

(1) Agency Department of Health		This space for use by IRRC RECEIVED 99 APR 15 PM 3:13 IRRC Number:
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(2) I.D. Number (Governor's Office Use) 10-158		
(3) Short Title Supplemental Nutrition Program for Women, Infants and Children (WIC Program)		
(4) PA Code Cite 28 Pa. Code Part VIII, Chapters 1101-1113	(5) Agency Contacts & Telephone Numbers Primary Contact: Greg Landis (717) 783-1289 Secondary Contact: Lesa Tressler (717) 783-2500	
(6) Type of Rulemaking (Check One) <input type="checkbox"/> Proposed Rulemaking <input type="checkbox"/> Final Order Adopting Regulation <input checked="" type="checkbox"/> Final Order, Proposed Rulemaking Omitted	(7) Is a 120-Day Emergency Certification Attached? <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes: By the Attorney General <input type="checkbox"/> Yes: By the Governor	
(8) Briefly explain the regulation in clear and non-technical language. These regulations govern the authorization and management of retail grocery stores in the WIC Program, and set forth procedures for administrative appeals of WIC applicants and participants, and local agencies and retail grocery stores.		

(9) State the statutory authority for the regulation and any relevant state or federal court decisions.

The WIC Program was authorized by an amendment to the Children Nutrition Act of 1966 (Act), 42 U.S.C. §1786. Through this Act, Congress charged the United States Department of Agriculture, Food Nutrition Services (USDA-FNS) with the responsibility for administering the WIC Program and distributing funding for its operation. The Act further provided that the USDA-FNS is to contract with state agencies for the establishment of the WIC Program. In the Commonwealth, the USDA contracts with the Department for the operation of the WIC Program. As a prerequisite for receiving funding, the federal regulations governing the WIC Program require that the state agency with which the USDA-FNS contracts for the administration of the WIC Program submit on an annual basis a state agency plan of operations (42 U.S.C. §1786(f)(1) (A)); 7 C.F.R. §246.4 (relating to state plan)) setting forth how the state intends to administer the program. The regulations further require that the state agency establish a procedure under which members of the general public are provided an opportunity to comment on the development of the state agency plan. In compliance with that requirement, the Department publishes notices in the *Pennsylvania Bulletin* and newspapers of general circulation, as well as sends notices to interested parties and holds meetings for the purpose of seeking comment on the state agency plan. All state agency plans, as well as any changes thereto, must be approved by the Secretary of the USDA. The state agency may not deviate from the plan without USDA approval. With respect to the administration of the WIC Program, there is, however no federal requirement for the establishment of state regulations.

The regulations were developed as a result of the Commonwealth Court's decision in Giant Food Stores, Inc. v. Commonwealth of Pennsylvania, Department of Health, 713 A.2d 177 (Pa. Cmwlth. 1998), wherein the Court found the criteria that the Department used to authorize grocery stores to participate in the food delivery system of the WIC Program was invalid because it was not promulgated as a regulation. The court did not address the propriety of the criteria; it found only that the criteria needed to be published as a regulation pursuant to the Commonwealth Documents Law, 45 P.S. §1102-1602, and submitted to the Attorney General pursuant to the Commonwealth Attorney's Act, 71 P.S. §732-204. The Court further found the Regulatory Review Act was inapplicable to the criteria the Department uses to authorize grocery stores, because the criteria was developed by the Department as a result of a delegation of authority based upon federal law and federal regulation, and thus, is outside the scope of the Regulatory Review Act.

The Department, nevertheless, has elected to submit these regulations to the Independent Regulatory Review Commission (IRRC) and the standing committees of the Pennsylvania House and Senate for review and to follow the Regulatory Review Act procedures for service upon and cooperation with IRRC and the standing committees.

(10) Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case or regulation, and any deadlines for action.

Giant Food Stores, Inc. v. Commonwealth of Pennsylvania, Department of Health, 713 A.2d 177 (Pa. Cmwlth. 1998). See the explanation contained in section 9 above.

(11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

These regulations provide for the authorization and management of retail grocery stores in the WIC Program. The Department of Health authorizes stores to provide supplemental nutrition benefits to women infants, and children who are found to be at nutritional risk during critical stages of growth. WIC participants purchase these supplemental foods with negotiable instruments at grocery stores authorized by the WIC Program. Without the regulation, the Department would be unable to provide supplemental foods to WIC Program participants.

(12) State the public health, safety, environmental or general welfare risks associated with non-regulation.

Without promulgation of these regulations, the WIC Program would be unable to authorize grocery stores to participate in the Program and much needed supplemental, nutritious foods would not be available to participants through the retail delivery system.

(13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)

The regulations will benefit approximately 243,000 WIC participants monthly by ensuring an adequate number of qualified retail stores for WIC participants to make their purchases.

(14) Describe who will be adversely affected by the regulation. (Quantify the adverse effects as completely as possible and approximate the number of people who will be adversely affected.)

There is no population that will be adversely affected by this regulation. An indeterminate number of retail stores will be denied authorization to participate in the WIC Program. Every interested store will have an equal opportunity to seek authorization.

(15) List the persons, groups or entities that will be required to comply with the regulation. (Approximate the number of people who will be required to comply.)

- Approximately 1,400 authorized vendors
- Approximately 30 WIC retail store personnel at the state and local agency level
- Approximately 243,000 WIC participants monthly

(16) Describe the communications with and input from the public in the development and drafting of the regulation. List the persons and/or groups who were involved, if applicable.

A public meeting was held on September 24, 1998, for the purpose of seeking comment on the draft regulations. The Department published a notice in the *Pennsylvania Bulletin*, sent individual notices to approximately 1400 grocery stores participating in the WIC program, sent notices to other interested organizations, such as the Pennsylvania Food Merchants Association (PFMA), and published a notice on the Department's web site of the public meeting. The Department also indicated in the notices that it would accept written comments in that manner. As a result of all the notices, only one organization, the PFMA, and no individuals presented comment on the regulations.

(17) Provide a specific estimate of the costs and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures which may be required.

As these regulations mirror past practice, there will be no new costs or savings incurred or expended.

(18) Provide a specific estimate of the costs and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures which may be required.

No fiscal impacts on local governments

(19) Provide a specific estimate of the costs and/or savings to state government associated with the implementation of the regulation, including and legal, accounting, or consulting procedures which may be required.

No fiscal impact on state government

(20) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community	\$ 0	0	0	0	0	0
Local Government	\$ 0	0	0	0	0	0
State Government	\$ 0	0	0	0	0	0
Total Savings	\$ 0	0	0	0	0	0
COSTS:						
Regulated Community	\$ 0	0	0	0	0	0
Local Government	\$ 0	0	0	0	0	0
State Government	\$ 0	0	0	0	0	0
Total Costs	\$ 0	0	0	0	0	0
REVENUE LOSSES:						
Regulated Community	\$ 0	0	0	0	0	0
Local Government	\$ 0	0	0	0	0	0
State Government	\$ 0	0	0	0	0	0
Total Revenue Losses	\$ 0	0	0	0	0	0

(20a) Explain how the cost estimates listed above were derived.

Proposed regulations mirror past non-regulatory administration of the program. No fiscal impact.

(20b) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY - 3	FY - 2	FY - 1	Current FY
Program Budget	\$169,625,029	169,169,467	170,739,760	168,030,464
Vendor Monitoring Expenditures	\$749,983	715,121	677,871	677,000 (est.)

(21) Using the cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and costs.

These regulations represent no change from past non-regulatory administration of the WIC Program, and as such, will have no fiscal impact.

(22) Describe the non-regulatory alternatives considered and the costs associated with those alternatives. Provide the reasons for their dismissal.

These regulations were required as the result of the Commonwealth Court order in Giant Food Stores, Inc. v. Commonwealth of Pennsylvania, Department of Health, 713 A.2d 177 (Pa. Cmwlth. 1998). As such, non-regulatory alternatives are not available.

(23) Describe alternative regulatory schemes considered and the costs associated with those schemes. Provide the reasons for their dismissal.

No other regulatory schemes were considered. State regulations must comply with the mandates of the federal law and regulations governing the WIC Program. These regulations were approved by the USDA by letter dated April 12, 1999.

(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulation.

Selection criteria is mandated by Federal regulation but is not prescriptive as to what the specific criteria must be. Selection criteria set forth in the regulations mirror those used in past non-regulatory administration of the WIC Program. Limitation criteria is encouraged, but not mandated, by federal regulations to ensure fiscal and administrative responsibility in the operation of the WIC Program.

(25) How does this regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

The Department has developed Limitation criteria which can be found in §1103.3 (relating to authorization of store slots) and §1103.4(b) (relating to selection and limitation criteria; authorization process). By letter dated April 12, 1999, the USDA approved these regulations as complying with federal requirements. Pennsylvania WIC has been recognized by the USDA for its vendor management practices, and has been used as a model for other states to follow. This regulation does not put Pennsylvania at a competitive disadvantage with other states because there is no interstate competition in the WIC Program.

(26) Will the regulation affect existing or proposed regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

These regulations repeal 28 Pa. Code §§8.41-8.74. Sections relating to the subject matter previously contained therein can now be found, with some minor changes, in Chapters 1101-1113.

(27) Will any public hearings or information meetings be scheduled? Please provide the dates, times, and locations, if available.

No further public hearings or information meetings are scheduled.

(28) Will the regulation change existing reporting, record keeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports which will be required as a result of implementation, if available.

No existing reporting or other paperwork will be changed by this regulation. Although there was never a formal requirement that authorized stores to maintain price and inventory records for a stated period of time, authorized stores have been required to provide the Department with the highest prices of certain authorized foods on a quarterly basis since the calendar quarter ending December 1991. Therefore, although not specifically required, authorized stores have had to maintain price and inventory records for at least a three-month period in order to comply with this obligation. The new regulation requiring authorized stores to maintain the price and inventory records for six months will not represent a significant impact on authorized stores. New federal regulations governing the food delivery systems of state agencies are anticipated in the near future. Although not required currently by federal regulation, the new federal regulations are anticipated to mandate that states require authorized stores to maintain price and inventory records for the same period of time as the businesses are required to maintain the records for federal tax purposes. Pennsylvania's requirement is significantly less burdensome.

(29) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

- 1) Use of a store by handicapped participants may qualify as participant hardship, and may allow a store probationary authorization.
- 2) The number of participants per store and the number of stores allowed within a mile radius are included to allow equal opportunity for WIC authorization to be granted to small privately owned grocery stores.
- 3) Maximum price policies on infant formula, peanut butter, milk and cheese are used to control costs to the program thereby enabling the Department to provide services to additional participants.
- 4) Minority participants are addressed by considering granting participant hardship to stores in cases of service to ethnic and religious neighborhoods.

(30) What is the anticipated effective date of the regulation; the date by which compliance with the regulation will be required; and the date by which any required permits, licenses or other approvals must be obtained?

The anticipated effective date of the regulation is May 1999.

Compliance will be required by July 31, 1999.

The Department will begin recertifying new stores immediately.

(31) Provide the schedule for continual review of the regulation.

These regulations will be monitored continually and will be updated as required by changes in Federal statutes or Federal regulations governing the WIC Program.

**DEPARTMENT OF
HEALTH**
...in pursuit of good health

DATE: April 13, 1999

SUBJECT: Regulatory Analysis Form

TO: Lori McLaughlin, Chief Counsel
Office of Legal Counsel
825 Health and Welfare Bldg.
Harrisburg, PA 17108

FROM: Clara M. Hartung
Special Assistant to the Secretary and
Director, Bureau of Financial Operations
(717) 787-6325

Our office reviewed the fiscal sections of the Regulatory Analysis Form (I.D. Number 10-158) for the proposed Women, Infants and Children regulations and agree these regulations mirror past practice and there is no fiscal impact.

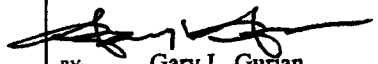
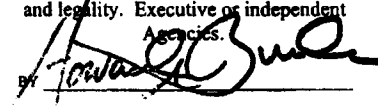
Please contact me if you need any additional information.

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<p>Copy below is hereby approved as to form and legality. Attorney General.</p> <p>BY _____ DEPUTY ATTORNEY GENERAL</p> <p>_____ DATE OF APPROVAL</p> <p><input type="checkbox"/> Check if applicable. Copy not approved. Objections attached.</p>	<p>Copy below is hereby certified to be a true and correct copy of a document issued, prescribed or promulgated by:</p> <p>_____ DEPARTMENT OF HEALTH (AGENCY)</p> <p>DOCUMENT/FISCAL NOTE NO <u>10-158</u></p> <p>DATE OF ADOPTION: _____</p> <p> BY: <u>Gary L. Gurian</u></p> <p>TITLE: <u>Acting Secretary of Health</u></p>	<p>Copy below is hereby approved as to form and legality. Executive or independent Agencies.</p> <p> BY: _____</p> <p><u>4/14/99</u> DATE OF APPROVAL</p> <p>(Deputy General Counsel) (Chief Counsel, Independent Agency) (Strike inapplicable title)</p> <p><input type="checkbox"/> Check if applicable. No Attorney General approval or objection within 30 days after submission.</p>
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DEPARTMENT OF HEALTH

FINAL RULEMAKING WITH PROPOSED RULEMAKING OMITTED
Department of Health

[28 Pa.Code Part I, Chapter 8 and Part VIII, Chapters 1101 -1113]
Supplemental Nutrition Program for Women, Infants and Children (WIC Program)

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A. Introduction

The Department of Health (Department), Bureau of Family Health, Division of WIC (WIC Program), submits as final rulemaking with proposed rulemaking omitted, regulations governing the authorization and management of stores participating in the WIC Program and regulations governing the procedures for administrative appeals of WIC applicants and participants, and local agencies and stores, in compliance with Federal regulations governing the WIC Program (7 C.F.R. §246). These State regulations add a new part, Part VIII, and chapters 1101-1113. The regulations also repeal §§8.41 - 8.62. These additions and repeals are set forth in Annex A hereto. The final form State regulations have been submitted to the United States Department of Agriculture, Food and Nutrition Services (USDA-FNS), for review and approval for compliance with the Federal regulations. The USDA-FNS approved the regulations by letters dated April 5, 1999 and April 12, 1999. Copies of the letters are available to the public upon request.

B. Summary

The regulations are presented in seven chapters: Chapter 1101 (relating to general provisions), Chapter 1103 (relating to authorization of stores), Chapter 1105 (relating to requirements of WIC authorized stores), Chapter 1107 (relating to sanctions), Chapter

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1109 (relating to administrative appeals), Chapter 1111 (relating to applicant and participant appeals), and Chapter 1113 (relating to local agency and store appeals).

Unless otherwise noted herein, the provisions of these regulations set forth in a regulatory format standards for the administration of the WIC Program, as they relate to design and operation requirements of the food delivery system, which have been in effect since 1986.

These regulations also repeal 28 Pa.Code §§8.41-8.74, the Department's current regulations pertaining to the WIC Program.

Chapter 1101. General Provisions.

This chapter explains the general purpose of the WIC Program, defines terms used in the regulations, and provides information relating to the administration of the WIC Program by the Department and the local agencies with which the Department contracts to help it administer the WIC Program.

Section 1101.1 (relating to background and scope) provides information on the Federal

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legislation authorizing the WIC Program and the purpose of that legislation. Through an amendment to the Child Nutrition Act of 1966, Congress authorized the Supplemental Nutrition Program for Women, Infants and Children for the purpose of providing supplemental foods and nutrition education to pregnant, postpartum and breastfeeding women, infants and young children, from families with inadequate income who are at special risk with respect to their physical and mental health by reason of inadequate nutrition or health care, or both. This section sets forth the purpose of the WIC Program, identifies the criteria persons need to satisfy to qualify as participants, and the services that the WIC Program provides to participants.

Subsection (b) sets forth the scope of the regulations contained in Part VIII. The regulations specify the design and operational requirements for the WIC Program's food delivery system, and prescribe procedures to be used by applicants, participants, local agencies and stores to appeal actions of the Department and local agencies that may adversely impact upon them. These procedures supplement or supersede the General Rules of Administrative Practice and Procedure Act.

Section 1101.2 (relating to definitions) provides definitions that are consistent with the

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Federal regulations governing the WIC Program found at 7 C.F.R. §246. The section also provide definitions for some terms which are not defined or used in Federal regulations.

Federal regulations governing the WIC Program found at 7 C.F.R. §246.3(b) (relating to delegation to state agency) delegate responsibilities for the effective and efficient administration of the WIC Program at the state level to state agencies. A "state agency," as defined under Federal regulation, is the health department or comparable agency of each state. In the Commonwealth, the USDA-FNS contracts with the Department of Health to carry out the responsibilities of the WIC Program.

Section 1101.3 (relating to administration) sets forth, in general terms, the responsibilities of the Department in administering the WIC Program, as well as the responsibilities of the local agencies with which the Department contracts to carry out the WIC Program at the local level. The Department sets forth the requirements imposed upon local agencies, in greater detail, in the biennial contracts entered into between the two. Responsibilities of both the Department and the local agencies change as required by statute or regulations.

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Chapter 1103. Authorization of Stores.

In accordance with the duties delegated to it by the Federal regulations, the Department is responsible for the fiscal management of and accountability for the WIC Program food delivery systems under its jurisdiction. 7 C.F.R. §246.12(a)(1). The Department has the option, under Federal regulations, to operate up to three different types of food delivery systems in the Commonwealth: a retail purchase system, a home delivery system, or a direct distribution system. 7 C.F.R. §246.12(b). With the exception of special infant formulas for which the Department has chosen to use a direct distribution system, the Department has elected to use a retail purchase system for the delivery of food benefits to WIC participants

This chapter explains the procedures the Department has established to select and authorize retail grocery stores to participate in the retail food delivery system of the WIC Program.

Section 1103.1 (relating to certification and recertification reviews) establishes objective

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criteria for the selection of stores to participate in the WIC Program. As required by 7 C.F.R. §246.12(e)(1), there shall be an on-site visit prior to, or at the time of, initial authorization of a new vendor. The procedures set forth in the section are used to determine, through an on-site reviews of stores, which stores meet the criteria to be authorized to participate in the WIC Program. The criteria used are found in §1103.4 (relating to selection and limitation criteria; authorization process.) The criteria ensure that each store is able to minimally meet the needs of participants who may choose to shop at the store for their WIC purchases.

Subsection (a) sets forth an exception to the requirements that stores must satisfy certain qualifications to be authorized. It permits an exception if the Department finds there is participant hardship if the store were not to receive authorization to participate in the WIC Program. This exception allows the Department to balance the needs of the participants against the shortcomings of the stores in meeting the criteria, in order to further the purpose of the Federal act, which is to provide supplemental food benefits to women, infants and children during critical periods of growth. This exception does not relieve the store from meeting its responsibilities and requires corrective action by the store to ensure the criteria are met. This exception is discussed further in §1103.7.

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The Department's authorization of stores is not perpetual. Subsection (c) sets forth the duration of certification. Consistent with 7 C.F.R. §246.12(f)(xvi), it puts the store on notice that neither the Department nor the store have an obligation to renew the vendor agreement. At least once every two years the Commonwealth is required, pursuant to 7 C.F.R. §246.12(g), to review the qualifications of all authorized vendors in its jurisdiction. The Department agreements with stores which have been selected to participate in the WIC Program are for no longer than two years duration. Based upon the results of the reviews, which are defined in these regulations as certification or recertification reviews, the Department decides which stores are to be selected to participate in WIC Program and provides authorization. This procedure provides an equitable opportunity for all stores to compete for limited store authorizations, at least once every two years, and allows Pennsylvania to select and authorize stores which provide the best value to the Commonwealth. This, in turn, provides for the most efficient use of Federal grant funds and allows the Commonwealth to serve more participants.

The Pennsylvania Food Merchants Association (PFMA) provided comment on this issue.

The PFMA wants vendor agreements to be of indefinite length but subject to ongoing

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monitoring by the Department. The Department provided all of the PFMA's comments to the USDA. The USDA's response to the suggestion by PFMA was:

We believe that fixed period agreements enable the State to manage its vendor population on a periodic basis more easily and allows it to be more responsive to changing Program conditions and needs than is the case with open-ended agreements. The majority of geographic State agencies contract with vendors for three years or less, making fixed-period contracts and agreements the norm nationwide.

Subsection (d) establishes the Commonwealth procedures for the certification/recertification reviews and provides that these reviews shall be conducted at least once every two years. The establishment of such standards is mandated by C.F.R. §246.12(g).

Section 1103.2 (relating to probationary certification) establishes procedures to authorize stores, on a probationary basis, which have not opened and do not have the frozen or dairy food sections stocked at the time of the certification review. This benefits both the

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stores and the WIC participants. It allows stores to be reviewed prior to opening and allows the participants to select these stores to make their WIC purchases as soon as the store is open for business.

This section also establishes procedures, when there would be participant hardship, for the Department to authorize stores to participate in the WIC Program, on a probationary basis, if such stores do not meet the selection and limitation criteria or which have been found to have problems during monitoring or compliance reviews. This section furthers the purpose of the Federal act by weighing the need of the participants and the Department in having stores to serve the participants in a particular area against the problems demonstrated by that store in failing to meet such requirements, or failing monitoring or compliance reviews which have been established to ensure the provision of WIC Program benefits to participants.

Section 1103.3 (relating to authorization of store slots) establishes a formula for determining how many stores the Department will authorize to participate in the WIC Program. The number is based upon a participant to store ratio. This furthers the purpose of the Federal act by assuring an appropriate number and distribution of authorized stores

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for adequate participant access as required by 7 C.F.R. §246.12(e)(1).

Federal regulations permit the State to establish criteria to limit the number of stores it will authorize to participate in the WIC Program so that the State can effectively and efficiently manage review of all stores under its jurisdiction. 7 C.F.R. §246.12(e)(1).

Pursuant to this section, the Department authorizes one store slot for every 160 participants in the area, except in Philadelphia. Because of the WIC population density in Philadelphia and the geographic density of grocery stores, one store slot is authorized for every 260 participants in Philadelphia.

Pennsylvania's standard is more liberal than many other states in the Mid-Atlantic region. The regional average is one store slot authorized for every 192 participants, with some states/districts having averages as high as one store for every 548 participants. Only two states have lower ratios than Pennsylvania: West Virginia and Virginia. The demographics of those states differ quite significantly from Pennsylvania. For example, the number of WIC participants served by the states, 52,700 and 137,655 respectively, compare to Pennsylvania's 242,551 participants. (Statistics are based upon figures provided for the First Quarter of FFY 1999).

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The PFMA advised the Department that it opposes criteria to limit the number of stores to participate in the WIC Program; it wants the Department to eliminate the vendor to participant ratio and replace it with a "WIC participant freedom to shop" policy. The PFMA would have the Department allow any store interested in participating in the WIC Program to be approved so long as the store maintains proper health standards and adequate product inventory. The USDA's response to this was:

It is important to understand that the establishment of vendor limitation criteria can be a critical element in providing quality services to participants and promoting efficient use of the State agency's food grant. Furthermore, if the State agency reduced its selection criteria to the two suggested by the PFMA, all vendors meeting these criteria would be authorized regardless of the prices they charge. Since WIC is not an entitlement program, such as Food Stamps, with funding available to serve all eligible applicants, higher food costs result in lower number of participants served. We do not believe this would result in the best value possible for the Program.

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Section 1103.4 (relating to selection and limitation criteria; authorization process) sets forth the criteria the Department will use to select stores to participate in the WIC Program. The Department has established criteria which will ensure that the Department authorizes to participate in the WIC Program only those stores which are able to provide participants with the foods that meet Federal nutritional standards set forth in 7 C.F.R. §246.10 and which are authorized by the Department. At the same time, the criteria ensures that the stores charge the Commonwealth reasonable prices for the foods which are purchased by the participants with WIC checks.

Subsection (a) sets forth twelve criteria the Department will use to determine which stores to authorize for participation in the WIC Program. Subsection (a)(2) requires that a store serve a minimum of 25 participants. This number permits small stores to participate in the WIC Program, while ensuring that the expenditure of Federal dollars for administration and monitoring is not wasted on stores that conduct so little WIC business that their participation in the WIC Program would yield a poor return for the cost.

Other criteria in this subsection have been developed to ensure that stores which are selected to participate in the WIC Program are able to properly maintain foods

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(subsection (a)(3)), have minimum inventory of WIC authorized foods available at all times (subsection (a)(5)), are open and available a reasonable number of hours and days for participants to shop (subsection (a)(7)), not have stale dated foods on the sales floor (subsection (a)(4)) and have shelf prices of WIC authorized foods at less than the maximum allowable cost established for the two food packages most prescribed for WIC participants (subsection (a)(6)).

Federal regulations charge the Department with the fiscal management of, and accountability for, the operation of the State WIC Program. 7 C.F.R. §246.12(a)(1). In response, the Department has established pricing criteria as part of the process for selecting retail grocery stores (subsection (a)(6)). Stores must have prices of WIC authorized food packages which are less than the maximum prices established by the Department. The maximum prices for WIC authorized food packages are based upon Statewide averages of food prices within three standard deviations. These prices will be revised annually based upon changes in industry prices. Maximum allowable prices are necessary to ensure responsible administration of the WIC Program. By only authorizing stores that satisfy criteria for maximum prices, the Department is ensuring that there is no extreme markup in the prices of WIC authorized foods and that the Department is acting

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in a fiscally responsible manner. This will provide a savings to the Commonwealth which, in turn, will ensure that the greatest number of qualified women, infants and children will receive food benefits from the WIC Program.

The PFMA would like any retail grocery store to be authorized as a WIC vendor as long as they meet State health and food safety inspection standards and are willing to stock the full line of WIC allowable foods.

The USDA's response to this comment was:

Although current Federal regulations do not include specific selection criteria State agencies must use in selecting stores for WIC authorization, this will soon change. The WIC Reauthorization Act of 1998 requires the Secretary of Agriculture to promulgate final regulations not later than March 1, 2000, which include the following mandate "...a state agency shall, in selecting a retail store for participation in the Program, take into consideration the prices that the store charges for food under the Program compared to the prices that other stores charge for the foods."

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With respect to the subsection (a)(4) requirement that the store not have stale dated allowable foods on its sales floor, this is particularly important as it relates to infant formula products where the infant's sole source of nutrition is infant formula. Out of date formula may present a potentially serious health threat to an infant.

The PFMA believes that the selection and limitation criteria are arbitrary; that they are unrelated to participant need, quality of stores, or the ability of stores to serve WIC customers, and that they are anti-competitive.

The USDA's response to the PFMA's comment on this issue was:

Selection criteria are standards established by the State agency to ensure the systematic selection of the most qualified vendors for authorization.

Although selection and limitation criteria may restrict the ability of particular stores to secure or retain WIC authorization, they are utilized to secure participant access and are a critical element in providing quality service to participants.

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The USDA further stated:

The WIC Program's role is to select vendors to service clients, not to set or ensure profit margins for participating vendors. Although vendors benefit from the considerable volume of food purchases made through WIC, as well as other foods purchased at the time of WIC redemption, it is of the utmost importance to remember that participants, not vendors, are the Program's clients.

Subsection (b) delineates criteria which the Department will use to determine which stores should be authorized in areas where more stores are applying for authorization than the Department has determined that it needs through the assignment of stores slots based upon participant population for the area. This criteria will only be used when more stores are applying than the Department has determined it can effectively and efficiently monitor. The underlying policy for limitation of stores was articulated in the discussion of §1103.3 (relating to authorization of store slots).

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The USDA provided the following general comment:

We fully support the State agency's decision to utilize limitation criteria as a means of ensuring the provision of quality services to participants; reducing the possibility of vendor fraud; and promoting the efficient use of the State agency's food grant.

Section 1103.5 (relating to minimum inventory) establishes minimum standards of WIC approved foods that each authorized store must maintain. This criteria is necessary to ensure that WIC authorized foods are available to participants when they shop at the store for WIC purchases. In accordance with 7 C.F.R. §246.12(e)(3), the Department considered the impact of authorization decisions on small businesses. To help small businesses, the Department has established minimum inventory standards that are sufficient to serve the needs of 1-3 participants. The inventory identified in this section meets the nutritional requirements set forth in 7 C.F.R. §246.10 (relating to supplemental foods).

Minor changes have been made to the minimum inventory requirements from those that the WIC Program is currently using under non-regulatory administration of the WIC

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Program. The change in the minimum inventory corresponds to changes in the quantities of foods prescribed for WIC participants to purchase. Specifically, the changes increase the requirements of milk and soy based powdered formula from five to six cans, and increase in requirements of evaporated milk from ten to twelve cans.

Subsection (c) (relating to annual publication of WIC food list) provides that the WIC Program will publish annually in the *Pennsylvania Bulletin* the list of authorized foods and acceptable brand name products. This complies with the mandates of 7 C.F.R. §246.12(h)(2) which requires that the State provide grocery stores with pertinent WIC Program information, including a list of acceptable brand name products. Revision of the list annually permits the Department to review new products, including store brands, and add them to the list if found to meet acceptable nutritional standards established by Federal regulation.

This differs from how the program currently operates under non-regulatory administration. Subsection (c) provides that the WIC Program will publish in the *Pennsylvania Bulletin* notice of the authorized foods and brand names no later than September 15 of each year. Currently, notice is provided annually by sending a copy of

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the WIC Food List to each authorized store. It is the intent of the WIC Program to continue the practice of sending the information to the stores in addition to publishing the information in a notice in the *Pennsylvania Bulletin*.

Subsections (d)-(f) identify the conditions under which the Department will grant to a store a waiver of the minimum inventory requirements (subsection (d)), the foods for which waivers may be granted (subsection (e)) and when the waivers will no longer be valid (subsection (f)). Waivers will be granted only for certain foods for which the Department has no documented WIC purchases at the store. A waiver granted to the store by the Department will no longer be valid when the store is presented a WIC check by a participant for the purchase of a WIC foods for which a waiver was granted. The granting of waivers benefits a store by relieving the store from the unnecessary burden of maintaining inventory of certain WIC authorized foods when the Department has no documented purchases of the foods. By requiring that the WIC authorized store be able to provide the food item within 72 hours after presentation of a WIC check, this permits the Department to ensure that the necessary, prescribed food item is available to the participant when sought or within a reasonable time thereafter.

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Section 1103.6 (relating to waiting list) establishes a procedure which allows for the effective administration and management of stores seeking authorization to participate in the WIC Program. This procedure requires that the Department maintain a waiting list of stores seeking authorization when no store slots are available. When a store slot becomes available, the Department will be cognizant of the stores interested in being authorized and will be able to send authorization information to all on the list, thus ensuring that the Department provides a fair and equitable opportunity for all stores interested to seek authorization.

Section 1103.7 (relating to participant hardship) establishes criteria the Department will consider in lieu of denying certification or recertification to a store when the store fails to meet selection and limitation criteria. In so doing, the Department is furthering the purpose of the Federal act by ensuring that participants have reasonable access to stores. Additionally, this section allows the Department to provide for continuity of services to participants when the store changes ownership, if there is a finding of participant hardship as defined in §§1103.7(b).

Subsection 1103.7(b)(1) permits the Department to make exceptions for stores that fail to

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meet selection and limitation criteria if they serve participants whose nationality, ethnicity or religious dietary needs cannot be properly served by another WIC authorized store within a certain and defined distance. For example, if a kosher grocery did not have the minimum inventory of whole milk available at the time a recertification review was conducted, and the next closest kosher grocery was more than three miles (for Philadelphia, the distance is one mile), the store would be placed on probation if ten or more participants were shopping at the store and required kosher products. The exception allows the Department to consider the special needs of WIC participants.

Subsections (b)(5)-(7) identifies reasonable travel distances to the next authorized store as a method of determining participant hardship. The distances vary according to the number of WIC participants who may be affected if the store were not authorized. As the number of participants affected increase, the distance to the next authorized store decreases.

This regulation reflects two changes from the current, non-regulatory administration of the WIC Program. The first is the addition of three-tenths of one mile distance for determining participant hardship for stores serving 300 or more participants. Previously

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there was no delineated travel distance for stores serving three hundred or more participants. The second change reflected in this regulation from how the WIC Program is currently operating provides for the temporary authorization of a store which had changed ownership. Temporary authorization would be permitted when the Department has not received sufficient notice to arrange for alternate shopping accommodations for WIC participants. As stated earlier, Federal regulations specifically provide that authorizations of stores are null and void when operation of the store ceases or ownership changes. 7 C.F.R. §246.12(f)(2)(xix). Administratively, the provision for temporary authorization permits the Department to be responsive to the immediate needs of the participants for supplemental foods. It also enables the Department to remain compliant with Federal regulations by providing for a temporary authorization of stores which have changed ownership. This temporary authorization is valid only until such time as the WIC Program is able to conduct a complete certification review of that store, and any other store which may be seeking certification.

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Chapter 1105. Requirements of WIC authorized stores.

Section 1105.1 (relating to training) establishes the type and frequency of training that the Department needs to provide to authorized vendors in order satisfy the requirements of Federal regulations for training of authorized grocery stores. The training is intended to prevent WIC Program errors and abuse, and to improve WIC Program service.

7 C.F.R. §246.12(h) (relating to food vendor training and guidelines).

Federal regulations require as a part of the vendor agreement, that the manager of a store or an authorized representative of a store accept training on program procedures and be responsible for training cashiers and other staff. The Federal regulations do not specifically mandate how this is to be accomplished. 7 C.F.R. §246.12(f)(2)(vii)-(ix).

The federal regulations also require that food vendors be provided with pertinent program information and guidance. 7 C.F.R. §246.12(h).

Subsection (a) pertains to initial training. It mandates that newly authorized stores receive training on WIC Program policies and procedures prior to actually accepting WIC checks to ensure that management and cashiers understand their responsibilities related to

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the store's participation in the WIC Program. This subsection requires that the local agency responsible for the area in which the store is located conduct the initial training within 30 days after the date of authorization to ensure that, once a store is authorized, it will be able to participate in the program as soon as administratively feasible. Requiring training of stores prior to accepting checks prevents WIC Program errors.

Subsection (b) pertains to annual training. It provides for continued education in an employment environment that experiences high turnover rates. The Department requires annual training of at least one person from each store responsible for training store personnel on WIC Program procedures. For the convenience of store personnel, the Department provides each store with two opportunities for attendance at the annual training. This subsection further provides for training within the county where the store is located or in an adjoining county so that the store representative will not be burdened by traveling long distances to attend the annual training. Annual training is designed to prevent WIC Program errors and improve WIC Program service by ensuring that authorized stores are not only provided continued education on the WIC Program, but also that the stores are keep abreast of pertinent changes in the WIC Program operation. Annual training programs facilitate communication between authorized stores and WIC

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Program staff and allow the WIC Program staff to be responsive to issues affecting stores.

Subsection (c) pertains to corrective training. It provides a means for the Department to aid stores in correcting violations identified during on-site reviews. Corrective training allows WIC Program staff to be responsive to problems documented during on-site visits to authorized stores. Corrective training ensures that the WIC Program has provided all possible assistance to stores in correcting problems prior to imposing sanctions against the store as provided in §1107.1 (relating to sanctions).

Section 1105.2 (relating to overcharge recovery system) establishes procedures for the Department to detect overcharges on WIC participant purchases by stores redeeming WIC checks and provides for reimbursement to the WIC Program of overcharges, if found.

Federal regulations require that the Department establish procedures to ensure the propriety of food instruments, which includes designing a system to review food instruments to detect suspected overcharges. 7 C.F.R. §246.12(r)(5). This section

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complies with that requirement. Subsection (a) requires authorized stores to submit to the Department, on a quarterly basis, prices for some WIC authorized foods (subsection (a)). The store is required to provide the information on a "Quarterly Price Report" form provided by the Department. The Department is keenly aware of changes in technology and has made provision for vendors to file these forms via facsimile.

Subsection (b) provides that the Department will compare the prices submitted by the store against the actual prices charged by the store on redeemed food instruments to determine if there have been overcharges. This system detects only the most egregious overcharges, because it uses the highest prices charged by the store during the reporting period to determine the maximum prices the store could have charged against the prices the store actually charged on WIC purchases.

Federal regulations permit the Department to seek reimbursement from the store for overcharges and require notice of the Department's intent to do so as part of the agreement between the Department and authorized store . (7 C.F.R. §246.12 (f)(2)(iv)). Subsection (f) requires the store to submit reimbursement to the Department within 20

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days. This time period allows the store a reasonable opportunity to investigate the propriety of the overcharges claimed by the Department and arrange for payment.

Subsection (g) provides a mechanism for vendors to dispute claims for overcharges if the store questions the propriety of the overcharges, provided that the store notifies the Department within 15 days of the date of the billing notice. Requiring that stores provide notice of a dispute within a defined time, provides for administrative efficiency by the Department and ensures prompt action by the store to identify and correct problems which may be cause of the overcharges. Failure to reimburse the Department for overcharges when due will result in the imposition of a sanction pursuant to §1107.1 (relating to sanctions).

Recovery of overcharges is not only required by Federal regulations, it also benefits the WIC Program by recapturing funds which the Department may recycle to provide food benefits to additional WIC participants.

Section 1105.3 (relating to terms and conditions of participation) sets forth the terms and conditions of participation for stores authorized to participate in the WIC Program.

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Specifically, subsection (a) sets forth the responsibilities of stores generally, subsection (b) sets forth the responsibilities of stores with regard to participants, and subsection (c) sets forth the terms and conditions of participation with regard to processing and redemption of WIC checks. Many of the requirements found in this section are specifically set forth in the Federal regulations. Other provisions have been added by the Department to ensure that the Department is able to carry out its responsibilities mandated by the Federal regulations and to carry out the purpose of the WIC Program.

For instance, stores are required to maintain minimum inventory of allowable foods (subsection (a)(4)) and to ensure that foods are properly store and refrigerated (subsection (a)(5)). This ensures that authorized stores are maintaining minimum levels of WIC authorized foods so that the foods are available for participants to make their WIC purchases when shopping at the store. Subsection (a)(5) ensures that foods are fresh and the nutritional content of certain foods are not compromised. These provisions permit the Department to carry out its responsibility of providing nutritious, supplemental foods to participants of the WIC Program.

Specifically, subsection (c) regarding the processing and redemption of WIC checks,

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establishes procedures for the stores to follow which protect the integrity of the WIC data and the integrity of the fiscal operation of the program.

The only change to the terms and conditions of participation set forth in this section from the way the program has previously operated is to require stores to display current shelf prices of WIC authorized foods. This change will ensure that accurate food prices are collected during compliance and monitoring reviews and will ensure that participants can shop wisely and utilize their benefits in a cost effective manner. The change takes into consideration the effect on small stores by allowing the option of displaying the prices on a food list, easily located and clearly visible to participants.

Section 1105.4 (relating to change of ownership of a WIC authorized stores) .

Subsection (e) puts stores on notice that the Department will not accept an application from a new owner where it appears that the change of ownership is a sham transaction used as a method of avoiding a sanction or disqualification.

Section 1105.5 (relating to changes in availability or location of WIC authorized stores)

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sets forth notification requirements for stores which temporarily or permanently close or relocate. It further provides Department procedures for dealing with each circumstance. The purpose of the section is to ensure that the WIC Program will have a minimal amount of time to notify participants when stores will not be open or are relocating. The notification by the stores to the Department allows the Department to make alternate arrangements for participant shopping so that there will be as little inconvenience as possible for participants.

Subsection (b) permits the Department to consider relevant factors under which a store may temporarily close, without imposing sanctions as required by §1107.1(relating to sanctions).

The draft regulations reflect three changes in the procedures under which the WIC Program previously operated. These changes benefit authorized stores by providing three situations under which the store will not lose its authorization or be sanctioned for temporary closings or minimal relocations.

The first change allows for a continued authorization of a store that temporarily closes

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due to natural disaster or death in the immediate family. This exception particularly benefits small business owners since many time businesses are family owned and operated, and the loss of an immediate family member impacts upon the operation of the business.

The second change allows for temporary closing for remodeling up to three days without the loss of the store's authorization, provided that the owner notifies the Department 15 days in advance of the date the store is scheduled to close for remodeling. Although this temporary closing may inconvenience participants who shop at the store, it allows the Department to notify the participants so that temporary, alternate arrangements can be made for WIC participant shopping. The change also allows the Department to provide continuity in WIC services. Participants will be able to resume making WIC purchases at the store when the store reopens, in lieu of having to permanently change stores, should the store lose its authorization and not be reauthorized when it reopens.

The third change allows for the continued authorization for stores which relocate less than one mile and are open for business at their new location less than three calendar days from the date the store closes at the prior location. The three day time limitation ensures

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that the closing is for a reasonable period of time and causes minimal inconvenience for participants. The limitation of one mile distance for relocation was selected because the store is still anticipated to attract the same participants if it relocates at this distance or less from its prior location. Any relocations of greater distances may cause participants to choose other stores located closer to the store's prior location because of travel distance and inconvenience. If participants choose other stores, there would be no reason why the store should receive special consideration over other stores which may be seeking authorization should the store slot open as a result of the relocation of the previously authorized store.

Section 1105.6 (relating to monitoring of WIC authorized stores) sets forth the procedures the Department has developed to meet the mandates of Federal regulations for monitoring authorized stores. The purpose of monitoring authorized stores is to ensure compliance with applicable Federal and state regulations, to provide a mechanism to identify problems and assist stores in correcting such problems, and, to provide the ability with Department to take action against stores which fail to correct problems or

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which may be engaging in fraudulent or abusive activity. Monitoring of stores protects the financial integrity of the program and ensures effective and efficient program service to WIC participants.

The Department is mandated by 7 C.F.R. §246.12(i) to monitor food vendors within its jurisdiction. The federal regulations require that the Department develop a system which identifies high-risk vendors and ensures on-site monitoring of WIC authorized stores.

7 C.F.R. §246.12(i)(1). The Department is responsible for designing a system to conduct on-site monitoring of at least ten percent of authorized stores per year, in order to survey the types and levels of abuse and errors among authorized stores and to take corrective action as appropriate. 7 C.F.R. §246.12(i)(2). Furthermore, the federal regulations provide the Department with the ability to conduct compliance purchases to collect evidence of improper vendor practices. 7 C.F.R. §246.12(i)(5).

The Department has established three methods for conducting on-site monitoring reviews of WIC authorized stores: high-risk reviews (subsection (b)), routine reviews (subsection (c)) and training buys (subsection (d)). Each of the three types of reviews have distinct

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purposes. Suspected problems at the stores determine which type of monitoring the Department will conduct.

Subsection (b) establishes procedures for monitoring high-risk stores. By its definition, a "high-risk store" is one which is identified as a possible perpetrator of fraud or abuse. The Department will make the preliminary determination that a store is possibly a high risk store based upon an analysis of redemption patterns of WIC checks or sales, through compliance violations or by participant or WIC Program staff complaint. Once a store has been identified as a high-risk store, the Department will use one of two methods for monitoring it to determine whether or not the store, is in fact, a perpetrator of fraud or abuse. The Department will either conduct a compliance investigation or an inventory audit of the store.

A compliance investigation involves a series of at least two investigations of the store by an undercover investigator posing as a WIC participant or person authorized by the WIC Program to act on behalf of a WIC participant. The purpose of the investigation is to ensure compliance with WIC Program requirements. By authorizing a person to pose as a WIC participant, the program is able to ascertain if store personnel are following WIC

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Program requirements in conducting WIC transactions. A report is completed following each review and the store will be notified by letter of any deficiencies noted during the review. This notice provides the store the opportunity to take corrective action. Should compliance investigations indicate on two consecutive occasions problems in conducting WIC transactions, the Department will conduct mandatory corrective training for store personnel to assist the store in correcting problems identified during the compliance investigation and to provide every possible means to ensure the store's continued participation in the WIC Program. This section further provides that the Department will disqualify a store from further participation in the WIC Program if deficiencies are found during a third investigation following the mandatory corrective training.

The Department will also use inventory audits to monitor high-risk stores. This procedure allows the Department to compare, over a specific period of time, the inventory levels of WIC authorized foods against the actual WIC sales of those same products during the same specific period of time. The Department will use inventory records to determine whether a store had adequate product inventory sufficient to satisfy claims made for WIC reimbursement. This method is a particularly useful tool for determining whether a store is trafficking in WIC checks.

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Pursuant to 7 C.F.R. §246.12(i)(2), the Department has developed a procedure for monitoring at least ten percent of authorized food vendors per year. This procedure is set forth in subsection (c). The purpose of these types of reviews are to determine whether or not authorized stores remain in compliance with the selection and limitation criteria set forth in §1103.4(a) and (b) (relating to selection and limitation criteria; authorization process). This type of review is also used to determine whether or not stores continue to comply with the terms and conditions for participation set forth in §1105.3 (relating to terms and conditions of participation). As with compliance investigations conducted on high risk stores, the Department will conduct at least two consecutive routine reviews during the investigation. The Department will provide corrective training for a store which fails two consecutive routine review. This is done in an effort to assist stores in correcting problems. Should problems be identified during the third routine review of the store, the Department will proceed to impose sanctions against the store in compliance with §1107.1.

Subsection (d) establishes a procedure to monitor a store's check redemption practices. These reviews are conducted by Federal, state or local agency personnel. The same standards for routine monitoring reviews apply regarding mandatory corrective training

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following two consecutive reviews identifying problems in the check redemption procedure and the imposition of sanctions against the store following problems noted during a third training buy.

Subsection (f) provides the means for the Department to seek reimbursement from a WIC authorized store that received funds improperly due to any violation of regulations governing the store's participation in the program which were discovered during monitoring reviews.

Subsection (h) puts stores on notice that the Department may utilize law enforcement agencies in the investigation of stores suspected of trafficking in WIC checks or suspected of other fraud or abuse of the WIC Program.

The PFMA requested that all references to high-risk reviews be eliminate. The PFMA suggested that the regulations be amended so that retailers have an opportunity to review identified problems before any sanction is implement.

The USDA's comment to PFMA's request was:

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High-risk review as described in Pennsylvania's regulation include compliance investigations and inventory audits. Such activities are required by Federal regulation 246.12(i) and therefore may not be eliminated.

An interpretation of Federal regulations 246.12(l) which we received from Supplemental Food Programs Division indicated that the opportunity to correct deficiencies was referring to deficiencies detected during on-site monitoring visits and not for more serious violations detected during covert compliance investigations or inventory audits.

The PFMA suggest that regulators must develop a distinction between willful violators and human error committed by well meaning employees.

The USDA's response to this comment was:

It is our position that vendors should be held accountable for noncompliance and Program violations, whether the be deliberate attempts to abuse the Program or a chronic repetition of inadvertent errors, since

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both ultimately result in increased food costs and fewer participants being served. Not only is it extremely difficult for State agencies to ascertain the intent behind an action, whether inadvertent or deliberate such action has the same negative effect on the Program. Furthermore, we believe that the fact that errors were performed by non-management employees does not relieve the vendor of the responsibility for that employee's actions.

Removing an abusive employee does not mitigate the effects of chronic vendor error and mismanagement on Program costs and does not lessen the vendor's responsibility to provide effective oversight and appropriate employee training.

Chapter 1107. Sanctions.

Section 1107.1 (relating to sanctions) establish the types of sanction, duration of sanctions and the standards the Department will use in imposing a sanction against a WIC authorized store.

Federal regulations mandate that the Department establish policies and procedures which determine the type and level of sanctions to be applied against food vendors, based upon

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the nature and severity of the WIC Program violations observed, and other such factors as the Department determines are appropriate. 7 C.F.R. §246.12(k)(1). The regulations mandate that the period of disqualification from the WIC Program be reasonable and shall not exceed a period of three years. The maximum period of disqualification shall only be imposed for the most serious of offense. 7 C.F.R. §246.12(k)(1)(ii).

There are three categories of specific sanctions, which have been grouped together based upon the nature and severity of the violation. Subsection (h)(2), *Class A abuses*, carry the sanction of one year disqualification from the program. These sanctions, generally relate to violations in the provision of food benefits to WIC participants.

Subsection (h)(3), *Class B abuses*, disqualify a store from participation in the WIC Program for a period of two years. These WIC Program violations generally relate to abuse of program funds by authorized stores.

Subsection (h)(4), *Class C abuses*, impose a three year disqualification upon stores for

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the most egregious program violations. These are WIC Program violations committed with the intent to defraud the WIC Program. These violations are considered the most severe, and therefore carry the stiffest penalty permitted by the Federal regulations.

For any program violations not specifically set forth in subsections (h)(2)-(4), the Department will determine the sanction based upon the nature and severity of the violation.

These regulations present five minor differences from how the WIC Program is currently administered in a non-regulatory format. The changes are reflected in the length of sanctions imposed upon a store for violations of statutes and regulations governing the store's participation in the WIC Program. The majority of the changes have decreased the time for the specific violations.

Previously, if an authorized store had the participant sign the check before completing the "Pay Exactly" box on the check, the Department imposed a two year sanction. The regulation changes the sanction to one year. Previously, if an authorized store overcharged the WIC Program by charging sales tax or providing more food than the

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quantity specified on the check, the Department imposed a two year sanction. The regulation changes the sanction to one year. Previously, if an authorized store provided rainchecks to a participant because WIC authorized food was unavailable, the Department imposed a two year disqualification. The regulation now provides that the Department shall determine the length of the sanction. Previously, if an authorized store demanded that a participant pay for authorized foods with the participant's own money or with another WIC check, the Department imposed a three year sanction. The regulation changes the sanction to one year.

Section 1107.2 (relating to civil money penalties) establishes when the Department will offer a store the option of paying a civil money penalty in lieu of denial of recertification or in lieu of disqualification. This option is only available when the Department finds that disqualification or the denial of recertification for the store would cause hardship, as defined in §1103.7 (relating to participant hardship) for the WIC participants currently making their WIC purchases at the store.

The calculation of the civil money penalty is based upon the formula contained in subsection (b) . This formula is similar to that used by the Food Stamp Program for

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calculation of civil money penalties with one exception: the Department multiplies five percent of the average monthly total value of WIC checks the store negotiated by the number of months the store would have been disqualified. The Food Stamps Program multiplies ten percent of the average monthly sales by the number of months the store would have ben disqualified. Current Federal regulations do not have a provision for offering civil money penalties in lieu of disqualification, but new federal regulations are anticipated to require this option be available under limited circumstances. Those circumstances are similar to that set forth in this regulation.

Chapter 1109. Administrative Appeals.

Section 1109.1 (relating applicability of general rules) establishes that 1 Pa. Code Part II (relating to general rules of administrative practice) is applicable to these regulations.

Section 1109.2 (relating to scope and purpose) establishes that Chapter 1111 (relating to applicant and participant appeals) and Chapter 1113 (relating to local agency and store appeals) prescribe the administrative procedures to be followed for hearings relating to the WIC Program and required by the Federal statute and regulations found at 7 C.F.R.

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§246.9 (relating to fair hearing procedures for participants) and 7 C.F.R. §246.18 (relating to administrative appeal of state agency decisions). Because certain procedures are required by Federal law, this section further indicates that specific procedures contained in Chapters 1111 and 1113 supplement or supersede general rules of administrative practice.

Section 1109.3 (relating for time limits for action) indicate that time limits relating to the issuance of orders by the hearing examiner pursuant to §1111.10(d) for applicant and participants appeals, and adjudication and orders issued by hearing examiners pursuant to 1113.3(b) for local agency and store appeals, are directory. The Department can provide time frames for the issuance of the decision, but has no control over the hearing examiner should the decision not be issued within the time frames provided for by these regulations. Furthermore, other factors may impact upon the timely issuance of a hearing decision, such as whether the matter was continued and whether post hearing briefs were requested by the hearing examiner.

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Chapter 1111. Applicant and Participant Appeals.

This chapter establishes procedures for applicants and participants of the WIC Program to appeal certain decisions which adversely impact upon their participation in the WIC Program. The Federal regulations regarding such appeals may be found at 7 C.F.R.

§246.9 (relating to fair hearing procedures for participants). The purpose for establishing special procedures for participants and applicants is to encourage participants and applicants to appeal decisions which they do not agree with by presenting a forum which is not unduly complex or legalistic. 7 C.F.R. §246.(h)(relating to rules of procedure).

Section 1111.1 (relating to participant and applicant appeal rights) establishes the scope of this chapter. Federal regulations have established hearing procedures which are intended to provide an opportunity for applicants and participants to challenge certain WIC Program decisions which may adversely impact upon the person. 7 C.F.R.

§246.9(a)(relating to availability of hearings).

Section 1111.2 (relating to notification of appeal rights) sets forth the WIC Program decisions which may be appealed. It further provides for Department notice to applicants and participants of their right to appeal decisions covered under the scope of this chapter.

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Subsection(a) requires that the local agency advise adult applicants or the parent or guardian of an infant applicant of the right to appeal decisions which deny benefits. This subsection further requires the Department to provide notice to an adult participant or the parent or guardian of an infant participant, of his or her right to appeal a decision which results in a claim against the individual for improperly issued benefits or that person's disqualification from the WIC Program. This section explicitly provides that the expiration of benefits is not appealable. This subsection complies with the requirements set forth in 7 C.F.R. §246.9(c)(relating to notification of appeal rights).

Subsection (b) requires the local agency provide the notice required pursuant to subsection (a) in writing, on forms provided by the Department. The purpose of this requirement is to ensure that the WIC Program has documentation that it has complied with the notice requirements set forth in subsection (a) and to ensure that the participant understands that he or she has the right to appeal such decisions. The Department has developed standard forms, readable at an eighth grade level, to ensure that the adult applicants and participants, or the parent or guardian of infant applicants or participants, understand their rights.

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Section 1111.3 (relating to appeal of a local agency decision) defines how an adult applicant and participant, or the parent or guardian of infant applicant or participant, may appeal a local agency decision.

Subsection (a) defines an appeal as a clear expression that the person wishes to present his or her case to a higher authority. The appeal need not be in writing. This is consistent with the Federal requirements set forth in 7 C.F.R. §246.9(d) (relating to request for hearing). While this clear expression does not have to be in writing from the participant, this subsection places the burden upon the Department or local agency to reduce the appeal to writing. This is required to document that the appeal was made and the date on which the appeal was made.

Subsection (b) establishes the standard for determining a docketing date for an oral appeal. The appeal shall be docketed as being filed when the local agency receives the communication. This date is important to ensure that the appeal was made within the required time for appeal set forth in §1111.4 (relating to time for appeal for a local agency decision).

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Section 1111.4 (relating to time for appeal of a local agency decision) requires the applicant, participant or authorized representative of the applicant or participant to appeal a WIC Program decision within 90 days after the date the local agency mails or delivers the decision. This standard is more liberal than the minimum standard set forth in 7 C.F.R. §246.9(e)(relating to time limit for request). Federal regulations require that the individual be provided a reasonable period of time to request a hearing to appeal the adverse decision provided, that such time limit is not less than 60 days.

Section 1111.5 (relating to scheduling the hearing) requires that the local agency appoint an individual who has not participated in the decision being appealed or who does not have a personal stake or involvement in the decision. This requirement ensures that the hearings are conducted by a fair and impartial hearing examiner, as mandated by 7 C.F.R. §246.9(i).

Subsection (b) provides that the local agency advise the hearing examiner of the date on which the appeal is docketed. This is to ensure that the hearing examiner has the information available to him or her to comply with the requirements for scheduling the hearing set forth in subsection (c).

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Subsection (c) sets forth the time frame for scheduling the hearing. In compliance with 7 C.F.R. §246.9(j)(relating to conduct of the hearing), the hearing shall be held within three weeks of the docketed date of the appeal. Further, the hearing examiner is required to provide the applicant or participant or authorized representative of the applicant or participant a minimum of 10 days advance written notice of the time and place for the hearing. The purpose of these requirements are to ensure that hearings are held promptly. If the decision of the local agency is overturned, an applicant may receive, as soon as possible, supplemental nutrition benefits that have been denied. If the decision of the local agency is overturned, the participant may resume receiving benefits from the WIC Program as soon as possible. The 10 day advance notice is sufficient to allow the applicant or participant or authorized representative to arrange their schedule to ensure attendance at the hearing which he or she requested.

Subsection (d) establishes standards for scheduling hearings in compliance with the mandate of 7 C.F.R. §246.9(h) for the development of uniform rules of procedure. These standards require that the forum for the hearing be convenient for the applicant or

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participant, provides the method for requesting continuances, provides the circumstance when appeals may be withdrawn and provide the circumstances when an appeal shall be discontinued.

Subsection (c) provides the hearing examiner, pursuant to 7 C.F.R. §246.9(i)(5), the ability to order, when relevant and necessary an independent medical assessment. When a medical condition is contested, this subsection provides the means for an impartial opinion.

Section 1111.6 (relating to denial or dismissal of appeal) prescribes the three instances when the hearing examiner may deny or dismiss the appeal of an applicant, participant or authorized representative of an applicant or participant. The appeal may be denied or dismissed when it is not timely received; when the appeal has been withdrawn or when the person fails without good cause to attend. These standards provide administrative management for the resolution of appeals.

Section 1111.7 (relating to continuation of benefits) provides for a continuation of benefits if the participant timely files an appeal of a local agency decision which that

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decision renders the participant ineligible to continue receiving benefits. This complies with 7 C.F.R. §246.9(g) (relating to continuation of benefits). The purpose of this section is to ensure that an individual receiving benefits who timely appeals the local agency decision, continues to receive the supplemental, nutritious foods until such time as the local agency decision to terminate benefits is determined by the hearing examiner to be appropriate. The costs of WIC Program benefits in the interim between the appeal and the decision is minimal when weighed against the possible loss of nutritional benefits to the participant if the local agency decision to terminate benefits is found to have been inappropriate.

Section 1111.8 (relating to rights of the appellant) prescribes the rights of the appellant during the appeals process. The rights set forth in this section are pursuant to the federal regulatory mandate that the State establish rules of procedure. These rules of procedure include the rules of conduct at the hearing and the rights of the appellant during the appeals process. 7 C.F.R. §246.9(h)(relating to rules of procedure). In particular, subsection (b) sets forth twelve rights of the appellant. Three of the rights contained therein supplement or supersede sections of 1 Pa. Code Part II (relating to general rules of administrative practice and procedure). The appellant has the right to appear in person at

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the hearing. This section supplements 1 Pa. Code, §31.21 (relating to appearance in person). The appellant has the right to be represented by an authorized representative at the hearing who not necessarily need be an attorney. This provision supersedes the 1 Pa. Code §§31.22 and 31.23 (relating to appearance by attorney; and other representation prohibited at hearings). This right complies with 7 C.F.R. §246.9(j)(2) which provides that the appellant be permitted to be assisted or represented by an attorney or other person at the hearing. The purpose of this subsection is to ensure that procedures are not unduly legalistic or complex. The intent is to encourage applicants and participants to appeal decisions if they believe the decision was inappropriate without requiring them to engage the service of an attorney. The applicant, participant or authorized representative may request from the hearing examiner a subpoena for the production of evidence. This section supplements 1 Pa.Code §35.142 (relating to subpoenas) by providing authority to the hearing examiner to issue a subpoena upon such request.

Section 1111.9 (relating to hearing record), subsection (a) prescribes the contents of the hearing record. Subsection (b) requires that hearing records be retained for three years. This is required pursuant to the federal record retention requirements found in 7 C.F.R. §246.25 (a)((1)-(2) (relating to recordkeeping requirements).

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Subsection (c) provides that hearing records shall be available for public inspection and copying pursuant to 7 C.F.R. §246.9(k)(4) (relating to hearing decisions) provided that names and addresses are kept confidential.

Section 1111.10 (relating to hearing examiner decisions) prescribes the standards for the hearing examiner in issuing a decision.

Section 1111.11 (relating appeal to the Secretary) establishes procedures for appeals of hearing examiner decisions to the Secretary within 15 days and prescribes the form of the appeal.

Section 1111.12 (relating to adjudication and order procedures) prescribes how the Secretary may reach a decision on an appeal from the local agency decision. The Secretary may reconsider the decision on the basis of the evidence in the record, admit additional evidence or order a new hearing. Subsection (b) further provides that, upon the filing of an appeal to the Secretary, there is no stay of the enforcement of the local agency decision to terminate benefits which was upheld by the hearing examiner.

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Section 1111.13 (relating to judicial review) provides that the applicant or participant has the right to appeal the Secretary's adjudication and order to the Commonwealth Court if the adjudication and order is adverse to the interest of the applicant or participant. This section further provides that the appeal must be filed within 30 days after the mailing date of the adjudication and order.

Chapter 1113. Local Agency and Store Appeals.

This chapter establishes procedures for a store or local agency to appeal certain decisions which adversely impact upon their participation in the WIC Program. The federal regulations regarding such appeals may be found at 7 C.F.R. §246.18 (relating to administrative appeals of State agency decisions). There is no requirement for local agency and store appeals, as there is for participant and applicant appeals, that the procedures the Department established not be unduly complex or legalistic. The Department has chosen to continue with that practice, however, in order to encourage local agencies and stores to participate in the appeals process should they believe that the decisions are incorrect.

Section 1113.1 (relating to right to appeal) establishes which decisions may be appealed

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by a store or local agency. Not all decisions are appealable. For example, the expiration of a WIC authorization is not subject to appeal, but the denial of a new authorization is appealable.

Section 1113.2 (relating to appeal procedures) establishes standards for notification by the Division of WIC of its adverse action against a store or local agency, provides for the form of the the appeal, and provides that any appeal made pursuant to this chapter shall be filed with the Director of the Division of WIC within 30 days after any final decision by the Division of WIC. This section further provides for scheduling the hearing and the appointment of the hearing examiner by the Secretary. Subsection (f) sets forth the standards for conducting a hearing.

Section 1113.3 (relating to adjudication and order) establishes the contents of the adjudication and order, the time frames (which are directory) for issuing the order, and the contents of the record the hearing examiner is required to maintain.

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Section 1113.4 (relating to continuing responsibilities) mandates a store or local agency continue to comply with any written agreement between with the Department and the store or local agency during an appeal.

Section 1113.5 (relating to judicial review) provides that the store or local agency has the right to appeal the Secretary's adjudication and order to the Commonwealth Court if the adjudication and order is adverse to the interest of the store or local agency. This section further provides that the appeal must be filed within 30 days after the mailing date of the adjudication and order.

C. Fiscal Impact

The WIC Program is 100% funded by the Federal government. No State dollars are involved in the operation of the WIC Program, including compensation of State employees. There will be no fiscal impact on the State government or any other political subdivision as a result of these regulations.

With few minor exceptions, as noted in the Section B "Summary," the provisions of

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these regulations set forth, in a regulatory format, how the Department has administered the WIC Program since approximately 1986. Therefore, these regulations will have no significant fiscal impact on the general public or on the stores that voluntarily choose to participate in the WIC Program.

D. Paperwork Requirements

As stated in Section C "Fiscal Impact," the regulations set forth, in a regulatory format, how the Department has administered the WIC Program since approximately 1986. The only change relating to paperwork these regulations will require is the maintenance by authorized stores of price and inventory records for a period of six months. (See §1105.3(a)(21)).

Although there was never a formal requirement that WIC authorized stores maintain price and inventory records for a stated period of time, authorized stores have been required to provide the Department with the highest prices of authorized foods on a quarterly basis since the calendar quarter ending December 1991. Therefore, authorized stores have had to maintain price and inventory records for at least a three-month period in order to comply with this obligation. The new regulation requiring authorized stores to maintain

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the price and inventory records for six months will not represent a significant impact on authorized stores. New Federal regulations governing the food delivery systems of state agencies are anticipated in the near future. The new Federal regulations are anticipated to mandate that states require authorized stores to maintain price and inventory records for the same period of time as the businesses are required to maintain the records for Federal tax purposes. Pennsylvania's requirement is significantly less burdensome.

E. Effective Date/ Date

The effective date of the regulations shall be the date of their publication in the *Pennsylvania Bulletin*. These regulations will be monitored continually and will be updated as required by changes in Federal statute or Federal regulations governing the WIC Program.

F. Statutory Authority

The WIC Program is a Federal program authorized by an amendment to the Child Nutrition Act of 1966 (Act), 42 U.S.C. §1786. Congress has authorized the United States

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Department of Agriculture, Food and Nutrition Services (USDA-FNS) to contract with state agencies for the establishment of the WIC Program. The Act and regulations governing the WIC Program require only that the state agency responsible for the administration of the WIC Program submit on an annual basis a state agency plan of operations (42 U.S.C. §1786(f)(1)(A); 7 C.F.R. §246.4 (relating to state plan)). The Federal statute and regulations require that the state agency establish a procedure under which members of the general public are provided an opportunity to comment on the development of the State agency plan, which the Department does by annually publishing notices in the *Pennsylvania Bulletin* and newspapers of general circulation, as well as sending notices to interested parties. All state agency plans of operations, as well as any changes thereto, must be approved by the Secretary of the USDA. The state agency may not deviate from the plan without USDA approval. There is, however, no Federal requirement for the establishment of state regulations.

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G. Regulatory Review

These regulations are being promulgated pursuant to the decision of the Commonwealth Court in Giant Food Stores, Inc. v. Commonwealth of Pennsylvania, Department of Health, 713 A.2d 177 (Pa. Cmwlth. 1998), wherein the court found the criteria that the Department used to authorize grocery stores to participate in the food delivery system of the WIC Program were invalid because they were not promulgated as a regulation. The court did not address the propriety of the criteria; it found only that the criteria needed to be published as a regulation pursuant to the Commonwealth Documents Law, 45 P.S. §1102-1602, and submitted to the Attorney General pursuant to the Commonwealth Attorney's Act, 71 P.S. §§732-204. The Court further found the Regulatory Review Act was inapplicable to the criteria the Department uses to authorize grocery stores, because the criteria was developed by the Department as a result of a delegation of authority based solely upon Federal statute and regulation, and thus, are outside the scope of the Regulatory Review Act.

The Department, nevertheless, has elected to submit these regulations to the Independent Regulatory Review Commission (IRRC) and the standing committees of the

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Pennsylvania House and Senate for review and to follow the Regulatory Review Act procedures for service upon and cooperation with IRRC and the standing committees.

Because the regulations relate to the administration of the WIC Program by the Department, the Department was required to submit them to the USDA-FNS for approval as part of the state agency annual plan of operations. Following revisions required by the USDA-FNS, by letter dated April 12, 1999, the regulations were approved. These regulations may not be changed without the review and approval of the USDA-FNS.

Under Section 5.1(a) of the Regulatory Department Review Act (Act), the Act of June 20, 1989 (PL. 73, No. 19) (71 P.S. §745.1-745.15), the Department submitted a copy of the regulation with proposed rulemaking omitted on _____ to IRRC and the Chairpersons of the House Health and Human Services Committee and the Senate Public Health and Welfare Committee. On the same date, the regulation was submitted to the Office of Attorney General for review and approval pursuant to the Commonwealth Attorneys Act. In addition to submitting the regulation, the Department has provided IRRC and the Committees with a detailed Regulatory Analysis Form prepared by the

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Department in Compliance with Executive Order 1996-1, "Regulatory Review and Promulgation." A copy of this material is available to the public upon request.

In accordance with Section 5.1(d) of the Act, the regulation was (deemed) approved by the House Health and Human Services Committee on _____ and (deemed) approved by the Senate Public Health and Welfare Committee on _____.
IRRC met on _____ and approved the regulation.

H. Contact Person

Persons with questions regarding the regulations may contact Greg Landis, Chief of the Grants and Retail Store Section, Division of WIC, Department of Health, P.O. Box 90, Room 604, Health and Welfare Building, Harrisburg, PA 17108, (717) 783-1289. If you are a person with a disability, questions regarding the regulation may also be submitted to Mr. Landis in alternative formats, such as by audio tape, braille, or by using V/TT 783-6514 for speech and/or hearing impaired persons or the Pennsylvania AT&T Relay

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services at 1-800-654-5984 [TT]. If you are a person with a disability and require an alternative format of this document (i.e. large print, audio tape, braille) please contact Mr. Landis so that he may make the necessary arrangements.

I. Findings

The Department for good cause finds that the procedures specified in 45 P.S. §1201 and 1202 are in the circumstances impracticable and contrary to the public interest.

As a result of the Commonwealth Court decision in Giant Food Stores, Inc. v. Commonwealth of Pennsylvania, Department of Health, 713 A.2d 177(1998), the Department was required to promulgate regulations governing the selection and management of grocery stores to participate in the WIC Program.

The Department has mandates imposed by Federal regulations which require that at least once every two years the Department review the qualifications of all authorized food vendors participating in the WIC Program and make appropriate adjustments among participating food vendors. 7 C.F.R. §246.12(g). These reviews must be completed no later than September 30, 1999, in order to stay compliant with Federal regulations. If the

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Department fails to do so, it faces audit exceptions and possible loss of Federal funding for the operation of the WIC Program until such time as it complies with the Federal regulatory requirements. Loss or even suspension for a short period of time of Federal funding for the WIC Program would render the program inoperable, as 100% of the programs funds are Federal, or would place a difficult, if not impossible, financial burden upon the Commonwealth, should the Commonwealth continue to operate the program. This WIC Program provides food benefits to approximately 260,000 women, infants and children who redeem, on an average daily basis, \$500,000.00 worth of WIC checks at retail grocery stores located within the Commonwealth. An interruption in the funding of the program would affect the receipt of necessary food benefits for the participants of the WIC Program, interfere with the retail grocery business, and the employment of personnel at the twenty-five local WIC agencies.

The store reviews referenced above were the subject of the Giant Commonwealth Court case wherein the court found the criteria used to conduct the reviews must be promulgated as a regulation. Therefore, until such time as the criteria is promulgated as a regulation, the Department is unable to conduct further reviews. The Department must conduct approximately 1,400 reviews of stores before September 30, 1999. To require

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the Department to engage in the customary regulatory process, is impracticable and contrary to the public interest in ensuring proper nutrition for women, infants and children during critical periods of growth.

J. Order

The Department, acting under the authorizing statute, orders that:

(1) The regulations of the Department 28 Pa.Code Chapter 8, §§ 8.41, 8.42, 8.43, 8.51, 8.51, 8.53, 8.54, 8.55, 8.56, 8.57, 8.58, 8.59, 8.60, 8.61, 8.62, 8.71, 8.72, 8.73 and 8.74, are hereby repealed.

(2) A new part VIII, Chapters 1101, 1103, 1105, 1107, 1109, 1111 and 1113 amend 28 Pa.Code by adding §§ 1101.1-1101.3, 1103.1-1103.7, 1105.1-1105.6, 1107.1-1107.2, 1109.1-1109.3, 1111.1-1111.13, and 1113.1-1113.5. and are hereby promulgated as set forth in Annex A.

(3) The Secretary of the Health shall submit this Order and Annex A to the

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Office of General Counsel and the Office of the Attorney General for approval as to form and legality as required by law.

(4) The Secretary of the Health shall certify this Order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(5) The effective date of the regulations shall be the date of their publication in the *Pennsylvania Bulletin*.

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ANNEX A
TITLE 28. HEALTH & SAFETY
PART I. GENERAL HEALTH
CHAPTER 8. PRACTICE AND PROCEDURE

* * * * *

- §8.41. [Scope and purpose.] (Reserved).
- §8.42. [Definitions.] (Reserved).
- §8.43. [General rule.] (Reserved).
- §8.51. [Notification of appeal rights.] (Reserved).
- §8.52. [Request for hearing.] (Reserved).
- §8.53. [Time limit for request.] (Reserved).
- §8.54. [Denial or dismissal of request.] (Reserved).
- §8.55. [Continuation of benefits.] (Reserved).
- §8.56. [Right of the appellant.] (Reserved).
- §8.57. [Responsibilities of the local agency.] (Reserved).
- §8.58. [Responsibilities of the State agency.] (Reserved).
- §8.59. [Responsibilities of the hearing official.] (Reserved).
- §8.60. [Hearing decisions.] (Reserved).
- §8.61. [Rehearing.] (Reserved).
- §8.62. [Judicial review.] (Reserved).
- §8.71. [Right to appeal.] (Reserved).
- §8.72. [Appeal procedures.] (Reserved).
- §8.73. [Continuing responsibilities.] (Reserved).
- §8.74. [Rehearing and judicial review.] (Reserved).

* * * * *

Part VIII. SUPPLEMENTAL NUTRITION PROGRAM FOR WOMEN, INFANTS AND CHILDREN (WIC PROGRAM)

CHAPTER 1101. GENERAL PROVISIONS

- §1101.1. Background and scope.
- §1101.2. Definitions.
- §1101.3. Administration.

CHAPTER 1103. AUTHORIZATION OF STORES

- §1103.1. Certification and recertification reviews.
- §1103.2. Probationary certification.

- §1103.3. Authorization of store slots.
- §1103.4. Selection and limitation criteria; authorization process.
- §1103.5. Minimum inventory.
- §1103.6. Waiting list.
- §1103.7. Participant hardship.

CHAPTER 1105. REQUIREMENTS OF WIC AUTHORIZED STORES

- §1105.1. Training.
- §1105.2. Overcharge recovery system.
- §1105.3. Terms and conditions of participation.
- §1105.4. Change of ownership of a WIC authorized store.
- §1105.5. Changes in availability or location of WIC authorized stores.
- §1105.6. Monitoring of WIC authorized stores.

CHAPTER 1107. SANCTIONS

- §1107.1. Sanctions.
- §1107.2 Civil Money Penalties.

CHAPTER 1109. ADMINISTRATIVE APPEALS

- §1109.1. Applicability of general rules.
- §1109.2. Scope and purpose.
- §1109.3. Time limits for action.

CHAPTER 1111. APPLICANT AND PARTICIPANT APPEALS

- §1111.1. Participant and applicant appeal rights.
- §1111.2. Notification of appeal rights.
- §1111.3. Appeal of a local agency decision.
- §1111.4. Time for appeal of a local agency decision.
- §1111.5. Scheduling the hearing.
- §1111.6. Denial or dismissal of appeal.
- §1111.7. Continuation of benefits.
- §1111.8. Rights of the appellant.

- §1111.9. Hearing record.
- §1111.10. Hearing examiner decisions.
- §1111.11. Appeal to the Secretary.
- §1111.12. Adjudication and order procedures.
- §1111.13. Judicial review.

CHAPTER 1113. LOCAL AGENCY AND STORE APPEALS

- §1113.1. Right to appeal.
- §1113.2. Appeal procedures.
- §1113.3. Adjudication and order.
- §1113.4. Continuing responsibilities.
- §1113.5. Judicial review.

CHAPTER 8. PRACTICE AND PROCEDURE

* * * * *

§ 8.41. [Scope and purpose.] (Reserved).

[(a) Sections 8.41-8.43, 8.51-8.62 and 8.71-8.74 applies to fair hearings held under 42 U.S.C.A. §1786(f)(9), relating to the Special Supplemental Food Program for Women, Infants and Children (WIC).

(b) The purpose of these sections is to supplement the Federal regulations, 7 CFR Part 246 (1979), governing the hearings and to provide for those situations where 1 Pa. Code Part II (relating to general rules of administrative practice and procedure) is inappropriate or inadequate.]

§ 8.42 [Definitions.] (Reserved).

[The following words and terms, when used in §§ 8.41 - 8.43, 8.51-8.62 and 8.71-8.74 have the following meanings, unless the context clearly indicates otherwise:

Appeal- A request for a hearing or for reconsideration of the hearing official's decision.

Appellant- The applicant, participant, local agency or food vendor who requested the hearing.

Breastfeeding woman- A woman up to 1 year postpartum who is breastfeeding her infant.

Categorical ineligibility- A person who does not meet the definition of pregnant woman, breast-feeding woman, postpartum woman, infant, or child.

Certification- The use of criteria and procedures to assess and document each applicant's eligibility for the program.

Child- A person who has had his first birthday but has not yet attained his fifth birthday.

Clinic- A facility where participants are certified or receive food instruments.

Competent professional authority- A physician, nutritionist, dietitian, registered nurse, physician's assistant, or State or local medically trained health official.

Department- The Department of Health of the Commonwealth.

Dual participation- Simultaneous participation in the program in more than one local agency or at more than one clinic in the same local agency.

Filing date- The date on which the local agency receives a hearing request.

Food instrument- A voucher, check, coupon, or other document which is used by a participant to obtain supplemental foods.

Food vendor- A retail store such as a supermarket, local grocery store, food co-op, dairy, or drug store which has an agreement with the State agency.

Health services- Ongoing routine pediatric and obstetric care such as infant and child care and prenatal and postpartum examinations.

Hearing request- Any clear expression by the appellant or the appellant's parent, guardian, or other representative that an opportunity to present the appellant's case to a higher authority is desired.

Local agency- An agency under contract to the Commonwealth to operate the program in a specific geographic area.

Nutritional risk- One or more of the following:

- (i) Detrimental or abnormal nutritional conditions detectable by biochemical or anthropometric measurements.
- (ii) Other documented nutritionally related medical conditions.
- (iii) Dietary deficiencies that impair or endanger health.
- (iv) Conditions that predispose persons to inadequate nutritional patterns or nutritionally related medical conditions.

Participant- A pregnant woman, breastfeeding woman, postpartum woman, infant, or child who is receiving supplemental foods or food instruments under the program.

Postpartum woman- A woman up to 6 months after termination of pregnancy.

Pregnant woman- A woman determined to have one or more embryos or fetuses in utero.

Program- The Special Supplemental Food Program for Women, Infants, and Children, WIC, authorized by Section 17 of the Child Nutrition Act of 1966, as amended.

Program benefits- Receipt of supplemental foods, nutrition education and referral to health services.

Secretary- The Secretary of Health of the Commonwealth.

Supplemental foods- The specific foods provided under the program.]

§ 8.43. [General rule.] (Reserved).

[Hearings shall be conducted in conformity with the regulations contained in 7 CFR Part 246 (1979), this section, §§ 8.41, 8.42, 8.51-8.62, 8.71-8.74 and 1 Pa. Code Part II (relating to general rules of administrative practice and procedure); provided that whenever the general rules of administrative practice and procedure are inconsistent with this section and 8.41, 8.42, 8.51-8.62, 8.71-8.74 or with the Federal regulations the latter two shall control.]

§ 8.51. [Notification of appeal rights.] (Reserved).

[(a) At the time of application and at the time of denial of participation or termination from the program, each individual shall be informed in writing of the right to a fair hearing, of the method by which a hearing may be requested, and that any positions or arguments on behalf of the individual may be presented personally or by a representative such as a relative, friend, legal counsel or other spokesperson. The notification is not required at the expiration of a certification period.

(b) The local agency shall use forms provided by the State agency to notify each individual of his appeal rights.]

§ 8.52. [Request for hearing.] (Reserved).

[A request for a hearing is any clear expression by the individual or the parent, guardian, or other representative of the individual, that an opportunity to present the case of the individual to a higher authority is desired. The State agency or local agency shall not limit or interfere with the freedom of the individual to request a hearing and shall provide whatever assistance is necessary to complete the request.]

§ 8.53. [Time limit for request.] (Reserved).

[The individual must request a hearing within 60 days from the date the agency mails or gives to the applicant or participant the notice of adverse action to deny or terminate benefits.]

§ 8.54. [Denial or dismissal of request.] (Reserved).

[The State agency and local agencies may not deny or dismiss a request for a hearing unless one of the following occurs;

- (1) The request is not received within the time limit in § 8.53 (relating to time limit for request).
- (2) The request is withdrawn in writing by the appellant or a representative.
- (3) The appellant or representative fails, without good cause, to appear at the scheduled hearing.]

§ 8.55. [Continuation of benefits.] (Reserved).

[(a) If a participant is found ineligible at any time during a certification period, the participant shall be advised in writing 15 days before termination of the reason for ineligibility

and of the right to a fair hearing. If a hearing is requested, benefits shall continue until the hearing official reaches a decision.

(b) Applicants and participants denied benefits at initial certification or at subsequent certifications may appeal the denial but shall not receive benefits while awaiting the hearing.]

§ 8.56. [Right of the appellant.] (Reserved).

[Each appellant has the following rights:

(1) To appear in person at the hearing. This paragraph supplements 1 Pa.Code §31.21 (relating to appearance in person).

(2) To represent himself or to be represented by an attorney, relative, friend or other person at the hearing. This paragraph supersedes 1 Pa.Code §§ 31.22 and 31.23 (relating to appearance by attorney; and other representation prohibited at hearings).

(3) To receive an explanation that the appellant may contact the local bar association for assistance in locating legal services.

(4) To present oral or documentary evidence, witnesses and arguments to support his position in accordance with procedures established by the hearing official. The procedures may not be unduly complex or legalistic and shall be designed to permit full understanding and participation of the appellant.

(5) To request a subpoena from the hearing official for the production of evidence or witnesses that the appellant determines are important to establish necessary facts. This paragraph supplements 1 Pa.Code § 35.142 (relating to subpoenas).

(6) To examine upon request, both before and during the hearing, the materials which the State agency or local agency has on file relative to the case which are not confidential.

(7) To be provided with the names of the program staff members and witnesses who will be present at the hearing.

(8) To question or refute any testimony or other evidence and to confront and cross-examine any adverse witnesses.

(9) To examine prior to and during the hearing documents and records presented to support the decisions under appeal.

(10) To submit evidence to establish all pertinent facts and circumstances in the case without undue interference.

(11) To appeal the final decision of the hearing official to the Secretary within 15 days of the mailing date of the hearing decision notice.

(12) To appeal the decision of the Secretary for judicial review in Commonwealth Court within 30 days.]

§ 8.57. [Responsibilities of the local agency.] (Reserved).

[(a) At the time of application and at the time of denial of participation or termination from the program, the local agency shall inform each individual of his appeal rights on forms provided by the State agency.

(b) The local agency shall accept any written or oral request for a hearing and initiate the procedures described in subsections (c)-(f) immediately.

(c) The local agency shall provide the necessary forms; explain to the applicant or participant how to file the hearing request; and, if necessary, provide assistance in completing the form.

(d) The local agency shall explain to the appellant his rights under the fair hearing procedure as described in § 8.56 (relating to rights of the appellant).

(e) The local agency shall give the appellant a written explanation of the time limits for action on the request.

(f) The local agency shall forward the hearing request and proposed action to the State agency within seven days of receipt of the hearing request.

(g) The local agency shall comply with the decision of the hearing official and shall inform the State agency in writing of such compliance.]

§ 8.58. [Responsibilities of the State agency.] (Reserved).

[(a) The State agency will acknowledge the request of the appellant for a hearing. A request for a hearing will be acknowledged by written communication from the State agency to the appellant and to the local agency within 2 working days of receipt of the appeal.

(b) The State agency will date-stamp the hearing request upon receipt and review it.

(1) If the State agency determines that the decision in question is in accord with program regulations, it will forward the hearing request to the hearing official within 2 days from the time the request is received for scheduling of a fair hearing.

(2) If the State agency determines that the decision in question is not in accord with program regulations or if new or additional information is introduced which alters the decision, it will take corrective action.

(c) The State agency will provide the appellant with a minimum of 10 days advance written notice of the time and place of the hearing. The State agency will enclose an explanation of the hearing procedure with the written notice. This subsection supersedes 1 Pa.Code § 35.105 (relating to notice of nonrulemaking proceedings).

(d) The State agency will notify the local agency of the decision of the hearing official.

(e) The State agency will review the compliance statement of the local agency to assure that the local agency has correctly complied with the decision. The State agency will maintain the compliance statement on file.]

§ 8.59. [Responsibilities of the hearing official.] (Reserved).

[(a) Hearings shall be conducted by an impartial official who does not have any personal stake or involvement in the decision and who was not directly involved in the initial determination of the action being contested.

(b) The hearing official shall schedule the hearing within three weeks from the filing date of the request for a fair hearing.

(1) The place of hearing shall be no further from the residence of the appellant than the county seat of the county in which the appellant resides. If the county seat is unsuitable due to the health of the appellant, transportation problems, convenience of witnesses, or for other legitimate

reasons, the alternative place of hearing shall be a location convenient to the home of the appellant.

(2) If the appellant wishes to postpone the hearing, he must contact the hearing official and provide the hearing official with reason for postponement. The hearing shall be rescheduled as soon as possible.

(3) An appellant may withdraw his request for a hearing at any time before a decision is made by the hearing official. This withdrawal must be written and directed to the hearing official. This paragraph supersedes 1 Pa.Code § 35.51 (relating to withdrawal of pleadings).

(4) If the appellant or the representative of the appellant fails to appear at the scheduled hearing without good cause as determined by the hearing official, the appeal shall be considered abandoned and shall be closed.

(c) The hearing official shall order, where relevant and necessary, an independent medical assessment or professional evaluation from a source mutually satisfactory to the appellant and the State agency.

(d) The hearing official shall render a hearing decision based exclusively on the hearing record. This subsection supersedes 1 Pa.Code § 35.201 (relating to certification of record without proposed report).]

§ 8.60. [Hearing decisions.] (Reserved).

[(a) Decisions of the hearing official shall comply with Federal law, regulations, and policy and shall be factually based on the hearing record. The verbatim transcript or recording of testimony and exhibits or an official report containing the substance of what transpired at the

hearing, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for a final decision by the hearing official. This record shall be retained for a period of three years. This record shall also be available, for copying and inspection, to the appellant or his representative at any reasonable time. This subsection supersedes 1 Pa.Code § 35.131 (relating to recording of proceedings).

(b) A decision by the hearing official shall be binding on the local agency and shall summarize the facts of the case, specify the reasons for the decision, and identify the supporting evidence and the pertinent regulations or policy. The decision shall become a part of the record.

(c) Within 45 days of the filing date of the request for the hearing, the appellant or representative shall be notified in writing of the decision and the reasons for the decision in accordance with subsection (b). If the decision is in favor of the appellant and benefits were denied or discontinued, benefits will begin with this 45 day time period. If the decision is in favor of the agency, the written notice to the appellant will include the right to a rehearing by the Secretary. Any continued benefits shall be terminated as soon as administratively possible as decided by the hearing official.

(d) All State agency and local agency hearing records and decisions shall be available for public inspection and copying, provided the names and addresses of participants and other members of the public are kept confidential.]

§ 8.61. [Rehearing.] (Reserved).

[(a) If the appellant wishes to appeal the decision of the hearing official, a request for rehearing must be submitted in writing to the Secretary within 15 days of the mailing date of the decision of the hearing official. The request shall contain a statement of reasons for rehearing. If the request for rehearing is to permit presentation of additional evidence, the request shall:

- (1) Present the additional evidence.
- (2) Explain why it was not previously introduced.
- (3) Explain its materiality unless it is obvious.

(b) The Secretary will grant or deny the request within 3 weeks after the filing date and will notify the appellant in writing. This subsection supersedes 1 Pa.Code

§ 35.190(c) (relating to appeals to agency head from rulings of presiding officers). If a request for a hearing is granted, the Secretary may:

- (1) Reconsider the decision on the basis of the evidence in the record.
- (2) Admit additional evidence.
- (3) Order a new hearing; if the Secretary denies the request for rehearing, he should state the reason for the denial.

(c) In cases in which the original fair hearing decision has resulted in a termination or reduction of benefits to the appellant, there shall be no reinstatement of benefits upon filing of a request for a rehearing. The reinstatement of benefits, if granted, shall be solely as a result of the rehearing decision. If the appeal of the appellant is sustained, benefits shall be issued for the period for which none were granted pending rehearing.]

§ 8.62. [Judicial review.] (Reserved).

[The decision of the Secretary will state that the appellant has the right to appeal to Commonwealth Court for judicial review within 30 days after the date of the decision of the Secretary.]

§ 8.71. [Right to appeal.] (Reserved).

[A food vendor or local agency adversely affected by a State agency or local agency action has the right to appeal. The right of appeal shall be granted when a local agency's or food vendor's application to participate is denied, when participation is terminated, when a contract is not renewed by the State agency, or when any other adverse action is taken by the State agency. The appeal process is designed to secure and protect the interest of both the appellant and the State agency and to insure equitable treatment for all involved. The adverse action shall be postponed until a hearing decision is reached.]

§ 8.72. [Appeal procedures.] (Reserved).

(a) Notification. Each local agency or food vendor adversely affected by a State agency action will be notified of the right to an administrative appeal.

(b) Request for a hearing. The request for a hearing may be made by the appellant or his representative in writing or in person stating the reasons for the request to the State program

coordinator within 30 days of any final decision by the State agency.

(c) *Scheduling the hearing.* Scheduling of hearings will comply with the following:

(1) The State program coordinator will notify the appellant in writing that his request for a hearing has been received and will appoint a time, date, and place for the hearing.

(2) Notice will be sent at least 10 days in advance of the hearing.

(3) If the appellant indicates that he desires another time and date, the State program coordinator will consider the request.

(4) The hearing will be held within 3 weeks from the date of the receipt of the request.

(5) This subsection supersedes 1 Pa.Code § 35.105 (relating to notice of nonrulemaking procedures).

(d) *Hearing official.* The Secretary will appoint a hearing official to decide the issue. Such person shall not have participated in the original decision or have any personal stake in the outcome. This subsection supersedes 1 Pa.Code § 35.185 (relating to designation of presiding officers).

(e) *Hearing procedures.* Hearing procedures shall comply with the following:

(1) The appellant may be assisted or represented by an attorney or other person. This paragraph supplements 1 Pa.Code § 31.21 (relating to appearance in person) and supersedes 1 Pa.Code § 31.22 and § 31.23 (relating to appearance by attorney; and other representation prohibited at hearings).

(2) The appellant or his representative may examine, prior to and during the hearing, the documents and records presented to support the decision under appeal.

(3) The hearing shall be open to the public.

(4) Both parties shall have the opportunity to present and cross-examine witnesses.

(5) The appellant may present any oral or documentary evidence and arguments to support his position in narrative form without interruption.

(6) The appellant may question or refute any testimony or other evidence presented by any other party.

(f) *The decision.* Decisions of the hearing official shall comply with the following:

(1) The decision of the hearing official shall be based only on the oral and documentary evidence presented at the hearing and applicable rules and regulations. It shall be made a part of the hearing record. 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.

(2) The hearing official shall notify in writing the State program coordinator and the appellant of the decision within 45 days from the date of the request for the hearing.

(3) The hearing official shall prepare a written record of the hearing. The record shall include the name of the decision under appeal, any documentary evidence submitted, a summary of any oral testimony presented at the hearing, the decision of the hearing official and the reasons therefore, and a copy of the notification to the appellant.

(4) Paragraphs (1)-(3) supersede 1 Pa.Code §§ 35.131, 35.201, 35.202 and 35.205.]

§ 8.73. [Continuing responsibilities.] (Reserved).

[Appealing an action does not relieve the local agency or food vendor from the responsibility of continued compliance with the terms of any written agreement or contract with the State agency or local agency.]

§ 8.74. [Rehearing and judicial review.] (Reserved).

[If the decision of the hearing official is rendered against the local agency or food vendor and the local agency or food vendor expresses an interest in pursuing a higher review of the decision, the State agency will explain any available State level review of the decision and any available State level rehearing process. If their remedies have been exhausted, the State agency will explain the right to pursue judicial review of the decision.]

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**PART VIII. SUPPLEMENTAL NUTRITION PROGRAM FOR WOMEN, INFANTS
AND CHILDREN (WIC PROGRAM)**

CHAPTER 1101. GENERAL PROVISIONS

§1101.1 Background and scope.

(a) Background. Through an amendment to the Child Nutrition Act of 1966, 42 U.S.C. §1786, Congress has authorized the USDA-FNS to contract with state agencies for the establishment of the WIC Program. The USDA-FNS contracts with and makes funds available to the Department to administer the WIC Program in Pennsylvania.

The purpose of the WIC Program is to provide allowable foods to income eligible pregnant, breast-feeding or postpartum women, infants, and children up to five years of age, who are at nutritional risk because of medical problems or poor diets. The WIC Program provides these individuals with nutritious foods to supplement their diets during critical stages of growth

and development. These foods are chosen to correct, prevent, or minimize health and nutritional problems. The foods are not intended to be a complete diet, but, rather, to supplement other foods available to the participants.

In addition to providing supplemental foods, the WIC Program refers applicants and participants to health services and offers nutrition education so that the food will be properly used and will improve the dietary and health habits of the entire family. The Department uses a retail purchase system to provide the majority of food benefits to participants.

(b) Scope. The chapters in this part establish design and operational requirements for the food delivery system for the WIC Program, and prescribe procedures to be used by applicants, participants, local agencies and stores to appeal actions of the Department and local agencies that may adversely impact upon them.

§1101.2. Definitions.

The following words and terms when used in this part have the following meanings, unless the context clearly indicates otherwise:

Allowable foods - Foods and infant formula on the WIC food list. These products meet nutritional standards established by the USDA-FNS and are authorized by the Department for purchase with WIC checks.

Applicant - An individual applying to become a participant.

Authorized representative - For an applicant or participant, an adult applicant or participant, a parent or guardian of an applicant or participant who is an infant or child, or an individual designated by such person to represent the applicant or participant in administrative proceedings involving the WIC Program. For a local agency or store, an individual designated by the local agency or store to represent it in administrative proceedings involving the WIC Program.

Breastfeeding woman - A woman, during one year postpartum, who is breastfeeding her infant.

Certification - For purposes of Chapters 1101-1109 and Chapter 1113 of this Part, certification shall mean the Department's acceptance of a store, not currently authorized to participate in the WIC Program, as a WIC authorized store. For purposes of Chapter 1111 of this Part, certification shall mean the Department's acceptance of an applicant to participate in the WIC Program as a participant.

Child - A person one year of age or older but under five years of age.

Clinic - A facility where applicants apply for and participants receive WIC Program services other than food benefits.

Compliance buy - A covert purchase at a WIC authorized store, with a WIC check, conducted to enable the Department to evaluate adherence by a WIC authorized store with regulations governing the store's participation in the WIC Program.

Compliance investigation - A series of at least two compliance buys conducted at the same WIC authorized store.

Competent professional authority - An individual on the staff of the local agency authorized to determine nutritional risk and prescribe supplemental foods. The following persons are the only persons the Department will authorize to serve as a competent professional authority: Physicians, nutritionists (bachelor's or master's degree in Nutritional Sciences, Community Nutrition, Clinical Nutrition, Dietetics, Public Health Nutrition or Home Economics with emphasis on nutrition), dieticians, registered nurses, physician's assistants (certified by the National Committee on Certification of Physician's Assistants or certified by the State medical certifying authority), or State or local medically trained health officials. This definition also applies to an individual who is not on staff at the local agency but who is qualified to provide data upon which nutritional risk determinations are made by a competent professional authority on staff of the local agency.

Department - The Department of Health of the Commonwealth.

Disqualification - For the purposes of Chapters 1101-1109 and Chapter 1113 of this part, disqualification means the action by the Department to end participation of a WIC authorized

store in the WIC Program for reasons of fraud, abuse or other violations of regulations governing the store's participation in the WIC Program. For purposes of Chapter 1111, disqualification means action by the Department or local agency to end participation of a participant who no longer meets the qualifications necessary to participate in the WIC Program or for reasons of fraud, abuse or violation of standards governing the participant's enrollment in the WIC Program.

Division of WIC - Division of WIC in the Department.

Endorser - The parent or guardian of an infant or child participant who is authorized to use and sign the WIC checks of the infant or child for purchase of allowable foods.

Filing date - The date on which the local agency or the Department receives an appeal.

Food prescription - A designation by a competent professional authority of allowable foods in specified quantities to meet a participant's nutritional needs based upon a determination of nutritional risk.

Health services - Routine pediatric and obstetric care (such as infant and child care and prenatal and postpartum examinations) or referral for treatment.

High risk store - A store identified as a possible perpetrator of fraud or abuse through analysis of redemption patterns of WIC checks or WIC sales, through compliance violations, or by complaints of participants or WIC Program staff.

Infant - A person under one year of age.

Inventory audits - A comparison of a WIC authorized store's inventory levels and purchases of a particular WIC product or products over a specific period of time, to actual WIC purchases of the same product or products during the same period of time, to determine if the store had adequate product quantities available to satisfy claims made for WIC reimbursement of the product or products during the same period of time.

Limitation criteria - Criteria established by the Department to limit the number of WIC authorized stores in a particular area to assure that State and local officials can effectively manage, review and monitor WIC authorized stores.

Local agency - A public or private non-profit health or human service agency with which the Department contracts to provide WIC Program services for a specific geographic area.

Nutritional risk - A determination that one of the following exists:

- (i) Detrimental or abnormal nutritional conditions detectable by biochemical or anthropometric measurements.
- (ii) Other documented nutritionally related medical conditions.

- (iii) Dietary deficiencies that impair or endanger health.
- (iv) Conditions that predispose persons to inadequate nutritional patterns or nutritionally related medical conditions.

On-site review - An overt visit to a store by Federal, Department or local agency personnel to determine if the store meets the selection criteria necessary to be certified or recertified as a WIC authorized store, or a visit to a WIC authorized store after certification or recertification, to determine whether the store is complying with regulations governing the store's participation in the WIC Program.

Participant - A pregnant woman, breast-feeding woman, postpartum woman, infant or child enrolled in the WIC Program.

Participant certification period - The period of time during which an individual is authorized to participate in the WIC Program.

Postpartum woman - A woman, during six months after termination of pregnancy.

Pregnant woman - A woman determined to have one or more embryos or fetuses in utero.

Proxy - A person authorized by the local agency and the participant, or by the participant's parent or guardian if the participant is an infant or child, to pick up or use WIC checks to make purchases for that participant.

Recertification - The Department's authorization of a WIC authorized store, following a review process, to continue as a WIC authorized store.

Redeem - A WIC authorized store submitting a WIC check to its bank for the purpose of securing a money payment for the amount appearing in the "Pay Exactly" box on the WIC check.

Sales floor - The display shelving, the floor in the area normally used for retail trade and the area behind the customer service desk, excluding areas not accessible to the general public.

Sanction - A penalty imposed by the Department upon a WIC authorized store for violation of regulations governing the store's participation in the WIC Program. A decision to deny certification or recertification following a certification or recertification on-site review process is not a sanction.

Secretary - The Secretary of Health of the Commonwealth.

Selection criteria - Criteria established by the Department which a store seeking to be certified or recertified is required to satisfy.

Standard formula - Infant formula products that 1) meet the Federal WIC regulatory definition of an iron-fortified formula (7 C.F.R. §246.10 (c)(1)(I)); 2) comply with the Infant Formula Act of 1980 (P.L. 96-359), amending the Food and Drug Act; and 3) meet the requirements of an "infant formula" as opposed to an "exempt infant formula" or "medical food" as determined by the Food and Drug Administration (FDA), United States Department of Health and Human Services.

Stale-dated - After the date imprinted on the product as the recommended last date for sale or use.

Store slot - A slot established by the Department for a WIC authorized store in a particular geographic area. The number of store slots the Department authorizes for a geographic area assigned to a local agency is based on the expected participant population of that area.

Trade area - A designated geographic area within the geographical area assigned to a local agency, which is organized to serve the participant populations in that designated area through an assigned number of store slots.

Training buy - The presentation of a WIC check by a Federal, Department or local agency representative to purchase foods at a WIC authorized store, which does not result in the actual

tender of the WIC check or the purchase of the foods, to evaluate adherence by a WIC authorized store with regulations governing the store's participation in the WIC Program.

USDA-FNS - The United States Department of Agriculture, Food and Nutrition Service.

WIC authorized store - A retail food store which is authorized through certification or recertification to provide allowable foods to participants by accepting WIC checks.

WIC check - A negotiable instrument issued to participants to purchase allowable foods at WIC authorized stores.

WIC food list - A list published by the Department in the *Pennsylvania Bulletin* of foods and infant formula which may be purchased with WIC checks.

WIC identification card - A document issued by the Department to a participant, which is used for identification purposes, signature verification, and authorization to purchase allowable foods with WIC checks at a WIC authorized store.

WIC Program- The Special Supplemental Nutrition Program for Women, Infants, and Children.

WIC Program benefits - Supplemental foods, nutrition education and referral to health services.

§1101.3. Administration.

(a) Department responsibilities. The Department will develop policies and procedures for the operation of the WIC Program, distribute funds to local agencies to assist the Department in operating the WIC Program, authorize stores to participate in the WIC Program, monitor and evaluate WIC Program services provided by WIC authorized stores, maintain fiscal records, submit reports, and carry out all other responsibilities delegated to it by the USDA-FNS for the operation of the WIC Program.

(b) Local agency responsibilities. Local agencies shall determine whether participants meet eligibility criteria developed by the Department, develop food prescriptions for participants, provide nutrition education to participants, provide referral information regarding ongoing health services, issue WIC checks to participants to purchase allowable foods, and ensure that all participants are served without discrimination. Local agencies shall function as representatives of the Department in conducting certification and recertification reviews, and in monitoring the activities of WIC authorized stores.

CHAPTER 1103. AUTHORIZATION OF STORES

§1103.1. Certification and recertification reviews.

(a) Qualifying for certification or recertification. To be certified or recertified as a WIC authorized store, a store shall meet the selection criteria in §1103.4(a) (relating to selection

and limitation criteria; authorization process) at the time of the on-site review. If the number of applicants satisfying the selection criteria exceeds the number of stores the Department permits to participate in the WIC Program in a trade area pursuant to the limitation criteria in §1103.4(b), the Department will determine which store or stores to certify or recertify pursuant to the process in §1103.4(c). The Department shall exempt a store from satisfying the selection and limitation criteria only if there is a finding of participant hardship, as set forth in §1103.7 (relating to participant hardship).

(b) Certification or recertification review process. The certification or recertification review process is as follows:

(1) A person authorized on behalf of a store to make an application for certification or recertification shall contact the local agency responsible for the county in which the store is located to request an application.

(2) The local agency shall determine if a store slot is available in the trade area in which the store seeking certification or recertification is located.

(3) If a store slot is available, the local agency shall send the WIC Program information and an application to the store.

(4) A store that is not certified shall complete the application in accordance with the instructions therein and return it to the local agency. If the local agency is apprised by a certified store that it wants to be recertified, the local

agency shall collect the application from the store at the time of the on-site review. The Department will not accept an application for certification or recertification from a store that has been provided notice of disqualification or is disqualified, from the WIC Program, or from an individual or other person if the individual or other person had at least a ten percent ownership interest in a disqualified store or such ownership interest has been transferred or sold to an immediate family member of an individual who had such an ownership interest. A

WIC Program disqualification period shall be completed before an application will be accepted by the Department.

(5) A person authorized on behalf of a chain of stores to make an application for certification or recertification shall complete a separate application for each store in the chain that seeks certification or recertification.

(6) The local agency shall schedule an on-site review of the store for the purpose of determining if the store meets the selection and limitation criteria set forth in §1103.4(a) and (b). The local agency will notify the store of the approximate date of the review.

(7) The local agency shall conduct the on-site review and forward the results to the Department for a decision on the store's application for certification or recertification.

(8) The Department will notify the store of its decision on the store's application for certification or recertification.

(c) Duration of certification or recertification. The certification or recertification of a store shall remain in effect until such time as the store is disqualified, changes ownership, withdraws from the WIC Program, its application for recertification is denied, or its certification expires if it fails to apply for recertification. The Department will provide 15 days written notice to the store prior to expiration of WIC authorization for any store failing to apply for recertification. Either the Department or the WIC authorized store may terminate the authorization for cause after providing at least 15 days advance written notice.

(d) Periodic reviews. At least once every two years, the Department will conduct contemporaneous certification and recertification reviews in a trade area for the purpose of filling store slots in that trade area with WIC authorized stores. Both stores that are certified, and stores that are not certified but want to become WIC authorized stores, shall make an application for certification or recertification. The Department will send a notification of the contemporaneous certification/recertification review process to each WIC authorized store and each store on the waiting list. The notice shall include information advising the store of the procedure for being reviewed for the purpose of receiving certification or recertification. The Department shall notify a store which fails to seek recertification or is denied recertification pursuant to this subsection of the date the store's current certification expires. Expiration of the certification shall be no less than 30 days after the mailing date of the notice.

(e) Moratorium on applications. The Department will not accept applications, or schedule or conduct certification reviews in a trade area 90 days or less prior to the scheduled start date of the contemporaneous certification/recertification reviews in that trade area. The Department will grant an exception to this moratorium only if the Department finds that there would be participant hardship, as set forth in §1103.7, if it does not consider the application. A store granted certification pursuant to this exception shall be exempt from the contemporaneous certification/recertification review if it has been certified for less than 60 days prior to the date the contemporaneous reviews begin in the trade area.

(f) No opportunity to correct problems. When the Department is making a decision on an application for certification or recertification, it will deny the application if the criteria for certification or recertification are not satisfied. The Department will make its decision on the application without providing a warning or an opportunity to correct problems identified during the certification or recertification review.

(g) Eligibility for stores denied certification or recertification. A store which has been denied certification or recertification shall wait six months from the date of the Department's decision to reapply, except a store denied certification or recertification pursuant to §1103.4(c)(2) will be placed on a waiting list and will be considered immediately for certification if a store slot becomes open.

§1103.2. Probationary certification.

(a) Criteria for probationary certification. If during the certification or recertification review, the store fails to meet one or more of the qualifications set forth in §1103.4(a) and (b) (relating to selection and limitation criteria; authorization process), the Department may grant probationary certification to the store for a period not to exceed six months when either of the following applies:

- (1) Participant hardship would occur if the store is not certified or recertified.
- (2) A store is reviewed prior to opening to the public and the store has not stocked its dairy section or its frozen juice section at the time of the review.

(b) Probationary certification reviews.

- (1) If a store receives probationary certification, except in situations of participant hardship identified in §1103.7 (b)(8), the Department will conduct an unannounced on-site review during the probationary certification period to determine if regular status should be granted to the store. The Department may rescind probationary certification and deny the store's application to serve as a WIC authorized store if the store fails to meet one or more of the selection criteria during this review.
- (2) If a store receives probationary certification due to participant

hardship as identified in §1103.7 (b)(8), the Department will conduct a certification review of the store and any other stores on the waiting list within the store's trade area. The Department may rescind probationary certification and deny the store's application to serve as a WIC authorized store if the store fails to meet one or more of the selection or limitation criteria during this review.

(c) *Extension of probationary certification.* If the store fails the review conducted during the probationary certification period, and participant hardship exists as determined by the Department, the Department may extend probationary certification for an additional period of three months during which time at least one representative of the store who is responsible for training store personnel on the WIC Program shall attend corrective training.

(d) *Extended probationary certification reviews.* The Department will conduct an unannounced on-site review during the extended probationary certification period after the store representative has attended corrective training, to determine if certification should be granted to the store. The Department will rescind probationary certification and deny the store's application to serve as a WIC authorized store if the store fails to meet one or more of the selection criteria during this review.

(e) *Rescission of probationary certification.* If the Department rescinds the probationary or extended probationary certification of a store, the store shall not be eligible to reapply for certification for six months from the date of the Department's rescission of such certification.

§1103.3. Authorization of store slots.

The Department will assign one store slot for every 160 participants anticipated by the Department to participate in the WIC Program, except in Philadelphia, where the Department will assign one store slot for every 260 participants anticipated by the Department to participate in the WIC Program.

§1103.4. Selection and limitation criteria; authorization process.

(a) Selection criteria. The Department will use the following selection criteria to identify stores that meet the operational criteria to serve as a WIC authorized store:

(1) The store shall be located within the Commonwealth of Pennsylvania.

(2) A store shall serve or reasonably expect to serve at least 25 participants per month.

(i) The Department will provide a store seeking certification which has not been certified previously, an eight month period to determine if the store is serving 25 participants. The Department may disqualify a store for a period of no less than six months in accordance with §1107.1(i) (relating to sanctions) if it is not serving 25 participants at the end of the eight month period.

(ii) The Department may deny recertification if the store is not serving

25 participants per month in the most recent month for which the Department has participant data at the time the recertification review is conducted.

- (3) The store shall have allowable foods properly stored and refrigerated.
- (4) The store shall not have stale-dated allowable foods on its sales floor.
- (5) The store shall have available on the sales floor at all times the minimum inventory requirements in §1103.5 (relating to minimum inventory) of allowable foods.
- (6) The store shall have shelf prices less than the maximum allowable cost established by the Department for Food Prescription One and Food Prescription Two. The highest price of each allowable food available at the store, regardless of brand, shall be recorded to determine if the store's prices are within the maximum allowable prices established by the Department. The Department will publish in the *Pennsylvania Bulletin*, no later than September 15 of each year, the maximum allowable prices for Food Prescription One and Food Prescription Two. Any revisions to the maximum allowable prices will be published in the same manner. Food Prescription One and Food Prescription Two are as follows:

(i) Food Prescription One consists of:

18 quarts or nine half gallons of milk;
one pound of cheese;
one dozen eggs;
one 15 to 18 ounce container of peanut butter or
one pound of dried beans or peas;
four 11.5 to 12 ounce containers of frozen concentrated juice
or four 46 ounce cans of single strength juice; and
30 ounces of cereal.

(ii) Food Prescription Two consists of:

24 13 ounce cans of concentrated contract brand milk or soy based
infant formula.

(7) The store shall be open for business at least eight hours per day, six days
per week.

(8) The store shall be sanitary. There shall be no evidence of unremoved
rubbish, vermin, or general lack of cleanliness.

(9) The store shall operate in a permanent fixed location where participants
may purchase allowable foods with their WIC checks.

(10) The store shall not be currently disqualified from participation in the Food
Stamp Program or have had a sanction imposed by the USDA-FNS for Food

Stamp Program violations within two years prior to the application to participate in the WIC Program.

(11) The store shall not be currently disqualified from the WIC Program or have been denied certification or recertification by the WIC Program within the past six months unless the conditions of §1103.6 (a) (2)(relating to waiting lists) are met.

(12) The store shall have implemented all required corrective actions resulting from monitoring by the Department, including repayment of any overcharges to the WIC Program, and shall be in compliance with all applicable Federal and State regulations.

(b) Limitation criteria. The Department will use the following criteria to limit the number of WIC authorized stores in a trade area:

(1) A store slot shall be available in the trade area in which the store is located.

(2) The store shall not be located within one mile of another WIC authorized store unless, in the discretion of the Department, there is sufficient WIC participant enrollment in that area to support an additional WIC authorized store or stores.

(c) Authorization process.

(1) If the total number of stores meeting all selection criteria are less than or equal to the total number of store slots assigned to the trade area, all stores meeting the selection criteria shall be authorized to participate in the WIC Program.

(2) If the total number of stores meeting all selection criteria are greater than the total number of store slots assigned to the trade area, the Department shall certify or recertify the stores having the lowest weighted prices for the two food prescriptions, until the store slots in the trade area have been filled. For determining the weighted food prices for the two food prescriptions, the Department will add 80% of the total of the store's highest price for Food Prescription One to 20% of the store's highest price for Food Prescription Two.

(3) The criteria in paragraph (2) shall also apply when more than one store applies for certification or recertification within one mile and there is not a sufficient number of participants in the area to support an additional WIC authorized store or stores.

§ 1103.5. Minimum inventory.

(a) A store shall have available on the sales floor at the time of the certification or recertification on-site review, and maintain at all times thereafter while participating as a WIC authorized store, minimum inventory requirements of allowable foods.

(b) Minimum inventory requirements of allowable foods are as follows:

(1) Formula.

(i) Contract milk-based formula with iron.

(A) Sixty-two 13 ounce cans of liquid concentrate;

(B) Twenty-five 32 ounce cans of ready-to-feed; and

(C) Six 14.1 ounce cans of powdered

(ii) Contract soy-based formula.

(A) Thirty-one 13 ounce cans of liquid concentrate,

(B) Twenty-five 32 ounce cans of ready-to-feed; and

(C) Six 14 ounce cans of powdered.

(iii) Other standard formulas specified on the WIC check are not minimum inventory requirements. The store shall be able to provide these within 72 hours after a participant makes a request for the formula.

(2) Milk.

(i) Fluid whole, vitamin D fortified, 14 one-half gallons or quart equivalent.

(ii) Fluid skim or low fat, vitamin A and D fortified, four one-half gallons or quart equivalent.

(iii) Nonfat dry, two pounds, in one or two pound containers.

(iv) Evaporated, twelve 12 ounce cans.

(3) Natural domestic cheese.

One pound each of three varieties prepacked in 8 or 16 ounce packages.

- (4) Grade "A" eggs.
Five, 1 dozen containers.
- (5) Juices.
 - (i) Canned, three varieties with a total of nine 46 ounce cans.
 - (ii) Frozen concentrated, two varieties with a total of nine 11.5 to 12 ounce containers.
 - (iii) Infant, three varieties with a total of fifteen 4 ounce individual containers.
- (6) Cereal.
 - (i) Adult, five varieties in eight ounce or larger packages totaling at least 72 ounces.
 - (ii) Infant, two varieties, totaling at least 32 ounces.
- (7) Peanut butter.
Five 15 to 18 ounce containers.
- (8) Dried peas and beans.
Two varieties, one pound each.
- (9) Tuna.
Four 6 to 6.5 ounce cans, chunk, light, packed in water.
- (10) Carrots.
Two pounds of whole, unpeeled fresh carrots in one or two pound cello pack, or two cans of sliced carrots in 14 to 20 ounce cans.

(c) Annual publication of WIC food list. The Department will publish in the Pennsylvania Bulletin, no later than September 15 of each year, the name of the contract brand of formula and, if applicable, the names of allowable brands of foods, and the maximum price permitted for those allowable foods for which the Department establishes a maximum price.

(d) Waivers. The Department may grant minimum inventory waivers for allowable foods listed in subsection (e) under the following circumstances:

(1) For a WIC authorized store, the Department has no current reported purchases of the allowable foods based upon WIC checks redeemed by the store.

(2) For a store seeking certification, the Department has no current reported purchases of the allowable foods based upon WIC checks redeemed by the WIC authorized store closest to the store applying for certification.

(3) The store occupies the same physical location as a prior WIC authorized store, the waiver was granted to the prior WIC authorized store, and the application for certification from the new owner is received by the Department within three months after the date the prior WIC authorized store's certification to participate in the WIC Program terminated.

(e) Waiverable allowable foods. These foods are:

(1) Contract milk based with iron ready-to-feed infant formula.

(2) Contract milk based with iron powdered infant formula.

(3) Contract soy based ready-to-feed infant formula.

(4) Contract soy based powdered infant formula.

(5) Nonfat dry milk.

(6) Evaporated milk.

(7) Carrots.

(8) Tuna.

(f) Expiration of waivers. A minimum inventory waiver of an allowable food granted by the Department shall expire upon the presentation to the store, on behalf of a participant, of a WIC check for the purchase of that allowable food. The WIC authorized store shall provide the food item within 72 hours after presentation of the WIC check.

§1103.6. Waiting list.

(a) Placement of stores on the waiting list. The Department will place on a waiting list eligible stores as follows:

(1) A store that seeks to become a WIC authorized store if no store slots are open in the trade area where the store is located.

(2) When the total number of stores seeking certification or recertification is greater than the total number of store slots available for the trade area, and the store meets all selection criteria and has prices within the maximum allowable costs of Food Prescription One and Food Prescription Two, but

is denied authorization because its weighted price is higher than other stores meeting all selection and limitation criteria.

- (3) A store that seeks to apply during a moratorium as set forth in §1103.1(c)(relating to certification and recertification reviews; authorization process).

(b) Certification review of stores on waiting list. The Department will ensure that all stores on the waiting list in a trade area will be reviewed when a store slot becomes available in the trade area, or when stores in the trade area are reviewed during the next contemporaneous certification/recertification review process. The only exception to reviewing all stores on the waiting list is when a store slot opens as a result of a change of ownership of a store and the store, under new ownership, applies for certification pursuant to section §1105.4(d)(relating to change of ownership of a WIC authorized store). The Department will review the store under its new ownership to determine if the store should receive certification.

§ 1103.7. Participant hardship.

(a) The Department will consider whether there is participant hardship when considering whether to place a store on probation, rather than deny certification or recertification, for failure to meet selection and limitation criteria in §1103.4(a) and (b) (relating to selection and limitation criteria; authorization process) during certification and recertification reviews or change of ownership reviews.

(b) Participant hardship is any of the following:

(1) Ten or more participants whose specific nationality, ethnicity or religious dietary needs can not be served properly by another WIC authorized store located within three miles of the store, except in Philadelphia, where the distance of one mile to the next closest WIC authorized store will be used for the determination.

(2) Ten or more participants will be required to travel three or more miles to the next closest WIC authorized store, except in Philadelphia, where the distance of one mile to the next closest WIC authorized store will be used for the determination.

(3) Ten or more people are affected by physical barriers or conditions which make normal travel to another WIC authorized store impractical.

(4) A participant has a physical disability that cannot be accommodated by another WIC authorized store within three miles, except in Philadelphia, where the distance of one mile to the next closest WIC authorized store will be used for the determination.

(5) One hundred or more participants but less than 200 participants use WIC checks to purchase allowable foods at the store and the distance to the next closest WIC authorized store exceeds two miles.

(6) Two hundred or more participants but less than 300 participants use WIC checks to purchase allowable foods at the store and the distance to the next closest WIC authorized store exceeds one mile.

(7) Three hundred or more participants use WIC checks to purchase allowable foods at the store and the distance to the next closest WIC authorized store exceeds three tenths of a mile.

(8) A WIC authorized store changes ownership without the Department receiving prior notice sufficient to arrange other accommodations for participants.

CHAPTER 1105. REQUIREMENTS OF WIC AUTHORIZED STORES

§ 1105.1. Training.

(a) Initial training. Following certification, the local agency shall provide initial training for the personnel a certified store designates. The training shall be mandatory and shall occur within 30 days after the date of certification. A store receiving certification shall not accept WIC checks prior to having its designated personnel attend the initial mandatory training.

(b) Annual training. The Department will provide for WIC authorized stores annual training which is designed to prevent WIC Program errors and abuses and to improve WIC Program services. The following apply to annual training:

(1) A WIC authorized store shall ensure that at least one representative from the store who is responsible for training store personnel on the WIC Program shall attend.

(2) Attendance is mandatory.

(3) The Department will offer each WIC authorized store two opportunities to attend.

(4) The Department will ensure that annual training is offered to a WIC authorized store either within the county in which it is located or in an adjoining county within the appropriate local agency's jurisdiction.

(5) Failure to have at least one representative attend training shall result in the Department imposing sanctions against the WIC authorized store as set forth in §1107.1 (relating to sanctions).

(c) Corrective training. The Department will provide corrective training as set forth in §1103.2 (relating to probationary certification) and §1105.6 (relating to monitoring of WIC authorized stores). Attendance is mandatory.

§1105.2. Overcharge recovery system.

(a) Quarterly price reports. A WIC authorized store shall provide to the Department, in a format prescribed by the Department, the highest prices the store charged for allowable foods during the previous quarter for which the Department collects prices. The report shall be known as the Quarterly Price Report. A store may submit its Quarterly Price Report by mail or via facsimile. If submitted by mail, the Quarterly Price Report shall be postmarked no later than the 15th of the month following the end of the calendar quarter. If submitted via facsimile, the Quarterly Price Report must be received by the Department by the 15th of the month following the end of the calendar quarter.

(b) Department review. The Department will review WIC check amounts redeemed by a WIC authorized store against the prices reported on the store's Quarterly Price Report to determine and collect overcharges owed to the Department.

(c) Determination of maximum redemption amount of each WIC check. For each WIC check redeemed for which the store was reimbursed for the sale of foods for which the Department collects prices, the Department will determine the maximum amount for which the WIC authorized store could have redeemed the check based upon prices provided in the Quarterly Price Reports supplied by the store.

(d) Determination of overcharges. The Department will compare the maximum amount for which a WIC authorized store could have redeemed a WIC check based upon the prices in the store's Quarterly Price Report, against the actual amount for which each WIC check accepted by the store during a reporting quarter was redeemed, to determine any overcharge owed to the Department.

(e) Pursuit of reimbursement. The Department will seek reimbursements from a WIC authorized store for the store's overcharges totaling \$10 or more for a calendar quarter.

(f) Reimbursement of overcharges. A WIC authorized store shall submit reimbursement of overcharges to the Department within 20 calendar days of the date on the Department's billing notice for the overcharge, unless the WIC authorized store disputes the overcharge determination.

(g) Overcharge disputes. A WIC authorized store that disputes an overcharge billing shall submit the basis for its dispute in writing to the Department, postmarked within 15 calendar days of the date on the Department's billing notice. Upon resolution of an overcharge dispute, any overcharge the Department determines to be owing shall be due within 15 calendar days of the mailing date on the Department's notification of its resolution of the dispute.

(h) Sanctions. The Department will impose a sanction against a WIC authorized store pursuant to §1107.1 (relating to sanctions) if the store fails to pay overcharges due within the time required under subsections (f) and (g).

(i) Disqualification. The Department may disqualify a WIC authorized store if the store's reported prices on the Quarterly Price Report exceed the current maximum allowable cost as published by the Department for Food Prescription One or Food Prescription Two, set forth in §1103.4(a)(6)(i) and (ii) (relating to selection and limitation criteria; authorization process).

§1105.3. Terms and conditions of participation.

(a) General terms and conditions. A WIC authorized store shall adhere to the requirements set forth in this subsection. Failure to do so shall result in the imposition of sanctions as set forth in §1107.1 (relating to sanctions). A WIC authorized store shall:

(1) Adhere to all applicable statutes and State and Federal regulations regulating the WIC Program, including the non-discrimination provisions of 7 C.F.R. Parts 15, 15a and 15b, 7 C.F.R. Part 246, and this part.

(2) Inform the public of its participation in the WIC Program by displaying at least one WIC decal supplied by the Department in a place conspicuously visible to the general public.

(3) Monitor, supervise, and be accountable for the actions of employees in the handling of WIC checks, the selling of allowable foods, and the performance of other conduct related to the WIC Program.

- (4) Maintain the minimum inventory of allowable foods.
- (5) Ensure that allowable foods are properly stored and refrigerated.
- (6) Ensure that there are no stale dated allowable foods on the sales floor.
- (7) Provide the Department, on the Quarterly Price Report form provided by the Department, the highest prices of allowable foods specified on the report form.
- (8) Maintain a clean and sanitary store.
- (9) Provide orientation and training to employees regarding applicable regulations governing the WIC Program.
- (10) Maintain a copy of the current WIC food list at each check-out aisle.
- (11) Send at least one representative who is responsible for training store personnel on the WIC Program to WIC Program training annually, or more often if required by the Department.

(12) Immediately notify the Department when store ownership changes, when store operations cease on a permanent or temporary basis, or when any other circumstance impacting service to participants occurs.

(13) Allow Federal, State, Department and local agency representatives who are involved in monitoring the store's compliance with statutes and regulations governing the WIC Program, to visit the store to observe its procedures for accepting and handling WIC checks and to conduct announced or unannounced on-site reviews to determine compliance with all applicable Federal and State regulations.

(14) Provide Federal, State, Department and local agency representatives who are involved in monitoring the store's compliance with statutes and regulations governing the WIC Program, access to all WIC checks accepted by the store and on its premises at the time of an on-site review.

(15) Provide Federal, State, Department and local agency representatives who are involved in monitoring the store's compliance with statutes and regulations governing the WIC Program, access to price and inventory records during an on-site review.

(16) Agree that neither the Department nor the WIC authorized store has an obligation to renew the store's authorization to participate in the WIC Program.

(17) Agree that the store's authorization to participate in the WIC Program shall become null and void when ownership of the store changes.

(18) Display the current shelf price of each allowable food either on the allowable food, on the shelf immediately above or below the allowable food, or prominently on an allowable food price list easily located by participants and clearly visible to them.

(19) Not transfer or assign its WIC certification or recertification to any other person or entity.

(20) Reimburse the Department for any funds received though transactions involving WIC checks which were not conducted in accordance with regulations in this part.

(21) Maintain price and inventory records for allowable foods for a minimum period of six months from the date of receipt of the inventory.

(b) *Terms and conditions of participation with regard to participants.* A WIC authorized store shall serve participants as set forth in this subsection. The Department will impose sanctions against a WIC authorized store that fails to do so, as set forth in §1107.1.

A WIC authorized store shall:

- (1) Provide allowable foods to participants only as authorized on the WIC food list and as specified on the WIC check.
- (2) Not encourage or discourage a participant from purchasing any allowable food specified on the WIC check.
- (3) Provide allowable foods to participants at or below the current price the store charges other customers.
- (4) Not seek restitution or payment from participants for WIC checks not reimbursed by the Department, or contact participants concerning WIC transactions that occur in the store.
- (5) Not seek restitution or payment from participants for allowable foods when the price the store charges for the allowable foods exceeds the "Not to Exceed" amount on the WIC check.
- (6) Not request personal addresses, telephone numbers or other personal identification of participants.

- (7) Offer participants the same courtesies offered other customers, and not distinguish or identify participants from other customers.
- (8) Provide services to participants without regard to race, color, age, sex, national origin, or handicap.
- (9) Give trading stamps to participants for purchases made with WIC checks if trading stamps are given for cash purchases.
- (10) Accept cents-off coupons, a store discount card or other discounts from participants for allowable foods, and deduct the savings in calculating the total purchase price entered into the "Pay Exactly" amount on WIC checks.
- (11) Accept "buy one get one free" coupons and manufacturers' promotional free product offers from participants.

(c) Terms and conditions of participation with regard to WIC check processing and redemption. A WIC authorized store shall adhere to the requirements of this subsection with regard to WIC check processing and redemption. The Department will impose sanctions against a WIC authorized store that fails to do so, as set forth in §1107.1. A WIC authorized store shall:

- (1) Treat the acceptance of a WIC check as a financial transaction between only the Department and the WIC authorized store, not the participant.

(2) Accept a WIC check only if the WIC check is made payable to that specific WIC authorized store, unless the Department has provided written authorization otherwise to the store.

(3) Accept a WIC check only if the participant, endorser or proxy presents the WIC check on or between the "First Day to Use" and the "Last Day to Use" designations on the WIC check.

(4) Accept a WIC check only if a valid WIC identification card is presented at the time of redemption.

(5) Accept a WIC check only if the signature of the participant, endorser or proxy is obtained, at the time of purchase, on the WIC check, and the signature on the WIC check matches the signature on the WIC identification card.

(6) Accept a WIC check only if there is no visible alteration on the WIC check.

(7) Charge the WIC Program only for the types and quantities of allowable foods specified on the WIC check and selected for purchase by the participant, endorser or the participant's proxy.

(8) Record in ink, on each WIC check immediately after completion of the WIC transaction and prior to the participant, endorser or proxy signing the WIC check, the actual purchase amount of the transaction net of any cents-off coupons or other discounts.

(9) Properly correct an error made in recording the "Pay Exactly" amount of a WIC check by drawing a single line through the incorrect amount and writing the correct amount above or below the error and having the participant, endorser or proxy initial next to the corrected amount. No other corrections are permissible.

(10) Not alter any information on the WIC check as presented by the participant, endorser or proxy.

(11) Not provide substitute items, rainchecks, or cash reimbursement for allowable foods that are unavailable.

(12) Not provide cash or credit for a WIC check.

(13) Not provide change for the difference between the "Not to Exceed" and the "Pay Exactly" amounts on the WIC check nor for any coupons tendered during the WIC transaction.

(14) Not refund money or provide exchanges to replace allowable foods returned by participants, endorsers or proxies.

(15) Not accept a WIC check as payment for items other than allowable foods specified on the WIC check.

(16) Not charge the WIC Program for allowable foods not received by the WIC participant or for allowable foods provided in excess of those listed on the WIC check.

(17) Not charge the WIC Program for the sale of an amount of an allowable food which exceeds the store's documented inventory of that food item covering the period of time under review and in which the sale was made.

(18) Deposit WIC checks accepted by it directly to its bank account no later than 45 days after the "First Day to Use" date on the WIC check.

(19) Not receive, transact, redeem or otherwise dispose of a WIC check outside of check redemption procedures set forth in this section.

(20) Not use a WIC check for the purchase of any commodity or the payment of any debt.

(21) Not collect sales tax on allowable food purchases.

(22) Reimburse the Department for payments the store has received for improperly executed WIC checks.

(d) The Department will deny payment to a WIC authorized store for WIC checks which the store did not process according to established redemption procedures.

§1105.4. Change of ownership of a WIC authorized store.

(a) A certification or recertification is null and void when a change of ownership of a WIC authorized store occurs.

(b) To allow uninterrupted service to participants subsequent to a change of ownership, the Department may accept an application for certification from the prospective new owner of a WIC authorized store prior to a change of ownership.

(c) When a change of ownership occurs and participant hardship as defined in §1103.7 would result, the store under the new ownership may receive probationary certification for a period not to exceed six months if the State conducts an immediate on-site visit followed by a complete certification visit at the store. Until the immediate on-site visit is conducted, the new owner may not accept WIC checks. As soon as possible within the six month probationary period or during the next recertification process, whichever occurs first, the store under the new ownership shall compete with stores on the waiting list in the trade area for the store slot.

(d) The Department will not accept an application for certification from a store that has been provided notice of disqualification or is serving a disqualification if an individual who had at least a ten percent ownership interest in the store has at least a ten percent ownership interest in the applicant or such ownership interest has been transferred or sold to immediate family members of such individual.

§ 1105.5. Changes in availability or location of WIC authorized stores.

(a) Notification of store closing. A WIC authorized store shall notify the Department at least 15 days prior to a temporary or permanent closing of the store, and of the reason for closing and the expected duration of a temporary closing, if it has at least 15 days prior knowledge. Otherwise, it shall provide such information to the Department immediately after it acquires the information.

(b) Temporary store closing. The Department may permit a WIC authorized store to temporarily close for reasons such as a natural disaster, death in immediate family or personal illness, without imposing a sanction against the store. In making a determination to permit a temporary closure, as well as the length of time of such closure, the Department will consider such circumstances as the nature of the disaster, number of WIC authorized stores affected by the disaster, nature and expected duration of illness, length of closing anticipated by the WIC authorized store, number of and distance to other WIC authorized stores, number of participants served by the store, number of stores on the waiting list, or any other information that the Department may determine to be relevant.

(c) Store closing for remodeling.

(1) A WIC authorized store that closes for more than 24 hours but less than three days for remodeling shall not lose its certification, provided it notifies the Department at least 15 calendar days prior to the day the store closes for remodeling.

(2) A WIC authorized store that closes in excess of three store operation days for remodeling, shall lose its WIC authorization and shall reapply for and secure certification before it may again serve as a WIC authorized store.

(d) Store relocations.

(1) A WIC authorized store that relocates one mile or less from its current location, and reopens within three calendar days at its new location, shall provide the Department with written notification of its new address. The store shall not lose its certification, provided it notifies the Department at least 15 calendar days prior to the day the store closes for relocating.

(2) A WIC authorized store relocating in excess of one mile of its current location shall lose its WIC authorization and shall reapply for certification at its new location.

(3) A WIC authorized store that closes in excess of three store operation days for relocating, without applying for and securing permission from the Department to do so, shall lose its WIC authorization and shall reapply for certification.

(e) Temporary authorization to accept WIC checks redeemable at other stores. The Department will temporarily authorize alternate WIC authorized stores to accept WIC checks designated on the face of the check to be used at another WIC authorized store, in order to provide participants with access to allowable foods when a WIC authorized store has permanently or temporarily closed, the store's authorization has been terminated, or the store has been disqualified as a WIC authorized store.

§ 1105.6. Monitoring of WIC authorized stores.

(a) Purpose and types of monitoring of WIC authorized stores. Federal, State or local representatives will conduct announced and unannounced on-site reviews of WIC authorized stores to determine compliance with applicable Federal and State regulations, and to investigate complaints regarding a store. The types of on-site reviews that may be conducted for monitoring purposes are high risk reviews, routine reviews and training buys.

(b) High risk reviews. The Department will monitor all high risk stores. The Department will use either compliance investigations or inventory audits as methods to monitor

high risk stores. The Department also may conduct compliance buys and inventory audits on stores that have not been identified as high risk stores.

(1) Compliance investigations. The following standards shall apply:

(i) The Department will conduct at least two compliance buys during a compliance investigation.

(ii) The Department will not notify the WIC authorized store that a compliance buy is scheduled.

(iii) The Department will provide written notification to the WIC authorized store of the results of each compliance buy, including the store's violation of any statute or regulation governing its participation in the WIC Program, unless subparagraph (viii) applies.

(iv) The Department will provide to the personnel of the WIC authorized store mandatory corrective training after two compliance buys detect violations of statutes or regulations governing the store's participation in the WIC Program.

(v) The Department will conduct a third compliance buy at the WIC authorized store after store personnel have attended mandatory corrective training.

(vi) The Department will disqualify the store if three compliance buys detect violations of statutes or regulations governing the store's participation in the WIC Program.

(vii) The Department will close the compliance investigation on a WIC authorized store if no violations of a statute or regulation governing the store's participation in the WIC Program are discovered after two consecutive compliance buys.

(viii) The Department may withhold notification of compliance buy results, and may withhold providing training or conducting further compliance investigations, when fraudulent activities by the WIC authorized store are indicated during a compliance investigation or by local agency or participant complaint.

(2) Inventory audits. The Department will disqualify the WIC authorized store when an inventory audit establishes the claim of reimbursement for authorized food in excess of documented inventory. No warning letters will be issued.

(c) Routine reviews. The Department will use reviews as follows to determine whether a WIC authorized store is in compliance with the selection and limitation criteria in §1103.4(a) and (b) (relating to selection and limitation criteria; authorization process) and terms and conditions of participation in §1105.3 (relating to terms and conditions of participation):

- (1) The Department will not notify the WIC authorized store that a routine review is scheduled.
- (2) The Department will provide written notification to the WIC authorized store of the results of each routine review, including violation of any statute or regulation governing the store's participation in the WIC Program.
- (3) The Department will conduct a second routine review of the WIC authorized store if the first routine review detects violations of any statute or regulation governing the store's participation in the WIC Program.
- (4) The Department will provide to the personnel of the WIC authorized store mandatory corrective training after two routine reviews detect violations of any statute or regulation governing the store's participation in the WIC Program.
- (5) The Department will conduct a third routine review of a WIC authorized store after store personnel have attended mandatory corrective training.

(6) The Department may disqualify a store if a third routine review detects violations of any statute or regulation governing the store's participation in the WIC Program.

(d) Training buys. The Department will use training buys to monitor WIC check transaction procedures and compliance with statutes and regulations governing the store's participation in the WIC Program. The following standards shall apply:

(1) The Department will not notify the WIC authorized store that a training buy is scheduled.

(2) The Department will provide written notification to the WIC authorized store of the results of each training buy, including violations of any statute or regulation governing the store's participation in the WIC Program.

(3) The Department will conduct a second training buy at the WIC authorized store if the first training buy detects violations of any statute or regulation governing the store's participation in the WIC Program.

(4) The Department will provide the personnel of the WIC authorized store mandatory corrective training after two training buys detect violations of any statute or regulation governing the store's participation in the WIC Program.

(5) The Department will conduct a third training buy at the WIC authorized store after store personnel have attended the mandatory corrective training.

(6) The Department may disqualify a store if a third training buy detects violations of any statute or regulation governing the store's participation in the WIC Program.

(e) Use of law enforcement agency. The Department may utilize a law enforcement agency in the investigation of a WIC authorized store or other store suspected of trafficking WIC checks or other fraud or abuse of the WIC Program.

(f) Reimbursement. The Department will seek reimbursement from a WIC authorized store that received funds improperly due to any violation of regulations governing the store's participation in the WIC Program discovered during monitoring reviews. The Department will send notice to the store of the amount of money to be reimbursed to the WIC Program. The store shall make payment within 20 days from the date of the notice.

CHAPTER 1107. SANCTIONS

§1107.1. Sanctions.

(a) The Department will impose a sanction against a store based upon the severity and nature of the violation of the statute or regulation governing the store's participation in the WIC Program.

(b) In addition to imposing a sanction against a WIC authorized store that commits fraud or abuse of the WIC Program, the Department may prosecute or make a referral for prosecution of the WIC authorized store to a criminal prosecution agency for prosecution under applicable Federal, State, or local laws.

(c) A WIC authorized store that has a sanction imposed against it by the Department for accepting a WIC check for items other than those specified on the WIC check shall also reimburse the Department for monies received for the purchase of such items with the WIC check.

(d) The Department may impose a sanction against a WIC authorized store for failing to remit any amount demanded due to violations of statutes or regulations governing its participation in the WIC Program within the time frame set forth in §1105.2(f) and (g) (relating to reimbursement of overcharges) or the notice given by the Department pursuant to §1105.6(e) (relating to monitoring reviews).

(e) Upon receiving notification that a WIC authorized store has been disqualified from another USDA-FNS program, such as the USDA Food Stamp Program, the Department will disqualify the WIC authorized store for an equivalent period of up to three years.

(f) The Department may disqualify from participation in the WIC Program a WIC authorized store if the store incurs a civil money penalty in lieu of disqualification from another USDA-FNS program, such as the USDA Food Stamp Program. If the Department finds that participant hardship would result from the disqualification of the store from the WIC Program, the Department may, at its option, offer the store the option of paying a civil money penalty in lieu of disqualification.

(g) The Department will notify the USDA-FNS of a store's disqualification from the WIC Program. Disqualification from the WIC Program may result in the store's disqualification from the USDA Food Stamp Program.

(h) Specific sanctions. The Department will determine the type and level of sanction to be imposed against a WIC authorized store for a violation of any statute or regulation governing the store's participation in the WIC Program.

(1) For first violations where fraudulent activity is not indicated, the Department will issue a letter to the WIC authorized store identifying the violation, directing the store to correct the violation, and warning the store of the penalty for continued non-compliance.

(2) Class A abuses. The Department will disqualify a WIC authorized store from participation in the WIC Program for a period of one year for the following violations:

- (i) Redeeming a WIC check for an item that is in a food category authorized by the WIC Program but is not an allowable food or is not specified on the WIC check.
- (ii) Having stale-dated allowable food on the sales floor.
- (iii) Failing to maintain minimum inventory requirements of an allowable food.
- (iv) Failing to request the participant's WIC identification card prior to accepting a WIC check.
- (v) Accepting a WIC check made payable to another store without prior written approval from the Department.
- (vi) Failing to maintain a clean and sanitary store.
- (vii) Failing to properly store and refrigerate allowable foods.

- (viii) Closure of the store by a city, local or county health department.
 - (ix) Charging or demanding that a participant pay for an allowable food with the participant's own money or with another WIC check for purchases made with a WIC check.
 - (x) Securing the signature of the participant, endorser or proxy prior to completing the "Pay Exactly" box on the WIC check.
 - (xi) Overcharging the WIC Program by charging sales tax or allowing the purchase with a WIC check of more of an allowable food than authorized on the WIC check.
- (3) Class B abuses. The Department will disqualify a WIC authorized store from participation in the WIC Program for a period of two years for the following violations:
- (i) Redeeming a WIC check for food that is not in a food category authorized to be purchased with a WIC check.
 - (ii) Charging the WIC Program more for an allowable food than a customer who is not a participant is charged for the same item.

- (iii) Charging the WIC Program more than the current price for an allowable food.
 - (iv) Giving monetary change to an authorized individual who tenders a WIC check.
 - (v) Failing to remit payment for an overcharge within the specified time frame.
 - (vi) Charging the WIC Program for an allowable food which was not purchased with a WIC check.
 - (vii) A repeated Class A violation.
- (4) Class C abuses. The Department will disqualify a WIC authorized store from participation in the WIC Program for a period of three years for the following violations:
- (i) Accepting a WIC check for cash, credit or a non-food item.
 - (ii) Physically altering or changing on the face of a WIC check the store name, food type or quantity, participant information, date, or printed dollar amount.
 - (iii) Redeeming WIC checks for the sale of an amount of an allowable food over a period of time which exceeds the WIC authorized

store's documented inventory for the same allowable food for the same period of time.

(iv) A repeated Class B violation.

(i) For any violation of a statute or regulation governing the store's participation in the WIC Program which is not specifically set forth in this section, the Department will determine the appropriate type and level of sanction to be imposed upon the store based upon the nature and severity of the violation.

(j) The Department will provide a WIC authorized store at least a 15 day advance notice of the effective date of any disqualifications and an opportunity to appeal the disqualification in accordance with § 1113.1 (relating to right to appeal).

(k) A store which has been disqualified from the WIC Program may apply for certification following expiration of the disqualification period. If the store chooses to apply for certification after expiration of the disqualification, the Department will not consider the prior disqualification from the WIC Program when determining eligibility, and the store will be considered in accordance with § 1103.4 (relating to selection and limitation criteria; authorization process) if a store slot is available, or placed on a waiting list in accordance with § 1103.6 (relating to waiting list) if no store slot is available.

§1107.2 **Civil money penalties.**

(a) Option available in lieu of a disqualification. The Department may offer to a store the option of paying a civil money penalty in lieu of a denial of recertification or a disqualification required to pursuant to §1107.1 (relating to sanctions), only if the Department finds participant hardship as set forth in §1103.7 (relating to participant hardship).

(b) Calculation of civil money penalty. The Department will calculate the civil money penalty the store shall pay by multiplying five percent of the average monthly total value of WIC checks redeemed for the most recent six-month period by the number of months the store would be disqualified pursuant to §1107.1. For stores which are denied recertification for which this option is available, the Department will multiply five percent of the average monthly total value of WIC checks for the most recent six-month period by six months to determine the civil money penalty to be paid. If six months of information relating to the monthly value of WIC checks redeemed is not available, the Department will calculate the monthly average based upon the number of months for which information is available.

(c) Written agreement. If the Department offers and the store agrees to pay a civil money penalty in lieu of disqualification, the Department and store shall set forth the terms of the agreement in writing. Such terms may include a probationary period during which the Department may conduct monitoring to ensure action has been taken by the store to correct problems. The agreement shall be effective upon the signature of the Director of the Division of WIC or the Director's designee.

(d) Payment of the civil money penalty. The store shall pay the civil money no later than 30 days from the effective date of the agreement, as set forth in subsection (c). Failure of the store to pay the civil money penalty when due shall be grounds for the Department to rescind the agreement and shall result in reinstatement of the disqualification.

(e) Continued compliance with regulations. A store which pays a civil money penalty is required to continue to comply with regulations governing the store's participation in the WIC Program. If the store commits additional violations of the regulations governing the store's participation in the WIC Program, the Department shall consider the violations for which the store paid the civil money penalty in determining the type and magnitude of sanction to be imposed against the store.

(f) Outstanding financial liabilities. Payment of the civil money penalty, unless specifically provided for in a written agreement between the Department and the store, does not relieve the store of any other past or future financial liability incurred by the store by reason of its participation in the WIC Program. This includes, by way of example, payment of outstanding overcharges or payments owed the Department for the unauthorized sale of foods.

CHAPTER 1109. ADMINISTRATIVE APPEALS

§1109.1. Applicability of general rules.

1 Pa. Code Part II (relating to general rules of administrative practice and procedure) is applicable to proceedings under this part, except as otherwise provided in this part.

§1109.2. Scope and purpose.

Chapters 1111 and 1113 apply to hearings held under 42 U.S.C. §1786(f)(9), relating to the WIC Program. Those chapters supplement the Federal regulations, 7 C.F.R. Part 246, governing hearings afforded under this part to applicants, participants, stores denied certification or recertification and local agencies, and supplement or supersede regulations in 1 Pa. Code Part II (relating to general rules of administrative practice and procedure) when their application would be inappropriate or inadequate.

§1109.3. Time limits for action.

Time limits set forth in §1111.10(d) (relating to hearing examiner decisions) and §1113.3(b)(relating to adjudication and order) are directory.

CHAPTER 1111. APPLICANT AND PARTICIPANT APPEALS

§1111.1. Applicant and participant appeal rights.

This chapter applies to applicants, participants, and their authorized representatives, in pursuing appeals from decisions that adversely impact upon the participation of applicants and participants in the WIC Program.

§1111.2. Notification of appeal rights.

(a) At the time of the denial of an application to become a participant, removal from the WIC Program as a participant, or placement on a waiting list to become a participant, the local agency shall inform in writing the adult applicant or participant, or the parent or guardian of a child or infant applicant or participant, of the right to appeal the decision, of the method by which an appeal may be filed, and that any positions or arguments on behalf of the applicant or participant may be presented personally or by an authorized representative, such as a relative, friend, legal counsel or other spokesperson. The expiration of the participant's certification period occurs automatically and is not appealable.

(b) The local agency shall use forms provided by the Department to provide notice of appeal rights to the adult applicant or participant, or the parent or guardian of an infant or child applicant or participant.

§1111.3. Appeal of a local agency decision.

(a) An appeal is any clear expression by the applicant, participant or authorized representative, that the decision of the local agency is contested and that an opportunity to challenge the decision and to present the case of the applicant or participant to a higher authority is desired. The Department or local agency shall not limit or interfere with the freedom of the applicant, participant or authorized representative to appeal the decision and shall provide whatever assistance is necessary to reduce an oral appeal to writing.

(b) When an appeal is made orally, the local agency shall docket it as being filed when the local agency receives the oral communication.

§1111.4. Time for appeal of a local agency decision.

The applicant, participant or authorized representative shall appeal within 90 days after the date the local agency mails or delivers to the adult applicant or participant, or parent or guardian of an infant or child applicant or participant, written notice of the action to deny or terminate benefits under the WIC Program. An appeal is timely filed if it is received by the local agency within the 90 day period.

§ 1111.5. Scheduling the hearing.

(a) Appointment of a hearing examiner. The local agency shall appoint a hearing examiner to preside over the appeal. The hearing examiner shall be an impartial official who does not have a personal stake or involvement in the decision, and who was not directly involved in the action being contested.

(b) Notification of the appeal. The local agency shall notify the hearing examiner of the appeal and the date on which it was docketed.

(c) Time frame for scheduling a hearing. The hearing examiner shall schedule the hearing within three weeks from the docketed date of the appeal. The hearing examiner shall provide the appellant participant or authorized representative with a minimum of 10 days advance written notice of the time and place of the hearing.

(d) Standards for scheduling the hearing. The hearing examiner shall use the following standards in scheduling a hearing:

- (1) The place of the hearing shall be no further from the residence of the applicant or participant than the county seat of the county in which the applicant or participant resides. If the county seat is unsuitable due to the health of the applicant or participant, transportation problems, convenience of witnesses, or for

other legitimate reasons, an alternative place of hearing shall be a location convenient to the home of the applicant or participant.

(2) If the applicant, participant, or authorized representative wants to postpone the hearing, that individual shall contact the hearing examiner, and the local agency and provide them with a reason for postponement. If the hearing is postponed by the hearing examiner, the hearing examiner shall reschedule it as soon as possible.

(3) An applicant, participant, or authorized representative may withdraw the appeal at any time before a decision is issued by the hearing examiner. This withdrawal shall be in writing and directed to the hearing examiner. This paragraph supersedes 1 Pa.Code § 35.51 (relating to withdrawal of pleadings.)

(4) If the applicant or participant fails to appear at the scheduled hearing in person or by authorized representative, without good cause as determined by the hearing examiner, the appeal shall be considered abandoned and shall be discontinued.

(e) The hearing examiner shall order, where relevant and necessary, an independent medical assessment or professional evaluation of the applicant or participant from a source mutually satisfactory to the applicant or participant or its authorized representative, and the local agency.

§1111.6. Denial or dismissal of appeal.

The hearing examiner may not deny or dismiss an appeal unless one of the following occurs:

(1) The appeal is not received by the local agency within the time limit in §1111.4 (relating to time for appeal of a local agency decision); or

(2) The appeal is withdrawn in writing by the applicant, participant or authorized representative; or

(3) The applicant, participant or authorized representative fails, without good cause, to appear at the scheduled hearing.

§1111.7. Continuation of benefits.

(a) If at any time during a participant's certification period, the local agency finds the participant to be ineligible to continue enrollment in the WIC Program, the local agency shall advise the participant in writing not less than 15 days before termination of the reason for ineligibility and of the right to appeal. If an appeal is received within 15 days after service of the notice of ineligibility, benefits shall continue until the hearing examiner reaches a decision or the certification period expires, whichever occurs first.

(b) An applicant denied initial enrollment, or an authorized representative of the applicant, may appeal the denial, but the applicant shall not receive benefits while awaiting disposition of the appeal.

§1111.8. Rights of the appellant.

(a) When an appeal is filed, the local agency shall inform the applicant or participant denied benefits, or an authorized representative, of the rights set forth in subsection (b).

(b) An applicant or participant who files an appeal, or on whose behalf the appeal is filed, has the following rights:

(1) To appear in person at the hearing. This paragraph supplements 1 Pa.Code §31.21 (relating to appearance in person).

(2) To represent himself or herself, or to be represented by an authorized representative such as an attorney, friend or other person at the hearing. This paragraph supersedes 1 Pa.Code §§31.22 and 31.23 (relating to appearance by attorney; and other representation prohibited at hearings).

(3) To receive an explanation that he or she may contact the local bar association for assistance in locating legal services.

(4) To present oral or documentary evidence, witnesses and arguments to support the position of the applicant or participant in accordance with procedures established by the hearing examiner.

(5) To request a subpoena from the hearing examiner for the production of evidence or witnesses that the applicant, participant or authorized representative, determines are important to establish necessary facts. This paragraph supplements 1 Pa.Code § 35.142 (relating to subpoenas).

(6) To request that the local agency provide an interpreter at the hearing if an adult applicant or participant, or the parent or guardian of an infant or child applicant or participant, does not understand English or is hearing impaired.

(7) To examine upon request, both before and during the hearing, the materials which the Department or local agency has on file relative to the case which are not confidential.

(8) To be provided with the names of the local agency staff members and witnesses who will be present at the hearing.

(9) To question or refute any testimony or other evidence presented against the applicant or participant and to confront and cross-examine any adverse witnesses.

(10) To examine, prior to and during the hearing, documents and records that will be presented to support the decision under appeal.

(11) To further appeal the final decision of the hearing examiner to the Secretary within 15 days of the mailing date of the hearing examiner's decision.

(12) To appeal the adjudication and order of the Secretary or agency head designated by the Secretary to the Commonwealth Court within 30 days of the mailing date of the adjudication and order.

§1111.9. Hearing record.

(a) Contents of the record. The verbatim transcript or recording of testimony and exhibits, or an official report containing the substance of what transpired at the hearing, together with all papers and requests filed in the proceeding, shall constitute the hearing record. This record shall be available to the applicant, participant or authorized representative, for copying and inspection at any reasonable time. This subsection supersedes 1 Pa. Code § 35.131 (relating to recording of proceedings).

(b) Retention of the record. This record shall be retained for a period of three years.

(c) Public inspection of the record. Department and local agency hearing records and decisions shall be available for public inspection and copying, provided the names and addresses of participants and other members of the public are kept confidential.

§1111.10. Hearing examiner decisions.

(a) The hearing examiner shall render a decision based exclusively on the evidence contained in the hearing record. This subsection supersedes 1 Pa.Code § 35.201 (relating to certification of record without proposed report).

(b) The decision of the hearing examiner shall comply with applicable Federal law, and Federal and State regulations.

(c) A decision by the hearing examiner shall summarize the facts of the case, specify the reasons for the decision, and identify the supporting evidence and the pertinent regulations or policy. The decision shall become a part of the record. A decision adverse to the position of the local agency shall be binding on the local agency.

(d) Within 45 days after the filing date of the appeal, the hearing examiner shall provide the applicant, participant, or authorized representative, and the local agency, a copy of the hearing examiner's decision.

(e) If the decision of the hearing examiner is in favor of the applicant or participant and benefits had been denied or discontinued, the local agency shall begin or resume providing benefits immediately upon the mailing date of the decision.

(f) If the decision is in favor of the local agency, the notice accompanying the decision of the hearing examiner to the applicant, participant or authorized representative shall include notice of the right to appeal to the Secretary. Immediately upon the date of the hearing examiner's decision, the local agency shall discontinue providing any benefits which had been continued pending issuance of the hearing examiner's decision.

§1111.11. Appeal to the Secretary.

If the applicant, participant, or authorized representative, chooses to appeal the decision of the hearing examiner, that individual shall file a written appeal with the Secretary within 15 days of the mailing date of the decision of the hearing examiner. The appeal shall contain a statement of reasons for reversing the decision of the hearing examiner. If the appeal asks for permission to present additional evidence, it shall:

- (1) Identify the additional evidence.
- (2) Explain why it was not previously introduced.

- (3) Explain its materiality unless it is obvious.

§1111.12. Adjudication and order procedures.

(a) In reaching a decision on the appeal, the Secretary or an agency head designated by the Secretary may:

- (1) Reconsider the decision on the basis of the evidence in the record.
- (2) Admit additional evidence.
- (3) Order a new hearing.

(b) In cases in which the hearing examiner's decision has resulted in a termination of benefits to the participant, there shall be no reinstatement of benefits upon filing of an appeal to the Secretary. The reinstatement of benefits, if granted, shall be solely as a result of the adjudication and order of the Secretary or designated agency head.

§1111.13. Judicial review.

The Secretary or designated agency head will issue an adjudication and order after considering the appeal. If the adjudication and order is adverse to the interest of the applicant or participant, the adjudication and order shall state, or be accompanied by a notice stating, that the applicant or participant has the right to appeal the adjudication and order to Commonwealth Court within 30 days after the mailing of the adjudication and order.

CHAPTER 1113. LOCAL AGENCY AND STORE APPEALS.

§1113.1. Right to appeal.

A store or local agency adversely affected by a Division of WIC action has the right to appeal. The right of appeal shall be granted when a local agency's or store's application to participate in the WIC Program is denied; or during the course of an agreement or period of authorization, when a local agency or store is disqualified; or when any other adverse action which affects participation is taken against the store or local agency by the Division of WIC. The expiration of a WIC authorization is not subject to appeal. The appeal process is designed to secure and protect the interest of both the store or local agency and the Division of WIC and to ensure equitable treatment for all involved. The adverse action shall be postponed until the hearing examiner issues an adjudication and order.

§1113.2. Appeal procedures.

(a) Notification. At the time the Division of WIC takes an adverse action against a local agency or store, the Division of WIC will notify the local agency or store of its right to an administrative appeal.

(b) Form of Appeal. The appeal shall be made by the local agency or store or its authorized representative, in writing, stating the reasons for the appeal.

(c) Time for filing an appeal. The appeal shall be filed with the Director of the Division of WIC within 30 days after any final decision by the Division of WIC.

(d) Scheduling the hearing.

(1) The Director of the Division of WIC shall forward the appeal to the office of the hearing examiner.

(2) The hearing examiner shall set a time, date and place for the hearing.

(3) The hearing examiner shall send notice to the local agency or store, or its authorized representative, at least 10 days in advance of the date of the hearing.

(4) The hearing examiner shall schedule the hearing to be held within 21 days after the date of receipt by the Division of WIC of the local agency or store appeal.

(5) The Department or the appellant may request in writing that the hearing be rescheduled for another time or date and the hearing examiner shall consider the request.

(6) This subsection supersedes 1 Pa.Code § 35.105 (relating to notice of nonrulemaking procedures).

(e) Hearing examiner. The Secretary will appoint a hearing examiner to preside over the appeal. Such person shall be an impartial decision maker, whose decision as to the validity of the Department's action shall rest solely on the evidence presented at the hearing and the statutory and regulatory provisions governing the program, and who shall not have participated in the decision made by the Division of WIC or have any personal stake in the outcome. This subsection supersedes 1 Pa.Code § 35.185 (relating to designation of presiding officers).

(f) Hearing procedures.

- (1) The local agency or store may be assisted or represented by an attorney or other authorized representative. This paragraph supplements 1 Pa.Code §31.21 (relating to appearance in person) and supersedes 1 Pa.Code §31.22 and § 31.23 (relating to appearance by attorney; and other representation prohibited at hearings).
- (2) The local agency or store, or its authorized representative, may examine, prior to and during the hearing, the documents and records considered by the Division of WIC in reaching its decision under appeal.
- (3) The hearing shall be open to the public.

- (4) Each party shall have the opportunity to present and cross-examine witnesses.
- (5) Each party may present oral or documentary evidence and arguments to support its position in narrative form.
- (6) Each party may object to or attempt to refute any testimony or other evidence presented by the other party.

§1113.3. Adjudication and order.

(a) The adjudication and order shall include findings of fact and conclusions of law. The findings of fact shall be based only on the oral and documentary evidence in the hearing record.

(b) The hearing examiner shall provide the Director of the Division of WIC and the local agency or store, or its authorized representative, with the adjudication and order within 60 days after the date of the receipt by the Division of WIC of the appeal, adjusted for any continuance of the hearing that causes it to be held more than 21 days after the date the appeal was filed.

(c) The hearing examiner shall maintain a written record of the hearing. The record shall include a docket number and caption for the appeal, any documentary evidence submitted,

the transcript of the testimony presented at the hearing, the adjudication and order of the hearing examiner, and a copy of the document transmitting the adjudication and order to the local agency or store, or its authorized representative.

(d) Paragraphs (a)-(c) supersede 1 Pa.Code §§ 35.131 (relating to recording of proceedings), 35.201 (relating to certification of record without proposed report), 35.202 (relating to proceedings in which proposed reports are prepared) and 35.205 (relating to contents of proposed reports).

§1113.4. Continuing responsibilities.

Appealing an action does not relieve the local agency or store from the responsibility of continued compliance with the terms of any written agreement or contract with the Department or certification or recertification by the Department.

§1113.5. Judicial review.

If the adjudication and order of the hearing examiner is rendered against the local agency or store, the hearing examiner will inform the local agency or store within the adjudication and order, or by notice accompanying the adjudication and order, of the right to pursue judicial review of the adjudication and order.

Commonwealth of Pennsylvania



DEPARTMENT OF HEALTH

HARRISBURG

April 15, 1999

THE SECRETARY

Mr. Robert E. Nyce
Executive Director
Independent Regulatory Review Commission
14th Floor, 333 Market Street
Harrisburg, Pennsylvania 17101

RE: Department of Health Regulations
Supplemental Food Program for Women, Infants and Children (WIC Program)
No. 10-158

Dear Mr. Nyce:

Attached are final regulations with proposed rulemaking omitted for review by the Independent Regulatory Review Commission (IRRC). These regulations are being promulgated pursuant to the Commonwealth Court's decision in Giant Food Stores, Inc. v. Commonwealth of Pennsylvania, Department of Health, 713 A.2d 177 (Pa. Cmwlth. 1998), wherein the court found the criteria that the Department of Health (Health) used to authorize grocery stores to participate in the food delivery system of the WIC Program were invalid because they were not promulgated as a regulation. The court did not address the propriety of the criteria; it found only that the criteria needed to be published as a regulation pursuant to the Commonwealth Documents Law, 45 P.S. §1102-1602, and submitted to the Attorney General pursuant to the Commonwealth Attorney's Act, 71 P.S. §§732-204. The court further found the Regulatory Review Act was inapplicable to the criteria the Department uses to authorize grocery stores, because the criteria were developed by the Department as a result of a delegation of authority based solely upon Federal statute and regulation.

The Department, nevertheless, has elected to submit these regulations to the IRRC and the standing committees of the Pennsylvania House and Senate for review and to follow the Regulatory Review Act procedures for service upon and cooperation with IRRC and the standing committees.

These regulations will add a new Part VIII, Chapters 1101-1113 to Title 28. The regulations also repeal 28 Pa.Code §§8.41-8.74 (relating to WIC Program general provisions; applicant or participant appeals; local agency or food vendor appeals). The subject matter

Mr. Robert E. Nyce

-2-

April 15, 1999

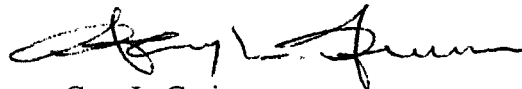
previously contained therein may now be found, with some minor changes, in chapters 1109-1113 (relating to administrative appeals; applicant and participant appeals; local agency and store appeals).

Because the regulations relate to the Department's administration of the WIC Program, the Department was required to submit the regulations to the United States Department of Agriculture (USDA) for approval as part of the state agency annual plan of operations. Following revisions required by the USDA, the USDA approved the regulations by letters dated April 5, 1999 and April 12, 1999. Copies of the USDA approval letters are attached for IRRC's review. These regulations may not be changed without the review and approval of the USDA pursuant to Federal regulations governing the operation of the WIC Program.

Section 5.1 (e) of the Regulatory Review Act provides that within 10 days after expiration of the standing committee review period, or at the IRRC's next regularly scheduled meeting, whichever is later, IRRC shall approve or disapprove the regulations.

The Department will provide IRRC with any assistance it requires to facilitate a thorough review of the regulations. If you have any questions, please contact Kim Sokoloski, Director, Office of Legislative Affairs, at (717) 783-3985.

Sincerely,



Gary L. Gurian
Acting Secretary of Health

Attachments



APR - 5 1999

United States
Department of
Agriculture

Food and Consumer
Service

Mid-Atlantic Region

Marcor Corporate Park
300 Corporate Boulevard
Robbinsville, N.J. 08881-1588

The Honorable Gary L. Gurian
Acting Secretary of Health
Pennsylvania Department of Health
Health and Welfare Building, Room 802
PO Box 90
Harrisburg, PA 17108

Dear Acting Secretary Gurian:



We are in receipt of your March 24, 1999 letter which provided a revised copy of your Proposed WIC State Vendor Regulations. We are pleased to provide you with our approval of the Regulations. However, prior to publication, we ask that you consider several additional suggestions and comments which are enclosed with this letter.

We wish to acknowledge the extensive amount of time and effort which has been expended by Mr. Frank Maisano and his staff in developing these Regulations. We believe the Regulations, as they are currently written, will serve the best interest of the Pennsylvania WIC Program and its participants.

Please feel free to contact me should you have any further questions.

Sincerely,

CHRISTOPHER J. MARTIN
Administrator
Mid-Atlantic Region

Enclosure

OPTIONAL FORM 99 (7-99)

FAX TRANSMITTAL

of pages 2

TO Leesa Tressler	FROM R. Hodsdon
PA Legal office	PHONE 609-259-5021
717-783-3794	FAX

NEN 7540-01-317-7388

5010-101

GENERAL SERVICES ADMINISTRATION



Suggestions and Comments on Pennsylvania's Proposed WIC State Vendor Regulations

Please provide us with a copy of the preamble to the Regulation when it is completed. We understand it will include the following items:

- An indication that the Regulations may be revised at any time due to policy, procedure, or regulatory changes which necessitate such revisions.
- An indication that Federal Regulations require State agencies to monitor at least ten percent of its authorized vendors per year.

§1105.3(a)-Terms and Conditions of Participation/General Terms and Conditions: We believe our suggestion to require retailers to maintain price and inventory records for a specific period of time may have been misunderstood. Rather than have stores retain such information for 31 days following on-site reviews, we suggest stores be required to keep the information for a set period of time regardless of whether or not an on-site review has been conducted. This would provide the State with access to historical information on a store at any given time.

§1105.4(c)-Change of Ownership of a WIC Authorized Store: We suggest the following phrase be reworded for clarity purposes: "...may receive on probationary certification...."

§1107.1(f)-Sanctions: We suggest the Regulations specify that the sanction imposed against a WIC authorized store which has received a civil money penalty (CMP) from the Food Stamp Program is either a WIC disqualification or a WIC CMP (if participant hardship would result from the disqualification).

§1107.2(b)-Civil Money Penalties/Calculation of Civil Money Penalty: This provision discusses how CMP's will be calculated for stores "...which are denied recertification for which this option is available...." We did not understand how denials of recertification related to CMP's since provision §1107.2(a) only indicates that CMP's will be offered to authorized stores in lieu of disqualification. It does not indicate that CMP's will be offered in lieu of recertification denials. We suggest this be clarified.

§1107.2(e)-Civil Money Penalties/Continued Compliance with Regulations: We suggest this regulatory section also indicate that CMP's do not relieve stores of their financial liability for previous compliance issues such as outstanding overcharge recoveries or payments due for sale of unauthorized foods (i.e. such outstanding liabilities must be paid in addition to the CMP).



APR 12 1999

United States Department of Agriculture

Food and Consumer Service

Mid-Atlantic Region

Mercer Corporate Park 900 Corporate Boulevard Robbinsville, N.J. 08691-1588



The Honorable Gary L. Gurian Acting Secretary of Health Pennsylvania Department of Health Health and Welfare Building, Room 802 PO Box 90 Harrisburg, PA 17108

Dear Acting Secretary Gurian:

We are in receipt of your April 8, 1999 letter which provided a revised copy of your Proposed WIC State Vendor Regulations. The Regulations satisfactorily addressed comments provided in our April 5, 1999 letter and thus no further changes are necessary. As previously stated in our April 5 letter, approval of the Regulations is hereby provided.

Please feel free to contact me should you have any further questions.

Sincerely,

Handwritten signature of Christopher J. Martin and typed name: CHRISTOPHER J. MARTIN Administrator Mid-Atlantic Region

OPTIONAL FORM 98 (7-88)

FAX TRANSMITTAL

of pages >

Form fields with handwritten entries: To: Leesa Tressler, Dept./Agency, From: Roberta Hodson, Phone: 705-259-5021, Fax: 517-783-3794

NBN 7540-01-317-7388

5000-101

GENERAL SERVICES ADMINISTRATION



**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT**

PROPOSED

I.D. NUMBER: 10-158
 SUBJECT: Supplemental Nutrition Program for Women, Infants & Children (WIC Program)
 AGENCY: DEPARTMENT OF HEALTH

99 APR 15 PM 3:13
 ALBERTA GOVERNMENT
 REGULATORY REVIEW COMMISSION

TYPE OF REGULATION

- Proposed Regulation
- Final Regulation
- X Final Regulation with Notice of Proposed Rulemaking Omitted
- 120-day Emergency Certification of the Attorney General
- 120-day Emergency Certification of the Governor
- Delivery of Tolled Regulation
 - a. With Revisions
 - b. Without Revisions

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
4-15-99	<i>Maryanne Felletts 2:40 pm</i>	HOUSE COMMITTEE ON HEALTH & HUMAN SERVICES
4/15/99	<i>Roger Shaffer 3:20 pm</i>	
4/15/99	<i>Orin John 2:50 pm</i>	SENATE COMMITTEE ON PUBLIC HEALTH & WELFARE
4/15/99	<i>Kurti Kreider 2:52 pm</i>	
4/15/99	<i>Kim C Garner</i>	INDEPENDENT REGULATORY REVIEW COMMISSION
4-15-99	<i>Mary McInnes 2:26 pm</i>	ATTORNEY GENERAL
		LEGISLATIVE REFERENCE BUREAU

April 15, 1999