

RECEIVED

Regulatory Analysis Form		This space for use by IRRC 2008 AUG 15 AM 11:40 INDEPENDENT REGULATORY REVIEW COMMISSION	
(1) Agency Department of Health		IRRC Number: 2718	
(2) I.D. Number (Governor's Office Use) 10-180			
(3) Short Title Supplemental Nutrition Program for Women, Infants and Children (WIC Program)			
(4) Pa. Code Cite 28 Pa. Code Part VIII Chapters 1101-1113		(5) Agency Contacts & Telephone Numbers Primary Contact: Greg Landis (717) 783-1289 Secondary Contact: Chris Harr (717) 783-1289	
(6) Type of Rulemaking (Check One)		(7) Is a 120-Day Emergency Certification Attached?	
<input checked="" type="checkbox"/>	Proposed Rulemaking	<input checked="" type="checkbox"/>	No
<input type="checkbox"/>	Final Order Adopting Regulation	<input type="checkbox"/>	Yes: By the Attorney General
<input type="checkbox"/>	Final Order, Proposed Rulemaking Omitted	<input type="checkbox"/>	Yes: By the Governor
(8) Briefly explain the regulation in clear and non-technical language. The regulations which the Department proposes to revise 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 proposed 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 proposed revisions also provide for WIC Program cost containment measures required by changes to federal law governing WIC. The Department proposes to classify stores in "peer groups" and provide competitive price criteria for authorization of stores in the WIC Program. The proposed regulations would also require stores seeking new authorization to maintain certain minimum information technology requirements.			

Regulatory Analysis Form

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

The WIC Program was authorized by an amendment to the 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.

(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.

The proposed 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 proposes to 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.

Regulatory Analysis Form

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.

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

As stated in more detail in Section 10 above, the proposed revisions seek to eliminate the proliferation of WIC-Only stores and contain WIC food costs through the creation of peer groups as required by federal law. The proposed 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 proposed 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 would foster increased competition in the marketplace, which can result in lower food costs to the WIC Program. Finally, the proposed 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 proposed revisions would require that stores seeking initial authorization maintain certain minimum information technology requirements. These proposed requirements would increase the efficiency of the WIC program and lead to improved services for WIC participants and other shoppers at WIC authorized stores. The proposed revisions would also reduce WIC administrative costs, thereby reducing overall program costs.

Regulatory Analysis Form

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

Without the proposed revisions to the regulations, the costs of operating the WIC Program could continue to rise, reducing the number of families who can obtain supplemental, nutritious foods and reducing the amount of food those individuals can obtain.

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

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) 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.)

Under the proposed regulations, all of the Commonwealth's approximately 1,500 WIC authorized stores would be 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 would be in lieu of manually hand stamping the WIC vendor number on each WIC check transacted. This method will also greatly reduce the number of errors and costly bank rejections of WIC checks.

Stores seeking initial authorization would also be required to maintain certain minimum information technology requirements. Currently, no such requirements exist 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.

(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.)

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 proposed regulations.

Regulatory Analysis Form

(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.

The Department worked closely with the Pennsylvania Food Merchants Association, the WIC Vendor Advisory Workgroup and the Pennsylvania Association of WIC Director's Vendor Committee in devising the strategy to implement the proposed regulatory changes.

(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 that may be required.

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 proposed regulation revisions concerning cost containment or infant formula purchasing. Although there may be a cost associated with complying with the proposed 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 that may be required.

Not applicable.

Regulatory Analysis Form

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

The requirement that WIC participants be able to shop at any authorized vendor would 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 would provide 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 and stamps for new authorized stores as well as an annual cost of approximately \$160,000 for additional bank processing charges would 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	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

Regulatory Analysis Form

TOTAL SAVINGS	0	0	0	0	0	0
COSTS						
Regulated Community	0	0	0	0	0	0
Local Government	0	0	0	0	0	0
State Government (from funding provided by federal grants)	0	0	0	0	0	0
TOTAL COSTS	0	0	0	0	0	0
REVENUE LOSSES:						
Regulated Community	0	0	0	0	0	0
Local Government	0	0	0	0	0	0
State Government	0	0	0	0	0	0
Total Revenue Losses	0	0	0	0	0	0

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

The cost estimates in Section 19 above were calculated based on the one time cost for the purchase of equipment necessary to implement an electronic transmittal system. These costs consist of purchases of mini-MICR readers and associated software.

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

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

Regulatory Analysis Form

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

The option chosen is the least costly and least labor intensive method to accomplish the data gathering necessitated by the change in federal law. Although there was an initial cost associated with purchasing of the equipment necessary to implement these federal mandates, the regulatory revisions seek to control the overall costs of the program by allowing for more competition in the marketplace and lower food costs to the WIC Program.

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

Because federal regulations mandate certain changes to state WIC programs as a condition of continued funding, no non-regulatory alternatives were available which could be considered.

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

As an alternative to the electronic methods which are being implemented, manual stamping of WIC store information on WIC checks by the authorized stores transacting the checks, and the use of the WIC Program's banking contractor to capture authorized store numbers from the checks was considered. Due to higher long term costs of the alternative method, and the large demand of personnel time required to operate under such a system, the electronic method was preferred. For more detail, please see Section 19 above.

(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.

None.

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

These proposed regulations are required in order for continued compliance with federal law. The proposed regulations 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 proposed regulatory revisions.

Regulatory Analysis Form

(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.

The WIC Program held meetings with the Pennsylvania Food Merchants' Association, WIC Vendor Advisory Workgroup and the Pennsylvania Association of WIC Director's Vendor Committee in preparation for drafting these proposed regulations. Various drafts of the proposed regulations were shared with these groups and comments and suggestions were requested.

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

These proposed regulations will require WIC stores to report to the Department the WIC check numbers of WIC checks they accept prior to depositing those checks. This reporting would be conducted electronically via computer or telephone, depending on the store's capabilities.

(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.

Not applicable.

(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?

These regulations would be effective upon publication as final rulemaking in the Pennsylvania Bulletin.

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

These proposed 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 proposed regulations will be investigated and the WIC Program will determine if changes are required.

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU

(Pursuant to Commonwealth Documents Law)

2718

RECEIVED

2008 AUG 15 AM 11:40

INDEPENDENT REGULATORY
REVIEW COMMISSION

DO NOT WRITE IN THIS SPACE

<p>Copy below is hereby approved as to form and legality. Attorney General.</p> <p><i>Angela M. Elliott</i> BY _____ DEPUTY ATTORNEY GENERAL</p> <p>JUL 24 2008 DATE OF APPROVAL</p> <p><input type="checkbox"/> Check if applicable. Copy not approved. Objections attached.</p>	<p>Copy below is hereby certified to be a true and correct copy of a document issued, prescribed or promulgated by:</p> <p>DEPARTMENT OF HEALTH (AGENCY)</p> <p>DOCUMENT/FISCAL NOTE NO. <u>10-180</u> DATE OF ADOPTION: _____</p> <p><i>Calvin B. Johnson</i> BY: <u>Calvin B. Johnson, M.D., M.P.H.</u></p> <p>TITLE: <u>SECRETARY OF HEALTH</u></p>	<p>Copy below is hereby approved as to form and legality. Executive or independent Agencies.</p> <p><i>Andrew C. Clark</i> BY _____ Andrew C. Clark</p> <p>JUN 24 2008 DATE OF APPROVAL</p> <p>(Deputy General Counsel) (Chief Counsel, Independent Agency) (Strike inapplicable title)</p> <p><input type="checkbox"/> Check if applicable. No Attorney General approval or objection within 30 days after submission.</p>
--	--	---

DEPARTMENT OF HEALTH

NOTICE OF PROPOSED RULEMAKING

TITLE 28. HEALTH AND SAFETY

[28 Pa. Code. Part VIII, Chapters 1101-1113]

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

Notice is hereby given that the Department of Health (Department), Bureau of Family Health, Division of WIC (WIC Program), proposes to amend 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.

Without some of these proposed 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 245,000 families and individuals, 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 proposed revisions to the WIC Program state regulations include the addition of language which will allow the WIC Program to more smoothly incorporate technology advancements. These advancements will ensure that 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.

A. *Summary of Amendments*

Section 1101.2. Definitions.

The Department proposes to revise this section to add definitions for the terms “above-50-percent-store,” “competitive price,” “food items,” “food sales,” “Food Stamp Program,” “full line grocery store,” “peer group,” and “store peer group system.” These proposed terms, and their definitions, are required for the implementation of the other revisions to the regulations providing for the identification of WIC-Only stores, the term more commonly used when referring to above-50-percent stores, and for additional federally mandated cost containment requirements.

The Department proposes to define an “above-50-percent-store” as a store that derives more than 50 percent of its annual food sales revenue from WIC checks and any new store that is expected to derive more than 50 percent of its annual food sales revenue from WIC checks. Guidelines for determining if more than 50 percent of the stores food sales revenue is from WIC checks are set by the USDA in accordance with federal laws.

The Department proposes to define “competitive price” as the price established by the Department, at or below which a store must maintain the required minimum inventory. As explained below, this term will replace “maximum allowable price” in some other existing

provisions of the regulations, although “maximum allowable price” will remain an operative term in the regulations.

The Department proposes to define “food items” as items sold for human consumption that are eligible items under the Food Stamp Program. The Department also proposed to define “food sales” as sales of all Food Stamp Program eligible foods.

The Department proposes to define “Food Stamp Program” as 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. This program is administered by the USDA-FNS and the Pennsylvania Department of Public Welfare.

The Department proposes to define “full line grocery store” as a store that, in addition to WIC authorized foods, offers for sale, food items in each of the four following food categories: 1) meat, poultry or fish; 2) bread or cereal; 3) vegetables or fruits; and, 4) dairy. A minimum of three different varieties of food items in each of the four categories must be available for sale at all times of operation and displayed in a public area of the store.

As stated above, above-50-percent-stores are typically referred to as WIC-Only stores. WIC-Only 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 result in a reduction in the number of WIC checks

provided to WIC Program participants and ultimately a reduction in the number of participants the WIC program can serve.

The Department proposes to define “peer group” as the classification of an authorized store pursuant to the store peer group system, as determined by the criteria selected by the Department. The term “store peer group system” is proposed to be defined as a classification of authorized stores into groups based on common characteristics or criteria 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. Both of these proposed terms and definitions will allow the Department to implement federally mandated cost containment measures.

The Department also proposes to revise the definition of “overpayment” to clarify that the maximum allowable price applicable to the store’s peer group will be used for determining whether the WIC Program made payment to a store for an amount higher than what the store would be entitled to under program regulations.

Section 1103.1. Authorization and reauthorization process and requirements.

The Department proposes to renumber §§ 1103.1(b)(5) and (b)(6) as §§ 1103.1(b)(6) and (b)(7) respectively, and insert a new § 1103.1(b)(5). The Department also proposes to revise this section to renumber subsections (c)(2) and (c)(3) as (c)(3) and (c)(4), respectively, in order to insert a new subsection (c)(2).

The proposed subsections (b)(5) and (c)(2) provide that the Department may request from a store seeking authorization or reauthorization any information the Department deems necessary to determine whether the store will derive or is deriving more than 50% of its annual food items sales revenue from the sale of food items for WIC checks. This information may include, but is not limited to, 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. Amendments to the federal regulations governing the WIC Program and appropriating the funding to the WIC Program necessitate these, and other similar revisions to the Pennsylvania WIC regulations. *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 (2005 Appropriations Act); *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 (2006 Appropriations Act). The Department published a notice of its intent to implement some of these federal mandates in the Pennsylvania Bulletin. *See*, 35 Pa.B. 77 (January 1, 2005).

The Department also proposes to revise § 1103.1 to add a new subsection (d)(7). This proposed subsection will allow the Department to terminate authorization of a store if the store fails to provide the Department with the information necessary for the Department to determine whether the store will derive or is deriving more than 50% of its annual food items sales revenue from the sale of food items for WIC checks. The proposed subsection requires that the Department provide written notice to the store of the information requested and that the Department allow the store 20 calendar days to provide the information.

The proposed revisions to this section also include the addition of a new subsection (d)(8) which provides for the termination of authorization of a store as a WIC vendor in the event the Department, subsequent to authorizing the store, determines the store is deriving more than 50% of its annual food items sales revenue from the sale of food items for WIC checks.

The proposed sections (d)(7) and (d)(8) assist the Department is ensuring all above-50-percent-stores are properly identified in order to implement the federally mandated cost containment measures. In conformity with federal law, the proposed subsections (b)(5), (c)(2), (d)(7) and (d)(8) do not apply to stores that are solely owned and operated by nonprofit entities.

Section 1103.4. Selection criteria for authorization and reauthorization.

The Department proposes to amend paragraph (5) to require that the minimum inventory be maintained at or below the competitive price applicable to the store's peer group. The regulations currently require the minimum inventory be maintained at or below the maximum allowable price. The Department will continue to reimburse stores up to the price paid by other customers or the maximum allowable price for the food items, whichever is less.

The Department proposes to revise paragraph (8) in § 1103.4 to add language requiring the store operate as a "full line grocery store" as defined in other revisions to these regulations.

The Department also proposes to add a new paragraph (14) which provides that one of the selection criteria for authorization is that the store does not, nor is expected to, derive more than

50% of its annual food items sales revenue from the sale of food items for WIC checks. In conformity with federal law, this provision does not apply to stores that are solely owned and operated by nonprofit entities.

The Department also proposes to add a new paragraph (15) which would require stores to maintain certain minimum information technology requirements set by the Department and published annually in the *Pennsylvania Bulletin*. These information technology requirements, including computer, internet and telephone requirements, will allow the Department to more smoothly implement improvements in the WIC benefit and food delivery system such as automated notification of WIC transactions, updates to competitive prices and maximum allowable prices, and provide other information to stores more quickly and efficiently. Stores authorized prior to the effective date of this section and maintaining an uninterrupted authorized status will be exempt from the requirements of this proposed paragraph.

These proposed revisions further the Department's efforts to implement the changes in federal law and in controlling WIC food costs. *See* 42 U.S.C. §1786(h)(11).

Section 1103.8. Store peer group system.

The Department proposes to add this new section to establish the store peer group system, also defined in these proposed regulatory revisions. Proposed subsection (a) would provide that the Department will establish the peer group system and distinct pricing criteria and reimbursement levels for each peer group. Proposed subsection (b) would provide that a minimum of two criteria would be selected by the Department for creating peer groups, one of which would be

geography. The Department would publish the peer group selection criteria in the *Pennsylvania Bulletin* on an annual basis. Because the federal WIC regulations require states to maintain flexibility in the peer group criteria selection process, the Department cannot more definitively establish those criteria in these regulations.

Proposed subsection (c) would provide a means for the Department to determine which peer group a store will be classified in and how the store will receive notification of this classification. Proposed subsection (d) would require a store to adhere to competitive prices and maximum allowable prices established for the peer group in which it has been classified. Proposed subsection (e) would require stores to notify the Department of any changes which would affect its peer group classification.

Section 1105.1. Training.

The Department proposes to revise § 1105.1(b)(5) to make reference to the proper provision in these regulations, as proposed revisions in other portions of these regulations will be renumbered.

Section 1105.2. Price adjustment.

The Department proposes to revise subsection (a) to provide that the application of maximum allowable prices will be based on the store's peer group.

The Department proposes to revise subsection (e) to make reference to the proper provision in these regulations, as revisions in other portions of these regulations will be renumbered.

Section 1105.3. Terms and conditions of participation.

The Department proposes to revise this section by adding two new subsections, (a)(17) and (a)(18).

Proposed subsection (a)(17) provides that WIC authorized vendors shall only purchase infant formula that is to be sold to WIC participants from Department-authorized infant formula manufacturers, wholesalers, distributors or retailers. The Department will maintain a list of authorized infant formula manufacturers, wholesalers, distributors and retailers, and make the list readily available to the stores. Information on where to obtain the list will be published simultaneously with the publishing of these regulatory revisions. This proposed subsection is required in order to conform to recent amendments in the federal WIC statutes. *See* 42 U.S.C. §§1786(h)(8)(A)(ix) and (x).

Proposed subsection (a)(18) provides that as a term and condition of being an authorized WIC vendor, a store must provide the Department with all the information the Department requests in order for the Department to determine whether more than 50% of the store's annual food items sales revenue is derived from the sale of food items for WIC checks. This proposed provision will not apply to stores that are solely owned and operated by nonprofit entities.

The Department also proposes to revise subsection (b)(3) to provide that the application of maximum allowable prices will be based on the store's peer group.

The Department proposes to delete subsection (c)(2). This subsection provides that, with regards to WIC check processing and redemption, a WIC-authorized store can only accept a WIC check if the check is made payable to that specific store. As a result of the amendments to the federal statutes that require states allow participants to redeem WIC checks at any authorized vendor in the state, this language must be deleted. *See* 42 U.S.C. §§1786(f)(1)(C)(i). The amendment allows WIC participants greater flexibility in the redemption of their WIC checks. In order to comply with federal law, the Department has been allowing WIC participants to redeem WIC checks at any authorized store since July 1, 2006.

The Department proposes to renumber subsections (c)(3) through (c)(18) as subsections (c)(2) through (c)(17), respectively.

The Department proposes to add subsection (c)(18), which requires a store to transmit to the Department, records of WIC check numbers accepted by the store prior to depositing the WIC checks, through communication channels made available by the Department. This requirement will assist the Department in tracking WIC checks following state implementation of the amendments to federal regulations that require states to allow participants to redeem WIC checks at any authorized vendor in the state, and will work in conjunction with proposed § 1103.4(15). *See* 42 U.S.C. §§1786(f)(1)(C)(i).

Stores transmit the WIC check numbers for checks accepted at the store in one of four ways via an electronic reporting system. First, some stores automatically transmit this data through their registers and computer systems with the addition of software provided by the Department.

Second, other stores are able to install software on their computers and transmit the information with the assistance of Magnetic Ink Character Recognition (mini-MICR) readers provided by the Department. Third, stores may use a secure website where they may log in and manually key in the WIC check numbers from WIC checks accepted by their store. Finally, those stores without computers or internet connections can call a toll-free number and input the WIC check information into a touch-tone system. The toll-free touch tone phone system is available to all stores in the event the preferred methods of electronic transmission experience any technical interruptions. As WIC participants have been permitted to redeem WIC checks at any authorized store since July 1, 2006, the Department has already implemented communication channels for the transmission of this information and stores have been complying with these proposed requirements.

The Department also proposes to revise subsection (d) to allow the Department some flexibility in determining when it will deny payment for checks which were inappropriately submitted for redemption. Because of changes in the redemption process, the department expects stores may have some initial errors in the redemption process. This proposed change will allow the Department to reimburse stores for the foods provided to participants and not punish them for mistakes which may occur as they adjust to new redemption procedures.

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

The Department proposes to delete § 1105.5(e) which provides for the temporary authorization of stores to accept WIC checks redeemable at other stores. As a result of other revisions, which

allow for redemption of WIC checks at any WIC-authorized store, this subsection has become inoperative and unnecessary. *See* 42 U.S.C. §§1786(f)(1)(C)(i).

Section 1105.6. Monitoring of WIC authorized stores.

The Department proposes to revise subsection (a) to add language providing for an annual analysis by the Department of each WIC authorized store to determine if the store is deriving more than 50% of its annual food items sales revenue from the sale of food items for WIC checks. This proposed revision furthers the Department's efforts to implement the changes to federal law, including restrictions pertaining to WIC-Only stores, into the state WIC Program. *See*, 42 U.S.C. § 1786(h)(11); 118 Stat. 2809, 2850, § 780; and, 119 Stat. 2120, 2163, § 787. In conformity with federal law, the proposed language does not apply to stores that are solely owned and operated by nonprofit entities.

The Department also proposes to add a new subsection (h). This proposed subsection provides for the annual determination by the Department of food items sales revenue percentages for WIC authorized stores, and includes language stating the Department may request from the store any information the Department requires to determine if more than 50% of the store's annual food items sales revenue is derived from WIC sales. This proposed subsection does not apply to stores solely owned and operated by nonprofit entities. As with other revisions to these regulations, this revision seeks to implement changes in federal WIC laws including restrictions pertaining to WIC-Only stores. *See* 2005 Appropriations Act, 118 Stat. 2809, 2850, § 780; 2006 Appropriations Act, 119 Stat. 2120, 2163, § 787; and 42 U.S.C. §1786(h)(11).

Section 1107.1a. Disqualifications.

The Department proposes to amend subsection (d)(4) to provide that a one year disqualification will occur if a WIC authorized store fails to make the minimum inventory of foods available at or below the current competitive price applicable to the store's peer group. The regulations currently require the minimum inventory be provided at or below the maximum allowable price.

The Department proposes to revise this section to delete subsection (d)(6). Subsection (d)(6) provides for a one-year disqualification for a WIC authorized store in the event the Department found two or more incidences of a WIC authorized store accepting, without prior Department authorization, a WIC check made payable to another store. As a result of other proposed revisions to these regulations, this is no longer a violation of the Department's WIC regulations. *See* 42 U.S.C. §§1786(f)(1)(C)(i).

Because of this proposed deletion, the Department proposes to renumbers existing subsections (d)(7) through (d)(17) as subsections (d)(6) through (d)(16), respectively.

Section 1107.2. Civil money penalties.

The Department proposes to revise subsection (a) to make clear that the Department will not offer a civil monetary penalty in lieu of a denial of reauthorization or disqualification for stores found to be subject to a disqualification under § 1107.1a(a). Section 1107.1a(a) provides for the permanent disqualification of a store convicted of trafficking in WIC checks or selling firearms, ammunition, explosives or controlled substances for WIC checks.

The Department also proposes to revise subsection (b)(2) to make reference to the proper provision in these regulations, as proposed in other portions of these regulations will renumber some of the subsections.

Section 1113.1. Right to administrative appeal.

The Department proposes to revise this section to add subsection (b)(4). This proposed subsection provides that the validity and appropriateness of the Department's store's peer group system and the criteria used by the Department to identify above-50-percent-stores may not be challenged by the appeal process set forth in these regulations. This language is required to conform to the recent amendments in federal WIC regulations. *See* 7 CFR § 246.18(a)(1)(iii)(B). Because of this proposed addition, the Department proposes to renumber existing subsections (b)(4) and (b)(5) as (b)(5) and (b)(6) respectively.

The Department also proposes to revise subsection (c) to make reference to the proper provision in these regulations, as proposed revisions in other portions of these regulations will renumber some of the subsections.

B. *Fiscal Impact.*

Fiscal Impact on the Department.

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

used at any authorized store, will cause the PA 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 PA 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 PA 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 PA 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 proposed 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 proposed 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 proposed 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 proposed 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. *Effective Date/Sunset Date.*

The proposed 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.

E. *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 proposed 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))

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 this proposed regulation 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 has provided IRRC and the Committees with a copy of a Regulatory Analysis Form prepared by the Department in compliance with Executive Order 1996-1, “Regulatory Review and Promulgation.” A copy of this material is available to the public upon request.

If IRRC has any objections to any portion of the proposed regulations, it will notify the Department by October 29, 2008. The notifications shall specify the regulatory review criteria which have not been met by that portion. The Act specifies detailed procedures for review, prior to final publication of the regulation by the Department, the General Assembly and the Governor, of objections raised.

G. *Contact Person.*

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed regulation to Greg Landis, Director, WIC Program, 2150 Herr Street, 1st Floor, Harrisburg, PA 17103, (717) 783-1289, within 30 days after publication of this notice in the *Pennsylvania Bulletin*. Persons with a disability who wish to submit comments, suggestions, or objections regarding the proposed regulation may do so by using the above number or address, or

for speech and/or hearing impaired persons 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.

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.

* * *

Store peer group system – A classification of authorized stores into groups based on common characteristics or criteria 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.

[(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.

[(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 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 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

August 15, 2008

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

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

Dear Mr. Kaufman:

Enclosed are proposed regulations for review by the Commission in accordance with the Regulatory Review Act (71 P.S. §§ 745.1-745.15). The regulations which the Department proposes to revise 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 proposed 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 proposed revisions also provide for WIC Program cost containment measures required by changes to federal law governing WIC. The Department proposes to classify stores in “peer groups” and provide competitive price criteria for authorization of stores in the WIC Program. The proposed regulations would also require stores seeking new authorization to maintain certain minimum information technology requirements.

Section 5(g) of the Regulatory Review Act, 71 P.S. § 745.5(g), provides that the Commission may, within 30 days after the close of the public comment period, convey to the proposing agency and the Standing Committees any comments, recommendations and objections to the proposed regulations. The Department expects the regulations to be published on August 30, 2008. A 30-day comment period is provided.

Mr. Kim Kaufman

Page 2

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, the agency shall submit to the Commission a copy of the agency's response to the 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.

The Department will provide the Commission within 5 business days of receipt, a copy of any comment received pertaining to the proposed regulations. The Department will also provide the Commission with any assistance it requires to facilitate a thorough review of the proposed regulations. If you have any questions, please contact Brent Ennis, Director of the Office of Legislative Affairs, at (717) 783-3985.

Sincerely,



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

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

- X 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
 2008 AUG 15 AM 11:40
 INDEPENDENT REGULATORY
 REVIEW COMMISSION

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
	_____ 8/15/08	HOUSE COMMITTEE ON HEALTH & HUMAN SERVICES
	Melanie Bevan 8/15/08	MAJORITY CHAIRMAN <u>The Honorable Frank L. Oliver</u>
	_____ 8/15/08	SENATE COMMITTEE ON PUBLIC HEALTH & WELFARE
	_____ 8/15/08	MAJORITY CHAIRMAN <u>The Honorable Edwin B. Erickson</u>
	8/15/08 Kathy Cooper	INDEPENDENT REGULATORY REVIEW COMMISSION
	_____	ATTORNEY GENERAL (for Final Omitted only)
	8/15/08 Mayra Garcia	LEGISLATIVE REFERENCE BUREAU (for Proposed only)