department has retained a three-year disqualification for this violation. As stated earlier in this preamble, in recognition of their obvious inappropriate nature with respect to the WIC Program, only one incidence of the sale of alcohol or alcoholic beverages or tobacco products in exchange for food instruments is necessary to trigger the mandatory sanction for this violation. In addition, as discussed below, the mandatory sanction for exchanging non-food items for food instruments has been increased to three years in this final rule, thus accommodating the commenter's concern regarding other non-food items.

III. Claiming Reimbursement in Excess of Documented Inventory

In response to the proposed violation for claiming reimbursement in excess of documented inventory, commenters requested clarification of the term ''documented inventory.'' One commenter asserted that many small rural stores will not have detailed documentation regarding their monthly inventories. Like any business, a retail store is required for tax purposes to maintain records on its purchases, receipts, and inventory. Although the type of recordkeeping may vary based on the size of a store, all vendors should have up-to-date inventory records. Current regulations at § 246.12(i)(4) include ''review of inventory records'' as one of the review methods for on-site monitoring visits. This method of review can be used to detect vendors who are, for example, redeeming food instruments for unauthorized stores, exchanging unauthorized food or non-food items for food instruments, or trafficking.

The final rule requires a pattern of this violation in order to trigger a mandatory sanction. A pattern for this violation can be established during a single review where a vendor's records indicate that the store's redemptions for a specific food item exceed its documented inventory for a number of months. The requirement of a pattern for this violation also responds to a commenter who suggested graduated sanctions based on the severity of the inventory shortfall. The evidence necessary to show a pattern of abuse for this violation depends on the magnitude of the shortfalls and the period of time over which they occur. For example, a pattern can be established over a short period of disproportionately large inventory shortfalls or over an extended period of time of small inventory shortfalls.

IV. Overcharging

On the proposed violation for ''charging WIC customers more for food than non-WIC customers or charging more than the current shelf or contract price,'' commenters were concerned about establishing a pattern for this violation, distinguishing between outright fraud and abuse and inadvertent human error, and having a sanction that is appropriate for the violation. As noted above in this preamble, the Department has modified this violation in the final rule to establish that a pattern of incidences is necessary to warrant a mandatory sanction. In addition, the Department has clarified that the evidence necessary to establish a pattern is influenced by both the severity and number of the incidences of a violation.

The intent to commit a violation versus inadvertent human error is not a distinction that State agencies must establish in order to impose sanctions, including sanctions for overcharging. The vendor sanctions are not criminal; they are imposed in order to protect the integrity of the WIC Program. If stores consistently overcharge customers for purchases, customers take their business elsewhere regardless of whether the overcharges are intentional or inadvertent. Likewise, when a pattern of overcharging is established, the State agency will be required to impose a mandatory sanction on the vendor

regardless of whether the violation is intentional or inadvertent. Current regulations at § 246.12(f)(2)(ix), which cover the requirements for vendor agreements, state: ''The food vendor shall be accountable for actions of employees in the utilization of food instruments or provision of supplemental foods.'' The WIC Program has limited resources and cannot tolerate vendors whose employment practices repeatedly result in direct losses to the Program.

Six commenters questioned the severity of the sanction for this violation. Overcharging is one of the most common vendor violations. Funds lost through overcharges could otherwise be used to serve more participants. As such, the sanction for this type of violation must be sufficient to deter this type of fraud and abuse. Consequently, the Department has retained the three-year sanction for this violation in the final rule.

One commenter suggested that vendors should be granted the opportunity to correct overcharging problems as outlined in § 246.12(r)(5)(iii) in the current regulations, which states: ''When payment for a food instrument is denied or delayed, or a claim for reimbursement is assessed, the affected food vendor shall have the opportunity to correct or justify the overcharge or error.* * *'' Another commenter noted that the regulations already require vendors to refund the difference between their reported price for the food package and the actual redemption price. The violation, as written in this final rule, does not prohibit the State agency from pursuing claims for overcharging before it rises to a level where it warrants a mandatory sanction. The mandatory sanction for this violation is only triggered when a pattern of overcharging is established. However, permitting vendors to just pay claims when the State agency detects overcharges provides vendors with no incentive to ensure that overcharging does not occur in the first place.

V. Outside of Authorized Channels and Unauthorized Persons

Several commenters requested a clarification that would distinguish the violation for ''accepting WIC food instruments from unauthorized persons'' from the violations for ''trafficking'' and ''receiving, transacting, and/or redeeming WIC food instruments outside of authorized channels.'' One commenter requested that the Department establish procedures a vendor must follow to verify an authorized person. Another commenter pointed out that some State agencies do not use WIC identification cards and rely on banks to return WIC checks to vendors when the signatures do not match. Due to the variety of methods used by State agencies to document and verify participants, it is impractical for the Department to establish a single set of procedures to verify an authorized person. As noted above in the Definition of Food Instrument section of this preamble, the only persons authorized to use food instruments to obtain supplemental foods are participants, designated proxies, and undercover investigators. Nevertheless, even participants can be unauthorized persons if they are transacting someone else's food instruments. In response to commenters' concerns, the Department consolidated the ''unauthorized person'' and ''outside authorized channels'' violations into a single violation in the final rule at § 246.12(k)(1)(iii)(D). This violation reads: ''A pattern of receiving, transacting, and/or redeeming food instruments outside of authorized channels, including the use of an unauthorized vendor and/or an unauthorized person.'' This violation includes situations in which a vendor, who owns more than one store, not all of which are authorized, accepts food instruments at an unauthorized store and redeems them through an authorized store.

VI. Supplemental Food Not Received

Commenters suggested several revisions to the sanction for the violation ''charging for food items not received by the WIC customer or for food provided in excess of those listed on the food instrument.'' One commenter suggested that the violation be modified to read: ''* * * for non-substitutionary foods provided in excess.* * *'' Another commenter requested that the violation differentiate between a minor violation, such as being shorted a dozen eggs, and a more significant violation, such as receiving nothing for a food instrument. The commenter suggested that only the more significant violation should warrant a three-year disqualification.

To accommodate commenters' concerns, the Department has deleted the phrase ''charging for food provided in excess of those listed on the food instrument'' from this violation and included it as part of a new violation, discussed below in the Unauthorized Food Items section of this preamble. The violation now reads ''a pattern of charging for supplemental food not received by the participant.'' The Department has retained the three-year disqualification for this violation, notwithstanding commenters' concerns about the severity of the sanction. The Department believes that charging for supplemental food not received is comparable to ''overcharging'' and thus should carry the same sanction. Nevertheless, ''charging for supplemental food not received'' is distinct enough from ''overcharging'' to justify its being a separate violation. For example, a vendor may charge the State agency the full price on a food instrument, even though the participant chose not to purchase several items listed on the food instrument. This would be an incidence of the charging for supplemental food not received by the participant. On the other hand, a participant may receive all of the food items listed on the food instrument, but the vendor charges more for the items than the current shelf prices. This would be an incidence of overcharging. In the final rule, these violations will result in three-year sanctions.

VII. Credit or Non-Food Items

Under the proposed rule, ''exchanging WIC food instruments for credit'' would trigger a one-year sanction. One commenter requested that the term ''credit'' be defined. Another commenter indicated that providing credit in exchange for food instruments is comparable to trafficking and suggested that the credit violation warrants a more severe sanction. Commenters expressed similar concerns about the proposed one-year sanction for ''exchanging non-food items, other than alcohol or alcoholic beverages or tobacco, for WIC food instruments.''

In response to commenters' suggestions, the Department has consolidated the two proposed violations into a single violation in the final rule at § 246.12(k)(1)(iii)(F). This violation reads: ''a pattern of providing credit or non-food items, other than alcohol, alcoholic beverages, tobacco products, cash, firearms, ammunition, explosives or controlled substances as defined in 21 U.S.C. 802, in exchange for food instruments.'' The Department also increased the sanction for this violation to a three-year disqualification. Consolidating the violations recognizes that providing credit in exchange for food instruments is essentially granting the participant access to any item in a store, including non-food items. As such, the Department concurs with the commenter who suggested that a more severe sanction is warranted for this violation. The Department wishes to clarify that if a vendor allows the credit to be used for the purchase of alcohol

or alcoholic beverages or tobacco products, then the vendor's actions fall under the ''alcohol/tobacco'' violation, which triggers a sanction after one incidence. In addition, if a vendor allows the credit to be used for any of the items included in the trafficking violation, then the vendor's actions fall under that violation, which also triggers a sanction after one incidence.

VIII. Unauthorized Food Items

Under the proposal, providing unauthorized food items in exchange for food instruments would fall under the violation for ''charging for * * * food provided in excess of those listed on the food instrument,'' which would warrant a three-year mandatory sanction. Comments from the vendor community expressed concern that the sanction was too severe for the violation. They suggested that the final rule make a clear distinction between incidences of minor ''substitution'' of food items and exchanging non-food items for food instruments. Further, they suggested that substitution of food items should result in a lesser sanction. In response to these concerns, the Department has inserted a new violation in the final rule at § 246.12(k)(1)(iv) that reads: ''a pattern of providing unauthorized food items in exchange for food instruments, including charging for supplemental food provided in excess of those listed on the food instrument.'' Rather than including it in the violation for ''charging for supplemental food not received by the participant,'' the Department decided to include ''charging for supplemental food provided in excess of those listed on the food instrument'' in this violation because such food is technically unauthorized.

The distinction made in this final rule between unauthorized food items and non-food items is consistent with program goals and strengthens the uniformity of the mandatory sanction system. Nevertheless, the Department wishes to make clear that it does not consider ''providing unauthorized food items in exchange for food instruments'' (i.e. ''substitution'') to be a minor violation. The WIC Program is a nutrition assistance program that provides specific foods to participants in order to improve their health and nutritional well-being. In addition, one-fourth of participants are able to receive program benefits due to rebates from manufacturers. Substituting unauthorized food items for WIC-approved food items may undermine State agency contracts with rebate manufacturers and is contrary to the mission and goals of the WIC Program.

Treatment of Mandatory Sanctions

One commenter suggested that the sanctions for WIC violations be additive within a single investigation. Rather than make disqualification periods additive, the Department established lengths of disqualification for the mandatory sanctions that are appropriate for the severity of the violations. As such, State agencies no longer need to establish multiple violations during an investigation in order to justify the length of disqualification. In situations in which a vendor is found to have committed multiple violations during the course of a single investigation, while all violations must be reflected in the notice of administrative action to the vendor, including State agency-established violations, the length of disqualification for a mandatory sanction shall be determined by the most serious violation. This approach recognizes that one investigation results in one disqualification, which represents a fair balance of both the Department's desire to address program violations and the vendor community's concern regarding the lengths of disqualification periods.

However, as discussed below in the Formula for Calculating Civil Money Penalties section of this preamble, the Goodling Act recognizes that multiple violations may occur during a single investigation and, thus, established limits on CMPs for both violations and investigations involving vendors convicted of trafficking/illegal sales. For consistency, the Department decided to adopt this approach for all CMPs, including those imposed as a result of State agency-established sanctions. Thus, in situations in which the State agency determines that disqualification of the vendor will result in inadequate participant access, the State agency must impose a sanction that includes CMPs for each violation that warrants a mandatory sanction.

The proposed rule included a provision to double the mandatory sanction if the vendor had been assessed a previous sanction. Four commenters requested clarification of this provision. Two commenters asked whether the second sanction had to be for the same violation as the first. One commenter asked whether the doubling applies to the more serious of the first and second sanctions or whether it only applies to the second sanction. Another commenter asked whether the doubling occurs if the first sanction is a State agency-established sanction. To clarify this provision in the final rule at § 246.12(k)(1)(v), the Department has revised it to read: ''When a vendor, who previously has been assessed a sanction for any of the violations in paragraphs (k)(1)(ii) through (k)(1)(iv) of this section, receives another sanction for any of these violations, the State agency shall double the second sanction. Civil money penalties may only be doubled up to the limits allowed under paragraph (k)(1)(x)(C) of this section'' (i.e., $10,000 per violation and $40,000 per investigation). This revision clarifies that while both the first and second sanction must be mandatory sanctions, they do not need to be for the same violation. The final rule also clarifies that it is the sanction for the second violation that is doubled. However, mandatory sanctions for vendors convicted of trafficking/illegal sales and those based on FSP disqualification do not count toward this provision and cannot be doubled. In addition, State agency-established sanctions do not count toward this provision.

As noted earlier, the sanction for a vendor's third mandatory sanction for a WIC violation has been revised in the final rule at § 246.12(k)(1)(vi). The provision now reads: ''When a vendor, who previously has been assessed two or more sanctions for any of the violations listed in paragraphs (k)(1)(ii) through (k)(1)(iv) of this section, receives another sanction for any of these violations, the State agency shall double the third sanction and all subsequent sanctions. The State agency shall not impose civil money penalties in lieu of disqualification for third or subsequent sanctions for violations listed in (k)(1)(ii) through (k)(1)(iv) of this section.'' No CMP option is allowed in these cases because by a third or subsequent sanction the State agency should have had time to make other arrangements to ensure adequate participant access. In addition, the Department specifically omitted the violation for vendors convicted of trafficking/illegal sales contained in paragraph (k)(1)(i) of this final rule from the CMP prohibition portion of this provision. This omission was made to reflect the requirement in the Goodling Act that gives the State agency the option to impose a CMP in lieu of permanent disqualification for this violation. However, as noted in the conference report that accompanied the Goodling Act, Congress expressed its expectation that State agencies should take the strongest possible action against each vendor who has been repeatedly convicted of trafficking or illegal sales of food instruments.

State Agency Vendor Sanctions

Recognizing that there are other violations in addition to those covered by the mandatory sanctions, the Department has left the authority to establish sanctions for any additional violations to State agency discretion, as long as vendors are made aware of such violations and sanctions prior to their imposition. Under the proposed rule at § 246.12(k)(1)(vi), the period of disqualification for State agency-established violations would be limited to six months. Six commenters requested more State agency discretion regarding State agency sanctions. As discussed in the Mandatory WIC Vendor Sanctions and Participant Access sections of this preamble, the final rule provides State agencies with little discretion in the imposition and disposition of the mandatory sanctions. This restriction of discretion ensures uniformity in the application of the mandatory sanctions across the WIC Program. However, the Department is sensitive to commenters' requests for more discretion with regard to State agency sanctions. To balance the restriction of discretion regarding mandatory sanctions, the Department decided to provide State agencies with as much discretion as possible in the imposition and disposition of State agency sanctions in this final rule.

Seven commenters requested that the sanction period for State agency sanctions be increased to one year. Two commenters suggested that the three-year maximum disqualification period contained in the current regulations should apply to State agency sanctions. One commenter indicated that a six-month limit was not appropriate unless State agency sanctions were additive. Another commenter requested clarification of whether State agency sanctions may be doubled and whether State agencies may permanently disqualify vendors for non-compliance with State agency sanctions.

To address these comments, the Department made several modifications in the final rule. The maximum disqualification period for State agency sanctions has been increased from six months to one year. In addition, State agency sanctions may be additive within an investigation or doubled, provided that the total disqualification period does not exceed one year per investigation and that any fines or CMPs imposed do not exceed $10,000 per violation and $40,000 per investigation. As required for the mandatory sanctions, when a vendor fails to comply with the terms of a CMP imposed in lieu of disqualification for a State agency-established violation, such as failing to pay the CMP, the State agency must disqualify the vendor for the length of time corresponding to the violation for which the sanction was assessed. The provisions regarding State agency sanctions have been moved to § 246.12(k)(2) of the final rule and include the State agency option to disqualify vendors who have been assessed an FSP CMP for hardship.

One commenter requested clarification of whether State agency sanctions may be added to a mandatory sanction required by this rule. As noted above in the Treatment of Mandatory Sanctions section, State agency sanctions may not be added to a mandatory sanction within the same investigation. However, State agencies may impose State agency sanctions from the same investigation in situations where mandatory sanctions are not upheld on appeal. Another point the Department has clarified in the final rule is that State agency sanctions do not count toward the provisions in § 246.12(k)(1)(v) and (vi) of the final rule, which cover vendors who have been assessed two or more mandatory sanctions.

One commenter requested that the Department provide some examples of possible State agency sanctions. Several commenters suggested violations that they believe warrant State agency sanctions. These suggested violations include redeeming food instruments outside of valid dates, selling stale-dated WIC food items, and charging sales tax. This list is not intended to be exhaustive but to give State agencies and other interested parties an idea of the types of violations that could be included in a State agency sanction schedule. Any State agency-established sanctions must be reflected in the State Plan under the description of the State agency's food delivery system, as currently required in § 246.4(a)(14). The final rule also makes clear that State agency sanctions may include fines, disqualification, or CMPs in lieu of disqualification.

Voluntary Withdrawal or Non-renewal in Lieu of Disqualification

Under § 246.12(k)(2) of the proposed rule, State agencies would not be able to accept voluntary withdrawal or use non-renewal of a vendor agreement as an alternative to disqualification. This provision was proposed in response to a September 1995 OIG audit that revealed that some WIC State agencies allowed vendors to voluntarily withdraw from the WIC Program in lieu of disqualification. In addition, some State agencies opted not to renew abusive vendors' contracts or agreements rather than disqualify them for violations that warrant disqualification. The Department does not support these practices, because they allow a vendor to circumvent reciprocal disqualification from the FSP. Enhanced cooperation between WIC and the FSP in the detection and removal of abusive vendors and retailers will result in more effective and efficient vendor/retailer management in both programs.

Most commenters supported this provision, provided that it only applies to the mandatory sanctions required by this rule. It was the Department's intent that the provision only apply to mandatory sanctions, because only mandatory sanctions trigger a reciprocal FSP action. As such, in § 246.12(k)(1)(viii), the final rule prohibits a State agency from either accepting voluntary withdrawal or using non-renewal as an alternative to imposing a mandatory sanction. When a State agency establishes that a vendor has committed a violation that warrants a mandatory sanction, the State agency is required to either disqualify the vendor or impose a CMP in lieu of disqualification due to inadequate participant access. State agencies continue to have the discretion to allow the use of voluntary withdrawal and non-renewal in connection with State agency-established sanctions.

Two commenters suggested that State agencies be permitted to use voluntary withdrawal in special circumstances, such as when a witness is not able to testify at an administrative review. The Department recognizes that on occasion circumstances may arise that impair the State agency's ability to successfully defend its action during an administrative review. Rather than grant exceptions to the rules, the Department believes that, when extenuating circumstances arise, the State agency should attempt to reschedule or postpone the review. The intent of this regulation is to provide State agencies and vendors with clear, firm, uniform rules for mandatory sanctions and administrative review procedures. As such, the commenter's suggestion is not adopted.

One commenter suggested that the Department clarify that a vendor may not voluntarily withdraw to avoid paying a CMP. As noted below in the Payment of Civil Money Penalties section of this preamble, the Department has added a paragraph in the final regulations at § 246.12(k)(6) that addresses this issue. If a vendor does not pay a CMP or voluntarily withdraws to avoid paying a CMP, the State agency must impose a disqualification

corresponding to the violation for which the CMP was assessed and notify the vendor of such disqualification.

Participant Access

The impact on participants' access to supplemental foods has always been a primary consideration for State agencies when determining whether to disqualify a violative vendor or to impose a CMP in lieu of disqualification. A participant access determination is, in fact, the only means available to State agencies to ensure that the sanction imposed is in the best interests of the Program. Several commenters noted the various terms used in the current regulations and the proposed rule to describe these determinations, including ''inadequate participant access,'' ''participant hardship,'' and ''undue hardship.'' One commenter suggested the Department use ''undue hardship.'' Another commenter asserted that State agencies should determine ''participant hardship, not participant inconvenience.'' The general consensus among commenters was that the terminology should be consistent throughout the regulations. In response to this request, the term ''inadequate participant access'' has been used throughout the final rule. The Department decided this term most closely describes the type of determination that State agencies are required to make.

Several commenters requested that the Department either clearly define the term ''participant access'' or establish specific criteria for State agencies' participant access determinations. In addition, Congress mandated in section 203(p)(1) of the Goodling Act that the Secretary establish criteria for ''hardship to participants'' determinations that may apply to vendors convicted of trafficking/illegal sales. The Department decided that any established criteria should apply to all participant access determinations, not just participant access determinations for vendors convicted of trafficking/illegal sales. However, a formal regulatory definition of ''participant access'' that includes all possible criteria for such determinations is inappropriate because it would not be flexible enough to apply to the variety of geographical areas where the WIC Program operates. What may be acceptable criteria for rural areas may be unreasonable for urban areas and vice versa.

To address this issue, the final rule in § 246.12(k)(8) requires: ''When making participant access determinations, the State agency shall, at a minimum, consider the availability of other authorized vendors in the same area as the violative vendor and any geographic barriers to using such vendors.'' This requirement focuses on the two central questions of these determinations: (1) Is there an adequate number of authorized vendors operating in the area to meet participant demand? and (2) Are there any specific geographic barriers that would significantly restrict participants access to using those authorized vendors? If the answers to these questions indicate that disqualification of the vendor would result in inadequate participant access, then the State agency must impose a CMP in lieu of disqualification (except that the State agency may not impose a CMP in lieu of disqualification either as a result of an FSP CMP or for a third or subsequent sanction as specified in § 246.12(k)(1)(vi)).

Current regulations at § 246.12(k)(1)(iv) require State agencies to document participant access determinations in cases of WIC disqualification for FSP CMPs, and current § 246.12(k)(1)(v) requires these determinations be made prior to disqualifying a vendor. However, neither provision provides specific guidance as to the documentation of these determinations. The proposed rule at § 246.12(k)(1)(viii) intended to clarify that a State agency must include in the file of each vendor, for whom participant access is required to be considered, a written record of its participation access determination and any supporting justification. Under the final rule, these determinations and their documentation are required for all mandatory sanctions, except for the vendors convicted of trafficking/illegal sales violation in § 246.12(k)(1)(i). Participant access determinations and their documentation are required for vendors convicted of trafficking/illegal sales only if the State agency chooses to exercise its option to consider participant access in determining the sanction for this violation. Participant access determinations and documentation are also required for WIC disqualification based on FSP CMPs, if the State agency chooses to exercise this option. Although not required, the Department also recommends that State agencies conduct and document participant access determinations prior to imposing disqualifications or CMPs for other State agency-established sanctions.

One commenter suggested that requiring State agencies to document participant access determinations is illegal under the Paperwork Reduction Act because it imposes an additional file burden on State agencies. This is not the case because participant access determinations, often targeted by vendors during administrative reviews, have always been required to be documented in vendors' files. The reason why the proposed rule explicitly stated that participant access determinations must be documented in vendors' files is because State agencies might have decided that documentation of these determinations would no longer be necessary, since they would no longer be subject to administrative review. Although no longer subject to administrative review, participant access determinations continue to be the only means of determining whether to impose a disqualification or a CMP and are still subject to audit. Further, if necessary, these determinations could become part of court proceedings. In the final rule, the documentation requirements for participant access determinations are reflected in § 246.12(k)(1)(i), (k)(1)(ix), and (k)(2)(ii)(B).

One commenter rebutted the statement in the proposed rule's preamble that State agencies are uniquely qualified to determine whether the disqualification of a specific vendor would result in inadequate participant access. Nevertheless, State agencies are uniquely qualified to make participant access determinations, because their primary concern is WIC Program participants. Whereas vendors know the volume of their own WIC business, only State agencies know the geographic distribution of WIC participants and of other WIC-authorized vendors, which are the primary criteria for making participant access determinations. The Department strongly believes that State agencies are in the best position to make participant access determinations that are in the best interests of program participants. In addition, the Department strongly believes that administrative reviews should focus on whether a vendor committed the violation(s) of which it has been accused, rather than whether a violative vendor agrees with a State agency's participant access determination. Consequently, the final rule maintains that State agencies' participant access determinations are not subject to administrative review.

Formula for Calculating Civil Money Penalties

To ensure that State agencies use a consistent method to determine the amount of a CMP imposed in lieu of disqualification, the Department proposed in § 246.12(k)(1)(x) a formula for calculating a CMP. The proposed formula is similar to the one used by the FSP and several WIC State agencies. Commenters generally supported the

use of a standard formula to calculate CMPs. As such, the final rule retains the provision with minor modifications.

The formula in the final rule is revised to establish a $40,000 per investigation cap on CMPs. Section 203(p)(1) of the Goodling Act amended section 17(o)(4)(B) of the CNA to mandate that the total amount of CMPs, imposed for violations investigated as part of a single investigation concerning vendors convicted of trafficking in food instruments or selling firearms, ammunition, explosives, or controlled substances in exchange for food instruments, must not exceed $40,000. The Department has decided to adopt the $40,000 per investigation cap for all CMPs, including those imposed as a result of State agency-established sanctions. As noted above in the Treatment of Mandatory Sanctions section of this preamble, for the mandatory sanctions listed in § 246.12(k)(1)(ii) through (k)(1)(iv), the length of the disqualification period that is imposed for violations investigated as part of a single investigation may not exceed the disqualification period corresponding to the most serious violation. However, in cases in which the State agency is required to impose a CMP in lieu of disqualification because of inadequate participant access, the State agency must impose a sanction that includes CMPs for each violation that warrants a mandatory sanction, provided that the amount of the CMP for each violation does not exceed $10,000 and the total amount of the CMPs imposed as a result of a single investigation does not exceed $40,000.

One commenter requested that the Department clarify whether the CMP formula applies to State agency-established sanctions. The final rule makes clear in § 246.12(k)(1)(x) that the CMP formula only applies to the mandatory sanctions required by this rule. For State agency sanctions, State agencies may use either this CMP formula or their own formula. However, for consistency, the Department has adopted the $10,000 per violation and $40,000 per investigation maximums for all CMPs, including CMPs resulting from State agency sanctions.

One commenter requested a clarification of what is meant by ''the month during which the store was charged with violations.'' Three commenters suggested that the CMP formula should be modified to allow for six months of redemption data rather than the proposed twelve months. In response to these comments, the final rule in § 246.12(k)(1)(x)(A) reads: ''Determine the vendor's average monthly redemptions for at least the 6-month period ending with the month immediately preceding the month during which the notice of administrative action is dated.''

Another commenter asked how to calculate a redemption average for a vendor who has been authorized under the WIC Program for less than twelve months. The Department recognizes that some flexibility in the application of the CMP formula is necessary. For example, if a vendor has been on the Program for three months or was closed for several months for renovations, the State agency will need to modify the formula to use available data to calculate an average that reflects the vendor's monthly redemptions. Generally, the State agency should use the same standard for all vendors and only modify the formula to address unusual circumstances.

Two commenters requested clarification of how to calculate a CMP in lieu of permanent disqualification. The commenters were unsure what to use in the last step of the formula for ''the number of months for which the store would have been disqualified.'' In recognition of the fact that permanent disqualification in the WIC Program is only imposed for the most severe violations—vendors convicted of trafficking/illegal sales and permanent disqualification from the FSP—the Department decided to require the maximum CMP allowed for such violations under the Secretary's authority as set in section 203(p)(1) of the Goodling Act. The final rule at § 246.12(k)(1)(x)(C) reads in part: ''For a violation that warrants permanent disqualification, the amount of the civil money penalty shall be $10,000.''

The final CMP formula is as follows: (1) Determine the vendor's average monthly redemptions for at least the 6-month period ending with the month immediately preceding the month during which the notice of administrative action is dated; (2) Multiply the average monthly redemptions figure by 10 percent (.10); and (3) Multiply the product from Step 2 by the number of months for which the store would have been disqualified. This is the amount of the CMP, provided that it does not exceed $10,000. In addition, the total amount of CMPs imposed for violations investigated as part of a single investigation must not exceed $40,000. Following is an example using this methodology:

Monthly WIC Redemptions

Jan.—$10,000
Feb.—$8,500
Mar.—$12,300
Apr.—$9,000
May—$7,000
June—$5,000
July—$6,000
Aug.—$4,000
Sept.—$5,500
Oct.—$7,000
Nov.—$7,000
Dec.—$5,000

Average Monthly Redemptions	$7,192.00
Multiply by 10 percent	x .10
	$719.00
Proposed disqualification period=1 year or 12 months:	x 12
Civil Money Penalty	$8,630.00

Payment of Civil Money Penalties

The final rule also makes clear in § 246.12(k)(5) that State agencies may use installment plans for the collection of CMPs and fines. State agencies must ensure that they are complying with Federal and State laws concerning the collection of interest on such debts. Section 246.12(k)(6) of the final rule makes clear that if a vendor does not pay, only partially pays, or fails to timely pay a CMP, the State agency must disqualify the vendor for the length of the disqualification corresponding to the violation for which the CMP was assessed (for a period corresponding to the most serious violation in cases where a mandatory sanction included the imposition of multiple CMPs as a result of a single investigation). ''Failure to timely pay a CMP'' includes the failure to pay a CMP in accordance with an installment plan approved by a State agency. This section is not intended to usurp a State agency's prerogative to revise an installment plan to accommodate a vendor who has a valid reason for missing a payment. These two provisions apply to both mandatory and State agency-established sanctions.

Disposition of Civil Money Penalties

Under the proposal at § 246.15(b), money collected from the imposition of CMPs or vendor fines would be treated as program income. Commenters were generally split on their support of or opposition to this provision. Those opposing wanted State agencies to retain the current flexibility to use the revenue generated from the fines and penalties as they deem appropriate. The Department believes that fines and penalties imposed as a result of WIC Program violations, including any interest collected as a result of such fines and penalties, should be used to support WIC Program objectives. As such, this final rule requires that fines and CMPs be treated as program income.

Vendor Appeals

Under the proposed rule, regulations at § 246.18(a)(1)(ii) would be revised to implement section 729(j) of the PRWORA, which provides that WIC vendors who are disqualified as a result of their disqualification as retailers from the FSP are not entitled to administrative or judicial review in the WIC Program. No comments that specifically opposed this provision were received. In the final rule, minor revisions were made to the proposed language to make it consistent with current WIC terminology regarding participant access.

In addition, the Department wishes to clarify that while section 729(j) of the PRWORA eliminates the WIC administrative review for vendors who are disqualified from WIC as a result of FSP disqualification, it does not eliminate administrative review for vendors who are disqualified from WIC based on an FSP CMP. While regulations at § 246.12(k)(2)(ii) allow WIC disqualification based on FSP CMPs for hardship, State agencies that use this option must continue to offer vendors disqualified under this provision an opportunity to appeal the WIC disqualification. However, neither the FSP decision to impose a CMP in lieu of disqualification nor the WIC State agency's participant access determination are subject to administrative review under the WIC Program. The areas subject to review include: whether the vendor was assessed a CMP in lieu of disqualification by the FSP, whether the FSP CMP was imposed due to ''participant hardship,'' and whether the vendor agreement included the required notice that the vendor was potentially subject to WIC disqualification based on an FSP CMP.

In response to the proposed rule, one commenter asked whether vendors may continue to redeem WIC food instruments during the appeals process. Under § 246.18(b)(1) of the current regulations, the State agency must provide the vendor with written notification of an administrative action not less than 15 days in advance of the effective date of the action. The State agency has discretion to make the action effective any time after the 15-day notice period has expired. The State agency's decision about when to make a disqualification effective determines whether a vendor may continue WIC operations during an appeal. For example, if a State agency decides to make its disqualification action effective 20 days after the notice of administrative action is received, then once that date passes, a vendor would not be able to redeem food instruments, even if the vendor had an appeal pending.

Another commenter asked whether vendor agreements may be renewed during the appeals process. If a vendor's agreement will expire during the administrative appeal process, the State agency should make the disqualification effective no later than the agreement's expiration. This is necessary to avoid the incongruous result of approving a vendor for reauthorization immediately after having made the decision to disqualify the same vendor.

As noted below in the Vendor Agreements section of this preamble, § 246.18(b) is revised to require the State agency to advise vendors of possible FSP disqualification based on WIC violations in the WIC notice of administrative action. In addition to this change, the words ''if any'' were inserted into § 246.18(b)(1) of the final rule to recognize that there are certain actions, such as WIC disqualification based on FSP disqualification, that are no longer subject to review.

Vendor Agreements

Under the proposal, State agencies would be required to add a provision to the vendor agreement or contract to advise vendors that disqualification from the FSP will result in disqualification from the WIC Program or, under certain circumstances, assessment of a CMP in lieu of disqualification. Commenters supported this provision. As such, this final rule adds paragraph (f)(2)(xix) to § 246.12 to require a statement to this effect in the vendor agreement. One commenter suggested that the Department add language to this section to cover the situation in which a State agency imposes a CMP in lieu of disqualification for a WIC Program violation. In response to this comment and to provide notice to vendors of the full range of mandatory sanctions, a new paragraph (f)(2)(xxi) has been added to § 246.12. This paragraph reads: ''The State agency shall disqualify a vendor for the mandatory sanctions listed in paragraphs (k)(1)(ii) through (k)(1)(iv) of this section. However, if the State agency determines that disqualification of the vendor would result in inadequate participant access, the State agency shall impose a civil money penalty in lieu of disqualification, except that, as provided in paragraph (k)(1)(vi) of this section, the State agency shall not impose a civil money penalty in lieu of disqualification for third or subsequent sanctions for violations in paragraphs (k)(1)(ii) through (k)(1)(iv) of this section.''

In addition to the above changes to this section, a new paragraph (f)(2)(xx) has been added to 246.12 in order to provide notice to vendors of the non-discretionary provision of the Goodling Act, which mandates permanent disqualification for WIC vendors convicted of trafficking or illegal sales of firearms, ammunition, explosives, or controlled substances. The final rule also amends § 246.12(f)(2)(xviii) to provide vendors notice that disqualification of a vendor based on a FSP disqualification and the State agency's participant access determinations are not subject to review. A new paragraph, (f)(2)(xxii), also has been added to § 246.12 in order to provide notification in the vendor agreement that disqualification from WIC may result in a disqualification in the FSP that is not subject to administrative or judicial review in the FSP.

Timely Referral of WIC Disqualified Vendors

To remove disqualified WIC vendors from participating as retailers in the FSP, FNS Instruction 906–1, issued December 1, 1988, requires the State agency to provide information on disqualified WIC vendors to the appropriate FNS office within 15 days after the date a vendor's opportunity to file for a WIC administrative appeal has expired or all of a vendor's WIC administrative appeals have been exhausted. To strengthen the Department's effort to ensure that reciprocal disqualification actions are taken in a timely manner, the 15-day notification period required by FNS Instruction 906–1 was included in the proposed rule at § 246.12(k)(3). The proposed rule also amended § 246.18(b)(1) to require the State agency to include in the notification of administrative action a statement that reads: ''This disqualification from WIC may result in disqualification as a retailer in the Food Stamp Program.'' To remind vendors that this type of reciprocal disqualification may not subject to appeal under the FSP, the following sentence was added to the notification statement in the final rule: ''Such disqualification may not subject to administrative or judicial review under the Food Stamp Program.''

In its May 6, 1998 proposed rule, the FSP proposed, under § 278.6(e)(8)(ii)(B), would require the WIC State agency to provide FNS with a signed and dated copy of the notice informing vendors that they could be disqualified from the FSP based on WIC violations. In

addition, the FSP proposed rule would require that such notice be provided to vendors prior to their time to request administrative review. To meet this requirement, the State agency would need to provide the appropriate FNS office with a copy of the notice of administrative action sent to a violative vendor. One method of meeting this requirement would be to provide FNS with a copy of the notice of administrative action at the same time it is sent to the vendor and then follow-up with FNS within fifteen days of the date the action is final. Another method would be to send FNS a copy of the vendor's notice of administrative action, which includes a notation that the action is final, within fifteen days of the date the action is final. A State agency, which sends vendors a notice of administrative action followed by a formal notice of disqualification, could meet this requirement in a timely manner by providing FNS with copies of both notices at the same time they are sent to vendors.

While six commenters supported the proposed 15-day notification period, one commenter suggested that it be extended to thirty days to account for scheduling and staffing constraints. The Department believes that a 15-day notification period is both reasonable and preferable and that with current technologies, including fax and e-mail, State agencies should be able to design a system to notify FNS in a timely manner. Therefore, the final rule retains the 15-day notification requirement in § 246.12(k)(1)(xi) and requires the State agency to send a copy of FNS the notice of administrative action. The final rule deletes *judicial review* from this provision in order to initiate the 15-day period at either the expiration of a vendor's time to file for an *administrative review* or the exhaustion of all of a vendor's administrative reviews. This change is being made in order to be consistent with the original requirements outlined in FNS Instruction 906–1 and to avoid undue delays between the time of the actual WIC disqualification and the reciprocal FSP disqualification. This would also eliminate the need for each State agency to determine the full range of potential bases for judicial review and the corresponding time periods in which the requests for judicial review must be filed.

An additional change is made by the final rule regarding notifying FNS of WIC CMPs. While the May 6, 1998 FSP proposed rule would not specifically mandate FSP disqualifications based on WIC CMPs, the WIC violation underlying a CMP in lieu of WIC disqualification could be used as a basis for a FSP disqualification. Therefore, the final rule requires WIC State agencies to notify FNS of WIC vendors who have been assessed CMPs in lieu of disqualification and the length of the disqualification periods corresponding to the vendors' violations.

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 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, the definition of ''Food instrument'' is revised to read as follows:

§ 246.2 Definitions.

* * * * *

Food instrument means a voucher, check, electronic benefits transfer card (EBT), coupon or other document which is used to obtain supplemental foods.

* * * * *

3. In § 246.4, paragraphs (a)(14)(v) through (a)(14)(x) are redesignated as paragraphs (a)(14)(vi) through (a)(14)(xi), and a new paragraph (a)(14)(v) is added to read as follows:

§ 246.4 State Plan.

(a) * * *

(14) * * *

(v) The option exercised by the State agency to sanction vendors pursuant to § 246.12(k)(1)(i).

* * * * *

4. In § 246.12:

a. paragraph (f)(2)(xviii) is revised;

b. paragraphs (f)(2)(xix) and (f)(2)(xx) are redesignated as paragraphs (f)(2)(xxiii) and (f)(2)(xxiv), respectively;

c. new paragraphs (f)(2)(xix), (f)(2)(xx), (f)(2)(xxi), and (f)(2)(xxii) are added;

d. paragraph (f)(3) is revised; and

e. paragraph (k) is revised.

The revisions and additions read as follows:

§ 246.12 Food delivery systems.

* * * * *

(f) * * *

(2) * * *

(xviii) The State agency may disqualify a vendor or impose a civil money penalty in lieu of disqualification for reasons of program abuse. The State agency does not have to provide the vendor with prior warning that violations were occurring before imposing such sanctions. The vendor has the right to appeal a State agency decision pertaining to disqualification, denial of application to participate, or other adverse actions that affect participation during the contract or agreement performance period; except that, expiration of a contract or agreement with a vendor, disqualification of a vendor as a result of disqualification from the Food Stamp Program, and the State agency's determination regarding participant access are not subject to review.

(xix) The State agency shall disqualify a vendor who has been disqualified from the Food Stamp Program. However, if the State agency determines that disqualification of the vendor would result in inadequate participant access, the State agency shall impose a civil money penalty in lieu of WIC disqualification.

(xx) The State agency shall permanently disqualify a vendor convicted of trafficking in food instruments or selling firearms, ammunition, explosives, or controlled substances (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) in exchange for food instruments. A vendor shall not be entitled to receive any compensation for revenues lost as a result of such violation. If reflected in its State Plan, the State agency shall impose a civil money penalty in lieu of a disqualification for this violation when it determines, in its sole discretion, and documents (in accordance with paragraph (k)(8) of this section) that—

(A) disqualification of the vendor would result in inadequate participant access; or

(B) the vendor had, at the time of the violation, an effective policy and program in effect to prevent trafficking; and the ownership of the vendor was not aware of, did not approve of, and was not involved in the conduct of the violation.

(xxi) The State agency shall disqualify a vendor for the mandatory sanctions listed in paragraphs (k)(1)(ii) through (k)(1)(iv) of this section. However, if the State agency determines that disqualification of the vendor would result in inadequate participant access, the State agency shall impose a civil money penalty in lieu of

disqualification, except that, as provided in paragraph (k)(1)(vi) of this section, the State agency shall not impose a civil money penalty in lieu of disqualification for third or subsequent sanctions for violations in paragraphs (k)(1)(ii) through (k)(1)(iv) of this section.

(xxii) Disqualification from the WIC Program may result in disqualification as a retailer in the Food Stamp Program. Such disqualification may not be subject to administrative or judicial review under the Food Stamp Program.

* * * * *

(3) Other provisions shall be added to the contracts or agreements to implement the State agency options in paragraphs (k)(2)(i), (k)(2)(ii), and (r)(5)(iv) of this section.

* * * * *

(k) *Participant and vendor sanctions.*

(1) *Mandatory vendor sanctions.*

(i) *Permanent disqualification.* The State agency shall permanently disqualify a vendor convicted of trafficking in food instruments or selling firearms, ammunition, explosives, or controlled substances (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) in exchange for food instruments. A vendor shall not be entitled to receive any compensation for revenues lost as a result of such violation. If reflected in its State Plan, the State agency shall impose a civil money penalty in lieu of a disqualification for this violation when it determines, in its sole discretion, and documents (in accordance with paragraph (k)(8) of this section) that—

(A) Disqualification of the vendor would result in inadequate participant access; or

(B) The vendor had, at the time of the violation, an effective policy and program in effect to prevent trafficking; and the ownership of the vendor was not aware of, did not approve of, and was not involved in the conduct of the violation.

(ii) *Six-year disqualification.* The State agency shall disqualify a vendor for six years for: one incidence of buying or selling food instruments for cash (trafficking); or one incidence of selling firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802, in exchange for food instruments.

(iii) *Three-year disqualification.* The State agency shall disqualify a vendor for three years for:

(A) One incidence of the sale of alcohol or alcoholic beverages or tobacco products in exchange for food instruments; or

(B) A pattern of claiming reimbursement for the sale of an amount of a specific supplemental food item which exceeds the store's documented inventory of that supplemental food item for a specific period of time; or

(C) A pattern of charging participants more for supplemental food than non-WIC customers or charging participants more than the current shelf or contract price; or

(D) A pattern of receiving, transacting and/or redeeming food instruments outside of authorized channels, including the use of an unauthorized vendor and/or an unauthorized person; or

(E) A pattern of charging for supplemental food not received by the participant; or

(F) A pattern of providing credit or non-food items, other than alcohol, alcoholic beverages, tobacco products, cash, firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802, in exchange for food instruments.

(iv) *One-year disqualification.* The State agency shall disqualify a vendor for one year for a pattern of providing unauthorized food items in exchange for food instruments, including charging for supplemental food provided in excess of those listed on the food instrument.

(v) *Second mandatory sanction.* When a vendor, who previously has been assessed a sanction for any of the violations in paragraphs (k)(1)(ii) through (k)(1)(iv) of this section, receives another sanction for any of these violations, the State agency shall double the second sanction. Civil money penalties may only be doubled up to the limits allowed under paragraph (k)(1)(x)(C) of this section.

(vi) *Third or subsequent mandatory sanction.* When a vendor, who previously has been assessed two or more sanctions for any of the violations listed in paragraphs (k)(1)(ii) through (k)(1)(iv) of this section, receives another sanction for any of these violations, the State agency shall double the third sanction and all subsequent sanctions. The State agency shall not impose civil money penalties in lieu of disqualification for third or subsequent sanctions for violations listed in paragraphs (k)(1)(ii) through (k)(1)(iv) of this section.

(vii) *Disqualification based on a Food Stamp Program disqualification.* The State agency shall disqualify a vendor who has been disqualified from the Food Stamp Program. The disqualification shall be for the same length of time as the Food Stamp Program disqualification, may begin at a later date than the Food Stamp Program disqualification, and shall not be subject to administrative or judicial review under the WIC Program.

(viii) *Voluntary withdrawal or nonrenewal of agreement.* The State agency shall not accept voluntary withdrawal of the vendor from the Program as an alternative to disqualification for the violations listed in paragraphs (k)(1)(i) through (k)(1)(iv) of this section, but shall enter the disqualification on the record. In addition, the State agency shall not use nonrenewal of the vendor agreement as an alternative to disqualification.

(ix) *Participant access determinations.* Prior to disqualifying a vendor for a Food Stamp Program disqualification pursuant to paragraph (k)(1)(vii) of this section or for any of the violations listed in paragraphs (k)(1)(ii) through (k)(1)(iv) of this section, the State agency shall determine if disqualification of the vendor would result in inadequate participant access. The participant access determination shall be made in accordance with paragraph (k)(8) of this section. If the State agency determines that disqualification of the vendor would result in inadequate participant access, the State agency shall impose a civil money penalty in lieu of disqualification. However, as provided in paragraph (k)(1)(vi) of this section, the State agency shall not impose a civil money penalty in lieu of disqualification for third or subsequent sanctions for violations in paragraphs (k)(1)(ii) through (k)(1)(iv) of this section. The State agency shall include documentation of its participant access determination and any supporting documentation in the file of each vendor who is disqualified or receives a civil money penalty in lieu of disqualification.

(x) *Civil money penalty formula.* For each violation subject to a mandatory sanction, the State agency shall use the following formula to calculate a civil money penalty imposed in lieu of disqualification:

(A) Determine the vendor's average monthly redemptions for at least the 6-month period ending with the month immediately preceding the month during which the notice of administrative action is dated;

(B) Multiply the average monthly redemptions figure by 10 percent (.10);

(C) Multiply the product from paragraph (k)(1)(x)(B) of this section by the number of months for which the store would have been disqualified. This is the amount of the civil money penalty, provided that the civil money penalty shall not exceed $10,000 for each violation. For a violation that warrants permanent disqualification,

the amount of the civil money penalty shall be $10,000. When during the course of a single investigation the State agency determines a vendor has committed multiple violations, the State agency shall impose a CMP for each violation. The total amount of civil money penalties imposed for violations investigated as part of a single investigation shall not exceed $40,000.

(xi) *Notification to FNS.* The State agency shall provide the appropriate FNS office with a copy of the notice of administrative action and information on vendors it has either disqualified or imposed a civil money penalty in lieu of disqualification for any of the violations listed in paragraphs (k)(1)(i) through (k)(1)(iv) of this section. This information shall include the name of the vendor, address, identification number, the type of violation(s), and the length of disqualification or the length of the disqualification corresponding to the violation for which the civil money penalty was assessed, and shall be provided within 15 days after the vendor's opportunity to file for a WIC administrative review has expired or all of the vendor's WIC administrative reviews have been completed.

(xii) *Multiple violations during a single investigation.* When during the course of a single investigation the State agency determines a vendor has committed multiple violations (which may include violations subject to State agency sanctions), the State agency shall disqualify the vendor for the period corresponding to the most serious mandatory violation. However, the State agency shall include all violations in the notice of administration action. If a mandatory sanction is not upheld on appeal, then the State agency may impose a State agency-established sanction.

(2) *State agency vendor sanctions.*

(i) The State agency may impose sanctions for violations that are not specified in paragraphs (k)(1)(i) through (k)(1)(iv) of this section as long as such violations and sanctions are included in the vendor agreement. State agency sanctions may include disqualifications, civil money penalties assessed in lieu of disqualification, and fines. The total period of disqualification imposed for State agency violations investigated as part of a single investigation may not exceed one year. A civil money penalty or fine shall not exceed $10,000 for each violation. The total amount of civil money penalties imposed for violations investigated as part of a single investigation shall not exceed $40,000.

(ii) The State agency may disqualify a vendor who has been assessed a civil money penalty for hardship in the Food Stamp Program, as provided under 7 CFR 278.6. The length of such disqualification shall correspond to the period for which the vendor would otherwise have been disqualified in the Food Stamp Program. If a State agency decides to exercise this option, the State agency shall:

(A) Include notification that it will take such disqualification action in its vendor agreement, in accordance with paragraph (f)(3) of this section; and

(B) Determine if disqualification of the vendor would result in inadequate participant access in accordance with paragraph (k)(8) of this section. If the State agency determines that disqualification of the vendor would result in inadequate participant access, the State agency shall not disqualify the vendor or impose a civil money penalty in lieu of disqualification. The State agency shall include documentation of its participant access determination and any supporting documentation in each vendor's file.

(3) *Prior warning.* The State agency does not have to provide the vendor with prior warning that violations were occurring before imposing any of the sanctions in this paragraph (k).

(4) *Appeal procedures.* The State agency shall provide adequate procedures for vendors to appeal a disqualification from participation under the Program as specified in § 246.18.

(5) *Installment plans.* The State agency may use installment plans for the collection of civil money penalties and fines.

(6) *Failure to pay a civil money penalty.* If a vendor does not pay, only partially pays, or fails to timely pay a civil money penalty assessed in lieu of disqualification, the State agency shall disqualify the vendor for the length of the disqualification corresponding to the violation for which the civil money penalty was assessed (for a period corresponding to the most serious violation in cases where a mandatory sanction included the imposition of multiple civil money penalties as a result of a single investigation).

(7) *Actions in addition to sanctions.* Vendors may be subject to actions in addition to the sanctions in this section, such as claims for improper or overcharged food instruments and penalties outlined in § 246.23, in the case of deliberate fraud.

(8) *Participant access determination criteria.* When making participant access determinations, the State agency shall consider, at a minimum, the availability of other authorized vendors in the same area as the violative vendor and any geographic barriers to using such vendors.

(9) *Participant sanctions.* The State agency shall establish procedures designed to control participant abuse of the Program. Participant abuse includes, but is not limited to, intentionally making false or misleading statements or intentionally misrepresenting, concealing or withholding facts to obtain benefits; sale of supplemental foods or food instruments to, or exchange with, other individuals or entities; receipt from food vendors of cash or credit toward purchase of unauthorized food or other items of value in lieu of authorized supplemental foods; and physical abuse, or threat of physical abuse, of clinic or vendor staff. The State agency shall establish sanctions for participant abuse. Such sanctions may, at the discretion of the State agency, include disqualification from the Program for a period up to three months. Warnings may be given prior to the imposition of sanctions. Before a participant is disqualified from the Program for alleged abuse, that participant shall be given full opportunity to appeal a disqualification as set forth in § 246.9.

(10) *Referral for prosecution.* The State agency shall refer food vendors and participants who abuse the Program to Federal, State or local authorities for prosecution under applicable statutes, where appropriate.

* * * * *

5. In § 246.15, a sentence is added to the end of paragraph (b) to read as follows:

§ 246.15 Program income other than grants.

* * * * *

(b) * * * Money received by the State agency as a result of civil money penalties or fines assessed against a vendor and any interest charged in the collection of these penalties and fines shall be considered as program income.

6. In § 246.18:

a. paragraph (a)(1) is revised;

b. the first sentence of paragraph (a)(3) is revised;

c. paragraph (b)(1) is revised.

The revisions read as follows:

§ 246.18 Administrative appeal of State agency decisions.

(a) * * *

(1) The right of appeal shall be granted when a local agency's or a vendor's application to participate is denied or, during the course of the contract or agreement, when a local agency or vendor is disqualified or any other adverse action which affects participation is taken. The following are exceptions to this provision:

(i) Expiration of a contract or agreement with a vendor and the State agency's determination regarding participant access shall not be subject to administrative review; and

(ii) Disqualification of a vendor as a result of disqualification from the Food Stamp Program shall not be subject to administrative or judicial review.

* * * * *

(3) Except for disqualifications assessed under § 246.12(k)(1)(i), which shall be made effective on the date of receipt of the notice of administrative action, the State agency may take adverse action against a vendor after the 15-day advance notification period mandated by paragraph (b)(1) of this section has elapsed. * * *

(b) * * *

(1) Written notification of the administrative action, the procedures to file for an administrative review, if any, the cause(s) for and the effective date of the action. Such notification shall be provided to participating vendors not less than 15 days in advance of the effective date of the action. When a vendor is disqualified due in whole or in part to violations specified in § 246.12(k)(1), such notification shall include the following statement: ''This disqualification from WIC may result in disqualification as a retailer in the Food Stamp Program. Such disqualification may not be subject to administrative or judicial review under the Food Stamp Program.'' In the case of disqualification of local agencies, the State agency shall provide not less than 60 days advance notice of pending action.

* * * * *

Dated: March 12, 1999.

Samuel Chambers, Jr.,

Administrator.

[FR Doc. 99–6465 Filed 3–17–99; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98–CE–92–AD; Amendment 39–11075; AD 99–06–11]

RIN 2120–AA64

Airworthiness Directives; British Aerospace HP137 Mk1, Jetstream Series 200, and Jetstream Models 3101 and 3201 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that applies to all British Aerospace HP137 Mk1, Jetstream series 200, and Jetstream Models 3101 and 3201 airplanes. This AD requires inspecting the elevator bias spring assembly for correct installation and to assure that the correctly manufactured bias spring is installed. This AD also requires replacing any incorrectly manufactured bias spring, reworking any incorrectly installed bias spring assembly, inspecting the link assembly for distortion or damage, and replacing any distorted and/or damaged parts. This AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for the United Kingdom. The actions specified by this AD are intended to prevent failure of the bearings in the elevator down bias spring assembly caused by the installation of an incorrectly manufactured bias spring or damage or distortion to the assembly, which could result in reduced or loss of control of the airplane.

DATES: Effective April 26, 1999.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of April 26, 1999.

ADDRESSES: Service information that applies to this AD may be obtained from British Aerospace Regional Aircraft, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland; telephone: (01292) 479888; facsimile: (01292) 479703. This information may also be examined at the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 98–CE–92–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106; or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mr. S.M. Nagarajan, Aerospace Engineer, FAA, Small Airplane Directorate, 1201 Walnut, suite 900, Kansas City, Missouri 64106; telephone: (816) 426–6932; facsimile: (816) 426–2169.

SUPPLEMENTARY INFORMATION:

Events Leading to the Issuance of This AD

A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to all British Aerospace HP137 Mk1, Jetstream series 200, and Jetstream Models 3101 and 3201 airplanes was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on December 8, 1998 (63 FR 67631). The NPRM proposed to require inspecting the elevator bias spring assembly for correct installation and to assure that the correctly manufactured bias spring is installed. The NPRM also proposed to require replacing any incorrectly manufactured bias spring, reworking any incorrectly installed bias spring assembly, inspecting the link assembly for distortion or damage, and replacing any distorted and/or damaged parts. Accomplishment of the proposed actions as specified in the NPRM would be in accordance with Jetstream Alert Service Bulletin 27–A–JA980606, Original Issue: July 6, 1998, Revision 1: July 31, 1998.

The NPRM was the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for the United Kingdom.

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were received on the proposed rule or the FAA's determination of the cost to the public.

The FAA's Determination

After careful review of all available information related to the subject presented above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed except for minor editorial corrections. The FAA has determined that these minor corrections will not change the meaning of the AD and will not add any additional burden upon the public than was already proposed.

Cost Impact

The FAA estimates that 350 airplanes in the U.S. registry will be affected by this AD, that it will take approximately 1 workhour per airplane to accomplish this action, and that the average labor rate is approximately $60 an hour. Parts cost approximately $40 per airplane. Based on these figures, the total cost impact of this AD on U.S. operators is estimated to be $35,000, or $100 per airplane.

Regulatory Impact

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism