

MCNEES, WALLACE & NURICK

ATTORNEYS AT LAW

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HARRISBURG, PA 17108-1166
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FAX (717) 237-5300
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FORTHCOMING

Nyce
Sandusky
Gelnett
Harris
Tyrrell
Wyatte

November 3, 1998

JEFFREY F. CHAMPAGNE
DIRECT DIAL: (717) 237-5305
E-MAIL ADDRESS: JCHAMPAG@MWN.COM

Howard A. Burde
Office of General Counsel
17th Floor
333 Market Street
Harrisburg, PA 17101

Re: Department of Health WIC Regulations

Dear Mr. Burde:

In our discussion yesterday, you emphasized the decision-making process at the federal level of the WIC program, and you invited me to demonstrate why the "final-omitted" process was not available to the Department of Health in its process of issuing WIC regulations.

I appreciate your invitation. I cannot help but comment, however, that you have invited me to disprove a negative. That is, you have invited me to disprove the proposition that the Regulatory Review Act's procedures for proposed rules do not apply. Perhaps because disproving the negative is so difficult, the law does not require that a person relying on a rule prove that there is no relevant exception to the rule. Rather, the burden of demonstrating that the Department of Health can omit part of the generally required procedures is on those who argue for the omission. It is the view of the Pennsylvania Food Merchants Association that any proposed WIC regulation is subject to the Regulatory Review Act; the Department of Health seems to agree. That being the case, the Regulatory Review Act (including the definitions in 71 P.S. § 745.3) tells us that the "final-omitted" procedures of the Regulatory Review Act apply only if the WIC situation falls within one of the three exceptions listed in 45 P.S. § 1204.

Section 1204 lists three situations in which the "final-omitted" process would be lawful. Subsection 1204(3) deals with emergencies. The Department of Health has not suggested that this subsection is satisfied here. Subsection 1204(2) deals with notification to all affected persons. The Department of Health has not suggested that this subsection is satisfied here. Thus, the question before us is whether subsection 1204(1) is satisfied in the case of WIC regulations. Please let me know if I have misapprehended the nature of the question.


RECEIVED
REGULATORY COMMISSION
NOV 5 1998
15:01 PM 5-10-98

Howard A. Burde
September 17, 1998
Page 3

Thank you for taking my call this morning and for your consideration of the above. If I can be of assistance as your office contemplates this matters, I would be pleased to do so.

Sincerely,

McNEES, WALLACE & NURICK

By 
Jeffrey F. Champagne

cc: David McCorkle
Mary Wyatte

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93 SEP 21 AM 9:20

RECEIVED
PENNSYLVANIA DEPARTMENT OF HEALTH

SD

JEFFREY F. CHAMPAGNE

DIRECT DIAL: (717) 237-5305

E-MAIL ADDRESS: JCHAMPAG@MWN.COM

September 17, 1998

Howard Burde
Office of Chief Counsel
Pennsylvania Department of Health
Room 806 -- Health and Welfare Building
Harrisburg, PA 17108

Forthcoming:

Nyce
Sandusky
Gelnett
Harris
Tyrrell

Re: WIC Rule-making

Dear Mr. Burde:

I am writing on behalf of the Pennsylvania Food Merchants Association with regard to the current rule-making effort of the Division of WIC of the Pennsylvania Department of Health. The Association believes that the WIC regulations are subject to the Regulatory Review Act. Although there were some confusing signals to the contrary, it is my understanding that the Department of Health is also treating the Regulatory Review Act as applicable to the WIC regulations. Please let me know if this understanding is incorrect.

The Division has announced an intention to promulgate this regulation in "final-omitted" form, thus dispensing with the processes that normally apply to proposed regulations under the Regulatory Review Act. When you and I discussed this, you mentioned that your office had not formally been presented with the question of whether "final-omitted" processing was appropriate, and you therefore had no definitive viewpoint to express on the question.

If the question is presented to your office, it is our view that your office should conclude that "final-omitted" processing would be inappropriate and unlawful for the regulatory proposal in question. As we understand it, "final-omitted" processing of the WIC regulation would be justified, if at all, on the grounds that the regulatory proposal would be a ministerial act that does no more than reiterate requirements that are already established elsewhere (*i.e.* in federal rules). The draft WIC regulations, however, do much more than reiterate federal requirements. Rather, they represent a discretionary choice among policy options. That being the case, the "final-omitted" process is not available and the regulation should not be approved by your office.

The proposed WIC regulations have been circulated in draft by the Department. At this point, I am not prepared to show you each discretionary, non-ministerial aspect of the draft regulations, but one or two examples should demonstrate the point. One broad example is the area of recertification of stores as authorized to provide allowable foods to participants. The federal rules require periodic reviews and appropriate adjustments to the roster of participating food vendors. 7 U.S.C. § 246.12(g). The draft regulations, however, require a system in which certification automatically expires periodically, subject to recertification. Neither certification nor an automatic expiration of certification is required in the federal rules. Thus, it cannot be said that the draft regulations are merely a ministerial reiteration of requirements that already exist or that must exist. We need not comment here on whether the Division's draft regulations constitute wise policy choices or an appropriate exercise of agency discretion. Rather, the point here is that the Division's draft regulations constitute discretionary policy choices. Thus, use of the "final-omitted" process is not available.

The above example is hardly unique. Another example is the draft regulatory decision that the Department will assign one store slot for every 160 participants except in Philadelphia where the Department will assign one store slot for every 260 participants. Even assuming that this discretionary choice is allowable under the federal rules and that it is wise policy, the fact remains that it is a discretionary policy choice. The "final-omitted" process is not designed for such discretionary regulatory choices. Obviously, then, we anticipate that your review will yield a conclusion that, whatever the wisdom of the content of the draft regulations, they cannot be submitted to the Independent Regulatory Review Commission in "final-omitted" form. The Pennsylvania Food Merchants Association is not interested in delay for delay's sake. We think that the rule-making should be done once and done right. Both the Department and the members of the Association would lose if the Department were to pursue a "final-omitted" path only to have it challenged in court on procedural grounds. Thus, our goal is a process that is, at a minimum, legally adequate.


I would be pleased to receive your reaction to this analysis. In addition, if the Division proposes the use of the "final-omitted" process based on other grounds, I request that you inform me of this so that I might have the opportunity to promptly share with you the Association's analysis of such alternate grounds.

Howard A. Burde
September 17, 1998
Page 3

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Sincerely,

McNEES, WALLACE & NURICK

By 
Jeffrey F. Champagne

cc: David McCorkle
Mary Wyatte

Original: 2030

Mizner

cc: Tyrrell

Harris

Sandusky

Legal



FAX

**TO: Chuck Tyrrell, Jr.
Independent Regulatory Review Commission**

Phone Number: (717) 772-3455

Fax Number: (717) 783-2664

**FROM: Lesa Treasler, Esquire
Office of Legal Counsel**

Phone Number: (717) 783-2500

Fax Number: (717) 783-3794

RECEIVED
INDEPENDENT REGULATORY REVIEW COMMISSION
MAY 17 PM 3:50

DATE and TIME: May 17, 1999 3:30 p.m.

NUMBER OF PAGES (including this page): 4 pages

MESSAGE:

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COUNTY WIC STATISTICS

COUNTY	LOCAL AGENCY	AUTHORIZED STORE SLOTS	STORE SLOTS FILLED	STORES ON WAITING LIST
Adams	South Central Community Action Program	12	9	1
Allegheny	Allegheny County Health Department	152	83	27
Armstrong	Family Health Council, Inc.	19	14	2
Beaver	Family Health Council, Inc.	23	19	2
Bedford	Broad Top Medical Center	8	7	0
Berks	Maternal Family Health Services	42	33	14
Blair	Home Nursing Agency of Blair	27	21	1
Bradford	Maternal Family Health Services	15	11	1
Bucks	Bucks County Health Department	40	40	5
Butler	Family Health Council, Inc.	23	19	2
Cambria	Cambria County Community Action Program	29	25	0
Cameron	North Central PA Regional Planning & Dev. Corp.	1	2	0
Carbon	Maternal Family Health Services	7	4	1
Centre	Family Health Council, Inc.	17	13	4
Chester	Chester County Health Department	28	26	0
Clarion	Human Support Services	9	9	0
Clearfield	North Central PA Regional Planning & Dev. Corp.	18	12	0
Clinton	Bi-County WIC	9	6	0
Columbia	Family Health Council of Central PA	8	6	0
Crawford	Human Support Services	13	12	0
Cumberland	Family Health Council of Central PA	19	15	0
Dauphin	Hamilton Health Center	38	34	8
Delaware	Crozer-Chester	52	36	0
Elk	North Central PA Regional Planning & Dev. Corp.	5	5	0
Erie	United Neighborhood Facilities Health Care Corp.	31	23	0
Fayette	Fayette County Community Action Agency	35	28	0
Forest	Shenango Valley Urban League	3	3	0
Franklin	South Central Community Action Program	18	15	1
Fulton	Broad Top Medical Center	3	2	0
Green	Community Action Southwest	13	10	0
Huntingdon	Broad Top Medical Center	9	7	2
Indiana	Family Health Council, Inc.	14	12	0
Jefferson	North Central PA Regional Planning & Dev. Corp.	8	7	0
Juniata	Family Health Council of Central PA	4	3	0
Leakawanna	Maternal Family Health Services	34	21	
Lancaster	Community Action Program of Lancaster	51	48	7
Lawrence	Family Health Council, Inc.	14	9	1
Lebanon	Family Health Council of Central PA	12	11	0
Lehigh	Maternal Family Health Services	42	38	22
Luzerne	Maternal Family Health Services	52	36	6
Lycoming	Bi-County WIC	22	17	0
McKean	Bradford Hospital	10	10	0
Mercer	Shenango Valley Urban League	18	15	2
Mifflin	Family Health Council of Central PA	7	6	0
Monroe	Maternal Family Health Services	18	12	0

COUNTY WIC STATISTICS

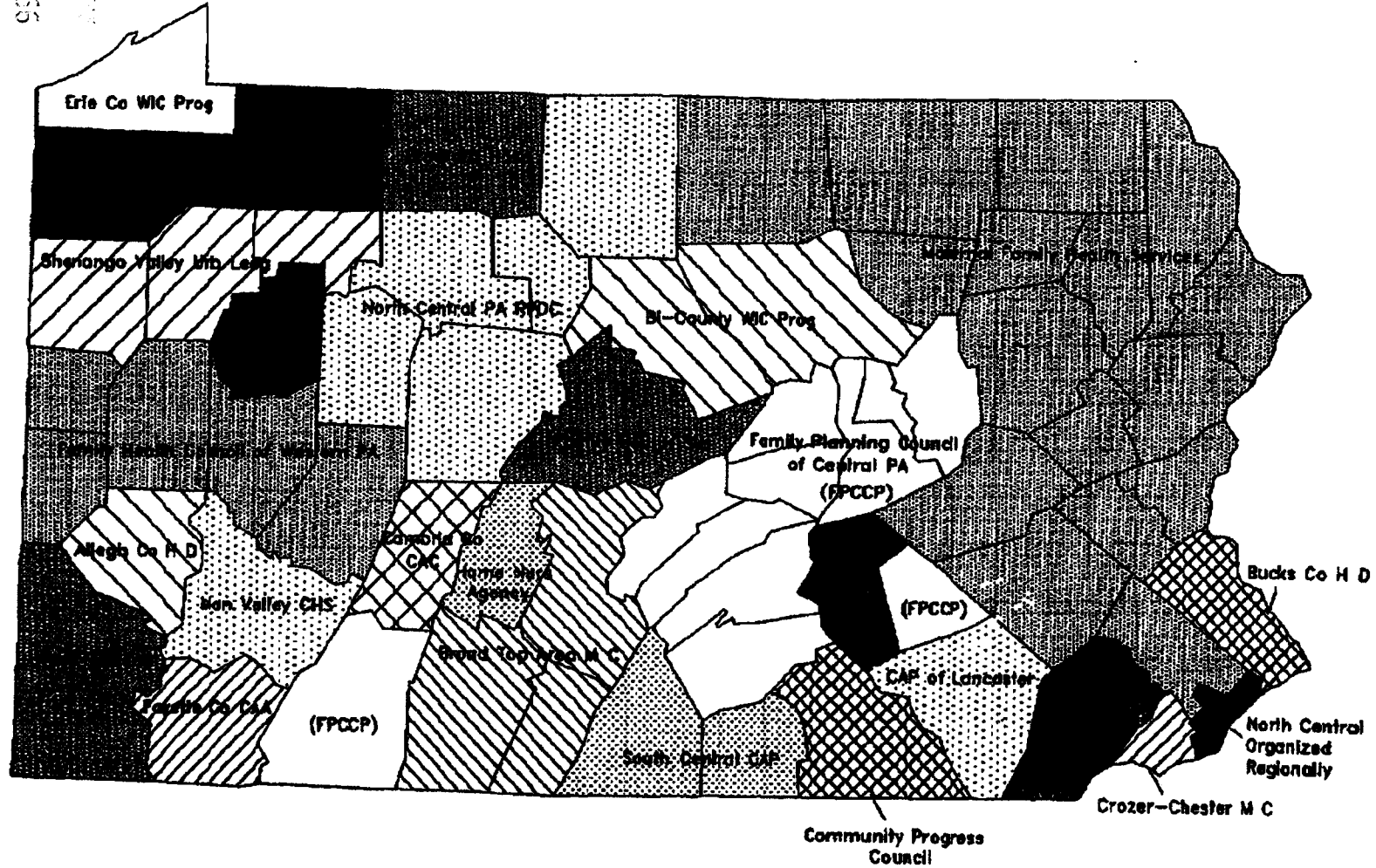
COUNTY	LOCAL AGENCY	AUTHORIZED STORE SLOTS	STORE SLOTS FILLED	STORES ON WAITING LIST
Montgomery	Maternal Family Health Services	51	53	19
Montour	Family Health Council of Central PA	3	2	0
Northampton	Maternal Family Health Services	27	25	5
Northumberland	Family Health Council of Central PA	13	12	2
Perry	Family Health Council of Central PA	8	5	0
Philadelphia	NORTH, Inc.	210	190	104
Pike	Maternal Family Health Services	4	4	0
Potter	North Central PA Regional Planning & Dev. Corp.	4	9	1
Schuylkill	Maternal Family Health Services	20	18	0
Snyder	Family Health Council of Central PA	5	4	0
Somerset	Family Health Council of Central PA	13	11	0
Sullivan	Maternal Family Health Services	2	1	0
Susquehanna	Maternal Family Health Services	11	9	3
Tioga	Maternal Family Health Services	11	8	2
Union	Family Health Council of Central PA	4	3	0
Venango	Shenango Valley Urban League	9	9	0
Warren	Human Support Services	8	7	0
Washington	Community Action Southwest	26	20	0
Wayne	Maternal Family Health Services	9	8	2
Westmoreland	Mon Valley Community Health Services	54	46	5
Wyoming	Maternal Family Health Services	7	7	2
York	Community Progress Council Inc.	43	43	6
SUM		1579	1288	266

PERMISSION

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STATEMENT
HEALTH COMMISSION

LOCAL WIC AGENCIES IN PENNSYLVANIA



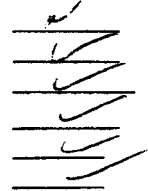
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November 3, 1998

Howard A. Burde
Office of General Counsel
17th Floor
333 Market Street
Harrisburg, PA 17101

Re: Department of Health WIC Regulations

Dear Mr. Burde:

In our discussion yesterday, you emphasized the decision-making process at the federal level of the WIC program, and you invited me to demonstrate why the "final-omitted" process was not available to the Department of Health in its process of issuing WIC regulations.

I appreciate your invitation. I cannot help but comment, however, that you have invited me to disprove a negative. That is, you have invited me to disprove the proposition that the Regulatory Review Act's procedures for proposed rules do not apply. Perhaps because disproving the negative is so difficult, the law does not require that a person relying on a rule prove that there is no relevant exception to the rule. Rather, the burden of demonstrating that the Department of Health can omit part of the generally required procedures is on those who argue for the omission. It is the view of the Pennsylvania Food Merchants Association that any proposed WIC regulation is subject to the Regulatory Review Act; the Department of Health seems to agree. That being the case, the Regulatory Review Act (including the definitions in 71 P.S. § 745.3) tells us that the "final-omitted" procedures of the Regulatory Review Act apply only if the WIC situation falls within one of the three exceptions listed in 45 P.S. § 1204.

Section 1204 lists three situations in which the "final-omitted" process would be lawful. Subsection 1204(3) deals with emergencies. The Department of Health has not suggested that this subsection is satisfied here. Subsection 1204(2) deals with notification to all affected persons. The Department of Health has not suggested that this subsection is satisfied here. Thus, the question before us is whether subsection 1204(1) is satisfied in the case of WIC regulations. Please let me know if I have misapprehended the nature of the question.

Howard A. Burde
November 3, 1998
Page 2

Subsection 1204(1) allows the omission of ordinary procedures if a regulation relates to:

- (i) military affairs; (ii) agency organization, management or personnel;
- (iii) agency procedure or practice; (iv) Commonwealth property, loans, grants, benefits or contracts; or (v) the interpretation of a self-executing act of Assembly or administrative regulation.

The draft WIC regulations satisfy none of the clauses in subsection 1204(1). It is also virtually certain that no WIC regulation will satisfy any of the clauses in subsection 1204(1). This is because, among other things, there is no self-executing act of Assembly or administrative regulation that can be the basis for a WIC regulation. Thus, it is not premature to inform the Department of Health of the unavailability of omitting ordinary procedures under section 1204, and it is not premature to advise the Department of Health to proceed along a correct regulatory path.

With regard to the legal impact of the federal WIC approval, you might find the decision in *Elkin v. Commonwealth, Department of Public Welfare*, 53 Pa. Commw. 554, 419 A.2d 202 (1980), worth considering. The most that federal approval could mean is that the Pennsylvania Department of Health's approach is not inconsistent with federal law. If we were claiming that the Pennsylvania Department of Health's rules violate federal law, federal approval would be material. But this has not been our claim; federal approval is therefore immaterial. Our claims at this point are, in essence, that the Department of Health's rules are unwise and that they are subject to the Regulatory Review Act and other procedural statutes. This is of no import to the federal Executive Branch, because the federal government is not empowered to reject a state WIC plan based on either the state's lack of wisdom or its failure to follow state procedural law. I assume that your office would be among the first to object if the federal government rejected Pennsylvania's plan on the grounds that Pennsylvania's WIC rules are not as wise as New York's WIC rules or Montana's WIC rules.

Nor is it within the federal government's job to ascertain whether the Pennsylvania Department of Health has complied with Pennsylvania rule-making statutes. No one has asked the federal government to ensure that state rule-making law is followed and no one has empowered the federal government to reject a state proposal on the grounds of state procedural law. I assume that your office would be among the first to object if the federal Executive Branch took it upon itself to interpret and apply Pennsylvania procedural law to Pennsylvania's WIC plan. That responsibility and that power reside in Pennsylvania (and have been entrusted, in part, to your office). Your suggestion that the Pennsylvania Food Merchants Association should go running to Washington over this issue is, we believe, misguided. What is more, our ability to complain to the federal government about adherence to state procedures does not affect the analysis under 45 P.S. § 1204, which is central. **Thus, we are back at the key question: can the Department of Health omit some of the procedures that are generally**

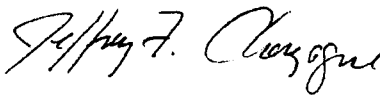
Howard A. Burde
November 3, 1998
Page 3

applicable under the Regulatory Review Act? We respectfully submit that the factors that you have preliminarily suggested do not satisfy the statutory standards for omitting any Regulatory Review Act procedure. Further, we suggest that you do not need to know the ultimate particulars of the Department of Health's proposal in order to address this question.

Thank you once again for taking the time to discuss the regulatory process. Please let me know if we can be helpful in moving the legal review process along. No legitimate interest is served by avoiding the legal issues that have been raised by the Department of Health's stated intent to omit some of the generally applicable procedures.

Sincerely,

McNEES, WALLACE & NURICK

By 

Jeffrey F. Champagne

cc: David McCorkle
Mary Wyatte



Original: 2030
 Mizner
 cc: Tyrrell
 Harris
 Sandusky



Legal

PFMA Officers

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PRESIDENT
 David L. McCorkle

May 7, 1999

RECEIVED
 99 MAY 12 AM 9:08
 FEDERAL RESERVE BANK
 HARRISBURG, PA

Mary Lou Harris
IRRC
 14th Floor, 333 Market Street
 Harrisburg, PA 17101

Dear Mary Lou:

Thank you for taking time from you schedule this morning to help point us in the correct direction in sending correspondence to elected officials regarding the WIC Program.

As per your request I have enclosed a copy of the letter that we are sending out. If you have any questions please call me at 731.0600, ext: 5570.

Thanks again for all of your help.

Yours truly,

Maria A. Christini
 Administrative Assistant to
 Randy St. John

/mac

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 P.O. BOX 870 • CAMP HILL, PA 17001-0870
<http://www.pfma.org>

1-800-522-9983 PA Only
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Original: 2030
Mizner

cc: Tyrrell
Harris
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Moscow, PA

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May 7, 1999

The Honorable Vincent J. Hughes
Democrat Chair, Public Health &
Welfare Committee
Senate of Pennsylvania
Senate Box 203007, Main Capitol Building
Harrisburg, PA 17120

Dear Senator Hughes:

The Pennsylvania Department of Health has sent you, or will shortly send you, a set of regulations implementing the Women, Infants, and Children (WIC) program. The Pennsylvania Food Merchants Association (PFMA) believes that the regulations are not only unwise but also unlawful. While the WIC regulations being proposed by the Department of Health presumably do not violate federal WIC requirements, they are inconsistent with Pennsylvania procedural law and Pennsylvania case law from a previous WIC dispute, and we believe that these regulations are unsound in terms of how the Department would continue to regulate the stores that serve WIC consumer-participants. We therefore urge you to disapprove the WIC regulations that the Department is sending to you for approval.

Regulatory Process

The Department of Health appears to acknowledge that the Regulatory Review Act, the Commonwealth Documents Law, and the Commonwealth Attorneys Act apply to the proposed regulations. However, the Department asserts that the "final-omitted" process under the Commonwealth Documents Law (CDL) (45 P.S. § 1204) allows the Department to skip the notice and comment requirements that are generally applicable to agency regulations. PFMA asserts, and asks you to conclude, that the final-omitted process is not available to the Department of Health with regard to these WIC regulations.

Section 1204 of the CDL lists three situations in which the "final-omitted" process would be lawful. Subsection 1204(1) allows the omission of ordinary procedures if a regulation relates to:



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May 7, 1999

The Honorable Harold F. Mowery, Jr.
Majority Chair, Public Health &
Welfare Committee
Senate of Pennsylvania
Senate Box 203031, Main Capitol Building
Harrisburg, PA 17120

Dear Senator Mowery:

The Pennsylvania Department of Health has sent you, or will shortly send you, a set of regulations implementing the Women, Infants, and Children (WIC) program. The Pennsylvania Food Merchants Association (PFMA) believes that the regulations are not only unwise but also unlawful. While the WIC regulations being proposed by the Department of Health presumably do not violate federal WIC requirements, they are inconsistent with Pennsylvania procedural law and Pennsylvania case law from a previous WIC dispute, and we believe that these regulations are unsound in terms of how the Department would continue to regulate the stores that serve WIC consumer-participants. We therefore urge you to disapprove the WIC regulations that the Department is sending to you for approval.

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May 7, 1999

The Honorable Frank L. Oliver
Democrat Chair, Health & Human Services
Committee
PA House of Representatives
34 East Wing, Main Capitol Building
Harrisburg, PA 17120

Dear Representative Oliver:

The Pennsylvania Department of Health has sent you, or will shortly send you, a set of regulations implementing the Women, Infants, and Children (WIC) program. The Pennsylvania Food Merchants Association (PFMA) believes that the regulations are not only unwise but also unlawful. While the WIC regulations being proposed by the Department of Health presumably do not violate federal WIC requirements, they are inconsistent with Pennsylvania procedural law and Pennsylvania case law from a previous WIC dispute, and we believe that these regulations are unsound in terms of how the Department would continue to regulate the stores that serve WIC consumer-participants. We therefore urge you to disapprove the WIC regulations that the Department is sending to you for approval.

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The Honorable Dennis M. O'Brien
Majority Chair, Health & Human Services
Committee
PA House of Representatives
209 Capitol Annex
Harrisburg, PA 17120

Dear Representative O'Brien:

The Pennsylvania Department of Health has sent you, or will shortly send you, a set of regulations implementing the Women, Infants, and Children (WIC) program. The Pennsylvania Food Merchants Association (PFMA) believes that the regulations are not only unwise but also unlawful. While the WIC regulations being proposed by the Department of Health presumably do not violate federal WIC requirements, they are inconsistent with Pennsylvania procedural law and Pennsylvania case law from a previous WIC dispute, and we believe that these regulations are unsound in terms of how the Department would continue to regulate the stores that serve WIC consumer-participants. We therefore urge you to disapprove the WIC regulations that the Department is sending to you for approval.

Regulatory Process

The Department of Health appears to acknowledge that the Regulatory Review Act, the Commonwealth Documents Law, and the Commonwealth Attorneys Act apply to the proposed regulations. However, the Department asserts that the "final-omitted" process under the Commonwealth Documents Law (CDL) (45 P.S. § 1204) allows the Department to skip the notice and comment requirements that are generally applicable to agency regulations. PFMA asserts, and asks you to conclude, that the final-omitted process is not available to the Department of Health with regard to these WIC regulations.

Section 1204 of the CDL lists three situations in which the "final-omitted" process would be lawful. Subsection 1204(1) allows the omission of ordinary procedures if a regulation relates to:



PFMA Officers

CHAIRMAN
William Bracey
Bill's Shur Saves
Moscow, PA

VICE-CHAIRMAN
Murray Battleman
Richboro Shop N Bag
Richboro, PA

TREASURER
David Genuardi
Genuardi's Family Markets
Norristown, PA

SECRETARY
Gary Kipp
Giant Eagle
Butler, PA

PRESIDENT
David L. McCorkle

PCSC Officers

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Rutter's Farm Stores
York, PA

VICE-CHAIRMAN
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Orloski's Quik Mart
Wilkes-Barre, PA

Services for our Members:

Legislative Representation
Coupon Redemption
Money Orders
Consumer Bill Payment Services
Insurance Programs
Seminars
Annual Conventions
Publications

May 7, 1999

The Honorable Mike Fisher
Attorney General
Office of the Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120

Dear Honorable Fisher:

The Pennsylvania Department of Health has sent you, or will shortly send you, a set of regulations implementing the Women, Infants, and Children (WIC) program. The Pennsylvania Food Merchants Association (PFMA) believes that the regulations are not only unwise but also unlawful. While the WIC regulations being proposed by the Department of Health presumably do not violate federal WIC requirements, they are inconsistent with Pennsylvania procedural law and Pennsylvania case law from a previous WIC dispute, and we believe that these regulations are unsound in terms of how the Department would continue to regulate the stores that serve WIC consumer-participants. We therefore urge you to disapprove the WIC regulations that the Department is sending to you for approval.

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(i) military affairs; (ii) agency organization, management or personnel; (iii) agency procedure or practice; (iv) Commonwealth property, loans, grants, benefits or contracts; or (v) the interpretation of a self-executing act of Assembly or administrative regulation.

None of these applies here. The Department of Health is making ordinary discretionary decisions in the WIC regulations that are coming before you.

Subsection 1204(2) allows agencies to bypass certain procedures when it provides individual notice to all affected persons. The Department of Health has not suggested that it will try to satisfy this subsection.

Subsection 1204(3) deals with emergencies. That is, it permits an agency to bypass the regular rule-making process for WIC programs when complying with the ordinary rule-making process would be impracticable, unnecessary, or contrary to the public interest. There is no emergency in this case. The federal rules for WIC programs require state plans, but not state regulations. The Department of Health apparently believes that it must issue regulations fairly soon because of the programmatic problems described in the Commonwealth Court decision in *Giant Food Stores, Inc v. Commonwealth, Dept. of Health*, 713 A.2d 177 (Pa. Cmwlth. 1998)]. We do not agree; the Commonwealth Court did not order the issuance of any regulations and did not establish any deadline. More important for present purposes, however, is the fact that the Commonwealth Court decision was issued on June 11, 1998. The passage of almost a year since then demonstrates that there is no emergency and defeats any suggestion that issuing proposed WIC regulations in the ordinary course of rule-making is impracticable. See *Automotive Service Councils v. Larson*, 82 Pa. Cmwlth. 47, 474 A.2d 404 (1984), where the court said that omitting proposed rule-making under section 204 of the Commonwealth Documents Law was improper in light of the time available to the agency.

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In short, the Department of Health's current "final-omitted" gambit violates the Commonwealth Documents Law and needlessly subjects everyone involved to the specter of litigation any time in the future that the regulations are invoked.

Recertification System and Penalties

A fundamental feature of the Department's traditional and proposed system is that WIC stores are certified or authorized for limited periods. Currently, there exists a system of penalties when inspections occur for recertification purposes that does not make sense in light of the system of penalties used when identical WIC inspections occur for other reasons. The grading of offenses in the proposed draft regulations may be a step in the right direction. But the fundamental problem remains. The federal WIC rules require periodic reviews and adjustments where necessary, but do not call for periodic automatic decertification and recertification nor do the federal rules prescribe the specific details of recertification. Thus, the fundamental problem with the recertification reviews is a creation of the Department of Health, not the federal government.

A decade ago, Commonwealth Court invalidated a Department of Health WIC action that removed a Giant Food Store from the program, because the Department of Health's action was based on the above mentioned artificial distinction between recertification inspections and other inspections. *Giant Food Stores, Inc. v. Commonwealth, Department of Health*, 123 Pa. Cmwlth. 418, 554 A.2d 174 (1989). The court correctly concluded that the Department's WIC recertification system was illogical and therefore invalid. In the 1989 case, Giant store #48 was to be expelled from the program for committing an offense in a recertification review which would have only brought a warning in a "monitoring" review. In that decision the court said:

The Department admits that the nature of the violation was such that in any period except a recertification one, the penalty would have been a warning. It is difficult to follow

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the Department's logic. The substantive effect of a one time shortage should make no qualitative difference depending on the time or type of inspection. As to whether a store is properly managed, there is no distinction to be made between a recertification inspection and any other type of inspection.

The finding [of violation made by the Department] is not based on substantial evidence. Substantial evidence is evidence that a reasonable mind would accept as adequate to support a conclusion. If a single product shortage is not sufficient to justify disqualification during a routine inspection, it is not sufficient to terminate store #48 from the WIC program on the basis of a one time shortage during a recertification inspection.

Giant, 123 Pa. Cmwlth. at 421-422, 554 A.2d at 176 (citations omitted). The Court therefore reversed the Department's decision to terminate the store. *Giant*, 123 Pa. Cmwlth. at 423, 554 A.2d at 176-177. After the 1989 court decision, the Department claimed that it could pursue its flawed approach to recertification once it wrote that approach down in a Handbook. We assume that the Department will feel all-the-more emboldened to pursue its judicially-invalidated approach once it publishes it as a regulation as it is currently attempting to do. Because the draft regulations are inconsistent with the Commonwealth Court decision, they are improper and should be rejected. The Department's approach, if allowed to go forward, will predictably lead to more needless litigation. The rancor and inefficiency of that process should be avoided by rejecting the regulation that is now being contemplated by the Department.

Other Substantive Issues

We have had initial discussions with the Department of Health regarding a different view of the program. In our view, for example, WIC store authorization should not be based on scarcity and monopolies, WIC

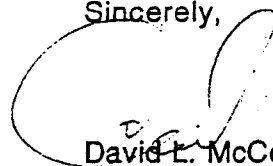
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store authorization should not automatically "sunset" every few years, and the Department's means of comparing store prices is dysfunctional. The Department and the Governor's office have said that they are willing to rethink these issues over the longer term (and we acknowledge that this is a potentially good sign). However, the Department's proposal to promulgate the regulations through the "final omitted" process would push that process off further, and without good reason.

PFMA believes that this rethinking should happen now, with broad consultation with stake holders, through ordinary regulatory procedures. Thus, because of the procedural improprieties, the inconsistency with the case law regarding recertification inspections, and the program design flaws that are ripe for discussion, PFMA believes that the current "final-omitted" regulatory effort of the Department should be rejected.

We regret that we are at temporary loggerheads with the Department on this regulation, and we believe that your intervention now will spare us all needless conflict and put us on a road to achieving a consensus with which we all can live.

Sincerely,



David L. McCorkle
President & CEO

DLM/mac

TESTIMONY

PRESENTED ON

**DRAFT REGULATIONS TO AMEND THE STATE PLAN OF PROGRAM
OPERATIONS AND ADMINISTRATION**

FOR THE

WOMEN, INFANTS AND CHILDREN'S PROGRAM

Forthcoming:

Nyce _____
Sandusky _____
Gelnett _____
Wyatte _____
Tyrrell _____
Harris _____

PRESENTED TO:

**PENNSYLVANIA DEPARTMENT OF HEALTH, DIVISION OF WOMEN, INFANTS &
CHILDREN**

PRESENTED BY:

**DAVID L. McCORKLE, PRESENT & CEO
PA FOOD MERCHANTS ASSOCIATION
CAMP HILL, PA**

September 24, 1998

SECTION I

Introduction

Congress created the Women, Infants & Children's program in 1972 to provide specific supplemental foods to low income pregnant, postpartum and breast feeding women and their infants and children who have been certified by a health professional to be at nutritional risk. Pennsylvania's WIC program is administered by the Dept. of Health and operates under a management plan approved by the U.S. Dept. of Agriculture. Individual states have great flexibility in the way WIC programs are administered. For example, in Maryland, any retailer interested in serving as a WIC vendor is approved by Maryland's WIC administrators as long as adequate inventories of all WIC allowable items are maintained. The Maryland policy recognizes the fact that the supermarket industry is extremely competitive. Any attempt to interfere with competitive market forces by assigning WIC participants to specific shopping locations is counterproductive for supermarket owners and participating families. Simply, by assigning families to specific stores, Pennsylvania's Department of Health insures the viability of one business, while putting other competitors at a distinct disadvantage. Federal guidelines make it clear that competitive forces are to be recognized when considering which retailer should participate in the program. However, this critically important issue has been totally overlooked by the PA Department of Health in drafting the guidelines for retailer participation.¹

The guidelines published following the September 5 notice in the PA Bulletin for Philadelphia state that the Department will seek to assign 160 WIC participants to an individual approved retail location. Although the sale of baby foods in supermarkets accounts for less than 1% of total supermarket sales, and the gross margin on these sales is less than half the average for other store products, assigned WIC families are likely to shop the WIC store for most of their monthly food and general merchandise needs.

Letters are attached from several members of the PA Food Merchants Association noting specific problems that they have experienced. It should be noted that the court case requiring the promulgation of these regulations stemmed from the following circumstances:

1. During a WIC inspection of the store, 2 half gallons of out-of-date milk were

¹ Require that "the state agency is encouraged to consider the impact of authorizations on small businesses". This should be expanded to cover all businesses competing in a trade area.

identified by a WIC local agency.

2. The local agency's objective and the Dept. of Health objective is to reduce the number of stores participating in the WIC program.
3. There were other WIC approved stores in the immediate proximity of the supermarket where WIC customers could purchase prescribed items.
4. The appeals process for a store charged with a minor violation simply requires a review of administrative procedures followed by the Dept. of Health in seeking to disqualify a store. Thus, there is no real opportunity for a fair and impartial review of the facts in the matter by administrative appeal hearing officers. The dependents only recourse was to challenge the criteria on the basis that guidelines had not been properly promulgated as set forth in the Commonwealth Documents Law and the Commonwealth Attorneys Act. As a result of the court's decision, it could be argued that all prior disqualification decisions made by the Dept. of Health are similarly invalid.

It is the contention of the PA Food Merchants Association that the conclusion reached by WIC administrators, as stated in the PA Bulletin, that "they are unable to authorize new stores, review currently authorized stores as required by federal regulations, etc.", is incorrect. The Department has unilaterally decided that they can make such decisions when "participant hardship dictates such action." In reality, the Department has the authority and responsibility to initiate a dialog with the retail food industry as to how WIC can be best administered in the Commonwealth. The following activities are suggested.

1. The Department of Health must immediately initiate a stakeholders process with retail vendors to develop new standards and policies for retail store WIC program participation.
2. When the process and document development planning is underway, the Department should continue to process new vendor applications, change of address applications, change of ownership applications and other administrative procedures routinely.

The review of currently authorized WIC stores can proceed as required by federal regulation.

3. The regulations must be amended to provide for a fair and impartial review of all Department enforcement actions, the establishment of a retail advisory committee to assist the Department in administering the WIC program and other specific changes as documented in the attached testimony.

The problem retailers face in maintaining their customer base can best be understood by the following example.

In Wayne County PA, WIC administrators have decided that the 1268 WIC participants can be served by 8 stores, each handling approximately 160 participants. However, in Wayne County at the present time there are 9 approved stores and additional retailers seeking to participate. Obtaining a WIC vendor agreement in many parts of Pennsylvania is almost as difficult as obtaining a license to serve or sell alcoholic products.

It is recommended that the Department develop a vendor review process that insures full compliance with WIC guidelines, is dependent upon WIC participant feedback to govern continued program operation for the retailer. The investigative presence of local agency contractors paid by the PA Department of Health seeking reasons for excluding retailers from the program, may not be needed. It would seem that state funds now used for policing retail locations can better be used by the Dept. of Health to increase the number of WIC participants being served. The department has reported that state-wide 73.21% of the persons eligible to receive WIC services are actually receiving those services. Others, have not applied, choose not to participate, or cannot be located.

General Comments

The proposed regulations create an unnecessary and unwise complication by having a store certification expire after a certain period of time. WIC vendor contracts should be indefinite in length, but subject to ongoing monitoring by the state.

If the regulations are not improved, the problem that led to the court case filed by Giant Foods could be repeated in every WIC certified store in the Commonwealth. As part of a recertification inspection, an agent working for the Dept. of Health identified 2-1/2 gallon containers of skim milk that should have been removed from the shelves the day prior to the inspection. Giant appealed the Department's decision to a hearing examiner, who conducted a hearing on August 7, 1997. The hearing examiner found

that the Department had followed proper notification procedures and inspection procedures in identifying the outdated products. As a result, the examiner concluded the Department could terminate the store's participation in the WIC program and that all customers shopping at that store would be "transferred" to another WIC vendor. Simply, the WIC guidelines provide the state with a list of infractions that can be used to decertify a store. Once decertified, the store is often in the situation where the Department "store limitation policies" becomes effective. That is, a store will not be allowed to apply for a WIC vendors license if there are enough stores in the county for participants. Often, decertification means permanent disqualification from the WIC program for the supermarket operator. Thus, the Department of Health, by disqualifying a store for having two half gallons of outdated milk available for sale on one day of the year, can impact the economic viability of that Pennsylvania-based business. PFMA members object to the continuation of such policies.

Issues of Concern

1. Vendor participant ratio.

As noted earlier, the WIC program currently limits stores within agency-defined trade areas based upon a vendor to participant ratio calculation. In addition, stores with fewer than 25 participants are excluded from the program. This vendor to participant ratio policy should be replaced by a WIC participant freedom to shop policy. This would allow any store interested in participating in the program to be approved as long as they maintain proper health standards as certified by a local health department and adequate WIC product inventory. WIC participants should receive training and shopping guidelines to ensure that they receive the best value for the WIC benefit provided.

2. WIC Pricing Criteria

In analyzing and comparing stores, WIC seeks to determine the lowest priced vendor. In cases where other factors are equal, the low price vendor will be selected to participate in the program and the store with the higher price will be excluded. The process used by WIC to compare prices is not based on the price of the same items in the stores. Rather, the WIC agent will seek to find the highest priced butter, cheese, peanut butter or other product available in the store. This assumes that the WIC customer will select the most expensive product available on the shelf. The store stocking gourmet peanut butter and offering that at a high price per ounce to the customer will be an immediate loser in the price comparison process. Such comparisons are arbitrary, unfair

and should be eliminated.

3. Private Label Products

WIC needs to be proactive in approving private label products of equal nutritional value to brand name goods. The regulations should develop a process for the analysis of such products and clearly outline a procedure for approving private label products in a timely manner.

4. Retail Advisory Council/Stakeholders Group

It is recommended that a retailer advisory panel be established by the Department to provide ongoing communication and input into proposed policies and procedures for the WIC program. The Advisory Council should consist of WIC administrators, WIC advocacy groups, retailers and participants. This group will serve as a sounding board for ideas and issues as they occur during when a public hearing is not required.

The PA Food Merchants Association was founded in 1953 to represent the interests of retail grocers in supermarkets in the Commonwealth. PFMA's 1800 corporate members represent supermarket chains, independently-owned supermarkets, convenience stores, mom and pop corner markets, food wholesalers and others. PFMA members operate approximately 6,000 retail stores in the Commonwealth.

The current competitive nature of the food business and the current job market must be fully understood in order to understand the problems faced by retailers who serve as WIC vendors. The industry is extremely competitive. 1997 industry operating results note that the average net profit after taxes for the fiscal year ending in March 1997 was 1.08%. Over the past decade, net profit has averaged 0.89%. Today, Americans spend a smaller portion of their disposable income on food consumed at home than do consumers in any other major economy in the world. In 1996, consumers spent 6.6% of their disposable income on food at home, down from 9.1% in 1980. However, American consumers spend approximately 4.2% of their income for food away from home.

High employee turnover in stores adds to the training cost and increases the chance of unintentional employee error in WIC transactions. Unintentional errors by employees have resulted in retailer fines, termination and now the added threat of food stamp license revocation. Regulators must develop a distinction between willful violators and human error committed by well meaning employees. The following

specific comments on the WIC draft regulations are provided to increase dialog between retailers and representatives of the Department of Health, expand shopping choices for WIC participants and to ensure a fair and impartial hearing process in cases where the retailer objects to administrative action taken by the Dept. of Health.

SECTION II

Testimony on draft state regulations governing retail store management and administrative appeals aspects of the WIC program

1101.1 General Purpose & Scope

Section B should be amended to state that appeals shall be conducted by an impartial mediator charged with fairly weighing information on the matter at hand to render judgment as to the appropriateness, fairness and severity of the actions alleged by the Dept. of Health.

1101.2 Definitions

Appeal - This section should be amended to insure a fair hearing by mediator to resolve the specific problem alleged by the department, local agency, store.

Disqualification

Punitive action by the department resulting in termination of a WIC authorized store in the WIC program for reasons of fraud, abuse or other willful program violations. The intent to defraud participants or State Dept. of Health must be demonstrated prior to program disqualification, or recertification denial.

Limitation Criteria

This definition and concept should be omitted.

Store Slots

Store slots should not be decided based on the participant population of the area. Rather, stores should be approved if they meet cleanliness and stocking guidelines. Participants would then have the option of increased shopping opportunities wherever they are located.

Authorization of Stores

1101.41 - Recertification Reviews

(b) - WIC recertification should be based upon prior service records, participant response to service questionnaires, local agency review and ability to meet stocking and product availability standards. The term limitation criteria should be eliminated.

(g) - All reference to selection and limitation criteria should be removed from this statement.

(h) - The department should provide an opportunity to correct problems identified during any review and should be notified of the same. All reference to selection and limitation criteria should be removed from this section.

(i) - This section allows the department to continue its planned reduction of stores participating in the WIC program. The department does this by arbitrarily increasing the average number of WIC participants assigned per store. Thus, the number of stores continues to decrease.

(j) - This section should be rewritten to state the following: Stores meeting health care standards outlined by local or state health care agencies and agreeing to fully stock all WIC items required to adequately serve participants, shall be added to the WIC program. The local agency shall conduct onsite reviews prior to state approval for a vendor to participate. All reviews shall be conducted within 30 days of the retailer's completed application to the PA State Dept. of Health.

(k) - All reference to selection and limitation criteria should be removed from this section.

(l) - The State should design a system whereby the certification and license renewal process is completed in a manner similar to licensing of stores to participate in the Food Stamp program. Any arbitrarily imposed moratorium provides competitive disadvantages to new stores entering the marketplace, or a changing ownership.

Probationary Certification 1101.42

(d) - The circumstances outlined in this section are designed to limit the certification of stores. Substitute language stating a stores requirement to meet local health standards and WIC inventory limits should be substituted so that a full licensing agreement between the department and applying vendor can be effectuated immediately.

(f) - Reference to selection and limitation criteria should be removed from this section.

Selection and Limitation Criteria 1101.43

(a) - Guidelines set forth in this section are arbitrary and unrelated to participant need or quality of stores and their ability to serve WIC customers. All reference to the limitation of number or distribution should be omitted. At the present time, about 1588 WIC vendors serve 252,000 participants. By including the figures noted in this section, the Department is declaring their goal to reduce the number of approved WIC vendors. This policy is anti-competitive and results in the kind of arbitrary decision-making that led to the lawsuit filed by Giant Foods, Inc.

(b) 1-11 - This section should be revised to note that all stores in the WIC program shall provide written certification by state or local food safety inspectors that they meet all cleanliness guidelines of the PA Dept. of Agriculture.

The department will use the following criteria to authorize WIC stores:

- (1) The store is located within the Commonwealth of Pennsylvania.
- (2) The store is licensed by the PA Dept. of Agriculture and/or local health agency to ensure that food safety requirements established by the appropriate regulatory agency are being successfully implemented.
- (3) The store shall have available on the sales floor at all times the minimum inventory of allowable food set forth in Section 1101.44 (B) (relating to the minimum inventory) and identified on a current WIC list. If the minimum inventory is not available, the retailer will certify that the product has been ordered and not delivered, and will be stocked within 8 hours.
- (4) The store shall have shelf prices less than the maximum allowable cost established by the department for the food prescription 1 and food prescription 2 identified below. For price comparison purposes, only products of the same brand, size and nutritional content shall be compared. The highest price of these comparable items shall be recorded to determine if the stores prices are within the maximum allowable price guidelines established by the department. The department will publish no later than September 15 of each year the maximum allowable price guidelines for food prescription 1 and food prescription 2. Any revisions of the price guidelines will be published in the same manner.

(i) Food Prescription 1 consists of: 18 quarts or 9 1/2 gallons of milk; (complete the list)

(ii) Food Prescription 2 consists of: 24 13-oz. cans of concentrated contract brand milk or soy based infant formula.

(5) The store shall be open for business at least 8 hours per day, 6 days per week.

(6) The store shall not be disqualified for participation in the food stamp program or been sanctioned by the food stamp program within the two years prior to application to participate in the WIC program.

(7) The store shall be in compliance with all applicable federal and state regulations as described in writing by the PA Dept. of Health.

(c) In any given trade area any new store will be allowed to participate in the WIC program as long as inventory, cleanliness and customer service standards meet the needs of WIC participants.

1101.44 - Minimum Inventory. No change is recommended in this section.

1101.45 - Waiting List. This section should be eliminated.

1101.46 - Participant Hardship. Since an open vendor approval policy will replace the current guidelines, this section is not necessary.

Requirements of WIC Authorized Stores - 1101.51 Training

1101.52 - Overcharge Recovery System. No changes recommended.

(16) - omit

(17) - Agree that the stores WIC authorization shall become null and void when ownership of the store changes. The department will work with new owners to ensure that transfer of WIC authorization and inspection of new ownership occurs within 7 days following the new owners opening for business.

1101.54 - Change of Ownership a WIC authorized store.

(a) WIC authorization is null and void when a change of ownership of a WIC

authorized store occurs. Upon notification of the change in ownership, the department shall initiate a review process that will promptly result in the licensing of the new store.

(b) To allow uninterrupted service to participants subsequent to a change in ownership, the department will accept an application for certification from prospective owner prior to a change of ownership.

1101.56 - Monitoring of WIC Authorized Stores.

All reference to high risk reviews shall be eliminated.

(b) Special store investigations. The department will determine through information presented by participants, local agencies or other means stores with low performance ratings in the WIC program. The department will monitor these stores and advise owners of specific steps that must be taken in order to maintain the privilege of serving as a WIC vendor.

(1) Compliance Investigations

If the department uses compliance investigations the department will: (the following changes are recommended)

(V) (5) Before any sanction is implemented, the store and employees shall have an opportunity to review problems identified with WIC administrators and local agency representatives. A plan will be developed to correct all problems and to ensure regular training follow-ups by local agency representatives. The objective of the compliance investigation process is to ensure that stores are provided the support necessary to fully implement all WIC guidelines and regulations. It must be recognized that a single incorrect item purchased by a customer, or compliance officer, should not result in the unfair revocation of vendor privileges.

(c) Routine Reviews

(6) Omit

(d) Training Buys

(6) Omit

1101.61 - Sanctions.

(a) The department will sanction the store based upon the severity and nature of the program violations.

(b) If a WIC authorized store commits fraud, it is liable to prosecution under applicable federal, state or local laws.

(f) Specific sanctions. The department will determine the type and level of sanction to be applied against WIC authorized stores that violate the regulations in this part.

(1) For all 1st violations, the department will issue a letter to the WIC authorized store identifying the violation, notifying the store to correct the violation and warning the store of possible penalties for continued noncompliance.

(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:

- Conviction of a fraudulent act following investigation and review by the PA Dept. of Health, local law enforcement agencies, other state or federal law enforcement organizations.**
- Closure of the store by a state, city, local or county health department.**
- Any other criminal abuse relating to the WIC program identified by a participant, or other party, and resulting in a conviction of the store owner or employee.**

(3) Class B Abuses. The department will disqualify a WIC authorized store from participating in the WIC program for a period of two years with the following violations:

- Willfully charging a WIC participant more for an allowable food item than a non-WIC customer is charged for the same item.**
- Failure to remit payment for an overcharge within the specified timeframe.**
- Being convicted of a fraudulent act that results in the overcharging of the WIC program by any means and subsequent prosecution thereof.**

- Overcharging the WIC program willfully by methods that might include, but are not limited to, willfully charging more than actual shelf price for foods, willfully charging sales tax, willfully charging for more than allowable food than is authorized on the WIC food check, and willfully charging a recipient for an allowable food not received. In each of the above cases the department shall provide proof that the vendor has willfully instructed employees to fraudulently charge the WIC program for services not provided to participants.

(4) Class C Abuses.

The department will disqualify WIC authorized store from participation in the WIC program for a period of three years for the following violations:

- Redeeming or exchanging the WIC check for cash, credit or nonfood items.
- Physically altering or changing the store name, food type or quantity, participants information, date or printed dollar amount on the face of the WIC check. Claiming reimbursement for the sale of an item for an allowable food over a specific period time which exceeds the WIC authorized stores documented inventory for the same allowable food for the same period of time.

(G) For any violations not specifically set forth herein, the department will determine the appropriate type and level of training and/or warning to be issued to the store. In setting such sanctions, it shall be kept in mind that a partnership with retail vendors must be maintained in order to ensure the prompt delivery of healthful foods to WIC participants.

Administrative Appeals - 1101.71 - Applicability of General Rules

In addition to administrative rules outlined in 1 PA Code Part 2 (relating to General Rules of Administrative Practices and Procedure) a fair hearing process conducted by a mediator to review all aspects of the case against a retailer, participant or Dept. of Health shall be conducted. A fair and impartial review hearing process will be established by the Department. The review will consist of presentation of the facts to a panel consisting of representative of the retail food industry, member of the PA House of Representatives and a WIC participant. All rights of the appellant will be retained until following full review of the panel and decision, which must be rendered within 45 days of the filing date of the request for the fair and impartial review.

Local Agency and Store Appeals - 1101.101 - Right to Appeal

The appeal process in this section must be revised to ensure a "process designed to secure and protect the interest of both the appellant and the department and to ensure equitable treatment for all involved."

In this regard, it is impossible for an appeals or hearing process to be equitable if the hearing examiner is selected by the Secretary of the Dept. of Health. How can a hearing examiner appointed by the Secretary providing over an appeal or administrative hearing not be subject to the influence of the Secretary in making a decision. How could such a process be equitable?

Hearing procedures not part of the initial agreement with vendors or local agencies should not be included in draft regulations. Similarly, the final section of the draft regulations, 1101.104 - Rehearing and Judicial Review, must be revised and comply with appropriate appellate procedures and should be set forth clearly in the regulatory language.

Summary and Recommendations

This testimony is presented to the PA Dept. of Health in the hope that it will broaden and improve the positive relationship that hundreds of Pennsylvania grocers have with representatives of the State Dept. of Health. The staff members of the Division of Special Food Programs has worked with retailers, participants, local agents and others to develop a food and nutrition program that fills a critically important role for thousands of families in the Commonwealth. WIC is one part of a nutritional safety net for Americans who are in need of public and private support to ensure that health care and nutritional needs are met. Food retailers, food manufacturers and food wholesalers participate in all aspects of America's food distribution and sales system. We look forward to continuing our very significant role in providing donated products to the nation's food banks, support for the WIC program and our expertise to improve benefit distribution procedures.

Regulations and program guidelines must be adjusted to fit the highly competitive nature of the food business in the Commonwealth. Simply, high employee turnover in stores adds to training cost and increases the chance of unintentional employee errors in the administration of the WIC program. The State Dept. of Health must develop training and program administration systems that can distinguish between willful violators and errors made by trained and well meaning employees. Members of our association look forward to working with Health Department officials to expand and improve the Women, Infants and Children's program in the Commonwealth of Pennsylvania.

Weis Markets, Inc.

1000 S. SECOND ST. • P.O. BOX 471 • SUNBURY, PA 17801-0471

September 23, 1998

NORMAN S. RICH
PRESIDENT

VIA FACSIMILE TRANSMISSION (717) 731-5472

Mr. David L. McCorkle, President & CEO
Pennsylvania Food Merchants Association
P. O. Box 870
Camp Hill, Pennsylvania 17001-0870

Re: Proposed WIC Regulations

Dear Mr. McCorkle:

Thank you for giving our company a preview of your testimony regarding the draft regulations for the Women, Infant and Children's Program in Pennsylvania. We support the WIC Program and laud the efforts of the Department of Health to run it effectively.

Many of the improvements in the program which you urge on the Department, are ones we advocated in the past and continue to advocate through PFMA. As you point out, improvements in both process and substance are needed.

We have a stake in the successful administration of the program. With a revised program making the program more accessible to intended beneficiaries, the next generation of Pennsylvanians will be healthier and better able to thrive in a competitive economic environment.

Of course we are also looking out for our company. With 130 of our 155 stores in Pennsylvania, our headquarters in Sunbury, and our warehouse and trucking operation in Milton, most of our 18,400 employees live and work in Pennsylvania. We are also a major purchaser of produce grown and harvested in Pennsylvania. Apropos of the WIC Program, we operate one of the best milk processing plants in the United States right here in Sunbury.

We support the vigorous efforts of PFMA. We are prepared to serve on a stakeholders' advisory committee, as we already do in Maryland.

Sincerely,

WEIS MARKETS, INC.



Norman S. Rich

c/c Mr. Michael Zetlemoyer
John P. Fernsler, Esq.

ACME MARKETS, INC.

75 VALLEY STREAM PARKWAY PO. BOX 3010, MALVERN, PA. 19355-0710 (610) 882-4000

September 23, 1998

Mr. David L. McCorkle
President & CEO
Penna. Food Merchants Assoc.
PO BOX 870
Camp Hill, PA 17001-0870

By facsimile and regular mail

Dear David:

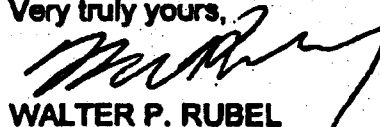
I have reviewed your proposed testimony on the "Draft Regulations to Amend the State Plan of Program Operations and Administration for the Women, Infants and Children". Our company is in agreement with the industry's position and wholeheartedly support it. On behalf of Acme and its over 14,000 employees, please feel free to represent our support for your testimony.

As you know, over the years we have encountered significant problems in the enforcement of WIC regulations. In one case we lost our WIC authorization because of the failure of a particular cashier to follow policy. No consideration was given to the fact that this employee was repeatedly retrained, was disciplined and ultimately was terminated. Simply put, her conduct should not have been imputable to the corporation and should not have resulted in the loss of WIC authorization. Unfortunately, as a result of the State's action, we also had our authorization to accept food stamps suspended by the United States Department of Agriculture for a one year period, thereby creating a serious sales and profit impact on that particular store.

While I have often stated that the Department of Health has fairly and consistently enforced the regulations, we feel those regulations need to be modified consistent with our experiences in other states, i.e. Maryland, New Jersey and Delaware. They must take into account the needs of the food retailing community and the WIC participants.

Once again, you have our full support for your testimony. If you have any questions, please do not hesitate to contact me.

Very truly yours,



WALTER P. RUBEL
Director of Labor Relations and
Labor Counsel

WPR/dch



September 22, 1998

PFMA Officers

CHAIRMAN
William Bracey
Bill's Supermarket
Moscow, PA

VICE-CHAIRMAN
Murray Battelman
Richboro Shop N Bag
Richboro, PA

TREASURER
Joseph McNally
Toot & Scoot
Pittsburgh, PA

SECRETARY
David Genuardi
Genuardi's Family Markets
Norristown, PA

PRESIDENT
David L. McCorkle

The Honorable Daniel F. Hoffman, Secretary
PA Department of Health
Health & Welfare Building
Harrisburg, PA 17108

Forthcoming:

Nyce ✓
Sandusky ✓
Gelnett ✓
Wyatte ✓ copy
Tyrrell ✓
Harris ✓ copy

Dear Secretary Hoffman:

The testimony presented on behalf of PFMA members conveys our support for the WIC program and our concern that the over regulations as proposed in the published guidelines will negatively impact many Pennsylvania businesses.

The proposed regulations fail to convey to the public the critical role that retailers play in the operation and success of the WIC program. It is the opinion of PFMA members and our Board of Directors that customers, i.e. WIC recipients, should be free to choose their store of choice. By allowing the Department to allocate customers based on artificially established trade areas and fixed quotas, creates an unfair competitive market problem for retailers.

Your assistance in developing a stakeholders group to resolve those problems described in the attached testimony is requested.

It is noted that the participating WIC stores were not given adequate time to respond to the draft regulations. In addition, the document was not available on the Department's Web page on September 11 as stated in the PA Bulletin. I appreciate the delivery of the document to this office on September 16, 1998.

SC Officers

CHAIRMAN
Richard Guttman
Crossroads Food Marts
Belle Vernon, PA

VICE-CHAIRMAN
Scott Hartman
Rutter's Farm Stores
York, PA

SECRETARY/TREASURER
Joseph Donas
Co-Go's, Inc.
Pittsburgh, PA

Services for our Members:

- Legislative Representation
- Coupon Redemption
- Money Orders
- Insurance Programs
- Seminars
- Annual Conventions
- Publications

Sincerely,

David L. McCorkle
President & CEO

DLM/si

717-731-0600
FAX 717-731-5472

PENNSYLVANIA FOOD MERCHANTS ASSOCIATION
1029 MUMMA ROAD
P.O. BOX 870 • CAMP HILL, PA 17001-0870

1-800-522-9983 PA Only
1-800-543-8207 National

MCNEES, WALLACE & NURICK
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INDEPENDENT REGULATORY
REVIEW COMMISSION



JEFFREY F. CHAMPAGNE
DIRECT DIAL: (717) 237-5305
E-MAIL ADDRESS: JCHAMPAG@MWN.COM

September 17, 1998

Howard Burde
Office of Chief Counsel
Pennsylvania Department of Health
Room 806 -- Health and Welfare Building
Harrisburg, PA 17108

Forthcoming:

Nyce
Sandusky
Gelnett
Harris
Tyrrell

Re: WIC Rule-making

Dear Mr. Burde:

I am writing on behalf of the Pennsylvania Food Merchants Association with regard to the current rule-making effort of the Division of WIC of the Pennsylvania Department of Health. The Association believes that the WIC regulations are subject to the Regulatory Review Act. Although there were some confusing signals to the contrary, it is my understanding that the Department of Health is also treating the Regulatory Review Act as applicable to the WIC regulations. Please let me know if this understanding is incorrect.

The Division has announced an intention to promulgate this regulation in "final-omitted" form, thus dispensing with the processes that normally apply to proposed regulations under the Regulatory Review Act. When you and I discussed this, you mentioned that your office had not formally been presented with the question of whether "final-omitted" processing was appropriate, and you therefore had no definitive viewpoint to express on the question.

If the question is presented to your office, it is our view that your office should conclude that "final-omitted" processing would be inappropriate and unlawful for the regulatory proposal in question. As we understand it, "final-omitted" processing of the WIC regulation would be justified, if at all, on the grounds that the regulatory proposal would be a ministerial act that does no more than reiterate requirements that are already established elsewhere (*i.e.* in federal rules). The draft WIC regulations, however, do much more than reiterate federal requirements. Rather, they represent a discretionary choice among policy options. That being the case, the "final-omitted" process is not available and the regulation should not be approved by your office.

The proposed WIC regulations have been circulated in draft by the Department. At this point, I am not prepared to show you each discretionary, non-ministerial aspect of the draft regulations, but one or two examples should demonstrate the point. One broad example is the area of recertification of stores as authorized to provide allowable foods to participants. The federal rules require periodic reviews and appropriate adjustments to the roster of participating food vendors. 7 U.S.C. § 246.12(g). The draft regulations, however, require a system in which certification automatically expires periodically, subject to recertification. Neither certification nor an automatic expiration of certification is required in the federal rules. Thus, it cannot be said that the draft regulations are merely a ministerial reiteration of requirements that already exist or that must exist. We need not comment here on whether the Division's draft regulations constitute wise policy choices or an appropriate exercise of agency discretion. Rather, the point here is that the Division's draft regulations constitute discretionary policy choices. Thus, use of the "final-omitted" process is not available.

The above example is hardly unique. Another example is the draft regulatory decision that the Department will assign one store slot for every 160 participants except in Philadelphia where the Department will assign one store slot for every 260 participants. Even assuming that this discretionary choice is allowable under the federal rules and that it is wise policy, the fact remains that it is a discretionary policy choice. The "final-omitted" process is not designed for such discretionary regulatory choices. Obviously, then, we anticipate that your review will yield a conclusion that, whatever the wisdom of the content of the draft regulations, they cannot be submitted to the Independent Regulatory Review Commission in "final-omitted" form. The Pennsylvania Food Merchants Association is not interested in delay for delay's sake. We think that the rule-making should be done once and done right. Both the Department and the members of the Association would lose if the Department were to pursue a "final-omitted" path only to have it challenged in court on procedural grounds. Thus, our goal is a process that is, at a minimum, legally adequate.

I would be pleased to receive your reaction to this analysis. In addition, if the Division proposes the use of the "final-omitted" process based on other grounds, I request that you inform me of this so that I might have the opportunity to promptly share with you the Association's analysis of such alternate grounds.

original: 2030
Mizner
cc: Tyrrell
Harris
Sandusky

Testimony of Lori McLaughlin
Before the
Independent Regulatory Review Commission
May 20, 1999

Final Rulemaking with Proposed Rulemaking Omitted
Supplemental Food Program for Women, Infants
Regs. 10-158

Good morning. My name is Lori McLaughlin and I am Chief Counsel for the Pennsylvania Department of Health. I am accompanied today by Lesa Tressler, Assistant Counsel for the Department of Health, Frank Maisano, Director for the WIC Program and Greg Landis, Chief of the Grants and Retail Store Management Section of the WIC Program.

The Department requests your approval of this regulation package for the Supplemental Food Program for Women, Infants and Children. The regulations relate to the authorization and management of retail grocery stores wishing to participate in the WIC Program, as well as administrative appeals for the WIC Program. The regulations governing the authorization and management of retail grocery stores have been developed as a result of the Commonwealth Court decision issued in Giant Food Stores, Inc. v. The Commonwealth of Pennsylvania, Department of Health. In that decision, the Commonwealth Court found that the criteria the Department uses to select grocery stores to participate in the WIC Program was not valid because it was not published 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.

The purpose of the WIC Program is to provide certain nutritious foods to income eligible

pregnant, post-partum and breastfeeding women, infants up to the age of one and children up to the age of five who are at nutritional risk because of medical problems or poor diets. This program is funded entirely by Federal money. Currently, the Commonwealth is providing benefits to 260,000 participants in the WIC Program.

Because these regulations relate to the operation of the WIC Program, the Department was required to submit them to the United States Department of Agriculture for review and approval. Following revisions required by the USDA, these state regulations were approved by the USDA as compliant with Federal regulations, as well as approved for fiscal and administrative responsibility in the operation of the WIC Program.

The Department has determined that submission of these regulations with proposed rulemaking omitted is essential in order for the Department to continue operation of the WIC Program and to ensure compliance with Federal regulations governing the program. As required by Federal regulation, the Department is required to conduct a review of approximately 1400 grocery stores no later than September 30, 1999, the end of the Federal fiscal year. Failure to do so will result in audit exceptions and the possible loss of Federal funding. Loss of funding will have a devastating effect on the Commonwealth. Loss or even suspension of funding for a short period of time would render the WIC program inoperable because 100% of the funding is Federal, or would place a difficult, if not impossible financial burden upon the Commonwealth to fund the program which provides benefits to approximately 260,000 participants on a monthly basis. To put this in perspective, the current budget for the WIC Program is approximately \$170 million. WIC Program participants redeem, on an average, approximately \$500,000 worth of WIC checks per day at grocery stores authorized to participate in the WIC Program.

Notwithstanding the Department's omission of proposed rulemaking, the Department has committed to conduct a complete and immediate review of these regulations pursuant to the Governor's Executive Order 1996-1. In support of that promise, and in addition to the 1996-1 review, the Department will be required to revise its state regulations before May 17, 2000, in order to be compliant with the USDA-FNS final rule relating to WIC/Food Stamp Program Vendor Disqualifications published in the Federal Register on March 18, 1999.

On behalf of the Department of Health, I appreciate the opportunity to appear before you and will be happy to answer any questions from the Commission concerning these regulations.