§ 2424.22 [Amended]

■ 15. Amend section 2424.22 as follows:
■ a. In paragraph (b)(3), add ''and'' after the semi-colon;
■ b. In paragraph (b)(4), remove the semi-colon and the word ''and'' from the end of the paragraph and add a period in their place; and
■ c. Remove paragraph (b)(5).

§ 2424.24 [Amended]

■ 16. Amend section 2424.24 as follows:
■ a. In paragraph (c)(3), add the word ''and'' after the semi-colon;
■ b. In paragraph (c)(4), remove the semi-colon and the word ''and'' from the end of the paragraph and add a period in their place; and
■ c. Remove paragraph (c)(5).

§ 2424.25 [Amended]

■ 17. Amend section 2424.25 by removing paragraph (c)(3).

§ 2424.26 [Amended]

■ 18. Amend section 2424.26 as follows:
■ a. Add the word ''and'' after the semi-colon at the end of paragraph (c)(1)(iv);
■ b. In paragraph (c)(2), remove the semi-colon and the word ''and'' from the end of the paragraph and add a period in their place; and
■ c. Remove paragraph (c)(3).

PART 2429—MISCELLANEOUS AND GENERAL REQUIREMENTS

■ 19. The authority cited for part 2429 continues to read as follows:

Authority: 5 U.S.C. 7134; § 2429.18 also issued under 28 U.S.C. 2112(a).

■ 20. Section 2429.21 is amended by revising paragraph (b) to read as follows:

§ 2429.21 Computation of time for filing papers.

* * * * *

(b) Except when filing an unfair labor practice charge pursuant to part 2423 of this subchapter, a representation petition pursuant to part 2422 of this subchapter, and a request for an extension of time pursuant to § 2429.23(a) of this part, when this subchapter requires the filing of any paper with the Authority, the General Counsel, a Regional Director, or an Administrative Law Judge, the date of filing shall be determined by the date of mailing indicated by the postmark date or the date a facsimile is transmitted. If no postmark date is evident on the mailing, it shall be presumed to have been mailed 5 days prior to receipt. If the date of facsimile transmission is unclear, the date of transmission shall be the date the facsimile transmission is received. If the filing is by personal delivery, it shall be considered filed on the date it is received by the Authority or the officer or agent designated to receive such materials. If the filing is deposited with a commercial delivery service that will provide a record showing the date the document was tendered to the delivery service, it shall be considered filed on the date when the matter served is deposited with the commercial delivery service.

* * * * *

■ 21. Section 2429.22 is revised to read as follows:

§ 2429.22 Additional time after service by mail or commercial delivery.

Except as to the filing of an application for review of a Regional Director's Decision and Order under § 2422.31 of this subchapter, whenever a party has the right or is required to do some act pursuant to this subchapter within a prescribed period after service of a notice or other paper upon such party, and the notice or paper is served on such party by mail or commercial delivery, 5 days shall be added to the proscribed period: Provided, however, that 5 days shall not be added in any instance where an extension of time has been granted.

■ 22. Section 2429.25 is revised to read as follows:

§ 2429.25 Number of copies and paper size.

Unless otherwise provided by the Authority or the General Counsel, or their designated representatives, as appropriate, or under this subchapter, and with the exception of any prescribed forms, any document or paper filed with the Authority, General Counsel, Administrative Law Judge, Regional Director, or Hearing Officer, as appropriate, under this subchapter, together with any enclosure filed therewith, shall be submitted on 8½ by 11 inch size paper, using normal margins and font sizes. The original and four (4) legible copies of each document or paper must be submitted. Where facsimile filing is permitted pursuant to § 2429.24(e), one (1) legible copy, capable of reproduction, shall be sufficient. A clean copy capable of being used as an original for purposes such as further reproduction may be substituted for the original.

■ 23. Section 2429.27 is amended by revising paragraph (d) to read as follows:

§ 2429.27 Service; statement of service.

* * * * *

(d) The date of service or date served shall be the day when the matter served is deposited in the U.S. mail, delivered in person, deposited with a commercial delivery service that will provide a record showing the date the document was tendered to the delivery service or, in the case of facsimile transmissions, the date transmitted.

■ 24. Add § 2429.29 to subpart B to read as follows:

§ 2429.29 Content of filings.

Any document that a party files in a proceeding covered by this subchapter that is before the Authority or the Office of Administrative Law Judges must include a table of contents if the document exceeds 10 double-spaced pages in length.

Dated: September 25, 2009.

Carol Waller Pope,

Chairman.

[FR Doc. E9–23552 Filed 10–7–09; 8:45 am]

BILLING CODE 6727–01–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 246

[FNS–2009–0001]

RIN 0584–AD71

Special Supplemental Nutrition Program for Women, Infants and Children (WIC): Vendor Cost Containment

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule adopts, with changes, an interim rule published on November 29, 2005 amending the WIC regulations. The final rule incorporates into program regulations new legislative requirements for vendor cost containment that affect the selection, authorization, and reimbursement of retail vendors. These requirements are contained in the Child Nutrition and WIC Reauthorization Act of 2004, enacted on June 30, 2004. The final rule reflects the statutory provisions that require State agencies to implement a vendor peer group system, competitive price criteria, and allowable reimbursement levels in a manner that ensures the WIC Program pays authorized vendors competitive prices for supplemental foods. It also requires State agencies to ensure vendors that derive more than 50 percent of their annual food sales revenue from WIC food instruments (''above-50-percent vendors'') do not cause higher food costs for the program than do other vendors (''regular vendors''). The intent

of these provisions is to maximize the number of eligible women, infants, and children served with available Federal funding.

DATES: *Effective Date:* This rule is effective November 9, 2009.

FOR FURTHER INFORMATION CONTACT: Debra Whitford, Chief, Policy and Program Development Branch, Supplemental Food Programs Division, Food and Nutrition Service, 3101 Park Center Drive, Room 522, Alexandria, Virginia 22302, (703) 305–2746.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This rule has been determined to be Significant and was reviewed by the Office of Management and Budget in conformance with Executive Order 12866.

Regulatory Impact Analysis Summary

As required for all rules designated as Significant by the Office of Management and Budget, a Regulatory Impact Analysis was developed for the WIC Vendor Cost Containment Final Rule. A complete copy of the Impact Analysis is available by contacting the person indicated in the **FOR FURTHER INFORMATION CONTACT** section of this Preamble.

Need for Action

This action is needed to implement the vendor cost containment provisions of the Child Nutrition and WIC Reauthorization Act of 2004, Public Law 108–265, which amended the Child Nutrition Act (CNA). The rule requires WIC State agencies to operate vendor management systems that effectively contain food costs by ensuring that prices paid for supplemental foods are competitive. The rule also responds to data which indicate that WIC food expenditures increasingly include payments to above-50-percent vendors whose prices are not governed by the market forces that affect most retail grocers. As a result, the prices charged by these vendors tend to be higher than those of other retail grocery stores participating in the program. To ensure the program pays competitive prices, this rule confirms the codification of the new statutory requirements in the interim rule for State agencies to use in evaluating vendor applicants' prices during the vendor selection process and when paying vendors for supplemental foods following authorization, with a few exceptions. However, in response to comments, the interim rule's requirement for weighting food instruments in quarterly cost neutrality assessments has been made optional in § 246.12(g)(4)(i)(D) of this final rule. Also, the requirement for recouping excess payments or terminating vendor agreements based on food instruments which had exceeded cost neutrality levels calculated during quarterly cost neutrality assessments, but were submitted for redemption within the maximum allowable reimbursement levels in effect at the time of redemption, has been removed from § 246.12(g)(4)(i)(D). Further, the final rule includes one new requirement based on the comments received; a sentence has been added to § 246.12(g)(4) stating the State agency must inform all vendors of the criteria for peer groups, and must inform each individual vendor of its peer group assignment. This one new requirement is not expected to increase the administrative burden of State agencies since State agencies are already doing this, as indicated during the processing of the certification and exemption requests.

While the Child Nutrition and WIC Reauthorization Act mandates that State agencies establish peer groups, competitive price criteria and allowable reimbursement levels, and states that these requirements must result in the outcome of paying above-50-percent vendors no more than regular vendors, the Act does not specify particular criteria for peer groups or acceptable methods of setting competitive price criteria and allowable reimbursement levels. The Food and Nutrition Service (FNS) considered using the interim rule to mandate specific means of developing peer groups, competitive price criteria and allowable reimbursement levels in order to ensure the outcome of this legislation was achieved. However, given the responsibility of the State agencies to manage WIC as a discretionary grant program, the varying retail food market conditions in each State, and the wide variations in current vendor cost containment systems operated by State agencies, the interim rule provided State agencies with flexibility to develop their own peer groups, competitive price criteria and allowable reimbursement levels.

The State agency vendor cost containment plans and exemption requests approved by FNS following the implementation of the interim rule reflected considerable diversity in peer group criteria, competitive price criteria, and allowable reimbursement levels. Paragraph 246.12(g)(4)(vi) of the interim rule required State agencies which authorized above-50-percent vendors to obtain certification for their vendor cost containment systems from FNS. Also, State agencies could seek an exemption from the requirement to establish peer groups under § 246.12(g)(4)(v), from the requirements for a geographic peer group criterion, or for the use of more than one peer group criterion under § 246.12(g)(4)(ii)(A). The peer group requirements applied to all State agencies, regardless of whether above-50-percent vendors were authorized. These vendor cost containment certification submissions and requests for exemption provided the data needed to determine whether State agency vendor cost containment systems actually reflected the flexibility intended by the interim rule. The following chart summarizes this data from the vendor cost containment plans submitted by the 32 State agencies which sought certification from FNS:

Peer group criteria/reimbursement policy	Number of State agencies using the peer group criteria/ reimbursement policy
Geography/Population Density	26
Number of Cash Registers	11
Type of Ownership (*e.g.*, Sole Proprietorship, Corporate)	3
Size (*e.g.*, Square Footage)	6
Type of Store (*e.g.*, Small Neighborhood Store, Chain)	11
WIC Sales Volume	10
Separate Peer Groups for Supercenter Stores or Commissaries	9
Separate Peer Groups for Above-50-Percent Vendors; Paid Statewide Average	13
Above-50-Percent Vendors in Same Peer Groups with Regular Vendors; Paid Statewide Average	16
Above-50-Percent Vendors in Same Peer Groups with Regular Vendors; Paid Peer Group Average	3

Further, FNS granted exemptions from the peer group requirements in entirety to 28 State agencies which did not authorize above-50-percent vendors. In addition, FNS granted exemptions from the requirement for a geographic peer group criterion to all 10 State agencies which had requested such exemptions. Finally, FNS granted exemptions from the requirement to use more than one peer group criterion to both State agencies which had requested such exemptions; for both of these State agencies, the geographic peer group criterion is the only peer group criterion.

Thus, the interim rule gave State agencies flexibility to design cost containment practices that would be effective in their own markets and would ensure adequate participant access. The final rule maintains this flexibility, while continuing to ensure that above-50-percent vendors do not result in higher costs to the program than regular vendors as required by the CNA.

Benefits

The WIC Program will benefit from the provisions of this rule by reducing unnecessary food expenditures, thereby increasing the potential to serve more eligible women, infants, and children for the same cost. The rule should ensure that payments to vendors reflect competitive prices for WIC foods, particularly regarding above-50-percent vendors. Previously, the WIC Program paid above-50-percent vendors more for supplemental foods than it paid other authorized vendors. Under the interim rule, State agencies that chose to authorize these vendors needed to demonstrate in their certification requests that payments to such vendors would not be higher on average per food instrument than payments to comparable vendors.

FNS conservatively estimated that implementation of the interim rule would result in a cost savings of approximately $75 million annually, as discussed in the Regulatory Impact Analysis for the interim rule. As previously noted, one State agency has already reported that it has been able to serve more than 40,000 additional participants because of the savings resulting from implementation of the interim rule. However, due to other factors which impact on food costs, such as inflation in commodity prices, it is not possible to confirm with absolute certainty that food costs for the Program have declined because of the interim rule. Even so, FNS stands by its estimate of savings since it was based on a comparison of regular vendor prices and above-50-percent vendor prices before the interim rule, when the prices of above-50-percent vendors were usually higher than the prices of regular vendors.

Costs

In order to comply with the interim rule, State agencies needed to make one-time changes in their vendor cost containment systems. Some State agencies were already in full or partial compliance with the rule, while others needed to demonstrate that they met the conditions for an exemption from all or some of the vendor peer group system requirements. As indicated by the State agency comments on the interim rule, many State agencies, particularly those that chose to authorize above-50-percent vendors, incurred additional costs and administrative burdens to achieve compliance with its provisions.

Of the eleven WIC State agencies which submitted comments on the interim rule, nine addressed the administrative burden resulting from implementation of the interim rule. All nine of these State agencies stated that implementation of the interim rule had required a substantial increase in the administrative burden, citing particular requirements of the interim rule, including the requirements to weight food instrument redemption amounts in cost neutrality assessments; collect food prices from vendors at least every six months following authorization; document the above-50-percent vendor status for all vendors; document the above-50-percent vendor status for pharmacies; and to conduct quarterly cost neutrality assessments for State agencies which do not have automated systems for performing statistical analyses. The requirement in the interim rule for weighting food instrument redemption amounts for cost neutrality assessments has been made optional in this final rule, and requirement for collecting food prices from vendors at least every six months following authorization have been modified in this final rule to provide for exemptions.

Also, FNS has provided State agencies with methodologies for reducing the administrative burden of identifying above-50-percent vendors and of the quarterly cost neutrality assessments. Over ninety percent of WIC vendors are also authorized by the Supplemental Nutrition Assistance Program (SNAP, formerly the Food Stamp Program). To assist the State agencies, FNS established a process for comparing WIC redemptions to SNAP redemptions; this process established that about 88 percent of authorized WIC vendors had greater SNAP redemptions than WIC redemptions. As a result, there was no need to obtain further documentation from these vendors, such as tax returns or other verifiable documentation, to establish whether more than 50 percent of a vendor's food sales were derived from WIC purchases. Further, the State agency workload for this redemption comparison process is negligible because FNS maintains the fully automated reporting process which matches the redemption data maintained by the WIC The Integrity Profile (TIP) and the SNAP Store Tracking and Redemption System (STARS) systems.

One State agency commented that this process should not use annualized WIC redemption data for a new WIC vendor because this may erroneously indicate that this vendor is an above-50-percent vendor, resulting in the restriction of payments to this vendor at the maximum allowable redemption levels permitted for above-50-percent vendors. However, the WIC–SNAP redemption match cannot result in a determination that a vendor is an above-50-percent vendor because this match does not include eligible food sales made with cash, credit cards, personal checks, etc. Instead, this process has one of two results: Either the vendor is not an above-50-percent vendor, or the vendor is potentially an above-50-percent vendor. If a vendor is designated as a potential above-50-percent vendor, the State agency needs to obtain further documentation before determining whether the vendor is in fact an above-50-percent vendor. Also, as discussed more fully below in the Background section of this preamble, the State agency must ask all vendor applicants whether they expect to become above-50-percent vendors, and, if not, the vendor must provide supporting documentation to the State agency.

Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612). Although not required by the Act, the Food, Nutrition, and Consumer Services hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities. The provisions implemented through this rulemaking apply to all State agencies administering the WIC Program, regardless of size. Further, as pointed out above, several provisions of this rule provide considerable flexibility to WIC State agencies regarding the manner of implementing its requirements, rather than new prescriptive requirements for the

operation and administration of the Program.

Public Law 104–4

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local and tribal governments and the private sector. Under section 202 of the UMRA, 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 by 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 most cost-effective or least burdensome alternative that achieves the objectives of the rule.

This final rule contains no Federal mandates (under the 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, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12372

WIC is listed in the Catalog of Federal Domestic Assistance under 10.557. For the reasons set forth in 7 CFR 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.

Federalism Summary Impact Statement

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the following three categories called for under section (6)(b)(2)(B) of Executive Order 13132.

Prior Consultation With State Officials

State agencies have expressed concerns and shared information regarding implementation of the interim rule. Because the WIC Program is a State-administered, federally funded program, FNS regional offices have formal and informal discussions with State agencies on an ongoing basis regarding program implementation and policy issues. This arrangement allows State agencies to raise questions and provide comments that form the basis for many of the implementation detail decisions in this and other WIC Program rules. Prior to the implementation of the interim rule, several regional offices convened meetings with State WIC staff that included discussion of the vendor cost containment provisions of this law. In addition, in October 2004, FNS' Supplemental Food Programs Division convened a meeting of WIC State agency representatives, USDA headquarters and regional office staff, and an outside expert on competitive pricing systems, to obtain more information on State agencies' current vendor cost containment systems. During the implementation of the interim rule, FNS further clarified the meaning of the cost containment provisions in response to numerous issues raised by the certification and exemption requests submitted by State agencies. These questions and informal comments received on the interim rule have assisted FNS in making the final rule responsive to State agency concerns.

Nature of Concerns and the Need To Issue This Rule

The comments of most of the State agencies on the interim rule reflected concerns about FNS interpretations of Public Law 108–265, the extent of the flexibility provided to the State agencies by the interim rule, and the administrative burden of implementing the interim rule. These concerns focused on several of the interim rule's requirements, including: above-50-percent vendors may not be paid more on average per food instrument type than regular vendors; food instrument redemption amounts must be weighted in cost neutrality assessments; food prices must be collected from vendors at least every six months following authorization; and verifiable documentation must be used to identify above-50-percent vendors.

Extent to Which Those Concerns Have Been Met

As discussed more fully below in the Background section of this preamble, most of the provisions of the interim rule reflected the explicit requirements of Public Law 108–265 and thus cannot be eliminated or altered. However, as also discussed below, some provisions of the interim rule which were not based on the explicit requirements of Public Law 108–265 have been modified in this final rule. Also, several of these modified provisions had been viewed as administratively burdensome in the comments of State agencies, including the weighting of food redemption amounts in cost neutrality calculations, which has been made optional in the final rule, and the collection of food prices from vendors every six months following authorization, from which a State agency may be exempted under the final rule but not under the interim rule. Additionally, as discussed more fully in the Regulatory Impact Analysis section of this preamble, FNS has also reduced the administrative burden by developing a methodology which has eliminated the need to obtain documentation from approximately 88 percent of authorized vendors regarding whether they are above-50-percent vendors. Finally, this final rule continues the considerable flexibility provided by the interim rule for the manner of State agency implementation, in particular the broad range of peer group criteria available to State agencies as noted above in the Regulatory Impact Analysis section of this preamble. Indeed, the peer group exemption process of the interim rule is continued in the final rule so State agencies may request exemptions from some or all of the peer group requirements; 40 State agencies were granted such exemptions under the interim rule.

Executive Order 12988

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

Civil Rights Impact Analysis

FNS has reviewed this final rule in accordance with Departmental Regulation 4300–4, ''Civil Rights Impact Analysis,'' to identify and address any major civil rights impacts the final rule might have on minorities, women, and persons with disabilities. FNS has determined that this final rule's intent and provisions will not adversely affect access to WIC services by eligible persons. All data available to FNS indicate that protected individuals have the same opportunity to participate in the WIC Program as non-protected individuals. FNS specifically prohibits State and local government agencies that administer the WIC Program from engaging in actions that discriminate based on race, color, national origin,

sex, age or disability. Section 246.8 of the WIC regulations (7 CFR part 246) indicates that Department of Agriculture regulations on non-discrimination (7 CFR parts 15, 15a and 15b) and FNS instructions ensure that no person shall on the grounds of race, color, national origin, age, sex, or disability, be excluded from participation in, be denied benefits of, or be otherwise subjected to discrimination under the Program.

Discrimination in any aspect of program administration is prohibited by Department of Agriculture regulations on non-discrimination (7 CFR parts 15, 15a, and 15b), the Age Discrimination Act of 1975 (Pub. L. 94–135), the Rehabilitation Act of 1973 (Pub. L. 93–112, section 504), and title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d). Enforcement action may be brought under any applicable Federal law. Title VI complaints shall be processed in accordance with 7 CFR part 15. Where State agencies have options, and they choose to implement a particular provision, they must implement it in such a way that it complies with § 246.8 of the WIC regulations.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR 1320) requires the Office of Management and Budget (OMB) approve all collections of information by a Federal agency before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number. Some of the information collections in this final rule have been previously approved under OMB No. 0584–0043, based on the information reporting requirements outlined in the interim rule WIC Vendor Cost Containment Interim Rule, published on November 29, 2005 at 70 FR 71708. The information collection for this final rule has been submitted to OMB with revisions based on comments and new information, as discussed below.

The preamble of the interim rule separated the reporting burden of that rule into three parts. The first part, listed under § 246.4(a)(14)(xv), included: The description of the vendor cost containment system (peer groups, maximum allowable reimbursement levels, average redemption amounts for selected food instruments) in the State Plan, which is an annual requirement; State agency notification to FNS concerning non-profit above-50-percent vendors exempted by the State agency from cost containment requirements, which could occur at any time; request for exemption from vendor peer group requirements, which must be re-approved triennially; information required for FNS for certification of the State agency's vendor cost containment system, which must be re-approved triennially; and, detailed assurances concerning the implementation of the commitments made under existing certifications, which must be provided annually in the State Plan. The second part, listed under § 246.12(g)(4)(i), concerns the identification of above-50-percent vendors. The third part, listed under § 246.12(g)(4)(ii)(B), concerns the collecting of vendor food prices every six months following authorization of the vendor.

Comments

As noted in the Regulatory Impact Analysis Summary of this preamble, nine commenters, all of them State agencies, addressed the administrative burden of the interim rule. However, only two of these State agencies suggested different burden hours than set forth in the interim rule. One of these State agencies stated that at least one-half of a staff position would be needed to manage ongoing reporting activities, without indicating how this staff time would be distributed between the different reporting burdens set forth in the preamble of the interim rule, including the burdens which have been modified in this final rule. Similarly, the other State agency stated that eight new staff had been requested to address the new administrative needs resulting from the interim rule, including all of the reporting burdens, but also to address the administrative needs unrelated to vendor cost containment—the State agency's emerging Electronic Benefits Transfer (EBT) system. Although lacking in specificity, these comments indicate that FNS may have underestimated the reporting burden hours.

The Regulatory Impact Analysis Summary of this preamble also discusses the other comments on the administrative burden and how the final rule reflects accommodations intended to reduce those burdens. All nine of these State agencies stated that implementation of the interim rule had required a substantial increase in the administrative burden, citing particular requirements of the interim rule, including the requirements to weight food instrument redemption amounts in cost neutrality assessments; collect food prices from vendors at least every six months following authorization; document the above-50-percent vendor status for all vendors; document the above-50-percent vendor status for pharmacies; and to conduct quarterly cost neutrality assessments for State agencies which do not have automated systems for performing statistical analyses. The information collection burden hours have also been adjusted due to these comments, as discussed below.

Collections Added by the Final Rule

Unlike the interim rule, this final rule includes a provision which permits State agencies to seek approval of their methodologies for excluding partially-redeemed food instruments from the required quarterly cost-neutrality assessments. The commenters who stated that such food instruments should be excluded from the cost neutrality assessments included two State agencies. Paragraph 246.4(a)(14)(xv) requires State agencies include information in their State Plan submissions to FNS demonstrating compliance with the cost containment provisions of § 246.12(g)(4), which includes the quarterly cost neutrality assessment requirement of § 246.12(g)(4)(i)(D). Thus a State agency would need FNS approval of a State Plan amendment setting forth a methodology for excluding partially-redeemed food instruments. This is one of the reasons why the information burden hourly rate for the State Plan submissions under the interim rule has been doubled under this final rule.

Burden hours have been added in the final rule to account for an exemption process which, unlike the interim rule, would permit State agencies to seek exemptions from the requirement set forth in § 246.12(g)(4)(ii)(B) for biannual collection of vendor shelf prices. FNS estimates that 15 State agencies will seek such exemptions at the same rate of 16 hours per response used in connection with the request for exemption from the peer group requirement under § 246.4(a)(14)(xv), resulting in 240 burden hours ($15 \times 16 = 240$). This change in the burden hours based on the addition of an exemption process under § 246.12(g)(4)(ii)(B) is the only change of burden hours due to program changes. All of the other changes in burden hours are considered to be adjustments.

The burden hours per response set forth in connection with § 246.12(g)(4)(ii)(B) of the interim rule for the collection of vendor food prices every six months following authorization has been increased in this final rule from one to two hours for both State agencies and vendors in recognition of the aforementioned comments. Although this provision has been modified in the final rule to

provide for exemptions, the overall result is a net increase of 223,154 burden hours for the biannual shelf price collection process. (The final rule allots 313,332 burden hours for the collection of shelf prices by the State agencies and vendors combined, while the interim rule allotted 90,178 hours for this.) Such exemptions could be based on numerous different reasons. As indicated in the Regulatory Impact Analysis, 67 percent of the State agencies are in compliance with the price collection requirement. Thus the exemptions would involve some proportion of the other 33 percent of the 90 State agencies (30 State agencies). FNS estimates that as many as one half of these State agencies may be granted exemptions, i.e., 15 State agencies. (See section 4 of the Background part of this preamble for more information on this exemption process.) Thus the chart below shows that 75 State agencies will need to collect vendor shelf prices biannually under § 246.12(g)(4)(ii)(B), about 83.3 percent of the State agencies, and that about 83.3 percent of the vendors—39,167 vendors—will need to cooperate with this price collection process. As a result, the chart also shows that each of the 75 State agencies will need to collect prices from 1,044 vendors on average twice per year, *i.e.,* $(39{,}167 \div 75 = 546.5) \times 2 = 1{,}044$.

Unlike the interim rule, § 246.12(g)(4) of this final rule states that the State agency must inform all vendors of the criteria for peer groups and each individual vendor of its peer group assignment. State agencies have been advising vendors of their peer group assignments and the peer group criteria, but, for added assurance, a sentence has been added to § 246.12(g)(4) in this final rule to state that the State agency must inform all vendors of the criteria for peer groups and each individual vendor of its peer group assignment. Thus this new requirement set forth in § 246.12(g)(4) would not result in any new information collection burden hours.

Reducing the Collections

As noted in the Regulatory Impact Analysis section of this preamble, four State agencies commented that the interim rule's requirement for weighting food instrument redemption amounts made the cost neutrality assessment process more burdensome. In response, FNS has eliminated the requirement for weighting food instrument redemption amounts in the cost neutrality assessment process. Also, FNS expects certification requests, exemption requests, and State Plan submissions in the future will only involve amendments and/or updating information for most State agencies.

Numbers of Certifications and Exemptions

The previous estimates of 65 State agencies seeking certification and 30 State agencies seeking exemptions need to be replaced with numbers based on actual experience. The certifications concern the cost neutrality of above-50-percent vendors with regards to comparable regular vendors. The exemptions concern the peer group requirements for all vendors. All State agencies are subject to the peer group requirements unless granted an exemption by FNS, but only those State agencies which authorize above-50-percent vendors need to be certified by FNS regarding their processes for maintaining the cost neutrality of above-50-percent vendors in comparison to comparable regular vendors. In Fiscal Years 2005 and 2006, 32 State agencies requested certification and 42 requested exemptions.

Conclusions

Balancing the State agency comments and new requirements against the factors reducing the paperwork burden expected for future certification requests, exemption requests, and State Plan submissions, the burden hours per response estimated for the final rule will be doubled for three of the four information burden categories related to these requests and submissions, as detailed in the chart below. This includes increasing the hourly information burden rate for the State Plan description of the vendor cost containment system from 4 to 8 hours, for exemptions from the peer group requirements from 8 to 16 hours, and for information related to the certification and monitoring of the vendor cost containment system from 8 to 16 hours.

FNS has not been notified by any State agency that it has authorized a non-profit above-50-percent vendor, as required by § 246.12(g)(4)(iv); such notification would be provided as a State Plan submission under § 246.4(a)(14)(xv). FNS does not know if any State agencies will elect to authorize such vendors in the future. Thus the current estimate of the number of State agencies and annual burden hours related to this notification requirement will remain unchanged: five State agencies with one annual burden hour for each, resulting in a total of annual five burden hours. This is the only information burden category related to certification requests, exemption requests, and State Plan submissions for which the burden hours will not be doubled.

The paperwork burden for the annual identification of above-50-percent vendors, per § 246.12(g)(4)(i), was previously set at 2 hours per response. As previously noted, the comparison of WIC and SNAP redemptions has made it possible to eliminate about 88 percent of authorized vendors from any need for further documentation since this comparison has confirmed that about 88 percent of authorized vendors have more SNAP redemptions than WIC redemptions. FNS has established an automated process which matches the redemption data maintained by the WIC TIP and the SNAP STARS systems. The State agency workload for use of this process is negligible.

FNS recognizes that obtaining additional documentation of above-50-percent status for the remaining 12 percent of vendors is more burdensome than the WIC–SNAP redemption match, for both State agencies and vendors. Accordingly, in consideration of the comments on the reporting burden, the burden hours per response for the State agencies has been increased from 2 to 4 hours, and for the vendors from 1 to 2 hours for the data collection related to identifying above-50-percent vendors. However, this higher number of burden hours for vendors will only be applied to the 12 percent of vendors which have been designated as potential above-50-percent vendors based on the WIC–SNAP redemption match (5,640 vendors), since those vendors which have been designated as not being above-50-percent vendors as a result of the WIC–SNAP redemption match will not need to provide any documentation to the State agency at all.

The chart below sets forth the estimated annual reporting burden for the final rule to reflect the above-noted revisions based on State agency comments and information not available when the interim rule was published. Decimals are not included in the chart.

FINAL RULE ESTIMATED ANNUAL REPORTING BURDEN

Section of the regulations	Estimated Number of respondents	Data collections or reports required annually	Estimated average burden hours per response	Estimated annual burden hours
§ 246.4(a)(14)(xv):				
• Description of vendor peer group system and allowable reimbursement levels; average redemption amounts for selected food instruments.	90	1	8	720
• Notification of exemption of non-profit vendors	5	1	1	5
• Request for exemption from vendor peer group requirement	42	1—(triennial)	16	224
• Information required for certification of vendor cost containment system and to monitor ongoing compliance with certification requirements.	32	1—(triennial)	16	171
	32	1	8	256
§ 246.4(a)(14)(xv) Total	90	3.66		1,376
§ 246.12(g)(4)(i)	90	63	4	22,560
Above-50-Percent Determination	5,640	1	2	11,280
§ 246.12(g)(4)(ii)(B)	75	1,044	2	156,666
Biannual Price Collection	39,167	2	2	156,666
§ 246.12(g)(4)(ii)(B) Biannual Price Collection Exemption	15	1	16	240
Total Burden Hours Due to Program Changes				240
Total Burden Hours Due to Adjustments				143,629
Total Burden Hours for the Final Rule				143,869
Currently Approved WIC Reporting and Recordkeeping Burden Hours				3,451,206
Total Proposed WIC Reporting and Recordkeeping Burden Hours				3,595,075

E-Government Act Compliance

FNS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Background

Ninety-two letters and electronic mail messages of comment were submitted on the interim rule during the comment period, from 37 WIC-authorized vendors; 22 WIC local agencies; 13 WIC State agencies; 8 members of Congress (in one joint letter); 5 retailer advocacy organizations; 5 social service advocacy organizations; 4 law firms representing WIC-authorized vendors; 3 general public individuals; and 2 non-WIC State agencies. Many of these comment letters and electronic mail messages addressed multiple issues.

1. Definitions of ''Above-50-Percent Vendor'' and ''Food Sales'' (§ 246.2)

Definition of ''Above-50-Percent Vendor''

Section 246.2 of the interim rule defined ''Above-50-percent vendors'' as referring to vendors that derive more than 50 percent of their annual food sales revenue from WIC food instruments, and new vendor applicants expected to meet this criterion under guidelines approved by FNS. Two commenters opposed this definition. One of these commenters stated that this group of vendors should be defined based on 70 percent of food sales derived from WIC, so small stores and convenience stores will not go out of business due to the requirement that the redemption amounts of above-50-percent vendors must be comparable to the redemption amounts of chain stores, potentially leading to inadequate participant access. The other commenter stated that the final rule should focus on vendors with WIC redemptions close to 100 percent of their food sales since these are the vendors which have proven to be so costly, not small vendors with a regular retail vendor business model who serve a high percentage of WIC participants in low-income areas.

The definition of ''above-50-percent vendor'' is based on a legislative requirement in section 17(h)(11)(D)(ii)(I) of the CNA, i.e., vendors with more than 50 percent of annual food sales revenue derived from WIC sales. Therefore, this definition remains as set forth in the interim rule.

Definition of ''Food Sales''

Three commenters opposed the definition of ''food sales'' in § 246.2 of the interim rule as referring to all SNAP-eligible foods. One of these commenters stated that ''food sales'' as defined in the interim rule cannot be easily verified by many stores because their scanners cannot identify SNAP-eligible food or, if they do, they cannot tally the amounts and that federal tax forms and other documentation maintained by the vendors do not show the sales based on SNAP-eligible foods. Another commenter asserted that State tax forms in one State were not helpful for determining above-50-percent status because these forms do not require a total sales amount from which taxable non-food sales could be subtracted to result in an estimate of food sales, and some foods are taxable; therefore this commenter stated that a vendor should be defined as an above-50-percent vendor based on total sales, not total food sales. One other commenter stated that there is no universal definition of ''food sales,'' resulting in WIC State agencies using a variety of conflicting approaches with disparate results. This commenter argued that State agencies should be allowed to accept self-declaration of vendors with legal penalties for inaccuracy, instead of imposing burdensome data collection processes on vendors.

However, section 17(h)(11)(D)(ii)(I) of the CNA identifies above-50-percent vendors based on more than 50 percent of annual revenue from the sale of food items for WIC food instruments, not food and all other items. Thus the final rule cannot permit total sales instead of total food sales as the basis for identifying above-50-percent vendors. Also, self-declaration would generally not serve as a proper basis for compliance with this provision of the CNA, since self-declaration would be an opinion, not objective data. Therefore,

the definition of ''food sales'' remains as set forth in the interim rule.

2. Assessment of Above-50-Percent Vendor Status (§ 246.12(g)(4)(i))

Methodologies for Determining the Above-50-Percent Status of Vendor Applicants

Three commenters objected to the statement at 70 FR 71715 of the preamble of the interim rule that State agencies must review invoices as one of the steps needed to determine the above-50-percent status of vendor applicants. These commenters view this requirement as unduly burdensome, recommending instead that State agencies be permitted to review stock for this purpose during the pre-authorization visit or at some other time, and to consider the history of the vendor. One of these commenters also stated that a review of invoices might be misleading because the State agency has no way of knowing if it has received all of a vendor's invoices. FNS agrees with the commenters that a review of invoices should not be required. Instead, the State agency should have the option to rely only on a review of stock at the preauthorization visit, as recommended by the commenters, or even to use both methodologies. Accordingly, new paragraphs 246.12(g)(4)(i)(E) and (g)(4)(i)(F) have been established in the final rule to set forth the required methodologies, previously discussed in the preamble to the interim rule and in FNS guidance, for determining the above-50-percent status of vendor applicants and current vendors, including the other methodologies set forth at 70 FR 71715 of the preamble of the interim rule, but including the review of invoices only as one option. Also, a reference to these two new paragraphs has been added to the second sentence of paragraph 246.12(g)(4)(i).

Timing of Determinations of Above-50-Percent Status

One commenter would prefer to conduct the annual review of the above-50-percent status of its vendors at their individual annual agreement renewal dates rather than reviewing all of them at the same time once a year. Like many State agencies, this State agency processes vendor applications for authorization on an ongoing basis. Paragraph 246.12(g)(4)(i) of the interim rule stated that each State agency must annually implement procedures approved by FNS to identify authorized vendors and vendor applicants as either above-50-percent vendors or regular vendors. The definition of the term ''above-50-percent vendor'' in § 246.2 of the interim rule refers to vendors that derive more than 50 percent of their annual food sales revenue from WIC food instruments, and new vendor applicants expected to meet this criterion. These provisions did not specify that a State agency must make this determination for all vendors at the same time. Thus, under these provisions, FNS may approve procedures which permit a State agency to conduct the annual review of the above-50-percent status of its vendors at their individual annual agreement renewal dates. These provisions remain unchanged in the final rule.

Assessment of Above-50-Percent Status of Pharmacies

Three commenters recommended greater discretion for State agencies to exclude pharmacies from above-50-percent status. One of these commenters stated that pharmacies generally do not meet the above-50-percent vendor definition and thus the expenditure of administrative resources is not justified to determine their above-50-percent status. Another commenter contended that it is inconsistent to permit exemption of pharmacies which only provide exempt infant formula and WIC-eligible medical foods, but not if these pharmacies also provide contract infant formula. One other commenter stated that State agencies should be able to exempt pharmacies that are authorized to provide exempt infant formula, even if they also provide contract infant formula.

Paragraph 246.12(g)(4)(iv) states that the State agency may except from the competitive price criteria and allowable reimbursement levels pharmacy vendors that supply only exempt infant formula and/or WIC-eligible medical foods, and non-profit vendors for which more than 50 percent of their annual revenue from food sales consists of revenue derived from WIC food instruments. This provision is based on section 17(h)(11)(D) of the CNA, which permits an exemption from competitive price criteria and allowable reimbursement levels for pharmacies that supply only exempt infant formula and WIC-eligible medical foods, but not for pharmacies which also transact food instruments for contract infant formula. Therefore, this final rule must reflect the requirement in the CNA.

State Agency Choice To Authorize Above-50-Percent Vendors

One commenter recommended a statement be added to § 246.12(g)(4)(i) to the effect that a State agency may choose to not authorize above-50-percent vendors. The interim rule included the equivalent statement in the last sentence of § 246.12(g)(4)(i) and in the first sentence of § 246.12(g)(4)(v)(A), by referring to State agencies choosing or not choosing to authorize above-50-percent vendors. This language mirrors the language of section 17(h)(11) of the CNA, which refers to State agencies electing to authorize or not authorize above-50-percent vendors. Therefore, this final rule adopts the language of the interim rule on this subject.

3. Cost Neutrality Standards and Assessment—(§ 246.12(g)(4)(i)(D))

Under § 246.12(g)(4)(i)(D) of the interim rule, the State agency is required to ensure that the prices of above-50-percent vendors do not result in higher total food costs if program participants transact their food instruments at above-50-percent vendors rather than at other vendors that do not meet the above-50-percent criterion. (These other vendors were referred to as ''regular vendors.'') The State agency must not permit the average cost of each type of food instrument redeemed by above-50-percent vendors to exceed the average cost of the same type of food instrument redeemed by regular vendors; the State agency must compute statewide average costs per food instrument at least quarterly to monitor compliance with this requirement. In addition, § 246.12(g)(4)(i)(D) also requires that the average cost per food instrument must be weighted to reflect the relative proportion of food instruments redeemed by each category of vendors in the peer group system.

Under § 246.12(g)(4)(vi) of the interim rule, which concerned FNS certification of State agency vendor cost containment systems, a State agency is required to demonstrate to FNS that its competitive price criteria and allowable reimbursement levels did not result in average payments per food instrument to above-50-percent vendors that are higher than average payments per food instrument to comparable vendors that are not above-50-percent vendors. The commenters who opposed the statewide average requirement of § 246.12(g)(4)(i)(D) supported the comparable vendor average requirement of § 246.12(g)(4)(vi). The term ''comparable vendor'' refers to the regular vendors which share common characteristics or criteria with above-50-percent vendors that affect food prices, as determined by the State agency, for the purpose of applying appropriate competitive price criteria to vendors at authorization and limiting payments for food to competitive levels.

Twenty-four commenters supported the requirement that the average redemption amount per food instrument for all above-50-percent vendors must not exceed the average redemption amount per food instrument of all regular vendors statewide. Thirty-six commenters opposed it. The opponents stated that this provision exceeded the intent of section 17(h)(11)(A)(i)(III)(bb) of the CNA, which requires State agencies to establish competitive price criteria and allowable reimbursement levels which do not result in higher food costs if participants transact food instruments with above-50-percent vendors rather than regular vendors. These commenters stated that cost neutrality for above-50-percent vendors should be based on the peer group average per food instrument, not the statewide average of all regular vendors per food instrument, since the statewide average does not take into account pricing differences based on location (*e.g.,* rural/urban) or type of vendor (*e.g.,* large/small/military commissaries/supercenter stores).

One of these commenters pointed out that section 17(h)(11)(A)(i)(III)(bb) of the CNA requires that food costs not be higher if participants use their food instruments with above-50-percent vendors than with regular vendors, unlike section 17(h)(11)(E) of the CNA, which requires that above-50-percent vendors not be paid more on average per food instrument than comparable regular vendors. According to this commenter, the absence of the average payment per food instrument language in section 17(h)(11)(A)(i)(III)(bb) shows that Congress intended to permit State agencies the discretion to consider participant preferences for above-50-percent vendors or other factors that may affect the different redemption levels of above-50-percent vendors in comparison to regular vendors. This commenter also stated that the final rule should include the statement in section 17(h)(11) of the CNA to the effect that the cost containment requirements may not be construed to compel a State agency to achieve lower food costs if participants transact WIC food instruments with above-50-percent vendors rather than regular vendors.

FNS does not agree with these comments. Section 17(h)(11)(A)(i)(III)(bb) of the CNA does not distinguish between vendors based on size or location, and does not provide discretion based on participant preferences or other factors. Such interpretations would undermine the point of this provision—that above-50-percent vendors must be cost neutral in comparison to all other retail vendors. Indeed, such interpretations would make this provision little different from section 17(h)(11)(E), which allows for distinctions based on comparability. Instead, the CNA requires above-50-percent vendors to be cost-neutral with respect to both comparable vendors and all other retail vendors. Moreover, the interim rule did not compel State agencies to achieve lower food costs if participants transact WIC food instruments with above-50-percent vendors rather than regular vendors, and thus a statement to this effect is not needed in the final rule.

Twelve commenters stated that Congress did not intend to put above-50-percent vendors out of business. However, the purpose of the interim rule was not to put above-50-percent vendors out of business. Instead, the interim rule intended to make above-50-percent vendors cost-neutral in comparison to regular vendors, both with respect to peer groups and all regular vendors statewide, as required by the CNA. Ensuring the availability of funds to serve program participants is the paramount consideration. Therefore, the cost neutrality standard remains as set forth in the interim rule.

Weighting

Paragraph 246.12(g)(4)(i)(D) of the interim rule required the average cost per food instrument to be weighted to reflect the relative proportion of food instruments redeemed by each category of vendors in the peer group system. As discussed in the preamble of the interim rule, a weighted average enables the State agency to take into account the frequency with which vendors redeem food instruments of varying redemption amounts. If a State agency makes more payments to vendors that offer the lowest prices for WIC foods, a weighted average will reflect this fact more than a simple average. The weighted average correlates with WIC participants' shopping patterns by giving the most weight to redemption prices of stores with the largest number of WIC transactions. However, following issuance of the interim rule, FNS issued guidance making this requirement optional, pending the final rule, to prevent any administrative difficulties in determining the weighted average from interfering with the certification of State agency vendor cost containment systems as required by the statute. Only one State agency has chosen to use weighting.

Seven comments were submitted on weighting; three of these comments supported the weighting requirement, while four opposed it. Two of the supporting comments stated that the rationale for the weighting requirement, as set forth in the preamble of the interim rule, was sound. The third supporting comment stated that the weighting requirement and the adding of standard deviations to redemption averages would help to avoid price adjustments unfairly based only on exceeding a simple average. Three of the opponents, all State agencies, stated that the weighting requirement would greatly complicate cost neutrality calculations which had already required a significant expenditure of administrative funds to modify their Management Information Systems. These three State agencies and one other, also an opponent of this requirement, stated that weighting should be an option, not a mandate.

FNS agrees with these commenters; the use of weighting in cost neutrality calculations should be optional, not mandatory. This requirement is not necessary to implement the cost neutrality requirements of the CNA, and some State agencies feel it is administratively burdensome. However, as noted above, one State agency has chosen to use weighting. Accordingly, weighting has been made optional in § 246.12(g)(4)(i)(D) of the final rule.

Recoupment and Termination Based on Cost Neutrality Assessments

Paragraph 246.12(g)(4)(i)(D) of the interim rule required the State agency to conduct quarterly cost neutrality assessments to ensure that above-50-percent vendors are not paid on average per food instrument more than all regular vendors statewide. In the event that the above-50-percent vendors are paid more on average than the regular vendors, the State agency had to take action to ensure compliance, such as adjusting payment levels. This provision also states that such action may have included recouping excess payments and terminating the vendor agreements of vendors whose prices are least competitive and which are not needed to ensure participant access. FNS has reconsidered this issue and decided that State agencies must not recoup monies that were paid to a vendor for food instruments redeemed within the established maximum allowable reimbursement level for that vendor, in order to achieve cost neutrality. Likewise, since a State agency cannot recoup monies paid to a vendor for food instruments redeemed within the established maximum allowable reimbursement level for that vendor in order to achieve cost neutrality, it follows that a State agency may not terminate the vendor agreement of a vendor that redeemed food

instruments within the established maximum allowable reimbursement level for that vendor in order to achieve cost neutrality. Accordingly, the above-noted language in § 246.12(g)(4)(i)(D) of the interim rule which referred to the recoupment of monies and the termination of vendor agreements has been deleted in this final rule.

This does not preclude a State agency from making price adjustments to food instruments in accordance with § 246.12(h)(3)(viii) of this final rule and recouping amounts paid to the vendor above the established maximum allowable reimbursement level applicable to the vendor. This also does not preclude a State agency from terminating the vendor agreement of a vendor for failure to remain price-competitive in accordance with § 246.12(h)(3)(viii) of this final rule, *i.e.,* for failure to maintain shelf prices at levels acceptable for authorization, or for failure to submit food instruments for redemption within the established maximum allowable reimbursement level applicable to that vendor.

Partially-Redeemed Food Instruments

Fifteen commenters stated that partially-redeemed food instruments should not be included in cost neutrality determinations because above-50-percent vendors typically redeem all of the supplemental foods authorized for a food instrument while many regular vendors do not; a vendor providing all of the supplemental food authorized for a food instrument should not be held to a redemption level based on food instruments redeemed by other vendors for less than all of the supplemental food authorized for a food instrument. One of these commenters stated that State agencies should have the discretion to compensate for relative rates of partial redemption. FNS agrees that State agencies should be able to exclude partially-redeemed food instruments from the quarterly cost neutrality assessments.

However, the identification of partially-redeemed food instruments to be excluded must be based on an empirical methodology. For example, a State agency could exclude a food instrument because its purchase price is less than the total of the vendor's least expensive food items authorized for that food instrument. A sentence has been added to § 246.12(g)(4)(i)(D) in the final rule to allow a State agency to exclude partially-redeemed food instruments from a quarterly cost neutrality assessment if FNS approves the State agency's empirical methodology for identifying the partially-redeemed food instruments to be excluded.

Another sentence has been added to § 246.12(g)(4)(i)(D) in the final rule to clarify that a State agency may not exclude food instruments from the quarterly cost neutrality assessment based on a rate of partially-redeemed food instruments. A rate of partially-redeemed food instruments, such as a percentage of food instruments with the lowest purchase prices, might include food instruments which reflect a vendor's lower prices instead of partial redemptions. Also, a definition of ''partially-redeemed food instrument'' has been added to the definitions in § 246.2 to ensure there is a clear understanding of the meaning of this term.

Other Cost Neutrality

One commenter recommended that State agencies be permitted to review no more than 80 percent of the most commonly used food instruments to determine cost neutrality, excluding food instruments which are not redeemed very often. However, the CNA does not provide that a food instrument may be excluded from cost neutrality requirements based on how often food instruments for the same authorized supplemental foods are redeemed.

Another commenter stated that a State agency should be able to assess overall cost neutrality without the redemptions of competitively priced as well as noncompetitively priced above-50-percent vendors needed for participant access. FNS does not agree. The exclusion of the redemptions of noncompetitively priced above-50-percent vendors needed for participant access is intended to prevent the high prices of these above-50-percent vendors from jeopardizing the State agency's efforts to achieve overall cost neutrality, given these State agencies have little choice but to authorize these vendors. Since the prices of competitively priced above-50-percent vendors would not jeopardize the State agency's efforts to achieve overall cost neutrality, there is no reason for the exclusion of their prices, even though these vendors were needed for participant access.

Finally, two commenters recommended that quarterly cost neutrality assessments should not be required for State agencies which establish maximum allowable reimbursement levels for above-50-percent vendors based on the statewide average redemption amount of regular vendors per food instrument type. FNS does not agree, since the quarterly review mechanism would be needed to ensure this process is working effectively.

Exemption From Cost Neutrality Requirements

One commenter stated that a State agency should be granted an exemption from the cost neutrality requirements if the redemptions of above-50-percent vendors comprise less than five percent of total WIC redemptions, as long as the State agency has implemented measurable competitive pricing criteria and allowable reimbursement levels. Paragraph 246.12(g)(4)(v) states that a State agency may use a vendor cost containment approach other than a peer group system if the State agency determines that food instruments redeemed by above-50-percent vendors comprise less than five percent of the total WIC redemptions in the State in the fiscal year prior to a fiscal year in which the exemption is effective, and the State agency's alternative vendor cost containment system would be as effective as a peer group system and would not result in higher costs if program participants redeem food instruments at above-50-percent vendors rather than at regular vendors. (This provision also permits an exemption from peer group requirements for a State agency which chooses not to authorize above-50-percent vendors and meets certain other conditions.)

This provision is based on section 17(h)(11)(A)(ii) of the CNA, which permits an exemption from the peer group requirements if less than five percent of total WIC redemptions consist of above-50-percent vendor redemptions, and for other reasons. The CNA does not provide for exemptions from the cost neutrality requirements for above-50-percent vendors. This rule cannot establish an exemption from the cost neutrality requirements which is not permitted by the CNA.

4. Shelf Price Collection—(§ 246.12(g)(4)(ii)(B))

Paragraph 246.12(g)(4)(ii)(B) of the interim rule required the State agency to collect and monitor each vendor's shelf prices at least once every six months following authorization. FNS established this requirement to help State agencies to ensure the shelf prices of above-50-percent vendors do not exceed those of regular vendors at authorization, and to establish reimbursement levels for above-50-percent vendors, as required by § 246.12(g)(4)(i)(C); to ensure the State agency has sufficient data to assess the effectiveness of peer groups and competitive price criteria every three years, and to change a vendor's peer group placement when warranted, as

required by § 246.12(g)(4)(ii)(C); and to ensure vendors have not, subsequent to authorization, raised their shelf prices to a level that would exceed the competitive price selection criteria under which they were authorized, contrary to § 246.12(g)(4)(iii). Otherwise, State agencies would need to rely on redemption data alone to fulfill these requirements.

Two commenters supported the semiannual price collection requirement, but on the condition that this would not involve an administrative burden for vendors. Four commenters opposed this requirement. The opponents stated that comparing prices to redemptions semiannually is not useful and is burdensome. They stated that State agencies should be permitted to use other methodologies, such as comparing the redemption amounts of vendors in the same peer group, to ensure vendor shelf prices are appropriate. One of these commenters, a State agency, bases its competitive price criteria and maximum allowable reimbursement levels for above-50-percent vendors on the statewide redemption averages per food instrument type of the regular vendors, and thus states that § 246.12(g)(4)(i)(C) should be revised to provide State agencies with flexibility regarding the evaluation of the shelf prices of above-50-percent vendors as long as cost neutrality is achieved.

Another commenter stated that FNS should grant an exemption from the semiannual price collection requirement to a State agency using an efficient and effective alternative methodology for monitoring compliance with §§ 246.12(g)(4)(i)(C), (g)(4)(ii)(C), and (g)(4)(iii), and that collection of shelf prices should be required annually instead of every six months. FNS agrees that an exemption process should be available and has added this to § 246.12(g)(4)(ii)(B).

However, although a State agency may be able to demonstrate that an alternative monitoring process provides an efficient and effective means to ensure such compliance with §§ 246.12(g)(4)(i)(C), (g)(4)(ii)(C), and (g)(4)(iii), frequent collection of shelf prices may be needed for other reasons. Shelf price data collected at least semiannually may provide the only empirical basis for detecting and excluding partial redemptions from cost neutrality calculations. Further, some State agencies establish maximum allowable reimbursement levels based on shelf prices; such State agencies would also need frequent shelf price data. Thus such State agencies would probably not be eligible for an exemption on the basis that the frequent collection of price data is not needed.

Accordingly, the requirement in § 246.12(g)(4)(ii)(B) for State agencies to collect vendor shelf prices at least once every six months has been modified in the final rule to provide that FNS may grant an exemption from this requirement if a State agency demonstrates that its alternative methodology for monitoring vendor compliance with §§ 246.12(g)(4)(i)(C), (g)(4)(ii)(C), and (g)(4)(iii) is efficient and effective and if other State agency policies and procedures are not dependent on frequent collection of shelf price data. This exemption will remain in effect until the State agency no longer meets the conditions on which the exemption was based, until FNS revokes the exemption, or for three years, whichever occurs first.

5. Miscellaneous Issues Regarding Competitive Price Criteria and Maximum Allowable Reimbursement Levels—(§ 246.12(g)(4), (g)(4)(i)(D), (g)(4)(iii), and § 246.12(h)(3)(viii))

Six comments addressed a variety of issues and provisions of the interim rule concerning competitive price criteria and maximum allowable reimbursement levels.

Undercharges

One commenter stated that undercharges on the redemption amounts of food instruments should be subtracted from the vendor's redemption amounts on other food instruments which exceed maximum allowable amounts. However, this would be inconsistent with the definition of ''price adjustment'' in § 246.2, which refers to an adjustment to the purchase price on a food instrument, not on a group of food instruments. Moreover, an undercharge on a food instrument may indicate only that the prices charged for the food items covered by that food instrument resulted in a combined price which was within the maximum allowable reimbursement level for that food instrument. This is not truly an undercharge, since a maximum allowable reimbursement level is not the expected purchase price; rather, it is expected that the purchase price should be lower since the maximum allowable reimbursement level is the maximum amount which the State agency will pay for that food instrument. Thus, the submission of a food instrument with a purchase price below the maximum allowed amount does not offset the submission of another food instrument with a purchase price exceeding the maximum allowed amount.

Category Pricing

Two commenters objected to ''category pricing,'' *i.e.,* a State agency establishing a price limit or maximum allowable reimbursement level for an entire food category, such as cereal, instead of allowing for the different prices of the various products within that category. One of these commenters stated that the State agency must be able to inform vendors of the price limit for each food product of a food category. The other commenter contended that it is unfair to require vendors to base their prices on a category of food product instead of individual food products, because this forces the vendors to adjust the prices on all of the food products in that food category for all customers. These commenters want such category pricing to be prohibited or limited.

However, this would infringe on the flexibility which FNS wants the State agencies to retain. The State agency needs the flexibility to balance vendor cost containment and fairness to the vendor. Some State agencies determine the per product price limit by averaging the high and low prices for the different products of a food product category; other State agencies base the per product price limit on the highest price of the different products of a food category.

Exclusion of Above-50-Percent Vendor Prices From Determinations of Maximum Allowable Reimbursement Levels

One commenter contended that it is unfair to exclude the food prices of above-50-percent vendors from the determination of peer group maximum allowable reimbursement levels. However, section 17(h)(11)(A)(i)(III) of the CNA clearly requires the State agency to distinguish between above-50-percent vendors and regular vendors by either establishing separate peer groups for above-50-percent vendors, or distinct competitive price criteria and maximum allowable reimbursement levels for above-50-percent vendors within a peer group which also contains regular vendors. Likewise, section 17(h)(11)(E) of the CNA states that a State agency must demonstrate, in order to obtain certification for its vendor cost containment system, that the competitive price criteria and maximum allowable reimbursement levels do not result in higher payments per food instrument for above-50-percent vendors than for regular vendors. To comply with these provisions, the food prices of above-50-percent vendors must not be included in the determination of peer group maximum allowable

reimbursement levels. Accordingly, unchanged from the interim rule, § 246.12(g)(4)(i)(D) of this final rule requires State agencies to ensure the prices of above-50-percent vendors do not inflate the competitive price criteria and allowable reimbursement levels of peer groups consisting of both above-50-percent and regular vendors.

Necessity for Maximum Allowable Reimbursement Levels When Competitive Price Criteria Have Been Met

One commenter stated that the redemption amounts of a vendor which meets competitive price criteria should logically not exceed maximum allowable reimbursement levels, and thus should not be subject to price adjustments. This commenter also suggested the use of weighting or standard deviations may be more likely to result in fair maximum allowable reimbursement levels. This commenter and one other commenter both viewed the price adjustments applied to the food instruments of regular vendors as excessive. The coordination of competitive price criteria and maximum allowed amounts is an ongoing process. Paragraph 246.12(g)(4)(iii) of the interim rule, adopted by this final rule, states that the State agency must establish procedures to ensure a vendor selected for participation in the program does not, subsequent to selection, increase prices to levels that would make the vendor ineligible for authorization. Also, § 246.12(h)(3)(viii) states that as part of the redemption procedures, the State agency must establish and apply limits on the amount of reimbursement allowed for food instruments based on a vendor's peer group and competitive price criteria, and that in setting allowable reimbursement levels, the State agency may include a factor to reflect fluctuations in wholesale prices.

It does not follow that meeting competitive price criteria should guarantee that price adjustments need not occur. Vendor prices change over time, so that maximum allowable reimbursement levels will also change over time. Per § 246.12(h)(1)(i), vendor agreement periods may not exceed three years; meeting competitive price criteria at the beginning of an agreement period does not ensure a vendor will continue to do so throughout the agreement period. State agencies typically use standard deviations or a percentage inflator to account for a reasonable variation in the prices charged by the vendors in the same peer group. FNS agrees with the commenter that such methods will help to ensure price adjustments are fair.

Maximum Allowable Reimbursement Levels That Allow Participants To Purchase All of the Prescribed Foods

One commenter recommended that the statement in the preamble of the interim rule that a State agency must set maximum allowable reimbursement levels that allow WIC participants to purchase all of the foods prescribed on the food instrument from any authorized vendor be included in § 246.12(g)(4) and (h)(3)(viii). While FNS continues to support this statement, there is no need to include it in the Federal WIC Regulations. FNS believes this statement is self-evident. The WIC Program is a nutrition program. If the participant cannot purchase all of the food authorized by a food instrument, then the program's goal of enhancing the nutrition of the participant is undermined.

6. Participant Access Criteria (§ 246.12(g)(4))

Paragraph 246.12(g)(4) of the interim rule stated that in establishing competitive price criteria and allowable reimbursement levels, the State agency must consider participant access by geographic area. One commenter recommended that FNS revise § 246.12(g)(4) by adding a sentence stating that geographic determinations regarding participant access must be narrowly tailored to ensure that participants have reasonable access to authorized vendors, including vendors offering exempt formula. The commenter noted that this added statement would better assure participant access currently jeopardized by redemption difficulties, the stigma resulting from redemption difficulties, lack of transportation, and difficulties encountered by participants attempting to obtain exempt formula. The commenter suggests above-50-percent vendors should be authorized without competitive price criteria and maximum allowable reimbursement levels since these vendors are needed to address these forms of inadequate participant access.

FNS does not agree with this comment. FNS recognizes that such barriers to participation exist. It does not follow, however, that authorization of above-50-percent vendors is the only answer. A State agency may, for example, intensify its training and monitoring of vendors to reemphasize stock requirements and the proper handling of food instruments at the cash register. Indeed, vendors may be terminated per § 246.12(g)(3) or sanctioned per § 246.12(l)(2) based on such deficiencies. In one innovative effort, a State agency contracted with a faith-based health and human service agency to provide direct distribution of supplemental foods to participants through eighteen sites in a large city. Moreover, the high prices frequently charged by above-50-percent vendors authorized to ensure participant access would reduce the program's ability to provide benefits to participants. Thus State agencies should explore all alternatives for addressing such participant access issues.

FNS is not aware of a participant access problem regarding exempt infant formula. Moreover, State agencies need not rely on retail food vendors for providing exempt infant formula to participants; State agencies may authorize pharmacies for this purpose, and many State agencies do so. Further, State agencies may order exempt formula from the manufacturer or from wholesalers such as, for example, a non-profit organization which currently provides exempt infant formula to participants in six States. Therefore, the participant access criteria in the final rule remains as set forth in the interim rule.

7. The Geographic Requirement for Peer Groups (§ 246.12(g)(4)(ii)(A))

Paragraph 246.12(g)(4)(ii)(A) of the interim rule required State agencies include at least two criteria for establishing peer groups, one of which must be a measure of geography, such as metropolitan or other statistical areas that form distinct labor and products markets, unless the State agency receives FNS approval to use a single criterion. Four comments addressed this requirement; one of these comments supported this requirement, two opposed it, and one supported it conditionally.

One of the opposing comments expressed doubt that geography is a reliable indicator of pricing, particularly for small vendors, and that the use of geographic criteria results in peer groups with small numbers of vendors; this commenter stated that further study is needed. The other opposing commenter noted that several studies conducted by WIC State agencies have shown that geographic location is not a key ingredient in pricing.

The comment conditionally supporting the requirement stated that the geographic component of peer groups should conform to vendor pricing zones or commonly accepted geographic regions. The comment supporting the geographic requirement stated that geographic zones alone were sufficient for vendor cost containment in one State.

FNS is not persuaded that the geographic requirement should be removed. Further study and experience may result in reconsideration of this requirement. In the meantime, § 246.12(g)(4)(ii)(A) of the final rule provides a mechanism for obtaining an exemption from this requirement. Thus far, only 10 State agencies have requested an exemption from this requirement, suggesting most State agencies are also not persuaded that the geographic requirement should be removed. The exemption alternative is available for State agencies which learn through study or experience that the geographic component is not conducive for vendor cost containment in their circumstances. All 10 of the requests which have thus far been made for this exemption have been granted. Thus the existing exemption mechanism is sufficient for ensuring the geographic peer group requirement is not imposed in inappropriate circumstances. Therefore, the geographic requirement for peer groups is adopted as final without change.

8. Peer Group Transparency (§ 246.12(g)(4))

Two commenters stated that the peer group process needs to be transparent. They stated that State agencies should ensure key information is available to vendors, including peer group criteria and the resulting peer groups, to ensure that vendors understand their peer groups and can advise the State agency if the peer group is inappropriate. One of these commenters cited an example of a State agency which allegedly had not provided this information. According to this comment, the State agency provided the vendors with a description of the peer groups, including a listing of the vendor types, geographic locations, and number of cash registers for each peer group. As part of this description, the State agency published a chart listing the counties included in each geographic area. The commenter then contacted the State agency for clarification about how the geographic areas had been created, which had not been published. The State agency then explained the basis for the geographic areas to the commenter. The comment stated that this explanation should have been published.

Thus the State agency had published the peer group criteria, but had not, in the commenter's opinion, published an adequate explanation for the basis of one of its criteria. FNS believes this State agency's publication of its peer group criteria was adequate, and that the State agency should not be required to publish explanations for its criteria. The State agency is responsible for establishing the peer group criteria, subject only to FNS approval. The State agency needs to inform the vendor of the peer group criteria which will determine how the State agency calculates the maximum allowable reimbursement amounts applicable to the vendor. FNS encourages State agencies to consider the views of vendors during the development of such criteria, such as in vendor advisory councils, but this does not necessarily involve publication. State agencies have been advising vendors of their peer group assignments and the peer group criteria, but, for added assurance, a sentence has been added to § 246.12(g)(4) in this final rule to state that the State agency must inform all vendors of the criteria for peer groups, and must inform each individual vendor of its peer group assignment.

Providing vendors with a description of the peer groups resulting from use of the criteria does not include a listing of the individual vendor peer group assignments. State agencies must not share the peer group assignment of a vendor with other vendors or their representatives or the public, since this would violate vendor confidentiality per § 246.26(e).

9. Administrative Review of Peer Group Designation and Above-50-Percent Status (§ 246.18(a)(1)(iii)(B))

One commenter stated that a vendor should be able to appeal peer group assignments because a vendor may be eligible for different peer groups in a State using multiple criteria, *e.g.,* a vendor might qualify for one peer group based on the number of cash registers, and also qualify for another peer group based on sales volume; an opportunity to appeal would provide the vendor with an opportunity to provide information ensuring the peer group assignment is equitable. FNS agrees. Paragraph 246.18(a)(1)(iii)(B) of the interim rule stated that the validity or appropriateness of the State agency's vendor peer group criteria and the criteria used to identify vendors that are above-50-percent vendors or comparable to above-50-percent vendors are not subject to administrative review.

This provision does not preclude administrative review regarding the application of the State agency's peer group and above-50-percent vendor status criteria to an individual vendor when this application of criteria is the basis for adverse actions (denial of authorization and termination of a vendor agreement for cause). For example, administrative review of such adverse actions could cover whether the State agency had considered all of the SNAP-eligible food sales documentation for the 12-month period used by the State agency to determine a vendor's above-50-percent status, or whether the State agency had used the correct square footage of the store if such criteria is used by the State agency to determine peer group designations for vendors, although such issues would only be subject to administrative review under the current regulations if the State agency had initiated an adverse action as a result of the application of this criteria.

A vendor should be able to seek administrative review regarding the State agency's peer group assignment or above-50-percent vendor status determination for that vendor even though a vendor has not been denied authorization or terminated. The peer group assignment and above-50-percent vendor status determination play crucial roles in the calculation of the maximum allowable reimbursement levels applied to a vendor, i.e., the level of compensation which a vendor will receive upon redemption of food instruments. Thus the peer group assignment and above-50-percent vendor status determination have a major and immediate economic impact on the vendor. Previously, the adverse actions subject to administrative review included only denials of authorization, terminations of vendor agreements for cause, disqualifications, and civil money penalties and fines. Given the economic impact of peer group assignments and above-50-percent vendor status determinations, these actions are included under § 246.18(a)(1)(ii)(C) of this final rule as adverse actions by themselves. However, given the narrow factual focus of such issues, full administrative reviews per § 246.18(a)(1)(i) would not be necessary; abbreviated administrative reviews per § 246.18(a)(1)(ii) would be sufficient.

The peer group assignment and above-50-percent vendor status determination also play crucial roles in the calculation of the competitive price levels which will determine whether an applicant vendor is eligible for authorization under the competitive price criteria. Paragraph 246.18(a)(1)(iii)(A) of the WIC regulations states that the validity or appropriateness of the State agency's vendor limiting or selection criteria are not subject to administrative review. Thus administrative review for competitive price criteria other than peer group assignments and above-50-percent vendor status determinations

are also limited to the application of such criteria and also have a narrow factual focus, such as the percentage or number of standard deviations above a peer group's average prices permitted for an applicant vendor's prices in order for the vendor to be authorized. Therefore, this final rule includes a new § 246.18(a)(1)(ii)(B) which will provide abbreviated administrative review for appeals concerning the application of any competitive price criteria which results in the denial of authorization. Paragraph 246.12(g)(4)(vii) of the interim rule indicated that the competitive pricing provisions of § 246.12(g)(4) do not create a private right of action based on facts that arise from the impact or enforcement of these provisions. Paragraph 246.12(g)(4)(vii) was not intended to prevent a vendor from obtaining administrative review concerning the application of a competitive price criterion. However, the reference to facts that arise from the impact or enforcement of the competitive price provisions might be misinterpreted to prevent such administrative review. Thus the reference to facts that arise from the impact or enforcement of the competitive price provisions has been removed from § 246.12(g)(4)(vii) of this final rule.

As pointed out above in connection with the transparency of peer group criteria, State agencies must not share the peer group assignment of a vendor with other vendors, their representatives or the public, since this would violate vendor confidentiality per § 246.26(e) of the WIC regulations. Thus vendors would not be entitled to such information as part of the administrative review process.

This final rule also includes conforming revisions of § 246.18(a)(1). The final rule deletes the application of competitive price criteria from § 246.18(a)(1)(i)(A), which previously included the application of competitive price criteria as subject to full administrative review. Additionally, the final rule revises the references in § 246.18(a)(1) to paragraphs of § 246.12(g) to correspond with the revisions of § 246.12(g) introduced by the interim rule and retained in this final rule.

List of Subjects in 7 CFR Part 246

Food assistance programs, Food donations, Grant programs—Social programs, Infants and children, Maternal and child health, Nutrition education, Public assistance programs, WIC, Women.

■ Accordingly, the interim rule amending 7 CFR part 246 which was published on November 29, 2005 at 70 FR 71708 is adopted as final with the following changes:

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

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

Authority: 42 U.S.C. 1786.

■ 2. In § 246.2, add in alphabetical order the definition of *partially-redeemed food instrument*, to read as follows:

§ 246.2 Definitions.

* * * * *

Partially-redeemed food instrument means a paper food instrument which is redeemed for less than all of the supplemental foods authorized for that food instrument.

* * * * *

■ 3. In § 246.12:

■ a. Paragraph (g)(4) is amended by adding a new sentence to the end of the introductory text;

■ b. Paragraph (g)(4)(i), end of the second sentence is amended by adding the words '', in accordance with paragraphs (g)(4)(i)(E) and (g)(4)(i)(F) of this section.'';

■ c. Paragraph (g)(4)(i)(D), third sentence is amended by revising the word ''must'' to read ''may''; the fifth sentence by removing the words '', recouping excess payments, or terminating vendor agreements with above-50-percent vendors whose prices are least competitive and that are not needed to ensure participant access''; and by adding two sentences at the end of the paragraph.

■ d. Add new paragraphs (g)(4)(i)(E) and (F);

■ e. Revise paragraph (g)(4)(ii)(B); and

■ f. Paragraph (g)(4)(vii) is amended by removing the words ''based on facts that arise from the impact or enforcement of these provisions''.

The additions and revision read as follows:

§ 246.12 Food delivery systems.

* * * * *

(g) * * *

(4) * * * The State agency must inform all vendors of the criteria for peer groups, and must inform each individual vendor of its peer group assignment.

(i) * * *

(E) Must determine whether vendor applicants are expected to be above-50-percent vendors. The State agency must ask vendor applicants whether they expect to derive more than 50 percent of their annual revenue from the sale of food items from transactions involving WIC food instruments. This question applies whether or not the State agency chooses to authorize above-50-percent vendors. A vendor who answers in the affirmative must be treated as an above-50-percent vendor. The State agency must further assess a vendor who answers in the negative, by first calculating WIC redemptions as a percent of total food sales in existing WIC-authorized stores owned by the vendor applicant. Second, the State agency must calculate or request from the vendor applicant the percentage of anticipated food sales by type of payment, *i.e.*, cash, Supplemental Nutrition Assistance Program, WIC, and credit/debit card. Third, the State agency must review either the inventory invoices for food items, or the actual food items present at the preauthorization visit required by paragraph (g)(5) of this section, or both. Fourth, the State agency must determine whether WIC authorization is required in order for the store to open for business. If the vendor would be expected to be an above-50-percent vendor under any of these criteria, then the vendor must be treated as an above-50-percent vendor. State agencies may use additional data sources and methodologies, if approved by FNS.

(F) Must determine whether a currently authorized vendor meets the above-50-percent criterion, based on the State agency's calculation of WIC redemptions as a percent of the vendor's total foods sales for the same period. If WIC redemptions are more than 50 percent of the total food sales, the vendor must be deemed to be an above-50-percent vendor. As an initial step in identifying above-50-percent vendors, the State agency may compare each vendor's WIC redemptions to Supplemental Nutrition Assistance Program redemptions for the same period. If more than one WIC State agency authorizes a particular vendor, then each State agency must obtain and add the WIC redemptions for each State agency that authorizes the vendor to derive the total WIC redemptions. If Supplemental Nutrition Assistance Program redemptions exceed WIC redemptions, no further assessment is required since the vendor would not be an above-50-percent vendor. For vendors whose WIC redemptions exceed their Supplemental Nutrition Assistance Program redemptions, or if this comparison of redemptions was not made, the State agency must obtain from these vendors a statement of the total amount of revenue derived from the sale of foods that could be purchased using

Supplemental Nutrition Assistance Program benefits. The State agency must also obtain from these vendors documentation (such as tax documents or other verifiable documentation) to support the amount of food sales claimed by the vendor. After evaluating the documentation received from the vendor, the State agency must calculate WIC redemptions as a percent of total food sales and classify the vendor as meeting or not meeting the above-50-percent criterion. State agencies may use additional methods, if approved by FNS.

(ii) * * *

(B) Routine collection of vendor shelf prices at least every six months following authorization to monitor vendor compliance with paragraphs (g)(4)(i)(C), (g)(4)(ii)(C), and (g)(4)(iii) of this section and to ensure State agency policies and procedures dependent on shelf price data are efficient and effective. FNS may grant an exemption from this shelf price collection requirement if the State agency demonstrates to FNSs' satisfaction that an alternative methodology for monitoring vendor compliance with paragraphs (g)(4)(i)(C), (g)(4)(ii)(C), and (g)(4)(iii) of this section is efficient and effective and other State agency policies and procedures are not dependent on frequent collection of shelf price data. Such exemption would remain in effect until the State agency no longer meets the conditions on which the exemption was based, until FNS revokes the exemption, or for three years, whichever occurs first;

* * * * *

■ 4. In § 246.18:

■ a. Revise paragraph (a)(1)(i)(A);

■ b. Paragraph (a)(1)(ii)(A) is amended by revising ''(§ 246.12(g)(3)(iii) and (g)(3)(iv))'' to read ''(§ 246.12(g)(3)(ii) and (g)(3)(iii))'';

■ c. Redesignate paragraphs (a)(1)(ii)(B) through (a)(1)(ii)(J) as paragraphs (a)(1)(ii)(D) through (a)(1)(ii)(L), and add new paragraphs (a)(1)(ii)(B) and (a)(1)(ii)(C).

■ d. In newly redesignated paragraph (a)(1)(ii)(F), revise ''§ 246.12(g)(7)'' to read ''§ 246.12(g)(8)'';

■ e. Revise paragraphs (a)(1)(iii)(A) and (a)(1)(iii)(B).

The revisions and additions read as follows:

§ 246.18 Administrative review of State agency actions.

(a) * * *

(1) * * *

(i) * * *

(A) Denial of authorization based on the application of the vendor selection criteria for minimum variety and quantity of authorized supplemental foods (§ 246.12(g)(3)(i)), or on a determination that the vendor is attempting to circumvent a sanction (§ 246.12(g)(6));

* * * * *

(ii) * * *

(B) Denial of authorization based on the application of the vendor selection criteria for competitive price (§ 246.12(g)(4));

(C) The application of the State agency's vendor peer group criteria and the criteria used to identify vendors that are above-50-percent vendors or comparable to above-50-percent vendors;

* * * * *

(iii) * * *

(A) The validity or appropriateness of the State agency's vendor limiting criteria (§ 246.12(g)(2)) or vendor selection criteria for minimum variety and quantity of supplemental foods, business integrity, and current Supplemental Nutrition Assistance Program disqualification or civil money penalty for hardship (§ 246.12(g)(3));

(B) The validity or appropriateness of the State agency's selection criteria for competitive price (§ 246.12(g)(4)), including, but not limited to, vendor peer group criteria and the criteria used to identify vendors that are above-50-percent vendors or comparable to above-50-percent vendors;

* * * * *

Dated: September 30, 2009.

Kevin W. Concannon,

Under Secretary for Food, Nutrition, and Consumer Services.

[FR Doc. E9–24143 Filed 10–7–09; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM403; Special Conditions No. 25–385–SC]

Special Conditions: Boeing Model 747–8/–8F Airplanes, Structural Design Requirements for Four-Post Main Landing Gear System

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions.

SUMMARY: These special conditions are issued for the Boeing Model 747–8/–8F airplane. This airplane will have novel or unusual design features associated with a four-post main landing gear system. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: *Effective Date:* November 9, 2009.

FOR FURTHER INFORMATION CONTACT: Mark Freisthler, FAA, Airframe & Cabin Safety Branch, ANM–115, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1119; facsimile (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Background

On November 4, 2005, The Boeing Company, P.O. Box 3707, Seattle, WA 98124, applied for an amendment to Type Certificate Number A20WE to include the new Model 747–8 passenger airplane and the new Model 747–8F freighter airplane. The Model 747–8 and the Model 747–8F are derivatives of the 747–400 and the 747–400F, respectively. Both the Model 747–8 and the Model 747–8F are four-engine jet transport airplanes that will have a maximum takeoff weight of 970,000 pounds and new General Electric GEnx–2B67 engines. The Model 747–8 will have two flight crew and the capacity to carry 660 passengers. The Model 747–8F will have two flight crew and a zero passenger capacity, although Boeing has submitted a petition for exemption to allow the carriage of supernumeraries.

Type Certification Basis

Under the provisions of 14 CFR 21.101, Boeing must show that the Model 747–8 and 747–8F (hereafter referred as 747–8/–8F) meet the applicable provisions of part 25, as amended by Amendments 25–1 through 25–117, except for earlier amendments as agreed upon by the FAA. These regulations will be incorporated into Type Certificate No. A20WE after type certification approval of the 747–8/–8F.

In addition, the certification basis includes other regulations, special conditions and exemptions that are not relevant to these special conditions. Type Certificate No. A20WE will be updated to include a complete description of the certification basis for these model airplanes.

If the Administrator finds that the applicable airworthiness regulations (*i.e.,* 14 CFR part 25) do not contain adequate or appropriate safety standards for the 747–8/–8F because of a novel or