

Regulatory Analysis Form		This space for use by IRRC RECEIVED 2000 SEP 18 PM 2:42 INDEPENDENT REGULATORY REVIEW COMMISSION IRRC Number: <u>2097</u>	
(1) Agency Department of Health			
(2) I.D. Number (Governor's Office Use) 10-161			
(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) 783-2500 Secondary Contact: Lesa Tressler (717) 783-2500	
(6) Type of Rulemaking (Check One) <input type="checkbox"/> Proposed Rulemaking <input checked="" type="checkbox"/> Final Order Adopting Regulation <input 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.			

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(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.

(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.

There is no federal requirement for the establishment of State regulations.

However, 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. Cmwith. 1998), the State regulations governing the WIC Program were developed and published by the Department of Health on July 24, 1999.

The proposed regulatory changes are necessitated by changes to Federal regulations, 7 C.F.R. §246, as published in the March 18, 1999 Federal Register. The Federal regulatory changes must be implemented by the Commonwealth by May 17, 2000.

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

Most of these regulatory changes are necessitated by changes to Federal regulations at 7 C.F.R. §246.12 which must be implemented by May 17, 2000. The remainder of the changes were developed through input of stakeholders in two public meetings which are intended to improve and streamline retail store applications and the store application and review process. The proposed changes will potentially increase the number of retail stores available to WIC participants.

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

These regulations enable the WIC Program to authorized grocery stores to participate in the Program. These stores provide access to the much needed supplemental, nutritious foods to participants through the retail delivery system.

Without the proposed changes to the regulations by May 17, 2000, the Commonwealth would face sanctions by the USDA-FNS, and possible loss of funds.

(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 234,000 WIC Participants monthly by ensuring an adequate number of qualified retail stores for WIC participants to make their purchases. In addition, the grocery store industry will benefit from the proposed changes in that the number of stores which may be potentially authorized to participate in the program, will increase.

(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 1,700 authorized vendors
- Approximately 30 WIC retail stores personnel at the State and local agency level
- Approximately 234,000 WIC participants monthly

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(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.

Public meetings were held on September 23, 1999 and November 5, 1999, for the purpose of seeking comment on regulatory revision. The Department publishes a notice in the *Pennsylvania Bulletin*, sent individual notices to approximately 1,700 grocery stores participating in the WIC program, solicited participation from WIC participants and sent notices to other interested organizations, such as the Pennsylvania Food Merchants Association (PFMA). These public meetings provided valuable input from various stakeholders ranging from WIC local agency personnel, store representatives, PFMA, State legislative staff, the USDA, and the Pennsylvania Hunger Action Center.

(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.

There will be no new costs incurred by the regulated community as a result of these regulatory changes.

(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 impact 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.

The potential increase in the number of stores authorized to participate in the WIC Program will increase the federally mandated monitoring costs incurred by the Department by approximately \$96,000 annually.

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(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	\$96,000	\$96,000	\$96,000	\$96,000	\$96,000	\$96,000
Total Costs	\$96,000	\$96,000	\$96,000	\$96,000	\$96,000	\$96,000
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.

Average annual cost per year per retail store of retail store management functions times the number of new store slots generated.

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(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	\$170,443,105	\$169,864,041	\$168,709,938	\$170,299,331
Vendor Monitoring Expenditures	\$677,831	\$647,970	\$677,000	\$773,000(est.)

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

The anticipated increase in vendor monitoring costs is necessary to provide adequate participant access to additional retail store outlets.

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

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.

Consideration was given to having no limit on the number of stores authorized to participate in the WIC Program. This was dismissed because there are federally mandated limits on the expenditure of funds for administrative purposes and this alternative would drastically increase potential vendor management costs and would not allow for the effective and efficient administration of the WIC Program.

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(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. The proposed regulatory changes lessen some requirements of the selection criteria.

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

These regulatory changes compare favorably with those of other states and will not place Pennsylvania at a competitive disadvantage.

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

No.

(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.

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(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.

(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 inadequate participant access and may allow a store to receive probationary authorization if the store fails to meet selection and limitation criteria.
- 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?

Pursuant to the regulation anticipated effective date of May 17, 2000, compliance also will be required by May 17, 2000.

(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.

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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>10-161</u></p> <p>DATE OF ADOPTION: _____</p> <p><i>Robert S. Zimmerman, Jr.</i> BY: <u>Robert S. Zimmerman, Jr.</u></p> <p>TITLE: <u>Secretary of Health</u></p>	<p>Copy below is hereby approved as to form and legality. Executive or independent Agencies</p> <p>BY <i>Howard G. Bue</i> _____ 8/28/00 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
Department of Health

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

A. Scope and Purpose

The Department of Health (Department) hereby adopts amendments to 28 Pa. Code Part VIII (relating to Supplemental Nutrition Program for Women, Infants and Children (WIC Program)) as set forth in Annex A hereto. These regulations amend 28 Pa. Code Chapters 1101 - 1113, which govern the authorization and management of grocery stores participating in the Department of Health's Special Supplemental Nutrition Program for Women, Infants and Children (WIC Program) and the procedures for administrative appeals of WIC applicants and participants, and local agencies and grocery stores.

The majority of the changes to the Department's regulations are necessitated by recent amendments to the Federal regulations governing the WIC Program found at 7 C.F.R. §246 (relating to Special Supplemental Nutrition Program for Women, Infants and Children). The Women, Infants and Children/Food Stamp Program (FSP) Vendor Disqualification Final Rule adopted on March 18, 1999, mandates uniform sanctions for the most serious violations of WIC Program Federal regulations by grocery stores authorized to participate in the WIC Program. The purpose of the Federal amendments, as explained in the preamble to the those regulations, is to curb vendor-related fraud and abuse in the WIC Program and to promote coordination between the WIC Program and

the Food Stamp Program in the disqualification of stores that violate either WIC Program or Food Stamp Program rules. These regulations reflect the Department's implementation of those changes, as well as several other changes agreed upon after meetings with stakeholders.

B. Comments

Notice of proposed rulemaking was published at 30 Pa.B. 873 (February 19, 2000) with an invitation to submit written comments. In addition to the notice published in the *Pennsylvania Bulletin*, the Department sent personal notice of the proposed rulemaking by letter dated February 18, 2000, to approximately 1400 grocery stores which were authorized to participate in the WIC Program.

The Department received no comments within the 30-day comment period

After the comment period, the Department received comments from the Independent Regulatory Review Commission (IRRC). The Department also received a letter from Senator Vincent Hughes. Although not received within the public comment period, the Department will address the comments expressed by Senator Hughes.

The WIC Program was authorized through an amendment to the Child Nutrition Act of 1966 (42 U.S.C. §1786). Congress authorized the United States Department of Agriculture, Food and Nutrition Services (USDA-FNS), to contract with and make funds available to states to administer the program. In Pennsylvania, the WIC Program receives 100% of its funding from the USDA-FNS. The WIC Program is governed by Federal regulations found at 7 C.F.R. Part 246. The Federal regulations require all aspects of program operation to be included in an annual State Plan of Operations which must be reviewed and approved by the USDA-FNS prior to a state's receipt of funding. 7 C.F.R. §246.4(relating to State plan). Because the Department's regulations relate to the operation of the WIC Program pursuant to its delegation of authority from the USDA-FNS to operate the WIC Program, the Department was required to submit the proposed regulations to the USDA-FNS for review and approval as an amendment to the State Plan of Operations. 7 C.F.R. §246.4(c). The Department submitted the regulations to the USDA-FNS. The USDA-FNS notified the Department by letter dated February 25, 2000, that it found the proposed regulations to be in accordance with the WIC Program/Food Stamp Program Vendor Disqualification Final Rule.

Following is a discussion of amendments to the regulations, the comments received by the Department and the Department's response to the comments.

The Department received no comments on the proposed changes to §§ 1103.5 (relating to minimum inventory), 1103.6 (relating to waiting list), 1105.1 (relating to training), 1105.2 (relating to overcharge recovery system), 1105.4 (relating to change of ownership of a WIC authorized store), and 1113.2 (relating to appeal procedures). The Department adopts as final the proposed changes to these sections.

§1101.2. Definitions.

The Department received no comments on this section, however, it has made two minor revisions to the definition of "store slot" for the purpose of clarification. The Department replaced the words "particular geographic" with the word "trade" to indicate that store slots are assigned to trade areas. The Department also added the words "in which the trade area is located" following the word "county" in the second sentence. This is to clarify that the Department's allocation of store slots is based upon the participant density of the specific county in which the store is located.

§1103.1. Certification and recertification reviews.

The Department received no comments from IRRC on this section. Senator's Hughes did, however, comment on the procedure that the Department uses to certify or recertify stores seeking authorization. He expressed the opinion that the distinction between certification and recertification reviews set forth in §1103.1, and monitoring reviews set forth in §1105.6 (relating to monitoring of WIC authorized stores), was illogical and invalid as a matter of law. Senator Hughes further commented that he had conducted an exhaustive review of relevant Federal regulations and that the regulations do not distinguish between periodic reviews and certification/recertification inspections. He commented that the regulations still fail to correct the problem cited by the Commonwealth Court in *Giant Food Stores v. Department of Health (Giant I)*, 554 A.2d 174 (Pa. Cmwlth. 1989).

In *Giant I*, the Commonwealth Court held that the finding of the hearing examiner upholding the Department's decision to terminate authorization of a store was not based upon substantial evidence. The decision was based upon the evidence before the Court at that time. In 1989, a store was authorized for a minimum period of 18 months up to a

period of two years. In *Giant I*, the Department conducted a recertification review at the store 14 months into the store's period of authorization. The store failed the review and the Department denied the store's application. The denial of the application was based upon failure to have minimum inventory standards available at the time of the review. The Court found that it was clear from the reading of the contract, that the store's authorization was valid for a period of two years (554 A.2d at 176) and that the violation upon which the denial of authorization was based, i.e. a shortage of inventory, was such that it would warrant a warning during any other review. The court found that if a single product shortage was not sufficient to justify disqualification during a routine inspection, it was not sufficient to terminate a store from the WIC Program during a recertification inspection. The court determined that there was not substantial evidence upon the record before it to make such a distinction. Therefore, it reversed the Department's decision.

In response to this case, the Department revised its agreement with grocery stores to put a store on notice that its authorization was valid only until such time as the next certification/recertification review was conducted. The duration of certification was codified in the regulations the Department promulgated in 1999 at §1103.1(c). A store's authorization to participate in the WIC program remains in effect only until such time as

“.... its application for recertification is denied or its certification expires if it fails to apply for certification.” Under both Federal regulations (7 C.F.R. §246.12(f)(2)(xviii) and State regulations (§1131.1(relating to right to appeal)), the expiration of a store’s authorization is non-appealable issue and there is no obligation of either party to renew the agreement (7 C.F.R. §246.12(f)(2)(xvi)).

The certification/recertification reviews are the periodic review of vendor qualifications the State agencies are required to conduct pursuant to 7 C.F.R. §246.12(g). The reviews are conducted to determine if stores meet the qualifications necessary to be authorized. The qualifications, called selection and limitation criteria, were established by the Department to further the purpose of the program by ensuring stores are able to meet the needs of participants going to the stores for WIC purchases. For instance, stores are required to maintain minimum inventory of WIC authorized foods to ensure that such foods are available to participants when making purchases. If the stores do not meet the qualifications, they are not authorized. To authorize a store which does not meet the qualifications the Department has established to serve the needs of the WIC participants would not further the purpose of the WIC Program. Section §1103.1(f) specifically states that the Department, when making a decision on an application for certification or

recertification, will deny the application if the criteria for certification or recertification set forth in §1103.4(a) and (b) are not satisfied, and that there will be no warning or opportunity to correct problems identified during certification or recertification reviews.

In contrast to the certification/recertification reviews which are required by Federal regulation to be conducted at least once every two years (7 C.F.R. §246.12(g)), the Department has also implemented a system to monitor stores which have been authorized to participate in the program. State agencies are required to monitor authorized stores pursuant to Federal regulation 7 C.F.R. §246.12(i). The system to monitor stores is set forth under §1105.6 (relating to monitoring of WIC authorized stores). The purpose of the monitoring is to ensure that once a store has demonstrated that it meets the qualifications necessary to be authorized, the store continues to comply with the program regulations. The purpose of monitoring reviews, as set forth in §1105.6, is to determine compliance with applicable Federal and State regulations, and to investigate complaints regarding stores. Thus, the purpose of monitoring reviews and certification/recertification reviews are completely different and should be treated differently, regardless of the fact that some of the same factors may be used in conducting the reviews.

The decision issued in *Giant I* was issued ten years prior to the publication of the regulations. The issue raised by Senator Hughes had been presented to the Department prior to its initial promulgation of the WIC regulations in 1999. The Department's regulations specifically correct the issue raised by the court in the *Giant I* case. The regulations clarify that there are different and distinct purposes for the types of reviews Senator Hughes commented on. The Department conducts certification/recertification reviews to determine whether or not a store meets the minimal qualifications necessary to be certified to participate in the WIC Program, while monitoring reviews determine whether a store is complying with regulations during a period of authorization.

In *Giant I*, as stated previously, the appellate court had no Department regulations before it to distinguish between the two types of reviews. Also, the record before the court did not reflect that the USDA-FNS construed its regulations to embrace such a distinction. Now, however, the USDA-FNS has approved of the regulatory scheme the Department uses for authorization of stores and found it to be in accordance with the authority the Department was delegated by Federal regulation.

Due to moving the criterion contained in §1103.4(a)(13) to limitation criteria contained in §1103.4(b) as discussed later herein, the Department citation that appears in (b)(2) for determining whether a store slot is available is incorrect. The Department has revised the proposal to reflect the proper citation. Other than this revision, the Department has made no change to this section.

§1103.2. Probationary certification.

IRRC asked for clarification of a citation found in subsection (b)(2). IRRC commented that there appeared to be a typographical error in subsection (b)(2) in the cross reference to inadequate participant access. In the proposed regulations, section 1107.3(c)(8) was given as the cite for an explanation of inadequate participant access. The correct citation is §1103.7(c)(8). The Department has revised the proposal to reflect the proper citation.

§1103.3. Authorization of store slots.

Subsection (b) provides that by October 1 of each year the Department will evaluate the WIC participant population to determine the store slot allocation per county for each Federal fiscal year. IRRC asked for an explanation of how the public and the industry

will be notified of annual changes to store slots. Upon consideration of this comment, the Department added language to this section to state that the Department will publish the yearly allocations of stores slots in the *Pennsylvania Bulletin* no later than October 30 of each year, thereby providing notification to the public and industry.

§1103.4. Selection and limitation criteria; authorization process.

The Department received no comments on this section, however, it has made a revision for the purpose of clarification. An incorrect citation appears in subsection (a)(2). The Department has replaced the reference to §1107.1(i) with §1107.2(j), the proper reference.

The Department had proposed to move the limitation criterion formerly contained in subsection (b)(2) to a selection criteria in subsection (a)(13). This criterion stated that the Department would not authorize a store if it was located within 1 mile of another WIC authorized store unless the Department determined that there was sufficient WIC participant shopping in order to support the authorization of an additional WIC authorized store. In the proposed regulations, the Department set forth a new three-tier method for defining “sufficient participant shopping.” This method was based upon the

proposed method for assigning store slots in §1103.3 (relating to authorization of store slots). Upon further consideration, the Department has determined that the criterion which appears in the proposed regulations as subsection(a)(13), is, in fact, a limitation criterion. The Department uses this as a limitation criterion in addition to that contained in subsection (b)(1) which requires that a store slot be available in a trade area before authorization of a store. Notwithstanding the fact that a store slot may be open, if a store is located within 1 mile of another store and there is not a sufficient number of WIC participants making their purchases in this area, the store will not be authorized. The purpose of this criterion is to ensure an adequate distribution of WIC authorized stores in a trade area by limiting the authorization of store to locations within a trade area where participants are shopping. The Department has moved the criterion to subsection (b)(2), and has revised the numbering in subsection (b) to reflect the change. The Department has made additional changes to subsection (c)(1) and (3) to reflect the move of this criterion from a selection criterion to a limitation criterion.

§1103.7. Inadequate participant access.

The Department received no comments on this section, however, it has made a revision

for the purpose of clarification. In subsection(c)(2), the Department has deleted the words “according to” and replaced them with “in accordance with one of”. The Department made this change so that the language used in subsection (b)(1), (2) and (3) is consistent.

§1105.3. Terms and conditions of participation.

In subsection (a), the Department has corrected the reference to section §1107.1 (relating to imposition of sanctions).

§1105.6. Monitoring of WIC authorized stores.

In subsection (b)(1)(vi), (c)(6), and (d)(6), references are made to the “disqualification” of a store based upon violations of statutes and regulations governing the store’s participation in the WIC Program detected during compliance investigations, routine reviews and training buys. Due to the changes in the proposed regulations which permit the Department to impose a civil money penalty in lieu of a disqualification if the Department determines that inadequate participant access would result if the store were to be disqualified, the Department has changed the language in these three subsections to reference sanctions pursuant to §1107.1(relating to imposition of sanctions). The section

sets forth the procedure for the Department to use in determining the appropriate sanction to be imposed, whether it be a disqualification or a civil money penalty.

§1107.1. Imposition of sanctions.

The Department changed the language in proposed subsection (a) to provide that the Department may choose, in certain circumstances, to not provide a store with a prior warning that program violations were occurring before imposing sanctions. The Department added the words “in the case of fraud, trafficking, sale of alcohol or alcoholic beverages or tobacco products, and other serious program violations or offenses” to set forth the circumstances that would guide the Department’s determination that no prior warning should be given before imposing such sanction. This change is consistent with 7 C.F.R. §246.12(k)(3)(relating to participant and vendor sanctions), and makes clear that providing a prior warning is an option for the Department only under certain circumstances. As stated in the preamble to the WIC/FSP Vendor Disqualification Final Rule:

The location of this provision (*referring to §246.12(k)(3)*) in the final rule clarifies that it applies to both mandatory and State agency-established sanctions. The provision clearly makes the use of prior warning a State agency option. However, such prior warning cannot be provided for trafficking violations or “the sale of alcohol, alcoholic

beverages or tobacco products” violation because these violations warrant a mandatory sanction for the first offense. Also, while prior warning for other violations may be acceptable for the first incidence, continual use of such warning undermines the State agency’s fraud and abuse investigation and prevention efforts. 64 F.R. 13314.

For clarification, the Department has added the word “inadequate” before the words “participant access” in the last sentence of subsection (a). This change promotes consistency with the language used throughout the regulations.

New subsections (b) and (c) both state “... the Department will give the store the option of paying a civil money penalty in lieu of ... disqualification ...” The parallel portions of 7 C.F.R. §246.12(f)(2)(xix) and (xx) provide “... the State agency shall impose a civil money penalty” IRRC asked the Department to explain why the language in the proposed amendment differs from the language in the Federal regulation.

The Federal regulations are mandatory for the Department with respect to the options that it may use when imposing sanctions upon stores in certain circumstances. The Federal regulations direct that the Department must impose a civil money penalty in lieu of disqualification in instances of inadequate participant access. Nevertheless, subsections (b) and (c) are adopted as proposed and provide the option to the store to pay the civil

money penalty in lieu of disqualification. This is because the WIC Program is a voluntary program in which vendors choose to participate. The Department can not require the store to pay the civil money penalty, and thus force the continued participation in the WIC Program by the store. The store may make a business decision that it will accept the disqualification for the specified period of time in lieu of payment of the civil money penalty. The USDA-FNS reviewed the proposed regulation and found it to be proper and in accordance with the Final Federal Vendor Disqualification Rule.

§1107.1a. Disqualifications.

Under subsection (d)(3), the Department added the language “on the premises at all times” to clarify that the store is responsible for always maintaining the minimum inventory required pursuant to §1103.5 (relating to minimum inventory) on the premises. The additional language is consistent with the proposed regulations that permit the store to maintain the inventory on the premises of the store, not the store shelves, as had been the previous requirement.

IRRC had two comments with respect to this section. First, IRRC commented that in subsection(d)(9), the phrase “or with another WIC check for purchases made with a WIC

check” is unclear, and asked for clarification as to what circumstances the phrase addressed. This phrase addresses a situation in which a store’s bank rejects a WIC check that the store improperly accepted and the store then attempts to have the WIC participant reimburse the store for the rejected check with another WIC check or with the participant’s own money. No change was made to this proposal.

Secondly, IRRC asked for clarification as to proposed subsection (d)(14), which provides for a one year disqualification of a store which fails “to remit payment of an overcharge within the specified time frame.” IRRC asked to for clarification as to the time frame the phrase “within the specified time frame” referred. To clarify this, the Department added references to §1105.2(f) and (g) (relating to overcharge recovery system) and §1105.6(f) (relating to monitoring of WIC authorized stores) which provides the specific time frames for which remittance is due.

Subsection (h) relates to disqualifications based on a FSP disqualification. The Department has added the words “WIC Program” in the last sentence of this subsection to clarify that it is the WIC Program disqualification as a result of a disqualification from the Food Stamp Program that is not subject to administrative or judicial review.

The Department has deleted language in subsection (1), which is unnecessary.

§1107.2. Civil money penalties.

The Department received no comments on this section, however, it has made a revision for the purpose of clarification. Under subsection (b)(1), the Department removed the proposed language that would require civil money penalties for stores denied recertification to be calculated at 10% of the average monthly sales for the most recent six-month period. For stores denied recertification for which the option of paying a civil money in lieu of the disqualification is available, the civil money penalty will be calculated on a 5% of the average monthly sales for the most recent six-month period as set forth in subsection (b)(2).

IRRC noted an inconsistency between proposed subsection (b)(2) and the preamble to the proposed regulations. IRRC commented that proposed subsection (b)(2) begins “For disqualifications identified in Sections 1107.1a(d)(2) - (15) ...” and the preamble identified this as §1107.1a(d)(2) - (16). The citation was incorrect in the proposed regulations and is corrected to reflect the proper reference to §1107.1a(d)(2)-(16).

In subsection (b)(2), the Department also removed the proposed words “the store shall pay” to clarify the sentence. These words were inadvertently added in the language of the proposed regulations and the removal of the language does not change the meaning of the subsection.

In subsection (f), the Department has clarified the example provided in the last sentence by explaining that an outstanding financial liability includes overcharges for the “sale of unauthorized foods” as opposed to “the unauthorized sale of foods”. The word “unauthorized” has been deleted before the word “sale”, then added after the word “sale” to make clear the intent.

§1113.1. Right to appeal.

The Department received no comments on this section, however, it has made a revision for the purpose of clarification. In subsection (b)(3), the Department has added the words “from the WIC Program” following the first word of the proposed subsection (b)(3) to clarify that a disqualification from the WIC Program as a result of a disqualification from the FSP is the disqualification that is non-appealable. This change is consistent with the Department’s clarification made to §1107.1a(h) set forth previously.

C. Fiscal Impact

The WIC Program is 100% Federally funded. No State dollars are involved in the operation of the WIC Program. The regulatory changes to §1103.3 (relating to authorization of store slots) that change the method of allocating store slots based upon WIC population density has the potential for increasing by approximately 200 the number of stores authorized to participate in the WIC Program. As a result, the Department anticipates an increase of approximately \$96,000 annually in store-related monitoring costs.

D. Paperwork Requirements

The regulations will not increase paperwork for the WIC Program participants or those grocery stores voluntarily participating in the WIC Program. Except to the extent that 200 additional stores will be participating in the WIC Program, the regulations also will not increase paperwork for the Department.

E. Effective Date/ Sunset Date

The regulations shall be effective upon publication. The Department will send approximately 1400 grocery stores currently participating in the WIC Program direct notice of the final regulations upon publication.

These regulations will be monitored continually and will be updated as required by changes in Federal statute or Federal regulations governing the WIC Program. Therefore, no sunset date has been set.

F. Statutory Authority

The WIC Program was authorized through an amendment to the Child Nutrition Act of 1966 (42 U.S.C. §1786). Congress authorized the USDA-FNS to contract with and make funds available to States to administer the program. In Pennsylvania, the WIC Program receives 100% of its funding from the USDA-FNS.

There are no state statutes governing the operation or administration of the WIC Program.

There is a State statute found at 62 P.S. §2951 which authorizes additional

State funding for the expansion of the WIC Program. The Commonwealth, however, has not provided funding for the expansion of the program since State Fiscal Year 1996.

The existing State regulations were developed and published in the *Pennsylvania Bulletin* on July 24, 1999, following the decision of the Commonwealth Court in *Giant Food Stores, Inc. v. Commonwealth of Pennsylvania, Department of Health (Giant II)*, 713 A.2d 177(1998). *Giant II* held that the Department was required to promulgate regulations governing the selection and management of grocery stores to participate in the WIC Program. The State regulations added a new part to Title 28, Part VIII, and chapters 1101-1113. The regulations also repealed 28 Pa. Code §§8.41 - 8.74, the Department's then existing regulations pertaining to WIC Program administrative appeals.

The changes to the existing State regulations contained herein are submitted under the Department's general power and duty to protect the health of the people of the Commonwealth (71 P.S. §532), and pursuant to *Giant II*.

G. Regulatory Review

Under Section 5(a) of the Regulatory Review Act, the Act of June 30, 1989 (P.L. 73, No. 19) (71 P.S. §745.1-745.15), the Department submitted a copy of a notice of proposed rulemaking, published at 30 Pa.B. 873, on February 9, 2000, to IRRC and to the Chairmen of the House Committee on Health and Human Services and the Senate Committee on Public Health and Welfare.

In compliance with Section 5.1(a) of the Act, the Department submitted a copy of the final-form regulations to IRRC and the Committees on September 18, 2000. In addition, the Department provided IRRC and the Committees with a copy of a Regulatory Analysis Form prepared by the Department in compliance with Executive Order 1996-1, "Regulatory Review and Promulgation." A copy of this material is available upon request.

In preparing the final-form regulations, the Department has considered all comments it received. The USDA-FNS reviewed and approved these regulations on February 25, 2000.

This final-form regulations were deemed approved by the House Health and Human Services Committee and deemed approved by the Senate Public Health and Welfare Committee. IRRC met on _____, and approved the regulations in accordance with Section 5.1(e) of the Act.

H. Contact Person

Questions regarding these regulations may be submitted to Greg Landis, Chief, Grants and Retail Store Management Unit, WIC Program, Room 604, Health and Welfare Building, Harrisburg, Pennsylvania 17109, 717- 783-1289. Persons with disabilities may submit questions in alternative formats such as by audio tape, braille or by using V/TT: 717-783-6514 or the Pennsylvania AT&T Relay Service at 1-800-654-5984 (TT).

Persons with disabilities who would like to obtain this document in an alternative format (i.e. large print, audio tape, braille) should contact Mr. Landis so that he may make the necessary arrangements.

I. Findings

The Department finds that:

(1) Public notice of intention to adopt the regulations adopted by this order has been given under sections 201 and 202 of the Act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§1201 and 1203), and regulations thereunder, 1 Pa.Code §§7.1 and 7.2.

(2) A public comment period was provided as required by law and no comments were received.

(3) The adoption of regulations in the manner provided by this order is necessary and appropriate for the compliance with the Federal regulations governing the WIC Program.

J. Order

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

(1) The regulations of the Department at 28 Pa.Code, Part VIII. Supplemental Nutrition Program for Women, Infants and Children (WIC Program) are amended by

adding §1107.1a and by amending §§1101.2, 1103.1, 1103.2, 1103.3, 1103.4, 1103.5, 1103.6, 1103.7, 1105.1, 1105.2, 1105.3, 1105.4, 1105.6, 1107.1, 1107.2, 1113.1, and 1113.2 as set forth in 30 Pa. B. 873 and Annex A hereto.

(2) The Secretary of Health shall submit this order and Annex A to the Office of General Counsel and Office of Attorney General for approval as required by law.

(3) The Secretary of Health shall submit this Order, Annex A and a Regulatory Analysis Form to IRRC, the House Committee on Health and Human Services and the Senate Committee on Public Health and Welfare for their review and action as required by law.

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

(5) This order shall take effect immediately upon publication in the *Pennsylvania Bulletin*.

Annex A
TITLE 28: HEALTH AND SAFETY

* * *

**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] Inadequate participant access.

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] Imposition of sanctions.
- §1107.1a. Disqualifications.
- §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. Applicant and participant 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.

**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.A. §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 this Commonwealth.

(1) 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 5 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.

(2) 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.* This part establishes design and operational requirements for the food delivery system for the WIC Program, and prescribes 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 that 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 1 year postpartum, who is breastfeeding her infant.

Certification - For purposes of Chapters 1101-1109 and 1113, the term means 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 (relating to applicant and participant appeals), the term means the Department's acceptance of an applicant to participate in the WIC Program as a participant.

Child - A person 1 year of age or older but under 5 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 this part 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. The term 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 1113 of this part, the term 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 this part governing the store's participation in the WIC Program. For purposes of Chapter 1111 (relating to applicant and participant appeals), the term 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 1 year of age.

Inventory audits - A comparison of a WIC authorized store's inventory levels and purchases of a particular WIC product over a specific period of time, to actual WIC purchases of the same product 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 during the same period of time.

Limitation criteria - Criteria in §1103.4(b) (relating to selection and limitation criteria; authorization process) which the Department has established 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 nonprofit 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.

Onsite 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 this part 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 6 months after termination of pregnancy.

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

Premises – The sales floor and storage areas within the building housing the WIC authorized store.

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 other areas not accessible to the general public.

Sanction - A penalty imposed by the Department upon a WIC authorized store for violation of this part governing the store's participation in the WIC Program. The term does not include a decision to deny certification or recertification following a certification or recertification on-site review process.

Secretary - The Secretary of Health of the Commonwealth.

Selection criteria - Criteria in § 1103.4(a) which the Department has established which a store seeking to be certified or recertified is required to satisfy.

Standard formula - Infant formula products that do the following:

(i) Meet the Federal WIC regulatory definition of an iron-fortified formula (7 CFR. §246.10 (c)(1)(I) (relating to supplemental foods)).

(ii) Comply with the Infant Formula Act of 1980, the Act of September 26, 1980 (Pub.L. No. 96-359, 94 Stat. 1190), which amended the Food and Drug Act.

(iii) 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~~ TRADE area. The number of store slots the Department authorizes for a geographic area assigned to a local agency is based on the [expected] density of participant population [of that area] in the county IN WHICH THE TRADE AREA IS LOCATED and the actual number of participants in the county.

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 this part 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 onsite 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~~ under the limitation criteria in §1103.4(b), the Department will determine which store to certify or recertify under the process in §1103.4(c). The Department will exempt a store from satisfying the selection and limitation criteria only if there is a finding of [participant hardship] inadequate participant access, as set forth in §1103.7 (relating to [participant hardship] inadequate participant access).

(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] in

accordance with §1103.4(a)(13) and (b) (relating to selection and limitation criteria; authorization process).

- (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 onsite 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. The WIC Program disqualification period shall be completed before an application will be accepted by the Department. The Department may deny an application for certification from a new owner of a recently purchased store if the Department determines that the purpose of the sale of the business was a sham transaction to avoid a WIC disqualification.

- (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 onsite 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 onsite 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 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] 30 days written notice to the store prior to expiration of WIC [authorization] certification for any store failing to apply for recertification. Either the Department or the WIC authorized store may terminate the [authorization] certification for cause after providing at least [15] 30 days advance written notice.

(d) *Periodic reviews.* At least once every 2 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 will notify a store which fails to seek recertification or is denied recertification under 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] inadequate participant access, as set forth in §1103.7, if it does not consider the application. A store granted certification under 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 set forth in §1103.4(a) and (b) 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 6 months from the effective date of the Department's decision to reapply, except a store denied certification or recertification under §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 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 6 months when either of the following applies:

- (1) [Participant hardship] Inadequate participant access 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] inadequate participant access identified in [§1103.7 (b)(8) (relating to participant hardship) § 1103.7(c)(8) (relating to inadequate participant access)], the Department will conduct an unannounced onsite 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] inadequate participant access as identified in ~~§1103.7 (b)(8)~~ §1103.7(C)(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] inadequate participant access exists as determined by the Department, the Department may extend probationary certification for an additional 3 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 onsite 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 is not eligible to reapply for certification for 6 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.]

(a) Assignment of store slots. The Department will assign store slots based upon WIC participant density according to the following:

- (1) In counties with WIC participant density greater than 100 participants per square mile, the Department will assign one store slot for every 175 WIC participants.
- (2) In counties with WIC participant density of 25 to 100 participants per square mile, the Department will assign one store slot for every 150 WIC participants.
- (3) In counties with WIC participant density less than 25 participants per square mile, the Department will assign one store slot for every 125 WIC participants.

(b) Yearly allocation of store slots. By October 1 of each year, the Department will evaluate WIC participant population to determine store slot allocations per county for each Federal Fiscal Year. THE DEPARTMENT WILL PUBLISH THESE ALLOCATIONS IN THE *PENNSYLVANIA BULLETIN* NO LATER THAN OCTOBER 30 OF EACH YEAR.

§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 this Commonwealth.
- (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 8-month period to determine if the store is serving 25 participants. The Department may disqualify a store for a period of no less than 6 months in accordance with ~~§1107.1(i)~~ §1107.1A(J) (relating to ~~imposition of sanctions~~ DISQUALIFICATIONS) if it is not serving 25 participants at the end of the 8-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 may 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] premises 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. 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 the following:
 - (A) Eighteen quarts or nine half gallons of milk.
 - (B) One pound of cheese.
 - (C) One dozen eggs.
 - (D) One 15 to 18 ounce container of peanut butter.
 - (E) One pound of dried beans or peas.

- (F) Four 11.5 to 12 ounce containers of frozen concentrated juice or four 46 ounce [cans] containers of single strength juice.
 - (G) Thirty ounces of cereal.
- (ii) Food Prescription Two consists of: [24] Thirty-one 13 ounce cans of concentrated contract brand milk or soy based infant formula.
- (7) The store shall be open for business at least 8 hours per day, 6 days per week.
- (8) The store shall be sanitary. There may not be 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 may 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 2 years prior to the application to participate in the WIC Program].
- (11) The store may not be currently disqualified from the WIC Program or have been denied certification or recertification by the WIC Program within the

past 6 months unless the conditions of §1103.6 (a) (2)(relating to waiting list) 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.

~~(13) The store shall not be located within 1 mile of another WIC authorized store within the same trade area unless the Department determines that there is sufficient WIC participant shopping within the 1 mile area to support an additional WIC authorized store or stores. For the purpose of this paragraph, to support the authorization of each additional WIC authorized store within the 1 mile radius, sufficient WIC participant shopping shall be determined by the following:~~

~~(i) For counties with WIC participant density greater than 100 participants per square mile, there shall be at least 175 WIC participants shopping within the 1 mile of the applying store for each store slot authorized.~~

~~(ii) For counties with WIC participant density of 25 to 100 participants per square mile, there shall be at least 150 WIC participants shopping within the 1 mile of the applying store for each store slot authorized.~~

~~(iii) For counties with WIC participant density less than 25 participants per square mile, there shall be at least 125 WIC participants shopping within the 1 mile of the applying store for each store slot authorized.~~

(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 may not be located within 1 mile of another WIC authorized store unless the Department determines that there is sufficient WIC participant shopping within the 1 mile area to support an additional WIC authorized store. For the purpose of this section, in order to support the authorization of each additional WIC authorized store within the 1-mile radius, sufficient WIC participant shopping shall mean that the Department has documentation that at least 160 WIC participants per store slot authorized are currently making WIC purchases within the 1-mile radius, except in Philadelphia where sufficient WIC participant shopping shall mean that the Department has documentation that at least 260 participants per store slot authorized are currently making WIC purchases within the 1-mile radius.]

(2) THE STORE SHALL NOT BE LOCATED WITHIN 1 MILE OF ANOTHER WIC AUTHORIZED STORE WITHIN THE SAME TRADE AREA UNLESS THE DEPARTMENT DETERMINES THAT THERE IS SUFFICIENT WIC PARTICIPANT SHOPPING WITHIN THE 1 MILE AREA TO SUPPORT AN ADDITIONAL WIC AUTHORIZED STORE OR STORES. FOR THE PURPOSE OF THIS PARAGRAPH, TO SUPPORT THE AUTHORIZATION OF EACH ADDITIONAL WIC AUTHORIZED STORE WITHIN THE 1 MILE RADIUS, SUFFICIENT WIC PARTICIPANT SHOPPING SHALL BE DETERMINED BY THE FOLLOWING:

(I) FOR COUNTIES WITH WIC PARTICIPANT DENSITY GREATER THAN 100 PARTICIPANTS PER SQUARE MILE, THERE SHALL BE AT LEAST 175 WIC PARTICIPANTS SHOPPING WITHIN 1 MILE OF THE APPLYING STORE FOR EACH STORE SLOT AUTHORIZED.

(II) FOR COUNTIES WITH WIC PARTICIPANT DENSITY OF 25 TO 100 PARTICIPANTS PER SQUARE MILE, THERE SHALL BE AT LEAST 150 WIC PARTICIPANTS SHOPPING WITHIN 1 MILE OF THE APPLYING STORE FOR EACH STORE SLOT AUTHORIZED.

(III) FOR COUNTIES WITH WIC PARTICIPANT DENSITY LESS THAN 25 PARTICIPANTS PER SQUARE MILE, THERE SHALL BE AT LEAST 125 WIC PARTICIPANTS SHOPPING WITHIN 1 MILE OF THE APPLYING STORE FOR EACH STORE SLOT AUTHORIZED.

(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 AND THERE IS SUFFICIENT WIC PARTICIPANT SHOPPING AS DEFINED IN SUBSECTION B(2), 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 will 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) also apply when more than one store applies for certification or recertification within 1 mile and there is not a sufficient ~~number of participants~~ WIC PARTICIPANT shopping ~~in the area~~ AS DEFINED IN SUBSECTION (B)(2) to support an additional WIC authorized store or stores.

§ 1103.5. Minimum inventory.

(a) A store shall have available on the [sales floor] premises at the time of the certification or recertification onsite 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.
 - (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.
 - (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, fourteen 1/2 gallons or quart equivalent.
- (ii) Fluid skim or low fat, vitamin A and D fortified, four 1/2 gallons or quart equivalent.
- (iii) Nonfat dry, 2 pounds, in 1 or 2 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] Three varieties with a total of nine 46 ounce [cans] containers.
 - (ii) Frozen concentrated or shelf stable 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 8 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, 1 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 1 or 2 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 3 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).
- (4) When a store slot is open and the store seeking certification is located within 1 mile of a WIC authorized store, if the Department determines

that there is not sufficient WIC participant shopping within the 1 mile area to support an additional WIC authorized store.

(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 under section §1105.4(c)(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] Inadequate participant access.

(a) The Department will consider whether there is [participant hardship] inadequate participant access 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) The Department may also consider whether there is inadequate participant access when deciding whether to place on probation a store undergoing a change of ownership pursuant to §1105.4(b) and (c) (relating to change of ownership of a WIC authorized store).

[b](c)[Participant hardship] Inadequate participant access 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.] in accordance with one of the following:
 - (i) Less than 3 miles of the store for counties with WIC participant density less than 25 participants per square mile.
 - (ii) Less than 2 miles of the store for counties with WIC participant density of 25 to 100 participants per square mile.
 - (iii) Less than 1 mile of the store for counties with WIC participant density greater than 100 participants per square mile.

- (2) Ten or more participants will be required to travel [3 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.] according to IN ACCORDANCE WITH one of the following:
 - (i) Three or more miles to the next closest WIC authorized store for counties with WIC participant density less than 25 participants per square mile.

- (ii) Two or more miles to the next closest WIC authorized store for counties with WIC participant density of 25 to 100 participants per square mile; or
- (iii) One or more miles to the next closest WIC authorized store for counties with WIC participant density greater than 100 participants per square mile.

(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 3 miles, except in Philadelphia, where the distance of one mile to the next closest WIC authorized store will be used for the determination.] in accordance with one of the following:

- (i) Within 3 miles of the store for counties with WIC participant density less than 25 participants per square mile.
- (ii) Within 2 miles of the store for counties with WIC participant density of 25 to 100 participants per square mile.
- (iii) Within 1 mile of the store for counties with WIC participant density greater than 100 participants per square mile.

- (4) Ten or more participants are affected by physical barriers or conditions which make normal travel to another WIC authorized store impractical.
- (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 2 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 1 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 3/10 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 may 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 in [§1107.1 (relating to sanctions)] §1107.1a(d)(16) (relating to disqualifications).

(c) *Corrective training.* The Department will provide corrective training as set forth in §§1103.2 and 1105.6 (relating to probationary certification; and 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 fax. 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 by fax, 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 under [§1107.1 (relating to sanctions)] §1107.1a(d)(14) (relating to disqualifications) 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 this subsection. Failure to do so shall result in the imposition of sanctions as set forth in ~~§1107.1 (relating to sanctions)]~~ §1107.1a (relating to disqualifications). ~~§1107.1 (RELATING TO IMPOSITION OF 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 CFR Parts 15, 15a, 15b and 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 on the premises.
- (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 under §1105.1(c) (relating to training).
- (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 onsite reviews to determine compliance with 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 [a] all WIC checks accepted by the store and on its premises at the time of an onsite 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 onsite 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 another person or entity.

- (20) Reimburse the Department for funds received through transactions involving WIC checks which were not conducted in accordance with 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 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, religion, national origin or disability.
- (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 under subsection (c).

§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] inadequate participant access as defined in [§1103.7 (relating to participant hardship)] §1103.7(c)(8) (relating to inadequate participant access) would result, the store under the new ownership may receive probationary certification for a period not to exceed 6 months if the State conducts an immediate onsite visit followed by a complete certification visit at the store. Until the immediate onsite visit is conducted, the new owner may not accept WIC checks. As soon as possible within the 6 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 10% ownership interest in the store has at least a 10% ownership interest in the applicant or such ownership interest has been transferred or sold to immediate family members of the 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 this 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 the closure, the Department will consider circumstances such 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 3 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 3 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 1 mile or less from its current location, and reopens within 3-calendar days at its new location, shall provide the Department with written notification of its new address. The store will 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 1 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 3 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, 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 onsite reviews of WIC authorized stores to determine compliance with applicable Federal and State regulations, and to investigate complaints regarding a store. The types of onsite 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 a 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~~ IMPOSE A SANCTION IN ACCORDANCE WITH §1107.1 (RELATING TO IMPOSITION OF SANCTIONS) AGAINST the store if three compliance buys detect violations of statutes or regulations governing the store's participation in the WIC Program. ~~The Department will determine the term of disqualification by the violation found during the compliance investigation, in accordance with §1107.1 (relating to imposition of sanctions).~~ If multiple violations are found during the compliance investigation, the Department will ~~disqualify~~ IMPOSE THE SANCTION AGAINST the store for the term corresponding to the most serious violation.

- (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 a 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 a 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 a 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~~ WILL IMPOSE A SANCTION IN ACCORDANCE WITH §1107.1 AGAINST a store if a third routine review detects violations of a statute or regulation governing the store's participation in the WIC Program. ~~The Department will determine the term of disqualification by the violation found during the routine reviews, in accordance with §1107.1.~~ If multiple violations are found during the routine reviews, the Department will ~~disqualify~~ IMPOSE THE SANCTION AGAINST the store for the term corresponding to the most serious violation.

(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 a 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 a 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 a 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~~ WILL IMPOSE A SACTION IN ACCORDANCE WITH §1107.1 AGAINST a store if a third training buy

detects violations of a statute or regulation governing the store's participation in the WIC Program. ~~The Department will determine the term of disqualification by the violation found during the training buys, in accordance with §1107.1.~~ If multiple violations are found during the training buys, the Department will ~~disqualify~~ IMPOSE THE SANCTION AGAINST the store for the term corresponding with the most serious violation.

(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 a 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] Imposition of 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 moneys 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 overcharge recovery system) or the notice given by the Department under §1105.6(f) (relating to monitoring of WIC authorized stores).

(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 3 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 a statute or regulation governing the store's participation in the WIC Program.

(1) *Class A abuses.* The Department will disqualify a WIC authorized store from participation in the WIC Program for a period of 1 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.
 - (xii) Having or charging prices which exceed the current maximum allowable costs established by the Department and published in the *Pennsylvania Bulletin* for either 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).
- (2) *Class B abuses.* The Department will disqualify a WIC authorized store from participation in the WIC Program for a period of 2 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.
- (3) *Class C abuses.* The Department will disqualify a WIC authorized store from participation in the WIC Program for a period of 3 years for the following violations:
- (i) Accepting a WIC check for cash, credit or a nonfood 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 classified as a Class A, Class B or Class C sanction as provided for in subsection (h), 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 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.]

The Department may disqualify a store or impose a civil money penalty in lieu of disqualification for reasons of program abuse. IN THE CASE OF FRAUD, TRAFFICKING, SALE OF ALCOHOL OR ALCOHOLIC BEVERAGES OR TOBACCO PRODUCTS THE DEPARTMENT WILL NOT PROVIDE THE STORE WITH A PRIOR WARNING THAT VIOLATIONS WERE OCCURRING BEFORE IMPOSING SUCH SANCTIONS. FOR OTHER SERIOUS PROGRAM VIOLATIONS OR OFFENSES, THE ~~The Department will~~ MAY CHOOSE TO not provide the store with prior warning that violations were occurring before imposing such sanctions. The store may appeal a Department decision pertaining to disqualification, denial of application to participate, or other adverse actions that affect participation during the agreement performance period in accordance with §1113.1 (relating to right to appeal). Expiration of an agreement with a store, disqualification of a store as a result of disqualification from the Food Stamp Program, and the Department's determination regarding INADEQUATE participant access are not subject to review.

(b) The Department will disqualify a store which has been disqualified from the Food Stamp Program unless the Department determines that the disqualification of the store would result in inadequate participant access under §1103.7 (relating to inadequate participant access). If the Department determines that disqualification of the store would result in inadequate

participant access under § 1103.7, the Department will give the store the option of paying a civil money penalty in lieu of WIC disqualification.

(c) The Department will disqualify a store for WIC Program violations in § 1107.1a (relating to disqualifications) unless the Department determines that disqualification of the store under § 1107.1a(b)-(d) would result in inadequate participant access. In that case, the Department will give the store the option of paying a civil money penalty in lieu of disqualification. The Department shall not impose a civil money penalty in lieu of disqualification for third or subsequent sanctions for violations.

(d) Disqualification from the WIC Program may result in disqualification as a retailer in the Food Stamp Program. The disqualification may not be subject to administrative or judicial review under the Food Stamp Program.

(e) 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.

(f) 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 these items with the WIC check.

(g) 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 in §1105.2(f) and (g) (relating to reimbursement of overcharges) or the notice given by the Department pursuant to §1105.6(f) (relating to monitoring of WIC authorized stores).

§1107.1a. Disqualifications.

(a) Permanent disqualification. The Department will permanently disqualify a WIC authorized store convicted of trafficking in WIC checks or selling firearms, ammunition, explosives, or controlled substances (as defined in section 102 of the Controlled Substances Act (21 U.S.C.A. §802)) in exchange for WIC checks. The Department will not compensate the store for revenues lost as a result of the violation.

(b) Six-year disqualification. The Department will disqualify a WIC authorized store for 6 years for either of the following:

- (i) One incidence of buying or selling WIC checks for cash (trafficking).
- (ii) One incidence of selling firearms, ammunition, explosives, or controlled substances as defined in section 102 of the Controlled Substances Act, in exchange for WIC checks.

(c) Three-year disqualification. The Department will disqualify a WIC authorized store for 3 years for any of the following violations:

- (1) One incidence of the sale of alcohol or alcoholic beverages or tobacco products in exchange for WIC checks.

- (2) A pattern of claiming reimbursement for the sale of an amount of a specific allowable food which exceeds the store's documented inventory of that specific allowable food item for a specific period of time. A pattern may be established during a single inventory audit encompassing a 2-month period when a WIC authorized store's records indicate that the WIC authorized store's redemptions for a specific allowable food exceed the WIC authorized store's documented inventory for that allowable food.

- (3) Two or more incidences of charging participants more for an allowable food than non-WIC customers or charging participants more than the current shelf price.

- (4) Two or more incidences of receiving, transacting or redeeming WIC checks outside of authorized channels, including the use of an unauthorized store or an unauthorized person, or both.

- (5) Two or more incidences of charging for allowable food not received by the participant.

(6) Two or more incidences of providing credit or nonfood items, other than alcohol, alcoholic beverages, tobacco products, cash, firearms, ammunition, explosives, or controlled substances as defined in section 102 of the Controlled Substances Act, in exchange for WIC checks.

(d) One-year disqualification. The Department will disqualify a WIC authorized store for 1 year for any of the following violations:

- (1) Two or more incidences of providing unauthorized food items in exchange for WIC checks, including charging for allowable food provided in excess of those listed on the WIC check.
- (2) Having stale-dated allowable food on the sales floor.
- (3) Failing to maintain ON THE PREMISES AT ALL TIMES minimum inventory requirements of an allowable food.
- (4) Failing to request the participant's WIC identification card prior to accepting a WIC check.
- (5) Accepting a WIC check made payable to another store without prior written approval from the Department.
- (6) Failing to maintain a clean and sanitary store.
- (7) Failing to properly store and refrigerate allowable foods.
- (8) Closure of the store by a city, local or county health department.

- (9) 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.
- (10) Securing the signature of the participant, endorser or proxy prior to completing the "Pay Exactly" box on the WIC check.
- (11) Overcharging the WIC Program by charging sales tax .
- (12) Having or charging prices which exceed the current maximum allowable costs established by the Department and published in the *Pennsylvania Bulletin* for either 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).
- (13) Giving monetary change to an authorized individual who tenders a WIC check.
- (14) Failing to remit payment for an overcharge within the specified time frame UNDER EITHER §§1105.2(f) and (g) (RELATING TO OVERCHARGE RECOVERY SYSTEM) OR 1105.6(F) (RELATING TO MONITORING OF WIC AUTHORIZED STORES).
- (15) 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.
- (16) Failing to have at least one representative of the store attend required training.

(e) Second mandatory sanction. When a WIC authorized store, which previously has been assessed a sanction for any of the violations in subsections (b)-(d), receives another sanction for any of these violations, the Department will double the second sanction. The Department will double civil money penalties up to the limits allowed under §1107.3(c) (relating to civil money penalties).

(f) Third or subsequent mandatory sanction. When a WIC authorized store, which previously has been assessed 2 or more sanctions for any of the violations listed in subsections (b)-(d), receives another sanction for any of these violations, the Department will double the third sanction and all subsequent sanctions. The Department will not impose civil money penalties in lieu of disqualification for third or subsequent sanctions for violations listed in subsections (b)-(d).

(g) Multiple violations during a single investigation. When during the course of a single investigation the Department determines a WIC authorized store has committed multiple violations, the Department will disqualify the WIC authorized store for the period corresponding to the most serious violation. However, the Department will include all violations in the notice of disqualification action.

(h) Disqualification based on a Food Stamp Program disqualification. The Department will disqualify a WIC authorized store which has been disqualified from the Food Stamp Program. The disqualification shall be for the same length of time as the Food Stamp

Program disqualification, but may begin at a later date than the Food Stamp Program disqualification. Under 7 C.F.R. §246.12(k)(1)(vii) and §1113.1(b)(3) (relating to right to appeal), the WIC PROGRAM disqualification shall not be subject to administrative or judicial review under the WIC Program.

(i) *Voluntary withdrawal or nonrenewal of agreement.* The Department will not accept voluntary withdrawal of the WIC authorized store from the WIC Program as an alternative to disqualification for the violations listed in subsections (a)-(d), but will shall enter the disqualification on the record. The Department will not permit the store to use nonrenewal of a store agreement as an alternative to disqualification.

(j) *Other violations.* For any violation of a statute or regulation governing the store's participation in the WIC Program which is not specifically classified in subsections (a)-(d) of 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. A disqualification imposed under this subsection will not exceed 1 year.

(k) *Advance notice.* The Department will provide a WIC authorized store at least 30 days advance notice of the effective date of any disqualifications and, if appropriate, an opportunity to appeal the disqualification under § 1113.1 (relating to right to appeal).

(l) *Certification following expiration of disqualification period.* A store that 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. 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 under §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 5% of the average monthly total value of WIC checks redeemed for the most recent 6-month period by the number of months the store would be disqualified under §1107.1. For stores which are denied recertification for which this option is available, the Department will multiply 5% of the average monthly total value of WIC checks for the most recent 6-month period by 6 months to determine the civil money penalty to be paid. If 6 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. The 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 [penalty] 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 will 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.]

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 under §1107.1 (relating to imposition of sanctions), only if the Department finds inadequate participant access as set forth in §1103.7 (relating to inadequate participant access). The Department will not provide this option for third or subsequent violations set forth in §1107.1a(b)–(d) (relating to disqualifications).

(b) Calculation of civil money penalty.

- (1) For civil money penalties in lieu of disqualifications under §1107.1a(b), (c) and (d)(1), the Department will calculate the civil money penalty for each violation identified by multiplying 10% of the average monthly total value of WIC checks redeemed for the most recent 6-month period by the number of months the store would be disqualified under §1107.1. For stores that are denied recertification, and for which this option is available, the Department will multiply 10% of the average monthly total value of WIC checks for the most recent 6-month period by 6 months to determine the civil money penalty to be paid. If 6 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.

(2) For disqualifications identified in §1107.1a(d)(2)-(4)(16), the Department will calculate the civil money penalty for each violation identified ~~the store shall pay~~ by multiplying 5% of the average monthly total value of WIC checks redeemed for the most recent 6-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 5% of the average monthly total value of WIC checks for the most recent 6-month period by 6 months to determine the civil money penalty to be paid. If 6 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) *Limitation of penalties.* The amount of the civil money penalty will not exceed \$10,000 for each violation. When, during the course of a single investigation, the Department determines a store has committed multiple violations, the Department will impose a civil money penalty for each violation. The total amount of civil money penalties imposed for violations investigated as part of a single investigation will not exceed \$40,000.

(d) *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. The 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 will be effective when it is signed by the Director of the Division of WIC or the Director's designee.

(e) Payment of the civil money penalty. If a WIC authorized store does not pay, only partially pays, or fails to timely pay a civil money penalty assessed in lieu of disqualification, the Department will disqualify the WIC authorized store for the length of the disqualification corresponding to the violation for which the civil money penalty was assessed . If a civil money penalty is assessed for more than one violation, the Department will impose the disqualification for the period corresponding to the most serious violation. The Department may permit payment of civil money penalties by installments.

(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 to the Department of outstanding overcharges for the ~~unauthorized~~ ACCEPTANCE OF WIC CHECKS FOR THE sale of UNAUTHORIZED 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) applies to proceedings under this part, except as otherwise provided in this part.

§1109.2. Scope and purpose.

Chapters 1111 and 1113 (relating to applicant and participant appeals; and local agency and store appeals) apply to hearings held under 42 U.S.C.A. §1786(f)(9), relating to the WIC Program. Those chapters supplement the Federal regulations, 7 CFR Part 246 (relating to special supplemental food program for women, infants and children) 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) and 1113.3(b) (relating to hearing examiner decisions; and 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 will 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 may not be 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.
- (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) *Independent assessment.* The hearing examiner shall order, when 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.

(f) *Supersession.* Subsection (d)(3) supersedes 1 Pa. Code §35.51 (relating to withdrawal of pleadings).

§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).
- (2) The appeal is withdrawn in writing by the applicant, participant or authorized representative.
- (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 may 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.
- (2) To represent himself, or to be represented by an authorized representative such as an attorney, friend or other person at the hearing.
- (3) To receive an explanation that he 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.
- (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 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.

(c) *Supersession.* Subsection (b)(1) supplements 1 Pa. Code §31.21 (relating to appearance in person). Subsection (b)(2) supersedes 1 Pa. Code §§31.22 and 31.23 (relating to appearance by attorney; and other representation prohibited at hearings). Subsection (b)(5) supplements 1 Pa. Code §35.142 (relating to subpoenas).

§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.

(b) *Retention of the record.* This record shall be retained for 3 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.

(d) *Supersession.* Subsection (a) supersedes 1 Pa. Code §35.131 (relating to recording of proceedings).

§1111.10. Hearing examiner decisions.

(a) The hearing examiner shall render a decision based exclusively on the evidence contained in the hearing record.

(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.

(g) Subsection (a) supersedes 1 Pa. Code 35.201 (relating to certification of record without proposed report).

§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) 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 during the period of authorization 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.]

(b) The following actions are not subject to appeal:

- (1) The expiration of a WIC authorization.
- (2) The Division of WIC's determination regarding participant access.
- (3) Disqualification FROM THE WIC PROGRAM of a store as a result of disqualification from the Food Stamp Program.

(c) 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.]

(d) Except for permanent disqualifications assessed under §1107.1a(a) (relating to disqualifications), the Department may take adverse action against a store after 30 days advance notification.

(e) In the case of a disqualification of a local agency, the Department will provide at least 60 days advance notice.

§1113.2. Appeal procedures.

(a) *Notification.* At the time the Division of WIC denies an application of a store, or disqualifies a WIC authorized store or takes an adverse action against a local agency or store during a period in which the local agency or store is authorized, 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.

(e) *Hearing examiner.* The Secretary will appoint a hearing examiner to preside over the appeal. The 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 may not have participated in the decision made by the Division of WIC or have any personal stake in the outcome.

(f) *Hearing procedures.*

- (1) The local agency or store may be assisted or represented by an attorney or other authorized representative.

- (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.

(g) *Supersession.* Subsection (d) supersedes 1 Pa. Code §35.105 (relating to notice of nonrulemaking procedures). Subsection (e) supersedes 1 Pa. Code §35.185 (relating to designation of presiding officers). Subsection (f)(a) 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).

§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, 35.201, 35.202 and 35.205.

§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

ROBERT S. ZIMMERMAN, JR., MPH
SECRETARY OF HEALTH

September 18, 2000

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

Re: Department of Health Final Regulation No. 10-161
28 Pa. Code Chapters 1101-1113
Supplemental Nutrition Program for Women,
Infants and Children (WIC Program)

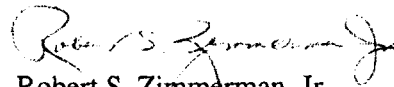
Dear Mr. Nyce:

Enclosed is a copy of final-form regulations for review by the Commission pursuant to the Regulatory Review Act (Act) (71 P.S. §§ 745.1-745.15). Please disregard the regulations that were previously delivered to the Commission. Section 5.1(a) of the Act provides that, upon completion of the agency's review of comments following proposed rulemaking, the agency is to submit to the Commission and the standing committees, a copy of the agency's response to the comments received, the names and addresses of commentators who have requested additional information relating to the final-form regulations, and the text of the final-form regulations which the agency intends to adopt. The Department received no comments during the public comment period.

Section 5.1(e) of the Act provides that within ten (10) days following the expiration of the standing committee review period, or at its next regularly scheduled meeting, the commission shall approve or disapprove the final form regulations.

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

Sincerely,



Robert S. Zimmerman, Jr.
Secretary of Health

Enclosures

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

I.D. NUMBER: 10-161
 SUBJECT: Supplemental Nutrition Program for Women, Infants and Children
 AGENCY: Department of Health

RECEIVED
 2000 SEP 18 PM 2:42
 INDEPENDENT REGULATORY
 REVIEW COMMISSION

TYPE OF REGULATION

- Proposed Regulation
- X Final Regulation
- 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
9/18/00	<i>Lily B. Burrell</i>	HOUSE COMMITTEE ON HEALTH & HUMAN SERVICES
9/18/00	<i>Karen Shaffer</i>	
9/18/00	<i>Carole A. Thiel</i>	SENATE COMMITTEE ON PUBLIC HEALTH & WELFARE
9/18/00	<i>Debbie Eaton</i>	
9/18/00	<i>J. Belmont</i>	INDEPENDENT REGULATORY REVIEW COMMISSION
		ATTORNEY GENERAL
		LEGISLATIVE REFERENCE BUREAU