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7 CFR Part 249

**Senior Farmers' Market Nutrition
Program Regulations; Final Rule**

DEPARTMENT OF AGRICULTURE**Food and Nutrition Service****7 CFR Part 249**

RIN 0584-AD35

Senior Farmers' Market Nutrition Program Regulations**AGENCY:** Food and Nutrition Service (FNS), USDA.**ACTION:** Final rule.

SUMMARY: This final rule implements the provision of the Farm Security and Rural Investment Act of 2002 that gives the Secretary of Agriculture the authority to promulgate regulations for the operation and administration of the Senior Farmers' Market Nutrition Program (SFMNP), thereby making it a permanent program rather than a competitive grant. The purposes of the SFMNP are to provide resources in the form of fresh, nutritious, unprepared, locally grown fruits, vegetables, and herbs from farmers' markets, roadside stands, and community supported agriculture programs to low-income seniors; to increase the domestic consumption of agricultural commodities by expanding or aiding in the expansion of domestic farmers' markets, roadside stands, and community supported agriculture programs; and to develop or aid in the development of new and additional farmers' markets, roadside stands, and community supported agriculture programs.

DATES: This rule becomes effective on January 11, 2007.

FOR FURTHER INFORMATION CONTACT: Debra Whitford or Donna Hines, Supplemental Food Programs Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Room 528, Alexandria, Virginia 22302, (703) 305-2746, OR Debbie.Whitford@fns.usda.gov, or Donna.Hines@fns.usda.gov.

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

As required for all rules that have been designated as Significant by the Office of Management and Budget, a Regulatory Impact Analysis was developed for this rule. It is attached as an appendix to this final rule.

Need for Action

Congress established the SFMNP in Section 4402 of Public Law 107-171 to provide resources in the form of fresh, nutritious, unprepared, locally grown fruits, vegetables, and herbs from farmers' markets, roadside stands, and community supported agriculture programs (CSAs) to low-income seniors; increase the domestic consumption of agricultural commodities by expanding or aiding in the expansion of domestic farmers' markets, roadside stands, and CSA programs; and develop or aid in the development of new and additional farmers' markets, roadside stands, and CSA programs. This final rule provides operating guidelines for the SFMNP, consistent with legislative intent.

The requirements of the final USDA rule for the SFMNP are similar to two USDA interventions: The WIC Farmers' Market Nutrition Program (FMNP), for individuals participating in the Special Supplemental Nutrition Program for Women, Infants and Children (WIC) and those individuals on a waiting list for WIC benefits; and the Senior Farmers' Market Nutrition Pilot Program (SFMNPP), administered by USDA as a pilot program in 2001. The SFMNP has been administered by USDA as a competitive grant program since Fiscal Year (FY) 2001. Establishing rules for the SFMNP similar to the FMNP and SFMNP eases the administrative burden for USDA, State agencies, farmers, and program recipients.

*Benefits***Benefits to Seniors**

Low-income seniors will be afforded nutrition education as well as a coupon benefit ranging in value from \$20 to \$50 per annum, which will be used to purchase fresh, unprepared fruits, vegetables, and herbs intended to improve seniors' diets. Seniors, and ultimately participating farmers, in each State agency will benefit from the total Federal grant to the State agencies minus the amount that State agencies spend on administration—up to 10 percent of the total grant.

It is possible that seniors will not eat additional fresh fruits and vegetables, but rather will substitute the fruits and vegetables that they would have purchased with their own funds with fruits and vegetables purchased with SFMNP coupons. You, *et al.*, "Consumer Demand for Fresh Fruits and Vegetables in the United States" (1998) found that the demand for fresh fruits and vegetables in the United States was responsive to price changes, but not changes in income.

Benefits to Farmers

Farmers will collect revenue from redeemed coupons up to the total Federal grants to State agencies for food costs (the total amount of revenue collected will depend also on the amount of the grant State agencies use to cover administrative costs). Additional revenue may be reaped as seniors might spend their own money (and in some States, food stamps) to purchase additional goods at the farmers' markets. Farmers will also benefit from the exposure of new populations to farmers' markets, roadside stands and CSAs, which could lead to increased revenues.

In FY 2005, the SFMNP operated at 2,663 farmers' markets, 2,001 roadside stands and 237 CSAs. USDA's Economic Research Service (ERS) reported in 2001, that the SFMNP has not been as effective [as envisioned] in developing new farmers' markets, produce stands, and community supported agricultural programs or in expanding existing ones. Nevertheless, ERS suggests that given evidence from the WIC FMNP, the SFMNP could increase the number of farmers' markets, roadside stands, and CSAs in the long run.

Costs

The costs associated with the SFMNP are based on the following assumptions:

- Funding for FY 2007–FY 2011 is maintained at the current authorized level of \$15 million annually (assumes no carryover funds are available in 2007-2011);
- State agencies use 10 percent of the Federal grant for administration in FY 2007–FY 2011;
- State agencies provide an average benefit level of \$17.50 to recipients (as shown in Table 4 on page 25); and
- The poverty rate among seniors remains constant over the period of analysis.

FNS also assumes for the purpose of this analysis that total funding and benefit levels will not be indexed for inflation; therefore, their value has been deflated using projections of the Consumer Price Index—Urban index for fresh fruits and vegetables (1989 baseline). Based on these assumptions, we estimate there will be little change in the percent of SFMNP eligibles served in the analysis period, due to the large number of eligibles nationally.

Because the resources devoted to the SFMNP are likely to be small in comparison to the size of the eligible population, the permanent Program will not enable State agencies to reach the majority of those eligible. However, the minimum and maximum benefit levels

put forth in this final rule will help enable State agencies to serve as many eligible individuals as possible. The final rule allows for future growth, should additional funds be made available. Further, State agencies are allowed to contribute their own funds to enhance their Federal SFMNP grants. There were five State agency grantees that added State funds to their SFMNP food benefits in FY 2005.

Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612). Nancy Montanez Johner, Under Secretary for Food, Nutrition, and Consumer Services, has certified that this rule will not have a significant economic impact on a substantial number of small entities. The provisions of this rulemaking are applicable to all State and local agencies, farmers, farmers' markets, roadside stands, and community supported agriculture programs, regardless of their size or of the volume of SFMNP business they conduct.

Public Law 104–4, Unfunded Mandate Reform Act of 1995 (UMRA)

Title II of the UMRA 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 to the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, Section 205 of the UMRA generally requires FNS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule.

This final rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or 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

The Senior Farmers' Market Nutrition Program is listed in the Catalog of Federal Domestic Assistance under No. 10.576. For the reasons set forth in the final rule in 7 CFR part 3015, Subpart

V and related Notice (48 FR 29115, June 24, 1983), this program is included in the scope of Executive Order 12372 that requires intergovernmental consultation with State and local officials.

Executive Order 12988

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

In the Senior Farmers' Market Nutrition Program, the administrative procedures are as follows:

- Local agencies, farmers, farmers' markets, roadside stands, and community supported agriculture programs—State agency hearing procedures issued pursuant to 7 CFR 249.16;
- Applicants and participants—State agency hearing procedures pursuant to 7 CFR 249.16;
- Sanctions against State agencies (but not claims for repayment assessed against a State agency) pursuant to 7 CFR 249.17—administrative appeal in accordance with 7 CFR 249.16; and
- Procurement by State or local agencies—administrative appeal to the extent required by 7 CFR 3016.36.

Federalism Summary Impact Statement

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under Section 6(b)(2)(B) of Executive Order 13132. FNS has considered the impact of this rule on State and local governments and has determined that this rule does not have federalism implications. Therefore, under Section 6(b) of the Executive Order, a federalism summary impact statement is not required.

Civil Rights Impact Analysis

FNS has reviewed this rule in accordance with FNS Regulation 4300–4, “Civil Rights Impact Analysis,” to identify and address any major civil rights impacts the rule might have on

minorities, women, and persons with disabilities. After a careful review of the rule's intent and provisions, and the characteristics of SFMNP participants, FNS has determined that none of the provisions in this rule have a discernible impact on minorities, women, or persons with disabilities that are likely to result in inequitable treatment. FNS specifically prohibits the State agencies, and their cooperators, that administer the SFMNP from engaging in actions that discriminate against any individual in any of the protected classes (see 7 CFR 249.7 for the nondiscrimination policy in the SFMNP). Where State agencies have options, and they choose to implement a certain provision, they must implement it in such a way that it complies with the SFMNP regulations set forth at § 249.7.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR 1320) requires that the Office of Management and Budget (OMB) approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number. The information collections in this rule are being reviewed by OMB and will not be effective until they have received OMB approval. Once they have received OMB approval, FNS will publish a notice in the **Federal Register**.

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

History of the SFMNP—FY 2001 Through FY 2004

USDA's Commodity Credit Corporation (CCC) established the Senior Farmers' Market Nutrition Program (SFMNP) in November 2000 as a pilot program (65 FR 65825, Nov. 2, 2000). A brief history of the program from FY 2001–FY 2004 was included in the preamble to the proposed rule. A total of \$15 million was made available for the pilot SFMNP, in which grant awards ranging from \$9,000 to \$1.2 million were made to 30 States, 5 Indian tribal governments, and the District of Columbia. Nearly 420,000 low-income seniors participated in the

SFMNP that first year. In FY 2002, Public Law 107-78 (the Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act) provided \$10 million from FNS' Commodity Assistance Program account to continue the SFMNP for a second year.

An additional \$5 million was provided from CCC funds by Section 4402 of the Farm Security and Rural Investment Act of 2002 (the Farm Bill), Public Law 107-171 (7 U.S.C. 3007). The Farm Bill also authorized the SFMNP for FY 2003 through FY 2007, provided funding at \$15 million for each of those years, and gave FNS the authority to develop regulations as deemed necessary for the SFMNP. The basic structure of the SFMNP has remained unchanged since its inception, with only slight modifications in the competitive grant process. By the end of FY 2004, 47 State agencies were participating in the program, and over 800,000 seniors had received SFMNP benefits during that year's market season.

The information below brings the history of the SFMNP up to date since the proposed rule was published.

SFMNP—FY 2005 Through FY 2006

Just prior to the beginning of FY 2005, OMB clarified to FNS that SFMNP funds that were not expended in the previous fiscal year could not be carried over for allocation in the current fiscal year, i.e., that only \$15 million could be allocated to grantees. To accommodate this clarification, FNS reduced each participating SFMNP State agency's grant award for FY 2005 by 10.2 percent. No funds were available to support the expansion of any current grantee's existing program, or the addition of any new State agencies that might have been interested in initiating a new SFMNP. Additionally, one State agency discontinued its SFMNP operation due to the unavailability of State funds. The SFMNP funds that had been initially allocated to this grantee were then redistributed proportionally to the remaining 46 SFMNP State agencies. Despite the reduction in their grant awards, the 46 State agency grantees not only continued to operate the SFMNP, but many were also able to leverage State, local, or private funds to make up the difference.

Public Law 108-447 (Rural Development, Food and Drug Administration and Related Agencies Appropriations Act 2005) included a provision that allows FNS to allocate any unspent funds from FY 2005, as well as the \$15 million appropriated for FY 2006, to eligible SFMNP grantees.

The availability of these unspent funds is expected to restore the grant awards for the 46 current SFMNP State agencies to levels approaching the grants that were awarded in FY 2004, but there will still be insufficient funds to solicit grant applications from new State agencies.

Consistency With the WIC Farmers' Market Nutrition Program (FMNP)

USDA's FNS has administered the FMNP since its inception as a pilot program in 1988, through its transition to an authorized independent program when the WIC Farmers' Market Nutrition Act of 1992 (Pub. L. 102-314) amended Section 17(m) of the Child Nutrition Act of 1966 (42 U.S.C. 1786(m)). The FMNP provides coupons to eligible WIC participants (or to individuals on WIC waiting lists) for the purchase of fresh, nutritious, unprepared fruits, vegetables and herbs at farmers' markets and, at the State agency's option, at roadside stands or farm stands. Many of the State agencies that have received SFMNP grant awards since FY 2001 were already established as administering agencies for the FMNP in that State. Based on the similar natures of the FMNP and the SFMNP, and in an effort to create consistency between the two programs, this final rule is constructed on the framework of the FMNP regulations, for which the final rule was published in the **Federal Register** on September 27, 1995 (60 FR 49739).

General Summary of Comments Received on the SFMNP Proposed Rule

The SFMNP Proposed Rule was published in the **Federal Register** on May 26, 2005 (70 FR 30558), with a 90-day comment period. A total of 415 comments were received on the Proposed Rule, over half of which were from program participants, and generally expressed support for the SFMNP's establishment as a permanent nutrition assistance program. One comment was opposed to the proposed rule in all of its provisions, and another commenter suggested that the SFMNP not be changed in any aspect beyond the addition of available funding.

The remaining comments were submitted from a variety of sources, including current SFMNP State agency grantees, State agencies not currently participating in the Program but interested in doing so, local agencies, farmers, professional organizations and associations, Congressional delegations, advocacy groups, nutritionists, and private citizens. The major comments are addressed by topic in further detail throughout this preamble.

What follows is a discussion of each section of the final SFMNP rule, including the major provisions set forth in each section; a brief summary of the comments received that addressed these issues; and FNS' rationale for either modifying each section in the final rule, or retaining its provisions as initially proposed. The section numbers referenced in the following discussion shall be sections of Title 7, Code of Federal Regulations, unless otherwise indicated.

1. General Purpose and Scope (§ 249.1)

While the essential purpose of the SFMNP is very similar to that of the FMNP, it differs from the FMNP purpose in one significant aspect—it includes community supported agriculture (CSA) programs (as defined in § 249.2) as allowable outlets for accepting SFMNP coupons or funds. CSA programs, while fairly familiar to the small farmer and sustainable agriculture communities, have not previously been associated with FNS programs.

A total of 220 comments were received in support of converting the SFMNP from a competitive grant program to permanent status, and of the stated purposes of the program. In fact, close to 200 form letters were sent in by participating seniors in a single county. The purposes and scope of the SFMNP are retained in this final rule unchanged from the proposal.

As directed by the provisions of Public Law 107-171 (7 U.S.C. 3007), the purpose and scope of the SFMNP are to improve/enhance the diets of low-income seniors by enabling them to obtain fresh fruits and vegetables from farmers' markets, roadside stands, and CSA programs, and to develop or expand these outlets by broadening their customer bases.

2. Definitions (§ 249.2)

Most of the definitions used in this rulemaking for the SFMNP are either the same as those used in the FMNP or are definitions used in the SFMNP competitive grant program. The majority of these definitions were either not addressed by commenters at all, or were supported by general comments to that effect. Therefore, with the exception of the definitions addressed below, all of the other definitions contained in § 249.2 of this final rule are retained as proposed.

“Bulk purchase.” A number of SFMNP grantees have used a modified CSA program model in which bulk quantities of certain produce items, such as apples or sweet potatoes, were purchased directly from authorized

farmers by the State agency. These items were then equitably divided among SFMNP participants, and distributed directly to them, either at a central distribution point (such as a local senior center) or through some type of home delivery network. Such a program model was found to be very successful, but was not addressed in the proposed rule. Three commenters argued that the bulk purchase option should be retained in the permanent SFMNP, and FNS concurs with this position, as long as it is carefully managed to ensure that all other program requirements are met, e.g. only eligible foods are purchased in bulk for distribution, farmers from whom the produce is purchased are authorized by the State agency, and the value of the produce provided to SFMNP participants does not exceed the allowable maximum of \$50 per participant. Therefore, a definition for "bulk purchase" is added to the list of regulatory definitions at § 249.2; additional information regarding the bulk purchase option is also provided in Section 10 of this preamble.

"Eligible foods." In the proposed rule, FNS defined "eligible foods" as fresh, nutritious, unprepared, locally grown fruits, vegetables, and herbs for human consumption. Three commenters suggested that the proposed definition of "eligible foods" be broadened to include fruits and vegetables that are not otherwise available through local production, as well as other nutritionally healthful items such as dried fruits and raw nuts. Another 6 commenters supported the addition of locally-produced honey to the list of eligible foods, and 2 comments supported allowing dried beans for purchase. One comment suggested the inclusion of any edible farm produce, with an emphasis on variety, while another proposed that State agencies be given the authority to determine what food items should be considered to be eligible for purchase under the SFMNP. Finally, one commenter suggested that FNS should provide a master list of eligible foods from which State agencies would select the items that could be purchased with SFMNP benefits or funds.

While FNS understands the motivation behind the suggested addition of such items as honey, dried fruits or beans, and raw nuts to the list of eligible SFMNP foods, it has no legislative authority to make such additions. The Farm Security and Rural Investment Act of 2002 (Pub. L. 107-171, also known as the Farm Bill) specifically stipulates that SFMNP funds are to be used for the purchase of fresh, unprepared fruits and vegetables.

State agencies do have a considerable amount of latitude in determining which fruits and vegetables are allowed for purchase within the Federal definition of eligible foods. It is not realistic to expect FNS to provide a master list of eligible foods beyond what is included in the current definition; FNS believes that individual State agencies are in the best position to know which fruits and vegetables are appropriate for sale within that State. Further, horticultural advances are constantly being made, and FNS would not want to exclude a potentially eligible fruit or vegetable from inclusion by establishing an exhaustive—and possibly inaccurate—list of eligible foods for the SFMNP.

Therefore, the definition of "eligible foods" for the SFMNP will be retained in this final rule as proposed.

"Locally grown." In the proposed rule, "locally grown" was defined as foods that are grown within the borders of the State that the project serves. State agencies also have the option to define "locally grown" to mean foods grown in areas of States adjacent to that State, as long as such areas are part of the United States, and/or to use a more stringent definition than the one established by FNS. Two comments were received that addressed the proposed definition of "locally grown". One commenter expressed concern that the definition as proposed is not sufficiently restrictive to ensure that the interests of local (i.e., within-State) farmers are protected, and suggested that the definition be strengthened to include a mandatory percentage of locally grown produce that must be offered for purchase through the SFMNP by authorized farmers, markets, and/or CSAs. The second commenter suggested that State agencies be allowed to define "locally grown" with no federally-imposed restrictions.

While FNS encourages all participating State agencies to promote the sale of locally-grown eligible foods to the greatest extent possible, we also realize that circumstances beyond the local farmers' control may occur to make it impossible to meet the demands of SFMNP participants entirely, at any given point in the market season. Once SFMNP coupons have been issued, or CSA shares assigned, a commitment has been made by the State agency to the participant that sufficient produce will be available to him or her in exchange for the full amount of benefits provided, should the participant want to use them. Thus it becomes incumbent upon the authorized farmer(s) to find a way to meet that demand. FNS believes that each individual State agency is in the

best position to determine how much of the produce offered must actually be grown by the farmer who accepts the SFMNP coupons in a transaction. Consistent with the FMNP, SFMNP State agencies will be responsible for defining the percentage of produce that must be grown by an authorized farmer. However, as clearly stated in the proposed rule, FNS believes that it is important for an authorized farmer to produce at least some portion of the fruits and vegetables that she/he offers for sale. This requirement is intended to support small farmers.

Therefore, the definition of "locally grown" is retained in this final rule as set forth in the proposed rule.

"Participant." The term "participant" was suggested by a commenter as a replacement for the term "recipient" that was included in the proposed rule. As the commenter pointed out, "participant" is consistent with the term used in other FNS-administered nutrition assistance programs. FNS agrees; therefore, the definition of "recipient" that was initially set forth in the proposed rulemaking is now used to define "participant" for SFMNP purposes, the term "recipient" is removed from § 249.2, and the term "participant" replaces "recipient" throughout this final rule.

3. Administration (§ 249.3)

This section of the rule delegates to FNS the responsibility within USDA for administering the SFMNP, and delegates the responsibility for direct administration of the program to State agencies. It also requires each State agency to submit an annual State Plan of Operations, and to execute written agreements between the administering (lead) State agency and any other State, local, or nonprofit agencies or entities involved in operating any aspect of the SFMNP. Finally, each State agency must ensure that sufficient staff is available to administer the SFMNP efficiently and effectively.

Three comments were received that addressed this section of the proposed rulemaking, and most of them were essentially supportive of the administrative structure set forth in the proposed rule. One commenter proposed that the final rule include a formal delegation of authority to operate and/or administer the SFMNP at the local level, but this provision is already included as a State agency option at § 249.3(d).

Therefore, § 249.3 is retained in this final rule as proposed.

4. State Plan Provisions (§ 249.4)

In establishing the SFMNP as a permanent program, Congress gave FNS the authority to set out basic standards and requirements for its operation. Consistent with other FNS nutrition assistance programs, as proposed, each State agency that desires to receive a SFMNP grant, including State agencies currently participating in the SFMNP, will need to submit a State Plan of Operation for approval by FNS. These State Plans will be due by November 15 of each year. Four commenters misunderstood this particular provision of the proposed rule, and wrote to suggest that submission of a SFMNP State Plan should not be required until the final SFMNP rule is published. It was never FNS' intent, nor was it suggested in the SFMNP proposed rule, that State Plans would be required prior to publication of the final rule. Therefore, the first SFMNP State Plans will be due to FNS Regional Offices by February 15, 2007, for the FY 2007 market season, and by November 15 of each year thereafter.

The State plan process replaces the grant application process that was used for the SFMNP since its inception in FY 2001. One commenter suggested that the SFMNP continue to be administered as a competitive grant program. This is not a feasible option for future oversight of the SFMNP; once the status of the SFMNP as a permanent program has been established, its administration at the Federal level is expected to be consistent with other FNS nutrition assistance programs, i.e., State plans are submitted by and approved for each participating State agency, and the direct oversight and day-to-day management of the program is provided through the seven FNS Regional Offices. Therefore, this final rule sets out at § 249.4(a) the specific elements that must be included in each State Plan submitted. A complete list of State Plan requirements is contained at § 249.4.

As indicated above, § 249.4(a) sets out specific requirements for information that must be included in the State Plan of Operation. Many of the requirements included in the SFMNP proposed rule were new to SFMNP operators, and reflected administrative requirements that generated a considerable number of comments in opposition to the requirements. Listed below are discussions of most of the proposed information to be included in SFMNP State Plans, the comments received, and FNS' decision regarding each proposed provision. Some of the larger administrative issues, such as income eligibility determination for SFMNP

applicants, are addressed in greater detail under their respective Sections.

Number and addresses of authorized participating markets, roadside stands, and CSA programs (§ 249.4(a)(8)(i))—Two commenters pointed out that it is unreasonable to require the actual addresses of all authorized SFMNP outlets in November as part of the State Plan before the market season actually begins the following spring or summer. As noted, markets and roadside stands are not always permanent locations, and circumstances may change during the intervening months that cause these locations to change. Commenters noted that providing the number of outlets by type (market, roadside stand, CSA) that are expected to be authorized for the coming season, based on the prior year's authorizations and/or projected additions such as new markets that are being solicited for inclusion in the SFMNP, should be sufficient. FNS agrees with commenters that providing the addresses of market outlets for the prior year is sufficient. Therefore, this final is revised in § 249.4(a)(8)(i) to require a State agency to provide in its State Plan the number and addresses of authorized market outlets that participated in the SFMNP during the prior year.

A technical oversight in this paragraph of the proposed rule has also been corrected in this final rule by adding the number of individual farmers authorized to accept SFMNP coupons or CSA program funds to this requirement.

Listing of all SFMNP certification/issuance sites, including a map outlining the service area and proximity of markets, roadside stands, and/or CSA programs to certification/issuance or distribution sites (§ 249.4(a)(8)(ii))—Similar to the requirement for the addresses of all authorized outlets, 4 commenters pointed out that this provision is burdensome and unrealistic, given that reasonable access to the authorized outlets where participants will be able to use their program benefits is essential to the fundamental success of the SFMNP. Again, FNS agrees that providing a list of SFMNP certification and issuance sites, including a map, for the upcoming market season is not reasonable. Therefore, this final is revised in § 249.4(a)(8)(ii) to require a State agency to include in its State Plan the SFMNP certification and issuance sites, including a map outlining the service area and proximity of authorized market outlets that participated in the SFMNP during the prior year.

Determination of areas to be served (§ 249.4(a)(9)(i))—In the proposed rule,

FNS included a provision to require the State agency to describe in its State Plan how it intended to select the area(s) within the State where SFMNP services would be offered. One commenter suggested that FNS should allow State agencies to exercise their own discretion in making such decisions. The limited amount of funding that is available for the SFMNP currently forces State agencies to make such determinations very carefully, and it has become evident over the past 5 years of operation that the considerations most important to FNS (higher concentrations of eligible persons and greater access to farmers' markets, roadside stands, and/or CSA programs) are already in use by the State agencies that received SFMNP grant awards. While we agree that State agencies have discretion to decide how to select the areas within the State to offer SFMNP benefits, FNS would like this information and believes State agencies should provide it information as part of the State Plan. Therefore, this requirement is retained in this final rule.

Method for preventing and identifying dual participation (§ 249.4(a)(9)(iv))—

Six commenters opposed the dual participation requirement, pointing out that such a requirement is unnecessary in a program as small as the SFMNP. These commenters also stated that because the majority of SFMNP participants come into the program by virtue of their certification for or participation in another assistance program (such as Food Stamps or the Commodity Supplemental Food Program (CSFP)), the requirement designed to prevent dual participation in the SFMNP is redundant, because such programs already have mechanisms in place to detect and prevent dual participation. FNS believes that the commenters may have misunderstood the intention of this requirement, and would like to clarify that such mechanisms are not intended to prevent a senior from participating in two different programs for which she/he may be eligible, such as CSFP and SFMNP. State agencies are still required, however, to have in place a mechanism to assure that dual participation within the SFMNP, i.e., receipt of SFMNP benefits from more than one local agency or program model, can be detected and prevented. Such a mechanism does not have to be complicated or elaborate, and may be combined with a procedure already in place in a program for which participation or certification confers automatic SFMNP eligibility. Therefore, the requirement regarding dual

participation at § 249.4(a)(9)(iv) is retained in this final rule as proposed.

5. Selection of New State Agencies (§ 249.5)

This section of the proposed rule stated that only State agencies, as defined in § 249.2, would be eligible to receive grants for and administer the SFMNP. It also set forth FNS' intention to grandfather in as State agencies in the permanent SFMNP those State agencies that participated in the SFMNP during the previous fiscal year (i.e., FY 2006) of the competitive grant program. In regard to the determination of entities that should be eligible to serve as SFMNP State agencies, one commenter expressed concern that local Area Agencies on Aging (AAA) would not be allowed to continue to administer the SFMNP. This is not the case. Since its inception, only a bona fide State agency or a federally recognized Indian Tribal Government has been eligible to receive funds as a SFMNP grantee. However, State agency grantees have also, since the inception of the SFMNP, had the option to allow local agencies such as AAAs to take on the day-to-day administrative and operational functions of the SFMNP. That option was expressly described in the proposed rule, and is retained in this final rule at § 249.5.

Three comments were received that opposed the proposal to grandfather in those State agencies currently participating in the SFMNP. These commenters argued that everyone should be given a fair opportunity to apply for the Program, and that the grandfathering clause is unfair to State agencies that have been unable to join the SFMNP. While funding limitations have made it impossible to accept applications from prospective SFMNP State agencies for the past 2 years, we disagree with the concern of overall unfairness. The grandfather clause is designed to facilitate the continuation of existing programs. Therefore, the clause is retained as proposed. Any new State agency interested in participating in the SFMNP is welcome to submit a State Plan of Operations to the appropriate FNS Regional Office by the regulatory deadline. Such prospective State agencies should keep in mind, however, that FNS approval of a SFMNP State Plan does not guarantee the availability of Federal funds to support the program.

6. Participant Eligibility (§ 249.6)

a. Categorical Eligibility

In §§ 249.2 and 249.6(a)(1) of the proposed rule, FNS defined a person categorically eligible for the SFMNP (a "senior") as an individual 60 years of

age or older. Indian tribal organizations administering the SFMNP could deem Native Americans who are 55 years of age or older as categorically eligible for SFMNP benefits. State agencies would have the option to establish a higher age limit, such as 62 or 65 years of age. Four commenters specifically stated their support for these minimum age requirements. One additional commenter opposed the requirement for proof of age as an eligibility determinant, but no such requirement was included in the proposed rulemaking, nor has one been added to this final rule. Although two comments were received opposing the option for State agencies to establish a higher age limit, FNS believes that this option is important to State agencies as a potential caseload management tool.

At § 249.6(a)(1), FNS also proposed to allow State agencies the option to deem disabled individuals under 60 years of age, who live in housing facilities occupied primarily by older individuals where congregate nutrition services are provided, as categorically eligible for SFMNP benefits. SFMNP State agencies opting to serve such disabled individuals would be responsible for weighing the relative benefits of serving those persons in certain housing facilities against serving additional elderly participants who are 60 years of age and older in the same, or possibly another, service delivery area. Four comments were received that addressed this provision, most of which were generally supportive. In fact, only one commenter opposed the "mandate" to serve persons less than 60 years old—a mandate that does not exist in either the proposed or this final rule.

The provisions at § 249.6(a)(1) regarding categorical eligibility for the SFMNP are therefore retained as set forth in the proposed rule.

b. Residency Requirement

Section 249.6(a)(2) of the proposed rule would have allowed State agencies to establish a residency requirement for SFMNP applicants, to determine a service area for any local agency, and to require an applicant to reside within that service area at the time of application. No durational or fixed residency requirement could be imposed. Only one comment was received related to the residency requirement for the SFMNP, and that comment reflected support for the provision. Therefore, this provision is retained as set forth in the proposed rule.

c. Income Eligibility

In developing the SFMNP proposed rule, FNS identified and considered three major aspects to the determination of income eligibility for the SFMNP:

1. What should be the maximum allowable household income?

2. Should FNS allow automatic income eligibility based on an individual's participation in other programs? If so, which programs should be included?

3. How much documentation or verification of income eligibility should be required for SFMNP applicants?

Five comments were received that generally opposed any and all income eligibility requirements. FNS does not support this view, because of the need for responsible stewardship and fundamental program accountability.

Income eligibility guidelines. As described in the preamble to the SFMNP proposed rule, most participating SFMNP State agencies use a maximum household income of 185 percent of the annual poverty income guidelines. In FY 2005, 36 of the 46 participating SFMNP State agencies used an income eligibility standard of 185 percent of the poverty guidelines, and another 7 State agencies linked SFMNP income eligibility to the maximum income limit used in the Commodity Supplemental Food Program (CSFP), i.e., 130 percent (7 CFR 247.7(a)(3)). A limited number of other variations existed, ranging from 150 to 200 percent of the poverty income guidelines. Therefore, in the proposed rule, FNS proposed a maximum household income of 185% of the poverty guidelines.

Although over twice as many of the comments received pertaining to this provision suggested the option of using an income eligibility standard higher than 185 percent as supported the 185 percent limit (15 and 7, respectively), FNS does not support the option of a higher standard, even on a case-by-case basis, because a fundamental principle of the SFMNP is to serve as many low-income seniors as possible. Therefore, in § 249.6(a)(3), FNS retains the maximum income limit of 185 percent for the SFMNP as set forth in the proposed rule.

Automatic income eligibility based on participation in other programs. Under the competitive grant model of the SFMNP, many grantees use participation in other means-tested programs, such as the Food Stamp Program, the CSFP, and the Food Distribution Program on Indian Reservations (FDPIR), to determine eligibility for the SFMNP. All of these programs use an income eligibility limit

that is at or below 130 percent of poverty.

FNS proposed to continue to allow State agencies to deem applicants automatically eligible for the SFMNP based on participation/certified eligibility to receive benefits in another means-tested assistance program, as determined by the State agency, as long as income eligibility is set at or below the SFMNP maximum income, i.e., 185 percent of the annual poverty income guidelines, and some form of documentation is required to establish income eligibility for that program.

All 3 of the comments received addressing this provision were supportive. One commenter went on to suggest that persons eligible for the Pharmaceutical Assistance to the Aged and Disabled (PAAD) Program also be deemed income eligible for the SFMNP. As long as the process for establishing eligibility for the PAAD is consistent with the requirements described above, and the individual is otherwise (categorically and residentially) eligible to participate in the SFMNP, FNS has no objection should a State agency wish to include the PAAD among its group of programs that confer automatic income eligibility for the SFMNP.

Documentation of income eligibility. Proposed § 249.6(b) would have required SFMNP applicants who are not automatically income eligible for the program based on participation in or certified eligibility for another means-tested program to provide documentation of family income at certification.

This requirement was strongly opposed in 123 comment letters, representing every commenter category. They expressed concern about imposing an administrative burden of this nature for such a relatively small annual benefit. One comment stated that the amount of time and effort anticipated to be necessary to obtain proof or documentation of income would be excessive given the value of the benefit offered—and the cost is unknown. This commenter went on to observe that the self-identification of need for food assistance, self-declaration of participation in another means-tested assistance program, or self-declaration of income should be the minimum requirement for accessing a \$20 to \$50 annual SFMNP benefit. FNS finds the arguments put forth in these comments to be compelling, and has not included in the final rule a requirement for income documentation from all SFMNP applicants who are not deemed otherwise income eligible. Instead, as set forth in this final rule, such applicants may be certified if they sign

an affidavit affirming that their household income does not exceed the State agency's maximum income limit for their individual household size, except that State agencies offering a benefit greater than \$50 per participant through a CSA program may not accept a signed affidavit of self-declared income eligibility, but must require documentation of household size and income for such participants. State and local agencies continue to have the option to verify reported income, in order to confirm an applicant's income eligibility for the SFMNP.

d. Certification Periods

FNS established in the proposed rule at § 249.6(c) a certification period for SFMNP participants. As proposed, recipients could be certified only for the current fiscal year's SFMNP period of operation. One commenter suggested that multiple-year SFMNP certification periods should be allowed, but FNS disagrees with this suggestion. Funds for the SFMNP are generally too limited, and turnover in the pool of potentially eligible senior SFMNP participants is too great, to justify such an option. Therefore, the provisions related to certification periods in the SFMNP are retained in this final rule as proposed.

e. Rights and Responsibilities

In § 249.6(d), FNS proposed to require State/local agencies to inform applicants or authorized representatives/proxies of their SFMNP rights and responsibilities. Several comments were received related to the Rights and Responsibilities notification—2 generally supported the provision, 3 specifically supported the provision of information on other services that may be available to SFMNP participants, and one suggested that a joint statement be allowed for seniors who are participating in both the SFMNP and the CSFP, when both programs are administered by the same State agency. FNS appreciates the principle behind such a suggestion, but does not agree. Even when one agency is responsible for administering multiple programs, such as the SFMNP and the CSFP, separate benefits are provided to participants under each program. Therefore, FNS believes that it is important to maintain separate statements of the participant's rights and responsibilities as they pertain to each individual program. This provision is retained in this final rule as proposed.

This section as proposed also required State/local agencies to notify applicants in writing if they were ineligible for SFMNP benefits (including the reasons for the determination of ineligibility), and of their right to a fair hearing. A

total of 18 comments were received opposing this written notification requirement, arguing that such a requirement is excessively burdensome in a program that has such a short duration each year. While FNS is sincere in its stated intention not to impose any administrative burden on participating State and local agencies that is not absolutely necessary, it cannot in good conscience eliminate this requirement. Once an individual has applied for Program benefits and has been found to be ineligible to receive them, that individual is entitled to a formal notification of such a determination and of his/her right to a fair hearing to challenge that decision. However, FNS also believes that there may be some confusion between an actual determination of an individual participant's program ineligibility and a State or local agency's inability to provide benefits because there simply are not enough funds (in the form of coupons or CSA shares) to serve everyone who is interested in receiving SFMNP benefits. This provision applies specifically to the former instance. The proposed rule did not intend to require that written notification be provided to all potentially eligible seniors in the State or local service delivery area when funds are not available to provide SFMNP benefits.

The requirement for written notification of applicant ineligibility and the right to a fair hearing is therefore retained in this final rule as set forth in the proposed rule. However, State and local agencies are not expected to implement a complicated or time-consuming process in order to provide written notices of ineligibility and the right to a fair hearing; a form letter that has the pertinent information (date, name, basis of ineligibility, and signature of the certifying official) filled in as appropriate and handed to the applicant at the time of application is acceptable.

f. Certification Without Charge

The proposed provision at § 249.6(e), stipulating that no applicant or authorized representative may be charged to apply or be certified for the SFMNP, was not addressed by commenters. Therefore, the provision is retained in the final rule as proposed.

g. Use of Authorized Representatives/ Proxies

The SFMNP proposed rule included a provision requiring any State agency electing to allow proxies or authorized representatives to obtain a signed statement from the eligible senior designating another person as his/her

authorized representative. This provision was characterized by 4 commenters as a positive addition; in fact, the use of proxies in the SFMNP has been an option for grantees since the program first began. However, another 5 comments were received that suggested that the requirement for a signed designation of a proxy by the eligible senior is too burdensome and should be deleted. FNS strongly disagrees, and finds this requirement to be essential in order to assure that SFMNP benefits are actually received by the eligible senior for whom they are intended. Therefore, in § 249.6(f) of this final rule, the provision is retained as proposed.

g. Processing Standards/Waiting Lists

SFMNP State agencies were required, at § 249.6(g) in the proposed rule, to notify applicants of their eligibility or ineligibility for benefits, or placement on a waiting list, within 10 days from the date of application. This provision was proposed to take into account the relatively short duration of the SFMNP's actual period of operation. Unlike other ongoing nutrition assistance programs, such as Food Stamps, FDPIR, or the CSFP, the SFMNP does not usually operate year-round. Therefore, it is important that the certification process for the SFMNP be expedited to some extent. Reaction to this provision was mixed—4 comment letters supported the 10-day standard, while 9 maintained that it is entirely too short. While FNS cannot agree to the 30-day processing standard suggested by 3 commenters, we can see some benefit to allowing State agencies a slightly longer period of time to complete the certification process. Therefore, in this final rule the processing standard for the SFMNP is increased at § 249.6(g) to 15 days. Although this is only 5 days longer than the 10 days initially proposed, the reduction of several significant administrative functions associated with the certification process (most notably the acceptance of a signed affidavit in the income eligibility determination process) makes the 15-day standard a reasonable one. State agencies would always have the option to establish a shorter processing standard for their local SFMNP agencies.

Further, FNS proposed to require State agencies to keep a waiting list of individuals who apply for benefits but cannot be served. This information would enable State/local agencies to certify individuals if funding within the State is reallocated based on need. The waiting list would include the name of the applicant, the date he/she was placed on the waiting list, and an address or phone number in order to

contact the applicant. These requirements are consistent with the FNS-administered CSFP, which also serves seniors. However, as pointed out by 18 commenters, it is not reasonable to maintain a waiting list when there is no realistic expectation of additional benefits becoming available at some later date. SFMNP benefits are often exhausted very quickly, sometimes within a matter of days or even hours. FNS concurs with the commenters' position that in such cases, having to maintain a waiting list of eligible seniors who are interested in benefits is a futile and burdensome requirement. Therefore, this provision has been modified in this final rule to require a State agency to maintain a waiting list only when there is some reasonable expectation of being able to provide benefits at a later date to those additional unserved individuals.

7. Nondiscrimination (§ 249.7)

As indicated in § 249.7(a) of the proposed rule, Title VI of the Civil Rights Act of 1964 requires that racial and ethnic participation data be collected from all SFMNP benefit participants. Eight commenters suggested that the racial/ethnic data collection requirement be deleted, and another commenter proposed that the data collection at least be delayed until the new racial/ethnic categories stipulated by OMB are in place for the CSFP as well. FNS recognizes that this data collection requirement may duplicate data collections that have been performed for SFMNP participants when they applied for other nutrition assistance programs such as Food Stamps, FDPIR, and/or CSFP. Therefore, to avoid duplicate collection of racial/ethnic data, a separate SFMNP collection would not be required for those participants who come into the SFMNP as automatically eligible based on their participation in another assistance program. Racial/ethnic data must be collected for all other SFMNP participants. State agencies must be able to provide racial/ethnic data upon request by FNS for all participants, whether obtained via another assistance program or collected by the SFMNP State agency.

8. Eligible Foods and Level of Benefits (§ 249.8)

Note: In the interest of clarity, the heading for this section is modified from the proposed rule to reflect the order of the topics addressed.

A comprehensive discussion regarding eligible foods in the SFMNP is included in the preamble to the

proposed rule. No other comments in addition to those discussed in section 2 of this preamble, regarding the definition of "eligible foods" for the SFMNP were received. Therefore, the provisions related to eligible foods set forth at § 249.8(a) are retained in this final rule as proposed.

In § 249.8(b), FNS proposed minimum and maximum annual benefit levels of \$20 and \$50, respectively, for all coupon issuance program models (farmers' markets, roadside stands and/or CSA programs). These levels were intended to accommodate the majority of State agencies that already use at least a \$20 benefit level, and are consistent with the current average benefit level of SFMNP benefits issued nationwide.

The proposed minimum and maximum benefit levels resulted in comments both for and against the provision. All 11 of the State agencies with benefit levels lower than \$20, along with several other interested State and local SFMNP agencies, wrote to protest the necessity of reducing the number of eligible seniors they were currently serving in order to raise the benefit level to the \$20 minimum. A relatively small number of commenters (6) supported the principle of a regulatory minimum and maximum benefit level, but half of those commenters went on to suggest that State agencies be allowed to issue a smaller benefit when Federal funds are decreased, such as in FY 2005 when all SFMNP grantees experienced an across-the-board reduction in their SFMNP grant awards.

Anecdotal evidence over the past 6 years of SFMNP operation consistently indicates that certified participants are more likely to make use of their SFMNP benefits when the benefit level is high enough to justify one or more trips to a farmers' market, roadside stand, and/or CSA program for the purchase of eligible fresh fruits and vegetables. FNS believes establishing a minimum SFMNP benefit of \$20 is not only appropriate, but will also be conducive to higher expenditure and redemption rates in future years of SFMNP operation. However, FNS also recognizes the difficulties that would be encountered by the 11 State agencies currently offering a seasonal benefit of less than \$20.

The strongest objections to this provision were submitted in opposition to the \$50 maximum benefit level. A variety of suggestions were put forth, including eliminating the benefit cap altogether, increasing the maximum benefit to \$80 or to \$100, and/or allowing State agencies the option of setting their own minimum and

maximum benefits, either for all program models or only for CSAs. Requests for a grandfather clause that would allow current State agencies to continue issuing the same level of SFMNP benefits came primarily from State agencies that expend the largest portion of their SFMNP grants on a CSA program model of operation. The basic structure of most CSAs is predicated upon shares of at least \$100 each, and a total of 60 comments were received from State agencies, local agencies, participating farmers, and even participants to request that the maximum SFMNP benefit level be increased or at least allowed to remain at their FY 2004 levels. Nearly 30 farmers stated that if the maximum CSA benefit level were reduced to \$50, they would no longer be willing or able to continue participating in the SFMNP.

Therefore, FNS has reconsidered the matter of minimum and maximum benefit levels in the SFMNP in this final rule, and has revised the requirements as follows:

- The minimum benefit level of \$20 is retained as proposed, except that SFMNP State agencies being grandfathered into the permanent program (i.e., that participated in the SFMNP in FY 2006) may continue to issue benefits at their FY 2006 levels.
- Current SFMNP State agencies that are grandfathering a CSA program model into the permanent program may continue to issue benefits to senior participants in the CSA programs at their current (FY 2006) levels, except that any State agency whose annual CSA participant benefit level is greater than \$50 will not be eligible to receive expansion funds until the \$50 benefit cap in the CSA program model is implemented. While FNS is sympathetic to the concerns expressed through the public comment process, we also believe in the principle of serving as many eligible senior participants as possible with the limited funds available to the SFMNP.

- New State agencies who begin operating the SFMNP after FY 2006 must comply with the \$20 benefit minimum as well as the \$50 benefit cap.

SFMNP State agencies that do not use a CSA program model must comply with the \$50 benefit cap as provided in the proposed rule.

As one commenter suggested, State agencies will continue to have the option of providing a higher benefit level out of funding sources other than the Federal SFMNP grant. Finally, FNS disagrees with the commenter who stated that longer growing seasons justify higher benefit levels, because it can also be argued that shorter growing

seasons, with commensurately higher prices for fresh produce because it is only available for a short time, can also justify higher benefit levels.

In order to ensure equitable treatment in and access to the SFMNP, FNS proposed in § 249.8(c) that all SFMNP participants served by the State agency must be offered the same level of SFMNP benefits. Reaction to this provision was almost evenly divided in support and opposition, but FNS is still convinced that a consistent statewide benefit level is important to the integrity of the SFMNP. Therefore, the requirement is retained in this final rule as proposed.

Also as proposed, FNS has retained in this final rule the provision that the same statewide benefit level does not have to be applied for SFMNP participants who are receiving benefits through a CSA program. Such participants are eligible to receive \$50 or more (if the State agency is exercising the grandfather clause set forth in § 249.8(b)) in SFMNP benefits, even if SFMNP participants in that same State are issued only \$10 (if the State agency has been grandfathered in at the lower minimum benefit level) or \$20 (for all other State agencies) in coupons to use at farmers' markets or roadside stands.

As proposed and as set forth in this final rule, SFMNP participants may also receive benefits through a bulk purchase program model, as described in § 249.2, as long as each participant receives an equitable value of fruits and vegetables. In addition, the total benefit provided to each participant (whether s/he receives a combination of coupons and bulk-purchased foods during the course of the season, or only bulk-purchased foods) must fall within the minimum and maximum levels set forth in this final rule.

Finally, § 249.8(c) of the proposed rule offered SFMNP State agencies the continued option to issue program benefits on either an individual or a household basis, as long as State agencies continue to report participant information to FNS on an individual basis. The household option, if SFMNP State agencies choose to implement it, allows more participants to be served with limited funds. The provisions contained in this section are retained in this final rule as proposed.

Section 249.8(c)(3) of the proposed rule prohibited sharing of food purchased through the SFMNP with non-participating household members. Seven commenters opposed this non-sharing provision, calling it unenforceable and therefore unnecessary. FNS recognizes the difficulty of enforcing such a provision,

but maintains that it is nonetheless an extremely important one. SFMNP benefits are generally issued to individuals with particular nutritional needs with the intention of improving that individual's diet by increasing his/her consumption of fresh fruits and vegetables. Therefore, program administrators can discuss this issue when participants are certified and/or provided basic information about the SFMNP. It is critical that program administrators and participants alike understand the importance of the SFMNP benefits that are being provided to specific eligible individuals for specific dietary reasons. Therefore, this provision is retained in this final rule as proposed.

9. Nutrition Education (§ 249.9)

As proposed, this section of the rule defined the goal of nutrition education in the SFMNP, required the State agency to integrate nutrition education into its SFMNP operations, and provided guidance on coordinating the delivery of nutrition education through other agencies within the State. Thirteen comments were received regarding the nutrition education provisions of the SFMNP proposed rule, more than half of which were generally supportive. Two commenters suggested that there should be some level of flexibility for nutrition education at the local level. Although the proposed rule did not specifically address such flexibility, FNS supports such discretion as long as the State agency is aware of the content and quality of the nutrition education that is being provided, and monitors it regularly as required. Additional suggestions related to the nutrition education provisions that were not incorporated into this final SFMNP rule included stipulating that all nutrition education should be provided or overseen by a Registered Dietician or other qualified nutrition professional (2 comments), and that each local agency should bear the costs associated with providing nutrition education to SFMNP participants. Conversely, it was suggested in another comment letter that the State agency should be responsible for providing all nutrition education materials to the local agencies, in all languages necessary.

FNS' view is that issues related to nutrition education are matters best negotiated between the State and local agency, rather than addressed through Federal program regulations. FNS agrees that it is important to take into consideration those participants with limited English proficiency, but believes that this is sufficiently covered in the

Participant Rights and Responsibilities statement set forth at § 249.6(g).

FNS believes nutrition education to be an integral component of any effective nutrition assistance program. For this reason, SFMNP State agencies have been required, since the inception of the pilot program in FY 2001, to include nutrition education as part of their program design in order to receive a Federal SFMNP grant.

Nutrition education has also long been the hallmark of several other FNS-assisted nutrition assistance programs, particularly the WIC Program and the FMNP, upon which the SFMNP is closely modeled. While nutrition education is being made increasingly available in other FNS programs, such as the Food Stamp Program, FDPIR, and CSFP, there is still no guarantee that SFMNP participants are also participating in any of these programs, or that the focus of the nutrition education that is offered is appropriate for the SFMNP participant population.

As proposed, this final rule requires, at § 249.9, all participating State agencies to describe the nutrition education that will be provided to SFMNP participants, including the agencies that will be responsible for providing the nutrition education (e.g., Cooperative Extension Service or local Area Agencies on Aging), the format(s) in which the nutrition education will be provided (e.g., recipe cards or cooking demonstrations), and the locations where the nutrition education is likely to be offered (e.g., senior centers, farmers' markets, common rooms in assisted living facilities). The content of the nutrition education should be age- and circumstance-appropriate for SFMNP participants. FNS encourages State agencies to take advantage wherever possible of existing nutrition education opportunities for senior participants. Such opportunities may exist, for example, in nutrition education classes or events emphasizing the importance of fresh fruits and vegetables to a healthy diet that may be offered to Food Stamp Program participants who are also participating in the SFMNP, or through food demonstrations and tastings provided as part of a congregate nutrition program funded by the Older Americans Act at a local senior center or farmers' market.

10. Coupon, Market and CSA Program Management (§ 249.10)

This section of the proposed rule outlined the State agency requirements regarding all aspects of coupon, market, and CSA program management in the SFMNP, specifically general responsibilities, agreements, training,

monitoring, coupon control and payment, coupon reconciliation, instructions to SFMNP participants, complaints and sanctions, and CSA program management.

The requirements set forth in § 249.10 regarding each of these areas were discussed at length in the preamble to the proposed rule. Five comments were received in general support of the market management and monitoring provisions, and another 2 commenters specifically cited their support for the proposed rule's efforts toward consistency between the SFMNP and the FMNP. Several commenters suggested that the SFMNP be allowed to operate year-round. Once the SFMNP is converted from a competitive grant program to a permanent, State Plan-based program, there is no reason that a SFMNP State agency cannot do so, as long as there are funds available to support the longer program period. Except as noted below, the provisions in this section are retained in this final as proposed.

a. Authorization

As proposed, the State agency would have been responsible for establishing criteria for the authorization of farmers, farmers' markets, and/or roadside stands, as well as the number of outlets that it plans to authorize, as provided in § 249.10. One commenter suggested that State agencies rank farmers, farmers' markets, roadside stands, and/or CSAs by risk factors as part of the authorization process. While FNS does not believe that this should be a regulatory requirement, there is nothing in either the proposed or the final SFMNP rule that would prohibit a State agency from doing so if it believes that such a process will result in a better group of authorized SFMNP outlets. Therefore, these provisions remain unchanged in this final rule.

One commenter expressed opposition to all of the requirements proposed at § 249.10(a) through (e), i.e., everything related to the authorization, training, monitoring, and payment of farmers, farmers' markets, roadside stands, and CSA programs in the SFMNP, and proposed that FNS should be responsible for authorizing all farmers, farmers' markets, roadside stands, and/or CSAs for the SFMNP, rather than individual SFMNP State agencies. The commenter cited as precedent for this proposal the fact that FNS is responsible for authorizing retailers in the Food Stamp Program. However, legislative authority would be necessary for such a provision to be implemented in the SFMNP. Furthermore, it would be extremely difficult for SFMNP State

agencies to maintain the degree of individuality that has been a hallmark of this program from the very beginning if FNS were to take on such a responsibility.

b. Agreements

As proposed, Section 249.10(b) outlined the contents of the farmers' market/CSA program agreement. No comments were received in regard to the provisions in this section, so they are retained in this final rule as proposed, with the additional provision allowing bulk purchases as defined at § 249.2.

c. Training

Pursuant to § 249.10(d), as proposed, FNS State agencies must conduct annual training for farmers, farmers' market managers, and (as appropriate) CSA program managers. State agencies have discretion in determining the method used for training purposes. Four commenters suggested that the final rule allow face-to-face training to include phone, videoconference, and/or web-based training. Section 249.10(d) in this final rule is clear in its requirement that all farmers and farmers' market managers who are participating in the SFMNP for the first time must receive interactive training that allows for real-time questions and answers between the State agency trainer and the farmer or farmers' market manager. Such training includes, for example, face-to-face training, videoconference training, and/or web-based training. Alternative methods of training may be used after the first year of program participation, at the State agency's discretion. The points that must be covered in training are listed at § 249.10(d), and are retained in this final rule as proposed.

d. Sanctions

Proposed § 249.10(k) set out a number of provisions related to sanctions that may be applied in the SFMNP. Comment letters were received from four State agencies suggesting that this section be rewritten in such a manner as to leave all fraud and sanction policies and procedures to the discretion of the State agency. FNS believes that the proposed rule offered sufficient flexibility and latitude to allow SFMNP State agencies to tailor the process to the particular needs and characteristics of its own program operations. Therefore, the provisions described in this section are retained in this final rule.

e. Community Supported Agriculture (CSA) Programs

The most significant difference between the FMNP and the SFMNP regarding market management

procedures falls in the area of CSA programs, which are not allowable outlets for program funds in the FMNP. As expected, there were a significant number of comments (44 in all) received in regard to, and largely in support of, CSA program operations and systems. Most of these comments focused on allowing State agencies with existing CSA program models in place to continue operating their programs with virtually no modifications or restrictions. Seventeen commenters supported the inclusion of CSAs in the SFMNP or opposed the implementation of a final rule that favors a coupon-based program over one that uses the CSA model.

A discussion of CSA programs and their unique requirements is provided below.

CSA programs are described in detail in the preamble to the proposed rule. The majority of State agencies that include a CSA program component in their SFMNP operations only do so on a limited basis, in combination with the more traditional coupon model. However, at least two State agencies have operated their SFMNP programs exclusively through the CSA program model since the SFMNP began in FY 2001.

Seven commenters categorically opposed FNS' proposal to restrict CSAs to no more than 50 percent of the State agency's total Federal SFMNP food grant, and another commenter requested further clarification of FNS' intent in establishing such a cap. As explained above, FNS believes that a greater number of low-income eligible seniors can be served through the more traditional coupon system, thereby improving the diets of a larger percentage of this vulnerable population.

One commenter expressed his objections to the limitations proposed for CSA program models. This commenter was of the opinion that Public Law 107-171 affords equal status to farmers' markets, roadside stands, and community supported agriculture programs, and that FNS does not have the discretion to choose those parts of the SFMNP that it wishes to support. This commenter further observed that Congress gave the States discretion to choose among these different delivery models in their development of successful SFMNP programs, and that FNS should not preempt such a state-level responsibility through rulemaking. FNS does not agree with this opinion. It is unquestionably true that no preference was stated or implied in the law for one program model over another, and USDA has made every

effort to work with State agencies in the development and success of less traditional program models as well as those to which we may have been more accustomed. This does not mean, however, that FNS is prepared to allow any State agency, regardless of the program model selected, to operate outside the fundamental Program guidelines and expectations that have been developed to assure integrity and accountability. Congress, with the passage of the Farm Bill, did in fact empower FNS to promulgate regulations for the SFMNP that would provide such assurances. The restrictions and limitations that are imposed on CSA program models for the SFMNP in this final rule are based on information collected over the past 5 years of SFMNP operation, and represent FNS' best efforts to prevent as many problems as possible as the SFMNP matures. Therefore, this final rule retains the requirement as proposed.

FNS further proposed to establish at § 249.8(b) one minimum and one maximum benefit level in the SFMNP, regardless of the program model used by the State agency. We recognized the impact of this proposal on the CSA program models in use by SFMNP State agencies around the country. The revised approach to participant benefit levels designed in response to the comments received on this topic is discussed earlier in this preamble and reflected at § 249.8.

In § 249.10(b)(3)(vi), FNS proposed to require that State agencies enter into written agreements with CSA programs, in order to ensure that CSA programs track the value of program benefits actually provided to individual participants and the remaining value owed, provide State agencies with access to such a tracking system, and ensure that the value of program benefits provided is consistent with program requirements addressing minimum and maximum benefit levels for each participant. None of the commenters addressed these requirements, and they are retained in this final rule as proposed.

Finally, 2 SFMNP State agencies have used a portion of their grants to purchase CSA program shares that are then used to supplement meals served at congregate feeding sites. Such a practice was technically allowable under the SFMNP competitive grants, primarily because there were no legislative or regulatory provisions to prevent it and the grants provided an opportunity to look at various program models. However, it is not consistent with the underlying intent of the SFMNP, which is to provide individual

low-income seniors with a resource that benefits their diets directly, rather than through any type of congregate feeding program. Therefore, at § 249.12(a)(3), FNS proposed that the use of any SFMNP funds to supplement congregate meal programs would be specifically prohibited. A total of 21 commenters wrote to protest this prohibition. However, FNS believes that adherence to the fundamental intent of the SFMNP cannot be ensured without such a restriction, and is retaining this provision as set forth in the proposed rule.

11. Financial Management System (§ 249.11)

This section of the proposed rule set forth FNS' specific requirements that would ensure the prompt and accurate payment or allowable costs in the SFMNP, as well as the allowability and allocability of costs in accordance with established general accounting and management procedures. Only one comment was received regarding this section, expressing general support for its provisions. Therefore, this section is retained in its entirety as proposed.

12. SFMNP Costs (§ 249.12)

a. Administrative Funding

The proposed SFMNP rule contained a provision that would have allowed a State agency to use up to 8 percent of its total Federal grant to defray administrative costs associated with the SFMNP, as described at § 249.12(a)(1)(i). Nearly 40 comments were received in opposition to the 8 percent administrative allowance, citing the extensive increase in administrative requirements for State and local agencies as well as the inequity between the administrative cost allowance for the FMNP and the proposed level for the SFMNP—a problem for the many State agencies that administer both programs. Based on commenters' suggestions, FNS has increased the maximum administrative allowance for the SFMNP in this final rule to 10 percent of the State agency's total Federal grant. This position is consistent with OMB Circular A-87 and the mission of this Agency to provide a level of administrative funding to help reasonably offset the costs for administering the program.

Eleven commenters also suggested that FNS should secure additional Federal funds for the SFMNP to cover the administrative allowance. This is not an issue that can be addressed through the regulatory process.

b. Food and Administrative Costs

As proposed, this section of the rule defined allowable and unallowable costs for the SFMNP, and defined specified allowable SFMNP costs. No comments were received that specifically addressed this section. It is retained in the final rule as proposed.

13. SFMNP Income (§ 249.13)

As proposed, this section defined program income for the SFMNP as gross income the State agency earns from grant-supported activities, and established procedures for its use and documentation. No comments were received that specifically addressed this section. It is retained in the final rule as proposed.

14. Distribution of Funds to State Agencies (§ 249.14)

In order to grandfather in those State agencies currently participating in the SFMNP competitive grant program, as previously discussed in Section 5 of this preamble, Selection of State Agencies, it was necessary to establish some fundamental principles for the allocation of SFMNP funds. The preamble to the proposed rule provided a comprehensive description of FNS' proposal for allocating both base grants and any SFMNP funds that might be available for expansion once the base grants are fulfilled. Briefly, SFMNP base grant levels would be based on the prior fiscal year's grant levels (rather than the prior year's expenditures); in the event that the amount of funding available to the SFMNP in any fiscal year is not sufficient to maintain the prior year funding levels for each participating SFMNP State agency, each State's grant would be ratably reduced by FNS. Once the base grants have been satisfied, any remaining funds that are available to the SFMNP will be allocated so that 75 percent of the remaining funding would be available to currently participating State agencies to expand their existing programs, and 25 percent would be available to State agencies with approved State plans that have not previously participated in the SFMNP. If either amount is greater than the amount necessary to satisfy requests for that category (i.e., current State agencies or new State agencies), the unallocated amount is then applied toward satisfying any unmet need in the other category.

Most of the 15 commenters that addressed these provisions were supportive of the base grant provision, but opinions were divided regarding the division of available funds after base grant commitments are met; one

commenter specifically supported the 75/25 split, and 3 commenters suggested a 50/50 split instead. Other comments included a recommendation to give preference to new State agencies over current ones, and 3 commenters stated that SFMNP funding is not proportionally allocated and that all State agencies should have an equal chance to secure funds for the SFMNP at the beginning of each year. However, FNS continues to believe that the funding allocation process set forth in the SFMNP proposed rule is the most logical and equitable process for the disbursement of SFMNP funds. Thus, these provisions are retained in this final rule as proposed.

It was also suggested that SFMNP funds should be made available to all interested State agencies and ITOs, and that funding should be increased for the SFMNP. As indicated earlier in this section, these are not matters that can be addressed through the promulgation of program regulations.

Finally, 4 commenters suggested that a timeline for base grant and expansion funding allocations be set out in the SFMNP regulations. FNS will allocate the funds as soon as they become available. No changes have been made in this final rule to address this commitment.

15. Closeout Procedures (§ 249.15)

As proposed, this section required SFMNP State agencies to submit a final closeout report to FNS for each fiscal year, and set forth the specific procedures to be followed when a SFMNP grant to a State agency is terminated. No comments were received that specifically addressed this section. It is retained in this final rule as proposed.

16. Administrative Appeal of State Agency Decisions (§ 249.16)

As proposed, SFMNP State agencies are required to provide a hearing procedure whereby any entity (applicants, participants, local agencies and farmers, farmers' markets, roadside stands, and/or CSA programs) adversely affected by certain actions of the State agency may appeal those actions. This section provided a list of the adverse actions that may be appealed. It also set out the procedures that must be followed when an appeal is requested, and clarifies that appealing an adverse action does not relieve the entity that has been permitted to continue in the SFMNP while its appeal is pending from responsibility for continued compliance with the terms of the written agreement or contract with the State agency. Finally, as proposed,

§ 249.16 required that the State agency explain the appellant's right to judicial review of any State level decision rendered against the appellant, and set forth additional proposed appeals procedures for State agencies that authorize farmers' markets rather than individual farmers.

Three comments were received that objected to the provisions in this section as too burdensome, and suggested that a less formal system be permitted. FNS does not agree with these comments. The requirements set forth regarding a formal hearing process for participants are necessary to ensure due process for any participant against whom an adverse action has been taken, and as such are critically important to protecting the rights of all participants. Therefore, the requirements set forth in the proposed rule are retained in this final rule.

17. Management Evaluations and Reviews (§ 249.17)

This section of the proposed rule would have required FNS and each SFMNP State agency to establish a management evaluation system in order to assess the accomplishment of SFMNP objectives, the State Plan, and the written agreement with FNS. No comments were received that specifically addressed this section. Therefore, the monitoring requirements are retained in this final rule as proposed.

18. Audits (§ 249.18)

As proposed, this section set forth the specific audit requirements for SFMNP State agencies. No comments were received that specifically addressed this section. It is retained in this final rule as proposed.

19. Investigations (§ 249.19)

Under this section of the proposed rule, FNS would be allowed to make an investigation of any allegation of noncompliance with the SFMNP regulations and FNS guidelines and instructions. As proposed, this section also requires that the identity of every complainant be kept confidential to the maximum extent possible. No comments were received that specifically addressed this section. It is retained in this final rule as proposed.

20. Claims and Penalties (§ 249.20)

As proposed, this section established procedures for the assessment of claims against a State agency, established the conditions under which interest would accrue on any unpaid claim against a State agency, and set out mandatory penalties for embezzlement, willful

misapplication, theft, or fraudulent acquisition of SFMNP funds. No comments were received that specifically addressed the provisions related to claims and interest charges against State agencies (§ 249.20(a) and (b)). These provisions are retained in this final rule as proposed.

Although no comments were received on the provision concerning penalties for embezzlement, willful misapplication, theft, or fraudulent acquisition (§ 249.20(c)), upon further review, we do not believe these provisions are authorized by the SFMNP legislation. The provisions proposed at § 249.20(c) are therefore deleted from the final rule. It should be noted, however, that the actions specified in the proposed rule are punishable under other Federal and State criminal laws.

21. Procurement and Property Management (§ 249.21)

The requirements in this section were proposed by FNS to ensure that all materials and services are obtained for the SFMNP in an effective manner and in compliance with the provisions of applicable law and executive orders. No comments were received that specifically addressed this section. It is retained in this final rule as proposed.

22. Nonprocurement/Suspension, Drug-Free Workplace, and Lobbying Restrictions (§ 249.22)

Under the proposed rule, SFMNP State agencies were required to ensure compliance with the requirements of FNS' regulations governing nonprocurement debarment and suspension, drug-free workplace, and FNS' regulations governing restrictions on lobbying, where applicable. No comments were received that specifically addressed this section. It is retained in this final rule as proposed.

23. Records and Reports (§ 249.23)

As proposed, this section set forth FNS' requirements to ensure that each SFMNP State agency maintains full and complete records concerning SFMNP operations, including the types of records that must be maintained, retention requirements for such records, and provisions addressing the access and availability of such records. It also required State agencies to submit financial and SFMNP performance data on a yearly basis as specified by FNS, and identified the minimum data that must be provided in such reports. In response to a technical comment, the words "and type" are removed from § 249.23(b)(1) of the final rule; they are not applicable to the SFMNP.

24. Data Safeguarding Requirements (§ 249.24)

This section of the proposed rule would affirm the Department's commitment to protecting the privacy of SFMNP applicants and participants by restricting the use or disclosure of information obtained from SFMNP applicants and participants to individuals directly connected with the operation or enforcement of the SFMNP, representatives of public organizations that administer food, nutrition, or other assistance programs serving persons categorically eligible for the SFMNP when written agreements with such organizations are in place, and the Comptroller General of the United States, for audit purposes. Although no comments were received that specifically addressed this section, it has been slightly revised and renamed for clarity.

25. Other Provisions (§ 249.25)

Section 249.25(a) of the proposed rule clarified that participation in the SFMNP did not preclude a participant from participating in food or nutrition assistance programs for which she/he may also be eligible. Two commenters wrote to support this provision. No other comments were received that specifically addressed this section. It is retained in this final rule as proposed.

26. SFMNP Information (§ 249.26)

This section lists the seven Regional offices of FNS, provides their contact information, and identifies the State agencies that are covered by each one.

27. OMB Control Number (§ 249.27)

The information collections in this rule are being reviewed by OMB and will not be effective until they have received OMB approval. Once they have received OMB approval, FNS will publish a notice in the **Federal Register**.

List of Subjects in 7 CFR Part 249

Aging, Community supported agriculture programs, Elderly, Farmers, Farmers' markets, Food assistance programs, Food donations, Grant programs, Nutrition education, Public assistance programs, Seniors, Social programs.

■ Accordingly, 7 CFR part 249 is added to read as follows:

PART 249—SENIOR FARMERS' MARKET NUTRITION PROGRAM (SFMNP)

Subpart A—General

Sec.

249.1 General purpose and scope.

249.2 Definitions.

249.3 Administration.

Subpart B—State Agency Eligibility

249.4 State plan.

249.5 Selection of new State agencies.

Subpart C—Participant Eligibility

249.6 Participant eligibility.

249.7 Nondiscrimination.

Subpart D—Participant Benefits

249.8 Level of benefits and eligible foods.

249.9 Nutrition education.

Subpart E—State Agency Provisions

249.10 Coupon, market, and CSA program management.

249.11 Financial management system.

249.12 SFMNP costs.

249.13 Program income.

249.14 Distribution of funds to State agencies.

249.15 Closeout procedures.

249.16 Administrative appeal of State agency decisions.

Subpart F—Monitoring and Review of State Agencies

249.17 Management evaluations and reviews.

249.18 Audits.

249.19 Investigations.

Subpart G—Miscellaneous Provisions

249.20 Claims and penalties.

249.21 Procurement and property management.

249.22 Nonprocurement debarment/suspension, drug-free workplace, and lobbying restrictions.

249.23 Records and reports.

249.24 Data safeguarding requirements.

249.25 Other provisions.

249.26 SFMNP information.

249.27 OMB control number. [Reserved]

Authority: 7 U.S.C. 3007.

Subpart A—General

§ 249.1 General purpose and scope.

(a) This part announces regulations under which the Secretary of Agriculture shall carry out the Senior Farmers' Market Nutrition Program (SFMNP). The purposes of the SFMNP are to:

(1) Provide resources in the form of fresh, nutritious, unprepared, locally grown fruits, vegetables and herbs from farmers' markets, roadside stands, and community supported agriculture (CSA) programs to low-income seniors;

(2) Increase the domestic consumption of agricultural commodities by expanding or aiding in the expansion of domestic farmers' markets, roadside stands, and CSAs; and

(3) Develop or aid in the development of new and additional farmers' markets, roadside stands, and CSAs.

(b) These goals will be accomplished through payment of cash grants to approved State agencies. The SFMNP shall be supplementary to the food stamp program carried out under the Food Stamp Act of 1977 (7 U.S.C. 2011, *et seq.*), and to any other Federal or State food or nutrition assistance program under which foods are distributed to needy families in lieu of food stamps.

§ 249.2 Definitions.

For the purpose of this part and all contracts, guidelines, instructions, forms and other documents related hereto, the term:

Administrative costs means those direct and indirect costs (as defined in—249.12(a)(1)(ii)), exclusive of food costs, which State agencies determine to be necessary to support SFMNP operations. Administrative costs include, but are not limited to, the costs associated with administration and start-up; the provision of nutrition education; SFMNP coupon issuance; participant education covering coupon redemption procedures; eligibility determinations; outreach services; printing SFMNP coupons, processing redeemed coupons, and training farmers, market managers, and/or farmers who operate CSA programs on the food delivery system; monitoring and reviewing program operations; required reporting and recordkeeping; determining which local sites will be utilized; recruiting and authorizing farmers, farmers' markets, roadside stands, and/or CSA programs to participate in the SFMNP; preparing contracts for farmers, farmers' markets, roadside stands, and/or CSA programs; developing a data processing system for redemption and reconciliation of coupons; designing program training and informational materials; and coordinating SFMNP implementation responsibilities between designated administering agencies.

Bulk purchase means a program model in which bulk quantities of certain produce items, such as apples or sweet potatoes, are purchased directly from authorized farmers by the State agency, and are then equitably divided among and distributed directly to eligible SFMNP participants, either at a central distribution point (such as a local senior center) or through some type of home delivery network.

Community supported agriculture (CSA) program means a program under which a farmer or group of farmers grows food for a group of shareholders (or subscribers) who pledge to buy a

portion of the farmer's crop(s) for that season. State agencies may purchase shares or subscribe to a community supported agriculture program on behalf of individual SFMNP participants.

Compliance buy means a covert, on-site investigation in which a SFMNP representative poses as a SFMNP participant or authorized representative and attempts to transact one or more SFMNP coupons, or, in the case of CSA programs, attempts to obtain eligible foods purchased with SFMNP funds at a distribution site.

Coupon means a check or other negotiable financial instrument by which benefits under the program are transferred to program participants.

Days means calendar days.

Department means the U.S. Department of Agriculture.

Distribution site means the location where packages of eligible foods are assembled for and/or distributed to SFMNP participants who are shareholders in CSA programs.

Eligible foods means fresh, nutritious, unprepared, locally grown fruits, vegetables and herbs for human consumption. Eligible foods may not be processed or prepared beyond their natural state except for usual harvesting and cleaning processes. Dried fruits or vegetables, such as prunes (dried plums), raisins (dried grapes), sun-dried tomatoes, or dried chili peppers are not considered eligible foods. Potted fruit or vegetable plants, potted or dried herbs, wild rice, nuts of any kind (even raw), honey, maple syrup, cider, seeds, eggs, meat, cheese and seafood are also not eligible foods for purposes of the SFMNP.

Farmer means an individual authorized to sell eligible foods at participating farmers' markets and/or roadside stands, and through CSAs. Individuals who exclusively sell produce grown by someone else, such as wholesale distributors, cannot be authorized to participate in the SFMNP. A participating State agency has the option to authorize individual farmers or farmers' markets, roadside stands, and/or CSA programs.

Farmers' market means an association of local farmers who assemble at a defined location for the purpose of selling their produce directly to consumers.

Federally recognized Indian tribal government means the same as the definition of that term found at § 3016.3 of this chapter, i.e., the governing body or a governmental agency of any Indian tribe, band, organization, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims

Settlement Act, 85 Stat. 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by the Secretary through the Bureau of Indian Affairs.

Fiscal year means the period of 12 calendar months beginning October 1 of any calendar year and ending September 30 of the following calendar year.

FNS means the Food and Nutrition Service of the U.S. Department of Agriculture.

Food costs means the cost of eligible foods purchased at authorized farmers' markets, roadside stands, and/or through bulk purchases or CSA programs.

Household means a group of related or nonrelated individuals who are living together as one economic unit.

Local agency means any nonprofit entity or local government agency that certifies eligible participants, issues SFMNP coupons, arranges for distribution of eligible foods through CSA programs, and/or provides nutrition education or information on operational aspects of the Program to SFMNP participants.

Locally grown means grown within State borders. If the State agency chooses, *locally grown* may also mean grown in areas of States adjacent to that State, as long as such areas are part of the United States.

Nonprofit agency means a private agency that is exempt from the payment of Federal income tax under the Internal Revenue Code of 1986, as amended (26 U.S.C. 1, *et seq.*).

Nutrition education means:

- (1) Individual or group sessions; and
- (2) The provision of relevant materials, in keeping with the individual's personal, cultural, and socioeconomic preferences and the Dietary Guidelines for Americans, that:
 - (i) Emphasize relationships between nutrition and health; and
 - (ii) Encourage participants to build healthful eating patterns, and to take action for good health.

OIG means FNS' Office of Inspector General.

Participant means a person or household who meets the eligibility requirements of the SFMNP and to whom coupons or equivalent benefits have been issued.

Program or SFMNP means the Senior Farmers' Market Nutrition Program authorized by Section 4402 of the Farm Security and Rural Investment Act of 2002, 7 U.S.C. 3007.

Proxy means an individual authorized by an eligible senior to act on the senior's behalf, including application for certification, receipt of SFMNP

coupons or other benefits, use of SFMNP coupons at authorized outlets, and/or acceptance of SFMNP foods provided through a CSA program, as long as the SFMNP benefits are ultimately received by the eligible senior. The terms *proxy* and *authorized representative* may be used interchangeably for purposes of this program.

Roadside stand means a location at which an individual farmer sells his/her produce directly to consumers. This is in contrast to a group or association of farmers selling their produce at a farmers' market or through a CSA program. The term *roadside stand* may be used interchangeably with the term *farmstand* as defined in § 248.2 of this chapter.

Senior means an individual 60 years of age or older, or as defined in § 249.6(a)(1).

SFPD means the Supplemental Food Programs Division of the Food and Nutrition Service of the U.S. Department of Agriculture.

Shareholder means a SFMNP participant for whom a full or partial share in a community supported agriculture program has been purchased by the State agency, and who receives SFMNP benefits in the form of actual eligible foods rather than coupons that must be exchanged for eligible foods at farmers' markets and/or roadside stands.

State means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and as applicable, American Samoa or the Commonwealth of the Northern Marianas.

State agency means the agriculture, aging, or health department, or any other agency approved by the Chief Executive Officer of the State that has administrative responsibility for the SFMNP; an intertribal council or group that is an authorized representative of Indian tribes, bands, or groups recognized by FNS of the Interior and that has an ongoing relationship with such tribes, bands, or groups for other purposes and has contracted with them to administer the Program; or the appropriate area office of the Indian Health Service, a division of FNS of Health and Human Services.

State Plan means a plan of SFMNP operation and administration that describes the manner in which the State agency intends to implement, operate and administer all aspects of the SFMNP within its jurisdiction in accordance with § 249.4.

WIC means the Special Supplemental Nutrition Program for Women, Infants and Children authorized by Section 17

of the Child Nutrition Act of 1966 (42 U.S.C. 1786).

WIC Farmers' Market Nutrition Program (FMNP) means the nutrition assistance program authorized by Section 17(m) of the Child Nutrition Act of 1966 (42 U.S.C. 1786(m)), to provide resources to women, infants, and children who are nutritionally at risk, in the form of fresh, nutritious, unprepared foods (such as fruits and vegetables) from farmers' markets; to expand the awareness and use of farmers' markets; and to increase sales at such markets.

§ 249.3 Administration.

(a) *Delegation to FNS.* Within FNS, FNS shall act on behalf of the Department in the administration of the SFMNP. Within FNS, SFPD and the FNS Regional Offices are responsible for SFMNP administration. FNS shall provide assistance to State agencies and evaluate all levels of SFMNP operations to ensure that the goals of the SFMNP are achieved in the most effective and efficient manner possible.

(b) *Delegation to State agency.* The State agency is responsible for the effective and efficient administration of the SFMNP in accordance with the requirements of this Part; the requirements of FNS' regulations governing nondiscrimination (parts 15, 15a and 15b of this title), administration of grants (part 3016 of this title), nonprocurement debarment/suspension (part 3017 of this title), drug-free workplace (part 3021 of this title), and lobbying (part 3018 of this title); FNS guidelines; FNS Instructions issued under the FNS Directives Management System; and Office of Management and Budget Circular A-130 (For availability of OMB Circulars referenced in this section, see 5 CFR 1310.3). The State agency shall provide guidance to cooperating State and local agencies on all aspects of SFMNP operations. State agencies may operate the SFMNP locally through nonprofit organizations or local government entities and must ensure coordination among the appropriate agencies and organizations.

(c) *Agreement and State Plan.* Each State agency desiring to administer the SFMNP shall annually submit a State Plan of Operations and enter into a written agreement with FNS for administration of the Program in the jurisdiction of the State agency in accordance with the provisions of this Part. If the State agency administers both the SFMNP and the WIC Farmers' Market Nutrition Program (FMNP), one consolidated State Plan may be submitted for both programs, in accordance with guidance provided by FNS.

(d) *Coordination with other agencies.* The Chief Executive Officer of the State shall ensure coordination between the designated administering State agency and any other State, local, or nonprofit agencies or entities involved in administering any aspect of the SFMNP by ensuring that the agencies enter into a written agreement or letter/memorandum of understanding. The written agreement or letter/memorandum of understanding must delineate the responsibilities of each agency, describe any compensation for services, and must be signed by the designated representative of each agency. This agreement must be submitted each year along with the State Plan.

(e) *State staffing standards.* Each State agency shall ensure that sufficient staff is available to administer the SFMNP efficiently and effectively. This shall include, but not be limited to, sufficient staff to identify and certify eligible SFMNP participants, provide program information and nutrition education to participants, and oversee coupon, market, and/or CSA program management, fiscal reporting, monitoring, and training. The State agency shall provide in its State Plan an outline of administrative staff and job descriptions for staff whose salaries will be paid from program funds.

Subpart B—State Agency Eligibility

§ 249.4 State Plan.

(a) *Requirements.* By November 15 of each year, each applying or participating State agency shall submit to FNS for approval a State Plan for the following year as a prerequisite to receiving funds under this section. If the State agency administers both the SFMNP and the FMNP, one consolidated State Plan may be submitted for both programs, in accordance with guidance provided by FNS. The State Plan must be signed by the State-designated official responsible for ensuring that the Program is operated in accordance with the State Plan. FNS will provide written approval or denial of a completed State Plan or amendment within 30 days of receipt. Portions of the State Plan that do not change annually need not be resubmitted. However, the State agency shall provide the title of the sections that remain unchanged, as well as the year of the last Plan in which the sections were submitted. At a minimum, the Plan must include the following items, which must include sufficient detail to demonstrate the State agency's ability to meet the requirements of the SFMNP:

(1) A copy of the agreement between the designated administering State agency and any other cooperating State, local, or nonprofit agencies or organizations for services such as certification of eligible participants, issuance of SFMNP coupons or benefits, and/or nutrition education, as required in § 249.3(d).

(2) A description of the State agency's procedures for identifying and certifying eligible SFMNP participants, including the specific age and income criteria that will be used to determine SFMNP eligibility.

(3) An estimated number of participants for the fiscal year, and proposed months of operation.

(4) A detailed budget for the SFMNP, including:

(i) The minimum amount necessary to operate the SFMNP;

(ii) A description of the Federal and non-Federal funds that will be used to operate the Program; and

(iii) An assurance that no more than 50 percent of the Federal SFMNP grant will be used to support a CSA program model for the delivery of SFMNP benefits.

(5) An outline of administrative staff and job descriptions.

(6) A detailed description of the SFMNP recordkeeping system including, but not limited to, the system for maintaining separate records for SFMNP funds pertaining to financial operations, coupon issuance and redemption, authorization of farmers, markets, and/or CSA programs, distribution of eligible foods through CSA programs, and SFMNP participation.

(7) A detailed description of the State agency's financial management system, including how the system will provide accurate, current and complete disclosure of the program's financial status and required reports.

(8) A detailed description of the service area, including:

(i) The number and addresses of authorized farmers, farmers' markets, roadside stands, and community supported agriculture programs that participated in the SFMNP during the prior year; and

(ii) SFMNP certification/issuance sites (such as senior centers or senior housing facilities), including a map outlining the service area and proximity of markets, roadside stands, and/or community supported agriculture programs to certification/issuance or distribution sites that participated in the SFMNP during the prior year.

(9) A description of the coupon issuance system including:

(i) A description of how the State agency will target areas with the highest concentrations of eligible persons and greatest access to farmers' markets and/or roadside stands;

(ii) The benefit level per participant, or household if benefits are issued on a household basis, including:

(A) How coupons will be issued;

(B) The value of benefits provided to each participant or household at each issuance during the year;

(C) The frequency of coupon issuance; and

(D) The total amount of SFMNP benefits issued to each participant or household during the year.

(iii) A method for instructing participants on the proper use of SFMNP coupons and the purpose of the SFMNP;

(iv) A method for ensuring that SFMNP coupons are issued only to eligible participants; and

(v) A method for preventing and identifying dual participation, in accordance with § 249.6(d)(1).

(10) If the agency is using a "paperless" system, i.e., a system that does not issue actual coupons, a complete description of how such a system will be operated in a manner that ensures the integrity of SFMNP funds and benefits.

(11) A detailed description of the SFMNP coupon redemption process including:

(i) The procedures for ensuring the secure transportation and storage of SFMNP coupons;

(ii) A system for identifying and reconciling SFMNP coupons; and

(iii) The timeframes for SFMNP coupon redemption by participants, submission for payment by farmers or authorized outlets (farmers' markets and/or roadside stands), and payment by the State agency.

(12) A description of the State agency's CSA program, if applicable, including:

(i) How the State agency will target and select community supported agriculture programs designed to provide SFMNP benefits to eligible participants;

(ii) The annual benefit amount per participant or household, if benefits are issued on a household basis;

(iii) How CSA program contracts are developed, negotiated, and executed by the State agency;

(iv) How CSA program shares are allocated to eligible SFMNP participants;

(v) A method for instructing participants and farmers participating in the CSA program on the purpose of the SFMNP, and the procedures for delivery

and distribution of eligible foods provided for the SFMNP through the CSA;

(vi) A system to ensure receipt by eligible participants of eligible foods provided through a CSA program. Such a system should include a written receipt or distribution log, with the participant's signature (or that of the eligible participant's proxy, if proxies are allowed) and the date of each distribution;

(vii) The payment procedures for the CSA program(s) used by the State agency;

(viii) How the State agency ensures that the full value of eligible foods for which it has contracted is provided regularly throughout the SFMNP season;

(ix) A listing of delivery dates and distribution sites for CSA program-provided eligible foods; and

(x) A system for ensuring that each SFMNP shareholder receives an equitable amount of eligible foods at each delivery, and that the total value of the eligible foods provided under the SFMNP falls within the minimum and maximum Federal SFMNP benefit levels, as specified in § 249.8(b).

(13) A complete description of age- and circumstance-appropriate nutrition education to be provided to SFMNP participants, including:

(i) The agencies that will provide the nutrition education;

(ii) The format(s) in which the nutrition education will be provided; and

(iii) The locations where nutrition education is likely to be provided.

(14) A detailed description of the State agency's system for managing its coupon, market, and CSA program management systems, including:

(i) The criteria for authorizing farmers' markets, roadside stands, and/or community supported agriculture programs, including the agency responsible for authorization;

(ii) The procedures for training farmers, market managers, and/or CSA program farmers at authorization, and annually thereafter;

(iii) The procedures for monitoring farmers' markets, roadside stands, and/or community supported agriculture programs;

(iv) A description of the State agency's system for identifying high-risk farmers and farmers' markets, roadside stands, and/or community supported agriculture programs, as set forth at § 249.10(e)(2)(ii);

(v) The procedures for sanctioning farmers, farmers' markets, roadside stands, and/or community supported agriculture programs;

(vi) A facsimile of the SFMNP coupon, including the denominations of

coupons that will be issued, and a clear indication of where the participant/proxy and (if applicable) farmer are required to sign, stamp, or otherwise endorse the coupon before it can be redeemed;

(vii) A complete listing of the fresh, nutritious, unprepared fruits, vegetables, and herbs eligible for purchase under the SFMNP;

(viii) A description of SFMNP coupon replacement policy or statement that coupons will not be replaced; and

(ix) The State agency's procedures for handling participant and farmer/farmers' market, roadside stands, and CSA program complaints.

(15) A system for ensuring that SFMNP coupons are redeemed only by authorized farmers/farmers' markets/roadside stands, and only for eligible foods.

(16) A system for identifying SFMNP coupons that are redeemed or submitted for payment outside valid dates or by unauthorized farmers/farmers' markets/roadside stands.

(17) A copy of the written agreement to be used between the State agency and authorized farmers/farmers' markets, roadside stands, and/or CSA programs. In those States that authorize farmers' markets, but not individual farmers, this agreement shall specify in detail the role of and procedures to be used by farmers' markets for monitoring and sanctioning farmers, and the appropriate procedures to be used by a farmer to appeal a sanction or disqualification imposed by a farmers' market.

(18) If available, information on the change in consumption of fresh fruits, vegetables, and herbs by SFMNP participants. This information shall be submitted as an addendum to the State Plan and shall be submitted at a date specified by the Secretary.

(19) If available, information on the effects of the program on farmers' markets, roadside stands, and/or CSA programs. This information shall be submitted as an addendum to the State Plan and shall be submitted at a date specified by the Secretary.

(20) A description of the procedures the State agency will use to comply with the civil rights requirements described in § 249.7(a), including the processing of discrimination complaints.

(21) A copy of the State agency's fair hearing procedures for SFMNP participants and the administrative appeal procedures for local agencies, farmers, farmers' markets, roadside stands, and/or CSA programs.

(22) State agencies that have not previously participated in the SFMNP must provide:

(i) A description of the need for the SFMNP in that State agency;

(ii) The specific goals and objectives of the SFMNP, designed to fulfill the purpose of the Program as set forth in § 249.1; and

(iii) A capability statement that includes a summary description of any prior experience with farmers' market projects or programs, including information and data describing the attributes of such projects or programs.

(23) For State agencies making expansion requests, documentation that demonstrates:

(i) The need for an increase in funding;

(ii) That the use of the increased funding will be consistent with serving eligible SFMNP participants by expanding benefits to more persons, by enhancing current benefits, or a combination of both, and expanding the awareness and use of farmers' markets, roadside stands, and CSA programs;

(iii) The ability of the State agency to operate the existing SFMNP satisfactorily;

(iv) The management capabilities of the State agency to expand; and

(v) Whether, in the case of a State agency that intends to use the funding to increase the value of the Federal benefits received by a participant, the funding provided will increase the rate of coupon redemption.

(b) *Amendments.* At any time after approval, the State agency may amend the State Plan to reflect changes. The State agency shall submit such amendments to FNS for approval. The proposed amendments shall be signed by the State-designated official responsible for ensuring that the SFMNP is operated in accordance with the State Plan. The amendments must be approved by FNS prior to implementation.

(c) *Retention of copy.* A copy of the approved State Plan shall be kept on file at the State agency for public inspection.

§ 249.5 Selection of new State agencies.

In selecting new State agencies, FNS will use objective criteria to rank and approve State plans submitted in accordance with § 249.4. In making this ranking, FNS will consider the amount of funds necessary to operate the SFMNP successfully in the State compared with other States and with the total amount of funds available to the SFMNP, the number of participants estimated to be served, and the projected benefit level. Approval of a State Plan does not equate to an obligation on the part of FNS to fund the SFMNP within that State.

Subpart C—Participant Eligibility

§ 249.6 Participant eligibility.

(a) *Eligibility for certification.*

Individuals who are eligible to receive Federal benefits under the SFMNP are those who meet the following criteria:

(1) *Categorical eligibility.* Participants must be not less than 60 years of age, except that State agencies may exercise the option to deem Native Americans who are 55 years of age or older as categorically eligible for SFMNP benefits. State agencies may, at their discretion, also deem disabled individuals less than 60 years of age who are currently living in housing facilities occupied primarily by older individuals where congregate nutrition services are provided, as categorically eligible to receive SFMNP benefits.

(2) *Residency requirement.* The State agency may establish a residency requirement for SFMNP applicants. The State agency may determine a service area for any local agency, and may require that an applicant be residing within the service area at the time of application to be eligible for the Program. However, the State agency may not impose any durational or fixed residency requirements.

(3) *Income eligibility.* The State agency must ensure that local agencies determine income eligibility through the use of a clear and simple application process approved by the State agency. Participants must have a maximum household income of not more than 185 percent of the annual poverty income guidelines, or be determined automatically income eligible based on current participation/eligibility to receive benefits in another means-tested program, as designated by the State agency, for which income eligibility is set at or below 185 percent of the poverty income guidelines and for which documentation of family income is required. FNS will announce the income poverty guidelines annually.

(b) *Documentation of income eligibility.*

(1) *Automatically income eligible applicants.* The State or local agency must require applicants determined to be automatically income eligible to provide documentation of their eligibility to participate in another means-tested assistance program, as designated by the State agency.

(2) *Other applicants.*

(i) The State or local agency must require all other applicants to provide, at a minimum, a signed statement affirming that their household size and income does not exceed the maximum income eligibility standard in use by the State agency.

(ii) If the State agency offers a benefit of more than \$50 per participant through a CSA program, it must require documentation of household size and income from all participants receiving the higher benefit level.

(iii) The State agency has the option to require all applicants to provide documentation of family income at certification, and/or to require verification of the information provided by the applicant.

(c) *Certification periods.* Participants may be certified only for the current fiscal year's SFMNP period of operation. Eligibility must be determined at the beginning of each period of operation. Prior fiscal year certifications may not be carried over into subsequent fiscal years, but the State agency may make use of its participant enrollment listings from the prior fiscal year in its outreach efforts for the current fiscal year.

(d) *Participant rights and responsibilities.* Where a significant number or proportion of the population eligible to be served needs information regarding participation in the SFMNP in a language other than English, reasonable steps must be taken to provide this information in the appropriate language(s) to such persons, considering the scope of the Program and the size and concentration of such population(s). In order to inform applicants and participants or their authorized representatives/proxies of SFMNP rights and responsibilities, State/local agencies must provide the following information:

(1) During the certification process, every program applicant or authorized representative must be informed of the illegality of dual participation, i.e., obtaining SFMNP benefits from more than one service delivery area or from more than one SFMNP program model (coupon system and CSA program) within the same service delivery area.

(2) At the time of certification, each SFMNP applicant or authorized representative must read or have read to him or her the following statements or similar statements:

I have been advised of my rights and obligations under the SFMNP. I certify that the information I have provided for my eligibility determination is correct, to the best of my knowledge. This certification form is being submitted in connection with the receipt of Federal assistance. Program officials may verify information on this form. I understand that intentionally making a false or misleading statement or intentionally misrepresenting, concealing, or withholding facts may result in paying the State agency, in cash, the value of the food benefits improperly issued to me and may subject me to civil or criminal prosecution under State and Federal law.

Standards for eligibility and participation in the SFMNP are the same for everyone, regardless of race, color, national origin, age, disability, or sex.

I understand that I may appeal any decision made by the local agency regarding my eligibility for the SFMNP.

(3) During the certification visit, each participant or authorized representative must:

(i) Receive an explanation of how to use his/her SFMNP coupons at farmers' markets and roadside stands, and/or how SFMNP foods will be provided under the CSA program in that service delivery area; and

(ii) Be advised of the other types of services that are available to SFMNP participants, where such services are located, how they may be obtained, and why they may be useful.

(4) Persons found ineligible for the SFMNP during a certification visit must be advised in writing of their ineligibility, of the reasons for their ineligibility, and of their right to a fair hearing. The reasons for ineligibility must be properly documented and must be retained on file at the local agency. Such notice is not required when participation is denied solely because of lack of sufficient funding to provide SFMNP benefits to all eligible applicants.

(5) When a State or local agency pursues collection of a claim pursuant to § 249.20(c) against an individual who has been issued SFMNP benefits for which she/he is not eligible, the person must be advised in writing of the reason(s) for the claim, the value of the improperly issued benefits that must be repaid, and of his/her right to a fair hearing.

(e) *Certification without charge.* Certification for the SFMNP must be performed at no cost to the applicant or the authorized representative.

(f) *Use of proxies or authorized representatives.* At the State agency's discretion, a senior may designate an authorized representative (proxy) to apply for certification, shop at the farmers' market or roadside stands, and/or pick up their eligible foods from CSA program distribution sites on his/her behalf if the senior is unable to perform these actions. The State agency must obtain a signed statement from the eligible senior designating another individual as his/her authorized representative. A senior who has been certified to receive SFMNP benefits may designate an authorized representative at any point during the program's period of operation.

(g) *Processing standards.* (1) Applicants for the SFMNP must be notified of their eligibility or

ineligibility for benefits, or of their placement on a waiting list, as described in paragraph (g)(2) of this section, within 15 days from the date of application.

(2) When all available program benefits have been allocated to eligible participants, and there is a reasonable expectation that additional funds may become available to provide further SFMNP benefits to eligible seniors, the local agency must maintain a waiting list of individuals who contact the local agency to apply for the Program. Individuals must be notified of their placement on a waiting list within 15 days after they contact the local agency to request Program benefits. To enable the local agency to contact these individuals when caseload space becomes available, the waiting list must include the name of the applicant, the date placed on the waiting list, and an address or phone number of the applicant.

(h) *Limitations on certification.* If necessary to limit the number of participants, State agencies may impose additional eligibility requirements, such as limiting participant certification to certain geographic areas. Each State agency must specifically identify these limitations on certification in its State Plan.

§ 249.7 Nondiscrimination.

(a) *Civil rights requirements.* (1) The State agency must comply with the following requirements to ensure that no person shall, on the grounds of race, color, national origin, age, sex or disability, be excluded from participation, be denied benefits, or be otherwise subjected to discrimination, under the SFMNP:

(i) Title VI of the Civil Rights Act of 1964;

(ii) Title IX of the Education Amendments of 1972;

(iii) Section 504 of the Rehabilitation Act of 1973;

(iv) The Age Discrimination Act of 1975;

(v) Department of Agriculture regulations on nondiscrimination (parts 15, 15a and 15b of this title); and

(vi) Applicable FNS Instructions, including requirements for racial and ethnic participation data collection, public notification of the nondiscrimination policy, and annual reviews of each local agency's racial and ethnic participation data (as required by title VI of the Civil Rights Act of 1964).

(2) Compliance with Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of

1975, and regulations and instructions issued thereunder shall include, but not be limited to:

(i) Notification to the public of the nondiscrimination policy and complaint rights of participants and potentially eligible persons, which may be satisfied through FNS' required nondiscrimination statement on brochures and publications;

(ii) Review and monitoring activity to ensure SFMNP compliance with the nondiscrimination laws and regulations; and

(iii) Establishment of grievance procedures for handling participant complaints based on sex and handicap.

(b) *Complaints.* Persons seeking to file discrimination complaints may file them either with the Secretary of Agriculture, or the Director, Office of Civil Rights, USDA, Washington, DC 20250 or with the office established by the State agency to handle discrimination grievances or complaints. All complaints received by State agencies that allege discrimination based on race, color, national origin, or age shall be referred to the Secretary of Agriculture or the Director of the Office of Civil Rights, USDA. A State agency may process complaints that allege discrimination based on sex or disability if grievance procedures are in place.

Subpart D—Participant Benefits

§ 249.8 Level of benefits and eligible foods.

(a) *General.* State agencies must identify in the State Plan the fresh, nutritious, unprepared, locally grown fruits, vegetables and herbs that are eligible for purchase under the SFMNP. Eligible foods may not be processed or prepared beyond their natural state except for usual harvesting and cleaning processes. Dried fruits or vegetables, such as prunes (dried plums), raisins (dried grapes), sun-dried tomatoes, or dried chili peppers are not considered eligible foods in the SFMNP. Potted fruit or vegetable plants, potted or dried herbs, wild rice, nuts of any kind (even raw), honey, maple syrup, cider, seeds, eggs, meat, cheese, and seafood are also not eligible for purposes of the SFMNP. "Locally grown" means produce grown only within a State's borders but may be defined by State agencies to include border areas in adjacent States. Under no circumstances may produce grown outside of the United States and its territories be considered eligible food.

(b) *The value of the Federal benefits received.* (1) The Federal SFMNP benefit level received by each participant, whether individual or household, may

not be less than \$20 per year or more than \$50 per year, except that:

(i) A State agency that operated the SFMNP in FY 2006 may continue to issue the same level of benefits that was provided to participants in FY 2006, even if the benefit level was less than \$20;

(ii) Participants served by a State agency that operated the SFMNP through a CSA program model in FY 2006 may, at the State agency's discretion, continue to receive the same CSA benefit levels that were provided to such participants in FY 2006, subject to the conditions set forth at § 249.14(e)(3), Distribution of Funds; and

(iii) Participants who are participating in the SFMNP through a CSA program may receive a higher total benefit level than participants participating in a check or coupon program model, as long as that level is consistent for all Senior CSA program participants and does not exceed the \$50 annual maximum per individual or household, except as provided in paragraph (b)(1) of this section.

(2) The total value of SFMNP benefits provided in a combination of program models, such as coupons/checks and bulk purchase, may not exceed the \$50 maximum benefit level set forth in paragraph 249.8(b)(1).

(c) *Participant or household benefit allocation.* (1) All SFMNP participants living in the areas served by the State agency must be offered the same amount of SFMNP benefits, regardless of the program model(s) used by that State agency.

(2) Benefits may be allocated on an individual or on a household basis.

(3) Foods provided are intended for the sole benefit of SFMNP participants and are not meant to be shared with other non-participating household members.

(4) Participants must receive SFMNP benefits free of charge.

§ 249.9 Nutrition education.

(a) *Goal.* Nutrition education shall emphasize the relationship of proper nutrition to good health, including the importance of consuming fruits and vegetables.

(b) *Requirement.* The State agency shall integrate nutrition education into SFMNP operations and may satisfy nutrition education requirements through coordination with other agencies within the State. State agencies wishing to coordinate nutrition education with another State agency or organization must enter into a written cooperative agreement with such agencies to offer nutrition education relevant to the use and nutritional value

of foods available to SFMNP participants. In cases where SFMNP participants are receiving relevant nutrition education from an agency other than the administering State agency, the provision of nutrition education is an allowable administrative cost under the SFMNP.

Subpart E—State Agency Provisions

§ 249.10 Coupon, market, and CSA program management.

(a) *General.* This section sets forth State agency responsibilities regarding the authorization of farmers, farmers' markets, roadside stands, and/or CSA programs. The State agency is responsible for the fiscal management of and accountability for SFMNP-related activities for farmers, farmers' markets, roadside stands, and CSA programs. Each State agency may decide whether to authorize individual farmers and farmers' markets separately, or to authorize only farmers' markets. In addition, each State agency may decide whether to authorize roadside stands and/or CSA programs. The State agency may authorize a farmer for participation in a farmers' market, a roadside stand, and/or CSA program simultaneously. All contracts or agreements entered into by the State agency for the management or operation of farmers, farmers' markets, roadside stands, and/or CSA programs shall conform to the requirements of part 3016 of this title.

(1) Only farmers, farmers' markets, and/or roadside stands authorized by the State agency may redeem SFMNP coupons. Only farmers authorized by the State agency, or having a valid agreement with an authorized farmers' market, may redeem coupons. Only CSA programs authorized by the State agency may receive payment from the State agency at the beginning of the planting season, in order to provide eligible foods to senior participants who are shareholders.

(2) The State agency must establish criteria for the authorization of individual farmers and/or farmers' markets, roadside stands, and/or CSA programs. Any authorized farmer, farmers' market, roadside stand and/or CSA program must agree to sell participants only those foods identified as eligible by the State agency. State agencies may determine farmers, farmers' markets and/or roadside stands as automatically authorized to participate in the SFMNP based on current authorization to operate in the FMNP under Part 248 of this chapter. Individuals who exclusively sell produce grown by someone else, such as wholesale distributors, cannot be

authorized to participate in the SFMNP, except individuals employed by a farmer otherwise qualified under these regulations, or individuals hired by a nonprofit organization to sell produce at roadside stands on behalf of local farmers.

(3) The State agency must ensure that an appropriate number of farmers, farmers' markets, roadside stands, and/or CSA programs are authorized for adequate participant access in the area(s) proposed to be served and for effective management of the farmers, farmers' markets, roadside stands, and/or CSA programs by the State agency.

(4) The State agency may establish criteria to limit the number of authorized farmers, farmers' markets, and/or roadside stands.

(5) The State agency must limit the value of shares awarded to CSA programs to no more than 50 percent of their total Federal SFMNP food grant, except in the case of a State agency that has grandfathered a CSA program model into the permanent SFMNP that uses more than 50 percent of the total Federal SFMNP food grant for the CSA program. The State agency shall make efforts to select the CSA program(s) that provides the greatest variety of eligible foods.

(6) The State agency may purchase bulk quantities of eligible foods directly from authorized farmers. Such foods must then be equitably divided among and distributed directly to eligible SFMNP participants. SFMNP participants who have received checks or coupons to purchase eligible foods earlier in the season may also receive foods through the bulk purchase option as long as the total combined value of the benefits provided to each SFMNP participant does not exceed \$50, as stipulated in § 249.8(b).

(7) The State agency shall ensure that training is conducted prior to start up of the first year of SFMNP participation of an individual farmer, farmers' market, roadside stand, and/or CSA program. The training shall include at a minimum those items listed in paragraph (d) of this section, and may be delivered in a variety of methods, including but not limited to classroom settings, telephone conferences, videoconferences, and web-based training modules.

(8) Authorized farmers shall display a sign stating that they are authorized to redeem SFMNP coupons.

(9) Authorized farmers, farmers' markets, roadside stands, and/or CSA programs shall comply with the requirements of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of

1973, the Age Discrimination Act of 1975, Department of Agriculture regulations on nondiscrimination (parts 15, 15a and 15b of this title), and FNS Instructions as outlined in § 249.7.

(10) The State agency shall ensure that there is no conflict of interest between the State or local agency and any participating farmer, farmers' market, roadside stand and/or CSA program.

(b) *Farmer, farmers' market, roadside stand, and/or CSA program agreements.* The State agency shall ensure that all participating farmers' markets, roadside stands, and/or CSA programs enter into written agreements with the State agency. State agencies that authorize individual farmers shall also enter into written agreements with the individual farmers. The agreement must be signed by a representative who has legal authority to obligate the farmer, farmers' market, roadside stand, and/or CSA program. Agreements must include a description of sanctions for noncompliance with SFMNP requirements and shall contain, at a minimum, the following specifications, although the State agency may determine the exact wording to be used:

(1) The farmer, farmers' market and/or roadside stand shall:

(i) Provide such information as the State agency may require for its periodic reports to FNS;

(ii) Assure that SFMNP coupons are redeemed only for eligible foods;

(iii) Provide eligible foods at or less than the price charged to other customers;

(iv) Accept SFMNP coupons within the dates of their validity and submit such coupons for payment within the allowable time period established by the State agency;

(v) In accordance with a procedure established by the State agency, mark each transacted coupon with a farmer identifier. In those cases where the agreement is between the State agency and the farmer and/or roadside stand, each transacted SFMNP coupon shall contain a farmer identifier and shall be batched for reimbursement under that identifier. In those cases where the agreement is between the State agency and the farmers' market, each transacted SFMNP coupon shall contain a farmer identifier and be batched for reimbursement under a farmers' market identifier.

(vi) Accept training on SFMNP procedures and provide training to farmers and any employees with SFMNP responsibilities on such procedures;

(vii) Agree to be monitored for compliance with SFMNP requirements,

including both overt and covert monitoring;

(viii) Be accountable for actions of farmers or employees in the provision of eligible foods and related activities;

(ix) Pay the State agency for any coupons transacted in violation of this agreement;

(x) Offer SFMNP participants the same courtesies as other customers;

(xi) Comply with the nondiscrimination provisions of USDA regulations as provided in § 249.7; and

(xii) Notify the State agency if any farmer, farmers' market or roadside stand ceases operation prior to the end of the authorization period.

(2) The farmer, farmers' market and/or roadside stand shall neither:

(i) Seek restitution from SFMNP participants for coupons not paid by the State agency; nor

(ii) Issue cash change for purchases that are in an amount less than the value of the SFMNP coupon(s).

(3) The CSA program shall:

(i) Provide such information as the State agency may require for its periodic reports to FNS;

(ii) Assure that SFMNP participants receive only eligible foods;

(iii) Provide eligible foods to their SFMNP shareholders at or less than the price charged to other customers;

(iv) Assure that the shareholder receives eligible foods that are of equitable value and quantity to their share;

(v) Assure that all funds from the State agency are used for planting of crops for SFMNP shareholders;

(vi) Provide to the State agency access to a tracking system that determines the value of the eligible foods provided and the remaining value owed to each SFMNP shareholder;

(vii) Assure that SFMNP shareholders/authorized representatives provide written acknowledgement of receipt of eligible foods;

(viii) Accept training on SFMNP procedures and provide training to farmers and any employees with SFMNP responsibilities for such procedures;

(ix) Agree to be monitored for compliance with SFMNP requirements, including both overt and covert monitoring;

(x) Be accountable for actions of farmers or employees in the provision of eligible foods and related activities;

(xi) Offer SFMNP shareholders the same courtesies as other customers;

(xii) Notify the State agency immediately when the CSA program is experiencing a problem with its crops, and may be unable to provide SFMNP shareholders with the complete amount

of eligible foods agreed upon between the CSA program and the State agency;

(xiii) Comply with the nondiscrimination provisions of USDA regulations as provided in § 249.7; and

(xiv) Notify the State agency if any CSA program ceases operation prior to the end of the authorization period.

(4) The CSA program shall not substitute ineligible produce when eligible foods are not available.

(5) Neither the State agency nor the farmer, farmers' market, roadside stand, and/or CSA program has an obligation to renew the agreement. The State agency or the farmer, farmers' market, roadside stand and/or CSA program may terminate the agreement for cause after providing advance written notification.

(6) The State agency may deny payment to the farmer, farmers' market and/or roadside stand for improperly redeemed SFMNP coupons and may demand refunds for payments already made on improperly redeemed coupons.

(7) The State agency may demand a refund from any CSA program that fails to provide the full benefit to all SFMNP shareholders as specified in its contract, or that provides ineligible foods as substitutes for eligible foods.

(8) The State agency may disqualify a farmer, farmers' market, roadside stand, and/or CSA program for SFMNP violations. The farmer, farmers' market, roadside stand, and/or CSA program has the right to appeal a denial of an application to participate, a disqualification, or a SFMNP sanction by the State agency. Expiration of a contract or agreement with a farmer, farmers' market, roadside stand, and/or CSA program, and claims actions under § 249.20, are not appealable.

(9) A farmer, farmers' market, roadside stand, and/or CSA program, which commits fraud or engages in other illegal activity is liable to prosecution under applicable Federal, State or local laws.

(10) Agreements may not exceed 3 years.

(c) *Agreements with farmers' markets that do not authorize individual farmers.* Those State agencies that authorize farmers' markets but not individual farmers shall require authorized farmers' markets to enter into a written agreement with each farmer within the market that is participating in SFMNP. The State agency must set forth the required terms for the agreement and provide a sample agreement that may be used.

(d) *Annual training for farmers, farmers' market managers and/or farmers that operate a roadside stand or CSA program.* State agencies shall

conduct annual training for farmers, farmers' market managers, and/or farmers who operate a CSA program in the SFMNP. The State agency must conduct interactive training for all farmers and farmers' market managers who have never previously participated in the SFMNP. After a farmer/farmers' market manager's first year of SFMNP operation, State agencies have discretion in determining the method used for annual training purposes. At a minimum, annual training shall include instruction emphasizing:

(1) Eligible food choices;

(2) Proper SFMNP coupon redemption procedures, including deadlines for submission of coupons for payment, and/or receipt of payment for CSA programs' distribution of eligible foods;

(3) Equitable treatment of SFMNP participants, including the availability of eligible foods to SFMNP participants that are of the same quality and cost as that sold to other customers;

(4) Civil rights compliance and guidelines;

(5) Guidelines for storing SFMNP coupons safely; and

(6) Guidelines for cancelling SFMNP coupons, such as punching holes or rubber-stamping.

(e) *Monitoring and review of farmers, farmers' markets, roadside stands, CSA programs and local agencies.* The State agency shall be responsible for the monitoring of farmers, farmers' markets, roadside stands, CSA programs and local agencies within its jurisdiction. This shall include developing a system for identifying high risk farmers, farmers' markets, roadside stands, and/or CSA programs, and ensuring on-site monitoring, conducting further investigation, and sanctioning of such farmers, farmers' markets, roadside stands, and/or CSA programs as appropriate. In States where both the SFMNP and the FMNP are in operation, these monitoring/review requirements may be coordinated to avoid duplication. If the same farmers, farmers' markets, and/or roadside stands are authorized for both programs, a review conducted by one program may be counted toward the requirement for the other program.

(1) Where coupon reimbursement responsibilities are delegated to farmers' market managers, farmers' market associations, or nonprofit organizations, the State agency may establish bonding requirements for these entities. Costs of such bonding are not reimbursable administrative expenses.

(2)(i) Each State agency shall rank participating farmers, farmers' markets, roadside stands, and/or CSA programs

by risk factors, and shall conduct annual, on-site monitoring of at least 10 percent of farmers, 10 percent of farmers' markets, 10 percent of roadside stands, and 10 percent of the CSA programs or one of each program model, whichever is greater, which shall include those farmers, farmers' markets, roadside stands, and/or CSA programs identified as being the highest-risk.

(ii) Mandatory high-risk indicators include:

(A) A proportionately high volume of SFMNP coupons redeemed by a farmer within a farmers' market or at a single roadside stand (as compared to other farmers within the farmers' market or within the State);

(B) Participant complaints;

(C) In the case of CSA programs, an extended or ongoing inability to provide the full SFMNP benefit to each shareholder as contracted; and

(D) Farmers, farmers' markets, roadside stands, and/or CSA programs in their first year of SFMNP operation. States are encouraged to formally establish other high-risk indicators for identifying potential problems.

(iii) If additional high-risk indicators are established, they must be set forth in the farmers, farmers' market, roadside stand, and/or CSA program agreement and in the State Plan. If application of the high-risk indicators results in fewer than 10 percent of farmers, farmers' markets, roadside stands, and/or CSA programs being designated as high-risk, the State agency shall randomly select additional farmers, farmers' markets, roadside stands, and/or CSA programs to be monitored in order to meet the 10 percent minimum. The high-risk indicators listed above generally apply to a State agency already participating in the SFMNP. A State agency participating in the SFMNP for the first time shall, in lieu of applying the high-risk indicators, randomly select 10 percent of its participating farmers, 10 percent of its participating farmers' markets, 10 percent of its participating roadside stands, and 10 percent of its participating CSA programs or at least one farmers' market, roadside stand, and/or CSA program, whichever is greater, for monitoring visits.

(3)(i) The following shall be documented for all on-site monitoring visits to farmers, farmers' markets, roadside stands, and/or CSA programs, at a minimum:

(A) Names of both the farmer, farmers' market, roadside stand, and/or CSA program and the reviewer;

(B) Date of review;

(C) Nature of problem(s) detected or the observation that the farmer, farmers' market, roadside stand, and/or CSA

program appears to be in compliance with SFMNP requirements;

(D) Record of interviews with participants, market managers, farmers, and/or farmers who operate a CSA program; and

(E) Signature of the reviewer.

(ii) Reviewers are not required to notify the farmer, farmers' market, roadside stand, and/or CSA program of the monitoring visit before, during, or immediately after the visit. The State agency shall do so after a reasonable delay when necessary to protect the identity of the reviewer(s) or the integrity of the investigation.

(iii) In instances where the farmer, farmers' market, roadside stand, and/or CSA program will be permitted to continue participating in the SFMNP after being informed of any deficiencies detected by the monitoring visit, the farmer, farmers' market, roadside stand, and/or CSA program shall provide plans as to how the deficiencies will be corrected.

(4) At least every 2 years, the State agency must review all local agencies within its jurisdiction.

(f) *Control of SFMNP coupons.* The State agency must:

(1) Control and provide accountability for the receipt and issuance of SFMNP coupons;

(2) Ensure that there is secure transportation and storage of unissued SFMNP coupons; and

(3) Design and implement a system of review of SFMNP coupons to detect errors. At a minimum, the errors the system must detect are a missing participant signature (if such signature is required by the State agency), a missing farmer and/or market identification, and redemption by a farmer outside of the valid date. The State agency must have procedures in place to reduce the number of errors in transactions.

(g) *Payment to farmers, farmers' markets, roadside stands, and/or CSA programs.* The State agency must ensure that farmers, farmers' markets, roadside stands, and/or CSA programs are promptly paid for food costs.

(h) *Reconciliation of SFMNP coupons.* The State agency shall identify the disposition of all SFMNP coupons as validly redeemed, lost or stolen, expired, or not matching issuance records. Validly redeemed SFMNP coupons are those that are issued to a valid participant and redeemed by an authorized farmer, farmers' market, and/or roadside stand within valid dates. SFMNP coupons that were redeemed but cannot be traced to a valid participant or authorized farmer, farmers' market, and/or roadside stand

shall be subject to claims action in accordance with § 249.20.

(1) If the State agency elects to replace lost, stolen or damaged SFMNP coupons, it must describe its system for doing so in the State Plan.

(2) The State agency must use uniform SFMNP coupons within its jurisdiction.

(3) SFMNP coupons must include, at a minimum, the following information:

(i) The last date by which the participant may use the coupon. This date shall be no later than November 30 of each year.

(ii) A date by which the farmer or farmers' market must submit the coupon for payment. When establishing this date, State agencies shall take into consideration the date financial statements are due to the FNS, and allow time for the corresponding coupon reconciliation that must be done by the State agency prior to submission of financial statements. Financial statements are due to FNS by January 30.

(iii) A unique and sequential serial number.

(iv) A denomination (dollar amount).

(v) A farmer identifier for the redeeming farmer when agreements are between the State agency and the farmer.

(vi) In those instances where State agencies have agreements with farmers' markets, there must be a farmer identifier on each coupon and a market identifier on the cover of coupons that are batched by the market manager for reimbursement.

(i) *Instructions to participants.* Each participant must receive instruction on the redemption of the SFMNP coupons, or participation in a CSA program (where applicable), including, but not limited to:

(1) A list of names and addresses of authorized farmers, farmers' markets, and/or roadside stands at which SFMNP coupons may be redeemed, or procedures on the home-delivery process;

(2) Procedures to designate a proxy;

(3) The name and address of the authorized farmer of the CSA program, and locations of distribution sites;

(4) A description of eligible foods and the prohibition against cash change for SFMNP purchases of eligible foods;

(5) A description of eligible foods that will be provided through the CSA program;

(6) A schedule outlining a timeframe for distribution of the eligible foods from the CSA program; and

(7) An explanation of his/her right to complain about improper farmer, farmers' market, roadside stand, and/or CSA program practices with regard to

SFMNP responsibilities and the process for doing so.

(j) *Participant and farmer, farmers' market, roadside stand, and/or CSA program complaints.* The State agency must have procedures that document the handling of complaints from participants and farmers/farmers' markets, roadside stands, and/or CSA programs. Complaints of civil rights discrimination shall be handled in accordance with § 249.7(b).

(k) *Participant and farmer, farmers' market, roadside stand, and/or CSA program sanctions.* (1) The State agency must establish policies which determine the type and level of sanctions to be applied against participants and farmers, farmers' markets, roadside stands, and/or CSA programs based upon the severity and nature of the SFMNP violations observed, and such other factors as the State agency determines appropriate, such as whether repeated offenses have occurred over a period of time. Farmers, farmers' markets, roadside stands, and/or CSA programs may be sanctioned, disqualified, or both, when appropriate. Sanctions may include fines for improper SFMNP coupon redemption and the penalties outlined in § 249.20, in the case of deliberate fraud.

(2) In those instances where compliance purchases are conducted, the results of covert compliance purchases can be a basis for farmer, farmers' market, and/or roadside stand sanctions.

(3) A farmer, farmers' market, roadside stand, and/or CSA program committing fraud or other unlawful activities are liable to prosecution under applicable Federal, State or local laws.

(4) State agency policies must ensure that a farmer that is disqualified from the SFMNP at one market, roadside stand, or CSA program shall not participate in the SFMNP at any other farmers' market, roadside stand or CSA program in the State's jurisdiction during the disqualification period.

(5) State agency policies must ensure that a farmer, farmers' market, roadside stand, and/or CSA program that is disqualified from participating in the WIC Farmers' Market Nutrition Program is also disqualified from participating in the SFMNP in the State's jurisdiction during the disqualification period.

§ 249.11 Financial management system.

(a) *Disclosure of expenditures.* The State agency must maintain a financial management system that provides accurate, current and complete disclosure of the financial status of the SFMNP. This must include an accounting for all property and other

assets and all SFMNP funds received and expended each fiscal year.

(b) *Internal controls.* The State agency shall maintain effective controls over and accountability for all SFMNP funds. The State agency must have effective internal controls to ensure that expenditures financed with SFMNP funds are authorized and properly chargeable to the SFMNP.

(c) *Record of expenditures.* The State agency must maintain records that adequately identify the source and use of funds expended for SFMNP activities. These records must contain, but are not limited to, information pertaining to authorization, receipt of funds, obligations, unobligated balances, assets, liabilities, outlays, and income.

(d) *Payment of costs.* The State agency must implement procedures that ensure prompt and accurate payment of allowable costs, and ensure the allowability and allocability of costs in accordance with the cost principles and standard provisions of this part, part 3016 of this title, and FNS guidelines and Instructions.

(e) *Identification of obligated funds.* The State agency must implement procedures that accurately identify obligated SFMNP funds at the time the obligations are made.

(f) *Resolution of audit findings.* The State agency shall implement procedures that ensure timely and appropriate resolution of claims and other matters resulting from audit findings and recommendations.

(g) *Reconciliation of food instruments.* The State agency must reconcile SFMNP coupons in accordance with § 249.10(h).

(h) *Transfer of cash.* The State agency must establish the timing and amounts of its cash draws against its Letter of Credit in accordance with 31 CFR Part 205.

§ 249.12 SFMNP costs.

(a) *General.* (1) *Composition of allowable costs.* In general, a cost item will be deemed allowable if it is reasonable and necessary for SFMNP purposes and otherwise satisfies allowability criteria set forth in part 3016.22 of this title and this Part. SFMNP purposes include the administration and operation of the SFMNP. Allowable SFMNP costs may be classified as follows:

(i) *Food costs and administrative costs.* Food costs are the costs of eligible foods provided to SFMNP participants. Administrative costs are the costs associated with providing SFMNP benefits and services to participants and generally administering the SFMNP. Specific examples of allowable administrative costs are listed in

paragraph (b) of this section. A State agency may use up to 10 percent of its total Federal SFMNP grant to cover administrative costs. Any costs incurred for food and/or administration above the Federal grant level will be the State agency's responsibility.

(ii) *Direct and indirect costs.* Direct costs are food and administrative costs incurred specifically for the SFMNP. Indirect costs are administrative costs that benefit multiple programs or activities, and cannot be identified to any one program or activity without effort disproportionate to the results achieved. In accordance with the provisions of part 3016 of this title, a claim for reimbursement of indirect costs shall be supported by an approved allocation plan for the determination of such costs. An indirect cost rate developed through such an allocation plan may not be applied to a base that includes food costs.

(2) *Costs allowable with prior approval.* A State or local agency must obtain prior approval in accordance with part 3016.22 of this title before charging to the SFMNP any capital expenditures and other cost items designated by part 3016.22 of this title as requiring such approval.

(3) *Unallowable costs.* Costs that are not reasonable and necessary for SFMNP purposes, or that do not otherwise satisfy the cost principles of part 3016.22 of this title, are unallowable. Notwithstanding any other provision of part 3016 of this title or this Part, the cost of constructing or operating a farmers' market is unallowable. The use of SFMNP funds to supplement congregate meal programs is prohibited. Unallowable costs may never be claimed for Federal reimbursement.

(b) *Specified allowable administrative costs.* Allowable administrative costs include the following:

(1) The costs associated with administration and start-up;

(2) The costs associated with the provision of nutrition education that meets the requirements of § 249.9;

(3) The costs of SFMNP coupon issuance, or participant education covering proper coupon redemption procedures;

(4) The cost of eligibility determinations and outreach services;

(5) The costs associated with the coupon and market management process, such as printing SFMNP coupons, processing redeemed coupons, purchasing bags or other containers to be used in home-delivery and bulk purchase operations, and training farmers, market managers, and/or

farmers who operate CSA programs on SFMNP operations;

(6) The cost of monitoring and reviewing Program operations;

(7) The cost of SFMNP training;

(8) The cost of required reporting and recordkeeping;

(9) The cost of determining which local sites will be utilized;

(10) The cost of recruiting and authorizing farmers, farmers' markets, roadside stands, and/or CSA programs to participate in the SFMNP;

(11) The cost of preparing contracts for farmers, farmers' markets, roadside stands, and/or CSA programs;

(12) The cost of developing a data processing system for redemption and reconciliation of SFMNP coupons;

(13) The cost of designing program training and informational materials; and

(14) The cost of coordinating SFMNP responsibilities between designated administering agencies.

§ 249.13 Program income.

Program income means gross income the State agency earns from grant supported activities. It includes fees for services performed and receipts from the use or rental of real or personal property acquired with Federal grant funds, but does not include proceeds from the disposition of such property. The State agency must retain Program income earned during the agreement period and use it for Program purposes in accordance with the addition method described in part 3016.25(g)(2) of this title. Fines, penalties or assessments paid by local agencies or farmers, farmers' markets, roadside stands, and/or CSA program are also deemed to be Program income. The State agency must ensure that the sources and applications of Program income are fully documented.

§ 249.14 Distribution of funds to State agencies.

(a) *State Plan and agreement.* As a prerequisite to the receipt of Federal funds, a State agency must have its State Plan approved and must execute an agreement with FNS in accordance with § 249.3(c).

(b) *Distribution of SFMNP funds to previously participating State agencies.* Provided that sufficient SFMNP funds are available, each State agency that participated in the SFMNP in any prior fiscal year shall receive not less than the amount of funds the State agency received in the most recent fiscal year in which it received funding, if it otherwise complies with the requirements established in this Part.

(c) *Ratable reduction.* If amounts appropriated for any fiscal year for

grants under the SFMNP are not sufficient to pay to each previously participating State agency at least an amount as identified in paragraph (b) of this section, each State agency's grant must be ratably reduced. However, to the extent permitted by available funds, each State agency shall receive at least \$75,000 or the amount that the State agency received for the most recent prior fiscal year in which the State participated, if that amount is less than \$75,000.

(d) *Expansion of participating State agencies and establishment of new State agencies.* Any SFMNP funds remaining for allocation after meeting the requirements of paragraph (b) of this section shall be allocated in the following manner:

(1) Of the remaining funds, 75 percent shall be made available to State agencies already participating in the SFMNP that wish to serve additional participants or increase the current benefit level. If this amount is greater than that necessary to satisfy all State Plans approved for expansion, the unallocated amount shall be applied toward satisfying any unmet need in paragraph (d)(2) of this section.

(2) Of the remaining funds, 25 percent shall be made available to State agencies that have not participated in the SFMNP in any prior fiscal year. If this amount is greater than that necessary to satisfy the approved State Plans for new States, the unallocated amount shall be applied toward satisfying any unmet need in paragraph (d)(1) of this section. FNS reserves the right not to fund every State agency with an approved State Plan.

(e) *Expansion for current State agencies.* In providing funds to State agencies that participated in the SFMNP in the previous fiscal year, FNS must consider on a case-by-case basis the following factors:

(1) Whether the State agency utilized at least 80 percent of its prior year food grant. States that did not spend at least 80 percent of their prior year food grant may still be eligible for expansion funding if, in the judgment of FNS, good cause existed which was beyond the management control of the State, such as severe weather conditions or unanticipated decreases in participant caseload;

(2) Documentation supporting the funds expansion request as outlined in § 249.4(a)(23); and

(3) Whether the State agency currently issues a participant benefit greater than \$50. Such State agencies will not be eligible to receive additional SFMNP funds for expansion until the maximum participant benefit no longer exceeds \$50.

(f) *Funding of new State agencies.* Funds will be awarded to new SFMNP State agencies in accordance with § 249.5.

(g) *Administrative funding.* A State agency will have available for administrative costs an amount not greater than 10 percent of the total SFMNP funds it receives.

(h) *Recovery of unused funds.* State agencies must return to FNS any unexpended funds made available for a given fiscal year by February 1 of the following fiscal year.

§ 249.15 Closeout procedures.

(a) *General.* State agencies must submit to FNS a final closeout report for the fiscal year on a form prescribed by FNS and on a date specified by FNS.

(b) *Grant closeout procedures.* When grants to State agencies are terminated, the following procedures shall be followed in accordance with part 3016 of this title.

(1) FNS may disqualify a State agency's participation under the SFMNP, in whole or in part, or take such remedies as may be appropriate, whenever FNS determines that the State agency failed to comply with the conditions prescribed in this part, in its Federal-State Agreement, or in FNS guidelines and Instructions. FNS will promptly notify the State agency in writing of the disqualification together with the effective date.

(2) FNS may terminate a grant when both parties agree that continuation under the SFMNP would not produce beneficial results commensurate with the further expenditure of funds.

(3) Upon termination of a grant, the affected agency may not incur new obligations after the effective date of the disqualification, and must cancel as many outstanding obligations as possible. FNS will allow full credit to the State agency for the Federal share of the noncancellable obligations properly incurred by the State agency prior to disqualification, and the State agency shall do the same for farmers, farmers' markets, roadside stands, and/or CSA programs.

(4) A grant closeout shall not affect the retention period for, or Federal rights of access to, SFMNP records as specified in § 249.23(a). The closeout of a grant does not affect the responsibilities of the State agency regarding property or with respect to any SFMNP income for which the State agency is still accountable.

(5) A final audit is not a required part of the grant closeout and should not be needed unless there are problems with the grant that require attention. If FNS considers a final audit to be necessary,

it shall so inform OIG. OIG will be responsible for ensuring that necessary final audits are performed and for any necessary coordination with other Federal cognizant audit agencies or State or local auditors. Audits performed in accordance with § 249.18 may serve as final audits providing such audits meet the needs of requesting agencies. If the grant is closed out without an audit, FNS reserves the right to disallow and recover an appropriate amount after fully considering any recommended disallowances resulting from an audit which may be conducted later.

§ 249.16 Administrative appeal of State agency decisions.

(a) *Requirements.* The State agency shall provide a hearing procedure whereby applicants, participants, local agencies and farmers, farmers' markets, roadside stands, and/or CSA programs adversely affected by certain actions of the State agency may appeal those actions.

(1) *What may be appealed.*

(i) An applicant may appeal denial of certification of SFMNP benefits, except that no appeal is available if certification is denied solely because of the lack of sufficient funding to provide SFMNP benefits to all eligible applicants.

(ii) A participant may appeal disqualification/suspension of SFMNP benefits.

(iii) A local agency may appeal an action of the State agency disqualifying it from participating in the SFMNP.

(iv) A farmer, farmers' market, roadside stand, and/or CSA program may appeal an action of the State agency denying its application to participate, imposing a sanction, or disqualifying it from participating in the SFMNP.

(2) *What may not be appealed.*

Expiration of a contract or agreement shall not be subject to appeal.

(b) *Time limit for request.* The State or local agency must provide individuals, local agencies, farmers, farmers' markets, roadside stands, and/or CSA programs a reasonable period of time to request a fair hearing. Such time limit must not be less than 30 days from the date the agency mails or otherwise issues the notice of adverse action.

(c) *Postponement pending decision.* An adverse action may, at the State agency's option, be postponed until a decision in the appeal is rendered.

(1) In a case where an adverse action affects a local agency or farmer, farmers' market, roadside stand, and/or CSA program, a postponement is appropriate where the State agency finds that participants would be unduly

inconvenienced by the adverse action. In addition, the State agency may determine other relevant criteria to be considered in deciding whether or not to postpone an adverse action.

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

(d) *Procedure.* The State agency hearing procedure shall at a minimum provide the participant, local agency or farmer, farmers' market, roadside stand, and/or CSA program with the following:

(1) Written notification of the adverse action, the cause(s) for the action, and the effective date of the action, including the State agency's determination of whether the action shall be postponed under paragraph (c) of this section if it is appealed, and the opportunity for a hearing. Such notification shall be provided within a reasonable timeframe established by the State agency and in advance of the effective date of the action.

(2) The opportunity to appeal the action within the time specified by the State agency in its notification of adverse action.

(3) Adequate advance notice of the time and place of the hearing to provide all parties involved sufficient time to prepare for the hearing.

(4) The opportunity to present its case and at least one opportunity to reschedule the hearing date upon specific request. The State agency may set standards on how many hearing dates can be scheduled, provided that a minimum of two hearing dates is allowed.

(5) The opportunity to confront and cross-examine adverse witnesses.

(6) The opportunity to be represented by counsel or, in the case of a participant appeal, by a representative designated by the participant, if desired.

(7) The opportunity to review the case record prior to the hearing.

(8) An impartial decision maker, whose decision as to the validity of the

State agency's action shall rest solely on the evidence presented at the hearing and the statutory and regulatory provisions governing the SFMNP. The basis for the decision shall be stated in writing, although it need not amount to a full opinion or contain formal findings of fact and conclusions of law.

(9) Written notification of the decision in the appeal, within 60 days from the date of receipt of the request for a hearing by the State agency.

(e) *Continuing responsibilities.* When a farmer, farmers' market, roadside stand, CSA program, and/or local agency appeals an adverse action (and is permitted to continue in the SFMNP while its appeal is pending), it continues to be responsible for compliance with the terms of the written agreement or contract with the State agency.

(f) *Judicial review.* If a State level decision is rendered against the participant, local agency, farmer, farmers' market, roadside stand, and/or CSA program and the appellant expresses an interest in pursuing a further review of the decision, the State agency shall explain any further State level review of the decision and any available State level rehearing process. If neither is available or both have been exhausted, the State agency shall explain the right to pursue judicial review of the decision.

(g) *Additional appeals procedures for State agencies that authorize farmers' markets and not individual farmers.* A State agency that authorizes farmers' markets and not individual farmers shall ensure that procedures are in place to be used when a farmer seeks to appeal an action of a farmers' market or association denying the farmer's application to participate, or sanctioning or disqualifying the farmer. The procedures shall be set forth in the State Plan and in the agreements entered into by the State agency and the farmers' market and the farmers' market and the farmer.

Subpart F—Monitoring and Review of State Agencies

§ 249.17 Management evaluations and reviews.

(a) *General.* FNS and each State agency shall establish a management evaluation system in order to assess the accomplishment of SFMNP objectives as provided under these regulations, the State Plan, and the written agreement with FNS. FNS will:

(1) Provide assistance to State agencies in discharging this responsibility;

(2) Establish standards and procedures to determine how well the objectives of this Part are being accomplished; and

(3) Implement sanction procedures as warranted by State SFMNP performance.

(b) *Responsibilities of FNS.* FNS will establish evaluation procedures to determine whether State agencies carry out the purposes and provisions of this part, the State Plan, and the written agreement with FNS. As a part of the evaluation procedure, FNS will review audits to ensure that the SFMNP has been included in audit examinations at a reasonable frequency. These evaluations shall also include reviews of selected local agencies, and on-site reviews of selected farmers, farmers' markets, roadside stands, and community supported agriculture programs. These evaluations will measure the State agency's progress toward meeting the objectives outlined in its State Plan and the State agency's compliance with these regulations.

(1) FNS may withhold up to 10 percent of the State agency's total SFMNP grant if FNS determines that the State agency has:

(i) Failed, without good cause, to demonstrate efficient and effective administration of its SFMNP; or

(ii) Failed to comply with the requirements contained in this section or the State Plan.

(2) Sanctions imposed upon a State agency by FNS in accordance with this section (but not claims for repayment assessed against a State agency) may be appealed in accordance with the procedures established in § 249.20(a). Before carrying out any sanction against a State agency, the following procedures will be followed:

(i) FNS will notify the chief departmental officer of the administering agency in writing of the deficiencies found and of FNS' intention to withhold administrative funds unless an acceptable corrective action plan is submitted by the State agency to FNS within 45 days after mailing of notification.

(ii) The State agency shall develop a corrective action plan, including timeframes for implementation to address the deficiencies and prevent their future recurrence.

(iii) If the corrective action plan is acceptable, FNS will notify the chief departmental officer of the administering agency in writing within 30 days of receipt of the plan. The letter will advise the State agency of the sanctions to be imposed if the corrective action plan is not implemented

according to the schedule set forth in the approved plan.

(iv) Upon notification from the State agency that corrective action has been taken, FNS will assess such action and, if necessary, perform a follow-up review to determine if the noted deficiencies have been corrected. FNS will then advise the State agency of whether the actions taken are in compliance with the corrective action plan, and whether the deficiency is resolved or further corrective action is needed. Compliance buys can be required if, during FNS management evaluations by regional offices, a State agency is found to be out of compliance with its responsibility to monitor and review farmers, farmers' markets, roadside stands, and community supported agriculture programs.

(v) If an acceptable corrective action plan is not submitted within 45 days, or if corrective action is not completed according to the schedule established in the corrective action plan, FNS may withhold the award of SFMNP administrative funds. If the 45-day warning period ends in the fourth quarter of a fiscal year, FNS may elect not to withhold funds until the next fiscal year. In such an event, FNS will notify the chief departmental officer of the administering State agency.

(vi) If compliance is achieved before the end of the fiscal year in which the SFMNP administrative funds are withheld, the funds withheld may be restored to the State agency. FNS is not required to restore funds withheld beyond the end of the fiscal year for which the funds were initially awarded.

(c) *Responsibilities of State agencies.* The State agency is responsible for meeting the following requirements:

(1) The State agency must establish evaluation and review procedures and document the results of such procedures. The procedures must include, but are not limited to:

(i) Conducting annual monitoring reviews of participating farmers' markets, roadside stands, and community supported agriculture programs. This includes on-site reviews of a minimum of 10 percent of farmers and 10 percent of each type of authorized outlet (farmers' markets, roadside stands, and community supported agriculture programs), and includes those farmers and authorized outlets identified as being at the highest risk. The first year of operation in the SFMNP shall be considered a high-risk indicator. More frequent reviews may be performed, as the State agency deems necessary. In States where both the SFMNP and the WIC Farmers' Market Nutrition Program are in operation,

these reviews may be coordinated to avoid duplication. A review by one program may be counted by the other program toward the monitoring requirement, provided that appropriate sanction action is taken for all violations found.

(ii) Conducting monitoring reviews of all local agencies within the State agency's jurisdiction at least once every 2 years. Monitoring of local agencies shall encompass, but not be limited to, evaluation of management, accountability, certification, nutrition education, financial management systems, and coupon and/or CSA program management systems. When the State agency conducts a local agency review outside of the SFMNP season, a review of documents and procedural plans of the SFMNP, rather than actual SFMNP activities, is acceptable.

(iii) Instituting the necessary follow-up procedures to correct identified problem areas.

(2) On its own initiative or when required by FNS, the State agency must provide special reports on SFMNP activities, and take positive action to correct deficiencies in SFMNP operations.

§ 249.18 Audits.

(a) *Federal access to information.* The Secretary of the U.S. Department of Agriculture, the Comptroller General of the United States, or any of their duly authorized representatives, or duly authorized State auditors shall have access to any books, documents, papers, and records of the State agency and their contractors, for the purpose of making surveys, audits, examinations, excerpts, and transcripts.

(b) *State agency response.* The State agency may take exception to particular audit findings and recommendations. The State agency shall submit a response or statement to FNS as to the action taken or planned regarding the findings. A proposed corrective action plan developed and submitted by the State agency must include specific time frames for its implementation and for completion of the correction of deficiencies and problems leading to the deficiencies.

(c) *Corrective action.* FNS will determine whether SFMNP deficiencies identified in an audit have been adequately corrected. If additional corrective action is necessary, FNS shall schedule a follow-up review, allowing a reasonable time for such corrective action to be taken.

(d) *State sponsored audits.* State and local agencies must conduct independent audits in accordance with parts 3015, 3016 (§ 3016.26 of this title),

or 3051 of this title, as applicable. A State or local agency may elect to obtain either an organization-wide audit or an audit of the Program if it qualifies to make such an election under applicable regulations.

§ 249.19 Investigations.

(a) *Authority.* FNS may make an investigation of any allegation of noncompliance with this part and FNS guidelines and instructions. The investigation may include, where appropriate, a review of pertinent practices and policies of any State and local agency, the circumstances under which the possible noncompliance with this Part occurred, and other factors relevant to a determination as to whether the State and local agency has failed to comply with the requirements of this Part.

(b) *Confidentiality.* No State or local agency, participant, or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege under this Part because that person has made a complaint or formal allegation, or has testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Part. The identity of every complainant shall be kept confidential except to the extent necessary to carry out the purposes of this Part, including the conducting of any investigation, hearing, or judicial proceeding.

Subpart G—Miscellaneous Provisions

§ 249.20 Claims and penalties.

(a) *Claims against State agencies.* (1) If FNS determines through a review of the State agency's reports, program or financial analysis, monitoring, audit, or otherwise, that any SFMNP funds provided to a State agency for food or administrative purposes were, through State agency negligence or fraud, misused or otherwise diverted from SFMNP purposes, a formal claim will be assessed by FNS against the State agency. The State agency must pay promptly to FNS a sum equal to the amount of the administrative funds or the value of coupons and/or eligible foods so misused or diverted.

(2) If FNS determines that any part of the SFMNP funds received, coupons printed, and/or eligible foods otherwise lost by a State agency were lost as a result of theft, embezzlement, or unexplained causes, the State agency must, on demand by FNS, pay to FNS a sum equal to the amount of the money or the value of the SFMNP funds or coupons/eligible foods so lost.

(3) The State agency will have full opportunity to submit evidence, explanation or information concerning alleged instances of noncompliance or diversion before a final determination is made in such cases.

(4) FNS is authorized to establish claims against a State agency for unreconciled SFMNP coupons, and/or for failure to comply with the terms of duly executed CSA program contracts or agreements. When a State agency can demonstrate that all reasonable management efforts have been devoted to reconciliation and 99 percent or more of the SFMNP coupons issued, or of the eligible foods contracted for delivery by the CSA program, have been accounted for by the reconciliation process, FNS may determine that the reconciliation process has been completed to satisfaction.

(b) *Interest charge on claims against State agencies.* If an agreement cannot be reached with the State agency for payment of its debts or for offset of debts on its current Letter of Credit within 30 days from the date of the first demand letter from FNS, FNS will assess an interest (late) charge against the State agency. Interest accrual shall begin on the 31st day after the date of the first demand letter, bill or claim, and shall be computed monthly on any unpaid balance as long as the debt exists. From a source other than the SFMNP, the State agency shall provide the funds necessary to maintain SFMNP operations at the grant level authorized by FNS.

§ 249.21 Procurement and property management.

(a) *Requirements.* State agencies must comply with the requirements of part 3016 of this title for procurement of supplies, equipment and other services with SFMNP funds. These requirements are adopted for use by FNS to ensure that such materials and services are obtained for the SFMNP in an effective manner and in compliance with the provisions of applicable laws and executive orders.

(b) *Contractual responsibilities.* The standards contained in part 3016 of this title do not relieve the State agency of the responsibilities arising under its contracts. The State agency is the responsible authority, without recourse to FNS, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in connection with the SFMNP. This includes, but is not limited to, disputes, claims, protests of award, source evaluation, or other matters of a contractual nature. Matters concerning

violation of law are to be referred to such local, State or Federal authority as may have proper jurisdiction.

(c) *State regulations.* The State agency may use its own procurement regulations provided that:

(1) Such regulations reflect applicable State and local regulations; and

(2) Any procurements made with SFMNP funds adhere to the standards set forth in part 3016 of this title.

(d) *Property acquired with program funds.* State and local agencies shall observe the standards prescribed in part 3016 of this title in their utilization and disposition of real property and equipment acquired in whole or in part with SFMNP funds.

§ 249.22 Nonprocurement debarment/suspension, drug-free workplace, and lobbying restrictions.

The State agency must ensure compliance with the requirements of FNS' regulations governing nonprocurement debarment/suspension (part 3017 of this title) and drug-free workplace (part 3021 of this title), as well as FNS' regulations governing restrictions on lobbying (part 3018 of this title), where applicable.

§ 249.23 Records and reports.

(a) *Recordkeeping requirements.* Each State agency must maintain full and complete records concerning SFMNP operations. Such records must comply with part 3016 of this title and the following requirements:

(1) Records must include, but not be limited to, information pertaining to certification, financial operations, SFMNP coupon issuance and redemption, authorized outlet (farmers, farmers' markets, and CSA program) agreements, authorized outlet monitoring, CSA program agreements, invoices, delivery receipts, equipment purchases and inventory, nutrition education, fair hearings, and civil rights procedures.

(2) All records must be retained for a minimum of 3 years following the date of submission of the final expenditure report for the period to which the report pertains. If any litigation, claim, negotiation, audit or other action involving the records has been started before the end of the 3-year period, the records must be kept until all issues are resolved, or until the end of the regular 3-year period, whichever is later. If FNS deems any of the SFMNP records to be of historical interest, it may require the State agency to forward such records to FNS whenever the State agency is disposing of them.

(3) Records for nonexpendable property acquired in whole or in part

with SFMNP funds must be retained for three years after its final disposition.

(4) All records must be available during normal business hours for representatives of FNS of the Comptroller General of the United States to inspect, audit, and copy. Any reports resulting from such examinations shall not divulge names of individuals.

(b) *Financial and participant reports.* State agencies must submit financial and SFMNP performance data on a yearly basis as specified by FNS. Such information must include, but shall not be limited to:

(1) Number of participants served with Federal SFMNP funds;

(2) Value of coupons issued and/or eligible foods ordered under CSA programs;

(3) Value of coupons redeemed and/or eligible foods provided to participants under CSA programs; and

(4) Number of authorized outlets by type; i.e., farmers, farmers' markets, roadside stands, and CSA programs.

(c) *Source documentation.* To be acceptable for audit purposes, all financial and SFMNP performance reports must be traceable to source documentation.

(d) *Certification of reports.* Financial and SFMNP reports must be certified as to their completeness and accuracy by the person given that responsibility by the State agency.

(e) *Use of reports.* FNS will use State agency reports to measure progress in achieving objectives set forth in the State Plan, and this part, or other State agency performance plans. If it is determined, through review of State agency reports, SFMNP or financial analysis, or an audit, that a State agency is not meeting the objectives set forth in its State Plan, FNS may request additional information including, but not limited to, reasons for failure to achieve these objectives.

§ 249.24 Data safeguarding procedures.

FNS and SFMNP State agencies will take reasonable steps to keep applicant and participant information/records private to the extent provided by law. Such steps include a requirement for each State agency to restrict the use or disclosure of information obtained from SFMNP applicants and participants to:

(a) Persons directly connected with the administration or enforcement of the SFMNP, including persons investigating or prosecuting violations in the SFMNP under Federal, State or local authority;

(b) Representatives of public organizations designated by the chief State agency officer (or, in the case of Indian Tribal governments acting as

SFMNP State agencies, the governing authority) that administer food, nutrition, or other assistance programs that serve persons categorically eligible for the SFMNP. The State agency must execute a written agreement with each such designated organization:

(1) Specifying that the receiving organization may employ SFMNP information only for the purpose of establishing the eligibility of SFMNP applicants and participants for food, nutrition, or other assistance programs that it administers and conducts outreach to SFMNP applicants and participants for such programs; and

(2) Containing the receiving organization's assurance that it will not, in turn, disclose the information to a third party.

(c) The Comptroller General of the United States for audit and examination authorized by law.

§ 249.25 Other provisions.

(a) *No aid reduction.* Any programs for which a grant is received under this part shall be supplementary to the food stamp program carried out under the Food Stamp Act of 1977 as amended (7 U.S.C. 2011, *et seq.*) and to any other Federal or State food or nutrition assistance program.

(b) *Statistical information.* FNS reserves the right to use information obtained under the SFMNP in a summary, statistical or other form that does not identify particular individuals.

§ 249.26 SFMNP information.

(a) Any person who wishes information, assistance, records or other public material must request such information from the State agency, or from the FNS Regional Office serving the appropriate State as listed below:

(1) Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, Vermont: U.S. Department of Agriculture, FNS, Northeast Region, 10 Causeway Street, Room 501, Boston, Massachusetts 02222-1066.

(2) Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Puerto Rico, Virginia, Virgin Islands, West Virginia: U.S. Department of Agriculture, FNS, Mid-Atlantic Region, Mercer Corporate Park, 300 Corporate Boulevard, Robbinsville, New Jersey, 08691-1598.

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

(4) Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin: U.S. Department of Agriculture, FNS, Midwest Region, 77 West Jackson Boulevard—20th floor, Chicago, Illinois 60604-3507.

(5) Arkansas, Louisiana, New Mexico, Oklahoma, Texas: U.S. Department of Agriculture, FNS, Southwest Region, 1100 Commerce Street, Room 555, Dallas, Texas 75242.

(6) Colorado, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah, Wyoming: U.S. Department of Agriculture, FNS, Mountain Plains Region, 1244 Speer Boulevard, Suite 903, Denver, Colorado 80204.

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

(b) Inquiries pertaining to the SFMNP administered by a federally recognized Indian tribal organization (ITO) should be addressed to the FNS Regional Office responsible for the geographic State in which that ITO is located.

§ 249.27 OMB control number. [Reserved]

Dated: December 1, 2006.

Nancy Montanez Johner,

Under Secretary, Food, Nutrition, and Consumer Services.

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

Appendix—Regulatory Impact Analysis

1. *Title:* 7 CFR 248: Senior Farmers' Market Nutrition Program (SFMNP).

2. *Statutory Authority:* Farm Security and Rural Investment Act of 2002 (Pub. L. 101-171).

3. *Need and Program History:* Congress established the Senior Farmers' Market Nutrition Program (SFMNP) in Public Law 101-171, Sect. 4401 to (1) provide resources in the form of fresh, nutritious, unprepared, locally grown fruits, vegetables, and herbs from farmers' markets, roadside stands, and community supported agriculture programs (CSAs) to low-income seniors; (2) increase the domestic consumption of agricultural commodities by expanding or aiding in the expansion of domestic farmers' markets, roadside stands, and CSA programs; and (3) develop or aid in the development of new and additional farmers' markets, roadside stands, and CSA programs. This final rule provides operating guidelines for the SFMNP, consistent with legislative intent.

The requirements of the final USDA rule for the SFMNP are similar to two USDA interventions: (1) The WIC Farmers' Market Nutrition Program (FMNP), for individuals participating in the Special Supplemental

Nutrition Program for Women, Infants and Children (WIC) and those individuals on a waiting list for WIC benefits; and (2) the Senior Farmers' Market Nutrition Pilot Program (SFMNPP), administered by USDA as a pilot program in 2001. The SFMNP has been administered by USDA as a competitive grant program since FY 2001. Establishing rules for the SFMNP similar to the FMNP and SFMNP eases the administrative burden for USDA, State agencies, farmers, and program recipients.

Special Nutritional Needs of Seniors

Seniors are a rapidly increasing segment of the population, accounting for 30 percent of the nation's healthcare costs.¹ The health and well-being of the nation's seniors has a substantial impact on the economy. Low-income seniors are at a particularly high nutritional risk. For instance, obesity rates for older adults with lower incomes are much higher than other population groups.³ Additionally, low-income seniors are found to consume fewer recommended foods from the Food Guide Pyramid and fewer nutrients.⁴ Further, in the general elderly population, not taking income into account, a study using USDA's 1994-1996 Continuing Survey of Food Intakes by Individuals (CSFII) found that average intakes of food energy, dietary fiber, vitamins B₆ and E, calcium, magnesium and zinc were lower than recommendations for older Americans.⁵

Consumption of fresh fruits and vegetables is important for all Americans and especially for the elderly who have additional health concerns.⁶ "Scientific evidence shows that consuming the recommended 5 to 9 daily servings of fruits and vegetables helps protect against heart disease and cancer. While there is no estimate for disease-related costs or numbers of deaths attributable to low fruit and vegetable consumption, medical experts, including the Surgeon General, have noted that physical inactivity and poor diet—of which low consumption of fruits and vegetables is a key component—cause diseases that result in the death of more than 300,000 Americans each year."⁷

¹ Administration on Aging (AOA), U.S. Department of Health and Human Services. 2000. A Profile of Older Americans: 2000. Washington, DC: USDHHS.

² United States Department of Agriculture, Economic Research Service (USDA/ERS) 1998. Factors Affecting Nutrient Intake of the Elderly. Agricultural Economic Report Number 769. Washington, DC: USDA/ERS.

³ Georgetown University, Center on an Aging Society. "Obesity Among Older Americans At Risk for Chronic Conditions." <http://www.aging-societ.org>, number 10, July 2003.

⁴ Guthrie, JF and BH Lin. Overview of the diets of lower- and higher-income elderly and their food assistance options. *Journal of Nutrition Education Behavior, Supplement 1*, March-April 2002.

⁵ Gerrior, Shirley A. Dietary Changes in Older Americans from 1977 to 1996: Implications for Dietary Quality. Center for Nutrition Policy and Promotion, *Family Economics and Nutrition Review*, Vol. 12 No. 2, 1999.

⁶ Gerrior, Shirley A., 1999.

⁷ United States General Accounting Office. Fruits and Vegetables: Enhanced Federal Efforts to Increase Consumption Could Yield Health Benefits for Americans. GAO-02-657, July 2002 (p. 4).

Fruits and vegetables comprise two of the five major food groups in the food guide pyramid. However, the cost of fresh fruits and vegetables may be a barrier for many. In addition to cost constraints, seniors face other obstacles to achieving good health; many seniors live in social isolation, and have limited mobility.^{8,9,10}

Farmers, Farmers' Markets, Roadside Stands, and Community Supported Agriculture Programs (CSAs)

In addition to increasing seniors' fresh fruit and vegetable consumption, the intent of Congress is also to increase the consumption of agricultural commodities and increase the number of farmers' markets, roadside stands, and CSAs.

The number of farmers' markets in the United States has grown dramatically, increasing 111 percent from 1994 to 2004.¹¹ According to the National Farmers' Market Directory, in 2004 there were over 3,700 farmers' markets operating in the United States; all 50 States and the Virgin Islands operate farmers' markets. The number of farmers' markets operating in States varies widely, from 6 in Delaware to 444 in California.¹² According to the 2000 USDA Farmers Market Study Statistics, 19,000 farmers reported selling their produce only at farmers' markets.¹³ Further, 58 percent of markets participate in WIC FMNP, food stamps, local and/or State nutrition programs.¹⁴

Programs Intended to Feed the Low-Income Elderly Population

The SFMNP will operate alongside several other food assistance programs funded by the federal government that provide benefits to seniors. The commonality of the programs is that they provide food in some capacity, for example, a Food Stamp Electronic Benefits Transfer (EBT) Card or a home-delivered meal from Meals on Wheels.

Child and Adult Care Food Programs (CACFP)

CACFP reimburses day care providers for making healthy meals and snacks available to children and adults in day care. Adult participants must be functionally impaired or age 60 or older, and enrolled in an adult care center where they may receive up to two meals and one snack each day. The total cost of the elderly component of the program in FY 2005 was \$80.3 million; average daily

adult attendance in CACFP was 103,386.¹⁵ In FY 2005, institutions caring for seniors received \$64.81 per senior in monthly CACFP benefits.¹⁶

Commodity Supplemental Food Program (CSFP)

Another program addressing the special needs of the low-income elderly population is the CSFP, operating in 32 States, the District of Columbia, and on two Indian reservations. USDA purchases food and makes it available to CSFP State agencies and Indian Tribal Organizations (ITOs), along with funds for administrative costs. State agencies that administer CSFP are typically departments of health, social services, education, or agriculture. State agencies store the food and distribute it to public and non-profit private local agencies. Local agencies determine the eligibility of applicants, distribute the foods, and provide nutrition education. Local agencies also provide referrals to other welfare, nutrition, and health care programs such as the Food Stamp Program, Medicaid, and Medicare. The food package for the elderly is designed for their specific nutritional needs and includes such nutritious foods as canned fruits and vegetables, juices, meats, fish, peanut butter, cheese, cereal and grain products, and dairy products. In FY 2005, the program, on average, served almost 460,000 elderly per month. Food costs totaled \$67.2 million and the elderly received approximately \$12.17 in food benefits per month.¹⁷

Food Stamp Program (FSP)

While the Food Stamp Program is available to alleviate hunger in the low-income senior population by providing EBT cards redeemable for food in approved food retail stores (and some farmers' markets), many seniors do not participate. In 2003, approximately 28 percent of eligible seniors used the program compared to a 56 percent participation rate in the total Food Stamp eligible population.¹⁸ Low participation rates by seniors are attributed to (1) A lack of information; (2) a perceived lack of need; (3) low expected food stamp program benefits; (4) burdensome program administration; and (5) stigma and other psychological reasons.^{19,20} In FY 2004, the most recent year for which data is currently available, 1.92 million seniors participated in the Food Stamp Program (8.2 percent of the total FSP caseload). At that time, the average monthly senior benefit was \$65 and the USDA spent about \$1.5 billion on elderly participants.²¹

Food Distribution Program on Indian Reservations (FDPIR)

FDPIR provides commodity foods to low-income households living on Indian reservations, and to American Indian households residing in approved areas near reservations or in Oklahoma. Many households participate in FDPIR as an alternative to the Food Stamp Program because they do not have easy access to food stamp offices or authorized food stores. Each month, participating households receive a food package to help them maintain a nutritionally balanced diet. No recent data exists on the number of elderly participating in the program. However, in 1990, the elderly constituted 14.8 percent of total program participation.²² If this has remained unchanged, the number of seniors participating in FY 2005 would have been about 14,638 at a cost of about \$11.3 million.²³ At that time, FDPIR recipients received an average of \$37 a month in commodities.²⁴

The Elderly Nutrition Program

The Administration on Aging's (AoA) Elderly Nutrition Program, authorized under Title III, Grants for State and Community Programs on Aging, and Title VI, Grants for Native Americans, under the Older Americans Act, provides grants to support congregate and home delivered (Meals on Wheels) meals and nutrition services to older people throughout the country. Meals served under the program must provide at least one-third of the daily-recommended dietary allowances established by the Food and Nutrition Board of the National Academy of Sciences—National Research Council (now the Institute of Medicine). In practice, elderly individuals participating in the Elderly Nutrition Program receive an estimated 40 to 50 percent of many required nutrients.²⁵ In FY 2002 (the most recent year that data is available), the ENP served 3.1 million elderly, costing the federal government \$604 million.²⁶ If the same number of participants were served in FY 2005, the cost of the ENP would have been about \$650 million.²⁷

While there is no means test among Elderly Nutrition Program participants, 80 to 90 percent have incomes below 200 percent of poverty.²⁸ More than twice as many Title III participants live alone; and two-thirds of participants are either over or under their desirable weight, placing them at risk for nutrition and health problems. Title III home-delivered meals participants have twice as many physical impairments compared with the overall elderly population.²⁹

⁸ Administration of Aging (AOA), U.S. Department of Health and Human Services. 1996. *Aging in the 21st Century*. Washington, DC:USDHHS.

⁹ United States Department of Agriculture, Economic Research Service (USDA/ERS) 1998.

¹⁰ United States Department of Agriculture, Food and Nutrition Service (USDA/FNS). 1999. *Reaching the Working Poor and Poor Elderly Study: What We Learned and Recommendations for Future Research*. Washington, DC: USDA/FNS.

¹¹ <http://www.ams.usda.gov/farmersmarkets/facts.htm>, April 5, 2006.

¹² <http://www.ams.usda.gov/farmersmarkets/map.htm>, April 5, 2006.

¹³ <http://www.ams.usda.gov/farmersmarkets/FMstudystats.htm>, April 5, 2006.

¹⁴ <http://www.ams.usda.gov/farmersmarkets/FMstudystats.htm>, April 5, 2006.

¹⁵ FNS, National Data Bank, May 1, 2006.

¹⁶ FNS, National Data Bank, May 1, 2006.

¹⁷ FNS, National Data Bank, May 1, 2006.

¹⁸ United States Department of Agriculture, Food and Nutrition Service. *Food Stamp Program Participation Rates: 2003*. July 2005.

¹⁹ USDA, 1999.

²⁰ Gabor, Vivian, *et al.* *Seniors' Views of the Food Stamp Program and Ways To Improve Participation—Focus Group Findings in Washington State: Final Report*. USDA/ERS, 2002.

²¹ USDA/FNS. *Characteristics of Food Stamp Households: FY 2004, September 2005*.

²² Evaluation of the Food Distribution Program on Indian Reservations, Volume 1: Final Report, Research Triangle Institute (prepared for USDA,

¹⁹ USDA, 1999.

²⁰ Gabor, Vivian, *et al.* *Seniors' Views of the Food Stamp Program and Ways To Improve Participation—Focus Group Findings in Washington State: Final Report*. USDA/ERS, 2002.

²¹ USDA/FNS. *Characteristics of Food Stamp Households: FY 2004, September 2005*.

²² Evaluation of the Food Distribution Program on Indian Reservations, Volume 1: Final Report, Research Triangle Institute (prepared for USDA, Food and Nutrition Service), 1990.

²³ FNS National Data Bank, May 1, 2006.

²⁴ FNS National Data Bank, May 1, 2006.

²⁵ http://www.aoa.gov/press/fact/alpha/fact_elderly_nutrition.asp, April 10, 2006.

²⁶ <http://www.aoa.gov>, March 19, 2004.

²⁷ <http://www.bls.gov> (FY 2002 cost inflated by

In 1995 Mathematica Policy Research, Inc. conducted an evaluation of the Elderly Nutrition Program for the Administration on Aging. Key findings included:

- People who receive ENP meals have higher daily intakes of key nutrients than similar nonparticipants.

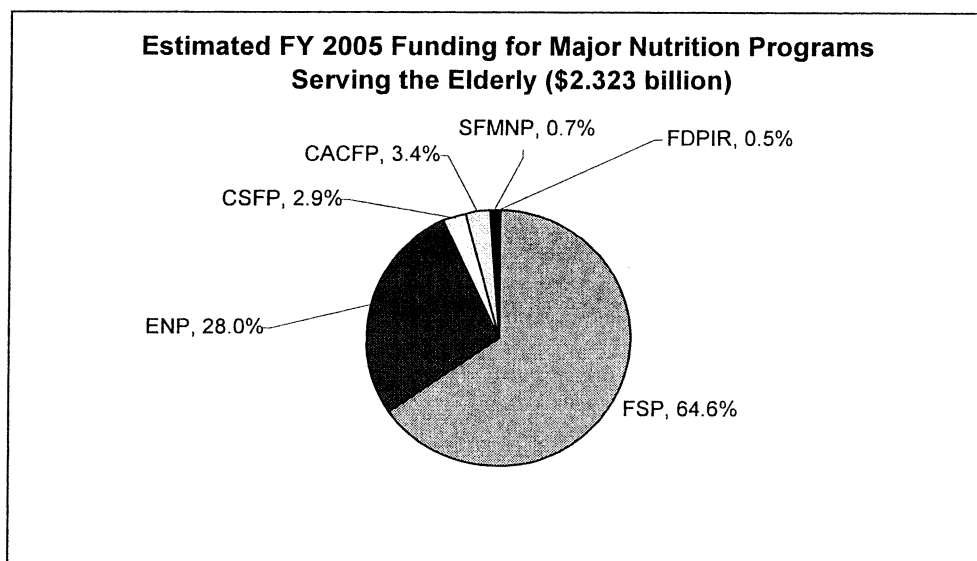
- ENP meals provide approximately 40 to 50 percent of participants' daily intakes of most nutrients.

- Participants have more social contacts per month than similar nonparticipants.
- Most participants are satisfied with the services the ENP provides.³⁰

Summary

The following chart depicts total nutrition assistance funding currently available for low-income seniors and the percent of total funding the SFMNP represents.

Figure 2.



³⁰ <http://www.mathematica-mpr.com/3rdLevel/enphot.htm>. Serving Elders at Risk, The Older

Americans Act Nutrition Programs, National

Evaluation of the Elderly Nutrition Program, 1993–1995, Mathematica Policy Research, Inc., 1995.

Nutrition assistance program	FY 2005 funding for seniors (in millions)
FSP	*\$1500
ENP	650
CSFP	67
CACFP	80
SFMNP	15
FDPIR	11
Total	2,323

* Food Stamp funding for seniors reflects the FY 2004 cost, which is the most recent year for which data is currently available.

SFMNP Program Models

The final rule draws from a variety of other programs, specifically, the WIC FMNP and the Senior Farmers' Market Nutrition Pilot Program and the SFMNP under the competitive grant process. The following section describes these programs in an effort to provide an understanding of the framework and provisions of the final rule.

WIC Farmers' Market Nutrition Program (FMNP)

In 1992, Congress established the WIC Farmers' Market Nutrition Program to provide WIC participants with additional benefits to purchase fresh, unprepared, locally grown fruits and vegetables, recognizing the importance of the nutritional benefits of fresh produce. The program also assists farmers by increasing sales, use and awareness of farmers' markets.

The WIC FMNP provides grants to State agencies. Administrative funds are available; however, State agencies are required to match 30 percent of the total administrative cost of the program.

By law, the federal benefit level provided to FMNP recipients (WIC participants and those on a waiting list for WIC services) must be not less than \$10 and not more than \$30 per year.³¹ State agencies may supplement this amount with State funds.

Forty-five State agencies currently operate the WIC FMNP. In FY 2005, almost 2.7 million or about 33 percent of WIC Program participants participated in the WIC FMNP. Farmers redeemed over \$23 million in coupons.³²

Seniors Farmers' Market Nutrition Pilot Program 2001

In an effort to extend FMNP services to other segments of the population and to promote farmers' markets, roadside stands and CSAs, USDA instituted the Seniors Farmers' Market Nutrition Pilot Program (SFMNPP) using Commodity Credit Corporation (CCC) funds in 2001. This program provided grants to State agencies to use to distribute coupons to eligible seniors. Coupons were redeemed at a value established by each State agency for fresh fruits and vegetables at farmers' markets, roadside stands and CSAs.

The pilot program was closely aligned to the WIC FMNP, as is the final rule. In 2001 USDA provided \$15 million to 36 grantees (45 State agencies applied for grants) using CCC funds. Grant awards ranged from \$9,000 to \$1.2 million, enabling participating States, tribes and the District of Columbia to serve 420,000 low-income seniors. Benefits to seniors differed by State agency, ranging from \$10 to \$540 per recipient per year. Approximately 8,508 farmers, 1,205 farmers' markets, 886 roadside stands, and 49 CSAs participated in the SFMNPP in 2001. State agencies spent 83 percent of available funds.³³

Subsequent to its first year of operation, the USDA's Economic Research Service (ERS) conducted an in-house analysis of the pilot program. ERS found the pilot program to be highly popular among stakeholders, including Congress, income-eligible seniors and farmers. Early findings also suggest that the coupons increased low-income seniors' ability to purchase fruits and vegetables, as seniors reported that produce at farmers' markets was less expensive than the produce at grocery stores. Additionally, ERS found that seniors are more inclined to redeem SFMNP coupons in contrast to food stamps where there is a stigma attached with redemption.³⁴

While ERS did not find the SFMNPP effective in developing farmers' markets or expanding existing markets, they did suggest that if the program continues to grow, it is possible that these goals will be realized as well. ERS also noted that State agencies wanted Federal funds to support administrative expenses. The final rule addresses this issue by allowing State agencies to use up to 10 percent of Federal grant dollars to fund the administration of the program.

Senior Farmers' Market Nutrition Program 2002

Congress continued to fund the SFMNP in 2002 and provided \$15 million to the program (\$10 million from the Agriculture Appropriations Act of 2002 and \$5 million from the Commodity Credit Corporation). In addition, Pub. L. 101-171 established the permanent SFMNP and authorized the SFMNP to be funded at \$15 million for each year from FY 2003 to FY 2007 from CCC funds. USDA was authorized to promulgate regulations implementing the program. In 2002, USDA awarded 36 grants that enabled State agencies to serve 500,000 low-income seniors. Approximately 10,000 farmers participated in 2002. Nearly 89 percent of program funds were spent.³⁵

Senior Farmers' Market Nutrition Program 2003

In 2003, the USDA grandfathered-in State agencies that had participated in the SFMNP in the previous year. After the original 36 State agencies were awarded 2002 Federal grant funds, there was enough funding available from unspent carryover funds to award grants to 4 new State agencies and to provide additional grant money to 13 current grantees.³⁶ USDA awarded a total of \$16.8 million in grants to State agencies; 800,000 low-income seniors participated. Over 85 percent of the total available program funds were spent.

Senior Farmers' Market Nutrition Program 2004

In FY 2004, USDA awarded State agencies a total of \$16.7 million for SFMNP grants; over 802,000 low-income seniors participated. All 40 State agencies that participated in the SFMNP in 2003 received funding. In addition, 4 new State agencies and 3 new ITOs received SFMNP funding in 2004. Nearly 86 percent of the total available program funds were spent.

Senior Farmers' Market Nutrition Program 2005

In FY 2005, no carryover funds from FY 2004 were available and an across-the-board reduction of just over 10 percent was applied to the current grantees' base grants. One State agency that participated in FY 2004 did not participate in FY 2005. A total of \$15 million was awarded to current State agencies and ITOs to fund their Programs; 94 percent of the SFMNP funds were spent in FY 2005.

TABLE 1.—SUMMARY OF THE 2005 SENIOR FARMERS' MARKET NUTRITION PROGRAM

	State agency grant amount	Income eligibility (% of poverty) ³⁷	Age eligibility "elderly"	Average benefit level per participant	Recipients per state	Farmers' markets per state	Roadside stands per state	CSAs per state
Mean	\$326,087	172%	60	\$33	17,505	58	44	5
Median	130,811	185%	60	27	7,185	31	1	0
Minimum	7,918	100%	55	10	148	0	0	0
Maximum	1,366,229	All elders	65	165	175,914	370	704	169

³¹ The 2004 Child Nutrition and WIC Reauthorization Law increased the maximum benefit from \$20 to \$30 in July 2004.

³² FNS National Data Bank, May 1, 2006.

³³ USDA/FNS Administrative Data, 2001.

³⁴ "The Seniors Farmers' Market Nutrition Pilot Program: A Preliminary Assessment." Unpublished staff paper. USDA/ERS. October 10, 2001.

³⁵ USDA/FNS Administrative Data, 2002.

³⁶ USDA/FNS Administrative Data, 2003.

TABLE 1.—SUMMARY OF THE 2005 SENIOR FARMERS’ MARKET NUTRITION PROGRAM—Continued

	State agency grant amount	Income eligibility (% of poverty) ³⁷	Age eligibility “elderly”	Average benefit level per participant	Recipients per state	Farmers’ markets per state	Roadside stands per state	CSAs per state
Total	15,000,000	771,285	2,663	2,001	237

Note: CSAs are Community Supported Agriculture Programs.

TABLE 2.—2005 PARTICIPATING STATE AGENCIES

State agency	Benefit level
Alabama Farmers’ Market Authority	\$20.00
Alaska Department of Health and Social Services	30.00
Arkansas Department of Human Services, Division of Aging	50.00
California Department of Aging	20.00
Chickasaw Nation of Oklahoma	100.00
Colorado	20.00
Connecticut Department of Agriculture	15.00
District of Columbia Department of Health	30.00
Five Sandoval Indian Pueblos	20.00
Florida Department of Elder Affairs	60.00
Grand Traverse Band of Ottawa & Chippewa Indians	50.00
Hawaii Department of Labor & Industrial Relations	165.00
Illinois Department of Human Services	15.00
Indiana Department of Health	18.00
Iowa Department of Agriculture & Land Stewardship	28.00
Kansas Department of Aging	30.00
Kentucky Department of Agriculture	40.00
Louisiana Department of Agriculture	16.00
Maine Department of Agriculture	67.00
Maryland Department of Agriculture	15.00
Massachusetts Department of Food and Agriculture	10.00
Michigan Office of Services to the Aging	40.00
Minnesota Department of Agriculture	20.00
Mississippi Department of Agriculture	28.00
Mississippi Band of Choctaw Indians	45.00
Montana Department of Public Health and Human Services	40.00
Nebraska Department of Agriculture	48.00
Nevada Department of Administration	30.00
New Hampshire Department of Health and Human Services	18.00
New Jersey Department of Health and Senior Services	20.00
New York Department of Agriculture and Markets	18.00
North Carolina Department of Health & Human Services	15.00
Ohio Department of Aging	65.00
Oregon Department of Human Services	40.00
Osage Tribal Council	25.00
Pennsylvania Department of Agriculture	20.00
Pueblo of San Felipe	40.00
Puerto Rico Department of Agriculture	16.00
Rhode Island Division of Agriculture	15.00
South Carolina Department of Social Services	25.00
Tennessee Department of Health	30.00
Vermont Department of Aging and Disabilities	61.00
Virginia Department for the Aging	40.00
Washington Department of Social and Health Services	31.00
West Virginia Department of Agriculture	20.00
Wisconsin Department of Agriculture, Trade, and Consumer Protection	30.00

4. *Summary³⁷ of Key Provisions:* Following is a summary of key provisions of this rule and their impact on USDA, State and local

agencies, farmers and recipients. Effects describe how the program will change

compared to policies in place for the current SFMNP.

³⁷ The Grand Traverse Band of Ottawa and Chippewa Indians allows all elders to be income

eligible; the Grand Traverse Band of Ottawa and

Chippewa Indians is excluded from the calculation of the mean and median.

TABLE 3

Final rule:	Final rule effect on:
<p>§ 249.3 Administration:</p> <p>(a) Delegates the responsibility within USDA to administer the SFMNP to FNS.</p> <p>(b) Delegates the responsibility for direct administration of the SFMNP, in accordance with program regulations, to State agencies. Allows State agencies to operate the SFMNP at the local level through written agreements with nonprofit organizations or local government entities.</p> <p>(c) Requires each State agency to ensure that sufficient staff is available to administer the SFMNP efficiently and effectively, and to include in the State Plan an outline of administrative staff and job descriptions for staff who will be paid out of SFMNP funds.</p>	<p>USDA</p> <p>The Supplemental Food Programs Division and FNS Regional Offices will need to use resources to provide assistance to State agencies and to assess and/or monitor all levels of Program operations to ensure that the goals of the Program are effectively and efficiently achieved.</p> <p><i>State/Local Agencies:</i> State agencies will need to use resources to meet administrative requirements. However, State agencies that participated in the SFMNP have administrative structures in place, mitigating the need for resources to develop new administrative structures, which can be supplemented if needed to meet any new responsibilities from this rule.</p>
<p>§ 249.5 Selection of new State agencies:</p> <p>All current SFMNP State agencies are grandfathered into the proposed program. The amount of the grant would be equal to the total Federal funds received in the prior fiscal year, contingent upon the availability of sufficient funds for the SFMNP and an approved State Plan.</p>	<p>USDA</p> <p>There will be some impact on FNS Regional Office resources in the review and approval of State plans submitted by State agencies, including those not currently participating in the SFMNP.</p> <p><i>State/Local Agencies:</i> Congress has authorized \$15 million per year for the SFMNP through FY 2007. Modest program expansion has been funded by unspent funds that have carried over into the next fiscal year. Therefore, it is unlikely that many additional State agencies will have the opportunity to participate in the program. Further, participating State agencies cannot expect to see their programs expand much. An appropriation not indexed to inflation will decrease in real dollars over time.</p> <p><i>Farmers:</i> Grandfathering in State agencies that currently participate in the SFMNP, combined with limited funding is likely to limit the program primarily to farmers, markets, and CSAs in State agencies already participating.</p> <p><i>Recipients:</i> Grandfathering in State agencies that currently participate in SFMNP, combined with limited funding is likely to limit the program to recipients in States currently participating.</p>
<p>§ 249.6 Participant eligibility:</p> <p>(a) Sets out criteria for eligibility for certification</p> <ol style="list-style-type: none"> 1. Categorical Eligibility. Participants must not be less than 60 years of age. ITOs have the option to deem Native Americans who are 55 years or older as categorically eligible. State agencies may, at their discretion, also deem disabled individuals less than 60 years of age who currently reside in housing facilities occupied primarily by older individuals where congregate nutrition services are provided, as categorically eligible. States have the option to establish a higher age limit. 2. Residency requirement. States are allowed to establish a residency requirement. 3. Income eligibility is set at 185% of poverty. <p>(b) The State or local agency must require applicants to either provide documentation of their eligibility to participate in another means-tested assistance program as designated by the State agency, sign a statement attesting to the participation in or certification for another means-tested program as designated by the State agency, or sign a statement affirming that their household income does not exceed the maximum income eligibility standard in use by the State agency. State agencies have the option of requiring income documentation as they deem necessary.</p>	<p>USDA</p> <p>Most SFMNP participants are likely to be income eligible based on documentation of their eligibility to participate in another means-tested assistance program. However, because some State agencies may not require documentation of income for other participants, it is possible that some participants may not be eligible, thus barring eligible seniors from participating and potentially resulting in some erroneous payments. State agencies have the authority to require income documentation from applicants, which would help alleviate the potential loss of funds due to erroneous payments.</p> <p><i>State/Local Agencies:</i> State agencies have latitude in defining the eligible population, enabling State agencies to tailor the program to their needs. The final rule also provides State agencies with the flexibility of not requiring income documentation from applicants who are not deemed automatically income eligible based on certification for or participation in another means-tested assistance program for which the income eligibility standard is not more than 185% of the Federal poverty income level. If State agencies choose to unilaterally require income documentation, they will face an increase in the administrative burden placed upon them. If income documentation is instead required on a case-by-case basis, State agencies would be expected to provide guidance to local agencies on when such documentation might be needed and local agencies will need to collect and review the documentation. It is not expected that these activities will impose a significant administrative burden upon State and local agencies.</p> <p><i>Recipients:</i> The final rule allows State agencies to continue serving those currently participating and provides for expansion of the program, based on the availability of funds.</p>

TABLE 3—Continued

Final rule:	Final rule effect on:
<p>§ 249.8 Level of benefits and eligible foods:</p> <p>(a) Eligible foods are fresh, nutritious, unprepared fruits, vegetables and herbs. States must specifically identify in the State Plans those foods that may be purchased.</p> <p>(b) Establishes that the SFMNP benefit received by each recipient may not be less than \$20 or more than \$50 each year, except that State agencies that provided an annual SFMNP benefit of less than \$20 in FY 2006 may continue, at their discretion, to issue less than the \$20 minimum after the program becomes permanent. Participants served by a State agency that operated the SFMNP through a CSA program model in FY 2006 may, at the State agency's discretion, continue to receive the same CSA benefit levels. New States may issue higher benefits up to \$50 per year to participants who are participating through a CSA program, as long as that level is consistent for all Senior CSA program participants.</p> <p>(c) Establishes that all SFMNP recipients living in the areas served by the State agency must be offered the same amount of SFMNP benefits, regardless of the program model used by that State agency. Benefits may be allocated on an individual or on a household basis.</p>	<p>USDA</p> <p>Instituting a minimum and maximum benefit level ensures a certain level of participation is possible, given cost constraints.</p> <p>Requiring a Statewide benefit level eases administrative burdens and promotes equity within the program.</p> <p><i>State/Local Agencies:</i> Maximum and minimum benefit levels reduce flexibility.</p> <p>Grandfathering CSA program models into the permanent program by current State agencies will allow current State agencies to maintain successful Programs by maintaining its economic viability for authorized farmers.</p> <p><i>Recipients:</i> The eligible food requirement increases access to fresh fruits and vegetables for participating seniors.</p> <p>If State agencies are unable to maintain current funding levels, State agencies will have to reduce benefits, reduce the number of seniors served, or both.</p>
<p>§ 249.9 Nutrition education:</p> <p>(a) Defines the goal of nutrition education in the SFMNP, i.e., to emphasize the relationship of proper nutrition to the total concept of good health, including the importance of consuming fresh fruits and vegetables.</p> <p>a. Requires the State agency to integrate nutrition education into SFMNP operations, and provides guidance on coordinating the delivery of nutrition education through other agencies within the State.</p>	<p>USDA</p> <p>FNS will have to monitor State's provision of nutrition education.</p> <p><i>State/Local Agencies:</i> All State agencies currently provide nutrition education. Only the new State agencies would experience an increase in burden; however, the final rule allows State agencies to use up to 10% of their Federal grant to offset this burden.</p> <p><i>Recipients:</i> Nutrition education could have a positive impact on the health of seniors. However, the manner in which it is provided, and its accessibility will determine the success of the education to improve eating and physical activity levels.</p> <p>Nutrition Education can be funded out of State agencies' administrative funds (up to 10% of the total grant), which could reduce (1) the amount of funds spent on program administration; and (2) the amount spent on food benefits.</p>
<p>§ 249.12 SFMNP costs:</p> <p>(a) Defines allowable and unallowable costs for the SFMNP</p> <ol style="list-style-type: none"> 1. States are permitted to use their grant of up to 10 percent for administrative costs. 2. Food costs are the costs of eligible foods provided to SFMNP recipients. 3. Administrative costs are those costs associated with providing benefits and services to recipients. 	<p><i>State/Local Agencies:</i> The Program has been operating since 2001. Administrative funds have not been available to State agencies since the program was established. ERS found in its 2001 in-house evaluation of the program that most State agencies wanted additional funds to support program administration.³⁸ It is therefore likely that State agencies will use the administrative funds allowed under the final rule. Additionally, State agencies have more administrative requirements under the program regulations in the final rule than they do under the current program (e.g. State Plan, racial/ethnic participation data collection and reporting, specific minimum and maximum benefit levels, management evaluation requirements for both FNS and each State agency, regular and routine participation and expenditure reports, audit requirements, and specific contractual requirements for authorized outlets.) There is no maintenance of effort requirement in the final rule, so it is unlikely that State agencies will continue to use the resources that they were using during the pilot programs.</p> <p>Because future funding levels are based on funding provided to current State agencies, administrative funding was not previously available, and the provisions in the final rule allow State agencies to use up to 10% of their total grant for administrative purposes, the actual dollar amount available for food benefits will likely be lower than the total food funds currently provided to State agencies.</p> <p><i>Farmers:</i> The reduction in total benefits to seniors due to allocating funds for program administration will impact farmers authorized to redeem SFMNP coupons. As food benefits decrease there may be some decrease in recipients' demand for farmers' market produce.</p>

TABLE 3—Continued

Final rule:	Final rule effect on:
	<p><i>Recipients:</i> Unless States augment federal funding, which they are encouraged to do, they will have to reduce SFMNP benefits, reduce the number of seniors served, or both. For instance, utilizing the total \$15 million, the program could provide benefits to about 4.9% of the eligible population in 2007. Assuming State agencies use 10% of grant funds for administration, the percentage of the eligible population served decreases by about 10 percent to 4.4% in 2007.</p>
<p>§ 249.14 Distribution of funds:</p> <p>(a) Establishes a base grant level (prior fiscal year's grant) for previously participating State agencies.</p> <p>(b) Provides for a ratable reduction of all SFMNP grants in the event that appropriated funds in any fiscal year are not sufficient to cover the base grants at the prior fiscal year's grant level.</p> <p>(c) Establishes a funding formula for the allocation of any remaining SFMNP funds (after base grants are met) for expansion of participating State agencies (75 percent) and introduction of new State agencies (25 percent).</p> <p>(d) Sets out factors to be considered in approving requests for expansion from participating State agencies.</p> <p>(e) Provides for the reallocation by FNS of any unspent SFMNP funds.</p>	<p>USDA</p> <p>Basing grants on prior year grant levels eases the administrative burden for FNS.</p> <p><i>State/Local Agencies:</i> Basing grant money on prior year grant levels would help State agencies plan and better manage their programs. The funding formula allows State agencies to maintain their programs and, if funds are available, for current and new State agencies to expand or start a SFMNP.</p> <p><i>Farmers:</i> Basing current funding levels on prior year levels provides stability within the Program. The funding formula establishes a method to distribute funds, when available, to allow current State agencies to expand their Program and to allow new State agencies to start operating the SFMNP. As current and new State agencies expand or start Programs, new program outlets (farmers' markets, roadside stands, and CSAs) will be added to the SFMNP.</p> <p><i>Recipients:</i> Basing current funding levels on prior year levels provides stability within the Program. The funding formula establishes a method to distribute funds, when available, to allow current State agencies to expand their Program and to allow new State agencies to start operating the SFMNP. As current and new State agencies expand or start programs, the SFMNP will be able to serve a larger share of the eligible elderly population.</p>

5. *Cost/Benefit Analysis of Proposed Rule:* Federal Cost. The SFMNP was authorized to be funded at \$15 million annually through FY 2007. This analysis assumes that the Program will continue to be funded at \$15 million per year throughout the 5-year period of analysis. The real cost of the program will be less than the nominal cost of \$15 million because the program is not indexed to inflation.³⁹ The FNS administrative cost associated with program implementation is assumed to be less than 1.5 percent of the total federal grant to State agencies.

Benefits to Seniors

Low-income seniors will be afforded nutrition education as well as a coupon benefit ranging in value from \$20 to \$50 per annum,⁴⁰ which will be used to purchase fresh, unprepared fruits, vegetables, and herbs intended to improve seniors' diets. Seniors, and ultimately participating farmers, in each State agency will benefit from the total Federal grant to the State agencies minus the amount that State agencies spend on administration—up to 10 percent of the total grant.

It is possible that seniors will not eat additional fresh fruits and vegetables, but rather will substitute the fruits and vegetables that they would have purchased with their own funds with fruits and

vegetables purchased with SFMNP coupons. You *et al.* (1998) found that the demand for fresh fruits and vegetables in the United States was responsive to price changes, but not changes in income.⁴¹

Benefits to Farmers

Farmers will collect revenue from redeemed coupons up to the total Federal grants to State agencies for food costs (the total amount of revenue collected will depend also on the amount of the grant State agencies use to cover administrative costs). Additional revenue may be reaped as seniors might spend their own money (and in some States, food stamps) to purchase additional goods at the farmers' markets. Farmers will also benefit from the exposure of new populations to farmers' markets, roadside stands and CSAs, which could lead to increased revenues.

In FY 2005, the SFMNP operated at 2,663 farmers' markets, 2,001 roadside stands and 237 CSAs.⁴² ERS reported in 2001, that "the SFMNP has not been as effective in developing new farmers' markets, produce stands, and community supported agricultural programs or in expanding existing ones."⁴³ Nevertheless, ERS suggests

that given evidence from the WIC FMNP, the SFMNP could increase the number of farmers' markets, roadside stands, and CSAs in the long run.

Limitations

Benefits to seniors and farmers will be limited by the authorized funding for the program, which will go primarily to already participating State agencies. The use of the Federal grant money to cover administrative costs will also limit the benefits realized by seniors and farmers. FNS recognizes the tradeoffs involved in these decisions, but feels that they are necessary to maintain strong infrastructure for the program.

Uncertainties

It is unclear what level of benefits State agencies will provide under this rule. The rule provides State agencies the flexibility to make tradeoffs between possibly making a larger difference in diet quality for a few seniors and providing some level of benefits for many. Growing seasons are also likely to have an impact; State agencies with longer growing/market seasons may be more likely to issue higher benefit levels so that seniors can take advantage of the season.

It is also unclear who will be served—anyone meeting age/residency and income requirements is eligible, but the program has not been funded at levels that come close to providing benefits to all who are eligible. State agencies will need to consider carefully their individual outreach and service priorities to ensure that the SFMNP,

(internal) staff paper. USDA/Economic Research Service. October 10, 2001.

³⁸ USDA/ERS, 2001.

³⁹ Inflation rate based on 2005 CPI-U data for fresh fruits and vegetables.

⁴⁰ This does not include those seniors participating in states that grandfathered a benefit level lower than \$20 or a CSA program model into the permanent SFMNP.

⁴¹ You *et al.* "Consumer Demand for Fresh Fruits and Vegetables in the United States." The Georgia Agricultural Experiment Stations, College of Agricultural and Environmental Sciences, The University of Georgia. *Research Bulletin*, number 431 (January 1998).

⁴² USDA/FNS Administrative Data, 2006.

⁴³ "The Seniors Farmers' Market Nutrition Pilot Program: A Preliminary Assessment." Unpublished

consistent with other FNS nutrition assistance programs, targets those most in need.

Estimate of Costs and Benefits of the Proposed Rule

The following table provides an estimate of the costs and benefits described above as well as the number of program recipients during 2007–2011. Key assumptions include:

- Funding for 2007–2011 is maintained at the current authorized level of \$15 million

annually (assumes no carryover funds are available in 2007–2011);

- State agencies use 10 percent of the Federal grant for administration in 2007–2011;
- State agencies provide an average benefit level of \$17.50 to recipients (as shown in Table 4); and
- The poverty rate among seniors remains constant over the period of analysis.

This analysis also assumes that total funding and benefit levels will not be indexed for inflation; therefore, their value has been deflated using projections of the Consumer Price Index—Urban index for fresh fruits and vegetables (1989 baseline). Based on these assumptions, we estimate there will be little change in the percent of SFMNP eligibles served in the analysis period, due to the large number of eligibles nationally.

TABLE 4.—PROJECTED COSTS AND BENEFITS OF PROPOSED RULE IN CONSTANT DOLLARS ⁴⁴
[Figures in millions unless otherwise noted]

	2005	2007	2008	2009	2010	2011
Total Federal Grants to State Agencies	\$15,000,000	\$15,000,000	\$14,995,800	\$14,992,300	\$14,988,510	\$14,984,720
Federal Administrative Costs	\$180,000	\$180,000	\$180,000	\$180,000	\$180,000	\$180,000
Administrative Funds for State Agencies	\$0	\$1,500,000	\$1,499,580	\$1,499,230	\$1,498,850	\$1,498,470
Benefits Paid to Participants/ Farmers	\$15,000,000	\$13,500,000	\$13,496,220	\$13,493,070	\$13,489,660	\$13,486,250
Number of Recipients	771,285	771,285	771,285	771,285	771,285	771,285
Average Benefit Per Participant ⁴⁵ Per Year	\$19.45	\$17.50	\$17.50	\$17.49	\$17.49	\$17.49
Number of Eligibles ⁴⁶	16,620,000	17,470,000	17,975,000	18,476,000	19,180,000	19,451,000
Percent of Eligibles Served	4.64%	4.41%	4.29%	4.17%	4.02%	3.97%

6. *Alternatives:* USDA considered a variety of alternatives when constructing the regulation for the Senior Farmers' Market Nutrition Program. Primarily, the proposed regulation is modeled after the FMNP, the SFMNP, and the SFMNP under the competitive grant process. Consistency provides administrative ease among the State agencies, localities, and USDA as well as continuity to beneficiaries and farmers who have been participating in the FMNP and/or the SFMNP. However, USDA carefully reviewed six alternatives with regard to: Grant structure, eligible grantees, provision of administrative funding, eligibility requirements, and benefit levels. An analysis of these alternatives was included in the regulatory impact analysis for the proposed rule. In response to comments on the proposed rule, USDA further considered additional alternatives to the final rule regarding participant eligibility, benefit levels, and SFMNP costs.

The Department received numerous comments in opposition to the requirement that if an applicant was not automatically income eligible for the SFMNP that he/she must provide documentation of income at the time of certification. Commenters expressed concern over the administrative burden that would be placed upon State agency personnel in order to obtain proof or documentation of income given the benefit eligible applicants would receive. It was suggested that self-identification of need for

food assistance, self-declaration of participation in another means-tested assistance program, or self-declaration of income should be the minimum requirement for accessing SFMNP benefits. As such, USDA removed the requirement that proof of income be provided by applicants not deemed income-eligible based on certification for or participation in another means-tested program that uses a maximum income level of not more than 185% of the Federal poverty income; however, the final rule continues to give State and local agencies the option to verify reported income.

The proposed rule put forth annual minimum and maximum SFMNP benefit levels of \$20 and \$50, respectively. All of the State agencies with benefit levels below \$20 as well as many other interested State and local SFMNP agencies opposed a \$20 minimum stating that it would require reducing the number of eligible seniors they were currently serving in order to comply with the \$20 minimum benefit. Commenters also strongly opposed the proposed \$50 maximum benefit level. Numerous farmers stated that if the maximum CSA benefit level were reduced to \$50, they would no longer be willing or able to participate in the SFMNP. USDA considered a variety of alternatives put forth by commenters, which included eliminating the benefit cap, increasing the maximum benefit to \$80 or \$100, allowing State agencies the option of setting their own minimum and maximum benefits, either for all programs or only for CSAs, or allowing current State agencies to continue issuing benefits at their FY 2004 level. USDA recognizes the importance of farmer participation, particularly in CSA program models, to the success of the SFMNP. As such, the Department has revised

the maximum benefit level requirements put forth in the proposed rule.

The final rule retains the minimum benefit level at \$20, as set forth in the proposed rule, but allows State agencies that issued a lower benefit in FY 2006 and that are grandfathered into the SFMNP when it becomes a permanent program to continue issuing benefits at the lower level. New State agencies who begin operating the SFMNP after FY 2006 must comply with the \$20 benefit minimum and the \$50 benefit cap put forth in the proposed rule. Current SFMNP State agencies that are grandfathering a CSA program model into the permanent program may continue to issue benefits at their current, FY 2006, levels. Any State whose annual CSA participant benefit level is greater than \$50 will not be eligible to receive expansion funds until the \$50 benefit cap in the CSA program model is implemented, and must require each SFMNP applicant to provide documentation that his/her household income does not exceed the 185% standard set forth in the final rule. State agencies will have the option of providing a higher benefit level out of funding sources other than the Federal SFMNP grant. The Department believes these changes will allow State agencies to maintain their current caseload while adhering to our principle of serving as many eligible senior participants as possible with limited available funds.

In addition, commenters suggested that the modified CSA program model in which bulk quantities of certain produce is purchased directly from authorized farmers by the State agency and then equitably divided among and distributed to SFMNP participants be retained in the permanent SFMNP. The Department did not address this type of program model in the proposed rule. Therefore, the final rule proposes and sets forth that SFMNP participants may also

⁴⁴ Baseline is 1989 for all tables.

⁴⁵ Weighted average benefit offered by states.

⁴⁶ Eligibles are calculated using Census projections of the total number of seniors (60+) in 2007–2011. The total number of seniors was adjusted to account for those in poverty by using the March 2004 CPS Supplement. The poverty rate is held constant at the 2004 level.

receive benefits through a bulk purchase program model. Commenters found this type of program model to be very successful and the Department is committed to maintaining the success of the SFMNP. Because the final rule requires that each participant receive an equitable value of fruits and vegetables and that the total benefit provided to each participant fall within the minimum and maximum levels set forth in this final rule, this addition will not change the estimated costs or benefits of the final rule.

7. Impact of the Final Rule on Current SFMNP Benefit Levels and Participation: Given the changes to the minimum and maximum benefit levels made from the proposed rule to the final rule, which gives State agencies more flexibility in establishing benefit levels, the Department expects that States will adjust benefits to a level that would allow them to maintain their current participation. This analysis assumes that State agencies will try to serve the same number of people in FY 2007 as they did in FY 2005. In doing so, it is expected that the weighted average benefit will decrease from approximately \$19.45 in FY 2005 to about \$17.50 in FY 2007. Because it is expected that State agencies will use 10 percent of their Federal grant to cover administrative costs, the estimated \$1.95 reduction in the average benefit level is the result of the 10 percent reduction in food funds.

If States choose to use a portion of their Federal grant to pay for the administrative costs of operating the SFMNP and do not

adjust their benefit levels to capture the reduction in food funds, they may not be able to serve as many eligible elderly individuals in FY 2007 as they did in FY 2005. For example, in FY 2007, if State agencies continue to issue an average benefit of \$19.45 and use 10 percent of their Federal grant for administration, there could be a decrease in the number of recipients served in FY 2007 of about 77,000 seniors. As a means of mitigating the effects of decreased food funds, State agencies could continue to cover administrative costs. This would allow States to maintain their FY 2005 participation and benefit levels in FY 2007.

Summary

Because the resources devoted to the SFMNP are likely to be small in comparison to the size of the eligible population, the permanent Program will not enable State agencies to reach the majority of those eligible. However, the minimum and maximum benefit levels put forth in this final rule will help enable State agencies to serve as many eligible individuals as possible. While the program is not currently fully funded, the final rule allows for future growth, should additional funds be made available.

Appendix A—Calculation of Eligibles

A. U.S. States

1. Used Census 1995 State Projection Series for 2007–2011, broken out by race and age (60+)

2. Multiplied State projection data by poverty rate, 185% and 130%, (broken out by race and age, seniors 60+); Poverty rate data found in Census' Current Population Survey March Supplement, 2004
3. Added all State eligibles to get total U.S. State eligibles at both 185% and 130% of poverty

B. U.S. Territories

1. Used Census' International Data Base
2. Used "Other Demographic Aggregation" (2004–2011), population by age and sex (by each territory)
3. Multiplied population projections by 1999 Census poverty level estimates (by territory); 130% of poverty was not available (used 124% poverty)

C. Total

1. Added eligibles from U.S. States and U.S. Territories
2. Did not calculate eligibles in Indian Tribal Organizations (very small number and data not readily available)
3. Did not calculate the disabled population living in senior facilities (very small number and data not readily available)

Note: Assumed constant poverty rate over 2007–2011 period (held constant at 2004 level as calculated from CPS data)

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