

Regulatory Analysis Form

(Completed by the Regulating Agency)



IRRC

Independent Regulatory Review Commission

SECTION I - PROFILE

(1) Agency:

Department of Health

(2) Agency Number: 10

Identification Number: 180

IRRC Number:

INDEPENDENT REGULATORY
REVIEW COMMISSION

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(3) Short Title:

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

(4) PA Code Cite:

28 Pa. Code Part VIII Chapters 1101-1113

(5) Agency Contacts (List Telephone Number, Address, Fax Number and Email Address):

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(6) Primary Contact for Public Comments (List Telephone Number, Address, Fax Number and Email Address) – Complete if different from #5:

(All Comments will appear on IRRC'S website)

(7) Type of Rulemaking (check applicable box):

- Proposed Regulation
- Final Regulation
- Final Omitted Regulation
- Emergency Certification Regulation;
 - Certification by the Governor
 - Certification by the Attorney General

(8) Briefly explain the regulation in clear and nontechnical language. (100 words or less)

These regulations govern the authorization and management of retail grocery stores in the WIC Program, and set forth procedures for administrative appeals of WIC applicants and participants, local agencies and retail grocery stores. These revisions remove the requirement that WIC checks be redeemed at a specific store as previously selected by the WIC participant, and prohibit the authorization of any new WIC-Only stores, which are referred to as "above-50-percent-stores." The revisions also provide for WIC Program cost containment measures required by changes to federal law governing WIC. The Department classifies stores in "peer groups" and provides competitive price criteria for authorization of stores in the WIC Program. The regulations also require stores seeking new authorization to maintain certain minimum information technology requirements.

(9) Include a schedule for review of the regulation including:

A. The date by which the agency must receive public comments: _____

B. The date or dates on which public meetings or hearings will be held: _____

C. The expected date of promulgation of the proposed regulation as a final-form regulation: _____

D. The expected effective date of the final-form regulation: These regulations would be effective upon publication as final rulemaking in the Pennsylvania Bulletin.

E. The date by which compliance with the final-form regulation will be required: _____

F. The date by which required permits, licenses or other approvals must be obtained: _____

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

These regulations would be used daily by the WIC Program to monitor WIC stores, and as such will be continuously reviewed. Any issues encountered or reported as a result of these regulations will be investigated and the WIC Program will determine if changes are required.

SECTION II: STATEMENT OF NEED

(11) State the statutory authority for the regulation. Include specific statutory citation.

The WIC Program was authorized by an amendment to the Child Nutrition Act of 1966, 42 U.S.C. §1786 (Child Nutrition Act). Through the Child Nutrition Act, Congress charged the United States Department of Agriculture, Food Nutrition Services (USDA-FNS) with the responsibility for administering the WIC Program and distributing funding for its operation. The Child Nutrition Act further provides that the USDA-FNS contract with state agencies for the establishment of the WIC Program. In the Commonwealth, the USDA-FNS contracts with the Department of Health (Department) for the operation of the WIC program. The Child Nutrition and WIC Reauthorization Act of 2004 provides for the continued existence of the WIC Program. *See*, Child Nutrition and WIC Reauthorization Act of 2004, Pub. L. No. 108-265, §203, 118 Stat. 729, 771-780.

Pursuant to the Commonwealth Court's ruling in *Giant Food Stores, Inc. v. Commonwealth of Pennsylvania, Department of Health*, 713 A.2d 177 (Pa. Cmwlth. Ct. 1998), the Department presented the initial WIC Program regulations to the Independent Regulatory Review Commission for approval in 1999. These regulations, found at 28 Pa. Code Part VIII, Chapters 1101-1113, were approved and adopted on July 23, 1999, effective July 24, 1999, and became the Commonwealth's WIC program regulations.

(12) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

The revisions to the regulation are mandated by recent changes to the Federal WIC statutes, regulations and appropriations. *See*, Child Nutrition and WIC Reauthorization Act of 2004, Pub. L. No. 108-265, § 203, 118 Stat. 729, 771-780.

First, as part of the Reauthorization Act and continuing WIC appropriations acts, and as an effort to strengthen these programs and improve their effectiveness, Congress seeks to implement stronger Vendor cost containment and eliminate the proliferation of "WIC-Only" stores, which currently operate in many states. *See*, 42 U.S.C. § 1786(h)(11). Any store that derives more than 50 percent of its annual

gross food sales revenue from the sale of food items for WIC checks is considered a WIC-Only store. These stores generally sell only WIC foods, serve only WIC participants, and charge significantly higher prices for WIC foods than typical grocery stores. In turn, these higher prices result in a higher cost for the WIC program, which could ultimately result in reduction in the number of participants the WIC program can serve and a reduction in the amount of benefits the WIC Program can provide participants.

Although the Reauthorization Act seeks to combat WIC-Only stores by requiring existing stores be separated into a distinct "peer group" by the states, continuing WIC appropriations acts also deny funding to any states that authorize new WIC-Only stores, unless those stores are separated into separate peer groups with distinct reimbursement criteria. The Department's amendments prohibit the authorization of these stores as a measure to ensure compliance with federal laws governing the WIC Program, control the individual participant costs, and maximize the funding provided by the Federal Government.

The Reauthorization Act also requires states to allow WIC program participants to redeem WIC checks at any approved WIC vendor. *See*, 42 U.S.C. §§1786(f)(1)(C)(i). Currently, the Commonwealth's WIC regulations only allow the redemption of WIC checks at the store specifically identified on the WIC check. While the majority of the changes required by the implementation of this new requirement involve internal operating procedures of the WIC Program, the regulation language requires revisions to eliminate any language that limited the redemption of WIC checks to specific stores and to provide a requirement for the WIC authorized store to notify the Department of the acceptance of a WIC check prior to depositing the check.

Finally, the Reauthorization Act requires states to maintain a list of state approved infant formula manufacturers, wholesalers, distributors and retailers. *See*, 42 U.S.C. §§1786(h)(8)(A)(ix) and (x). WIC authorized stores can purchase infant formula for resale to WIC participants only from manufacturers, wholesalers, distributors and retailers on these lists.

(13) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

As stated in more detail in Section 12 above, the revisions eliminate the proliferation of WIC-Only stores and contain WIC food costs through the creation of peer groups as required by federal law. The regulations also seek to prohibit the authorization of WIC-Only stores. These cost containment measures curtail the cost to the WIC Program and in turn maintain or increase the number of individuals the WIC Program can assist.

The revisions would also allow WIC participants greater flexibility in obtaining WIC approved foods with their WIC checks by allowing participants to redeem the WIC checks at any authorized store. Further, they foster increased competition in the marketplace, which can result in lower food costs to the WIC Program. Finally, the revisions provide that WIC authorized stores can purchase infant formula for

resale to WIC participants only from state approved infant formula manufacturers, wholesalers, distributors and retailers.

Finally, the revisions require that stores seeking initial authorization maintain certain minimum information technology requirements. These requirements increase the efficiency of the WIC program and lead to improved services for WIC participants and other shoppers at WIC authorized stores. The revisions also reduce WIC administrative costs, thereby reducing overall program costs.

Monthly, approximately 245,000 WIC participants in the Commonwealth will benefit from these changes, by providing greater flexibility regarding where they can shop with their WIC checks. Additionally, approximately 1,500 WIC authorized stores will benefit from these regulatory revisions through the ability to better compete for WIC shopping dollars.

(14) If scientific data, studies, references are used to justify this regulation, please submit material with the regulatory package. Please provide full citation and/or links to internet source.

N/A.

(15) Describe who and how many will be adversely affected by the regulation. How are they affected?

Under the regulations, all of the Commonwealth's approximately 1,500 WIC authorized stores are required to notify the Department that they have accepted specific WIC checks. This will be accomplished through electronic notification to the Department of the WIC check numbers. This additional task is in lieu of manually hand stamping the WIC vendor number on each WIC check transacted. This method greatly reduces the number of errors and costly bank rejections of WIC checks.

Stores seeking initial authorization will also be required to maintain certain minimum information technology requirements. Currently, no such requirements exists for stores, although the WIC program encourages stores to maintain certain telephone and computer capabilities and standards which provide additional benefits to authorized WIC stores through more efficient participation in the WIC Program.

(16) 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.

Currently, there are approximately 1,500 WIC authorized stores statewide, all of which will be required to comply with the proposed regulations. Additionally, any store seeking initial authorization as a WIC vendor would be required to comply with these regulations.

SECTION III: COST AND IMPACT ANALYSIS

(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. Explain how the dollar estimates were derived.

The regulated community consists of approximately 1,500 WIC authorized stores and any stores seeking initial authorization as WIC vendors. There are no quantifiable costs and/or savings to the stores anticipated with the regulation revisions concerning cost containment or infant formula purchasing. Although there may be a cost associated with complying with the minimum information technology requirements for stores seeking initial authorization, it is not possible to quantify those costs at this time as it is unclear what capabilities these stores currently have or whether new stores would seek authorization in the WIC Program.

(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. Explain how the dollar estimates were derived.

N/A.

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

The requirement that WIC participants be able to shop at any authorized vendor add costs to the administration of the Program. The WIC Program is required by federal regulation to be able to identify which vendor transacted any individual WIC check. The options available to accomplish this mandate are; 1) require stores to hand stamp a vendor number on each check transacted and have the WIC bank read the vendor number from WIC checks; or, 2) electronic transmittal of check numbers transacted by stores either through a stores electronic cash register system, mini-MICR (Magnetic Ink Character Recognition) readers or, 3) stores could use a secure website where they may log in and manually key in the WIC check numbers from WIC checks accepted by their store, 4) an interactive telephone system. One time equipment and software costs for the electronic data capture method are \$93,823. Due to deadlines for compliance with federal requirements, these purchases have already been made. These costs were absorbed into the funds appropriated for the 2005-2006 Commonwealth fiscal year through funds from the 2005-2006 federal fiscal year grant. There are no additional current or future costs anticipated for state government.

The alternative method of hand stamping checks and having vendor numbers transmitted to the WIC Program by the contracted bank provides for more costs and labor demands. A one time cost of \$2,800 for the rubber stamps and on-going annual costs of approximately \$300 per year for replacement stamps

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and stamps for new authorized stores as well as an annual cost of approximately \$160,000 for additional bank processing charges will be incurred with the rubber stamp option.

Unfortunately, it is impossible to accurately quantify the savings the changes will realize, but it is believed that the savings could completely offset any costs in the long run.

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

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

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

Program	FY -3	FY -2	FY -1	Current FY
WIC	\$121,155,003	\$159,167,650	\$155,757,155	\$175,000,000

compare favorably with other states and will not place Pennsylvania at a competitive disadvantage. Pennsylvania has been at the forefront of incorporating technology into the operation of the WIC Program, and continues to do so with these regulatory revisions.

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

No.

(27) Submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

N/A.

(28) 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.

N/A.

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU

(Pursuant to Commonwealth Documents Law)

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INDEPENDENT REGULATORY
REVIEW COMMISSION

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<p>Copy below is hereby approved as to form and legality. Attorney General.</p> <p>BY _____ DEPUTY ATTORNEY GENERAL</p> <p>_____ DATE OF APPROVAL</p> <p>Check if applicable. Copy not approved. Objections attached.</p>	<p>Copy below is hereby certified to be a true and correct copy of a document issued, prescribed or promulgated by:</p> <p>DEPARTMENT OF HEALTH (AGENCY)</p> <p>DOCUMENT/FISCAL NOTE NO. <u>10-180</u></p> <p>DATE OF ADOPTION: _____</p> <p>BY: <u>Everette James</u> Everette James</p> <p>TITLE: <u>Secretary of Health</u></p>	<p>Copy below is hereby approved as to form and legality. Executive or independent Agencies.</p> <p>BY: <u>Andrew C. Clark</u> <u>MAY 7 2009</u></p> <p>_____ DATE OF APPROVAL</p> <p>(Deputy General Counsel) (Chief Counsel, Independent Agency) (Strike inapplicable title)</p> <p>Check if applicable. No Attorney General approval or objection within 30 days after submission.</p>
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NOTICE OF FINAL RULEMAKING

TITLE 28. HEALTH AND SAFETY

DEPARTMENT OF HEALTH

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

CHAPTER 1101. GENERAL PROVISIONS

CHAPTER 1103. AUTHORIZATION OF STORES

CHAPTER 1105. REQUIREMENTS FOR WIC AUTHORIZED STORES

CHAPTER 1107. SANCTIONS

CHAPTER 1113. STORE APPEALS

The Department of Health (Department), Bureau of Family Health, Division of WIC (WIC Program), amends 28 Pa. Code Chapters 1101, 1103, 1105, 1107 and 1113. 28 Pa. Code Chapters 1101 – 1113 govern the authorization and management of stores participating in the Special Supplemental Nutrition for Women, Infants and Children (WIC) Program. The amended regulations are set forth in Annex A hereto.

Without some of these revisions, the United States Department of Agriculture, Food Nutrition Services (USDA-FNS) may withhold funding to the WIC Program. If federal funding is interrupted, the Department would likely need to suspend or eliminate the WIC Program, having a significant negative impact on the health and welfare of WIC eligible women, infants and children. Loss or even suspension of federal funding for the WIC Program would render it inoperable, as 100% of the WIC Program's funds are federal funds, or would place a difficult, if not impossible, financial burden on the Commonwealth, should the Commonwealth continue to operate the WIC Program with state funds. The WIC Program serves approximately 260,000 families and individuals each month, and is a high profile benefits program not only in the Commonwealth, but also around the country. An interruption in the funding of the WIC Program would affect the receipt of necessary food benefits for the participants of the WIC Program, the retail grocery business and the employment of personnel at twenty-four local WIC agencies.

Other revisions to the WIC Program state regulations include the addition of language which allow the WIC Program to more smoothly incorporate technology advancements. These advancements ensure the Pennsylvania WIC Program remains at the forefront of

quality and efficiency and continues to provide the best experience for WIC participants and WIC authorized stores.

The Department published notice of the proposed rulemaking in the *Pennsylvania Bulletin* at 38 Pa.B. 4767 (August 30, 2008), and provided a 30 day public comment period. There were no comments submitted from the public.

Under Section 5(a) of the Regulatory Review Act (71 P.S. §§ 745.1 – 745.15), the Department submitted a copy of the proposed regulations on August 15, 2008, to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Health and Human Services Committee and the Senate Public Health and Welfare Committee. In addition to submitting the proposed regulations, the Department provided IRRC and the Committees with a copy of a Regulatory Analysis Form prepared by the Department in compliance with Executive Order 1996-1, “Regulatory Review and Promulgation.” There were no comments submitted by the House Health and Human Services Committee and the Senate Public Health and Welfare Committee. IRRC submitted comments to the Department on October 29, 2008. The comments and the Department’s responses to them appear in the summary of the final rulemaking below.

A. COMMENTS AND REVISIONS

Section 1101.2. Definitions.

IRRC suggested the Department explain the phrase “federally-mandated cost containment measures.” The phrase “federally-mandated cost containment measures”

refers to the requirement that states establish peer group pricing and competitive pricing as found in 7 C.F.R. § 246.12(g)(4)(ii).

IRRC also noted the proposed definition for “peer group” referred to “criteria selected by the Department,” and the proposed definition for “store peer group system” referred to “common characteristics” or “criteria that affect food prices.” IRRC suggested the Department provide examples of such criteria for both phrases. In response to IRRC’s request, the Department supplemented the phrase “criteria selected by the Department” in the definition of “peer group” with, “including the size of a store sales floor, number of cash registers in the store, number of stores owned and county where the store is located.” The Department also supplemented the phrase “common characteristics” and “criteria that affect food prices” in the definition of “store peer group system” with “the size of a store sales floor, number of cash registers in the store, number of stores owned, and a measure of geography, such as metropolitan or other statistical areas that form distinct labor and product markets.”

Section 1103.1. Authorization and reauthorization process and requirements.

IRRC noted that proposed subsections (b)(5) and (c)(2) referred to “any information necessary” for the Department to determine whether the store qualifies as an above-50-percent-store. IRRC suggested the Department provide examples of the relevant “information” needed. In response to IRRC’s request, the Department added the following language “this information may include official State and Federal Income Tax

Filings, official State Sales Tax records, inventory purchase records, sales records and/or a self-declaration from the applicant.”

IRRC also noted that proposed subsection (d)(7) states that if the Department does not receive from the store the information requested to determine if the store qualifies as an above-50-percent-store within 20 calendar days, the Department will terminate a store’s authorization or reauthorization. IRRC inquired about the appropriateness of this timeframe. The twenty day time period was selected to remain consistent with current WIC program policy to give 20 days for payment or receipt of items (*see* the explanation of § 1107.1a(d)(13) below). If those items are not received within 20 days, a "Late Due Notice" is sent to the store giving them an additional 10 days. If the items are not received after those additional 10 days, a disqualification letter is sent to the store which gives the store an additional 30 days to submit the item(s). If the item(s) are still not received, the store is disqualified. This disqualification can be appealed by a store.

Section 1103.4. Selection criteria for authorization and reauthorization.

IRRC noted that under proposed paragraph (15), the Department will provide notice by September 15 of minimum technology requirements for the following year. IRRC asked whether, notice by September 15 would allow a store sufficient time to purchase, test and implement the new technology in all circumstances, given the potential magnitude of the technology change. Stores will have ample time to purchase, test and implement the new technology requirement because this paragraph will apply only to new stores applying for initial authorization. Stores authorized prior to the effective date of this

paragraph and maintaining an uninterrupted authorized status will be exempt from the requirements of this proposed paragraph. If a store applies for authorization, they will be required to "meet the minimum technology requirement" which is set by the Department prior to the start of that federal fiscal year.

Section 1103.8. Store peer group system.

IRRC noted proposed subsection (b) stated the Department will create peer groups "based upon at least two criteria selected by the Department...." IRRC further noted this subsection lists a measure of geography as one criterion, but it does not explain the second. IRRC suggested the Department should explain both criteria. In response, the Department has revised the subsection to explain the criteria as "the size of a store sales floor, number of cash registers in the store, number of stores owned, and a measure of geography, such as metropolitan or other statistical areas that form distinct labor and product markets."

Section 1107.1a. Disqualifications.

IRRC inquired as to how long a store must be in violation of this section before it will be subject to a one year disqualification. IRRC also asked if the store will receive notice of the violation and be given an opportunity to cure it before it is disqualified, what happens after the one year period ends and the procedure by which a store becomes reauthorized.

There are many reasons for disqualification in this section, all of which can be appealed by a store. All state WIC programs are required by federal regulation 7 C.F.R. §

246.12(j) to monitor WIC authorized stores for compliance with WIC regulations, and stores must follow WIC regulations, even when not under investigation.

Violation of § 1107.1a(d)(4) would be observed during a retail store monitoring review. All WIC programs are required to annually monitor at least five percent of their authorized retail stores through "routine monitoring" per 7 C.F.R. § 246.12(j)(2). This is done with a computerized random selection process and WIC representatives who visit the randomly selected stores. Each store is reviewed to determine whether they are maintaining the minimum inventory of WIC items priced at, or below, competitive price levels and if the WIC allowable items are fresh or stale dated. The store personnel are asked a series of questions to ensure they are following the program rules and regulations. If a store passes one monitoring review during a monitoring investigation, the investigation is closed and the store is considered to be in compliance. Following each review, a store is sent written notification of the results of each review, and provided training after failing two monitoring reviews. A store must fail three monitoring reviews during a monitoring investigation before a store will be disqualified. The information about routine reviews and store notification can be found at § 1105.6(d).

Violations as a result of § 1107.1a(d)(6) and (7) could be reported by a WIC customer and the store would be inspected by WIC program staff. One incidence would warrant a store's disqualification.

Violation of § 1107.1a(d)(8) would warrant a one year immediate disqualification of the store.

According to 7 C.F.R. § 246.12(j)(4), each state WIC program is required to monitor at least five percent of the WIC authorized stores through compliance investigations. Violation of § 1107.1a(d)(9)-(12) would be discovered during a compliance investigation, which is not closed until a store passes two consecutive compliance buys. Following each compliance buy, a store is given written notification of the results of each compliance buy, and required to receive mandatory cashier training if they fail two compliance buys. Pursuant to § 1105.6(b)(8), the Department may withhold notification of compliance buy results, and may withhold providing training or conducting further compliance investigations, when fraudulent activity by the WIC authorized store is indicated during a compliance investigation or by local agency or participant complaint. A store may be disqualified if they fail at least three compliance buys through the course of a compliance investigation. The information about compliance investigations and store notification can be found at § 1105.6(b).

Violation of § 1107.1a(d)(13) occurs when a store fails to reimburse the Department for overpayments, overcharges, or other improper charges. Stores are given 20 days to reimburse the Department following written notification. If payment is not received, the store is given an additional 10 days through written notification. If payment is still not received, a store is sent a disqualification letter that gives them an additional 30 days to send payment. If the store still does not provide payment, the store is disqualified.

If there was a violation of § 1107.1a(d)(14) that can be proven, the store would be immediately disqualified for one year.

Pursuant to 7 C.F.R. § 246.12(h)(7)(i), state WIC programs are required to provide annual training to each WIC authorized retail store. This training is to keep stores notified of any changes in federal or state regulations, and ensure stores maintain the knowledge to transact WIC checks properly. A store must attend an annual training session by the end of each federal fiscal year or the store will be disqualified for non-compliance with WIC regulations. If a store misses their annual training session, they are given an opportunity to attend alternative training sessions before being disqualified.

A store may apply for authorization following a one year period of disqualification. If any store is on the program for a period of three consecutive years, they would be required to be reauthorized. The information about what stores may do after a one year disqualification can be found at § 1107.1a(l). The information about reauthorizations can be found at § 1103.1, referring to authorizations and reauthorizations.

Section 1105.1. Training.

The Department did not receive comments on this section.

Section 1105.2. Price adjustment.

The Department did not receive comments on this section.

Section 1105.3. Terms and conditions of participation.

The Department did not receive comments on this section.

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

The Department did not receive comments on this section.

Section 1105.6. Monitoring of WIC authorized stores.

The Department did not receive comments on this section.

Section 1107.1a. Disqualifications.

The Department did not receive comments on this section.

Section 1107.2. Civil money penalties.

The Department did not receive comments on this section.

Section 1113.1. Right to administrative appeal.

The Department did not receive comments on this section.

B. FISCAL IMPACT

Fiscal Impact on the Department

The WIC Program is 100% federally funded. No state dollars are involved in the operation of the WIC Program. The regulatory change to § 1105.3, allowing a WIC check

to be used at any authorized store, causes the WIC Program to incur a one time equipment purchase fee.

Pennsylvania is one of the few states whose regulations provide for store specific WIC checks. The customary practice in states that are non-store specific is to require their banking contractor to capture the authorized store number from the face of each check as it is processed through the bank. This service would have added approximately \$.02 to the cost of each check processed. Pennsylvania processes approximately 8,000,000 WIC checks annually, which would result in an estimated direct cost increase of approximately \$160,000 annually if this method were implemented. Additional costs to the Department under this method would include the issuance and maintenance of WIC authorization stamps to approximately 1,500 authorized stores. The anticipated initial cost would be \$2,800 and ongoing replacement and new applicant stamp cost of approximately \$300 annually.

Pennsylvania chose an alternate method to this check identification system, which is less costly and less labor intensive. The alternate method is through the use of direct data transfer from each WIC authorized store to the WIC Program. This is accomplished with the use of electronic cash registers, Magnetic Ink Character Recognition (mini-MICR) readers, a secure website, and/or touchtone telephones. Each WIC authorized store is required to transfer check redemption data to the WIC Program prior to depositing their redeemed WIC checks. The data is then combined electronically with each WIC check number, before the bank will redeem the check. This process will incur an initial cost of

\$93,823 for the cost of the mini-MICR readers that will be supplied to stores that have the appropriate communications equipment. There will be no additional banking fees incurred. Since the Department was required by federal law to implement these changes no later than July 1, 2006, before regulatory revisions could be completed, some of these costs have already been absorbed by the WIC Program.

Although costs to the Department initially increased, the long-term costs are greatly reduced. Additionally, savings in efficiencies at the local agency level will mitigate these initial cost increases. WIC checks previously identified the authorized store at which they were to be redeemed. However, when the store did not have the products the participant wanted or ceased operating, participants had to go back to the clinics to have the WIC checks reissued to another store. This created additional workload at the clinics, which is eased with these changes. Unfortunately, the actual cost of this additional workload cannot be quantified for accurate comparison to expected increases in costs.

Other aspects of changes in these regulations may cause some additional costs to the Department. The initial and annual determination of whether a store is, or is expected to, derive more than 50% of its annual revenue from the sale of food items from WIC sales and the establishment and maintenance of the store peer group system will require additional staff time. However, it is anticipated this task can be absorbed by the existing staff.

In addition, the list of authorized infant formula manufacturers, wholesalers, distributors or retailers required to be provided to WIC authorized stores will include approximately 11,000 -12,000 entities. The Department has worked with USDA and determined that such a list can be provided or made available to WIC authorized stores in an electronic format, thereby mitigating the cost of production of an 11,000 – 12,000 entry list to approximately 1,400 WIC authorized stores annually.

Any cost increases as a result of these changes mandated by federal law will be covered by the federal funding provided to the WIC Program. Additional costs saving may also be realized from the cost containment measures in these regulations as required by federal law.

Fiscal Impact on the Regulated Community

The Department does not anticipate any increased costs for the regulated community as a result of these regulations.

C. PAPERWORK REQUIREMENTS

Paperwork Requirements for the Department

The Department's paperwork will increase in obtaining, preparing, and updating the list of authorized infant formula manufacturers, wholesalers, distributors and retailers. The Department's paperwork requirements will also increase in the evaluation and documentation of the review of each store's actual or anticipated WIC sales to determine if any store is deriving more than 50% of its annual revenue from the sale of food items

from WIC sales and in establishing and maintaining the store peer group system and the applicable competitive and maximum allowable prices.

Paperwork Requirements for the Regulated Community

The amendments do not increase paperwork for WIC Program participants. The WIC authorized stores are required to submit electronic data regarding the redemption of WIC checks prior to deposit. Although this task will increase the time necessary for WIC authorized stores to prepare WIC checks for deposit, it will be somewhat offset by the fact that cashiers will no longer need to verify that the WIC check being presented for payment is payable to the store.

D. STATUTORY AUTHORITY

The WIC Program was authorized through an amendment to the Federal Child Nutrition Act of 1966 (42 U.S.C.A. § 1786). Congress authorized the United States Department of Agriculture, Food and Nutrition Services (USDA-FNS) to contract with and make funds available to states to administer the WIC Program. In this Commonwealth, the WIC Program receives 100% of its funding from the USDA-FNS. Recent amendments to the federal WIC statutes and appropriations necessitate these regulatory revisions. *See* Child Nutrition and WIC Reauthorization Act, Pub. Law 108-265, § 203(e)(10), 118 Stat. 729 at 776-779 (2004)(codified at 42 U.S.C. § 1786(h)(11)); Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 2833 and 2850 § 780; *and*, Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-97, 119 Stat. 2120, 2144 and 2163 § 787.

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 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. Cmwlth. 1998). The Commonwealth 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 (relating to supplemental nutrition program for women, infants and children (WIC program)) to Title 28 of the Pennsylvania Code. The regulations also deleted 28 Pa. Code §§ 8.41 - 8.74, the Department's then existing regulations pertaining to WIC Program administrative appeals.

The final-form regulations are published 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. Section 2102(a) of the Code gives the Department the authority and duty to protect the health of the people of this Commonwealth. (71 P.S. § 532(a)).

E. EFFECTIVE DATE/SUNSHINE DATE

The regulations will become effective upon publication in the *Pennsylvania Bulletin* as final rulemaking. The regulations will be monitored continuously and will be updated as required by changes in federal laws governing the WIC Program. Therefore, no sunset date has been set.

F. REGULATORY REVIEW

Under Section 5(a) of the Regulatory Review Act (71 P.S. §§ 745.1 – 745.15), the Department submitted a copy of a Notice of Proposed Rulemaking, published at 38 Pa.B. 4767 (August 30, 2008), to the Independent Regulatory Review Commission (“IRRC”) and to the Chairpersons of the House Health and Human Services Committee and the Senate Public Health and Welfare Committee on August 15, 2008. The Department received no comments during the formal comment period. In compliance with the Regulatory Review Act, the Department also provided IRRC and the Committees with copies of all other required documentation.

In compliance with Section 5.1(a) of the Regulatory Review Act, the Department submitted a copy of the final-form regulations to IRRC and the Committees on _____ . 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 in compliance with Executive

Order 1996-1, "Regulatory Review and Promulgation." 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 regulation was deemed approved by the House Health and Human Services Committee on _____ and deemed approved by the Senate Public Health and Welfare Committee on _____. IRRC met on _____, and approved the regulation in accordance with Section 5.1(e) of the Regulatory Review Act.

G. CONTACT PERSON

Questions regarding these regulations may be submitted to Greg Landis, Director, WIC Program, 2150 Herr Street, 1st Floor, Harrisburg, PA 17103, (717) 783-1289. Persons with a disability may submit questions in alternative format such as by audio tape, Braille or by using V/TT (717) 783-6514 or the Pennsylvania AT&T Relay Service at (800-654-5984[TT]). Persons who require an alternative format of this document may contact Mr. Landis at the above address or telephone numbers so that necessary arrangements may be made.

H. FINDINGS

The Department finds that:

(1) Public notice of intention to adopt the regulations adopted by this order has been given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§1201 and 1202), and the regulations thereunder, 1 Pa. Code §§7.1 and 7.2.

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

(3) The adoption of regulations in the manner provided by this order is necessary and appropriate for the administration of the authorizing statute.

I. ORDER

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

(1) The regulations of the Department at 28 Pa. Code Chapters 1101, 1103, 1105, 1107 and 1113 are amended as set forth in Annex A.

(2) 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.

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

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

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

Annex A

TITLE 28: HEALTH AND SAFETY

* * *

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

CHAPTER 1101. GENERAL PROVISIONS

* * *

§1101.2. Definitions.

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

Above-50-Percent-Store – A store that derives more than 50 percent of its annual food sales revenue from WIC checks, and a new store applicant expected to meet this criterion under guidelines approved by USDA-FNS.

* * *

Competitive price – The price established by the Department, at or below which a store must maintain the required minimum inventory.

* * *

Food items – Items sold for human consumption that are eligible for purchase under the Food Stamp Program.

* * *

Food Sales - Sales of all Food Stamp Program eligible foods intended for home preparation and consumption, including meat, fish, and poultry; bread and cereal products; dairy products; fruits and vegetables. Food items such as condiments and spices, coffee, tea, cocoa, and carbonated and noncarbonated drinks may be included in food sales when offered for sale along with foods in the categories identified above. Food sales does not include the sale of any item that cannot be purchased with food stamp benefits, such as hot foods or food that will be eaten in the store.

Food Stamp Program - The government benefits program operated under the authority of the Food Stamp Act of 1964 (7 U.S.C. Chapter 51), as amended, and Part II, Subpart L of Title 55 of the Pennsylvania Code, and administered by the USDA-FNS and the Pennsylvania Department of Public Welfare.

Full line grocery store - A store that:

(1) Offers for sale, in addition to WIC authorized foods, food items from each of the following four food categories on a continuous basis:

(i) Meat, poultry or fish;

(ii) Bread or cereal;

(iii) Vegetables or fruits; and,

(iv) Dairy.

(2) Has available for sale at all times of operation and displays in a public area of the store, a minimum of three different varieties of food items in each of the four above listed food categories.

* * *

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 applicable to the store's peer group for [of] each allowable food authorized for purchase on the WIC check.

* * *

Peer group – The classification of an authorized store pursuant to the store peer group system, as determined by the criteria selected by the Department, INCLUDING SIZE OF A STORE SALES FLOOR, NUMBER OF CASH REGISTERS IN THE STORE, NUMBER OF STORES OWNED, AND COUNTY WHERE THE STORE IS LOCATED.

* * *

Store peer group system – A classification of authorized stores into groups based on common characteristics or criteria INCLUDING SIZE OF A STORE SALES FLOOR, NUMBER OF CASH REGISTERS IN THE STORE, NUMBER OF STORES OWNED, AND A MEASURE OF GEOGRAPHY, SUCH AS METROPOLITAN OR OTHER STATISTICAL AREAS THAT FORM DISTINCT LABOR AND PRODUCT MARKETS that affect food prices, for the purposes of applying appropriate competitive pricing criteria to stores at authorization and reauthorization and limiting payment for foods to competitive levels.

* * *

CHAPTER 1103. AUTHORIZATION OF STORES

§1103.1. Authorization and reauthorization process and requirements.

* * *

(b) *Authorization Process.*

* * *

(5) The Department may request from the store any information necessary for the Department to determine whether the store qualifies as an Above-50-Percent-Store. THIS INFORMATION MAY INCLUDE OFFICIAL STATE AND FEDERAL INCOME TAX FILINGS, OFFICIAL STATE SALES TAX RECORDS, INVENTORY PURCHASE RECORDS, SALES RECORDS AND/OR A SELF-DECLARATION FROM THE APPLICANT.

[(5)](6) The local agency shall conduct the onsite review and forward the results to the Department for a decision on the store's application.

[(6)](7) 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) *Reauthorization Process.*

* * *

(2) The Department may request from the store any information necessary for the Department to determine whether the store qualifies as an Above-50-Percent-Store. THIS INFORMATION MAY INCLUDE OFFICIAL STATE AND FEDERAL

INCOME TAX FILINGS, OFFICIAL STATE SALES TAX RECORDS, INVENTORY PURCHASE RECORDS, SALES RECORDS AND/OR A SELF-DECLARATION FROM THE APPLICANT.

[(2)](3) The local agency shall conduct the onsite review and forward the results to the Department for a decision on the store's application.

[(3)](4) 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) *Termination of authorization or reauthorization.* The Department will terminate a store's authorization or reauthorization if:

* * *

(7) The Department does not receive from the store, within 20 calendar days of the store's receipt of a written notice from the Department, the information the Department has requested necessary for it to determine whether the store qualifies as an Above-50-Percent-Store.

(8) After authorization of the store, the Department determines the store qualifies as an Above-50-Percent-Store. This paragraph does not apply to stores solely owned or operated by nonprofit entities.

* * *

§1103.4. Selection criteria for authorization and reauthorization.

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

* * *

(5) The store shall have available on the premises at all times the minimum inventory of allowable foods as established by the Department under § 1103.5 (relating to minimum inventory) at shelf prices that are equal to or less than the [maximum allowable] competitive prices applicable to the store's peer group for those foods. The Department will publish in the *Pennsylvania Bulletin* and mail to all WIC authorized stores, quarterly, the competitive prices and maximum allowable prices applicable to all peer groups for allowable foods for the next quarter.

* * *

(8) The store shall operate as a full line grocery store in a permanent fixed location where participants may purchase allowable foods with their WIC checks.

* * *

(14) The store shall not qualify or shall not be expected to qualify as an Above-50-Percent-Store. This paragraph does not apply to stores solely owned or operated by nonprofit entities.

(15) The store shall meet the minimum information technology requirements set by the Department. The Department will publish in the *Pennsylvania Bulletin* and mail to all WIC authorized stores, by September 15 of each year, the minimum technology requirements applicable for the following calendar year. This paragraph shall not apply to stores authorized prior to the effective date of this section and maintaining an uninterrupted authorized status.

* * *

§1103.8. Store peer group system.

(a) The Department will establish a store peer group system, including distinct competitive pricing criteria and allowable reimbursement levels for each peer group.

(b) The Department will create peer groups based upon at least two criteria selected by the Department; . ~~one of which will be~~ THESE CRITERIA MAY INCLUDE THE SIZE OF A STORE SALES FLOOR, NUMBER OF CASH REGISTERS IN THE STORE, NUMBER OF STORES OWNED, AND a measure of geography, such as metropolitan or other statistical areas that form distinct labor and product markets. The Department will annually publish the peer group selection criteria in the *Pennsylvania Bulletin*.

(c) The Department will place a store seeking authorization into an appropriate peer group based upon information gathered from the store's application as completed by the store and returned to the local agency in accordance with § 1103.1(b)(1). The Department will notify a store of its peer group classification prior to conducting an on site review under § 1103.1(b)(5). A WIC authorized store seeking reauthorization shall remain in the peer group previously selected for the store unless otherwise notified by the Department.

(d) A WIC authorized store shall adhere to the competitive prices and maximum allowable prices applicable to the store's peer group.

(e) A WIC authorized store shall inform the Department of any store changes applicable to the peer group selection criteria in effect.

CHAPTER 1105. REQUIREMENTS OF WIC AUTHORIZED STORES

§1105.1. 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 under [§1107. 1a(d)(16)] §1107. 1a(d)(15) (relating to disqualifications).

* * *

§1105.2. Price adjustment.

(a) *Determination of overpayment.* 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 maximum allowable prices applicable to the store's peer group for foods authorized for purchase on the check against the actual amount for which the WIC check was redeemed, to determine whether there was an overpayment.

* * *

(e) *Sanctions.* The Department will impose a sanction against a WIC authorized store under [§1107.1a(d)(12)] §1107.1a(d)(11) (relating to disqualifications) if the store fails to reimburse the Department for an overpayment within the time required under subsections (c) and (d).

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

* * *

(17) Purchase infant formula for resale to WIC participants only from Department authorized infant formula manufacturers, wholesalers, distributors or retailers. Information on where to obtain the list will be published by the Department in the *Pennsylvania Bulletin* simultaneously with the initial publishing of this sub-section.

(18) Provide the Department, within 20 calendar days of the store's receipt of a written notice from the Department requesting the additional information, any information the Department has requested necessary for the Department to determine whether the store qualifies as an Above-50-Percent-Store. This paragraph does not apply to stores solely owned or operated by nonprofit entities.

* * *

(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:

* * *

(3) Provide an allowable food to a participant or authorized representative at or below the current price the store charges other customers, and at or below the maximum allowable price applicable to the store's peer group.

* * *

(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:

* * *

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

[(3)] Accept a WIC check only if the participant 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)](3) Accept a WIC check only if a valid WIC identification card is presented at the time of the WIC transaction.

[(5)](4) Accept a WIC check only if the signature of the participant or authorized representative is obtained on the WIC check at the time of the WIC transaction and the family identification number on the WIC check matches the family identification number on the identification card.

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

[(7)](6) 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 or authorized representative.

[(8)](7) Record in ink, on each WIC check immediately after completion of the WIC transaction and prior to the participant or authorized representative signing the

WIC check, the actual purchase amount of the transaction net of any cents-off coupons or other discounts.

~~[(9)](8)~~ 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 or authorized representative initial next to the corrected amount. No other corrections are permissible.

~~[(10)](9)~~ Not alter any information on the WIC check as presented by the participant or authorized representative.

~~[(11)](10)~~ Not provide a substitute item, raincheck or cash reimbursement for an allowable food that is unavailable.

~~[(12)](11)~~ Not provide cash or credit for a WIC check.

~~[(13)](12)~~ Not provide change for a coupon tendered during the WIC transaction.

~~[(14)](13)~~ Not provide an exchange to replace an allowable food returned by a participant or authorized representative unless the exchange is to replace an identical product that was found to be damaged or otherwise unusable.

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

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

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

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

(18) Prior to depositing WIC checks, transmit records of WIC check numbers from WIC checks accepted by the store to the Department through transmission mechanisms made available by the Department.

* * *

(d) 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] may deny payment. If payment already has been made, the Department [will] may 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 will 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.

* * *

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

* * *

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

§1105.6. Monitoring of WIC authorized stores.

(a) *Purpose and types of monitoring of WIC authorized stores.*

(1) 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 compliance investigations, inventory audits, routine reviews and 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.

(2) The Department will conduct an annual analysis of a WIC authorized store's sales data in order to determine whether the store qualifies as an Above-50-Percent-Store, except that stores solely owned or operated by nonprofit entities shall not be subject to this annual analysis.

* * *

(h) *Annual Determination of WIC Sales Percentage.* The Department may request from a store any information necessary for the Department to determine whether the store qualifies as an Above-50-Percent-Store. This information may include a request for state or federal income tax returns, state sales tax records, PA Dept of Revenue Form PA-3 filings, and sales records. This paragraph does not apply to stores solely owned or operated by nonprofit entities.

CHAPTER 1107. SANCTIONS

* * *

§1107.1a. Disqualifications.

* * *

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

* * *

(4) Failing to maintain on the premises at all times minimum inventory requirements of an allowable food at or below the current [maximum allowable] competitive price applicable to the store's peer group for that food.

* * *

[(6)] Two or more incidences of accepting a WIC check made payable to another store without prior written approval from the Department.]

[(7)](6) Failing to maintain a clean and sanitary store.

[(8)](7) Failing to properly store or refrigerate an allowable food.

[(9)](8) Closure of the store by a city, local or county health department.

[(10)](9) Charging or demanding that a participant or authorized representative pay for an allowable food with money or with another WIC check for purchases made with a WIC check.

[(11)](10) Two or more incidences of securing the signature of the participant or authorized representative prior to completing the "Pay Exactly" box on the WIC check.

[(12)](11) Two or more incidences of charging the WIC Program sales tax.

[(13)](12) Giving monetary change to the person who tenders a WIC check.

~~[(14)](13)~~ Failing to reimburse the Department for overpayments, overcharges or other improper charges within the specified time frame.

~~[(15)](14)~~ Physically altering or changing on the face of a WIC check the store name, food type or quantity, participant information, date, or printed dollar amount.

~~[(16)](15)~~ Failing to have at least one representative of the store attend required training.

~~[(17)](16)~~ Providing false information on the application for authorization or reauthorization.

* * *

§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 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 under § 1107.1a(b)—(d) (relating to disqualifications) or for any permanent disqualifications under § 1107.1a(a).

(b) *Calculation of civil money penalty.*

* * *

(2) For a civil money penalty in lieu of disqualification under [§1107.1a(d)(3)-(16)] §1107.1a(d)(3)-(15), 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 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.

* * *

CHAPTER 1113. STORE APPEALS.

§1113.1. Right to administrative appeal.

* * *

(b) A store may not appeal the following:

* * *

(4) The validity or appropriateness of the Department's store peer group system criteria and the criteria used by the Department to identify stores that qualify as an Above-50-Percent-Store or that are comparable to an Above-50-Percent-Stores.

[(4)](5)Disqualification from the WIC Program as a result of disqualification from the Food Stamp Program.

[(5)](6)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) A denial of authorization under [§1103.1(b)(6)] §1103.1(b)(7) 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.

* * *

Commonwealth of Pennsylvania



DEPARTMENT OF HEALTH

HARRISBURG

THE SECRETARY

June 3, 2009

Mr. Kim Kaufman
Executive Director
Independent Regulatory Review Commission
14th Floor, 333 Market Street
Harrisburg, Pennsylvania 17101

Re: Department of Health – Final Regulations No. 10-180
Supplemental Nutrition Program for Women, Infants and Children
(WIC Program)

Dear Mr. Kaufman:

Enclosed is a copy of final-form regulations for review by the Commission pursuant to the Regulatory Review Act (Act) (71 P.S. §§745.1-745.15). Section 5.1(a) of the Act provides that, upon completion of the agency's review of comments following proposed rulemaking, the agency is to submit to the Commission and the Standing Committees, a copy of the agency's response to the comments received, the names and addresses of commentators who have requested additional information relating to the final-form regulations, and the text of the final-form regulations which the agency intends to adopt.

The Department has not received any public comments or requests for additional information regarding Regulations No. 10-180.

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

The Department will provide the Commission with any assistance it requires to facilitate a thorough review of the regulations. If you have any questions, please contact Neil Malady, Director, Office of Legislative Affairs.

Sincerely,

A handwritten signature in black ink that reads "Everette James".
Everette James

Enclosures

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

I.D. NUMBER: 10-180
 SUBJECT: Supplemental Nutrition Program for Women, Infants and Children (WIC Program)
 AGENCY: Department of Health

TYPE OF REGULATION

- Proposed Regulation
- 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

RECEIVED
 2009 JUN -4 AM 11:30
 INDEPENDENT REGULATORY
 REVIEW COMMISSION

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
6/4/09	<u>[Signature]</u>	HOUSE COMMITTEE ON HEALTH & HUMAN SERVICES
6/4/09	<u>[Signature]</u>	MAJORITY CHAIRMAN <u>Frank L. Oliver</u>
6/4/09	<u>[Signature]</u>	SENATE COMMITTEE ON PUBLIC HEALTH & WELFARE
6/4/09	<u>[Signature]</u>	MAJORITY CHAIRMAN <u>Edwin B. Erickson</u>
6/4/09	<u>[Signature]</u>	INDEPENDENT REGULATORY REVIEW COMMISSION
_____	_____	ATTORNEY GENERAL (for Final Omitted only)
_____	_____	LEGISLATIVE REFERENCE BUREAU (for Proposed only)