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FNS INSTRUCTION 800-1

AC T I O N BY: Regional Directors  
Supplemental Food Programs

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WIC Program--General Administration: Confidentiality

Limited Disclosure of Information

As set forth in Section 246.26(d) of the WIC Regulations, State agencies are required to restrict the use or disclosure of information obtained from program applicants and participants. Such disclosure is limited to:

- (1) Persons directly connected with the administration or enforcement of the program, including persons investigating or prosecuting violations in the WIC Program under Federal, State, or local authority. "Persons directly connected with the administration... of the program..." is intended to include WIC staff and managers and administrators who are responsible for the ongoing conduct of program operations. It does not include, for example, personnel in a State's Health Department who do not have ongoing involvement in the operation or management of the program. Thus, this provision excludes operational personnel not certifying and serving WIC applicants and participants and administrators who do not directly supervise WIC staff.
- (2) Representatives of public organizations designated by the chief State health officer (or in the case of Indian State agencies, the governing authority) which administer health or welfare programs that serve persons categorically eligible for the WIC Program. In these situations, the State agency must enter into a written agreement with each designated organization, as set forth in the regulations.
- (3) The Comptroller General of the United States for audit and examination authorized by law.

Obtained Versus Observed Information

The confidentiality requirements set forth above apply both to information provided by an applicant or participant and to information which is based on direct observation of an applicant's or participant's condition or behavior. The time and date a participant was at the WIC clinic and any aspect of the

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appearance or apparent condition of persons attending the WIC clinic are examples of observed information. WIC information, whether provided by applicants and participants or observed by WIC staff, is protected under the confidentiality provisions of Section 246.26(d) of the regulations, except as discussed below.

#### Release of Anonymous Information

It should be noted that the confidentiality provision does not prohibit the release of information if the information is released in a way that protects the identity of the individuals. Therefore, requests for data in aggregate or summary form may be granted as long as the released information excludes any items which would identify program participants or applicants. Consistent with this, Section 246.26(b) authorizes FNS to use applicant/ participant data in summary, statistical, or other forms that do not involve the release of names and Section 246.26(c) requires State agencies, upon request by FNS, to release medical and other data collected on participants so that program impact studies can be conducted.

#### Release of Information for Income Verification and/or Dual Participation Detection Purposes

The provisions in Section 246.26(d) of the regulations are not intended to limit States' abilities to meet other requirements or implement optional State procedures set forth in other sections of the regulations. For example, Section 246.7(c)(2)(vi) allows States and local agencies to verify information necessary to ensure WIC income eligibility. Section 246.4(a)(15) requires State agencies to develop plans to prevent and detect dual participation, either simultaneous participation in WIC or in the WIC and the Commodity Supplemental Food Program. In both examples, certain applicant and participant information may need to be shared in order to implement these requirements. The release of information necessary to fulfill this regulatory mandate and option is permissible and applicants should be informed at the time of application of the circumstances under which information provided by the applicant or participant may be shared in order to comply with specific regulatory provisions. Applicants and participants do not have the option of declining to permit such information sharing if they wish to participate in the program.

#### Release of Joint Program Application Form Information

In some States joint program application forms are being developed and used whereby an applicant completes one application form that is used to determine eligibility for two or more programs, e.g., a single application for the WIC and Medicaid Programs. In developing joint application forms, State and local agencies must (1) work out the manner in which each program's confidentiality requirements will be met, and (2) ensure that all applicants' rights and responsibilities pertaining to each of the programs are clearly and fully stated. In using a joint program application form, State and local agencies cannot force applicants to apply for benefits in all programs for which the joint application is intended. Applicants must be given the opportunity to choose, in writing, the programs for which they wish to apply. In so designating, the applicant is consenting to the use and sharing of information on the form by the agencies specified. Therefore, if WIC staff collect the information on the application form, the form may be shared in its entirety with the designated programs without need of an agreement, although an agreement with these programs would be required for the sharing of information on such applicants/participants in addition to what appears on the application form. Once a joint application form is received by the WIC Program, any and all information on the form, whether or not the information is

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used to determine WIC eligibility, becomes part of the WIC record and must not be released, except as stipulated in this instruction.

#### Reporting of Child Abuse and Neglect Under State Statute

Many States have laws which require any person who knows about, or has reason to suspect, child abuse or neglect to report such information to appropriate State officials. Many of these State statutes are based on a requirement in Section 8 of the Child Abuse Prevention and Treatment Act (42 U.S.C. 5106 a). This Act authorizes the Secretary of Health and Human Services to make grants to States to assist them in developing and implementing child abuse and neglect prevention and treatment programs. The position of Congress, as set forth in the Act and later implemented through regulations, is that State statute must require the reporting of known or suspected child abuse or neglect to specified persons in order for States to receive such grants.

(Under this Act, the State statute must employ methods to preserve the confidentiality of all records concerning reports of child abuse and neglect. The implementing regulations also provide that unauthorized disclosure must be considered a criminal offense. In addition, under provisions established in some State statutes, any person reporting child abuse or neglect is immune from prosecution under State and local laws.)

This statute reflects Congress' intent that suspected or known child abuse or neglect be reported. Therefore, it would be inappropriate for WIC regulations pertaining to confidentiality to take precedence over any State law requiring the reporting of suspected child abuse. This applies to States' statutes enacted expressly to meet the conditions for receiving grants under the Child Abuse Prevention and Treatment Act, as well as States with statutes established independent of this Act, such as felony reporting laws. If State law requires the reporting of known or suspected child abuse or neglect, WIC staff must release such information.

In States where State statute does not require the reporting of known or suspected child abuse, WIC State agencies stronger their legal counsels to determine the appropriateness of reporting such information. While confidentiality is of critical importance in the WIC Program, WIC confidentiality provisions were not intended to create barriers to reporting child abuse and neglect.

There may also be instances in which State or local child protection services contact the local agency for information which might substantiate allegations of child abuse made by a third party, e.g., information on a child's appearance, abnormal interaction between a child and parent or guardian, Information on missed WIC appointments or a child's medical records. Such requests may be separate and distinct from any responsibility that the State or local agency might have under State law to report instances of child abuse. Therefore, the general confidentiality rules described above may apply to these requests. Further, unless such requests are covered by State law, any information pertaining to an applicant or participant may not be disclosed in response to such requests unless, in analyzing the individual case, the State or local agency legal counsel identifies a legal imperative to respond, e.g., a subpoena that cannot or should not, in the counsel's opinion, be contested, or a perceived need to comply with the request in order to avoid any legal liability for possible consequences to the child of failure to provide the requested information.

#### Optional Information Sharing

Disclosing applicant and participant information to public health or welfare programs is an option available to State agencies. Section 246.26( d) is not intended to require information sharing, but to facilitate coordination of all health and social service needs of an individual. As set forth in the regulations, the receiving organization may use WIC Program information

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only for the purposes of establishing the eligibility of WIC applicants or participants for health or welfare programs and conducting outreach to WIC applicants and participants for such programs.

State agencies are encouraged to obtain public input in deciding whether to implement the optional information sharing provision and to which health or welfare agencies such information will be disclosed. In addition to the formal notification requirement discussed below, State agencies may wish to provide applicants and participants with a clear explanation of why the State decided to share information with certain agencies and how the system works.

State agencies choosing to implement information sharing must execute a written agreement with each agency or program to which they plan to disclose information, specifying what program(s) will have access to the information and the purposes for which they will use it, and containing the receiving agency's assurance that it will not, in turn, disclose this information. Written agreements must not be made with an umbrella agency, such as a State's Department of Health, making a participant's record indiscriminately available to a wide variety of personnel and programs, potentially compromising a WIC participant's confidentiality.

Therefore, it would be acceptable to incorporate WIC information into a health department's integrated computerized information system of WIC and other health program data only if (1) a written agreement is obtained with each agency in the system intended to have access to WIC information, and (2) only these agencies are permitted, through issuance of access codes or other nontechnical measures, to review the WIC information in the system. However, a physically separate agreement need not be provided for each program. The chief State health officer may, instead, list all programs to be included in the information sharing in a single agreement form and collect the signatures of responsible officials for all such programs on that agreement form.

State agencies which choose to share applicant and participant information through written agreements with certain agencies are not required to obtain a separate release form signed by the applicant or participant. However, State agencies must inform applicants and participants of this potential disclosure at certification and recertification in accordance with Section 246.7(h)(9) of the regulations. As set forth in Section 246.7(h)(9), State agencies which establish written agreements with public organizations which administer health and welfare programs to share information must include a statement, to be added to the rights and responsibilities statement on the certification form, indicating that information provided by applicants and participants in connection with application for WIC Program benefits may be provided to designated health or welfare program representatives that serve persons categorically eligible for WIC for the purposes of (1) determining eligibility for programs administered by the recipient organizations and (2) conducting outreach for such programs. We strongly recommend that State and local agencies list, either on the application form or on an attachment to it, each specific program covered by WIC information sharing agreements. Merely stating that information will be shared with some other programs under the health department would not be sufficient notification. Such general references could, in fact, serve as a barrier to WIC participation by giving applicants the impression that information may be shared with all programs within the health department, including programs the applicant may not wish to receive information, such as drug and alcohol counseling programs, even though such information exchange will not, in fact, take place. This information on the certification form is only a statement of action which may be taken by the State agency. States are not required to secure the permission of applicants and participants in order to engage in the information sharing authorized by Section 246.26(d) of the regulations. Applicants and participants do not have the option of declining to permit such information sharing if they wish to participate in the program.

A State agency may choose to offer applicants and participants the right to refuse the release of the above information for sharing with designated agencies and organizations, although such a procedure is not

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required by Federal regulations or policy. If a State agency chooses to do this, a separate release form must be used as discussed below under Use of Information Release Forms. Once the State agency offers applicants and participants the right to refuse, signing such a release form cannot be considered a condition of eligibility and must be handled as discussed below.

#### Use of Information Release Forms

State agencies are reminded of the crucial distinction between the systematic sharing of information with public organizations administering health and welfare programs, as provided for in the regulations under written agreement, and the disclosure of information to individuals or other organizations. The only way that WIC applicant and participant information that is not covered by such agreements may be shared is if the affected applicant or participant signs a release form authorizing the disclosure. A signed release form provides the State or local agency with the documentation necessary to show that particular information was released per the applicant's or participant's request or with his/ her approval. Furthermore, a State or local agency is not obliged to request that the applicant or participant sign a release form in order to attempt to accommodate outside requests for such information, but can simply decline to provide it to the requesting organization or individual. In any case, State agencies must not require at certification or at any other time that applicants or participants sign a statement giving State agencies the authority to release information. To the extent that applicants or participants waive their rights to the confidentiality of the information they provide, by signing a release form, the restrictions on information sharing in Section 246 .26(d) do not apply with respect to the disclosures described in the release.

We strongly encourage State and local agencies to limit requests for applicants and participants to sign release forms to the following situations: (1) a court requests information (for a further discussion of releases of subpoenaed information, see below, Release of Information for Child Custody Cases and Other Cases); and (2) an applicant or participant requests that information be sent to a third party or an organization; e.g., a doctor or a health maintenance organization. In addition, the Department strongly discourages the practice of requesting applicants and participants to sign general release forms which give State agencies unlimited authority to release information, or which take the place of the sharing agreements with health and welfare organizations detailed in the regulations. Using an open-ended release form could result in the inappropriate sharing of information and could create a situation whereby an applicant or participant's privacy is compromised, with no knowledge on the part of the applicant or participant of the specific organization(s)/individual(s) requesting and/ or obtaining the information. Furthermore, such a practice of requesting all applicants or participants to sign a release could also serve as a barrier to participation for a large number of people who are most in need of program benefits.

Also, using release forms as an alternative to the sharing agreements for health and welfare organizations could result in disclosing information in a manner inconsistent with the safeguards set forth in the regulations. This practice may also result in an increased administrative burden on local agency and clinic staff and could serve as a barrier to information sharing which the regulations recognize as appropriate. Release forms would need to be completed by all applicants/ participants at initial certification and at each subsequent certification. In addition, applicants and participants must be given the right to refuse to sign a separate release form, thus requiring clinic staff to track such refusals, limiting information sharing with other agencies serving the same population, and requiring staff to ensure that confidentiality of information on certain applicants and participants is maintained.

Because signing a release form may not be a condition of eligibility or participation, State agencies which nonetheless request applicants and participants to sign voluntary release forms which give State agencies the authority to release information to anyone or to specific health and welfare

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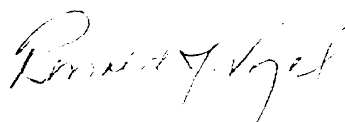
organizations not covered by information sharing agreements must make absolutely sure the applicants and participants are aware that they can decline to sign a release form without in any way jeopardizing their program status. In order that there be no confusion in this regard, such release forms must not even be mentioned until after the certification process is completed and the applicant has been informed of the eligibility determination. Because the certification process and the request to sign a separate release form must be handled sequentially, the release form may not be integral to the certification form, but must be a separate form presented for the applicant's or participant's consideration after completion of the certification process. Furthermore, the separate release form must include a statement to the effect that failure to sign in no way jeopardizes program eligibility or participation.

#### Release of Information for Child Custody Cases and Other Cases

Questions have been raised with regard to the release of WIC information in child custody cases and other instances in which the request comes from an individual other than the applicant or participant, or from an organization not covered by an information sharing agreement. One example is a situation in which a parent of a child participant who is not the child's legal guardian requests the child's WIC records to be used against the guardian in a child custody suit. These situations raise the question of who has the authority to waive the confidentiality requirement. With respect to infants and children, the person with the authority to sign a release form will be dependent on State law, and may include one or both parents, guardians, et cetera. These issues usually arise during a court proceeding when a subpoena has been issued for WIC records. Another example would be a request by the police department for applicant or participant information, e.g., address, phone number, et cetera. We strongly advise WIC officials to consult with their legal counsels in response to these and similar requests. The attorney can then decide who the appropriate individual to sign a release is and what procedures to follow with respect to a request or subpoena. Such determinations must be made on a case-by-case basis and can be dependent on State or local law. If a subpoena is issued, the parties of the suit and the court, however, should be informed of the WIC Program regulations and other regulations concerning confidentiality and the limitations on the disclosure of WIC applicant and participant information before releasing any information. The variety of situations in which such requests can be made, and of the possible legal ramifications of such requests, are so great that neither program regulations nor this instruction can establish procedures that would always be appropriate. Therefore, State and local agencies must depend on their legal counsels in assessing each individual request.

#### Release of Information to Applicants and Participants

A WIC applicant or participant may ask to see or copy his or her own record, or a parent or guardian may request access to, or a copy of, a child's or infant's record. Assuming that any issues regarding custody or guardianship have been settled, such persons have the right of access to all information provided by the applicant or participant. However, the local agency need not grant the participant or guardian access to any other information in the file or record, such as documentation of income provided by third parties or any information which serves as a staff assessment of the participant's condition or behavior, unless required by State or local law or policy.



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