



**Billing Code: 3410-30-P**

**DEPARTMENT OF AGRICULTURE**

**Food and Nutrition Service**

**7 CFR Part 253**

**[FNS -2019-0048]**

**RIN 0584-AE78**

**Food Distribution Program on Indian Reservations: Two-Year Administrative Funding Availability and Substantial Burden Waiver Signatory Requirement**

**AGENCY:** Food and Nutrition Service (FNS), USDA.

**ACTION:** Final rule.

**SUMMARY:** Through this rulemaking, the U.S. Department of Agriculture's (the Department or USDA) Food and Nutrition Service (FNS) is codifying a revised statutory requirement included in the Agriculture Improvement Act of 2018. The 2018 Farm Bill at section 4003 requires FDPIR administrative funds to remain available for obligation at the Indian Tribal Organization (ITO) and State agency level for a period of two Federal fiscal years. This provision was self-executing and went into effect upon enactment of the 2018 Farm Bill in Federal fiscal year (FY) 2019. This final rulemaking will also amend the Department's previous implementation of the 2018 Farm Bill provision on the administrative match waiver requirement based on substantial burden.

**DATES:** This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Barbara Lopez, Program Analyst,  
Food Distribution Division, Food and Nutrition Service, U.S. Department of Agriculture,  
1320 Braddock Place, Alexandria, Virginia 22314 or email [Barbara.Lopez@usda.gov](mailto:Barbara.Lopez@usda.gov).

**SUPPLEMENTARY INFORMATION:**

I. Discussion of Final Rule

II. Two-Year Administrative Funding Availability

A. Background

B. Implementation Memorandum

C. Regulatory Changes to Two-Year Availability of Administrative Funding

III. Revision of State Agency/ITO Administrative Match Waiver Requirements

A. Background

B. Comment Analysis and Regulatory Change

IV. Procedural Matters

**I. Discussion of Final Rule**

In the following discussion and regulatory text, the term “State agency,” as defined at 7 CFR 253.2, is used to include ITOs authorized to administer FDPIR and the Food Distribution Program for Indian Households in Oklahoma (FDPIHO) in accordance with 7 CFR parts 253 and 254. The term “FDPIR” is used in this rulemaking to refer collectively to FDPIR and FDPIHO.

On December 20, 2018, the 2018 Farm Bill was signed into law. Section 4003 of the 2018 Farm Bill included FDPIR-specific provisions and modified Section 4(b) of the Food and Nutrition Act (FNA) (7 U.S.C. 2013(b)). This rule codifies the statutory requirement included in Section 4003(a)(3), which modifies Section 4(b)(7) of the FNA (7 USC 2013(b)(7)) to allow FDPIR administrative funds to remain available for obligation by the State agency for a period of two Federal fiscal years. Previously, funds made available to State agencies for the administration of FDPIR remained available for obligation for only one Federal fiscal year. This rule revises Federal regulation at 7 CFR 253.11(i) to conform to Section 4003(a)(3) of the 2018 Farm Bill. This provision is non-discretionary; accordingly, the Department is issuing this rule as a final rule and is not taking comments.

Section 4003 of the 2018 Farm Bill also modified Section 4(b)(4) of the FNA (7 USC 2013(b)(4)) to allow State agencies/ITOs to qualify for an administrative funding match waiver if their required match share would be a substantial burden. This provision was added to Federal regulations through a previous final rule with request for comments, *Food Distribution Program on Indian Reservations: Revisions to the Administrative Match Requirement* (84 FR 45873), published on September 3, 2019. In response to comments received, this rulemaking will revise FDPIR regulations at 7 CFR 253.11(c)(2)(ii) to change the level of signatory required on the letter that an ITO submits to FNS to request the waiver of the administrative funding match requirement based on substantial burden. The modification in the signatory requirements for the substantial burden waiver evolved from comments received in prior rulemaking (84 FR 45873). The

provision has already been open to public comment; therefore, the Department is issuing this change in a final rule and is not taking comments.

The Administrative Procedures Act (APA) at 5 U.S.C. 553(a)(2) specifically exempts rules involving grants and benefits from notice-and-comment requirements, giving the Department the authority to issue final rules in grants and benefits programs, like FDPIR.

## **II. Two-Year Administrative Funding Availability**

### **A. Background**

Prior to FY 2017, FDPIR administrative funds had a period of availability of only one Federal fiscal year. Beginning in FY 2017, FNS received authority in the Consolidated Appropriations Act, 2017 (P.L. 115-31), and in appropriation bills thereafter, to allow FDPIR administrative funds to remain available for obligation at the Federal level for a period of two Federal fiscal years. This authority allowed FNS to retain any unobligated or unliquidated FDPIR administrative funds after one Federal fiscal year. Instead of returning funds to the U.S. Treasury Department, FNS could reallocate those funds to State agencies in the following Federal fiscal year. This authority did not allow State agencies to retain the funds without interruption. Federal regulations, consistent with statutory requirements, required State agencies to obligate administrative funds by September 30 of each Federal fiscal year and liquidate those funds within 90 days following the close of the Federal fiscal year (e.g., by December 30). This resulted in delays in accessing any un-liquidated funds at the State agency level in the second

Federal fiscal year since those funds, per federal regulation, had to be returned to FNS first.

The 2018 Farm Bill made a statutory change to allow FDPIR administrative funds to remain with the State agency for a period of two Federal fiscal years. This statutory change improves program administration by allowing for a longer period of time in which funds can be obligated and expended, allowing FDPIR program administrators to plan operations and use funds more flexibly and effectively.

## **B. Implementation Memorandum**

The 2018 Farm Bill was signed into law during the FY 2019 FDPIR budget cycle. The Department determined that prolonging the implementation of this provision would negatively impact State agencies that administer the FDPIR by delaying their ability to utilize the new flexibility of retaining FDPIR administrative funds across two Federal fiscal years. The Department also determined that this provision was self-executing and, therefore, implemented the provision immediately in FY 2019.

On April 5, 2019, FNS released a memorandum titled, “Food Distribution Program on Indian Reservations (FDPIR)—Agriculture Improvement Act of 2018 (P.L. 115-334) Two-Year Administrative Funding Provision—Information Memorandum.” This memorandum explained that as of December 20, 2018, FDPIR administrative grants now have a period of performance of two Federal fiscal years instead of one and provided information on related FDPIR reporting and financial procedures, enabling the change to go into effect prior to this rulemaking to update program regulation at 7 CFR part 253.

### **C. Regulatory Changes to Two-Year Availability of Administrative Funds**

FDPIR regulations at 7 CFR 253.11(i)(1) allow the Department to require State agencies to return unobligated funds or to reduce State agencies' administrative funding allocations prior to the end of the fiscal year if the Department determines any of the provisions at 7 CFR 253.11(i)(1)(i), (ii), or (iii) are met.

Consistent with the statutory change in the period of performance of FDPIR grants from one to two Federal fiscal years, this rule revises 7 CFR 253.11(i)(1) to allow the Department to require the return of unobligated funds or to reduce administrative funding allocations during the entire period of performance of the administrative grant.

This rulemaking also revises 7 CFR 253.11(i)(2), which requires State agencies to return to Department within ninety (90) days following the close of each Federal fiscal year any funds received which remained unobligated. The revised regulatory text requires unobligated funds to be returned within ninety (90) days following the close of the period of performance of the FDPIR administrative grant.

### **III. Revision of State Agency/ITO Administrative Match Waiver Requirement**

#### **A. Background**

Section 4003 of the 2018 Farm Bill added a new provision at Section 4(b)(4)(B)(ii) of the FNA to allow State agencies and ITOs to qualify for an administrative match waiver if funding their share of the costs would be a substantial burden for the State agency/ITO. On September 3, 2019, the Department published a final rule with request for comments, *Food Distribution Program on Indian Reservations: Revisions to the Administrative Match Requirement* (84 FR 45873), to add this provision to FDPIR federal regulations at

7 CFR part 253. In that rulemaking, the Department determined that, in order to apply for a waiver of the administrative match based on substantial burden, the State agency/ITO must submit a signed letter from the leadership of a State agency or, in the case of an Indian Tribal Organization, a signed letter from the Tribal Council, describing why providing the matching funds would be a substantial burden for the State agency/ITO along with supporting documentation, as needed.

## **B. Comment Analysis and Regulatory Change**

Five commenters on this rule, out of six total commenters, felt that getting a signature from the Tribal Council would be burdensome. Commenters expressed concern that the initial rulemaking required ITOs to obtain a signature from their Tribal Council, the highest level of political leadership in a Tribe, but did not require a State agency to obtain a signature from the highest level of their State political leadership (e.g., State Governor). Thus, commenters felt that the burden imposed on ITOs was greater than the burden imposed on State agencies under the same provision. Commenters requested that the signatory of the letter not be the Tribal Council but a more appropriate entity as determined by Tribal leadership such as Tribal budget offices, departments of agriculture, health, food or nutrition.

In Tribal consultation meetings on December 10<sup>th</sup>, 2019 and February 13<sup>th</sup>, 2020, Tribal leaders in attendance expressed to the Department that they shared and supported the concerns of the commenters about obtaining a signature at the Tribal Council level. Tribal leaders shared their support for changing the signatory and specifically referenced comments made on the rule.

The comments received in response to the September 3<sup>rd</sup> rule and subsequent Tribal consultation meetings with elected Tribal leaders have provided the Department with valuable perspective from FDPIR stakeholders on the implementation of this 2018 Farm provision and on the FDPIR community's concerns about requiring a signed letter from the Tribal Council. FNS heavily weighted comments received from the Tribal community and, through this rule, will revise federal regulation to allow the appropriate Tribal department, instead of the Tribal Council, to be the signatory. Therefore, 7 CFR 253.11(c)(2)(ii) is being revised to allow the leadership of the Tribal agency that oversees FDPIR to be the signatory when applying for an administrative match waiver based on substantial burden.

## **Procedural Matters**

### **Congressional Review Act**

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. § 804(2).

### **Executive Order 12866 and 13563**

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563



emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

This final rule has been determined to be not significant and was reviewed by the Office of Management and Budget (OMB) in conformance with Executive Order 12866.

#### Regulatory Impact Analysis

This rule has been designated as not significant by the Office of Management and Budget, therefore, no Regulatory Impact Analysis is required.

#### Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601-612) requires Agencies to analyze the impact of rulemaking on small entities and consider alternatives that would minimize any significant impacts on a substantial number of small entities. Pursuant to that review, it has been certified that this rule would not have a significant impact on a substantial number of small entities. This final rule would not have an impact on small entities because the revised requirement provides more flexibility on the period of availability of administrative funds at the local agency level. This lessens the financial administrative burden previously required by allowing ITOs and State agencies to access their funds across a two-year period versus only one year.

#### **Executive Order 13771**

Executive Order 13771 directs agencies to reduce regulation and control regulatory costs and provides that the cost of planned regulations be prudently managed and

controlled through a budgeting process. This final rule is an EO 13771 deregulatory action. This rulemaking provides a reduction in the State agency/ITO requirement to return funds at the end of each Federal fiscal year, allowing for two Federal fiscal year availability instead.

### **Unfunded Mandates Reform Act**

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local and tribal governments and the private sector. Under section 202 of the UMRA, the Department generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures by State, local or tribal governments, in the aggregate, or the private sector, of \$146 million or more (when adjusted for inflation; GDP deflator source: Table 1.1.9 at <http://www.bea.gov/iTable>) in any one year. When such a statement is needed for a rule, Section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the most cost effective or least burdensome alternative that achieves the objectives of the rule.

This final rule does not contain Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local and tribal governments or the private sector of \$146 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 program listed in the Catalog of Federal Domestic Assistance under Number 10.567 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 2 CFR chapter IV.)

### **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.

The Department has determined that this rule does not have Federalism implications. This rule does not impose substantial or direct compliance costs on State and local governments. Therefore, under Section 6(b) of the Executive Order, a Federalism summary impact statement is not required.

### **Executive Order 12988, Civil Justice Reform**

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full and timely implementation.

### **Civil Rights Impact Analysis**

FNS has reviewed this final rule in accordance with USDA Regulation 4300-4, “Civil Rights Impact Analysis,” to identify any major civil rights impacts the rule might have on program participants on the basis of age, race, color, national origin, sex or disability. After a careful review of the rule’s intent and provisions, FNS has determined that this rule is not expected to affect the participation of protected individuals in the FDPIR.

### **Executive Order 13175**

Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. In 2019, the Department engaged in a series of consultative and coordinated sessions with elected Tribal leaders and Tribal representatives from the FDPIR community to discuss FDPIR-specific provisions included in the 2018 Farm Bill, including the provisions included in this rulemaking. Reports from the consultative sessions will be made part of the USDA annual reporting on Tribal Consultation and Collaboration. USDA is unaware of any current Tribal laws that could be in conflict with this rule.

FNS consulted with ITO representatives late 2019 and early 2020 to assess their opinions on comments requesting a change in obtaining a signature from Tribal council in order to submit a waiver for substantial burden. This rulemaking is in direct response to concerns Tribal leaders shared during consultation with requiring a signature from

Tribal council. We are unaware of any current Tribal laws that could be in conflict with the final rule.

### **Paperwork Reduction Act**

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; 5 CFR part 1320) requires the Office of Management and Budget (OMB) approve all collections of information by a Federal agency before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number. This rule does not contain information collection requirements subject to approval by the Office of Management and Budget under the Paperwork Reduction Act of 1994.

### **E-Government Act Compliance**

The Department 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.

### **List of Subjects in 7 CFR Part 253**

Administrative practice and procedure, Food assistance programs, Grant programs, Social programs, Indians, Surplus agricultural commodities.

Accordingly, 7 CFR part 253 is amended as follows:

**PART 253—ADMINISTRATION OF THE FOOD DISTRIBUTION PROGRAM  
FOR HOUSEHOLDS ON INDIAN RESERVATIONS**

1. The authority citation for 7 CFR part 253 continues to read as follows:

**Authority:** 91 Stat. 958 (7 U.S.C. 2011-2036).

2. In §253.11:

- a. Revise paragraph (c)(2)(ii);
- b. Revise paragraph (i)(1) introductory text; and
- c. Revise paragraph (i)(2).

The revisions read as follows:

**§253.11 Administrative funds.**

\* \* \* \* \*

(c)\*\*\*

(2) \*\*\*

(ii) For a waiver based on substantial burden, a signed letter from the leadership of the State agency or, in the case of an Indian Tribal Organization, from the leadership of the Tribal agency that oversees the Food Distribution Program, describing why meeting the 20 percent matching requirement would impose a substantial burden on the State agency, and why additional administrative funds are necessary for the effective operation of the program, along with supporting documentation, as needed.

\* \* \* \* \*

(i) \* \* \*

(1) FNS may require State agencies to return, during the period of performance of their administrative grant and after receipt of administrative funds, any or all unobligated funds received under this section, and may reduce the amount it has apportioned or agreed to pay to any State agency if FNS determines that: \* \* \*

(2) The State agency shall return to FNS, within ninety (90) days following the close of the period of performance of each administrative grant, any funds received under this section which are unobligated at that time.

---

Pamilyn Miller,  
Administrator,  
Food and Nutrition Service.

[FR Doc. 2020-15047 Filed: 7/13/2020 8:45 am; Publication Date: 7/14/2020]