

Regulatory Analysis Form		RECEIVED This space for use by IRRC
(1) Agency Department of Health		2003 JUN 30 PM 4: 21 IRRC REVIEW COMMISSION
(2) I.D. Number (Governor's Office Use)		IRRC Number: 2289
(3) Short Title Supplemental Nutrition Program for Women, Infants, and Children (WIC Program)		
(4) Pa Code Cite 28 Pa Code Part VIII Chapters 1101, 1103, 1105, 1107, 1109 and 1113	(5) Agency Contacts & Telephone Numbers Primary Contact: Greg Landis (717) 783-1289  Secondary Contact: Frank C. Maisano (717) 783-1289	
(6) Type of Rulemaking (Check One)  Proposed Rulemaking  <input checked="" type="checkbox"/> Final Order Adopting Regulation  Final Order, Proposed Rulemaking Omitted		(7) Is a 120-Day Emergency Certification Attached?  <input checked="" type="checkbox"/> No  Yes: By the Attorney General  Yes: By the Governor
(8) Briefly explain the regulation in clear and non-technical language.  These regulations govern the authorization and monitoring of retail grocery stores in the WIC Program, and set forth procedures for administrative appeals of WIC applicants, participants and 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 through an amendment to the Child Nutrition Act of 1966 (42 U.S.C. A. § 1786). Congress authorized the USDA-FNS to contract with and make funds available to States to administer the program. In the Commonwealth, 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. The Women's, Infants' and Children's Nutrition Improvement Act (62 P.S. §§ 2951 – 2955) 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 State regulations governing the WIC Program were promulgated and published at 29 Pa. B. 3841 (July 24, 1999), following the decision of the Commonwealth Court in *Giant Food Stores, Inc. v. Commonwealth of Pennsylvania, Department of Health*, 713 A.2d 177 (Pa. Commw. 1998). The Court 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 Part VIII to Title 28 (relating to supplemental nutrition program for women, infants and children (WIC Program)). The regulations also deleted §§ 8.41 – 8.74, the Department's then existing regulations pertaining to WIC Program administrative appeals.

These amendments are promulgated under section 2102(g) of the Administrative Code of 1929 (code) (71 P.S. § 532(g)), which provides the Department general power to promulgate regulations to carry out its duties under section 2102(a) of the code (71 P.S. § 532(a)), which gives the Department the authority and duty to protect the health of the people of the Commonwealth, and under the *Giant* decision.

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

A portion of these regulatory changes are necessitated by changes to Federal regulations at 7 CFR Part 246, published in the December 29, 2000 Federal Register. The balance of the amendments to the regulation are discretionary amendments to implement the Department's decision, permitted by Federal regulation, to eliminate the limitation criteria used to limit the number of stores authorized to participate in the WIC Program.

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

A portion of these regulatory changes are necessitated to bring the Commonwealth into compliance with changes to Federal regulations at 7 CFR Part 246. The remainder of the changes were developed through input from stakeholders in a series of public meetings. For some time, stakeholders have urged elimination of the limitation criteria so that any store that could establish ability to meet selection criteria could serve as a WIC authorized store. At the same time, the Department has long been interested in controlling Program costs. These regulations accomplish both goals and benefit the vendor community and participants in the WIC Program.

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

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

Without these amendments to the regulations, which will bring the Commonwealth into compliance with changes to Federal regulations, the Commonwealth could face sanctions by the USDA-FNS including 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 230,000 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 these amendments in that the number of stores that may be potentially authorized to participate in the Program will increase.

The potential WIC participant population will benefit from lower prices for WIC foods resulting from the Program's establishment of maximum allowable prices for each allowable food. Controlled ceiling prices for all allowable foods will translate into an increased ability to serve more participants.

(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 these regulatory changes. With the elimination of limitation criteria in the store selection process, fewer stores will be denied authorization. With the introduction of temporary authorization, fewer stores will be denied reauthorization. Every interested store will have an equal opportunity to demonstrate compliance with selection criteria and receive authorization to serve as a WIC authorized store.

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(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.)

Any store seeking WIC authorization will be required to comply with the regulations. Currently there are approximately 1,300 WIC authorized stores. The Department anticipates that number may increase to approximately 1,800 with the elimination of limitation criteria.

(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.

Input was received through Vendor Advisory Workgroup meetings on January 17, February 16, March 8, June 5, 2001 and May 10, 2002. The Workgroup consisted of members from WIC State and local agency personnel, store representatives, Pennsylvania Food Merchants Association (PFMA), 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.

There will be 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 that may be required.

The potential significant increase in the number of stores authorized to participate in the WIC Program will increase the federally mandated monitoring costs incurred by the Department. The decrease in the frequency of periodic reviews, however, from once every 2 years to once every 3 years, will decrease the Department's retail store management costs. Moreover, the Department anticipates a reduction in administrative costs associated with: 1) appeals by stores, as fewer stores will be denied authorization and reauthorization, and, 2) the replacement of the labor intensive overcharge recovery system with the automated price adjustment system. Overall, the Department does not expect a significant increase or decrease in administrative costs to the WIC Program.

The reduction in food costs through the price limitations will result in savings that will permit services to additional participants.

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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
<b>SAVINGS:</b>	\$	\$	\$	\$	\$	\$
Regulated Community	\$ 0	0	0	0	0	0
Local Government	\$ 0	0	0	0	0	0
State Government	\$315, 000	315,000	315,000	315,000	315,000	315,000
<b>Total Savings</b>	<b>\$315,000</b>	<b>315,000</b>	<b>315,000</b>	<b>315,000</b>	<b>315,000</b>	<b>315,000</b>
<b>COSTS:</b>						
Regulated Community	\$ 0	0	0	0	0	0
Local Government	\$ 0	0	0	0	0	0
State Government	\$315,000	315,000	315,000	315,000	315,000	315,000
<b>Total Costs</b>	<b>\$315,000</b>	<b>315,000</b>	<b>315,000</b>	<b>315,000</b>	<b>315,000</b>	<b>315,000</b>
<b>REVENUE LOSSES:</b>						
Regulated Community	\$ 0	0	0	0	0	0
Local Government	\$ 0	0	0	0	0	0
State Government	\$0	0	0	0	0	0
<b>Total Revenue Losses</b>	<b>\$0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>

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

Savings: Average annual reduction in periodic review costs, as a result of change in frequency of periodic reviews from once every 2 years to once every 3 years. Estimate of fiscal savings also includes administrative savings described in answer to question # 19.

Costs: Average annual cost per year per retail store of retail store management functions times the number of additional stores Program estimates will be authorized as a result of elimination of limitation criteria.

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

Program	FY - 4	FY - 3	FY - 2	FY - 1
WIC Program Nutrition Services and Administrative Expenditures	\$35,269,687	\$34,197,104	\$34,919,845	\$34,389,107
WIC Program Food Expenditures	\$91,942,497	\$89,071,373	\$91,663,532	\$89,899,794

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

There are no negative cost effects anticipated.

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

There are no non-regulatory alternatives available.

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

The Department considered maintaining limitation criteria. Historically, the Department has been reluctant to eliminate limitation criteria, long urged by the retail store community, because of the resulting increase in retail store management costs. In Advisory Workgroup Meetings, however, the retail store community supported revision of selection criteria including maximum prices for WIC allowable foods, consistent with recent revisions to Federal regulations requiring price controls for WIC allowable foods. Through introduction of provisions regarding maximum prices for WIC allowable foods, the Department hopes to realize two objectives: (1) to keep the number of stores applying for authorization within reasonable limits; and (2) to achieve savings in food costs that may translate into the additional administrative dollars needed to monitor the additional stores. Other aspects of these regulatory changes, such as removal of provisions requiring store input and WIC Program collection of quarterly prices from each retail store and reduction in the frequency of periodic reviews will generate Program savings to offset increase retail store management costs.

(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.

No. With the elimination of limitation criteria, Pennsylvania would have State regulations that meet but do not exceed Federal standards.

(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 favorable 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.

None scheduled at this time.

(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 additional reporting will be required from the regulated population.

(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.

No new special provisions have been incorporated into the amendments. The following provisions, which were revised slightly, originally were developed to meet the needs of the affected group:

- (1) Use of a store by handicapped participants is considered when determining whether a store that serves handicapped participants and that failed to meet selection criteria will be granted probationary authorization.

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- (2) Price limitations on all foods that may be authorized for purchase by WIC participants will control costs to the program to a greater extent than the existing more limited price controls thereby enabling the Department to provide services to greater numbers of potential WIC participants.
- (3) The ethnic and religious backgrounds of participants is considered when determining whether a store that serves those participants and that failed to meet selection criteria will be granted probationary authorization.

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

The regulations will be effective upon publication of final rulemaking in the *Pennsylvania Bulletin*.

(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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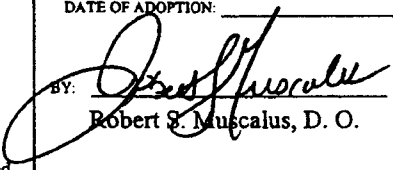
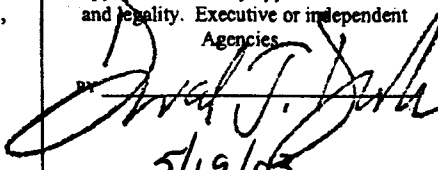
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**NOTICE OF FINAL RULEMAKING  
DEPARTMENT OF HEALTH**

**Title 28. Health and Safety**

**Part VIII.**

**Relating to Supplemental Nutrition Program for Women, Infants and Children  
(WIC Program)**

**28 Pa. Code Chs. 1101, 1103, 1105, 1107, 1109 and 1113.**

The Department of Health (Department) adopts amendments to 28 Pa. Code Part VIII (relating to Supplemental Nutrition Program for Women, Infants and Children (WIC Program)), Chapters 1101, 1103, 1105, 1107, 1109 and 1113 to read as set forth in Annex A. These regulations govern the authorization, management and appeal rights of stores participating in the WIC Program (WIC authorized stores).

*A. Purpose and Background*

The primary purpose of these amendments to the Department's regulations is to achieve compliance with recent amendments to the Federal regulations governing the WIC Program found at 7 CFR Part 246, adopted by the United States Department of Agriculture, Food Nutrition Service (USDA-FNS). The Federal amendments, adopted on December 29, 2000, mandate selection criteria, training requirements, criteria to be used to identify high-risk stores, and monitoring requirements, including compliance investigations.

These amendments also implement the Department's decision, permitted by Federal regulation, to eliminate the limitation criteria used to limit the number of stores authorized to participate in the WIC Program. Prior to these amendments, a store desiring to become a WIC authorized store had to satisfy the selection *and* limitation criteria in § 1103.4 (relating to selection and limitation criteria; authorization process). Through the amendments to the Department's regulations, the Department will allow any store that meets the revised selection criteria to participate in the WIC Program. The Department has retained all previous selection criteria with some additions and revisions.

The most significant of the revisions is to the manner in which the Department imposes price limitations on foods that may be purchased with WIC checks (allowable foods). Prior to these amendments, the Department had maintained limited control on prices for allowable foods by establishing the total maximum allowable cost for two defined “food prescriptions” consisting of food items that participants purchase most frequently. The Department has established maximum prices for all allowable foods. Stores are required to have allowable foods available at or below the published prices. Payment by the WIC Program of WIC checks submitted for redemption by WIC authorized stores is limited to no more than the sum total of the maximum prices for each of the WIC food items authorized for purchase on the check.

The Department conducted a thorough review of its existing WIC Program regulations under the Governor’s Executive Order 1996-1 before proposing amendments to the regulations governing the WIC Program. The Department also held a series of meetings for the purpose of soliciting comments from persons affected by these regulations. The discretionary changes to the Department’s regulations published as proposed rulemaking were, to a large measure, the result of the discussions held during these meetings.

The Department’s regulations are also a part of the State Plan of Operations required to be submitted to the USDA-FNS under 7 CFR 246.4 (relating to state plan). Therefore, in addition to meeting the Commonwealth’s statutory requirements for promulgating regulations, the Department was required to submit changes to its WIC Program regulations to the USDA-FNS for approval. The Department submitted both the

proposed and the final form regulations to the USDA-FNS, which approved the regulations.

The Department published proposed regulations at 32 Pa. B. 4585 (September 21, 2002) and provided a 30-day public comment period. Additionally, the Department sent out a Retail Store Alert to each Local Agency WIC Director, Local Agency WIC Retail Store Coordinator and WIC authorized store, informing them of the publication of the proposed regulations and directing their attention to the revised sections.

The Department received comments to the proposed regulations from four commentators. The comments and the Department's responses to the comments appear in the summary of this final regulation. If a section is not mentioned in the Summary, no comments were received on that section, and it was adopted as proposed.

#### *B. Summary*

One commentator expressed overall support for the stated general purpose of the proposed amendments. Additionally, the commentator expressed specific support for: the elimination of existing § 1103.4(b) and (c) (relating to limitation criteria), the imposition of price limitations on all allowable foods in § 1103.4 (5), the deletion of references to the appeal rights of local agencies in § 1101.1(b) and Chapter 1113, and the establishment of the Vendor Advisory Group in § 1101.3(b).

One commentator expressed agreement with the establishment of the Vendor Advisory Workgroup as set forth in § 1101.3(b) and with § 1103.4(5) which establishes price limitations on WIC allowable foods.

*Section 1101.2. Definitions.*

One commentator expressed the opinion that all onsite reviews (defined at § 1101.2) should be unannounced in order to achieve the greatest level of compliance with the terms and conditions that govern participation of authorized stores.

The definition of “onsite review” states that an onsite review may be announced or unannounced. An onsite review for purposes of store authorization or reauthorization is announced for the reason that the review represents the store’s single opportunity to demonstrate understanding and compliance with the criteria governing authorization and reauthorization. Under the amendments, failure to demonstrate compliance during the announced onsite review results in denial of the store’s application for authorization or reauthorization.

Onsite monitoring reviews are unannounced because the purpose of the monitoring review is to assess compliance with terms and conditions for participation in the WIC Program. If the WIC Program provided notice of the monitoring review, a store routinely not complying with terms and conditions of participation could avoid detection and eventual sanction. For that reason no notice is given. To ensure fairness, however, the WIC Program does not impose a sanction until at least 3 monitoring reviews reveal violations of terms and conditions of WIC Program participation. Moreover, the WIC Program notifies the store of the results of each review (§ 1105.6(b)(3)), gives the store notice that the investigation will continue, and imposes training requirements after the second problematic store review. § 1105.6(b)(3). Unannounced onsite reviews allow the WIC Program to monitor WIC authorized stores for abuse and errors as well as to take

corrective action when appropriate as mandated by Federal regulations at 7 CFR 246.12(j)(2) (relating to routine monitoring).

*Section 1103.4. Selection criteria for authorization and reauthorization.*

IRRC expressed concern that the Department's plan to publish in the *Pennsylvania Bulletin* the maximum allowable prices for allowable foods quarterly, as provided for under proposed § 1103.4 (5), would place an undue burden on stores by requiring them to monitor the *Pennsylvania Bulletin* to maintain compliance with the Program. IRRC recommended that the information be made available on the Department's website or mailed directly to vendors.

The Department concurs with this suggestion and will inform each WIC authorized store of the maximum allowable prices for WIC allowable foods by mailing the information to the stores prior to publication in the *Pennsylvania Bulletin*. Section 1103.4 (5) has been revised to state that the Department will mail to stores maximum price information for WIC allowable foods.

One commentator expressed concern that an increase in the number of WIC authorized stores as a result of the Department's proposal to eliminate the limitation criteria at § 1103.4(b) and (c), now deleted, would cause an overall increase in the administrative costs associated with mandated onsite reviews. IRRC supported this commentator in its comments and specifically requested that the Department further explain the fiscal impact of this change.

The Department has not revised the regulations in response to these comments. The fiscal impact of the increase in store numbers participating in the WIC program will be neutral for two reasons: (1) while the number of stores participating in the WIC

Program and the administrative costs associated with those stores will increase, the total number of onsite store reviews the Department must conduct each year, and the costs associated with those reviews, will decrease, and (2) the administrative costs associated with the very labor-intensive overcharge recovery system, being replaced by the computer-driven price adjustment system, will be eliminated.

Under prior regulations, WIC authorized stores were reviewed once every 2 years to determine whether the store would continue as a WIC authorized store. Accordingly, the WIC Program conducted onsite reauthorization reviews of 50% of all WIC authorized stores each year. In addition, the WIC Program conducted onsite monitoring reviews in accordance with federal requirements, of a minimum of 5% of all WIC authorized stores. Therefore, the WIC Program performed onsite reviews of 55% of all WIC authorized stores annually. Under these amendments, each WIC authorized store must be reviewed once every 3 years, reducing the number of annual onsite authorization and reauthorization reviews performed by the WIC Program to 34% of all WIC authorized stores. Even considering the federal monitoring requirement, the overall annual onsite review requirement will be reduced from 55% to 39% of the total number of all WIC authorized stores. The total number of WIC authorized stores would have to increase by 41% before the cost of onsite reviews required under these amendments would equal the previous cost of reviews to the Program.

After store reviews, the next highest cost component of the retail store management area of the WIC Program is the overcharge recovery system. Under the overcharge recovery system, all WIC authorized stores are required to submit to the local agency a quarterly price report in which the store lists its highest price during the quarter

for each WIC allowable food. WIC Program staff responsible for direct client services have performed the task of manually entering store specific price data, for each WIC authorized store, into the WIC Program's computer data system. These amendments replace the overcharge recovery system with the price adjustment system, which requires no manual input of store specific price data into the computer data system. Therefore, the cost to the Department will remain neutral.

*Section 1103.5. Minimum inventory.*

The Department has significantly revised proposed § 1103.5 (relating to minimum inventory). Proposed § 1103.5 listed all foods to which minimum inventory requirements would apply along with exact quantities of the foods that WIC authorized stores would be expected to have on the store premises at all times. Because exact quantities can vary as a result of manufacturer product or packaging changes, the Department determined that the most effective means to identify the minimum inventory requirements of allowable foods adopted by the Department is to publish in the *Pennsylvania Bulletin*, a list of all categories and types of allowable foods for which minimum inventory requirements exist. The list will be published by September 15 of each year and when the Department adopts a revised list. The list will be distributed to all WIC authorized stores at the time of publication of this final rulemaking and to any new store when it is authorized to participate in the Program.

The provision, as revised, also contains a list of WIC allowable foods for which minimum inventory requirements exist, restricts the minimum inventory requirement of each WIC allowable food to the maximum quantity which could be authorized for one participant for one month under Federal Regulations at 7 CFR 246.10 (relating to



supplemental foods), contains a provision for exceptions to the minimum inventory requirements, a list of WIC allowable foods for which exceptions may apply and defines when an exception to the minimum inventory requirements expires. Also, as a consequence of the elimination of the list of specific minimum inventory requirements in § 1103.5, the Department has eliminated the reference to the list of minimum inventory requirements in § 1103.4(5).

*Section 1103.7. Inadequate participant access.*

One commentator expressed concern that the effect of the Department's decision to delete paragraphs (5),(6) and (7) of § 1103.7(c) (relating to participant access) would be to narrow the definition of "inadequate participant access" which might have an adverse impact on participant access to the supplemental foods the WIC Program provides.

Adequate participant access is a fundamental concern for the Department. The purpose of paragraphs (5),(6) and (7) of § 1103.7(c) was to reduce for the Program the administrative burden associated with the transfer of a large number of participants to another store in the context of a denial of reauthorization of a store or a store's disqualification for violation of the terms and conditions that govern participation in the program. Deletion of these sections has no substantive impact on participant access decisions, which are driven by numerous factors. Before denying authorization to a store or disqualifying a store from the Program, the Department gives consideration to: availability of public transportation, the proximity of other WIC authorized stores in relation to the number of WIC participants, special dietary needs or ethnicity of participants, existence of physical barriers or other conditions which make access for

participants to another WIC authorized store impractical and whether or not there are participants with physical disabilities that cannot be accommodated by another WIC authorized store. By considering all of these factors, and with the increase in the number of WIC authorized stores as a result of the elimination of limitation criteria, the Department is able to ensure adequate participant access to WIC authorized stores that offer an sufficient inventory of fresh WIC allowable foods in order to meet the nutritional needs of the WIC participants. The Department has not changed the regulation in response to this comment.

*Section 1107.1. Imposition of sanctions.*

Section 1107.1(d)(2),(5),(6),(11) and (12), as proposed, would have allowed for a 1 year disqualification for the following violations of the terms and conditions governing participation in the Program: providing an allowable food in excess of the amount authorized for purchase on the WIC check (proposed subsection (d)(2)), failing to request a WIC identification card prior to accepting a WIC check (proposed subsection (d)(5)), accepting a WIC check made payable to another store without prior written approval from the Department (proposed subsection (d)(6)), securing the signature of the participant or authorized representative prior to completing the “Pay Exactly” box on the WIC check (proposed subsection (d)(11)), or charging the WIC Program sales tax (proposed subsection (d)(12)). The USDA commented that Federal regulations at 7 CFR 246.12(l)(1)(i)(iv) (relating to one year disqualification) require that the state agency disqualify a store from participation in the WIC Program after a *pattern* of each of the above violations of the terms and conditions governing participation in the program. The Department revised proposed §1107.1(d)(2),(5),(6),(11) and (12) to require a pattern

before the state agency may impose a one year term of disqualification. Paragraphs (d)(2), (5), (6), (11) and (12) now state that the state agency will disqualify a store for having committed 2 or more incidences of any of the specific violations.

*Section 1113.2 Administrative appeal procedures.*

The Department has revised proposed §1113.2 (relating to administrative appeal procedures). Proposed § 1113.2 provided that an administrative appeal had to be filed within 30 days after the effective date of the adverse action. According to 7 CFR 246.18(a)(2) (relating to effective date of adverse actions against vendors), the Department must set the effective date of denials of authorization and disqualifications (other than those imposed under § 246.12(l)(1)(i) (relating to permanent disqualification)) no earlier than 15 days and no later than 90 days after the date of the notice of the adverse action.

Additionally, 7 CFR 246.18(b)(2) (relating to full administrative review procedures) provides that the Department must give an authorized store or local agency the opportunity to appeal an adverse action within a time period specified by the Department in its notification of the adverse action. Prior to proposing regulations in September of 2002, the Department defined the time period for allowance of appeal of an adverse action as 30 days from the date that the Department mailed the notice of adverse action.

Due to the mandatory time period of at least 15 days between the notice of an adverse action and the effective date of that action required under § 246.18(a)(2), the language in the regulations as proposed allowed for, at a minimum, a 45-day time period

between the date when the Department mailed a notice of an adverse action and expiration of the 30-day time period allowed for any resulting notice of appeal.

The Department has determined that the long standing time period of 30 days from the date a notice of adverse action is mailed is sufficient for an authorized store or local agency to file an appeal. As a result, in the final rulemaking, the Department has revised the language of § 1113.2 to state that an authorized store or local agency may appeal an adverse action within 30 days from the date the Department mailed the notice of the adverse action.

### *C. Fiscal Impact*

The WIC Program is 100% federally funded. No State dollars are involved in the operation of the WIC Program. The amendment to §1103.3, which deals with authorization of stores, eliminating provisions regarding store slots and competition for those slots based upon prices, in and of itself, has the potential for increasing dramatically the number of stores that may be authorized to participate in the WIC Program. Through introduction of provisions regarding maximum allowable prices for all WIC allowable foods, however, the Department hopes to realize two objectives: (1) to keep the number of stores applying for authorization within reasonable limits; and (2) to achieve savings in foods costs that may translate into the additional administrative dollars needed to monitor the additional stores. Other aspects of these amendments, such as deletion of the provisions that imposed limitations on the number of store slots available, deletion of the provisions requiring store input and WIC Program collection of quarterly prices from

each retail store, as well as the decrease in the annual onsite review requirement will generate program savings. Overall, the Department anticipates the fiscal impact of these regulations to be neutral.

#### *D. Paperwork Requirements*

The amendments will not increase paperwork for WIC Program participants or those grocery stores voluntarily participating in the WIC Program. The increase in the Department's paperwork requirements that will result from the increase in the number of authorized stores will be offset by the decrease in paperwork associated with identifying, based on price calculations, which stores will be awarded available store slots. Paperwork requirements also will decrease as a result of the elimination of the overcharge recovery system and less frequent annual onsite review requirements. Moreover, the Department anticipates fewer appeals by stores denied authorization. Only stores failing to meet selection criteria will be denied authorization and reauthorization and, through temporary authorization, stores may have more than one opportunity to meet selection criteria.

#### *E. Effective Date/Sunset Date*

The final-form regulation will become effective upon final publication in the

*Pennsylvania Bulletin*. These regulations will be monitored continually and will be updated as required by changes in Federal statute or Federal regulations governing the WIC Program. 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. A. § 1786). Congress authorized the USDA-FNS to contract with and make funds available to States to administer the program. In the Commonwealth, 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. The Women's, Infants' and Children's Nutrition Improvement Act (62 P.S. §§ 2951 – 2955) 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 State regulations governing the WIC Program were promulgated and published at 29 Pa. B. 3841 (July 24, 1999), following the decision of the Commonwealth Court in *Giant Food Stores, Inc. v. Commonwealth of Pennsylvania, Department of Health*, 713 A.2d 177 (Pa. Commw. 1998). The Court 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 Part VIII to Title 28 (relating to supplemental nutrition program for women, infants and children (WIC

Program)). The regulations also deleted §§ 8.41 – 8.74, the Department's then existing regulations pertaining to WIC Program administrative appeals.

These amendments are promulgated under section 2102(g) of the Administrative Code of 1929 (code) (71 P.S. § 532(g)), which provides the Department general power to promulgate regulations to carry out its duties, under section 2102(a) of the code (71 P.S. § 532(a)), which gives the Department the authority and duty to protect the health of the people of the Commonwealth, and under the *Giant* decision.

#### *G. Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)) (act), on September 11, 2002, the Department submitted a copy of the notice of proposed rulemaking published at 32 Pa. B. 4585 to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Committee on Health and Human Services and the Senate Committee on Public Health and Welfare for review and comment.

In compliance with section 5(c) of the act (71 P.S. § 745.5(c)), the Department also provided IRRC and the Committees with copies of all comments received as well as other documentation.

In compliance with section 5.1(a) of the act, the Department submitted a copy of the final-form rulemaking to IRRC and the Committees on June 30, 2003. In addition, the Department provided IRRC and the Committees with information pertaining to commentators and a copy of a detailed regulatory analysis form prepared by the Department. A copy of this material is available to the public upon request.

In preparing this final-form regulation, the Department has considered all comments received from IRRC, the Committees and the public.

This final-form rulemaking was approved by the House Committee on Health and Human Services and the Senate Committee on Public Health and Welfare on \_\_\_\_\_ . IRRC met on \_\_\_\_\_ , and approved the regulation in accordance with section 5.1(e) of the act. The Attorney General approved the final-form rulemaking on \_\_\_\_\_ .

#### H. *Contact Person*

Questions regarding these final-form regulations may be submitted to Greg Landis, Chief, Grants and Retail Store Management Unit, WIC Program, Room 604, Health and Welfare Building, Harrisburg, PA 17108, (717) 783-1289. Persons with a disability may submit questions in alternative formats such as audio tape, Braille or by using V/TT: (717) 783-6514 for speech and/or hearing impaired persons or the Pennsylvania AT&T Relay Service at 1-800-654-5984 [TT]. Persons who require an alternative format of this document (that is, large print, audio tape, Braille) should contact Mr. Landis at the above listed address or telephone numbers so that he may make necessary arrangements.

#### I. *Findings*

The Department finds that:



(1) Public notice of the intention to adopt the amendment 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 1202), and the regulations hereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law and all comments were considered.

(3) The adoption of the final-form rulemaking in the manner provided by this order is necessary and appropriate for the administration of the authorizing statutes.

#### *J. Order*

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

(a) The regulations of the Department, 28 Pa. Code §§ 1101.1, 1101.2, 1101.3, 1103.1, 1103.2, 1103.3, 1103.4, 1103.5, 1103.6, 1103.7, 1105.1, 1105.2, 1105.3, 1105.4, 1105.5, 1105.6, 1107.1, 1107.1a, 1107.2, 1109.2, 1113.1, 1113.2, 1113.3, 1113.4 and 1113.5 are amended, and § 1103.6 is deleted to read as set forth in Annex A.

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

(c) 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.

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

(e) This order shall take effect 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] Authorization and reauthorization process and requirements.
- §1103.2. Probationary [certification] authorization.
- §1103.3. [Authorization of store slots] Temporary authorization.
- §1103.4. Selection [and limitation] criteria[;] for authorization [process] and reauthorization.
- §1103.5. Minimum inventory.
- §1103.6. [Waiting list] [Reserved].
- §1103.7. Inadequate participant access.

**CHAPTER 1105. REQUIREMENTS OF WIC AUTHORIZED STORES**

- §1105.1. Training.
- §1105.2. [Overcharge recovery system] Price adjustment.
- §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. 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 1113. [LOCAL AGENCY AND] STORE APPEALS**

- §1113.1. Right to administrative appeal.
- §1113.2. [Appeal] Administrative 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.**

\* \* \* \* \*

(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:

\* \* \* \* \*

Authorization – The grant of authority to a store to serve as a WIC authorized store.

*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, a proxy or endorser, 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. For a compliance buy or WIC transaction review, the person conducting the compliance buy or WIC transaction review.

\* \* \* \* \*

*Certification* - [For purposes of this chapter and Chapters 1103, 1105, 1107, 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] The Department's acceptance of an applicant to participate in the WIC Program as a participant.

\* \* \* \* \*

Claim – A demand for reimbursement of an overcharge or other improper charge to the WIC Program as a result of a store violation.

\* \* \* \* \*

Contract brand – The specific manufacturer brand of an allowable food that the Department is contractually bound to prescribe for participants.

\* \* \* \* \*

*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.

\* \* \* \* \*

*Inventory [audits] audit* - A comparison of a WIC authorized store's inventory levels [and purchases] of a particular [WIC product] allowable food over a specific period of time, to [actual WIC] purchases of the [same product] allowable food with WIC checks 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] a quantity of the allowable food available for sale during that time sufficient to support its claim for reimbursement for the sale of the allowable food.

[*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.]

\* \* \* \* \*

*Maximum allowable price* – The maximum price the Department will pay for an allowable food.

\* \* \* \* \*

*Onsite review* - [An overt] A 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. An onsite review may be announced or unannounced.

*Overcharge* – A charge by a WIC authorized store to the WIC Program through redemption of a WIC check for an allowable food in excess of the store's shelf price for that food or in excess of the price charged a non-WIC participant for that food.

Overpayment – Payment to a WIC authorized store of a WIC check redeemed by the store in an amount in excess of the amount to which the store was entitled based upon the maximum allowable price of each allowable food authorized for purchase on the WIC check.

\* \* \* \* \*

Periodic review – Contemporaneous announced onsite reviews of stores in a trade area conducted not less than once every 3 years to select stores for reauthorization.

\* \* \* \* \*

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

Price adjustment - The retroactive reduction in the amount paid for a redeemed check as a result of a determination of overpayment.

Probationary authorization – The Department’s probationary authorization of a WIC authorized store when inadequate participant access would occur if the store were not authorized or reauthorized or when the store is reviewed prior to opening to the public and has not yet stocked its dairy section or its frozen juice section.

\* \* \* \* \*



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

[*Redeem*] Redemption – [A WIC authorized store submitting] Submission of a WIC check by a WIC authorized store to its bank for the purpose of securing a money payment for the amount appearing in the "Pay Exactly" box on the WIC check.

Routine review – An unannounced onsite review of a WIC authorized store to evaluate adherence by the store with the requirements in this part governing the store's participation in the WIC Program.

\* \* \* \* \*

*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] authorization or reauthorization following [a certification or recertification] an announced onsite review [process].

*Secretary* - The Secretary [of Health] of the Department.

*Selection criteria* - Criteria in §1103.4[(a)] (relating to selection criteria for authorization and reauthorization) which the Department has established which a store seeking to be [certified or recertified] authorized or reauthorized is required to satisfy.

\* \* \* \* \*

[*Store slot* - A slot established by the Department for a WIC authorized store in a trade area. The number of store slots the Department authorizes for a geographic area assigned to a local agency is based on the density of participant population in the county in which the trade area is located and the actual number of participants in the county.]

*Store violation* – Intentional or unintentional action by the owners, officers, managers, agents or employees of a WIC authorized store that violates the requirements in this part governing the store's participation in the WIC Program and that may result in a claim.

*Temporary authorization* – The Department's temporary and conditional authorization of a WIC authorized store that fails to meet specified selection criteria during the initial onsite review for purpose of reauthorization.

*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.]

\* \* \* \* \*

*WIC authorized store* - A retail food store which is authorized [through certification or recertification] or reauthorized in accordance with § 1103.1 (relating to authorization and reauthorization process and requirements) to provide allowable foods to participants by accepting WIC checks.

\* \* \* \* \*

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

\* \* \* \* \*

*WIC transaction* – The presentation of a WIC check by a participant or authorized representative to a WIC authorized store resulting in the purchase of one or more of the allowable foods designated on the check.

WIC transaction review - 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 the requirements in this part governing the store's participation in the WIC Program.

**§1101.3. Administration.**

\* \* \* \* \*

(b) Vendor Advisory Workgroup. The Department will form a Vendor Advisory Workgroup with representation from the retail store community, appropriate advocacy groups and associations for retail stores and participants, and from the State and local agencies. The Department will schedule at least two meetings of the Vendor Advisory Workgroup annually to review and discuss retail store and food delivery issues. The Vendor Advisory Workgroup shall function in an advisory capacity only; acceptance of Workgroup recommendations shall be at the discretion of the Department.

(c) 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] onsite reviews, and in monitoring the activities of WIC authorized stores.

### CHAPTER 1103. AUTHORIZATION OF STORES

§1103.1. [Certification and recertification reviews] **Authorization and reauthorization process and requirements.**

(a) [*Qualifying for certification or recertification*] Duration of authorization or reauthorization. To [be certified or recertified] serve 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] be authorized in accordance with the requirements in subsection (b) or reauthorized in accordance with the requirements in subsection (c). [If the number of applicants satisfying the selection criteria exceeds the number of stores the Department permits to participate in the WIC Program 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 inadequate participant access, as set forth in §1103.7 (relating to inadequate participant access).] A store's authorization or reauthorization shall remain in effect until the Department acts on the store's application for reauthorization when the next periodic review is conducted in the trade area in which the store is located, unless terminated earlier in accordance with subsection (d). At least once every 3 years, the Department will conduct a periodic review in each trade area. Failure to submit an application for reauthorization as prescribed under subsection (c) shall result in expiration of the store's authorization or reauthorization. The Department will provide 30 days written notice to the store prior to

expiration of authorization or reauthorization for any store failing to submit an application. A store that has received a letter of authorization dated less than 60 days prior to the date of the notice of the periodic review in the store's trade area shall be exempt from the periodic review.

(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 accordance with §1103.4.
- (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 criteria in § 1103.4(a). 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.]

Authorization Process.

- (1) The store's representative shall contact the local agency responsible for the trade area where the store is located to request an application for authorization. The local agency shall send WIC Program information and an application for authorization to the store. The store shall complete the application for authorization and return it to the local agency.
- (2) The Department will refuse to accept an application from a store if the store has been provided notice of disqualification or is disqualified from

the WIC Program, if the Department determines that the store relocated or effected a change of ownership to avoid a disqualification, or if the store has been denied authorization or reauthorization and is not eligible to apply for authorization.

- (3) The Department will not accept an application for authorization less than 90 days prior to the scheduled start date of the periodic review in that trade area unless the Department finds that there would be inadequate participant access, as set forth in §1103.7, if it does not consider the application.
- (4) If the store's application for authorization is accepted, the local agency shall schedule, as expeditiously as possible, an announced onsite review of the store to determine if the store meets the selection criteria in § 1103.4 (relating to selection criteria for authorization and reauthorization). The local agency shall notify the store in advance of the approximate date of the review.
- (5) The local agency shall conduct the onsite review and forward the results to the Department for a decision on the store's application.
- (6) The Department will deny the application if the selection criteria in §1103.4 are not satisfied, unless the Department grants probationary authorization under §1103.2 (relating to probationary authorization). The Department will notify the store in writing whether the store's application for authorization is granted or denied. If the Department denies the



application for authorization, the store shall be eligible to reapply for authorization six months after the effective date of the denial.

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

*Reauthorization Process.*

- (1) The Department will include an application for reauthorization with the notice of periodic review it sends to the store. The local agency will collect the application for reauthorization at the time of the announced onsite review of the store to determine if the store meets the selection criteria in § 1103.4. The local agency shall notify the store in advance of the approximate date of the review.
- (2) The local agency shall conduct the onsite review and forward the results to the Department for a decision on the store's application.
- (3) The Department will deny the application without advance warning if the selection criteria in §1103.4 are not satisfied, unless the store requests and the Department grants temporary authorization in accordance with

§1103.3 (relating to temporary authorization) or the Department grants probationary authorization in accordance with §1103.2. The Department will notify the store in writing whether the store's application for reauthorization is granted or denied. If the Department denies the application for reauthorization, the store shall be eligible to apply for authorization 6 months after the effective date of the denial. If the Department grants and later rescinds temporary authorization, the store shall be eligible to apply for authorization 1 year from the date of the first onsite review for reauthorization.

(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.]

Termination of authorization or reauthorization. The Department will terminate a store's authorization or reauthorization if:

- (1) The store has been disqualified.
- (2) The store supplied false information in the application for authorization or reauthorization.
- (3) The store is not serving at least 25 participants 8 months following authorization.
- (4) Ownership of the store changes.
- (5) The store relocates in excess of one mile of its current location and to a geographical area assigned to another local agency.
- (6) The store closes for more than 3 business days and does not notify the Department.

[(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 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] authorization.**

(a) *Criteria for probationary [certification] authorization.* If during the [certification or recertification] onsite review, the store fails to meet [one or more of the qualifications in] selection criteria at §1103.4[(a) and (b)] (3), (4), (5), (6), (7) or (8) (relating to selection [and limitation] criteria[;] for authorization [process] and reauthorization), the Department [may] will grant probationary [certification] authorization to the store for a period not to exceed 6 months when either of the following applies:

- (1) Inadequate participant access would occur if the store is not [certified or recertified] authorized or reauthorized.

(2) A store is reviewed prior to opening to the public and the store has not yet stocked its dairy section or its frozen juice section [at the time of the review].

(b) [*Probationary certification reviews*] Reviews during probationary authorization period.

[(1)] If a store receives probationary [certification, except in situations of inadequate participant access identified in §1103.7(c)(8) (relating to inadequate participant access)] authorization, the Department will conduct an unannounced onsite review during the probationary [certification] authorization period to determine [if regular status should be granted to] whether the store is in compliance with selection criteria in §1103.4. The Department [may] will rescind probationary [certification] authorization 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, unless extension is required under subsection (c). The Department will grant authorization or reauthorization, as applicable, if the store meets all selection criteria during the second onsite review.

[(2)] If a store receives probationary certification due to inadequate participant access as identified in §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] authorization.* If the store fails the review conducted during the probationary [certification] authorization period, and inadequate participant access exists as determined by the Department, the Department [may] will extend probationary [certification] authorization 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] authorization reviews.* The Department will conduct an unannounced onsite review during the extended probationary [certification] authorization period after the store representative has attended corrective training, to determine [if certification should be granted to] whether the store is in compliance with the selection criteria in §1103.4. The Department will rescind probationary [certification] authorization 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. The Department will grant authorization or reauthorization, as applicable, if the store meets all selection criteria during the third and final unannounced onsite review.

(e) *Rescission of probationary [certification] authorization.* If the Department rescinds the probationary or extended probationary [certification] authorization of a store, the store is [not] eligible to [reapply] apply for [certification for] authorization 6 months from the

date of the Department's rescission of [the certification] probationary or extended probationary authorization.

**§1103.3. [Authorization of store slots] Temporary authorization.**

(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.]

(a) Failure to meet selection criteria during onsite review. If a WIC authorized store that applies for reauthorization fails to meet one or more of the selection criteria in §1103.4 (relating to selection criteria for authorization and reauthorization) during the announced onsite review, the store may request temporary authorization, except that a store that fails to meet the price and minimum inventory requirements of § 1103.4(5) shall be ineligible for temporary authorization. A store that is a high risk store or the subject of an ongoing compliance investigation also shall be ineligible for temporary authorization.

(b) Conditions of temporary authorization. Temporary authorization shall be conditioned upon the following:

- (1) The Department will conduct a second announced onsite review during the temporary authorization period to determine whether the store is in compliance with the selection criteria in §1103.4. The Department will grant reauthorization if the store meets all selection criteria during this review. The Department will rescind temporary authorization and deny the store's application for reauthorization if the store fails to meet one or more of the selection criteria during the second review.
- (2) If the Department rescinds the temporary authorization of a store, the store is eligible to apply for authorization 1 year after the date of the first onsite review that was conducted following the Department's receipt of the store's application for reauthorization.
- (3) The Department will reduce by 10% the maximum allowable prices for foods authorized for purchase on WIC checks the store redeems for WIC



transactions that occur during the first 90 days of the temporary authorization period.

**§1103.4. Selection [and limitation] criteria [;] for authorization [process] and reauthorization.**

[(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:

\* \* \* \* \*

(2) A store seeking reauthorization 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 §1107.1a(j) (relating to disqualifications) if it is not serving 25 participants at the end of the 8-month period.

[(ii) The Department [may] will deny [recertification] reauthorization 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] onsite review for reauthorization is conducted.

\* \* \* \* \*

(5) The store shall have available on the premises at all times

the minimum inventory [requirements] of allowable foods required in AS ESTABLISHED BY THE DEPARTMENT UNDER §1103.5 (relating to minimum inventory) [of allowable foods] at shelf prices that are equal to or less than the maximum allowable prices for those foods. The Department will publish in the *Pennsylvania Bulletin* quarterly AND MAIL TO ALL WIC AUTHORIZED STORES, QUARTERLY, the maximum allowable prices for allowable foods for the next quarter.

[(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 containers of single strength juice.

(G) Thirty ounces of cereal.

(ii) Food Prescription Two consists of: Thirty-one 13 ounce cans of concentrated contract brand milk or soy based infant formula.]

[(7)] (6) The store shall be open for business and able to serve participants at least 8 hours per day, 6 days per week.

[(8)] (7) The store shall be sanitary. There may not be [evidence of] unremoved rubbish, vermin, or general lack of cleanliness.

[(9)] (8) \* \* \*

(9) If the store has been denied authorization or reauthorization within the past 12 months, the store must be eligible to apply for authorization under §1103.1(b) or (c) (relating to authorization and reauthorization process and requirements) or §1103.3(b)(2) (relating to temporary authorization).

(10) The store may not be currently disqualified from participation in the Food Stamp Program or have been assessed a civil money penalty in lieu of a disqualification from the Food Stamp Program that, had it been imposed, would not yet have expired.

(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] reimbursement of any overcharges [to the WIC Program] or overpayments, and shall be in compliance with all applicable Federal and State regulations.
- (13) None of the store's current owners, officers, or managers shall have been convicted of or had a civil judgment entered against them for conduct demonstrating a lack of business integrity.

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

- (1) A store slot shall be available in the trade area in which the store is located.
- (2) The store shall not be located within 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 sufficient WIC participant shopping 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 premises at the time of the [certification or recertification] onsite review, and maintain at all times thereafter while participating as a WIC authorized store, the minimum inventory [requirements] of allowable foods at shelf prices equal to or less than the maximum allowable prices.~~

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

~~(1) — *Formula.*~~

~~(i) — Contract brand milk-based formula with iron:~~

~~(A) — [Sixty-two]Thirty one 13 ounce cans of liquid concentrate.~~

~~(B) — Twenty five 32 ounce cans of ready-to-feed.~~

~~(C) — [Six]Nine 14.1 ounce cans of powdered.~~

~~(ii) — Contract brand soy-based formula:~~

~~(A) — Thirty one 13 ounce cans of liquid concentrate.~~

~~(B) — Twenty five 32 ounce cans of ready-to-feed.~~

~~(C) — [Six]Nine 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]ten 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]4 pounds, in 1 or 2 pound containers.~~

~~(iv) Evaporated, [twelve]twenty four 12 ounce cans.~~

~~(3) Natural domestic cheese. [One pound each]Four pounds total of three varieties prepacked in 8 or 16 ounce packages.~~

~~(4) Grade "A" eggs. [Five]Three, 1 dozen containers.~~

~~(5) Juices.~~

~~(i) [Three]Two varieties with a total of [nine] seven 46 ounce containers.~~

~~(ii) [Frozen] Two varieties of frozen concentrated or shelf stable concentrated, [two varieties] with a total of [nine]seven 11.5 to 12 ounce containers.~~

~~(iii) Infant, three varieties of contract brand 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]40 ounces.~~

(ii) — ~~Infant, two varieties of contract brand in 8 ounce packages, totaling at least [32] 24 ounces.~~

(7) — ~~Peanut butter. [Five]One 15 to 18 ounce [containers] container.~~

(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 infant formula, juice and cereal and, if applicable, the names of [allowable] brands and types of allowable foods[, and the maximum price permitted for those allowable foods for which the Department establishes a maximum price].~~

(d) — ~~[Waivers] Exceptions to minimum inventory requirements. The Department [may] will grant an exception to the minimum inventory [waivers] requirements for an allowable [foods] food listed in subsection (e) [under the following circumstances:] when the Department's most recent check redemption information for a store shows no purchases of the allowable food for a period in excess of 90 days.~~

{(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] Allowable foods to which exception may apply. These foods are:~~

~~(1) Contract brand milk based with iron liquid concentrate infant formula~~

~~[(1)] (2) Contract brand milk based with iron ready to feed infant formula.~~

~~[(2)] (3) Contract brand milk based with iron powdered infant formula.~~

~~(4) Contract brand soy based liquid concentrate infant formula~~

~~[(3)] (5) Contract brand soy based ready to feed infant formula.~~

~~[(4)] (6) Contract brand soy based powdered infant formula.~~

~~[(5)] (7) Nonfat dry milk.~~

~~[(6)] (8) Evaporated milk.~~

~~[(7)] (9) Carrots.~~

~~[(8)] (10) Tuna.~~

~~(f) *Expiration of [waivers] exception to minimum inventory requirements.* [A] The exception to minimum inventory [waiver of] requirements for 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]~~ 48 hours after presentation of the WIC check.~~

(A) *MINIMUM INVENTORY REQUIREMENTS.*

(1) THE DEPARTMENT WILL ADOPT MINIMUM INVENTORY REQUIREMENTS AND THEIR EFFECTIVE DATES, FOR THE FOLLOWING WIC ALLOWABLE FOODS:

(I) CONTRACT BRAND INFANT FORMULA.

(II) MILK.

(III) NATURAL DOMESTIC CHEESE.

(IV) GRADE "A" EGGS.

(V) JUICE.

(VI) CEREAL.

(VII) PEANUT BUTTER.

(VIII) DRIED PEAS AND BEANS.

(IX) TUNA.

(X) CARROTS.

(2) THE DEPARTMENT WILL SET MINIMUM INVENTORY REQUIREMENTS FOR ALL ALLOWABLE FOODS FOR WHICH MINIMUM INVENTORY REQUIREMENTS EXIST AT A LEVEL NOT TO EXCEED THE MAXIMUM QUANTITY OF SUPPLEMENTAL FOOD AUTHORIZED PER MONTH AS SET FORTH IN FEDERAL REGULATIONS AT 7 CFR 246.10(2)(c) – (7).

(3) THE DEPARTMENT WILL PUBLISH MINIMUM INVENTORY REQUIREMENTS IN THE *PENNSYLVANIA BULLETIN* AND DISTRIBUTE THOSE REQUIREMENTS TO ALL WIC AUTHORIZED STORES NO LATER THAN SEPTEMBER 15 OF EACH YEAR, AND WHEN MANUFACTURER PRODUCT OR PACKAGING CHANGES OCCUR.

(B) *EXCEPTIONS TO MINIMUM INVENTORY REQUIREMENTS.* THE DEPARTMENT WILL GRANT AN EXCEPTION TO THE MINIMUM INVENTORY REQUIREMENTS FOR AN ALLOWABLE FOOD LISTED IN SUBSECTION (C) WHEN THE DEPARTMENT'S MOST RECENT CHECK REDEMPTION INFORMATION FOR A STORE SHOWS NO PURCHASES OF THE ALLOWABLE FOOD FOR A PERIOD IN EXCESS OF 90 DAYS.

(C) *ALLOWABLE FOODS TO WHICH EXCEPTIONS MAY APPLY.* THESE FOODS ARE:

- (1) CONTRACT BRAND MILK-BASED WITH IRON LIQUID CONCENTRATE INFANT FORMULA.

- (2) CONTRACT BRAND MILK-BASED WITH IRON READY-TO-FEED INFANT FORMULA.
- (3) CONTRACT BRAND MILK-BASED WITH IRON POWDERED INFANT FORMULA.
- (4) CONTRACT BRAND SOY-BASED LIQUID CONCENTRATE INFANT FORMULA
- (5) CONTRACT BRAND SOY-BASED READY-TO-FEED INFANT FORMULA.
- (6) CONTRACT BRAND SOY-BASED POWDERED INFANT FORMULA.
- (7) NONFAT DRY MILK.
- (8) EVAPORATED MILK.
- (9) CARROTS.
- (10) TUNA.

(D) *EXPIRATION OF EXCEPTION TO MINIMUM INVENTORY REQUIREMENTS.*  
THE EXCEPTION TO MINIMUM INVENTORY REQUIREMENTS FOR 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 48 HOURS AFTER PRESENTATION OF THE WIC CHECK.

§1103.6. [Waiting list] (Reserved).

[(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. Inadequate participant access.**

(a) The Department will consider whether there is inadequate participant access when considering whether to place a store on probation, rather than deny [recertification] authorization or reauthorization, for failure to meet selection [and limitation] criteria in §1103.4[(a) and (b)] (relating to selection [and limitation] criteria[;] for authorization [process] and reauthorization) during [recertification reviews] the onsite review.

(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)] whether to impose a civil money penalty in lieu of disqualification under § 1107.1 (relating to imposition of sanctions).

(c) 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 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 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) A participant has a physical disability that cannot be accommodated by another WIC authorized store 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.

\* \* \* \* \*

- [(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] authorization, the local agency shall provide initial training for the personnel [a certified] the WIC authorized store designates. The training shall be mandatory and shall occur within 30 days after the date of [certification] authorization. A store receiving [certification] authorization 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:

\* \* \* \* \*

- (5) Failure to have at least one representative attend training shall result in the Department imposing sanctions against the WIC authorized store [as in] under §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] authorization; and monitoring of WIC authorized stores). Attendance is mandatory.

**§1105.2. [Overcharge recovery system] Price adjustment.**

(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 15<sup>th</sup> 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] overpayment.* [The] In each calendar quarter, 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,] the maximum allowable prices for foods authorized for purchase on the check against the actual amount for which [each] the WIC check [accepted by the store during a reporting quarter] was redeemed, to determine [any overcharge owed to the Department] whether there was an overpayment.

[(e)] (b) *Pursuit of reimbursement.* The Department will seek reimbursements from a WIC authorized store [for the store's overcharges totaling \$10 or more for] when the price comparison reveals overpayments to the store in excess of \$10 in a calendar quarter.

[(f)] (c) *Reimbursement of [overcharges] overpayments.* A WIC authorized store shall [submit reimbursement of overcharges to] reimburse the Department for overpayments within 20-calendar days of the date on the Department's [billing] notice [for the overcharge] of

the overpayment, unless the WIC authorized store disputes the [overcharge] determination of overpayment.

[(g) *Overcharge disputes*] (d) *Dispute of overpayments*. A WIC authorized store that disputes [an overcharge billing] a determination of overpayment 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] Reimbursement the Department determines to be owing shall be due within 15-calendar days of the mailing date [on] of the Department's notification of its resolution of the dispute. The Department's resolution of a dispute regarding overpayments is not an adverse action that may be appealed.

[(h)] (e) *Sanctions*. The Department will impose a sanction against a WIC authorized store under §1107.1a(d)[(14)](12) (relating to disqualifications) if the store fails to [pay overcharges due] reimburse the Department for an overpayment within the time required under subsections [(f)](c) and [(g)](d).

(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 in] under §1107.1 (relating to imposition of sanctions). A WIC authorized store shall:

\* \* \* \* \*

- (3) [Monitor, supervise and be] Be accountable for the actions of owners, officers, managers, agents and [employees] 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] Comply with the selection criteria in §1103.4 (relating to selection criteria for authorization and reauthorization) throughout the authorization period.
- [(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)] (5) \* \* \*

[(10)] (6) \* \* \*

[(11)] (7) \* \* \*

[(12)] (8) \* \* \*

[(13)] (9) \* \* \*

[(14)] (10) \* \* \*

[(15)] (11) 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, which includes providing copies if requested by the Department, to [price and inventory] purchase records [during an onsite review] used for Federal tax reporting purposes and other records as requested to determine compliance with WIC Program requirements.

[(16)] (12) Agree that authorization does not constitute a license or a property interest, that the store must reapply for authorization in accordance with §1103.1(c) (relating to authorization and reauthorization process and requirements), and 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)] (13) \* \* \*

[(18)] (14) \* \* \*

[(19)] (15) Not transfer or assign its WIC [certification or recertification] authorization or reauthorization 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)] (16) Maintain [price and inventory] purchase records and records used for Federal tax reporting purposes for allowable foods for a minimum [period] of [6 months from the date of receipt of the inventory] 2 years.

(b) *Terms and conditions of participation with regard to participants.* A WIC authorized store shall serve participants and authorized representatives 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] a participant or authorized representative only as authorized on the WIC food list and as specified on the WIC check.
- (2) Not encourage or discourage a participant or authorized representative from purchasing an allowable [foods] food specified on the WIC check.
- (3) Provide an allowable [foods] food to [participants] a participant or authorized representative at or below the current price the store charges other customers, and at or below the maximum allowable price.
- (4) Not seek restitution or payment from [participants] a participant or authorized representative for a WIC [checks] check not reimbursed by the Department, or contact [participants] a participant or authorized representative concerning a WIC [transactions] transaction that [occur] occurs in the store.
- (5) Not seek restitution or payment from [participants] a participant or

- authorized representative for an allowable [foods when the price the store charges for the allowable foods exceeds the “Not to Exceed” amount on the WIC check] food authorized for purchase on the WIC check tendered by the participant or authorized representative.
- (6) Not request the personal [addresses] address, telephone [numbers] number or other personal identification of [participants] a participant or authorized representative.
- (7) Offer [participants] each participant or authorized representative the same courtesies offered other customers, and not distinguish or identify [participants] a participant or authorized representative from other customers, if no other terms and conditions of participation are violated in doing so.
- (8) Provide services to [participants] each participant or authorized representative without regard to race, color, age, sex, religion, national origin or disability.
- (9) [Give trading stamps to participants] Provide the same promotional incentive for [purchases] a purchase made with a WIC [checks] check [if trading stamps are] as given for a cash [purchases]purchase.
- (10) Accept cents-off coupons, a store discount card or other discounts from [participants] a participant or authorized representative for an allowable [foods] food, 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] a participant or authorized representative.

- (12) Provide a promotional incentive for use of a WIC check only if the same incentive is offered for a cash purchase.

(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 and the Department, not the participant.

\* \* \* \* \*

- (3) Accept a WIC check only if the participant[, endorser or proxy] or authorized representative 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] the WIC transaction.
- (5) Accept a WIC check only if the signature of the participant[, endorser or proxy] or authorized representative is obtained[, ] on the WIC check at the time of [purchase,] the WIC transaction [on the WIC check,] and the [signature on the WIC check matches the signature on the WIC



identification card] family identification number on the WIC check matches the family identification number on the identification card.

\* \* \* \* \*

- (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] or authorized representative.
- (8) Record in ink, on each WIC check immediately after completion of the WIC transaction and prior to the participant[, endorser or proxy] or authorized representative 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] or authorized representative 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] or authorized representative.
- (11) Not provide a substitute [items, rainchecks] item, raincheck or cash reimbursement for an allowable [foods] food that [are] is unavailable.

\* \* \* \* \*

- (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] a coupon tendered during the WIC transaction.

(14) Not [refund money or] provide [exchanges] an exchange to replace an allowable [foods] food returned by [participants, endorsers or proxies] a participant or authorized representative unless the exchange is to replace an identical product that was found to be damaged or otherwise unusable.

(15) Not refund money for an allowable food purchased in a WIC transaction that is returned by a participant or authorized representative.

(16) Not accept a WIC check as payment for [items] an item other than an allowable [foods]food specified on the WIC check.

[(16)] (17) Not charge the WIC Program for an allowable [foods] food not received by the [WIC] participant or authorized representative or for an allowable [foods provided] food in excess of [those listed] the quantity prescribed on the WIC check.

[(17)] (18) \* \* \*

[(18)] (19) Deposit a WIC [checks]check 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)] (20) Not receive, transact, redeem or otherwise dispose of a WIC check [outside] in violation of check redemption procedures set forth in this section.

[(20)] (21) Not use a WIC check for the purchase of any [commodity] item other than an allowable food or for the payment of any debt.

[(21)] (22) Not collect sales tax [on allowable food purchases] in connection with a WIC transaction.

[(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).] When the Department determines, prior to payment of a check submitted for redemption, that the store has committed a violation of this section that affects the payment to the store, the Department will deny payment. If payment already has been made, the Department will establish a claim for reimbursement by sending the store a written notice of the overcharge or other improper charge. The store may dispute the Department's claim and shall submit the basis for its dispute in writing within 15 calendar days of the date of the Department's written notice. The Department shall notify the store of the resolution of the claim dispute. The Department's resolution of a claim dispute is not an adverse action that may be appealed.

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

(a) [A certification or recertification] A store's status as a WIC authorized store is void when a change of ownership of [a WIC authorized] the store occurs.

(b) To allow uninterrupted service to participants subsequent to a change of

ownership of a WIC authorized store, the Department may accept an application for [certification] authorization from the prospective new owner of [a WIC authorized] the store prior to a change of ownership.

(c) [When a change of ownership occurs and inadequate participant access as defined in §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.] The Department will not accept a store's application for authorization if the Department determines that the store submitting the application, either under prior ownership or in a previous location, was disqualified and the purpose of the relocation or sale of the store was to avoid a disqualification.

**§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] provide 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] 15 days for remodeling [will not lose its certification, provided] shall continue as a WIC authorized store if 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] 15 store operation days for remodeling, shall automatically lose its [WIC authorization] status as a WIC authorized store and shall [reapply] apply for and secure [certification] authorization 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 or within the same geographical area assigned to the local agency, and reopens within [3-] 15-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] continue as a WIC authorized store if it notifies the Department at least 15-calendar days prior to the day the store closes for relocating.

(2) A WIC authorized store [relocating] that relocates in excess of 1 mile of its current location and to a geographical area assigned to another local agency shall [lose its WIC authorization and shall reapply for certification] automatically lose its status as a WIC authorized store and shall apply for authorization at its new location to again serve as a WIC authorized store.

(3) A WIC authorized store that closes in excess of 3 store operation days for relocating [, without applying for and securing permission from] shall notify the Department [to do] before doing so, or shall automatically lose its status as a WIC [authorization] authorized store and shall [reapply]

apply for [certification] authorization to again serve 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] compliance investigations, inventory audits, routine reviews and [training buys] WIC transaction reviews. The monitoring process, to determine compliance with applicable Federal and State regulations, operates independently of the authorization process and may overlap more than one authorization period.

(b) [*High risk reviews*] Compliance investigations. [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 apply:

[(i)] (1) \* \* \*

[(ii)] (2) \* \* \*

[(iii)] (3) 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)] paragraph (8) applies.

[(iv)] (4) 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] a statute or regulation governing the store's participation in the WIC Program, unless paragraph (8) applies.

[(v)] (5) [The] If paragraph (8) does not apply, the Department will [conduct a third compliance buy at will] continue a compliance investigation of the WIC authorized store after store personnel have attended mandatory corrective training.

[(vi)] (6) The Department will 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] a statute or regulation governing the store's participation in the WIC Program. If multiple violations are found during the compliance investigation, the Department will impose the sanction against the store for the term corresponding to the most serious violation.



[(vii)](7) The Department will close the compliance investigation on a WIC authorized store if the Department discovers no [violations] violation of a statute or regulation governing the store's participation in the WIC Program [are discovered] after two consecutive compliance buys.

[(viii)](8) The Department may withhold notification of compliance buy results, and may withhold providing training or conducting further compliance investigations, when fraudulent [activities] activity by the WIC authorized store [are] is indicated during a compliance investigation or by local agency or participant complaint.

[(2)](c) *Inventory audits.* The Department will disqualify [the] a WIC authorized store when an inventory audit establishes [the claim of reimbursement for authorized] that the store has redeemed or attempted to redeem WIC checks for the purported sale of an allowable food in excess of documented inventory. No warning [letters] letter will be issued.

[(c)](d) *Routine reviews.* The Department will use routine 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):

\* \* \* \* \*

- (6) The Department 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. If multiple violations are found during the routine reviews, the Department will impose [the sanction] against the store [for the term corresponding to the most serious violation] the most severe sanction the Department may impose for any one of the violations committed by the store.

[(d) *Training buys*] (e) WIC transaction reviews. The Department will use [training buys] WIC transaction reviews 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] WIC transaction review is scheduled.
- (2) The Department will provide written notification to the WIC authorized store of the results of each [training buy] WIC transaction review, 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] WIC transaction review at the WIC authorized store if the first [training buy] WIC transaction review detects [violations] a violation 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] WIC transaction reviews 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] WIC transaction review at the WIC authorized store after store personnel have attended the mandatory corrective training.
- (6) The Department will impose a sanction in accordance with §1107.1 [against a store] if a third [training buy] WIC transaction review detects [violations] a violation of a statute or regulation governing the store's participation in the WIC Program. If multiple violations are found during the [training buys] WIC transaction reviews, the Department will impose [the sanction] against the store [for the term corresponding with the most serious violation] the most severe sanction the Department may impose for any one of the violations committed by the store.

[(e)](f) \* \* \*

[(f)](g) *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] on the notice.

## CHAPTER 1107. SANCTIONS

### §1107.1. Imposition of sanctions.

(a) The Department may disqualify a WIC authorized store or impose a civil money penalty in lieu of disqualification for reasons of [program] WIC 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 the sanctions. For other serious program violations or offenses, the Department may choose to not provide the store with prior warning that violations were occurring before imposing the sanctions. The store may appeal a Department decision pertaining to disqualification, denial of [application to participate] authorization or reauthorization, or other adverse [actions] action that [affect participation during the agreement performance period] affects the store's status as a WIC authorized store in accordance with §1113.1 (relating to right to administrative appeal). Expiration of [an agreement with a store] authorization, 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 that has been assessed a civil money penalty in lieu of disqualification under the Food Stamp Program unless disqualification of the store from the WIC Program would result in inadequate participant access or would otherwise adversely affect the interest of participants. If the Department disqualifies a store under this subsection, the length of the disqualification will correspond to the period for which the store would otherwise have been disqualified from participating in the Food Stamp Program.

[(c)](d) 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 will not [impose] give the store the option of paying a civil money penalty in lieu of disqualification for third or subsequent [sanctions for] violations. A violation committed during a prior authorization period will support a disqualification.

[(d)](e) Disqualification from the WIC Program may result in disqualification as a retailer in the Food Stamp Program under regulations governing the Food Stamp Program. [The disqualification may not be subject to administrative or judicial review under the Food Stamp Program.] Applicable Federal regulations may prohibit administrative or judicial review

of a disqualification from the Food Stamp Program based upon a disqualification from the WIC Program.

[(e)](f) 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)](g) A WIC authorized store that has a sanction imposed against it by the Department for accepting a WIC check for [items] an item other than those specified on the WIC check shall also reimburse the Department for [monies received for the purchase of these items with the] moneys it receives through the WIC check redemption process after accepting a WIC check for the purchase of the item.

[(g)](h) 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)] imposed by regulation or in the notice given to the store by the Department [under §1105.6(f) (relating to monitoring of WIC authorized stores)] of the store's obligation to reimburse the Department.

**§1107.1a. Disqualifications.**

\* \* \* \* \*

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

\* \* \* \* \*

- (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 WIC check 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] overcharges.
- (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] a WIC check that the store is not authorized to receive, transact or redeem.

\* \* \* \* \*

(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] a food item other than an allowable food in exchange for WIC checks[, including charging for allowable food provided in excess of those listed on the WIC check].
- (2) TWO OR MORE INCIDENCES OF ~~Providing~~ PROVIDING an allowable food in excess of the amount authorized for purchase on the WIC check.
- (3) Having a stale-dated allowable food on the sales floor.
- [(3)](4) Failing to maintain on the premises at all times minimum inventory requirements of an allowable food at or below the current maximum allowable price for that food.
- [(4)](5) TWO OR MORE INCIDENCES OF ~~Failing~~ FAILING to request [the participant's] a WIC identification card prior to accepting a WIC check.
- [(5)](6) TWO OR MORE INCIDENCES OF ~~Accepting~~ ACCEPTING a WIC check made payable to another store without prior written approval from the Department.
- [(6)](7) \* \* \*
- [(7)](8) Failing to properly store [and] or refrigerate an allowable [foods] food.
- [(8)](9) \* \* \*
- [(9)](10) Charging or demanding that a participant or authorized representative pay for an allowable food with [the participant's own] money or with another WIC check for purchases made with a WIC check.



[(10)](11)TWO OR MORE INCIDENCES OF ~~Securing~~ SECURING the signature of the participant[, endorser or proxy] or authorized representative prior to completing the "Pay Exactly" box on the WIC check.

[(11)](12)TWO OR MORE INCIDENCES OF [Overcharging] Charging CHARGING 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] the person who tenders a WIC check.

(14) Failing to [remit payment for an overcharge] reimburse the Department for overpayments, overcharges or other improper charges within the specified time frame [under either §§1105.2(f) and (g) or 1105.6(f) ((relating to overcharge recovery system; monitoring of WIC authorized stores)].

\* \* \* \* \*

(17) Providing false information on the application for authorization or reauthorization.

(e) *Second mandatory sanction.* [When] If 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 §1107.2(c) (relating to civil money penalties).

(f) *Third or subsequent mandatory sanction.* [When] If a WIC authorized store, which previously has been assessed two 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] permit the store to pay a civil money [penalties] penalty 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 CFR 246.12(k)(1)(vii) and §1113.1(b)(3) (relating to right

to administrative appeal), the WIC [program] Program disqualification is not 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 enter the disqualification on the record. The Department will not permit the store to use [nonrenewal of a store agreement] expiration of authorization as an alternative to disqualification.

(j) *Other violations.* For [any] a violation of a statute or regulation governing the store's participation in the WIC Program which is not specifically classified in subsections (a)-(d), 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] a disqualification. The notice will include the store's appeal rights, if applicable.

(l) [Certification] Authorization following expiration of disqualification period. A store that has been disqualified from the WIC Program may apply for [certification] authorization following expiration of the disqualification period. If the store chooses to apply for

[certification] authorization 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] Department will consider the store's application in accordance with §1103.4 (relating to selection [and limitation] criteria [;] for authorization [process] and reauthorization) [or placed on a waiting list in accordance with §1103.6 (relating to waiting list)].

**§1107.2. Civil money penalties.**

(a) *Option available in lieu of a disqualification or denial of reauthorization.* The Department may offer to a WIC authorized store the option of paying a civil money penalty in lieu of a denial of [recertification] reauthorization 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 [in] under §1107.1 a(b)-(d) (relating to disqualifications).

(b) *Calculation of civil money penalty.*

(1) For a civil money [penalties] penalty in lieu of [disqualifications] a disqualification under §1107.1a(b), (c) [and] or (d)(1) and (2), 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. 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)-(16)] a civil money penalty in lieu of disqualification under §1107.1a(d)(3)-(16), the Department will calculate the civil money penalty for each violation identified 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] a store to which the Department may deny reauthorization and 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] penalties.* The amount of the civil money penalty will not exceed \$10,000 for each violation. [When] If, 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] penalty for all violations investigated as part of a single investigation will not exceed \$40,000.

\* \* \* \* \*

(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] authorized for 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] authorized for the most serious violation. The Department may permit payment of a civil money [penalties] penalty 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] reimbursement to the Department of [outstanding overcharges for the acceptance of WIC checks for the sale of unauthorized foods] overpayments.

## CHAPTER 1109. ADMINISTRATIVE APPEALS

\* \* \* \* \*

### §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 nutrition program for women, infants and children) governing hearings afforded under this part to applicants, participants, and 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.

\* \* \*

#### **CHAPTER 1113. [LOCAL AGENCY AND] STORE APPEALS.**

##### **§1113.1. Right to administrative appeal.**

(a) A store [or local agency adversely affected by a Division of WIC action] has the right to appeal an adverse action of the Division of WIC that affects the store's participation in the WIC Program as a WIC authorized store. [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.] Adverse actions include:

- (1) Termination of authorization or reauthorization in accordance with §1103.1(d) (relating to authorization and reauthorization process and requirements).
- (2) Denial of an application for authorization or reauthorization.
- (3) Refusal to accept an application for authorization or reauthorization.

(b) [The following actions are not subject to appeal] A store may not appeal the following:

- (1) The expiration of [a WIC] authorization or reauthorization.
- (2) [The Division of WIC's determination regarding participant access] The validity or appropriateness of selection criteria.
- (3) [Disqualification from the WIC Program of a store as a result of disqualification from the Food Stamp Program] The validity or appropriateness of the Department's participant access criteria and the Division of WIC's participant access determination.
- (4) Disqualification from the WIC Program as a result of disqualification from the Food Stamp Program.
- (5) The resolution of an overpayment dispute under §1105.2(d) (relating to price adjustment) or the resolution of an overcharge dispute under § 1105.3(d) (relating to terms and conditions of participation).

(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.] A denial of authorization under §1103.1(b)(6) and a disqualification imposed under §1107.1a(a) (relating to disqualifications) shall be effective on the date of the store's receipt of notice of the adverse action. All other adverse actions shall be effective on the date set forth in the written notice.

- [(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] Administrative 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] The Division of WIC will provide to the store written notice of the adverse action, the procedures to follow to appeal the adverse action and the cause for and the effective date of the action.

(b) *Form of administrative 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 and effect of filing an administrative 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] ~~the effective date of the adverse action~~ FROM THE DATE THE NOTICE OF ADVERSE ACTION IS MAILED. The filing of an appeal shall serve to stay the Department's adverse action pending issuance of an adjudication and order by the hearing examiner under § 1113.3 (relating to adjudication and order). The stay shall be lifted upon receipt of the hearing examiner's adjudication and order affirming the adverse action, or upon receipt of the store's written notice of withdrawal of the appeal.

(d) *Scheduling 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] Division of WIC or the [appellant] store 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 WIC Program, and who may not have participated in the decision made by the Division of WIC or have any personal stake in the outcome] determination is based solely on whether the Division of WIC has correctly applied Federal and State statutes, regulations, policies and procedures governing the WIC Program, according to the evidence presented at the hearing.

(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.

\* \* \* \* \*

**§1113.3. Adjudication and order.**

\* \* \* \* \*

(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) If the hearing examiner upholds the Department's adverse action, the adverse action shall be effective as of the date of the store's receipt of written notice of the hearing examiner's adjudication and order.

(d) 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)] (e) \* \* \*

**§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] regulations under this part applicable to a WIC authorized store.

**§1113.5. Judicial review.**

If the adjudication and order of the hearing examiner [is rendered against the [local agency or store] upholds the Department's adverse action, 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

THE SECRETARY

June 30, 2002

Mr. Robert E. Nyce  
Executive Director  
Independent Regulatory Review Commission  
14<sup>th</sup> Floor, 333 Market Street  
Harrisburg, PA 17101

Re: Department of Health – Final Regulations No. 10-169  
Supplemental Nutrition Program for Women, Infants and Children  
(WIC Program)

Dear Mr. Nyce:

Enclosed are final-form regulations for review by the Commission in accordance with the Regulatory Review Act (71 P.S. §§745.1-745.15). These regulations govern the authorization and monitoring of retail grocery stores in the WIC Program, and set forth procedures for administrative appeals of WIC applicants, participants and grocery stores.

Section 5.1(a) of the Regulatory Review Act, 71 P.S. §745.5a(a), provides that upon completion of the agency's review of comments following proposed rulemaking, the agency is to submit to the Commission a copy of the agency's response to comments received, the names and addresses of the 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.

A list of the names and addresses of the commentators who requested a copy of the final-form regulations is enclosed. The Department previously forwarded their comments to the Commission.

Section 5.1(e) of the Regulatory Review Act, 71 P.S. §745.5a(e), provides that the Commission may have until its next scheduled meeting which occurs no less than 30 days after receipt of these regulations, to 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 Dawn Jackson, Director of the Office of Policy and Legislative Affairs, at (717) 787-4525.

Sincerely,

A handwritten signature in black ink, appearing to read 'C. Johnson', written in a cursive style.

Calvin B. Johnson, M.D., M.P.H.  
Acting Secretary of Health

Enclosures

Commentators to proposed Department of Health Regulation No. 10-169, Supplemental Nutrition Program for Women, Infants and Children, published in *The Pennsylvania Bulletin* on September 21, 2002:

Berry Friesen  
Executive Director  
Pennsylvania Hunger Action Center  
208 North Third Street  
Suite 200  
Harrisburg, PA 17101

Pat Cuminsky-Czeto  
Regional Director  
Supplemental Food Programs  
United States Department of Agriculture  
Mid-Atlantic Region  
300 Corporate Blvd.  
Robbinsville, NJ 08691-1598

William J. Cochran, MD, FAAP  
Department of Nutrition  
Geisinger Medical Center  
100 N. Academy Avenue  
Danville, PA 17822-0001



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

I.D. NUMBER: 10-169  
 SUBJECT: Supplemental Nutrition Program for Women, Infants and Children  
 AGENCY: Department of Health

**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

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 INDEPENDENT REGULATORY  
 REVIEW COMMISSION

**FILING OF REGULATION**

DATE	SIGNATURE	DESIGNATION
6/30/03	<i>[Signature]</i>	HOUSE COMMITTEE ON HEALTH & HUMAN SERVICES
6/30/03	<i>Jd. Chen</i>	
6/30/03	<i>Debbie Eater</i>	SENATE COMMITTEE ON PUBLIC HEALTH & WELFARE
6/30/03	<i>[Signature]</i>	INDEPENDENT REGULATORY REVIEW COMMISSION
		ATTORNEY GENERAL (for Final Omitted only)
		LEGISLATIVE REFERENCE BUREAU (for Proposed only)