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WIC REGULATORY BULLETIN 2013-01

NOTICE OF FINAL ACTION

- Subject** Final Action on the Notice of Proposed Changes posted as Regulatory Alert 2013-01 on June 14, 2013 posted at:
<http://www.cdph.ca.gov/programs/wicworks/Pages/WICRegulations.aspx>
- Date of Adoption** The Final Action will be effective October 17, 2013.
- Stakeholder Comments and Responses** Please see Attachment 1 of this Regulatory Bulletin for the Stakeholder Comments and Responses. This attachment includes a table of contents, an outline of how to use the document, written comments received by the Department, the Department’s responses to the stakeholder comments, and revisions to the Vendor Authorization Criteria.
- Regulations** Article 4.
70000 Vendor Authorization Criteria. (a) When authorizing a vendor the Department shall assign a peer group to new vendor applicants for purposes of authorization. For determining ongoing compliance with authorization criteria the Department shall apply the criteria based on the vendor’s currently assigned peer group. For purposes of this article, the Department is defined as, the California Department of Public Health and the California WIC Program. “WIC” is defined as the California Special Supplemental Nutrition Program for Women, Infants, and Children.
(b) In order to be authorized for participation in the program all vendors must enter into a vendor agreement with the Department.
(c) The Department shall apply the vendor authorization criteria in this article to all vendors throughout the authorization period and to vendor applicants. Vendor applicants will be denied authorization for failure to meet the vendor authorization criteria. If a vendor fails to meet the authorization criteria at any time during the authorization period, the Department shall terminate the vendor’s participation in WIC.



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70100 Business Integrity. (a) The Department shall consider the business integrity of vendors and vendor applicants for participation in the WIC program.

(b) Unless denial of authorization of a vendor or vendor applicant would result in inadequate participant access as defined in Title 22, California Code of Regulations, Section 40740(h), the Department shall not authorize or continue authorization of a vendor if during the last six (6) years the vendor or vendor applicant's current owners, officers, directors, or managers have been convicted of or had a civil judgment entered against them for any activity indicating a lack of business integrity.

(c) Activities indicating a lack of business integrity are those activities set forth in Title 7, Code of Federal Regulations, Section 246.12(g)(3)(ii).

70200 California Retail Food Facility Code (Health and Safety Code Section 113700 et. seq.). All vendors and vendor applicants must maintain a valid permit on the premises to operate a retail food facility, as required by the California Retail Food Facility Code (Health and Safety Code Section 114381) and, upon request, provide proof of the permit to the Department for the authorization period. All authorized vendors must notify the Department of the suspension or revocation of their permit within ten (10) business days. Failure to notify the Department of the suspension or revocation of a vendor's permit within ten (10) business days will result in the termination of the vendor's agreement. Closure of a vendor store based on permit suspension or revocation will result in the termination of a vendor's agreement.

70300 Cash Register. (a) Each vendor and vendor applicant must maintain and use a cash register system in conducting all business sales transactions.

(b) The cash register system must calculate, record, and print a daily totals summary of all sales transactions conducted during each business day showing the transfer of goods for money or monetary equivalents.

(c) The cash register system must automatically print an itemized receipt of each transaction. The receipt must be given to the customer at each transaction.

(d) The daily totals summary of all sales transactions from the cash register system must have the vendor's name and address, the transaction date, the quantity purchased, the sale price of the item purchased, the amount of tax charged, and the indication of tax status. Cash register receipt detail and daily totals summaries are part of the standard business records vendors are required to maintain for a minimum of three (3) years and are subject to both verification and Program audit. The daily totals summary of all sales transactions can be retained in paper or electronic formats.

70400 Certify that Information Provided on the Vendor Application is True and Correct. All vendors and vendor applicants must certify that the information provided

during the application and authorization process is true and correct. If the Department determines that the vendor or applicant provided false information in connection with its application for authorization and the false information was material to the Department's decision to authorize the vendor, the vendor's agreement shall be terminated, or the vendor applicant denied authorization. Information is material if it could change the Department's decision regarding authorization.

70500 Circumvention of WIC Sanction. (a) The Department shall deny authorization or reauthorization if it determines that a vendor is attempting to circumvent a WIC sanction or vendor claim.

(b) The Department will deny authorization to a vendor applicant for any of the following actions indicating an attempt to circumvent a WIC sanction or vendor claim:

(1) The vendor applicant purchased or obtained any legal interest in the store from a relative by blood or marriage and the store or business has a WIC sanction currently in effect, or a vendor claim which is still outstanding at that store location.

(2) The vendor applicant purchased or obtained any legal interest in the store or business for less than fair market value and there is a WIC sanction currently in effect, or a vendor claim is still outstanding at that location.

(3) The vendor applicant owns, previously owned, or has a legal interest in a store or business that has a WIC sanction currently in effect, if the vendor applicant was the owner at the time the sanction was noticed or made effective by the Department.

(4) The vendor applicant owns, previously owned, or has a legal interest in a store or business, including the applicant location that has an outstanding vendor claim, if the vendor applicant was the owner at the time the vendor claim was noticed or made effective by the Department. Failure to make payments as agreed via stipulation will be considered an outstanding vendor claim.

(5) The vendor applicant purchased or obtained any legal interest in the store or business pursuant to (1) or (2) above and allows the previous owner to retain a role in the operation of the business such as a manager, director, officer or shareholder.

(6) The vendor applicant retained legal interest in the store after a change of business type and there is a WIC sanction currently in effect or a vendor claim which is still outstanding at that location. Business type includes corporation, general partnership, limited partnership, sole proprietorship and limited-liability company.

(c) The Department may, in its sole discretion, request additional information from the vendor applicant, which may include, but is not limited to, tax identification number, or other identifying information from the applicant and/or previous owner(s) to enable the Department to conduct a thorough background check, and a bill of sale, lease agreement, bank statements or other information verifying the change in ownership of the store. The vendor applicant shall not be required to provide information if the vendor can demonstrate to the Department that the release of that information is prohibited by federal or California state laws or regulations regarding confidentiality.

70600 Competitive Price Criteria. (a) Prices charged by the vendor or vendor applicant for a combination of all Market Basket items carried must not at any time exceed 120 percent of the Average Overall Market Basket price established by the Department for the vendor or applicant's peer group.

(b) The foods in the Market Basket may only include foods in the WIC Authorized Food List. The Market Basket shall consist of the following types of authorized foods:

- (1) 12 oz. and 18 oz. Breakfast Cereal
- (2) 16 oz. Cheese
- (3) 16 oz. Corn Tortillas
- (4) 1 lb. Bag of Dry Beans, Peas, or Lentils
- (5) 1 Dozen Large Eggs (chicken only)
- (6) 64 oz. Shelf-Stable Bottled Juice
- (7) 1 Gallon Milk (whole and lower fat)
- (8) Milk-based infant formula currently under contract with the Department
- (9) 16 oz. – 18 oz. Peanut Butter
- (10) 16 oz. Whole Wheat Bread Loaf

(c) Vendors shall submit the shelf price of their highest priced and lowest priced authorized food for each of the 10 food types in the Market Basket sold in that store during a fourteen (14) day period specified by the Department. For example, if the Market Basket food type is cheese, the vendor shall submit the shelf price of their highest price cheese and the shelf price of their lowest price cheese. Vendors shall provide these shelf prices of their market basket foods every six (6) months upon request of the Department. The Department will provide a thirty (30) day notice of the request for prices and vendors must respond with their shelf prices within thirty (30) days of the date of the notice. Vendor applicants must submit prices for a

fourteen (14) day period specified by the Department as part of the vendor application process. Only regular prices may be submitted; sale or promotional prices may not be included in the price collection. If a Market Basket item had a sale or promotional price during the fourteen (14) day period, the vendor shall determine the highest and lowest prices based on the item's price prior to the sale or promotion. Vendors that stock one type of a Market Basket item or offer same priced alternatives of that type shall submit a single price for that item as the highest and the lowest prices.

(d) The Average Overall Market Basket price will be determined by averaging the Vendor Market Basket price of all vendors in a peer group based on the current semi-annual submissions. Vendors and vendor applicants with a Vendor Market Basket price that exceeds one hundred and twenty percent (120%) of the Average Overall Market Basket price in their peer groups shall be determined noncompetitive because they do not meet the competitive price criteria.

(1) For purposes of determining whether a vendor is non-competitive and does not meet the competitive price criteria the Vendor Market Basket price shall be defined as either:

(A) A single vendor or applicant's average price of all Market Basket items submitted by the vendor or applicant for the applicable period. The Department shall determine the average of the highest and lowest prices of the individual Market Basket items and add the averaged prices together to determine the Vendor Market Basket price; or

(B) The sum of the regular shelf prices of the Market Basket items observed by the Department during a monitoring or compliance visit.

(e) Vendors or vendor applicants that do not meet the competitive price criteria will be issued a written notice of their failure to meet current vendor authorization criteria and of their need to correct their prices to meet the competitive price criteria. The vendor will be given thirty (30) days to correct their prices to meet the competitive criteria. Vendor applicants will be given ten (10) days to correct their prices to meet the competitive price criteria.

(1) If after thirty (30) days and within a twenty four (24) month period from the date of the notice the Department makes a subsequent determination that a vendor's prices do not comply with the competitive price criteria, the vendor shall have demonstrated a pattern of failure to meet competitive price criteria and shall be disqualified from participation in the program for a period of one year for failure to meet authorization criteria.

(2) If after ten (10) days from the date of the notice a vendor applicant's prices do not meet the competitive price criteria, the vendor applicant will be denied

authorization for failure to meet the vendor authorization criteria for competitive price. The applicant will be permitted to submit another application in no less than six (6) months.

(f) A vendor who fails to submit their semi-annual price information will be issued a written notice of their failure to comply with vendor selection criteria. If after thirty (30) days from the date of the written notice, the vendor has failed to submit their semi-annual price information, the Department will terminate the vendor from participation in the program.

70700 Compliance with Title VI of the Civil Rights Act. The Department shall not authorize a vendor applicant or continue authorization of a vendor that is subject to a ruling by a federal or state enforcement agency that the vendor applicant or vendor, on the grounds of race, color, national origin, age, sex or handicap, excluded from participation in, denied benefits to, or otherwise subjected to discrimination any Program participant in the process of obtaining Program benefits from that vendor.

70800 Incentive Item Requirements. (a) The Department shall not authorize or continue authorization of an above-50-percent vendor, or make payments to an above-50-percent vendor, which provides or indicates an intention to provide prohibited incentive items to customers.

(1) Above-50-percent vendors are those vendors that derive more than 50 percent of their annual food sales revenue from WIC food instruments, or vendor applicants likely to meet this criterion.

(2) Evidence of intent to provide prohibited incentive items to customers includes the following:

(A) Advertisement of the availability of the prohibited incentive items;

(B) Promotion through signage and labeling of prohibited incentive items on store shelves and/or on the store premises;

(C) Verbal and written accounts of prohibited incentives items being offered;
or

(D) Offering prohibited incentive items during compliance monitoring, as witnessed by Department staff.

(3) Pursuant to 7 C.F.R. § 246.12(g)(3)(iv)(B), prohibited incentive items for these vendors include:

(A) Services which result in a conflict of interest or the appearance of such conflict for the above-50-percent vendor, such as assistance with applying for WIC benefits;

(B) Lottery tickets provided to customers at no charge or below face value;

(C) Cash gifts in any amount for any reason;

(D) Anything made available in a public area as a complimentary gift which may be consumed or taken without charge;

(E) An allowable incentive item provided more than once per customer per shopping visit, regardless of the number of customers or food instruments involved, unless the incentive items had been obtained by the vendor at no cost or the total value of multiple incentive items provided during one shopping visit; have a value of less than \$2.00;

(F) Food, merchandise or services of greater than nominal value provided to the customer;

(G) Food, merchandise sold to customers below cost, or services purchased by customers below fair market value;

(H) Any kind of incentive item which incurs a liability for the WIC Program; or

(I) Any kind of incentive item which violates any Federal, State, or local law or regulations.

(4) Allowable incentive items for above-50-percent vendors include:

(A) One or any combination of the following; as long as the combined total value is less than two dollars:

1. Prepackaged WIC authorized fresh fruit and vegetables.
2. Fourteen (14)-ounce to sixteen (16)-ounce cans of any brand or variety of mature beans, mature peas, or lentils.
3. Any variety of prepackaged uncooked, plain, dried, mature beans, peas, or lentils.
4. Commercially made, prepackaged, 100 percent corn tortillas.
5. Commercially made, prepackaged, 100 percent whole wheat bread. Package must state "100% Whole Wheat" on the front label.
6. Five (5)-or six (6)-ounce cans of chunk light, water-packed tuna.
7. WIC authorized supplemental foods offered as part of a taste testing sample to a participant family.

(B) Minor customer courtesies of the retail food trade, such as bagging supplemental foods for the participant and assisting the participant with loading the supplemental foods into his/her vehicle. Minor customer courtesies do not include delivery of the supplemental foods to another

location.

(b) The Department shall not authorize or continue authorization of a vendor that is not an above-50-percent vendor which provides incentive items solely to WIC participant customers. Incentive items provided by non above-50-percent vendors must be offered to all customers.

(1) Incentive items for vendors who are not above-50-percent vendors are defined as

(A) Free or reduced price food or other items;

(B) Cash or cash gift cards;

(C) Lottery tickets;

(D) Buy one, get one free;

(E) Buy one, get one at a reduced price;

(F) Free amounts added to an item by manufacturer coupons, store loyalty cards, and sales specials for supplemental foods; or

(G) Free or reduced price services and minor customer courtesies of the retail food trade, such as bagging supplemental foods for the participant and assisting the participant with loading the supplemental foods into his/her vehicle.

(c) Vendors found to be out of compliance with this section on the first incidence will be issued a written notice of the vendor's failure to comply with incentive item requirements. If after thirty (30) days from the date of the notice and within a twenty-four (24) month period from the date of the notice the vendor in a subsequent incident fails to comply with incentive item requirements, the vendor shall have demonstrated a pattern of failure to comply with incentive item requirements and shall be disqualified from participation in the program for a period of one (1) year for failure to meet authorization criteria.

70900 Infant Formula. Authorized vendors and vendor applicants must purchase all authorized infant formula only from the following suppliers:

(a) A manufacturer of infant formula registered with the Food and Drug Administration;

(b) A wholesaler, distributor, or retailer within California that has a current, valid seller's permit number that the vendor has verified through the California Board of Equalization; and

(c) A wholesaler, distributor, or retailer outside of California that is a licensed supplier of infant formula in that state and is included on that state WIC agency's list

of authorized suppliers of infant formula.

(d) Vendors found to be out of compliance with this section on the first incidence will be issued a written notice of the vendor's failure to comply with infant formula purchasing requirements. If after thirty (30) days from the date of the notice and within a twenty-four (24) month period from the date of the notice the vendor in a subsequent incident fails to comply with infant formula purchasing requirements, the vendor shall have demonstrated a pattern of failure to comply with infant formula purchasing requirements and shall be disqualified from participation in the program for a period of one (1) year for failure to meet authorization criteria.

71000 Inventory Records. (a) Each vendor, defined in Section 40635, must maintain adequate inventory purchase records, including adequate transfer records if inventory is moved between stores.

(b) If a vendor owns more than one vendor store, including multiple stores under a Master Vendor Agreement, separate inventory purchase records including transfer records, must be maintained for each store location. Inventory purchase records, including transfer records for each individual store under one ownership will be reviewed separately and will not be combined for purposes of audit to determine if a vendor is claiming reimbursement for the sale of a volume of supplemental food which exceeds the vendor inventory purchase documentation for a specific period of time as identified in the audit.

(c) All vendors must maintain inventory purchase records and transfer records for a period of three (3) years and provide agents of the State, the Department, and the Comptroller General of the United States access to these records. Records can be retained in paper or electronic formats.

(d) Inventory purchase records include all of the following:

(1) Records showing all WIC authorized supplemental food purchases, wholesale and retail, in the form of invoices. Each invoice or receipt shall:

(A) Be prepared entirely by the wholesaler, distributor, or retailer from whom the WIC vendor made the purchase;

(B) Indicate the date of purchase, the name of the seller, and the name of the WIC vendor who made the purchase;

(C) Be specific when identifying WIC food items- for example; "milk" is not an adequate identification. It must be specified as to the type of milk, such as "fluid", "dry", or "evaporated" and whether it is "whole", "lowfat", or "nonfat", etc. Similarly, "fruit juice" is not an adequate identifier. The type of juice, e.g., "orange" or "apple" must be indicated, and the brand must also be identified;

(D) Identify the quantity and container size of each WIC food item purchased from the wholesaler, (number of containers, cans, boxes, etc., and number of ounces, pounds, etc., per container); and

(E) Indicate the unit price for each WIC food item purchased.

(2) Sales and use tax return, if required by federal and state law

(3) Books of account

(4) Other records that can be used to verify WIC authorized supplemental food item purchases or proper peer group assignment including, but not limited to, check registers and bank statements.

(5) Transfer records. Transfer records must:

(A) Be created at the time the food products are shipped from the location of original delivery to the following vendor store location;

(B) Indicate the date of the transfer;

(C) Indicate the address and store name where the food item is being shipped from;

(D) Indicate the address and store name where the food item is being shipped to;

(E) Be specific when identifying WIC food items – for example; “milk” is not an adequate identification. It must be specified as to the type of milk, such as “fluid”, “dry”, or “evaporated” and whether it is “whole”, “lowfat”, or “nonfat”, etc. Similarly, “fruit juice” is not an adequate identifier. The type of juice, e.g., “orange” or “apple” must be indicated, and the brand must also be identified; and

(F) Identify the quantity and container size of each WIC food item transferred from the source location (number of containers, cans, boxes, etc., and number of ounces, pounds, etc., per container).

(e) If a vendor fails to maintain the required inventory and transfer records, including separate inventory and transfer records for each vendor location owned, the Department shall terminate the vendor’s agreement.

71100 Minimum Stocking Requirements. (a) For participation in the Program, all vendor and vendor applicant locations must at all times maintain on the premises of the vendor applicant or authorized location the amounts listed in subsection (b)(1)-(15) below of WIC authorized supplemental foods, adopted as the WIC Authorized Food List and Shopping Guide by WIC Regulatory Bulletin.

(b) Inventory must be stocked on store shelves in the public area available for

purchase unless quantities of stock allowed in storage on the premises of that store location are specified in subsections (b)(10), (12), and (13). For purposes of this regulation, inventory shall not include inventory on order that has not been delivered. Each vendor and applicant vendor must stock, at a minimum, the following:

(1) Bottled Juice and Concentrate.

(A) Eight (8) sixty-four (64) ounce bottles of authorized shelf stable juice.

(B) Ten (10) eleven and a half (11.5) or twelve (12) ounce containers of authorized frozen juice concentrate.

(2) Breakfast Cereal. At least one hundred forty-four (144) total ounces, of any four (4) different types or brands of authorized cereal. Of the total ounces one (1) type must be of twelve (12) ounce size box and one (1) type must be of eighteen (18) ounce box. Two (2) of the types or brands must be listed as whole grain cereals on the WIC Authorized Food List and Shopping Guide.

(3) Canned Fish. Either

(A) Twelve (12) five (5) ounce cans or ten (10) six (6) ounce cans of authorized types of tuna; or

(B) Four (4) fifteen (15) ounce cans of authorized types of sardines; or

(C) Twelve (12) five (5) ounce cans, ten (10) six (6) ounce cans, or four (4) fourteen and three quarters (14.75) ounce cans of authorized types of salmon.

(4) Cheese. At least four (4) one (1) pound packages of any combination of types of cheese.

(5) Dry Beans, Peas, or Lentils. At least six (6) pounds of any combination of authorized dry beans, peas, or lentils, in either one (1) pound packages or six (6) pounds in bulk.

(6) Eggs. At least four (4) one (1) dozen containers of authorized types of eggs.

(7) Fresh Bananas. Eight (8) fresh yellow bananas.

(8) Fruits and Vegetables.

(A) Thirty-two dollars (\$32) worth of a combination of five (5) authorized varieties of fresh fruits and five (5) varieties of authorized fresh vegetables. Dollar amount is based on the vendor shelf price.

(B) Thirty-two dollars (\$32) worth of a combination of three (3) varieties of authorized frozen fruits and (3) varieties of authorized frozen vegetables. Dollar amount is based on the vendor shelf price.

(C) Thirty-two dollars (\$32) worth of a combination of three (3) authorized varieties of canned fruits and three (3) varieties of authorized canned vegetables. Dollar amount is based on the vendor shelf price.

(9) Infant Cereal. Two (2) sixteen (16) ounce containers and two (2) eight (8) ounce containers of any authorized brand and type of infant cereal.

(10) Infant Formula. Authorized milk-based infant formula in the following quantity:

(A) Twenty (20) authorized size containers of authorized milk-based infant formula in powdered form. Of the twenty (20) containers, at least ten (10) must be on the shelf with the remainder kept in storage on the premises. For example, if the vendor stocks twenty (20) containers on the shelf, no less than four (4) containers must be in storage on the premises.

(11) Infant Fruits and Vegetables. Either

(A) Fifty-six (56) four (4) ounce containers; or

(B) Sixty-four (64) three and a half (3.5) ounce containers.

(12) Infant Meats. Sixty-two (62) two and a half (2.5) ounce containers of authorized infants meats. Of the sixty-two (62) containers at least thirty-one (31) must be on the shelf with the remainder kept in storage on the premises. For example, if the vendor stocks thirty-one (31) containers on the shelf, no less than thirty-one (31) containers must be in storage on the premises.

(13) Milk.

(A) Six (6) one (1) gallon containers of authorized fluid whole milk;

(B) Fourteen (14) one gallon containers of 2%, 1%, or nonfat authorized fluid milk. Of the fourteen (14) one (1) gallon containers, at least ten (10) must be on the shelf with the remainder kept in storage on the premises. For example, if the vendor stocks ten (10) one (1) gallon containers on the shelf, no less than four (4) one (1) gallon containers must be in storage on the premises;

(C) Two (2) half-gallon containers of any combination of 2%, 1%, or nonfat authorized fluid milk.

(14) Peanut Butter. At least four (4) sixteen (16) to eighteen (18) ounce containers of authorized types of peanut butter.

(15) Whole Grain.

(A) At least two (2) one pound packages of 100% whole wheat bread loaves;
and

(B) At least two (2) one pound packages of white or yellow soft corn tortillas;
and

(C) At least two (2) one pound packages or two (2) pounds of bulk oatmeal or oats; or two (2) one (1) pound packages or two (2) pounds of bulk brown rice.

(c) A vendor who fails to meet the stocking requirements in this section at any time shall be issued a written notice of the vendor's failure to meet authorization criteria. If after thirty (30) days from the date of the notice and within a twenty-four (24) month period from the date of the notice the vendor subsequently fails to meet the stocking requirements of this section the vendor shall have demonstrated a pattern of failure to meet minimum stocking requirements and shall be disqualified from participation in the program for a period of one (1) year for failure to meet authorization criteria.

71200 Minimum Technology Requirements. All vendors and vendor applicants must have access to a computer or other electronic device that has the ability to:

- (a) Access the internet, and
- (b) Receive and send emails, and
- (c) Use web-based applications, and
- (d) Apply an electronic signature to official documents.

71300 No Conflict of Interest Between the Vendor and the Department or any WIC Local Agency. The Department shall not authorize a vendor applicant or continue authorization of a vendor if the Department makes a determination that a conflict of interest exists between a vendor and the Department or between a vendor and a local agency. For purposes of this article, local agency is defined to include all employees of local agencies pursuant to Title 22, California Code of Regulations, Section 40641. A conflict of interest exists when:

- (a) The vendor could profit by having a relative or an agent who is on the staff of a local agency or the Department who could refer participants to the vendor's store; or
- (b) The vendor could profit by having a relative or an agent who is on the staff of the Department who could make Departmental decisions or influence Department

policies and procedures related to program vendors.

71400 Restrictions and Allowed Uses of the WIC Acronym and WIC Logo. (a) For the purpose of this section and all contracts, instructions, forms and other documents related hereto, the following terms are defined:

(1) General Definitions

(A) Point of Display. Point of Display items are used to identify WIC authorized supplemental foods and where the food items are located or shelved. Point of Display items include shelf-talkers and signs.

(2) Printing and Image Definitions

(A) CMYK. CMYK, also known as process color, four- or full color, refers to the four process colors (cyan, magenta, yellow and black) used to create all colors in standard color printing. This process is one of two allowed printing processes for reproduction of the California WIC logo. The CMYK process can create thousands of clear, vibrant colors; therefore this option is permitted and is the preferred image file for vendors to reproduce the California WIC logo.

(B) EPS Format. EPS, Encapsulated PostScript, is a method for creating logos and other line-art illustrations using mathematical vectors to define the lines and curves that make up the logo or other artwork. These vectors retain proportion within the artwork regardless of how it is resized without loss of detail or distortion. This format is the only allowable option permitted for all reproduction of the California WIC logo.

(C) Spot Color. Spot Color refers to an image file which uses individual Pantone colors instead of CMYK process to reproduce the California WIC logo. It takes four separate Pantone colors to print the logo and the results will not be as rich in color as the CMYK process defined above. This format is one of two allowed options permitted for all reproduction of the California WIC logo. The black and white EPS image file is a variant of the spot color logo that uses a single color (black) to create the California WIC logo.

(D) Vector. Graphic images created by a computer program and stored in file format as a series of numbers which define shape, position and color of EPS images. Vectors are object-oriented and work as a whole unit together. The mathematic property of the vectors allows increase and decrease in image size without distortion.

(E) White Space Required for Newspaper Ad or Insert. Visual area surrounding logo which must be free of typeset, color, or other imagery to prevent detracting from the appearance of the logo. White space is literally

space around the logo which is white.

(b) The federal WIC logo and the WIC acronym are registered service marks of the United States Department of Agriculture (USDA). The federal WIC logo and the California WIC logo are the property of the Federal and State Governments. Vendors shall use of the WIC acronym and logo only as permitted in this Section 71400:

(1) Vendors and vendor applicants shall not use the federal WIC logo or acronym or the State WIC logo or acronym or close facsimiles thereof, in total or in part in any manner only without prior written consent of the Department, except when printing signs and shelf talkers pursuant to the requirements in subsection (d)(3).

(2) The Department shall deny authorization or shall not continue authorization of a vendor or applicant whose name or logo includes the WIC acronym, the federal WIC logo, the California WIC logo, or close facsimiles thereof, in total or in part, either in the official name in which the vendor is registered or in the name under which it does business, if different. This includes, but is not limited to, using the letters "W", "I", and "C" in that order next to one another in the vendor or vendor applicant's name, or these letters in that order but not next to one another, with the letters made to stand out in some fashion, such as with a different color or size than other letters.

(3) Vendors and vendor applicants must not attach or affix in any manner the WIC acronym, the federal WIC logo, or the California WIC logo on any authorized food or incentive item.

(4) Vendors and vendor applicants may use the California WIC logo only on materials produced or approved by the Department including shelf talkers, posters, signs, decals or stickers.

(5) Vendors may reproduce the California WIC logo in dated, general circulation newspaper ads or inserts that advertise the vendor's store, as specified in subsection (d) below.

(c) Upon prior written approval by the Department vendors are permitted to print the California WIC logo pursuant to the printing and formatting requirements specified in this Section 71400. When using the California WIC logo, the vendor shall use only the California WIC logo files that are available for download on the Vendor WIC Information eXchange website ("VWIX") at: <https://vwix.ca.gov>. These are the only image file options available to WIC authorized vendors for printing the California WIC logo image; no other image file formats are allowed.

(1) Vendors shall print the California WIC logo image using the CMYK process or spot color image file options, as defined in subsection (a) above and in color

as specified in subsections (c)(1)(B)-(C) below:

(A) The California WIC logo and tagline may appear in a single color, but only in black on white.

(B) The CMYK combination, a permitted and preferred option, which produces a full-color image of the California WIC logo shall be as follows:

1. Purple: fifty (50) percent cyan, ninety (90) percent magenta, and zero (0) percent black.
2. Red: zero (0) percent cyan, ninety-one (91) percent magenta, eighty-seven (87) percent yellow, and zero (0) percent black.
3. Lime: forty-three (43) percent cyan, zero (0) percent magenta, seventy-nine (79) percent yellow, and zero (0) percent black.
4. Green: seventy-five (75) percent cyan, zero (0) percent magenta, one-hundred (100) percent yellow, and zero (0) percent black.

(C) Pantone colors, a permitted option of the CMYK combination, is used to produce a full-color image of the California WIC logo shall be as follows:

1. Purple: pantone 258
2. Red: pantone 179
3. Lime: pantone 368
4. Green: pantone 361

(2) When printing the California WIC logo, vendors must ensure the California WIC logo remains intact each time it is printed. The California WIC logo includes the WIC acronym and tagline "Families grow healthy with WIC". The vendor shall not use the tagline as a separate graphic element. Shelf talkers are the only exception and may be printed without the tagline.

(3) When printing the California WIC logo, vendors must not distort the California WIC logo. When enlarging or scaling it down, vendors shall keep the logo proportionate in size. Change to the size must be the same percentage increase in both height and width. For example, if the height of the logo image is increased 25 percent the width must also be increased 25 percent.

(4) When printing the California WIC logo, vendors must print only the California WIC logo and not add any additional graphics or text around the logo.

Exception: upon approval by the Department additional graphics or text may be allowed when printing the California WIC logo in general circulation newspaper ads or inserts that advertise the vendor's store when used as specified in subsection (b)(5).

(5) When printing the California WIC logo, vendors must maintain integrity of the California WIC logo when printing in newspaper ads or inserts by using the “white space” around the logo as downloaded from VWIX. White space means visual area free of typeset or other imagery to prevent detracting from the appearance of the logo.

(6) Vendors shall not wrap text around the white space surrounding the California WIC logo. Vendors shall always leave enough white space around the logo to prevent “crowding” by other elements.

(7) Vendors shall print the California WIC logo in a white box when the logo is placed on a background color or photograph. Vendors shall not print the logo on a solid background color, screen or tint of a color, or a photographic or illustrative background if the background shows through the logo.

(8) Vendors shall not enclose the California WIC logo in other framing shapes including, but not limited to circles or ellipses.

(d) Vendor uses of the California WIC logo. The California WIC logo shall not be used in any media other than print as specified in this subsection (d).

(1) Posters. The Department may provide vendors with posters which include the California WIC logo to identify a store as authorized to accept food instruments from participants for the sale of supplemental foods. Only posters provided by the Department may include the WIC acronym or logo. Department supplied posters may only be displayed on store walls and boards or in window displays. Vendors may not print or display posters with the federal WIC logo, the WIC acronym, or the California WIC logo.

(2) Decals. The Department may provide vendors with decals to identify a store as authorized to accept food instruments from participants for the sale of supplemental foods. Only decals provided by the Department may be used if the decals include the WIC acronym or logo. Department supplied decals may only be affixed to windows or doors. Vendors may not print or display decals with the federal WIC logo, the WIC acronym, or the California WIC logo.

(3) Point of Display Items

(A) Signs. The Department may provide vendors with signs to identify WIC authorized supplemental foods and where the food items are located or shelved. Department supplied signs may only be affixed on displays to identify where food items are located or to emphasize fruits and vegetables as a food item choice. Vendors may not print or display signs with the federal WIC logo, the WIC acronym, or the California WIC logo.

1. When printing signs for WIC authorized foods a vendor may only use

the following image containing the California WIC logo, available on VWIX and represented below. Vendors may resize the following logo for sign use up to 6 inches in height, without distorting the proportion of the logo image. This image is available for use as a sign or decal on VWIX.

A. Logo for Signs



(B) Shelf Talkers. Vendors are permitted to display shelf talkers to identify WIC authorized supplemental foods. Shelf talkers may only be affixed to shelves to identify where food items are located or shelved. Shelf talkers may be supplied by the Department or printed by a vendor with approval from the Department pursuant to subsection (c)(3)(B)(3) below.

1. Shelf talkers printed by a vendor that identify WIC authorized supplemental foods must comply with the printing and formatting requirements specified in subsection (c).
2. Shelf talkers for WIC authorized foods must be printed in color.
3. When printing shelf talkers for WIC authorized foods a vendor may only use one of the following images containing the California WIC logo, available on VWIX and represented below. Vendors may not resize or make any other changes to the images available for use as shelf talkers on VWIX.

A. Right Shelf Talker



B. Left Shelf Talker



C. Standard Shelf Talker



(4) Newspaper Ad or Inserts Requirements. Upon approval of the Department, vendors may print the California WIC logo in dated, general circulation newspaper ads or inserts that advertise the vendor's store (Ex. Weekly store ad).

(A) Newspaper ads or inserts printed by a vendor must comply with the printing and formatting requirements specified in subsection (c).

(B) Newspaper ads or inserts may be printed in color or in black. The black and white logo may only be used in black and white newspaper ads or inserts.

(C) When printing newspaper ads or inserts a vendor may only use one of the following logos, available on VWIX and represented below. The following logos may not be printed larger than 1/8 of the total size of the ad or insert:

1. Color Logo



2. Black and White Logo



(e) All vendors wishing to print or use the WIC logo pursuant to the requirements of this Section 71400 shall submit a sample of the proposed use prior to printing or publication to the Department for approval. The Department will review the proposed use for compliance with this Section 71400 and issue a determination as to whether the use is approved within 10 business days of receipt of request for approval.

(f) Vendors found to be out of compliance with this section on the first incidence will be issued a written notice of the vendor's failure to comply with restrictions on the use of the WIC acronym and logo. If after 30 days from the date of the notice and within a twenty-four (24) month period from the date of the notice the vendor in a subsequent incident fails to comply with restrictions on the use of the WIC acronym and logo, the vendor shall have demonstrated a pattern of failure to comply with restrictions on the use of the WIC acronym and logo and shall be disqualified from participation in the program for a period of one (1) year for failure to meet authorization criteria.

71500 Store Location and Hours. (a) All vendors and vendor applicants must have a fixed location for each vendor store from which food instruments are transacted and authorized foods provided to participants, and

(b) All vendor stores must be open at least eight (8) hours per day, six (6) days per week. Of the eight (8) hours, at least four (4) of the hours that the vendor is open must be core hours. Core hours are defined as 9:00 a.m. to 5:00 p.m.

71600 Vendors Disqualified from SNAP/CalFresh will not be Authorized Unless Denying Authorization would result in Inadequate Participant Access. Unless denying authorization of a vendor applicant would result in inadequate participant access, the Department shall not authorize a vendor applicant that is currently disqualified from the SNAP/CalFresh Program or that has been assessed a SNAP/CalFresh civil money penalty for hardship and the disqualification period that would otherwise have been imposed has not expired. Inadequate participant access shall be determined by the criteria specified in Title 22, California Code of

Regulations, Section 40740 (h)(1).

71700 Vendors Must be SNAP/CalFresh Authorized. As of February 28, 2014, vendors and vendor applicants must be authorized for participation in the SNAP/CalFresh Program at the time of application and at all times during the term of the vendor agreement.

71800 Vendor Training. (a) Prior to authorization and at least once every three (3) years after authorization while authorized, vendor applicants and vendors or their designated representative must attend an interactive training and successfully pass an examination upon completion of the training as required by Title 22, California Code of Regulations, Section 40733.

(b) All vendors or their designated representatives must also participate in annual training provided by the Department as required by Title 22, California Code of Regulations, Section 40733. Each vendor must certify completion of the annual training by returning, within thirty (30) days of their receipt of the annual training, a statement certifying their participation in the annual training and their understanding of the materials.

(1) The Department will provide written notice to an authorized vendor that fails to complete the annual training.

(2) The vendor will be provided thirty (30) days from the date of the notice to complete the training and certify their participation in the annual training and their understanding of the materials.

(c) Failure to complete the annual training and certify their participation in the annual training and their understanding of the materials thirty (30) days from the date of the written notice will result in the Department terminating the vendor's agreement.

71900 Visible Posted Prices. (a) All vendors and vendor applicants are required to post prices of all WIC authorized supplemental foods so that the prices are visible to customers.

(1) Prices must be posted on the individual WIC authorized supplemental food item, or

(2) Prices must be posted on the shelf on which the WIC authorized supplemental food is placed, directly below the product,

(3) Directly above the product, or

(4) If the supplemental foods are part of a display, the prices must be posted on the display.

(b) A vendor who fails to meet the price posting requirements of this section at any time shall be issued a written notice of the vendor's failure to meet authorization

criteria. If after thirty (30) days from the date of the notice and within a twenty-four (24) month period from the date of the notice the vendor subsequently fails to meet the price posting requirements of this section, the vendor shall have demonstrated a pattern of failure to meet price posting requirements and shall be disqualified from participation in the program for a period of one (1) year for failure to meet authorization criteria.

Feedback

Stakeholders may provide feedback regarding the impact of this Final Action and any policy adjustments to be considered by the Department after implementation. Comments may be sent electronically with the Bulletin number in the subject line to: WICRegualtions@cdph.ca.gov.

Attachment 1

Vendor Authorization Criteria

Stakeholder Comments and CDPH Responses

California Women, Infants, and Children Supplemental Nutrition Program

September 17, 2013

Health & Safety Code §123322 authorizes the California Department of Public Health (CDPH) to establish regulations regarding Vendor Authorization Criteria of the California Women, Infants, and Children (WIC) Supplemental Nutrition Program using a regulatory bulletin process. The Department is utilizing this process to adopt these regulations. This document is intended to provide responses to stakeholder comments on the proposed Vendor Authorization Criteria, specified in Regulatory Alert 2013-01. Revisions to the proposed regulation as a result of the stakeholder comment period will be adopted into California regulation.

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How to Use this Document

This document consists of written stakeholder letters provided during the stakeholder comment period received from June 24 – July 19, 2013. This document also includes Departmental responses to stakeholder comments, and revisions to Vendor Authorization Criteria regulations proposed in Regulatory Alert 2013-01.

This document contains a reproduction of individual written stakeholder letters and each stakeholder comment has been enumerated in the margin of each letter. Comments are denoted using a numbering system that identifies the stakeholder's letter and the specific comment number within each letter. For example, Comment 4.5 refers to the fifth comment in stakeholder Letter 4. Responses to each of these comments follow each stakeholder letter and follow the same corresponding numbering system. Thus, Response 4.5 addresses Comment 4.5 in stakeholder Letter 4.

Clarification text that has been added to Vendor Authorization Criteria regulations proposed in Regulatory Alert 2013-01 is indicated with underlining. Text that has been deleted is indicated with ~~strikethrough~~.

Written Comment Letters Received

Comment letters received by the Department in regard to Vendor Authorization Criteria regulations proposed in Regulatory Alert 2013-01 were received from the following 10 organizations:

1. Matthew Sharp, Senior Advocate, California Food Policy Advocates, July 17, 2013
2. Keri Bailey, Senior Vice President, California Grocers Association, July 19, 2013
3. Laurie True, Executive Director, California WIC Association, June 28, 2013
4. Laurie True, Executive Director, California WIC Association, July 15, 2013
5. Christine Dodd, WIC Program Director, Clinica Sierra Vista, July 13, 2013
6. Patricia Richardson, WIC Administration Specialist, Contra Costa County, June 25, 2013
7. Steve Haisha, Haisha Enterprises LLC, July 11, 2013
8. Leslie R. Smith, Attorney, Leslie R. Smith, A Professional Law Corporation, July 19, 2013
9. Jennifer Reddington, National Account Manager, Nestlé Infant Nutrition, USA, July 16, 2013 (Email #1)
10. Jennifer Reddington, National Account Manager, Nestlé Infant Nutrition, USA, July 16, 2013 (Email #2)
11. Nutritional Grocers Association of California, July 19, 2013
12. Nicholas Pyle, President, Robert N. Pyle & Associates, July 11, 2013

Letter 1 California Food Policy Advocates

July 17, 2013

Erika Trainer, Chief

Women, Infants and Children Program

California Department of Public Health

3901 Lennane Drive MS 8600

Sacramento, CA 95834



Los Angeles Office
205 S. Broadway
Suite 402
Los Angeles
CA 90012

T: 213.482.8200
F: 213.482.8203
www.cfpa.net

RE: WIC VENDOR AUTHORIZATION REGULATIONS

Dear Ms. Trainer:

California Food Policy Advocates is writing to share our comments in support of the WIC vendor authorization regulations promulgated by your office.

California Food Policy Advocates (CFPA) is a statewide nonprofit organization whose mission is to improve the health and well being of low-income Californians by increasing their access to nutritious, affordable food. CFPA does this by promoting participation in, access to and quality of the federal nutrition programs.

CFPA supports the proposed changes to the approval of WIC vendors in California because CFPA supports the objective of maintaining overall program integrity. This includes not allowing store owners to enter into or continue WIC Vendor Agreements unless they can show they are legitimate retailers who can consistently offer most WIC foods to WIC shoppers at competitive prices.

In some cases, the new criteria are more stringent, holding WIC grocery stores to higher business operating standards than current rules. To protect the program integrity and bottom line of California WIC, CFPA strongly believes that only stores who are willing to comply with these rigorous criteria should be allowed to benefit from a WIC vendor agreement.

CFPA would like to draw your attention to three sections within the 112 page document. We've commented on these three proposals because of CFPA's knowledge and expertise developed through decades of effort to expand CalFresh.

Minimum Stocking Requirements

Requires all stores to stock a minimum group of WIC foods at all times to enable WIC participants to purchase their full food prescriptions at one store.

1.1

1.2

CFPA is a statewide policy and advocacy organization dedicated to improving the health and

CFPA Comment: This proposal is reasonable and makes it easier for smaller stores to comply, while increasing required quantities for more commonly purchased items, such as WIC cereals and milk, benefitting shoppers. Keeping the requirement that WIC-authorized stores stock at least \$32 worth of five different fresh and frozen fruits and vegetables (three different canned), will continue to improve healthy food access in both rural and urban areas where shoppers rely on small stores for more of their groceries.

1.2
cont.

CalFresh-Disqualified Vendors

Vendors disqualified from CalFresh will not be WIC authorized unless denying them would result in inadequate participant access.

The new rule defines adequate access as: (A) another authorized WIC store is in "the same geographic area" and (B) no geographic barriers that prevent participants from shopping at other stores. "Same geographic area" is defined differently for rural and urban parts of the state. In rural areas, it's within a 5-mile radius of either the vendor or the WIC site. In urban areas, it's within a 2-mile radius of the vendor or the WIC site closest to the vendor.

1.3

CFPA Comment: These provisions will help keep more "bad actors" out of the program. The clearer definitions to maintain participant access will prevent costly and needless disputes while safeguarding access in remote or inner-city areas.

WIC Vendors Must be CalFresh-Authorized

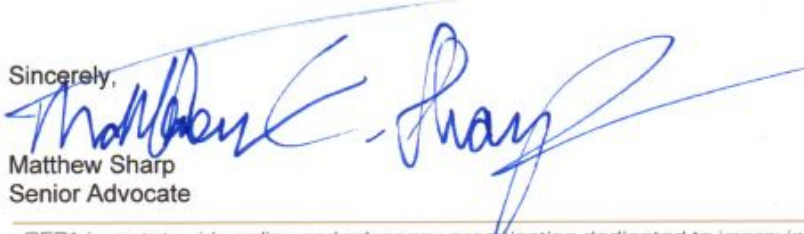
The regulations propose that all WIC vendors must also be authorized for participation in CalFresh at the time of application and all through the vendor agreement period. CalFresh authorization requires that stores sell a variety of qualifying staple foods, with some perishable foods available within four categories, or that more than 50% of total retail sales come from the sale of eligible foods. And, CalFresh maintains and monitors strict program integrity guidelines.

1.4

CFPA Comment: Requiring all WIC stores to be CalFresh-authorized is good public policy that will benefit both WIC participants and low-income shoppers. Authorization from both programs will ensure that these stores will serve a larger set of shoppers by offering, at a minimum, a variety of nutritious staple foods for different age groups and household sizes. This will benefit WIC and CalFresh participants alike, improving the quality of retail access in many California neighborhoods.

If we can provide additional information regarding these comments, please contact me at 213.482.8200x201.

Sincerely,


Matthew Sharp
Senior Advocate

CFPA is a statewide policy and advocacy organization dedicated to improving the health and

RESPONSES TO LETTER 1

- 1.1. The commenter is supportive of the WIC vendor authorization criteria regulations because they support the overall objective of maintaining program integrity.
- 1.2. The commenter expresses support for the criterion set forth in §71100, Minimum Stocking Requirements, to reduce the financial impact on small vendors, improve WIC participant choice, and improve access to healthy fruits and vegetables.
- 1.3. The commenter expresses support for §71600, Vendors Disqualified from SNAP/CalFresh Will Not Be Authorized Unless Denying Authorization Would Result in Inadequate Participant Access. The commenter states that this requirement, “will help keep out more “bad actors” out of the program” because a clearer participant access definition will eliminate disputes while safeguarding access in remote and urban areas.
- 1.4. The commenter is supportive of the SNAP/CalFresh Authorized requirement proposed in §71700 because the requirement will benefit WIC and CalFresh participants by improving the quality of retail access in many neighborhoods in California.

Letter 2 California Grocers Association



July 19, 2013

California Department of Public Health
Women, Infants & Children (WIC) Program
PO Box 997375
MS 8600
Sacramento, CA 95899-7375
Sent Via e-mail to: WICRegulations@cdph.ca.gov

Re: ARTICLE 4, 70000 ET SEQ - VENDOR AUTHORIZATION CRITERIA

To Whom It May Concern:

On behalf of the California Grocers Association (CGA) and its member companies, I respectfully submit the following comments relative to the proposed Article 4, 70000 et seq, Vendor Authorization Criteria proposed for the California WIC Program.

We thank the Department for providing stakeholders with an opportunity to comment on the proposal and have done our best to coordinate comments from our food retail, wholesale and manufacturing membership. CGA is a non-profit, statewide trade association representing the food industry since 1898. CGA represents approximately 500 retail members including chain and independent supermarkets, convenience stores and mass merchandisers operating over 6,000 food stores in California and Nevada, and approximately 300 grocery supplier companies.

2.1

There are few questions and concerns that do not necessarily relate to specific sections of the proposal but rather weave through several sections or the proposal in its entirety. It appears the proposal lacks any information on how vendors will be notified about alleged violations and whether those will occur in connection with monitoring visits, some other mechanism, or a combination thereof. Should vendors expect to receive official letters from the State agency and if so, how long after a monitoring visit or other allegation of violation(s)? Will notification processes and timelines vary based on the nature of the alleged violation? Does the State agency intend to issue a subsequent proposal regarding notifications?

2.2

In addition, the proposal lacks any reference to a vendor appeal or dispute process that could be utilized by a vendor at any stage. Will vendors have a mechanism to appeal or dispute denial of authorization or alleged violations? Is it the intention of the State agency to issue a subsequent proposal to outline vendor appeal/dispute process or does the State agency intend to eliminate appeal/dispute processes?

2.3

70000 VENDOR AUTHORIZATION CRITERIA

A question has been raised with regard to proposed section 70000(a) and whether peer group assignments may be altered once assigned. If the Department finds it may be appropriate to move a vendor to an alternate peer group will the proposal allow for that rather than vendor termination? It

2.4

CALIFORNIA GROCERS ASSOCIATION | 1215 K Street, Suite 700 | Sacramento, CA 95814-3946 | T: 916.448.3545 | F: 916.448.2793 | www.cagrocers.com

seems moving a vendor to an appropriate peer group when circumstances change may be more effective than terminating a vendor and could help to preserve customer access. 2.4 cont.

While it is appropriate for any new criteria to apply to vendors on a going forward basis, language contained in the proposal appears to open the door for retroactive application of the new authorization criteria. Specifically in 70000(c) indicates that, "The Department shall apply the vendor authorization criteria in this article ***to all vendors at any time...***" and further, "If a vendor fails to meet the authorization criteria at ***any time during the authorization period...***", authorization ***shall*** be terminated. 2.5

Concerns have been raised that vendors operating under existing authorizations will be in a position of having to comply with new criteria pursuant to the proposal or be subject to automatic termination – without time to review and modify existing practices and processes. For instance, if enacted as proposed the technology requirements could force some vendors to upgrade systems or purchase new ones. Likewise, vendors may be required to review and modify stock rotation and/or inventory tracking policies and processes to achieve compliance. As written, 70000(c) would deem vendors subject to immediate termination upon final approval of regulations even if they meet all requirements in an unexpired, existing vendor agreement in place at that time. **We respectfully request that accommodation be given in those circumstances and companies be given adequate time to review, and to the extent necessary modify, existing practices prior to automatic termination from the WIC program.** This could be accomplished by allowing existing vendor agreements to remain in place through expiration or by fixing the implementation date of the proposed regulations at a date certain in the future. 2.6

70100 BUSINESS INTEGRITY

In the proposal, when discussing determination of the concept of adequate participant access, verbiage is different when describing "urban" and "rural" areas. It is unclear whether that difference will have a material impact on vendor authorizations and whether varying word usage was intended. In addition, it appears the criteria for determining participant access in the proposal does not include consideration of geographic barriers. In some instances, access may be limited or eliminated entirely based on geographic barriers. 2.7

70300 CASH REGISTER

The proposal requires vendors to utilize cash register systems that record certain information and produce receipts. The proposal further requires certain transaction records to be maintained for a minimum of three years. While one would assume that the requirement for cash register records may be retained in electronic format, **the proposal should be modified to explicitly provide for electronic records retention by vendors.** 2.8

In addition, the records retention language notes retention for ***"...a minimum of three (3) years..."*** though no indication is given as to what circumstances would require longer retention or how much longer. **The proposal should be clarified to indicate a time certain for retention of required cash register records.** Otherwise, a vendor has no way of knowing how long records must be retained. 2.9

70400 CERTIFY THE INFORMATION PROVIDED ON THE VENDOR APPLICATION IS TRUE AND CORRECT

There is certainly a need to ensure that applicants supply the WIC program with accurate and truthful information in all instances, including those relating to applications. However, as currently written 70400 requires vendors and vendor applicants to certify that information is, ***"...true and correct."*** That 2.10

standard should be modified to require certification that information is true and correct to the best of the vendor or vendor applicant's knowledge.

The standard of true and correct to the best of a party's knowledge is a commonly accepted standard. Requiring otherwise creates a situation where a party unknowingly executes a document that contains simple human error or information the party was unaware was incorrect. And yet even in those circumstances the proposed regulation allows for termination of the vendor agreement. Though the regulation attempts to narrow the possibility for that in situations where errors are inadvertent, the only requirement is that the incorrect information was used in the Department's decision. That standard is highly subjective and could ultimately lead to honest mistakes resulting in termination of vendor authorization.

2.10
cont.

70500 CIRCUMVENTION OF WIC SANCTION

While it is certainly appropriate to address the issue of circumvention of WIC sanctions, and to address situations where a vendor may attempt to do so, the proposal goes far beyond those instances and in fact could lead to lifetime bans for parties that were not involved in such attempts.

70500(b)(3) and (4) require the Department to deny a vendor application when the vendor applicant, "...owns, previously owned, or has a legal interest in a store or business..." with a current sanction or outstanding vendor claim in place. Unfortunately, this language goes far beyond circumstances in which an individual is attempting to circumvent a WIC sanction. The term previously owned is not qualified in any way - meaning an individual could sell a company or an individual store location and subsequent to the sale the company could be subject to a WIC sanction or vendor claim. Notwithstanding that the violation took place after the sale, with the previous owner no longer involved in the business, the previous owner would arguably be barred from approval as a vendor. The problem is compounded when you take into consideration the fact that there is no time qualification on the required denial. If at any time after sale of a business that business was subject to a vendor sanction or outstanding claim, all previous owners and all individuals who previously had a legal interest in the business would be barred from authorization in perpetuity.

2.11

It makes little sense to bar individuals from vendor authorization just because a company they previously had an ownership or legal interest in runs afoul of WIC requirements. At a minimum, the proposed criteria should be modified to ensure that only individuals who divest themselves of ownership or legal interest in an attempt to avoid WIC sanctions are penalized. **The proposed criteria should be modified to ensure that the ban on vendor authorization applies only when an individual's ownership or legal interest in a company coincides with violations that lead to sanctions. In addition, rather than imposing a lifetime ban, this section should be harmonized with proposed section 70100 regarding Business Integrity and set time parameters for mandatory denial of authorization.** Many individuals with ownership or legal interest are not in fact responsible for store-level operations. They should not be subject to a lifetime ban if they were not directly involved in practices that led to sanctions.

2.12

There are also concerns that given current drafting owners with multiple store locations would face disqualification at all current and future authorized locations if and when a sanction or vendor claim was imposed on a single location. For instance, a vendor looking to purchase or build a location in one city would be denied vendor authorization if a store location in a different city were subject to a sanction. Similarly, the combination of proposed sections 70000 and 70500 lead to concerns that if a vendor were subject to sanction at a single store location, the Department would be required to terminate authorization at all locations.

2.13

Similarly, challenges exist in the proposed section 70500(c) which would allow the Department, in its sole discretion, to require vendor applicants to obtain, "...identifying information from the applicant and/or previous owners(s) to enable the Department to conduct a thorough background check...". It is unclear how a vendor applicant is to obtain such information from previous owner(s) and if they would even have the legal right to do so depending upon whether information beyond that contained in current business documents is requested. While some public records may exist noting company owners, directors, etc... it is unclear whether obtaining that information would be enough. The current proposal leaves open the possibility that the Department could request information protected by California privacy laws, or information not available to a vendor applicant and then deny an application based solely upon a failure to provide the information. Unfortunately, not all business ventures end happily and former owners or stakeholders may be unwilling to provide requested information to current applicants. Likewise, a current applicant may not have a relationship with a former owner or have any way to convince that entity or those entities to produce information required by the Department. Further, there are no limitations to the information the Department could demand from current or former owners and no assurance that requested information is material to the applicant or relevant from business perspective.

2.14

At a minimum, the proposal should be modified to allow for potential denial of authorization only if a vendor applicant fails to provide material, relevant information that is otherwise publicly available and not protected by California or Federal privacy and/or confidentiality laws. It is unreasonable to expect detailed identifying information from an applicant regarding previous owners - especially when there is no time limitation to govern how far back into history an ownership interest may have been and whether the information is realistically and legally available to the vendor applicant.

2.15

70600 COMPETITIVE PRICE CRITERIA

While it is understood that the Department is working to effectuate cost containment strategies within the WIC program, the change proposed is quite dramatic and without explanation. New methodology may in fact be in order, but without frame of reference for why the 120% of average market basket it is impossible for the public or program stakeholders to determine whether the change is appropriate. Unintended consequences and significant impacts to vendor viability could result in various peer groups yet without context it is impossible to estimate real life impacts or to suggest viable alternatives to achieve cost containment goals with less market disruption. **At a minimum the Department should disclose to the public and stakeholders methodology behind the decision to utilize 120% of market basket.**

2.16

Additionally, the process outlined in 76000(c) is somewhat confusing. It appears that the Department will, every six months, request pricing information from vendors upon a thirty day notice. However, the proposal goes on to say that vendors are afforded fourteen days to respond to the thirty day notice. **The proposal should be redrafted to clarify the process by which shelf prices are collected from vendors and timelines associated with collection.**

2.17

70800 INCENTIVE ITEM REQUIREMENTS

While it is appropriate to engage stakeholders in a discussion regarding incentive items in the WIC program, a specific question arises relative to the proposal's prohibition on locally sourced produce. Section 70800(a)(4)(A)(1) allows Above-50-percent vendors to utilize only pre-packaged, WIC authorized produce, "...purchased from a wholesaler." There is no explanation why produce cannot be sourced from a local farm or even another retail channel.

2.18

71000 INVENTORY RECORDS

Proposed section 71000 establishes detailed and lengthy requirements for inventory and transfer records preparation and retention for authorized vendors. One overarching question and need for clarification relates to electronic records. It is unclear whether electronic records retention, an increasingly standard business practice, is acceptable for the required inventory and transfer records and if so whether that applies across-the-board or to only certain inventory and transfer records. **It would be our preference that electronic inventory and transfer records suffice but the issue needs to be clarified in the proposal to ensure consistency across inspections and jurisdictions.** This clarification is critical given that proposed 71000(e) calls for termination of a vendor’s authorization if they fail to maintain required inventory and transfer records at each location.

2.19

In addition, in many instances companies utilize a centralized office to manage inventory. Records and documentation received at individual store locations may be forwarded to that central location and stored there rather than being filed on site. While it is certainly reasonable to expect vendors to maintain proper records and make them reasonably available for inspection, a requirement for physical or electronic copies at each individual store location could be a significant challenge. We suggest that **two years is a more appropriate records retention timeframe and suggest that records maintained at a corporate office should suffice.** Parameters could be established requiring records to be maintained within California and produced within a short, reasonable timeframe. In addition, vendors could be required to notify the State agency of the location of records and make that location available as needed for inspections.

2.20

71100 MINIMUM STOCKING REQUIREMENTS

While it is necessary to ensure WIC clients have ready access to WIC-authorized items, it is also necessary to work within the confines of the realities of business operations. The proposal should be modified to allow for usage of common stock rotation and shelf re-stocking practices. As it currently reads, 71100(a) requires minimum stocking to be met, “...**at all times...**” while proposed 71100(b) mandates that in most instances, “**Inventory must be stocked on store shelves in the public area available for purchase...**” Under the proposal, it appears a vendor could be determined to be out of compliance if a customer removes two boxes of cereal from the shelf and they are not immediately replaced – even if some quantity of the product remains on the shelf and even if a WIC customer has ready access to the product by asking a clerk or customer service representative. **The proposal should be modified to provide for usage of normal inventory monitoring practices and warnings or sanctions should not be applied if reasonable steps, such as an inquiry by a WIC customer, result in restocking or a product being made available.** It is unreasonable in many settings to expect immediate restocking of items on store shelves even though adequate quantities of product are on site and restocking takes place on a regular, consistent basis.

2.21

71200 MINIMUM TECHNOLOGY REQUIREMENTS

While it is our understanding that the Department is comfortable with access to the technology outlined in proposed section 71200 through accessing a public or shared computer in a library or elsewhere, clarifying language is needed in the proposal. As currently written, there is room for broad interpretation and some could construe the requirement to mean that access at each authorized vendor store location is required. In some instances, that is not feasible nor is it desired by the business owner. Even at some larger chains external internet access is not provided, though such access is available at a regional or corporate office with intranet utilized for store-to-store and store-to-division/corporate communications. **The proposal should be clarified to ensure companies are not forced to install and maintain independent internet access at each authorized store location.**

2.22

71500 STORE LOCATION AND HOURS

The proposal requires all vendor locations to be open, "...at least either (8) hours per day, six (6) days per week." At least four of those hours must be during "core" hours which are defined as, "...9:00 a.m. to 5:00 p.m." While potentially infrequent, there may be instances where customer demand does not necessitate a full 48 hours of operation weekly. In addition, there could be instances where a store is located in a location where weekend access is difficult if not impossible based on landlord restrictions or other factors. **The proposal should be amended to provide an opportunity for vendors to demonstrate to the Department that customer access can adequately be met through alternate, site-specific days and hours of operation.**

2.23

71700 VENDORS MUST BE SNAP/CALFRESH AUTHORIZED

While it is our understanding that many vendors currently authorized to accept WIC in California are also authorized to accept CalFresh it is unclear why such dual authorization should be required. The business model of dual authorization may work well in some instances, but in others it may not be a desired or beneficial arrangement for a vendor. It is possible that the Department's assertion that dual authorization could compliment the goals of the WIC program but it does not appear authority exists in Federal regulations to mandate such dual participation. The State agency is required to authorize vendors and to develop authorization criteria but there is no apparent requirement to force authorized vendors to participate in the CalFresh program when they do not desire to do so. **The proposed regulation should be modified to eliminate this requirement altogether or at a minimum to provide an incentive to any vendor applicant choosing to additionally participate in the CalFresh program.**

2.24

71800 VENDOR TRAINING

We applaud the Department's efforts to ensure all WIC vendors are appropriately trained and possess a degree of knowledge that reinforces program integrity. It may be beneficial to modify the proposed language to allow for annual training conducted by the Department or an entity approved by the Department to conduct training. Some other mandatory training programs, such as food handler cards for restaurant workers, authorize entities to develop and submit training modules for approval by the regulator. In some instances, companies opt to create approved programs that incorporate customer service practices or store policies specific to that company. This kind of flexibility works well and as long as programs are approved by the Department, will meet the objective of training and competency.

2.25

71900 VISIBLE POSTED PRICES

While it is important all customers, not just WIC customers, have an opportunity to understand and evaluate the price of every item they wish to purchase before that purchase it, the proposed language regarding posted prices is overly restrictive and could lead to unnecessary disqualifications. Specifically, in 71900(a), the proposal limits price posting options to on-item, on-display, or on the shelf "...directly below the product..." This is a significant challenge as stores move away from traditional display models and increasingly list product information, including price, next to or above categories of food. Under a plain reading of the proposal, a vendor choosing to post prices on the side of a narrow shelf display rather than on the front would be subject to sanction even though the price was readily visible and identifiable for the product. **The proposal should be modified to allow more flexibility in pricing and to allow vendors to modify store displays.**

2.26

In addition, there is significant concern that the proposal lacks any requirement for documentation of the violation. Unfortunately, it is routine in the retail setting to have customers move products, remove stickers from products, knock shelf tags off, or move components of a display. Most retailers have policies in place to periodically monitor these issues and correct them as detected. **Without a requirement for some sort of documentation, it is frankly far too subjective an issue and impossible for a vendor to defend.** The concern is even greater when recognizing that the proposal lacks any outline of vendor appeal or dispute processes.

2.27

Again, thank you for the opportunity to comment on the proposed regulations. We look forward to a continued dialogue and to being provided with an opportunity to comment on a revised version of the proposal that addresses concerns raised by our industry and other stakeholders. As you know, it is of critical importance that the process be an open dialogue that leads to outcomes that are workable for both the "public" and "private" of this program, which is after all the consummate example of a public-private partnership. It is imperative that the vendor community be afforded an opportunity to work collaboratively with the Department to ensure that proposed changes to vendor authorization do not result in unnecessary vendor impacts or disqualifications. It would be a grave disservice to WIC participants were that to happen.

2.28

Please do not hesitate to contact me with any questions regarding our comments or if you would like to discuss any aspects of our industry comment letter in more detail.

Sincerely,



Keri Askew Bailey
Senior Vice President
Government Relations & Public Policy
California Grocers Association

RESPONSES TO LETTER 2

- 2.1. The commenter provided a general introduction to the comments and acknowledges the opportunity to participate in the expedited regulatory process.
- 2.2. The commenter is concerned that there are no provisions in the proposed WIC Bulletin Regulations (W.B.R.) §§70000-71900 for the notification of vendors for vendor authorization criteria violations. Pursuant to Health and Safety Code §123327, the Department is required to notify a vendor if the Department determines that the vendor has committed an initial violation for which a pattern of the violation must be established to impose a sanction. The Department must also notify vendors no less than fifteen days prior to termination of the vendor agreement as required by 7 C.F.R. §246.12(h)(3)(xxvi). The Department is not including requirements regarding notification to vendors for program violations in this bulletin because these requirements already exist.
- 2.3. The commenter is concerned that there are no provisions in the proposed W.B.R. §§70000-71900 for vendor appeal rights for vendors with adverse actions from vendor authorization violations. Vendors have the right to administrative review of adverse actions, as specified in 7 C.F.R. §246.18 and Cal. Code of Regs., tit. 22, §40751 and §40752. The Department is not including additional requirements concerning appeal rights in this bulletin because these requirements already exist.
- 2.4. The commenter proposes the Department move a vendor to an alternate peer group instead of terminating the vendor when appropriate. Federal regulation (7 C.F.R. §246.12(h)(3)(xxiv)) does not provide the Department with the discretion to change a vendor's peer group instead of terminating a vendor's agreement when the vendor fails to comply with vendor selection criteria. The federal rules do not provide the Department with discretion to consider participant access in the authorization or termination of vendors except as specified in W.B.R. §70100 and §71600. Because of the federal regulations, the Department is not including alternative requirements concerning participant access or reassignment of a peer group as an alternative to termination.
- 2.5. The commenter suggests that the Department amend the regulation to clarify that the provisions in W.B.R. §70000, Vendor Authorization Criteria, be applied prospectively instead of retroactively. In adopting this regulation the Department will not retroactively apply the newly adopted criteria. The Department will amend this section to match the requirement in the federal regulations that vendors to comply with the vendor selection criteria, including any changes, throughout the authorization period. (7 C.F.R. §246.12(h)(3)(xxiv)) Vendors that are found to be

out of compliance of the vendor selection criteria must be terminated. (Id.) All current and new California WIC vendors must comply with W.B.R. §§70000-71900 after adoption.

- 2.6. The commenter requests that accommodation be given to vendors whose circumstances require them adequate time to modify existing inventory systems and practices which may subject them to termination from the program. Vendors were notified on December 21, 2012 via Vendor Alert 2012-17 and Regulatory Alert 2012-01 that Assembly Bill (AB) 2322 gave the Department authority to establish requirements for vendor peer groups and reimbursement, the criteria used for vendor authorization, and WIC Program authorized foods. The alerts stated that before a WIC Regulatory Bulletin is placed into effect, the Program shall provide notice to affected stakeholders, including vendors, manufacturers, local agencies, participants, advocates, consumer groups, and their respective associations. The Department released Regulatory Alert 2013-01 on June 14, 2013 informing stakeholders that if the Department did not withdraw the proposed action, a final action would be posted on its website no later than 120 days after the end of the comment period. Pursuant to Health and Safety Code §123322, stakeholders also receive at least 30 days notice of a final action prior to the action's effective date. The Department has taken this comment into consideration and has determined that the vendors have had a reasonable amount of notification allowing them time to be prepared for the vendor authorization criteria regulations when they go into effect. The Department will amend the implementation date of §71700 to in order to allow vendors until February 28, 2014 to obtain SNAP authorization from USDA. Based on these reasons, the Department expects that vendors and vendor applicants will obtain SNAP authorization by February 28, 2014 and will adhere to all other vendor authorization criteria on October 17, 2013.
- 2.7. The commenter states that “when discussing the determination of adequate participant access, verbiage is different when describing “urban” and “rural” areas and it is unclear whether that difference will have a material impact on vendor authorizations whether varying word usage was intended.” The commenter is also concerned that the criteria for participant access does not include consideration of geographic barriers. Rather than adopting a different standard for participant access decisions in vendor authorization, the Department is applying California Code of Regs., tit. 22, §40740(h) inclusive of its subdivisions as the criteria for all participant access decisions made by the Department. This includes California Code of Regs., tit. 22, §40740(h)(3) regarding geographic barriers. The Department believes it is important to maintain a consistent participant access standard that ensures participant access in rural areas. The

application of the standard in this section only applies to vendors who do not meet the authorization criteria in W.B.R. §70100 and §71600; not all vendors seeking authorization, thus the Department does not expect this will have a material impact on vendor authorizations.

- 2.8. The commenter suggests that the Department should amend §70300, Cash Register, to allow vendors to retain electronic daily transaction summaries. Auditing entities, including the California Franchise Tax Board and the Internal Revenue Service (IRS), accept electronic inventory records, but must be able to trace the electronic records to the original source documents. Accordingly, the Department will amend the section to permit vendors to retain records in an electronic format.
- 2.9. The commenter suggests that W.B.R. §70300, Cash Register, be amended to clarify the length of time that vendors are required to retain cash register records. Federal regulations require the state agency to determine the length of time in which vendors must retain records (7 C.F.R. §246.12(g)(h)(3)(xv)). Health and Safety Code §123315(a)(6) requires vendors to retain records for, “at least three years.” In compliance with Health and Safety Code §123315(a)(6), W.B.R. §70300 establishes the minimum amount of time a vendor must retain daily sales summaries. The Department is not amending this requirement to specify the maximum time a vendor must retain their cash register records. Vendors can choose to retain their daily sales summaries longer than three years to satisfy internal recordkeeping procedures or to satisfy the requirements of other entities.
- 2.10. The commenter suggests that the Department revise W.B.R. §70400 “to require certification that the information is true and correct to the best of the vendor or the vendor applicant’s knowledge.” The Department has taken this comment into consideration and will not amend this change because 7 C.F.R. §246.12(h)(3)(xvi) requires the Department to terminate a vendor’s agreement if the vendor provides false information in connection with its application for authorization. In response to questions regarding the value of vendor self-declarations on applications, USDA indicated that it believed that adding a requirement to terminate the vendor agreement when a vendor is found to have provided false information will deter such behavior among vendor applicants, 65 FR 83248-01, 83255. As stated on page 13 of the Statement of Reasons, the determination that false information provided was material to the Department’s decision to authorize a vendor “allows for the possibility that the vendor may make a typographical or inconsequential error that would not have affected the Department’s decision to authorize the vendor, and which should not result in termination.” It is the responsibility of the vendor or vendor applicant to provide

verifiable information before applying for authorization or reauthorization. Thus, the Department is not amending this section.

- 2.11. The commenter states that the proposed language in W.B.R. §70500(b)(3) and (4) goes beyond circumstances in which a vendor applicant is attempting to circumvent a WIC sanction. W.B.R. §70500(b)(3) and (4) reaffirms the federal requirement in 7 C.F.R. §246.12(g)(7), which states that “[t]he State agency may not authorize a vendor applicant if the State agency determines the store has been sold by its previous owners in an attempt to circumvent a WIC sanction.” The Department agrees that the requirements in (b)(3) and (b)(4) could be interpreted to go beyond circumstances intended to be a circumvention of a sanction. Accordingly, the Department will amend these two sections by adding the respective qualifications: “if the vendor applicant was the owner at the time the sanction was noticed or made effective by the Department” and “if the vendor applicant was the owner at the time the vendor claim was noticed or made effective by the Department.”
- 2.12. The commenter expresses concerns regarding §70500(b)(3) and (4), indicating that the criteria should be modified to ensure that the ban on vendor authorization applies only when an individual’s ownership or legal interest in a company coincides with violations that lead to sanctions. In addition, rather than imposing a lifetime ban, this section should be harmonized with proposed §70100. The Department has addressed this concern with the proposed changes. If the applicant vendor is subject to only those sanctions for violations noticed and effective during his/her ownership, the ban is limited to the disqualification period under that ownership and would not be a lifetime ban. Any claim against a vendor noticed of during the vendor’s ownership would result in a ban for as long as the vendor fails to pay the claim. The timeframe of this ban is in control of the vendor. This change harmonizes the requirements with §70100 in that it provides reasonable limits to the prohibitions on authorization in circumvention of a sanction: either the same limits as the disqualification, or timeframe chosen by the vendor to pay a claim.
- 2.13. The commenter is concerned that based on the current language proposed in §70500, owners with multiple store locations would face disqualification at all current and future authorized locations if and when a sanction or vendor claim was imposed on single location. This statement is not accurate, as this section does not provide for the disqualification of all current locations when a vendor sanction or claim is imposed on a single location. As stated on page 16, Attachment 1, Vendor Authorization Criteria and Statement Reasons, “The Department will not allow vendors to apply for reauthorization or authorization of

new or additional stores when they have an outstanding vendor claim, or currently have a WIC sanction in effect.” This section is consistent with current California Code of Regs., tit. 22, §40739(j) which allows the Department to deny authorization to a vendor who has “an ownership interest in a market during a period for which a sanction is in effect, or during a period for which an audit claim is outstanding.”

- 2.14. The commenter is concerned about language in W.B.R. §70500(c). Specifically, the criterion allows the Department to request information from vendor applicants in cases where a vendor applicant may attempt to circumvent a WIC sanction. The commenter does not think it is reasonable for the Department to request a vendor applicant to provide information about a previous owner and that the information may be unavailable. The Department must be able to obtain all information necessary to make a determination as to whether or not a circumvention of a sanction is occurring, which includes information about both the seller and purchasing applicant vendors. When a vendor’s authorization is terminated, the Department no longer has the authority to seek information from that vendor so a good source of this information would be from the purchasing vendor. The Department believes that this requirement is reasonable because the information may be essential to the determination, and this section does not penalize vendor applicants who may be unable to obtain information from the previous vendor. W.B.R. §70500 does not provide for the denial of authorization if a vendor is unable to provide information from a previous owner. However, if the Department later discovers that a vendor applicant has circumvented a sanction, that vendor would be terminated for failure to meet vendor selection criteria. Applicants purchasing stores from WIC vendors are encouraged to exercise due diligence prior to purchasing a vendor store to ensure they do not engage in an activity that would violate W.B.R. §70500.
- 2.15. The commenter is also concerned about the possibility that the Department could request information protected by privacy laws. The commenter suggests that “the proposal should be modified to allow for potential denial of authorization only if a vendor applicant fails to provide material, relevant information that is otherwise publicly available and not protected from disclosure by California or Federal privacy and/or confidentiality laws.” Accordingly, the Department will amend this section to state that the vendor is not required to release information if the vendor can demonstrate to the Department that the release of that information is prohibited by federal or California state laws or regulations regarding confidentiality.

- 2.16. The commenter has concerns about the impact W.B.R. §70600, Competitive Price Criteria, will have on vendor viability and requests that the Department disclose the methodology used to develop the process. To develop the competitive price criteria, the Department researched other states methods and used shelf price data to test the proposal. The Department analyzed 110 percent, 115 percent, and 120 percent of the Average Overall Market Basket. The data showed that 110 percent and 115 percent of the average prices by peer group may terminate large numbers of vendors. The data analysis showed that when the vendor's Market Basket price is within 120 percent of the Average Overall Market Basket, 95 percent of sampled vendors are price competitive within their peer group. Given this data on vendor competitiveness at 120 percent of the Average Overall Market Basket, the Department believes that the impact on vendor viability is reasonably necessary in order for the Department to comply with the federal funding mandate of cost containment.
- 2.17. The commenter is concerned with the timeframes in which the vendors are required to submit shelf prices for the competitive price criteria calculation. This provision requires that shelf prices be collected from vendors. Every six months, the Department will request pricing information from vendors. Vendors will be given thirty days notice of the deadline for a vendor to respond. Should a vendor fail to submit their shelf prices, they will be issued a written notice of their failure to comply with vendor selection criteria. If after 30 days from the date of the notice of failure to comply with vendor selection criteria, the vendor still has not submitted their shelf prices, the vendor will be terminated. The commenter's concerns about the confusing nature of this provision prompted a new review of the language, and there is a portion that will be revised because it is misstated. The Department will amend this section to state that the Department will provide a 30 day notice of the request for prices and that the vendor must respond in 30 days of the date of the notice.
- 2.18. The commenter questions why W.B.R. §70800(a)(4)(A)(1) specifies that the allowed incentive item of prepackaged WIC authorized fresh fruit and vegetables must be purchased from a wholesaler and not a local farmer or even another retail channel. The Department has accepted this comment and will amend the section to remove the restrictions on the sources from which an above-50-percent vendor may purchase incentive items.
- 2.19. The commenter suggests that the Department should amend W.B.R. §71000, Inventory Records, to allow vendors to maintain electronic inventory records. Auditing entities, including the California Franchise Tax Board and the Internal Revenue Service (IRS), accept electronic inventory records, but must be able to

trace the electronic records to the original source documents. Accordingly, the Department will amend the section to permit vendors to retain inventory records in an electronic format.

- 2.20. This commenter suggests that two years, rather than three years as stated in W.B.R. §71000, is an appropriate amount of time to retain inventory records and that the records can be stored at a centralized location. The Department has taken this comment into consideration and will not make the change because of the following reasons. W.B.R. §71000 supplements California Health and Safety Code §123315(a)(6) that requires vendors to retain records for, “at least three years.” Further, although §71000 requires that vendors maintain separate records for each store location, it does not require that vendors maintain the records on the store premises. The Department recognizes the common practice for vendors to retain records in a centralized location; therefore, inventory audits are scheduled with the vendor in advance to allow for vendor records collection.
- 2.21. The commenter suggests that the Department amend the Minimum Stocking Requirements, W.B.R. §71100, to allow for individual store stock rotation and restocking practices. The commenter suggests warnings or sanctions should not be applied if reasonable steps result in restocking or a product being made available. The Department has taken this comment into consideration and will not make the change because it believes this requirement is reasonable to ensure that authorized foods are available to participants. The minimum stocking requirements are reasonable and necessary to ensure that participants have access to the most commonly redeemed supplemental foods at all times. Vendor stores that expect a high demand for WIC products may ensure compliance by stocking more product on the shelf or restocking more frequently. If the vendor regularly restocks WIC authorized supplemental foods it is unlikely they will face adverse actions based on §71100 violations. Because this regulation requires the Department to establish a pattern of noncompliance prior to disqualifying a vendor. Health and Safety Code §123327 requires the Department must notify vendors of the first incidence of violation no later than 30 days after the Department determines the first investigation that identified the violation is complete. The written notice must include a description of the initial violation and may include information to assist the vendor to take corrective action. The Department will not amend this section to include a requirement regarding warning notices for violations of this section because this requirement already exists.
- 2.22. The commenter suggests that W.B.R. §71200, Minimum Technology Requirements, be amended to clarify that vendors will not be required to have

internet access at the store location. Section 71200 requires vendors to have access to a computer or electronic device to access the internet. This regulation does not define a specific location at which the vendors are required to access the internet. Accordingly, the Department will not amend this section.

- 2.23. In response to W.B.R. §71500, the commenter states that customer demand does not necessitate a full 48 hours of weekly operation and stores may be located in a location where weekend access is limited. Further, the commenter suggests that the Department consider that the proposed regulation “be amended to provide an opportunity for vendors to demonstrate to the Department that customer access can adequately be met through alternate, site-specific days and hours of operation.” As stated on page 72 of the Statement of Reasons, the days and hours provide a reasonable amount of time needed to ensure that participants are able to access WIC authorized supplemental foods and to provide time for the Department to conduct routine monitoring visits, compliance investigations, and local vendor liaison technical assistance visits. The Department believes this regulation is reasonable because it is in the best interest of the participants to be able to shop at the store of their choice when it is most convenient for them, including weekends. Limiting participant access to weekdays or to reduced hours does not serve the needs of all participants. Participants who work or have family responsibilities may need access to authorized foods on weekends. While the Department understands the commenter’s business concerns, the suggested change does not support the needs of the participants. Therefore, the Department will not amend this section.
- 2.24. The commenter suggests that W.B.R. §71700, Vendors Must be SNAP/CalFresh Authorized, should be eliminated from the vendor authorization criteria or, at a minimum, provide an incentive to any vendor applicant choosing to participate in the SNAP/CalFresh program because the requirement does not exist in federal regulations. USDA approved the Department’s requirement to include SNAP authorization as part of its vendor selection criteria and specified that no vendors should be excluded from this requirement. The Department believes that because many WIC participants also receive SNAP/CalFresh benefits, the requirement that WIC vendors maintain SNAP authorization will benefit participants by allowing them access to nutritious staple foods and to complete their grocery purchases in one location. This requirement will allow the California WIC program to partner with SNAP to provide nutritious foods and, through reciprocal compliance policies, ensure vendor adherence with both programs requirements. The Department will amend the implementation date of §71700 to in order to allow vendors until February 28, 2014, to obtain SNAP authorization from USDA.

- 2.25. The commenter requests that §71800, Vendor Training, be modified to include that in addition to the Department, an entity approved by the Department would also be allowed to conduct training. The Department will not amend this section because if training were to be outsourced, the Department would experience an increased administrative burden due to the oversight and monitoring of another training entity in order to ensure Departmental compliance with 7 C.F.R. §246.12(i). If a vendor chooses to receive training from another entity, this training would not satisfy vendor training requirements.
- 2.26. The commenter suggests that §71900, Visible Prices Posted, is overly restrictive and could lead to unnecessary disqualifications. The commenter suggests this section should be amended to allow for more flexibility in price posting at vendor stores as vendors move away from traditional display models. The Department has taken this comment into consideration and will amend this section to allow vendors to post prices above the supplemental food. Standards for the posting of prices are necessary not only to allow participants to evaluate the prices of WIC supplemental foods but to limit the administrative burden and cost of the Department's compliance activities.
- 2.27. The commenter is also concerned that §71900, Visible Prices Posted, lacks a requirement for documentation of the violation. Section 71900 requires the Department to establish a pattern of noncompliance prior to disqualifying vendors for visible prices posted violations. Pursuant to Health and Safety Code §123327 vendors who have committed an initial violation for which a pattern of violations must be established to impose a sanction must receive a warning notice. The Department must notify vendors of the first incidence of violation no later than 30 days after the Department determines the first investigation that identified the violation is complete. The written notice must include a description of the initial violation and may include information to assist the vendor to take corrective action. Further, vendors have the right to appeal adverse actions affecting WIC Program participation, with exceptions, as required in Cal. Code of Regs., tit. 22 §40751(a).
- 2.28. The commenter acknowledges the opportunity to participate in the expedited regulatory process and that the success of the Program is dependent on a collaborative process.

Letter 3 California WIC Association

From: [Laurie True](#)
To: [WICRegulations](#)
Subject: RE: Regulatory Alert 2013-01 Stakeholder Workgroup Webinar
Date: Friday, June 28, 2013 11:54:22 AM
Attachments: [image001.png](#)
[image002.png](#)

Thanks for including me in the upcoming Stakeholder Webinar.

Here are some preliminary questions, just thought I would submit them in advance:

1. The FFY 2014 WIC Division State Plan Goals and Objectives (Goal Two, Objective III) states that the WIC Division will "Implement the Vendor Authorization Criteria and Peer Group regulatory packages, including assessing all vendors for compliance with authorization and reassigning peer groups." *Will the Department be issuing a separate package that will delineate new vendor peer groups and MADR rates? If so, will these regulations require a separate 120-day review and comment period?* 3.1

2. The proposed Section 70000 sets out overall vendor authorization criteria and the Statement of Reasons lays out overall vendor-limiting criteria, including criteria (b): "the ability of the Department to ensure that that authorized supplemental foods will be provided through in-store compliance purchases." *Does the state plan to set an official numerical limit on the number of vendors it can manage, or a vendor caseload per Vendor Unit FTE it can manage? Or will the state impose a moratorium of all new vendor authorizations when it determines it no longer has the ability to monitor vendors through in-store compliance purchases? Will vendors be but on a waiting list if the State determines it no longer has the ability to ensure that authorized supplemental foods will be provided through in-store compliance purchases?* 3.2

Cheers,
Laurie True

California WIC Association

www.calwic.org



From: WICRegulations [mailto:WICRegulations@cdph.ca.gov]
Sent: Thursday, June 27, 2013 4:48 PM
Subject: Regulatory Alert 2013-01 Stakeholder Workgroup Webinar

Thank you for your interest in participating in our Vendor Authorization Criteria Regulatory Stakeholder Webinar scheduled for 10:00 a.m.–12:00 p.m. (PST) on Thursday, July 11, 2013. Detailed information on how to join the meeting via online meeting/teleconference and links to additional materials will be provided by email prior to the July 11 meeting.

Please note that participation in the online meeting/teleconference is limited to one login per registered RSVP.

Prior to the webinar, please review and familiarize yourself with [Regulatory Alert 2013-01](#), as it will be the focus of our discussion. If you have questions or comments about this action, please contact the California WIC Program at WICRegulations@cdph.ca.gov.

Thank you and we look forward to meeting with you.

RESPONSES TO LETTER 3

- 3.1. The commenter asks if the Department will issue a WIC Bulletin Regulation to address peer groups and reimbursement rates as stated in the Federal Fiscal Year 2014 California WIC State Plan Goals and Objectives. The Department will address vendor peer groups and reimbursements in a future WIC Bulletin Regulations package which will include a separate 120 day review and comment period.

- 3.2. The commenter asks if the Department will set an official numerical limit on the number of vendors based on Departmental resources. The Department has not adopted any vendor limiting criteria in this regulatory bulletin but may consider this in a future package should it prove necessary. If the Department determines that a future moratorium is necessary, it must specify the reason for, exceptions to, and duration of the moratorium in compliance with Health and Safety Code §123312.

Letter 4 California WIC Association



July 15, 2013

Erika Trainer, Chief
Women, Infants and Children (WIC) Program
California Department of Public Health
3901 Lennane Drive MS 8600
Sacramento, CA 95834

Dear Erika,

On behalf of the California WIC Association Board of Directors and members, I am pleased to share comments and questions about the proposed new Vendor Authorization Regulations released on June 14, 2013. We congratulate you and your staff for the progress and hard work that this package represents.

In general, CWA welcomes this package, which codifies, updates, modernizes and strengthens existing federal and state regulations governing the approval of WIC vendors in California. If implemented, CWA believes that they will make it easier for California WIC to maintain overall program integrity by not allowing store owners to enter into or continue WIC Vendor Agreements unless they can show they are legitimate retailers who can consistently offer most WIC foods to WIC shoppers at competitive prices.

CWA believes that being a WIC-authorized grocer is a privilege, not an entitlement. This status should be granted only to stores who can comply with and maintain business functions such as basic cleanliness and honesty, business integrity and recordkeeping, transparency of transactions and pricing, adequate stocking and inventory, and basic 21st century technology. WIC vendors will also be expected to attend regular trainings in order to keep up with changes and maintain their approved status. Finally, of course, treating every single WIC participant with courtesy and dignity should be a top priority for all stores.

4.1

In some cases, the new criteria are more stringent, holding potential and existing WIC grocery stores to higher business operating standards than current rules. To protect the program integrity and bottom line of California WIC, CWA strongly believes that only stores who are willing to comply with these rigorous criteria should be allowed to benefit from a WIC vendor agreement. As local agency contractors, CWA members understand that, just as there are for WIC participants, there are both rights and responsibilities involved in this relationship. Our comments (and some questions) on the specific proposed Sections (70000-71900) are listed below.

1. Overall Vendor Authorization Criteria

The second vendor-limiting criterium, "the ability of the Department to ensure that that authorized supplemental foods will be provided through in-store compliance purchases"

4.2

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is badly needed to guarantee a manageable caseload for State vendor monitors. However, the proposed rule does not set a specific or numerical cap on the number of vendors that the State can effectively monitor with finite resources/staffing. This criterium may need further specificity and clarification; for example, a stated ratio of stores to vendor monitoring staff that can be supported with existing WIC Nutrition Services and Administration funds.

4.2
cont.

Without some kind of numerical limit on WIC vendors, it is unclear how CDPH will determine if and when the WIC Division no longer has the staff/resource capacity to properly monitor stores in the WIC system, especially if that number increases, as it has in the past. This prompts a number of questions, for example: Will all stores meeting all criteria for WIC authorization under these rules be automatically approved? Or, will some stores be put on a waiting list until state monitoring capacity can support that store's approval? And if so, how will the waiting list be managed? Will the state impose a moratorium of all new vendor authorizations when it determines it no longer has the ability to monitor vendors through in-store compliance purchases? If future WIC budget cuts were to force the State to reduce the number of WIC vendor monitors, which stores would be terminated and in what order?

4.3

CWA urges CDPH not to open up for new vendor authorizations without specifically addressing this critical issue. Failure to do so could result in a future unmanageable and contentious situation with high fiscal and political risks.

4.4

2. Business Integrity

These more stringent business integrity provisions will help keep more "bad apples" out of the program. The clearly and publicly stated definitions around participant access will prevent costly and needless disputes while protecting participants.

4.5

3. Retail Food Facility Code

It is absolutely appropriate to protect WIC moms and kids from dirty or unsafe retail environments, as determined by City or County health inspections, and to prevent stores from continuing to do WIC business if they've been closed due to health code violations.

4.6

4. Cash Registers

Fair pricing of WIC foods cannot be determined without detailed receipts. WIC shoppers have a right to get a detailed receipt when they purchase their benefits at any store. Unacceptable program violations such as overcharging and selling WIC foods at other locations (trafficking) will go undetected without detailed receipts and daily summaries. These more stringent requirements will make it harder for unscrupulous vendor to cheat WIC participants – and the program.







4.7

5. Application is True and Correct

4.8

2

If WIC participants can be denied benefits if they falsify their application information, WIC stores must be held to the same standards. Small errors and “typos” would not result in termination, only material misrepresentation.	4.8 cont.
6. Circumvention of WIC Sanction In the past, some WIC vendors have engaged in complex “shell games” to avoid WIC sanctions and fines due to program violations. By exploiting loopholes in current rules, these “bad apples” have even been able to open new stores. This rule would enable the State to close these loopholes to protect WIC program integrity and collect vendor fines levied if stores break the rules.	4.9
7. Competitive Price Criteria This is a significant new paperwork requirement. Will a computer application be developed to make this easier for both stores and State?	4.10
8. Compliance with Civil Rights Act, Title VI Federal law requires that WIC comply with all civil rights requirements. This should definitely apply to WIC vendors as well as WIC state and federal program providers.	4.11
9. Incentives The proposal states that incentives for WIC items at non-WIC-Only stores will not result in higher prices. For example, “A vendor will not be likely to raise the prices solely on WIC-authorized foods to offset the cost of buy one, get one at a reduced price promotion provided to all customers.” Is there documentation to support this statement? Some WIC foods, such as 16-oz breads and tortillas, are special to WIC. Wouldn’t the prices be raised solely on these foods and yet still be allowable for BOGOs and other incentives?	4.12
The State should consider not allowing WIC specialty foods to be used by non-Above-50-Percent stores for BOGOs or other incentives.	4.13
Prohibiting non-A-50 stores from offering incentive items solely to WIC participant customers is easier said than done. This section will be very difficult, if not impossible to monitor and enforce.	4.14
CWA believes that it would be cleaner and easier to simply <i>prohibit all incentivizing of the sale of WIC-approved food items by all stores, including A50 stores</i> . We understand that current federal rules and guidance prohibit this. We will be working with other advocates to seek federal reforms in this area in coming years.	4.15
10. Infant Formula This stringent rule is wholly necessary to protect infants from the potential health hazards that result from consuming WIC formula obtained through unreliable sources and to prevent the re-sale of illegally sourced formula.	4.16

- | | |
|---|---|
| <p>11. Inventory Records
 More detailed records of WIC wholesale and retail food sales and transactions are needed because federal regulations require that WIC grocery stores maintain compliance with program rules throughout the authorization period. Tightening up record-keeping requirements will improve accuracy of state and federal audits and ensure that both WIC wholesalers and WIC retailers are following both the law and standard business practices.</p> |  <p>4.17</p> |
| <p>12. Minimum Stocking Requirements
 The proposals are reasonable and feasible. The proposed MSR trims requirements to stock some foods, such as tofu and soymilk, making it easier for smaller stores to comply, while increasing required quantities for more commonly purchased items such as WIC cereals and milk, benefitting shoppers. Keeping the requirement that WIC-authorized stores stock at least \$32 worth of 5 different fresh and frozen fruits and vegetables (3 different canned), will continue to improve healthy food access in both rural and urban areas where shoppers rely on small stores for more of their groceries.</p> |  <p>4.18</p> |
| <p>13. Minimum Technology Requirements
 It's time for all WIC-authorized vendors to enter the 21st Century and use the internet for WIC business. Not only does this save time and needless expenditures for paper and postage, it helps prevent careless error and substantially lowers the potential for fraud and abuse.</p> |  <p>4.19</p> |
| <p>14. Conflicts of Interest
 At the local agency level, a relative or agent of a WIC vendor could preferentially refer participants to that particular store or stores. At the state level, such a relationship could inappropriately influence decisions or procedures impacting WIC vendors.</p> |  <p>4.20</p> |
| <p>15. Use of the WIC Acronym
 CWA warmly welcomes these specific new rules. They will enforce a very important distinction. Confusing store signage and advertising that misuses or blurs the official WIC logo leads program participants to believe that such stores are somehow preferred or endorsed by the federal or state WIC program. Inappropriate signage has led many WIC participants to think WIC stores are actually operated by the state or local WIC agencies. This unfortunate public misperception can be partially corrected with the clearly defined uses and prohibitions outlined in this section.</p> |  <p>4.21</p> |
| <p>16. Store Location and Hours
 This common sense rule ensures that stores do not become mobile or roving operations, and remain open for business during enough hours and days to permit working WIC participants to shop on weekends. State and local vendor monitors and vendor liaisons making store visits also need to be assured that they can access all stores during at least part of every work day.</p> |  <p>4.22</p> |

4

17. CalFresh-Disqualified Vendors

These provisions simply implement existing federal regulations and will help keep more “bad apples” out of the program. The clearer definitions around participant access will prevent costly and needless disputes while safeguarding access in remote or inner-city “food desert” areas.

4.23

18. WIC Vendors Must be CalFresh-Authorized

Requiring all WIC stores to be CalFresh-authorized is good public policy that will benefit both WIC participants and low-income shoppers. Authorization from both programs will ensure that these stores will serve a larger set of shoppers by offering, at a minimum, a variety of nutritious staple foods for different age groups and household sizes. Dual authorization also strategically leverages the monitoring and compliance policies and resources of both WIC and SNAP to better enforce vendor business integrity.

4.24

19. Vendor Training Requirements

WIC program vendor rules are very complex and the WIC program undergoes frequent change. Regularly trained, well-informed vendors who regularly participate in trainings are less likely to break the rules and then face costly sanctions or termination. The State has a responsibility to provide timely updates and high-quality trainings to vendors or their designated representatives. By the same token, WIC vendors have a responsibility to attend trainings and master the content, or face the consequences.

4.25

20. Visible Posted Prices

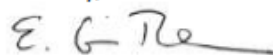
Non-existent or unclearly displayed shelf prices are a fairly common problem in some WIC-authorized stores. This is not fair to WIC participants, who learn in WIC Smart Shopper classes to look for the least expensive brand. It also severely hinders the State’s monitoring and compliance work and makes shelf price surveys difficult to impossible. Finally, displaying shelf prices is standard and traditional grocery business practice. There is no good reason for stores not to display clear food prices!

4.26

Thank you for the opportunity to comment on these proposed new rules. As local WIC program providers and advocates for the nation’s best WIC program, we look forward to collaborating with the WIC Division to implement these and other measures to ensure that California WIC’s program integrity and cost-effectiveness is strengthened and protected. Please do not hesitate to contact us if you have any questions.

4.27

Sincerely,



LAURIE TRUE
Executive Director

RESPONSES TO LETTER 4

- 4.1. In general, the commenter is supportive of the proposed vendor authorization package because it codifies, updates, and strengthens existing federal and state regulations governing authorization of WIC vendors in California.
- 4.2. The commenter expresses concerns that Department does not have the resources to manage the vendors efficiently. She notes that the proposed rule does not set a numerical cap on the number of vendors that the State can effectively monitor with finite resources. She suggests that the regulations include a stated ratio of stores to vendor monitoring staff that can be supported with existing WIC funding. The Department is working with the United States Department of Agriculture (USDA) to address cost containment and vendor oversight by strengthening regulations and increasing staffing to prepare for new vendor authorizations. The Department may consider limiting the number of authorized vendors or setting ratios for monitoring staff by number of vendor stores in a future regulatory package should it prove necessary.
- 4.3. The commenter suggests that for overall vendor authorization set forth in W.B.R. §70000, there should be a specific cap on the number of vendors the Department can effectively manage assuming finite resources and staffing. The Department is not setting a limit on the number of vendors in this bulletin. Currently there is a moratorium in effect. The Department will authorize new vendor applicants if they meet the vendor authorization criteria and the Moratorium Exemption Criteria listed in Vendor Alert 2013-03. The criteria for exemption from the moratorium include a lack of participant access for the area, a transfer of ownership from one vendor to another vendor currently authorized vendor, or a temporary closure. (See Vendor Alert 2013-03 for details on specific situations in which new vendors applicants are currently authorized.) The Department may consider limiting the number of authorized vendors or setting ratios for monitoring staff by number of vendor stores in a future regulatory package should it prove necessary.
- 4.4. The commenter recommends that the Department address vendor management prior to authorizing new vendors. The Department is working with the USDA to address cost containment and vendor oversight, by strengthening regulations and increasing staffing to prepare for new vendor authorizations.
- 4.5. The commenter expresses support for the criterion set for in W.B.R. §70100, Business Integrity, which will help keep vendors who lack standards of integrity out of the program.

- 4.6. The commenter expresses support for the criterion set forth in W.B.R. §70200, California Retail Food Facility Code (Health and Safety Code §113700 et. seq.), which will protect participants from dirty or unsafe retail environments.
- 4.7. The commenter expresses support for the criterion set forth in W.B.R. §70300, Cash Register, to improve WIC participant shopping experience and to reduce vendor violations.
- 4.8. The commenter expresses support for the requirement that the information on the vendor application must be true and correct.
- 4.9. The commenter supports the inclusion of W.B.R. §70500, Circumvention of WIC Sanction, because the regulation will allow the Department to protect the WIC program integrity by closing up loopholes in current rules.
- 4.10. The commenter is concerned that W.B.R. §70600, Competitive Price Criteria, could result in a significant amount of paperwork for vendors and the State and asks if there will be a computer application vendors can use for this process. The Department is currently developing a shelf price survey program on the Vendor WIC Information eXchange (VWIX) that vendors will access to input shelf prices.
- 4.11. The commenter expresses support for the inclusion of W.B.R. §70700, Compliance with Title VI of the Civil Rights Act.
- 4.12. Regarding the proposed regulations on incentives, W.B.R. §70600, the commenter questions whether there is documentation to support the following statement, “[a] vendor will not raise the prices solely on WIC-authorized foods to offset the cost of buy one, get one at a reduced price promotion provided to all customers” on page 30 of “Attachment 1, Vendor Authorization Criteria and Statement of Reasons” (June 14, 2013). First, the Department asserts that this statement is true for foods not special to WIC since vendors will not be able to make up the cost on the incentives if they must provide them to all the customers. The reason why this statement will also be true for foods special to WIC is that when the proposed vendor authorization criteria regulatory package goes into effect the vendor or vendor applicant must adhere to §70600(a), Competitive Price Criteria, which states that “[p]rices charged by the vendor or vendor applicant for a combination of all Market Basket items carried must not at any time exceed 120 percent of the Average Overall Market Basked price established by the Department for the vendor or applicant’s peer group.” 16 oz. corn tortillas and 16 oz. whole wheat bread are included in the Market Basket. As stated in §70600, paragraph (e), vendors or vendor applicants who do not meet the competitive price criteria will be issued a written notice 30-day or 10-day

respectively, and will be given the opportunity to correct prices to meet the competitive price criteria. Vendors that do not correct prices and exhibit a pattern of failure to meet the competitive price criteria will be disqualified from the program for one year. The Department will not be amending this section because the competitive price criteria will establish price limitations to ensure that the program obtains competitive prices for supplemental foods.

- 4.13. The commenter suggests that the Department should not allow WIC specialty foods to be used by non above-50-percent for buy one, get one free or other incentives. The Department will not amend this section at this time since, as described above, the competitive price criteria requirements will establish price limitations to ensure that the program obtains competitive prices for supplemental foods. No changes will be made to this section.
- 4.14. The commenter states that prohibiting non above-50-percent vendors from offering incentive items solely to WIC participants will be difficult to monitor and enforce. The Department does monitor these activities through compliance buys and complaints received. If a non above-50-percent vendor is found to be out of compliance with §70800(b), sanctions are in place as defined in W.B.R. §70800(c) which may result in disqualification from the program for one year.
- 4.15. The commenter's opinion is that it would be cleaner and easier to simply prohibit all incentivizing of the sale of WIC authorized supplemental foods by all stores, including above-50-percent vendors. 7 C.F.R. §246.12(g)(3)(iv) provides a list of approved incentive items and requirements for above-50-percent stores and gives the State agency authority to further define allowable and non-allowable incentive items in those stores. As discussed on page 30 of Attachment 1, "Vendor Authorization and Statement of Reasons," federal regulations in 7 C.F.R. §246.12(h)(3)(iii), require vendors to offer WIC Program participants the same courtesies that are offer to non-WIC customers. Thus if a non above-50-percent store provides incentive items to its general customers, they must offer them to WIC Program participants. Federal regulations have separate incentive requirements. For those reasons, the Department has the authority to define separate allowed and non-allowed incentive items for above-50-percent and non above-50-percent vendors. The Department does not have the authority to regulate the incentives that non above-50-percent vendors offer to non-WIC customers, and will not be amending this section.
- 4.16. The commenter supports the infant formula purchasing restrictions set forth in W.B.R. §70900.

- 4.17. The commenter expresses support for the criterion set forth in W.B.R. §71000, Inventory Records, because it will improve the accuracy of audits and ensure that WIC wholesalers and WIC retailers follow the law and standard business practices.
- 4.18. The commenter expresses support for the criterion set forth in W.B.R. §71100, Minimum Stocking Requirements, to reduce the impact on small vendors, improve WIC participant choice, and improve participant access to healthy fruits and vegetables.
- 4.19. The commenter supports the minimum technology requirements for vendors set forth in W.B.R. §71200.
- 4.20. In regards to conflict of interest, W.B.R. §71300 the commenter seems to be paraphrasing the rule. As a clarification, the regulation in subsection (a) states that a conflict of interest exists when a vendor could profit by having a relative or agent who is on the staff of a local agency or the Department who could refer participants to the vendor's store. The Department will not be amending this section based on the comment.
- 4.21. The commenter supports the WIC acronym and logo requirements set forth in W.B.R. §71400.
- 4.22. The commenter supports the inclusion of W.B.R. §71500, Store Hours and Locations, and expresses that proposed store location and hours requirements are common sense rules which ensure that stores do not become mobile operations, participants are provided enough hours to shop in the day, and participants can shop on the weekends to accommodate weekday work schedules.
- 4.23. The commenter expresses support for the inclusion of W.B.R. §71600, Vendors Disqualified from SNAP/CalFresh Will Not Be Authorized Unless Denying Authorization Would Result in Inadequate Participant Access, which implements existing federal regulations and provides a definition of participant access.
- 4.24. The commenter supports W.B.R. §71700, which requires that all vendors must be SNAP/CalFresh authorized. The commenter states that authorization from both programs will ensure these stores serve a larger set of shoppers by offering, a variety of nutritious foods for different age groups and household sizes.
- 4.25. The commenter states that the requirements in W.B.R. §71800, Vendor Training, are complex and that vendors who regularly attend trainings are less likely to be

out of compliance and face sanctions or termination. The commenter adds that the State must provide timely updates and high quality trainings and, by the same token, vendors must attend trainings and master the content or face the consequences. §71800(c) will require that vendors who do not complete annual training and do not certify their participation and understanding of the materials within 30 days of the training will be terminated.

- 4.26. The commenter supports the criterion set forth in W.B.R. §71900, Visible Prices Posted, because the requirements will help WIC participants use the shopping skills they learned in the clinics, assist the Department's monitoring and compliance work, and make shelf price surveys possible. The commenter also points out that displaying shelf prices is standard and traditional in grocery business practice.
- 4.27. The commenter acknowledges the opportunity to participate in the expedited regulatory process and expresses an interest in collaboration for implementing the requirements.

Letter 5 Clinica Sierra Vista

From: [Christine Dodd](#)
To: [WICRegulations](#)
Subject: Comment regarding FA 2013-01
Date: Saturday, July 13, 2013 9:57:03 AM

Requiring all WIC Authorized vendors to maintain the same minimum stocking requirements is problematic for rural areas. A store that serves very few WIC participants in a very small town is required to have the same inventory as a store that serves substantially more in dense urban areas such as LA.

5.1

I recommend a separate minimum stocking requirement for stores that serve less than x number of participants; or redeem less than x number of food instruments. I do not have data regarding the range of fi's redeemed at stores so I cannot provide an exact recommendation.

Or, perhaps have an exception process where the store can apply for a reasonable stocking requirement based on their geographic location (proximately to other WIC authorized vendors) and their redemption rates. Since the minimum stocking requirements would be scaled-down based on the WIC need in the area, participants will still have access to the foods in adequate quantities. To limit the administrative burden of allowing this alternative stocking requirement, the application process could be restricted to once a year.

5.2

There are rural areas where there is one store and if that store is disqualified for not having the minimum stocking requirements then participants would have to travel over an hour for the next WIC authorized vendor. This barrier would certainly cause the current WIC participants to no longer receive services.

5.3

Should you have any questions or would like to discuss this further, please contact me.

Thank you,
Christine

Christine Dodd, MPH, RD
WIC Program Director
Clinica Sierra Vista
Phone: (661) 326-6490
Christine.Dodd@clinciasierravista.org

RESPONSES TO LETTER 5

- 5.1 The commenter suggests that the Department develop separate minimum stocking requirements for small or low redeeming stores. The minimum stocking requirements in W.B.R. §71100 represents an overall reduction in the variety and quantity of the WIC authorized supplemental foods required from the July 5, 2011 Minimum Stocking Requirements Certification. The Department considered participant redemption behavior, vendor complaints, and vendor stocking behavior during the development of §71100. The Department believes this regulation is reasonable because §71100 only requires vendor to stock enough authorized foods to fill two prescriptions of each of the six most commonly prescribed food packages. Because different minimum stocking requirements for different vendor types would increase the administrative burden Department's monitoring and compliance activities, the Department is not amending W.B.R. §71100. The Department is aware that some states have a graduated system of stocking requirements for small and large vendor stores, and may consider researching the feasibility of a system like this for future regulation revisions.
- 5.2 The commenter suggests the Department develop an exception process in which vendors can apply for reduced minimum stocking requirements based on geographic criteria. The Department believes this regulation is reasonable because W.B.R. §71100 only requires vendor to stock enough authorized foods to fill two prescriptions of each of the six most commonly prescribed food packages. Even with temporal limits, an exemption process increases the administrative burden Department's monitoring and compliance activities. The Department may consider researching the feasibility of a minimum stocking requirement system with different requirements based on store characteristics for future regulation revisions.
- 5.3 The commenter is concerned that disqualifying vendors for W.B.R. §71100 violations in rural areas will force participants to travel long distances to access their WIC foods. The Department conducts participant access determinations prior to disqualifying vendors for minimum stocking violations. Cal. Code of Regs., tit. 22, §40740(h) defines "adequate participant access" as the following: the presence of another food vendor in the same geographic area as either the violating food vendor or the local agency clinic site closest to the violating food vendor, and the absence of geographic barriers that prevent participants from redeeming their food instruments at the other food vendor location described above. Cal. Code of Regs., tit. 22, §40740(h) provides for a different evaluation of participant access for rural vendors. In a rural area, the "same geographic area" is defined as the area within a five-mile radius of the vendor or a local

agency. (Cal. Code of Regs., tit. 22, §40740(h)(2)(A)) If disqualification of a vendor will result in inadequate participant access, the Department may impose a civil money penalty (Cal. Code of Regs., tit. 22, §40741(b)). Because there is already a provision in place to evaluate participant access needs when a vendor faces disqualification, the Department will not amend this section.

Letter 6 Contra Costa County

From: Patricia.Richards@hsd.cccounty.us
To: [WICRegulations](#)
Subject: Comments and suggestion
Date: Tuesday, June 25, 2013 9:45:25 AM

Thank you!

The proposed changes to the MSR and the CASH REGISTER RECEIPTS is long overdue and it is greatly appreciated that these issues are being addressed.

I am so excited about the proposed changes to the MSRs. This will ease the burden on small vendors and encourage them to maintain minimums without loss of revenue.

The addition of the proposed requirements to make the use of cash registers and cash register RECEIPTS mandatory is very long overdue. This will significantly impact and limit the abuse of price gauging in the program, and will provide documentation when abuse does occur.

The only proposal I would add is in the language about shelf talkers. Vendors should be reminded that they can not selectively place shelf talkers to direct clients to only one specific product when not brand specific. They must place shelf talkers for all the allowable items if they are going to use them. Currently, many vendors are using the shelf talkers selectively under 1 or 2 juices, only 1 brand of peanut butter, etc. This is a very big complaint with our participants.

Thank you for the opportunity to address my thoughts and concerns.

Sincerely,

Patricia Richards

Patricia Richards
WIC Administration Specialist
Primary Local Vendor Liaison
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6.1

6.2

RESPONSES TO LETTER 6

- 6.1. The commenter expresses support for the criterion set forth in §70300, Cash Register, which the commenter believes will “limit the abuse of price gauging in the program and will provide documentation when abuse does occur.” The commenter also expresses support for the criterion set forth in §71100, Minimum Stocking Requirements, which will ease the financial impact on small vendors.
- 6.2. The commenter recommends that in regards to shelf talkers, vendors should be reminded that they cannot selectively place shelf talkers to direct participants to only one specific product when authorized foods are not brand specific. The Department has reviewed this recommendation and will consider it for future regulatory action. The Department is not amending W.B.R. §71400 at this time because other stakeholders may want to comment on this change.

Letter 7 Haisha Enterprises LLC

WICRegulations

From: Steve Haisha <steve.haisha@gmail.com>
Sent: Thursday, July 11, 2013 3:33 PM
To: WICRegulations
Cc: Spencer Skeen; Mark Arabo; Keri Askew Bailey; Duraid Hallak; Brian Rees; Randy Kruska; Randy DelGado
Subject: Minimum Stocking Requirement
Attachments: _2011 Virginia Vendor Manual Waiver.pdf; _Colorado WIC Program Stocking Requirements with waiver.pdf; _Pennsylvania WIC Stocking with waiver.pdf; _Nevada minstock with peer groups.pdf; MSRComparison2013.pdf

BIG VALUE MARKET

623 SIXTY NINTH STREET SAN DIEGO, CALIFORNIA 92114

[\(619\) 262-9808](tel:6192629808) [FAX \(619\) 262-7221](tel:6192627221)

Hi ,

After participating in the WEBenar meeting for Stakeholders Groups today, July 11, 2013, I was instructed to send my comments to this address. I am pleased to see that the Soy and Lactose items have been removed from the MSR, I believe WIC could have done better in the proposed MSR's. the "Infant Fruits and Vegetables" along with the "Infant Meats" categories should have been looked into more thoroughly as were the others. The lack of use/movement compared to the other categories seems to be a bit high in those areas.

7.1

The "Frozen Juice" and "Frozen Fruits" should be re-evaluated too, they are a few more of the categories that the participants do not seem to use. I would like to pass on what I am hearing from the participants themselves, regarding frozen juices and fruit. Frozen juices need to be mixed with water prior to use, that the local water does not taste very well, and the use of bottles water makes it too expensive to use; they prefer the bottled ones for that reason. As for the frozen fruit, we live in California, fresh fruit is available year round and frozen is not a necessity as it is in other parts of the country.

7.2

I have one more question, I have looked into WIC MSR in other States, they are very much different than ours. The Peer Groups have different stocking requirement for each group type and some have "Waivers " for items that have lack of movement or use by the participants. Are we allowed that same ability to receive "waivers" for items as in the other States ? Why was this option given to them and not to us ?

7.3

I will enclose what I have found in the other States WIC policies.

/r

Steve Haisha
Haisha Enterprises LLC
Big Value Market
WIC # 367768
[619-442-7456](tel:619-442-7456)

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RESPONSES TO LETTER 7

- 7.1. The commenter is in agreement with the elimination of the tofu, soy beverage, lactose free milk, and contract soy-based infant formula from the minimum stocking requirement but suggests that the amounts for infant fruits and vegetables and infant meats should have been reduced further. The Department considered participant redemption behavior, vendor complaints, and vendor stocking behavior during the development of W.B.R. §71100. The July 5, 2011 Stocking Requirement Certification requires vendors to stock 176 4-ounce or 200 3.5-ounce containers of Infant Fruits and Vegetables. W.B.R. §71100 only requires vendors to stock 56 4-ounce or 64 3.5-ounce containers, a difference of 120 and 136 containers respectively. The required amount of Infant Meats remains unchanged. The Department has taken this comment into consideration but will not make the change regarding these food items. The Department believes this regulation is reasonable because §71100 only requires vendors to stock enough authorized foods to fill two prescriptions of the most commonly redeemed food package for these items. The required amounts of infant fruits and vegetables and infant meats are necessary to ensure that two families can redeem their food instruments at all times.
- 7.2 The commenter suggests that the Department review the stocking requirements for frozen juice concentrate and frozen fruits. The Department does not have the resources to make stocking requirement determinations based on the individual community preferences, such as the preference for the use of bottled water over local tap water. The Department considered participant redemption behavior, vendor complaints, and vendor stocking behavior during the development of W.B.R. §71100. The Department will not reevaluate the inclusion of frozen juice concentrate and frozen fruits at this time because the range of foods in the minimum stocking are necessary to provide California WIC participants with a variety of choices while shopping.
- 7.3 The commenter provided minimum stocking requirements from other states that have different stocking requirements for small stores. This commenter asks why California WIC does not have a minimum stocking system similar to other states and if vendors are able to obtain a waiver from the stocking requirements. Federal regulations require state agencies to develop minimum stocking food requirements that include at least two varieties of fruits, two varieties of vegetables, and at least one whole grain cereal. The Department believes this regulation is reasonable because §71100 only requires vendor to stock enough authorized foods to fill two prescriptions of each of the six most commonly prescribed food packages. There is no provision in W.B.R. §71100 to allow vendors to sign a waiver to be exempt from the minimum stocking requirements. Individual states in the WIC Program develop their own minimum stocking requirements and the decision to have stocking requirements that are based on

store characteristics is at the discretion of the states. The Department is aware that some states have a graduated system to stocking requirements for small and large vendor stores. A minimum stocking requirement which allows for waivers or exemptions increases the administrative burden on the Department's monitoring and compliance activities. The Department will not make a change to this section in the process of adopting these regulations, but may consider researching the feasibility of a system like this for future regulation revisions.

Letter 8 Leslie R. Smith, A Professional Law Corporation



6500 Wilshire Boulevard, Suite 1650
Los Angeles, California 90048
Tel: 323.944.0400 • Fax: 323.944.0106

July 19, 2013

VIA EMAIL - WICRegulations@cdph.ca.gov
California Department of Public Health
WIC Program
3901 Lennane Drive
P.O. Box 997375
MS 8600
Sacramento, California 95899-7375

RE: COMMENTS TO REGULATORY ALERT 2013-01

Dear Sir/Madam:

I wish to share my thoughts and concerns about the proposed changes to the California WIC Program as delineated in Regulatory Alert 2013-01. I also welcome the opportunity to discuss any of these issues with you prior to finalization of the proposed changes if you would like. 8.1

Proposed Section 70000 - Vendor Authorization Criteria

This stakeholder believes it would be improper to apply any of the newly proposed vendor authorization criteria retroactively. Thus, the language of Section 70000 should be modified to ensure that it is clear the Regulation would apply prospectively only. 8.2

Proposed Section 70200 - Requirement of Food Facility Permit

This Section does not appear to be necessary in order for the State to comply with federal WIC requirements. Moreover, this provision does not appear to be designed for the purpose of ensuring the "lowest practicable food prices" nor does it appear to be designed to ensure "adequate participant access." 8.3

The statute upon which the Department is relying to add this requirement - i.e., Health & Safety Code Section 13703, et seq. - appears to be designed to "safeguard public health and provide consumers food that is safe, unadulterated and honestly presented..." While food safety is most certainly a public concern, this stakeholder recommends that this Section should be revised so that it applies only to vendors who sell hot/cold food items that are intended to be consumed on the premises, and to expressly exclude vendors such 8.4

as WIC-only vendors who only sell pre-packaged items from manufacturers since WIC-only vendors do not sell hot food or items that are intended to be consumed on premises. Thus, this stakeholder recommends that this Section should be redrafted to apply only to stores that have cafeteria or deli-type areas on its premises which sell hot/cold food items that are intended to be consumed immediately on or off the premises where "foodborne illnesses" are more likely to occur.

8.4
cont.

Proposed Section 70300 - Cash Register Receipts

This stakeholder understands the objective of the Department in ensuring that vendors maintain adequate inventory and transaction records. However, as technology continues to advance at a rapid pace, and as vendors, participants, and government agencies are relying more on electronic databases and electronic means of transacting business, this stakeholder would recommend that electronic records and vendor databases, including electronic receipts that evidence each sale transaction on the date of the transaction, and which cannot be altered once it's been entered into the database, but can be printed at a later date if necessary, be an acceptable alternative, particularly given the fact that paper receipts are not environmentally friendly and in view of the number of years such data is required to be preserved.

8.5

Proposed Section 70400 - Certification of Information

This stakeholder believes that the language of this proposed provision is vague and ambiguous, and may lead to arbitrary and capricious application and conduct by the Department. The information that is provided in an application is potentially based upon a vendor's reliance on representations made by others, including legal counsel. Information included in an application may also be based upon inquiries which were improperly understood by the vendor. The Department may deem all such information to be intentionally "false" or falsely provided, when in reality the vendor applicant believed the information to be true. Therefore, this stakeholder believes the language in Section 70400 should be amended to state that a vendor who signs a vendor application shall certify that the information contained therein be "true and correct to the best of his/her knowledge or understanding."

8.6

Proposed Section 70500 - Circumvention of WIC Sanction

This stakeholder believes that the language of this proposed provision is vague and ambiguous, and may lead to arbitrary and capricious application and conduct by the Department. It is also unclear from this provision whether the Department intends to suggest that the Department will disqualify or refuse to reauthorize a vendor that owns multiple stores if a single store has a sanction in place. That may not be the intention of the proposed language, but because of the ambiguity of the proposed language, it could potentially be misapplied and lead to unintended consequences. Therefore, this stakeholder submits that the language in this Section should be clarified to address this important concern.

8.7

Proposed Section 71000 - Inventory Records

This stakeholder understands the objective of the Department in ensuring that vendors maintain adequate inventory records. However, as technology continues to advance at a rapid pace and more vendors are relying on electronic transactions and databases, this stakeholder would recommend that electronic records and vendor databases, including electronic inventory transfer records evidencing each such transfer which cannot be altered once it's input into the database, but which can be printed at a later date if necessary, be an acceptable alternative, particularly given the fact that paper receipts are not environmentally friendly and in view of the number of years such data is required to be preserved.

8.8

Also, subdivision (e), as drafted, is too draconian, particularly given that there is no uniformity in vendor audits nor in the types of inventory records a particular auditor may request at the time of an audit. This provision also conflicts with existing regulations. In addition to denying a payment or assessing a claim, the current state and federal regulations permit the Department to impose a sanction of a one-year or 3-year disqualification of a vendor but only if the Department demonstrates a "pattern" by a vendor. See Tit. 22 CCR Sections 40740(e)(2) and 40741(a)(15). In accordance with these regulations, sanctions involving inventory audits are not automatic like the one proposed here.

8.9

Moreover, it would be fundamentally unfair for the Department to automatically terminate a vendor agreement or disqualify a vendor for allegedly failing to have a specific document that an auditor may arbitrarily deem inadequate, particularly if the vendor has all other records which adequately demonstrate what inventory was purchased during a specific period, and which clearly justify the sums a vendor redeemed from the Department during a specific period of time. As written, this provision is likely to lead to an arbitrary and capricious application by the State Controller's Office and/or the Department when performing vendor inventory audits. For these reasons, this stakeholder believes that subdivision (e) should be omitted entirely from the proposed regulation. 8.10

Proposed Section 71300 - No Conflict of Interest

To avoid ambiguity, this stakeholder would recommend that the language in the preamble be revised to read: "The Department shall not authorize a vendor applicant or continue authorization of a vendor if the Department makes a determination that a conflict of interest exists with the Department, with an employee or representative of the Department, or with a local agency." 8.11

Proposed Section 71700 - SNAP Authorization

This stakeholder believes the Proposed regulation mandating that all WIC vendors be "authorized for participation in the SNAP/CalFresh Program at the time of application and during the term of the vendor agreement" is not being proposed for the purpose of furthering the federal WIC requirements. It appears to this stakeholder that the proposal of Section 71700 is designed for the purpose of allowing the Department to circumvent a federal regulation. For example, 7 CFR Section 246.12(g)(5) expressly prohibits states from imposing EBT costs on retail vendors. However, since all vendors authorized by the SNAP program already have EBT systems in place, and because the WIC Program is under mandate to implement its own EBT system, the proposed requirement in Section 71700 appears to be an attempt to actually circumvent the prohibition set forth in 7 CFR Section 246.12(g)(5). Thus, unless all states are under mandate by federal WIC regulations to only authorize vendors who are also participants of the SNAP program, this stakeholder believes the proposal of Section 71700 appears improper and should be excluded from the proposed regulations. 8.12

Proposed Section 71900 - Visible Posted Prices

This stakeholder does not believe proposed Section 71900 meets the threshold requirements of Health & Safety Code Section 123322(a) for circumventing the Administrative Procedures Act. The proposed section neither establishes requirements for the criteria used for vendor authorization, nor does it establish requirements for Peer groups, the reimbursement system, or WIC authorized foods. Thus, this stakeholder believes this is an improper use of H&SC Section 123322. Moreover, this stakeholder believes that the current regulations (i.e., Tit. 22 CCR §40741(a)(7)) already address the issue raised in proposed section 71900, and those regulations are sufficient. 8.13

Further, this stakeholder believes it is far too easy for an investigator to use a subjective standard for determining whether the prices posted are, in fact, visible. This often times can lead to a vendor being wrongfully disqualified from the Program. Therefore, this stakeholder would suggest that any further additions/modifications to a regulation regarding the visible price postings should include a requirement that the vendor be notified about the alleged violation while the investigator (or LVL) is on the premises so that the vendor has an opportunity to confirm with the investigator (or LVL) whether or not the price is visibly posted, and investigator (or LVL) and the vendor can timely document the item, shelf or display case immediately "on-the-spot" with a photograph, written acknowledgment, or other means. This way, there is no further debate about whether or not the price was visibly posted for a particular item if, or when, the vendor receives a Warning Letter leading up to a subsequent disqualification. This benefit the Department and the vendor in eliminating potential issues on appeal. 8.14

Thank you again for the opportunity to comment on the proposed changes, and I look forward to an ongoing dialogue with the Department to ensure that the entire WIC community continues to be served. The Program's success is dependent upon this collaborative process. Of course, if you have any questions or wish to discuss any of these issues with me further, please do not hesitate to contact me directly. 8.15

Very truly yours,



Leslie R. Smith

RESPONSES TO LETTER 8

- 8.1. The commenter offers to discuss the issues raised in the comments prior to the Department's issuance of the final rule.
- 8.2. The commenter suggests that the Department amend the regulation to clarify that the provisions in W.B.R. §70000, Vendor Authorization Criteria, be applied prospectively instead of retroactively. In adopting this section the Department will not retroactively apply newly adopted criteria. The Department will amend this section to match the requirement in the federal regulations that vendors to comply with the vendor selection criteria, including any changes, throughout the authorization period (7 C.F.R. §246.12(h)(3)(xxiv)). Vendors that are found to be out of compliance of the vendor selection criteria must be terminated. (Id.) All current and new California WIC vendors must comply with W.B.R. §§70000-71900 at the time of adoption.
- 8.3. The commenter questions whether W.B.R. §70200, California Retail Food Facility Code, is necessary because it is not required to comply with federal WIC requirements and it is not designed to ensure the lowest practicable food prices or ensure adequate participant access. 7 C.F.R. §246.12(g)(3) allows state agencies to develop and implement criteria to select stores for authorization. The Department is adopting the requirement that all authorized vendors must operate retail food stores that are legally permitted to sell food to the general public.
- 8.4. Although the commenter agrees with the Department that food safety is a public concern, the commenter recommends that the Retail Food Facility Code criterion only apply to vendors who sell hot/cold food items for consumption on the premises. The Department will not amend this section. The California Retail Food Facility Code applies to all WIC vendors. Health and Safety Code §113789 (a) defines "[f]ood facility" as an operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption at the retail level..." Foodborne illnesses are not limited to retail operations which sell hot and cold food items intended to be consumed immediately. It would be contrary to the interests of WIC participant for the Department to adopt a standard which would permit certain vendors to sell foods to participant in violation of the California Retail Food Facility Code.
- 8.5. The commenter suggests that the Department should amend W.B.R. §70300, Cash Register, to allow vendors to retain electronic daily transaction summaries. Auditing entities, including the California Franchise Tax Board and the Internal Revenue Service (IRS), accept electronic inventory records, but must be able to trace the electronic records to the original source documents. Accordingly, the

Department will amend the section to permit vendors to retain records in an electronic format.

- 8.6. The commenter suggests that the Department revise W.B.R. §70400 to state that the standard should be amended to require certification that the information is “true and correct to the best of his/her knowledge or understanding.” The Department has taken this comment into consideration and will not amend this section because 7 C.F.R. §246.12(h)(3)(xvi) requires the Department to terminate a vendor’s agreement if the vendor provides false information in connection with its application for authorization. In response to questions regarding the value of vendor self-declarations on applications, USDA indicated that it believed that adding a requirement to terminate the vendor agreement when a vendor is found to have provided false information will deter such behavior among vendor applicants, 65 FR 83248-01, 83255. As stated on page 13 of the Statement of Reasons, the determination that false information provided was material to the Department’s decision to authorize a vendor “allows for the possibility that the vendor may make a typographical or inconsequential error that would not have affected the Department’s decision to authorize the vendor, and which should not result in termination.” It is the responsibility of the vendor or vendor applicant to provide verifiable information before applying for authorization or reauthorization. Thus, the Department will not amend this section.
- 8.7. The commenter states that the language in W.B.R. §70500, Circumvention of WIC Sanction, is vague and ambiguous and may lead to arbitrary and capricious application and conduct by the Department. The Department is amending this section to clarify the following: if the applicant vendor is subject to only those sanctions for violations noticed and effective during his/her ownership, the ban is limited to the disqualification period under that ownership and would not be a lifetime ban. Any claim against a vendor noticed during the vendor’s ownership would result in a ban for as long as the vendor fails to pay the claim. The timeframe of this ban is in control of the vendor. This change harmonizes the requirements with W.B.R. §70100 in that it provides reasonable limits to the prohibitions on authorization in circumvention of a sanction: either the same limits as the disqualification, or timeframe chosen by the vendor to pay a claim. The commenter also indicates that she believes it is not clear whether the criterion would allow the Department to disqualify or refuse reauthorization to a vendor that owns multiple stores if a single store has a sanction in place. As stated on page 16, Attachment 1, Vendor Authorization Criteria and Statement of Reasons, “The Department will not allow vendors to apply for reauthorization or authorization of new or additional stores when they have an outstanding vendor

claim, or currently have a WIC sanction in effect.” This section is consistent with current Cal. Code of Regs., tit. 22, 40739(j) which allows the Department to deny authorization to a vendor who has “an ownership interest in a market during a period for which a sanction is in effect, or during a period for which an audit claim is outstanding.”

- 8.8. The commenter suggests that the Department allow vendors to retain electronic inventory records to comply with W.B.R. §71000, Inventory Records. Auditing entities, including the California Franchise Tax Board and the Internal Revenue Service (IRS), accept electronic inventory records, but must be able to trace the electronic records to the original source documents. Accordingly, the Department will amend the section to permit vendors to retain records in an electronic format.
- 8.9. The commenter states that the termination sanction for W.B.R. §71000 violations is draconian and is subjective depending on the types of records requested by auditors. Further, the commenter suggests that this section conflicts with sanctions in Cal. Code of Regs., tit. 22, §§40740(e)(2) and 40741(a)(15). Cal. Code of Regs., tit. 22, §40740(e)(2) has a three year disqualification sanction for, “. . . claiming reimbursement for the sale of a volume of supplemental food which exceeds the food vendor’s inventory purchase documentation . . .” Cal. Code of Regs., tit. 22, §40741(a)(15), the one year disqualification for an audit finding that exceeded ten percent of the total food instrument reimbursement was repealed. The Department has taken this comment into consideration and will not make the change because the requirement that a vendor maintain inventory and transfer records which as specified in W.B.R. §71000 is a condition of WIC authorization not a vendor violation for which the Department has imposed a sanction. A vendor who fails to maintain the required inventory and transfer records is subject to termination of its vendor agreement for failure to meet vendor selection criteria; a pattern is not required. Vendors have the right to appeal adverse actions including terminations for cause as set out in 7 C.F.R. §246.18 and Cal. Code of Regs., tit. 22, §40751.
- 8.10. The commenter feels that W.B.R. §71000, Inventory Records may result in arbitrary and capricious application by the Department and its auditors. 7 C.F.R. §246.12(g)(3) allows state agencies to develop and implement criteria to select stores for authorization. The Department is adopting the requirement that all authorized vendors must maintain separate records for each vendor store location which meet the requirements for adequate inventory purchase records including transfer records as set out in W.B.R. §71000(d). This section is designed to ensure that a vendor keeps the type of inventory records the Department will need for an audit. Vendors have the right to appeal adverse

actions affecting WIC Program participation, with exceptions, as required Cal. Code of Regs., tit. 22, §40751(a).

- 8.11. The commenter suggests that to avoid ambiguity, the language in the preamble of W.B.R. §71300, No Conflict of Interest Between the Vendor and the Department or any WIC Local Agency, be revised to include the following: “The Department shall not authorize a vendor applicant or continue authorization of a vendor if the Department makes a determination that a conflict of interest exists with the Department, with an employee or a representative of the Department, or with a local agency.” The Department has taken this comment into consideration and is amending this section to restate the federal requirement in 7 C.F.R. §246.12(h)(3)(xix) to avoid ambiguity.
- 8.12. The commenter believes that the proposed SNAP/CalFresh authorization requirement is not being proposed for the purpose of furthering federal WIC requirements. The commenter states that it appears that W.B.R. §71700 is designed for the purpose of allowing the Department to circumvent a federal regulation and provides the example of 7 C.F.R. §246.12(g)(5). 7 C.F.R. §246.12(g)(5) expressly prohibits state agencies from imposing EBT cost on retail vendors. Currently, all SNAP/CalFresh vendors use an EBT system, which is an electronic system that automates the delivery, redemption, and reconciliation of issued SNAP/CalFresh benefits. SNAP/CalFresh EBT costs are not imposed on the participating vendor (7 C.F.R §274.3(a)(2)). The EBT system is federally funded by the USDA.

USDA approved California WIC’s requirement to include SNAP authorization as part of its vendor selection criteria and specified that no vendors should be excluded from this requirement. The Department believes that because many WIC participants also receive SNAP/CalFresh benefits, the requirement that WIC vendors maintain SNAP authorization will benefit participants by allowing them access to nutritious staple foods and to complete their grocery purchases in one location. This requirement will allow the California WIC program to partner with SNAP to provide nutritious foods and, through reciprocal compliance policies, ensure vendor adherence with both programs’ requirements. The Department will amend the implementation date of §71700 to in order to allow vendors until February 28, 2014, to obtain SNAP authorization from USDA.

- 8.13. The commenter claims that enacting W.B.R. §71900, Visible Prices Posted, through the expedited regulatory process allowed by Health and Safety Code §123322 is a circumvention of the Administrative Procedures Act. The commenter believes that the provisions in Cal. Code of Regs., tit. 22,

§40741(a)(7) sufficiently address prices posted. 7 C.F.R. §246.12(g)(1) requires the state agency to authorize an appropriate number and distribution of vendors in order to ensure the lowest practicable food prices consistent with adequate participant access to supplemental foods and to ensure effective state agency management, oversight, and review of its authorized vendors. 7 C.F.R. §246.12(g)(4) requires the State agency to use its competitive price criteria to evaluate the prices a vendor applicant charges for supplemental foods as compared to the prices charged by other vendor applicants and authorized vendors, and must authorize vendors selected from among those that offer the program the most competitive prices. The State agency must consider a vendor applicant's shelf prices or the prices it bids for supplemental foods, which may not exceed its shelf prices. Standards for the posting of prices are necessary to allow the Department to comply with federal regulation while limiting the administrative burden and cost of the Department's compliance activities. Prior to authorization, the Department observes the prices posted and will not approve a vendor for authorization that does not visibly post prices. Cal. Code of Regs., tit. 22, §40741(a)(7) only provides for a sanction of existing vendors who do not post visible prices. W.B.R. §71900 makes the visible posting of prices a condition of authorization. Vendor applicants who do not comply with standards for visible posted prices will be denied authorization for failure to meet vendor selection criteria.

- 8.14. The commenter suggests that W.B.R. §71900, Visible Prices Posted, uses a subjective standard for determining that the posted prices are visible and suggest that the requirement be amended to include a requirement that the vendor be notified about the alleged violation while the investigator is on the premises. The Department has taken this comment into consideration and will not make the change because the Department already notifies the vendor of violations during routine monitoring visits. During a routine monitoring visit, Department staff observe and document all program violations and issue a corrective action plan detailing the violations to the vendor. Technical assistance visits by Local Vendor Liaisons are conducted in the same manner in which the vendor is notified at the time of inspection of program violations. If a violation of W.B.R. §71900 is discovered during a compliance buy, the vendor will be issued a warning notice in compliance with Health and Safety Code §123327. Pursuant to Health and Safety Code §123327 vendors who have committed an initial violation for which a pattern of violations must be established to impose a sanction must receive a warning notice. The Department must notify vendors of the first incidence of violation no later than 30 days after the Department determines the first investigation that identified the violation is complete. The written notice must

include a description of the initial violation and may include information to assist the vendor to take corrective action.

- 8.15. The commenter acknowledges the opportunity to participate in the expedited regulatory process and that the success of the Program is dependent on a collaborative process.

Letter 9 Nestlé Infant Nutrition, USA

WICRegulations

Subject: RE: Baby Food MSRs

From: Redington, Jennifer, ROYSE CITY, Infant Nutrition [<mailto:jennifer.redington@us.nestle.com>]
Sent: Tuesday, July 16, 2013 10:04 AM
To: WICRegulations
Subject: Fwd: Baby Food MSRs

Hi,
Could you clarify the MSR question I have below?

Jennifer Redington MS, RD
National Account Manager
Infant Nutrition Medical Sales: WIC
Nestlé Infant Nutrition, USA
Phone: [214-683-9572](tel:214-683-9572)

Visit us at www.medical.gerber.com

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Begin forwarded message:

From: Redington, Jennifer, ROYSE CITY, Infant Nutrition [<mailto:jennifer.redington@us.nestle.com>]
Sent: Monday, July 15, 2013 2:05 PM
To: Cording, Anne (CDPH-PCFH-WIC)
Subject: Baby Food MSRs

Hi Anne,

I saw the proposed changes to your minimum stock requirements and had a clarifying question. The current MSRs specify an amount on shelf and an additional amount on the premises. Since the proposed MSR does not distinguish between on shelf and on premises I wondered whether the proposed 56 – 4 oz jars OR 64 3.5 oz containers of purees and the 2 – 8 oz containers AND 2 – 16 oz containers of infant cereal would be required on shelf or simply on premises. Thank you for the clarification.

9.1

Jennifer Redington MS, RD
National Account Manager
Infant Nutrition Medical Sales: WIC & SHSH Partnership Teams
Nestlé Infant Nutrition, USA
Phone: 214-683-9572

Visit us at www.medical.gerber.com

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RESPONSE TO LETTER 9

- 9.1 The commenter asks if the required amounts of infant fruits and vegetables and infant cereal can be stored on the premises of the vendor store for the purposes of determining minimum stocking. Per W.B.R. §71100(b), all required inventory must be kept in the public area available for purchase unless otherwise specified. At this time, the items with stock allowed to be stored on the premises are Infant Formula (W.B.R. §71100(b)(10)(A)), Infant Meats (W.B.R. §71100(b)(12)), and Milk (W.B.R. §71100(b)(13)(B)). The required inventory for Infant Fruits and Vegetables and Infant Cereal must be on the store shelves at all times. To provide further clarification, the Department will amend section W.B.R. §71100(b)(10)(A), W.B.R. §71100(b)(12), and W.B.R. §71100(b)(13)(B) to give examples of how vendor stock may be stored.

Letter 10 Nestlé Infant Nutrition, USA

From: [Redington, Jennifer, ROYSE CITY, Infant Nutrition](#)
To: [WICRegulations](#)
Subject: Regulatory Alert 2013-01
Date: Tuesday, July 16, 2013 12:53:24 PM

Hi,
I have a question about the proposed MSR for infant cereal. If the MSR is changed from 12 - 8 oz containers to 2-16 oz and 2-8oz containers would the voucher still allow the participant to choose to redeem all 8 oz containers or would one of the vouchers only list the 16 oz size? I appreciate your clarification. 10.1

Jennifer Redington MS, RD
National Account Manager
Infant Nutrition Medical Sales: WIC
Nestlé Infant Nutrition, USA
Phone: [214-683-9572](tel:214-683-9572)
Visit us at www.medical.gerber.com

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RESPONSE TO LETTER 10

- 10.1 The commenter asks if there will be a change in the redemption requirements of infant cereal as a result of the minimum stocking requirements in W.B.R. §71100. The California WIC Program will modify the food instruments that allow the option of multiple 8-ounce containers of infant cereal to require participants to redeem one 16-ounce box and one 8-ounce box of infant cereal.

Letter 11 Nutritional Grocers Association of California

From: comments@nutritionalgrocers.org
To: [WICRegulations](#)
Subject: NGAC Proposed Comments
Date: Friday, July 19, 2013 11:25:39 AM

Regulatory Alert 2013-01 - Comments and Questions

July 19, 2013

Section 70600 - Competitive Price Criteria:

This section provides the methodology that will be used to determine a vendor's cost competitiveness among their peer group. While it is understood a need exists to change the methodology to prevent abusive pricing practices, A-50 stores are concerned that this may negatively impact the statewide average and therefore the MADRs for peer group 1.

- *How will the 120% market basket limitation impact the statewide average?*
- *How will the 120% market basket limitation impact the MADRs for A-50 stores?*

11.1

Section 70800 - Incentive Item Requirements:

The proposed regulation states "A vendor will not be likely to raise the prices solely on WIC-authorized foods to offset the cost of buy one, get one at a reduced price promotion provided to all customers." There is no mechanism, however, in place to monitor or prohibit a vendor from raising prices during a special as an offset. The shelf price survey requirement states that special prices are not to be included in a shelf price survey. Specials such as a BOGO would be considered a special price and not likely captured in the shelf price survey. If a vendor raises prices during these types of specials, the WIC program ends up paying more for that Food Instrument. The Department has a fiscal responsibility to monitor and track these pricing trends. Ideally, these types of specials that include WIC authorized foods would be prohibited across the board. If this practice is allowed to continue, the Department should put mechanisms in place to monitor the actual pricing practices.

- *The Department should put in place procedures to track the pricing practices on buy one get one free specials to ensure that prices are not raised.*
- *There is a significant disparity in the incentive rules governing A-50 stores and those stores that are not classified as A-50. Whatever rule the Department adopts, it should apply equally to all vendors*

11.2

(4)(A)1. Requires prepackaged WIC authorized fresh fruit and vegetables to be purchased

11.3

from a wholesaler. Purchases from a local farmer would meet the intent of this requirement, support local farmers, help reduce the footprint and benefits the local economy.

11.3
cont.

- *We recommend (4)(A)1 be revised to allow purchases from local farmers.*

Section 71400 - Restrictions and Allowed Uses of the WIC Acronym and WIC Logo:

This section provides restrictions regarding the allowed use of the WIC acronym and logo. The proposed regulation details newspaper ad or insert requirements when using the logo, but appear to focus on the color and size of the logo. There is reference to requiring advance approval to ensure compliance with the section and ensure vendors do not improperly use the logo. The regulations appear to divert from historical guidance, though it is unclear why this is the case. Previous Vendor Alerts on this subject provided rules that are now excluded in this proposed regulation. Vendor Alert 2009-13 and Vendor Alert 2007-10 stated that USDA permits states the discretion on whether to allow vendors to use the WIC acronym in advertising or other promotion materials but only to inform the public that the vendor is WIC authorized. The limitation on using the acronym only to inform the public that the vendor is WIC authorized is not included in the proposed regulation, though it is cited under the Authority section. This limitation is important to prevent the use of the acronym to target WIC participants for certain promotions or incentives.

11.4

- *Please include in the regulation that the use of the WIC acronym in advertising or other promotional materials is limited to the sole purpose of informing the public that the vendor is WIC authorized and that use of the WIC acronym to target WIC participants for specials or incentives is prohibited.*

Section 71500 - Store Location and Hours:

This section requires all vendors must be open at least eight hours per day, six days per week, and four of the hours must be in the core hours defined as 9:00 a.m. to 5:00 p.m. This new requirement will create a hardship on vendors that have stores located in an area where operating six days a week is not feasible. Some stores are uniquely situated and are not open on the week-ends due to a variety of reasons. For example, a store may be in a complex that is not open on the week-end and would be prohibited by the landlord from opening; a store may be in a medical facility that operates Monday through Friday and a vendor would have no way of accessing the complex. Landlords can be very restrictive in terms of operating hours. Some stores are remotely located and there are no week-end shoppers in a particular area due to the isolated location. Other stores are both remotely located and next door to a WIC clinic. In these cases, the store hours coincide with the WIC clinic hours, and some clinics do not operate on the week-end. To require a vendor to

11.5

open on a day where it is not possible, or makes no business sense to do so, places a vendor in a no-win situation and creates a financial hardship that is not reasonable.

- *Please amend this proposed regulation to be a recommendation, recognizing some locations would be unable to operate six days a week. The Department could, on a case-by-case basis, work with vendors to increase hours if it was determined the hours were too restrictive and impacted participant access.*

11.5
cont.

RESPONSES TO LETTER 11

11.1. The commenter is concerned that W.B.R. §70600, Competitive Price Criteria, will negatively impact above-50-percent vendors. The commenter asks two questions regarding §70600:

1. How will the Competitive Price Criteria Average Overall Market Basket price limitation of 120 percent impact the statewide average?

The actual impact of competitive price criteria on the statewide average is unknown prior to adoption and implementation of the final rule. The Department suggests it is a reasonable assumption that if vendors are disqualified from the WIC Program for noncompetitive prices, the absence of those prices may reduce the statewide average. However, the Department's data analysis shows that when vendor prices were competitive at 120 percent of the Average Overall Market Basket, 95 percent of sampled vendors were price competitive within their peer group.

2. How will Competitive Price Criteria Average Overall Market Basket price limitation of 120 percent impact the Maximum Allowable Department Reimbursement (MADR) rates for the above-50-percent vendors?

The actual impact of competitive price criteria on the statewide average, which is the MADR for above-50-percent stores, is unknown prior to adoption and implementation of the final rule. The Department suggests it is a reasonable assumption that if vendors are disqualified from the WIC Program for noncompetitive prices, the absence of those prices may reduce the statewide average. However, the Department's data analysis shows that when vendor prices were competitive at 120 percent of the Average Overall Market Basket, 95 percent of sampled vendors were price competitive within their peer group.

11.2. The commenter refers to the statement, "A vendor will not raise the prices solely on WIC-authorized foods to offset the cost of buy one, get one at a reduced price promotion provided to all customers" as proposed regulation. However, the statement, found on page 30 of "Attachment 1, Vendor Authorization Criteria and Statement of Reasons" (June 14, 2013) is not proposed regulation text, but it is a rationale as to why the Department is adopting W.B.R. §70800(b)(1)(A) into California regulation. Further, the commenter suggests that there is no mechanism in place to monitor vendors who raise prices during a sale as an offset. First, the Department believes that the statement in the rationale is correct since vendors will not be able to make up the cost on incentives solely on WIC-

authorized foods if they must provide them to all the customers. Even if the vendor provides incentives on foods special to WIC, vendors must still meet the competitive price criteria for the Market Basket foods (§70600) as described below. Second, as the commenter indicates, the shelf price survey requirements state that special prices are not to be included in the survey for the determination of the Market Basket price (§70600). The Department does not have the resources to track pricing practices on BOGO pricing specials, but believes that the competitive pricing criteria will provide containment on price increases.

When the proposed vendor authorization criteria goes into effect the vendor or vendor applicant must adhere to §70600(a), Competitive Price Criteria, which states that “Prices charged by the vendor or vendor applicant for a combination of all Market Basket items carried must not at any time exceed 120 percent of the Average Overall Market Basketed price established by the Department for the vendor or applicant’s peer group.” As stated in §70600, paragraph (e), vendors or vendor applicants who do not meet the competitive price criteria will be issued a written notice and given a 30-day or 10-day respectively, an opportunity to correct prices to meet the competitive price criteria. Vendors that do not correct prices and exhibit a pattern of failure to meet the competitive price criteria will be disqualified from the program for one year. Because competitive price criteria will establish price limitations to ensure that the program obtains competitive prices for supplemental foods, the Department will not make changes to §70600.

- 11.3. The commenter states that there is a significant disparity in incentive rules governing above-50-percent stores and non above-50-percent stores and any rules the Department adopts should apply to all vendors. 7 C.F.R. §246.12(g)(3)(iv) provides a list of approved incentive items and requirements for above-50-percent stores and gives the State agency authority to further define allowable and non-allowable incentive items in those stores. As discussed on page 30 of “Attachment 1, Vendor Authorization and Statement of Reasons,” federal regulations in 7 C.F.R. §246.12(h)(3)(iii), require vendors to offer WIC Program participants the same courtesies that are offer to non-WIC customers. If a non above-50-percent store provides incentive items to its general customers, they must offer them to WIC Program participants. Federal regulations have separate incentive requirements for above-50-percent and non above-50-percent vendors The Department does not have the authority to regulate the incentives that non above-50-percent vendors offer to non-WIC customers, the Department will not be making changes to this section.
- 11.4. The commenter questions why W.B.R. §70800(a)(4)(A)(1) specifies that the allowed incentive item of prepackaged WIC authorized fresh fruit and vegetables

must be purchased from a wholesaler and not a local farmer. The Department has accepted this comment and will amend the section to remove the restrictions on the sources from which an above-50-percent vendor may purchase incentive items.

- 11.5. The commenter questions why the proposed regulations in W.B.R. §71400, Restrictions and Allowed Uses of the WIC Acronym and WIC Logo, are silent about the historical guidance about the use of the WIC acronym in advertising or other promotion materials including Vendor Alerts 2009-13 and 2007-10 and USDA guidance. The commenter suggests that the guidance has required that the rule on vendor use of the WIC acronym should be restricted to the vendor informing participants that the vendor is WIC authorized. The proposed regulation is consistent with previous vendor alerts and federal guidance (FNS Instruction 800-2, June 2, 1992 and WIC Policy Memorandum 2009-1, dated December 31, 2008). The California WIC Program adopted all mandatory federal regulations and requirements in Regulatory Bulletin 2012-01. The Department will not make changes to this section.
- 11.6. The commenter states that the proposed store location and hours requirement specified in W.B.R. §71500 will create a hardship for vendors that have stores located in an area where operating six days a week is not feasible. Further, the commenter suggests that the Department consider that the proposed regulation be amended “to be a recommendation, recognizing that some locations would be unable to operate six days a week. The Department could, on a case-by-case basis, work with vendors to increase hours if it was determined that hours were to restricted and impacted participant access.” As stated on page 72 of the Statement of Reasons, the days and hours provide a reasonable amount of time needed to ensure that participants are able to access WIC authorized supplemental foods and they provide time for the Department to conduct routine monitoring visits, compliance investigations, and local vendor liaison technical assistance visits. Limiting participant access to weekdays does not serve the needs of all participants. The Department believes this regulation is reasonable because it is in the best interest of the participants to be able to shop when it is most convenient for them, including weekends. Participants who work or have family responsibilities may need access to authorized foods on weekends. While the Department understands the business aspect of the commenter’s concerns, the suggested changes do not support the needs of the participants. Therefore, the Department will not amend this section.

Letter 12 Robert N. Pyle & Associates

ROBERT N. PYLE & ASSOCIATES
PUBLIC RELATIONS

1223 POTOMAC STREET, N.W.
WASHINGTON, D.C. 20007-3212

TELEPHONE: (202) 333-8190
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Via email: WICRegulations@cdph.ca.gov

July 11, 2013

California WIC Program
3901 Lennane Drive
MS 8600
Sacramento, CA 95899

To whom it may concern:

This letter is in response to the California WIC Program's Regulatory Alert 2013-01, Article 4, 71100 B, the minimum stocking requirements for breakfast cereals for the California WIC Program.

The state proposes that at least 144 total ounces of any four different types or brands of authorized cereal be carried. Of the total ounces, one type must be in a 12 oz box and one type must be in an 18 oz box. Two of the types or brands must be listed as whole grain cereals on the WIC Authorized Food List and Shopping Guide.

We would like to call your attention to two cereals that are Federally WIC eligible but not currently on the California WIC Program that meet these proposed guidelines.

POST HONEY BUCHES OF OATS - VANILLA BUNCHES

Post Honey Bunches of Oats Vanilla Bunches is a whole grain WIC cereal (63% whole grain) that is available in an 18 oz box only. The vanilla in the cereal is deemed a "spice" by FDA standards, not a flavor. It is currently WIC allowed in 28 states.

12.1

POST ALPHA-BITS

Post Alpha-Bits is a whole grain WIC cereal (69% whole grain) that recently changed to a 12 oz box. The cereal is extremely child friendly and encourages young children to learn about their letters.

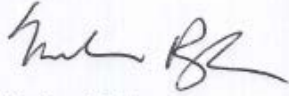
CONCLUSION

We encourage the California WIC Program to include these two cereals during the next food review cycle. Uniform sizes (12 oz/18 oz/36 oz) allow better retailer redemption for participant's full cereal prescription.

MAILING ADDRESS: POST OFFICE BOX 3731, WASHINGTON, D.C. 20007

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Nicholas A. Pyle', with a stylized flourish at the end.

Nicholas A. Pyle
President

Pyle & Associates is a Washington, DC based public relations firm representing numerous food companies to federal, state, territorial and Native American WIC Program for over 33 years.

RESPONSE TO LETTER 12

- 12.1. The commenter suggests that the California WIC Program add Post Honey Bunches of Oats – Vanilla Bunches and Post Alpha-Bits to the list of authorized foods. The Department has taken this comment into consideration and will not make the change because of the following reason. This bulletin only addresses criteria for vendor authorization. Minimum stocking requirements reflect the current WIC authorized supplemental foods but do not make change to the WIC authorized food list. Changes to WIC authorized supplemental foods are addressed through the food category change process. The California WIC Program currently accepts requests for changes to brand specific foods and food category change requests on an annual basis. The Department will consider authorizing brand specific products that meet the USDA Food Eligibility Requirements. The Department will announce on the website at www.wicworks.ca.gov when requests for changes to brand specific foods and food category changes are accepted. Any changes made as a result of the food category change process will be adopted by regulatory bulletin.

Revisions to Vendor Authorization Criteria Regulations Proposed in Regulatory Alert 2013-01

Revised sections of Article 4 are listed below are incorporated into WIC Bulletin Regulation:

Article 4, §70000 is revised as follows:

70000 Vendor Authorization Criteria. (a) When authorizing a vendor the Department shall assign a peer group to new vendor applicants for purposes of authorization. For determining ongoing compliance with authorization criteria the Department shall apply the criteria based on the vendor's currently assigned peer group. For purposes of this article, the Department is defined as, the California Department of Public Health and the California WIC Program. "WIC" is defined as the California Special Supplemental Nutrition Program for Women, Infants, and Children.

(b) In order to be authorized for participation in the program all vendors must enter into a vendor agreement with the Department.

(c) The Department shall apply the vendor authorization criteria in this article to all vendors ~~at any time~~ throughout the authorization period and to vendor applicants. Vendor applicants will be denied authorization for failure to meet the vendor authorization criteria. If a vendor fails to meet the authorization criteria at any time during the authorization period, the Department shall terminate the vendor's participation in WIC.

Article 4, §70300 is revised as follows:

70300 Cash Register. (a) Each vendor and vendor applicant must maintain and use a cash register system in conducting all business sales transactions.

(b) The cash register system must calculate, record, and print a daily totals summary of all sales transactions conducted during each business day showing the transfer of goods for money or monetary equivalents.

(c) The cash register system must automatically print an itemized receipt of each transaction. The receipt must be given to the customer at each transaction.

(d) The daily totals summary of all sales transactions from the cash register system must have the vendor's name and address, the transaction date, the quantity purchased, the sale price of the item purchased, the amount of tax charged, and the indication of tax status. Cash register receipt detail and daily totals summaries are part of the standard business records vendors are required to maintain for a minimum of three (3) years and are subject to both verification and Program audit. The daily totals summary of all sales transactions can be retained in paper or electronic formats.

Article 4, §70500 is revised as follows:

70500 Circumvention of WIC Sanction. (a) The Department shall deny authorization or reauthorization if it determines that a vendor is attempting to circumvent a WIC sanction or vendor claim.

(b) The Department will deny authorization to a vendor applicant for any of the following actions indicating an attempt to circumvent a WIC sanction or vendor claim:

(1) The vendor applicant purchased or obtained any legal interest in the store from a relative by blood or marriage and the store or business has a WIC sanction currently in effect, or a vendor claim which is still outstanding at that store location.

(2) The vendor applicant purchased or obtained any legal interest in the store or business for less than fair market value and there is a WIC sanction currently in effect, or a vendor claim is still outstanding at that location.

(3) The vendor applicant owns, previously owned, or has a legal interest in a store or business that has a WIC sanction currently in effect, if the vendor applicant was the owner at the time the sanction was noticed or made effective by the Department.

(4) The vendor applicant owns, previously owned, or has a legal interest in a store or business, including the applicant location that has an outstanding vendor claim, if the vendor applicant was the owner at the time the vendor claim was noticed or made effective by the Department. Failure to make payments as agreed via stipulation will be considered an outstanding vendor claim.

(5) The vendor applicant purchased or obtained any legal interest in the store or business pursuant to (1) or (2) above and allows the previous owner to retain a role in the operation of the business such as a manager, director, officer or shareholder.

(6) The vendor applicant retained legal interest in the store after a change of business type and there is a WIC sanction currently in effect or a vendor claim which is still outstanding at that location. Business type includes corporation, general partnership, limited partnership, sole proprietorship and limited-liability company.

(c) The Department may, in its sole discretion, request additional information from the vendor applicant, which may include, but is not limited to, tax identification number, or other identifying information from the applicant and/or previous owner(s) to enable the Department to conduct a thorough background check, and a bill of sale, lease agreement, bank statements or other information verifying the change in ownership of the store. The vendor applicant shall not be required to provide information if the vendor can demonstrate to the Department that the release of that information is

prohibited by federal or California state laws or regulations regarding confidentiality.

Article 4, §70600 is revised as follows:

70600 Competitive Price Criteria. (a) Prices charged by the vendor or vendor applicant for a combination of all Market Basket items carried must not at any time exceed 120 percent of the Average Overall Market Basket price established by the Department for the vendor or applicant's peer group.

(b) The foods in the Market Basket may only include foods in the WIC Authorized Food List. The Market Basket shall consist of the following types of authorized foods:

- (1) 12 oz. and 18 oz. Breakfast Cereal
- (2) 16 oz. Cheese ~~(any type)~~
- (3) 16 oz. Corn Tortillas
- (4) 1 lb. Bag of Dry Beans, Peas, or Lentils
- (5) 1 Dozen Large Eggs (chicken only)
- (6) 64 oz. Shelf-Stable Bottled Juice
- (7) 1 Gallon Milk (whole and lower fat)
- (8) Milk-based infant formula currently under contract with the Department
- (9) 16 oz. – 18 oz. Peanut Butter
- (10) 16 oz. Whole Wheat Bread Loaf

(c) Vendors shall submit the shelf price of their highest priced and lowest priced authorized food for each of the 10 food types in the Market Basket sold in that store during a fourteen (14) day period specified by the Department. For example, if the Market Basket food type is cheese, the vendor shall submit the shelf price of their highest price cheese and the shelf price of their lowest price cheese. Vendors shall provide these shelf prices of their market basket foods every six (6) months upon request of the Department. The Department will provide a thirty (30) day notice of the request for prices and vendors must respond with their shelf prices within ~~fourteen~~ thirty (4430) days of the date of the notice. Vendor applicants must submit prices for a fourteen (14) day period specified by the Department as part of the vendor application process. Only regular prices may be submitted; sale or promotional prices may not be included in the price collection. If a Market Basket item had a sale or promotional price during the fourteen (14) day period, the vendor shall determine the highest and lowest prices based on the item's price prior to the sale or promotion. Vendors that stock one type of a Market Basket item or offer same priced alternatives of that type shall submit a single price for that item as the highest and the lowest prices.

(d) The Average Overall Market Basket price will be determined by averaging the Vendor Market Basket price of all vendors in a peer group based on the current semi-annual submissions. Vendors and vendor applicants with a Vendor Market Basket price that exceeds one hundred and twenty percent (120%) of the Average Overall Market Basket price in their peer groups shall be determined noncompetitive because they do not meet the competitive price criteria.

(1) For purposes of determining whether a vendor is non-competitive and does not meet the competitive price criteria the Vendor Market Basket price shall be defined as either:

(A) A single vendor or applicant's average price of all Market Basket items submitted by the vendor or applicant for the applicable period. The Department shall determine the average of the highest and lowest prices of the individual Market Basket items and add the averaged prices together to determine the Vendor Market Basket price; or

(B) The sum of the regular shelf prices of the Market Basket items observed by the Department during a monitoring or compliance visit.

(e) Vendors or vendor applicants that do not meet the competitive price criteria will be issued a written notice of their failure to meet current vendor authorization criteria and of their need to correct their prices to meet the competitive price criteria. The vendor will be given thirty (30) days to correct their prices to meet the competitive criteria. Vendor applicants will be given ten (10) days to correct their prices to meet the competitive price criteria.

(1) If after thirty (30) days and within a twenty four (24) month period from the date of the notice the Department makes a subsequent determination that a vendor's prices do not comply with the competitive price criteria, the vendor shall have demonstrated a pattern of failure to meet competitive price criteria and shall be disqualified from participation in the program for a period of one year for failure to meet authorization criteria.

(2) If after ten (10) days from the date of the notice a vendor applicant's prices do not meet the competitive price criteria, the vendor applicant will be denied authorization for failure to meet the vendor authorization criteria for competitive price. The applicant will be permitted to submit another application in no less than six (6) months.

(f) A vendor who fails to submit their semi-annual price information will be issued a written notice of their failure to comply with vendor selection criteria. If after thirty (30) days from the date of the written notice, the vendor has failed to submit their semi-annual price information, the Department will terminate the vendor from participation in

the program.

Article 4, §70800 is revised as follows:

70800 Incentive Item Requirements. (a) The Department shall not authorize or continue authorization of an above-50-percent vendor, or make payments to an above-50-percent vendor, which provides or indicates an intention to provide prohibited incentive items to customers.

(1) Above-50-percent vendors are those vendors that derive more than 50 percent of their annual food sales revenue from WIC food instruments, or vendor applicants likely to meet this criterion.

(2) Evidence of intent to provide prohibited incentive items to customers includes the following:

- (A) Advertisement of the availability of the prohibited incentive items;
- (B) Promotion through signage and labeling of prohibited incentive items on store shelves and/or on the store premises;
- (C) Verbal and written accounts of prohibited incentives items being offered; or
- (D) Offering prohibited incentive items during compliance monitoring, as witnessed by Department staff.

(3) Pursuant to 7 C.F.R. §246.12(g)(3)(iv)(B), prohibited incentive items for these vendors include:

- (A) Services which result in a conflict of interest or the appearance of such conflict for the above-50-percent vendor, such as assistance with applying for WIC benefits;
- (B) Lottery tickets provided to customers at no charge or below face value;
- (C) Cash gifts in any amount for any reason;
- (D) Anything made available in a public area as a complimentary gift which may be consumed or taken without charge;
- (E) An allowable incentive item provided more than once per customer per shopping visit, regardless of the number of customers or food instruments involved, unless the incentive items had been obtained by the vendor at no cost or the total value of multiple incentive items provided during one shopping visit; have a value of less than \$2.00;
- (F) Food, merchandise or services of greater than nominal value provided to the customer;
- (G) Food, merchandise sold to customers below cost, or services purchased

by customers below fair market value;

(H) Any kind of incentive item which incurs a liability for the WIC Program; or

(I) Any kind of incentive item which violates any Federal, State, or local law or regulations.

(4) Allowable incentive items for above-50-percent vendors include:

(A) One or any combination of the following; as long as the combined total value is less than two dollars:

1. Prepackaged WIC authorized fresh fruit and vegetables, ~~purchased from a wholesaler.~~

2. Fourteen (14)-ounce to sixteen (16)-ounce cans of any brand or variety of mature beans, mature peas, or lentils, ~~purchased from a wholesaler.~~

3. Any variety of prepackaged uncooked, plain, dried, mature beans, peas, or lentils, ~~purchased from a wholesaler.~~

4. Commercially made, prepackaged, 100 percent corn tortillas, ~~purchased from a wholesaler.~~

5. Commercially made, prepackaged, 100 percent whole wheat bread, ~~purchased from a wholesaler.~~ Package must state "100% Whole Wheat" on the front label.

6. Five (5)-or six (6)-ounce cans of chunk light, water-packed tuna, ~~purchased from a wholesaler.~~

7. WIC authorized supplemental foods offered as part of a taste testing sample to a participant family.

(B) Minor customer courtesies of the retail food trade, such as bagging supplemental foods for the participant and assisting the participant with loading the supplemental foods into his/her vehicle. Minor customer courtesies do not include delivery of the supplemental foods to another location.

(b) The Department shall not authorize or continue authorization of a vendor that is not an above-50-percent vendor which provides incentive items solely to WIC participant customers. Incentive items provided by non above-50-percent vendors must be offered to all customers.

(1) Incentive items for vendors who are not above-50-percent vendors are defined as

(A) Free or reduced price food or other items;

(B) Cash or cash gift cards;

- (C) Lottery tickets;
- (D) Buy one, get one free;
- (E) Buy one, get one at a reduced price;
- (F) Free amounts added to an item by manufacturer coupons, store loyalty cards, and sales specials for supplemental foods; or
- (G) Free or reduced price services and minor customer courtesies of the retail food trade, such as bagging supplemental foods for the participant and assisting the participant with loading the supplemental foods into his/her vehicle.

(c) Vendors found to be out of compliance with this section on the first incidence will be issued a written notice of the vendor's failure to comply with incentive item requirements. If after thirty (30) days from the date of the notice and within a twenty-four (24) month period from the date of the notice the vendor in a subsequent incident fails to comply with incentive item requirements, the vendor shall have demonstrated a pattern of failure to comply with incentive item requirements and shall be disqualified from participation in the program for a period of one (1) year for failure to meet authorization criteria.

Article 4, §71000 is revised as follows:

71000 Inventory Records. (a) Each vendor, defined in Section 40635, must maintain adequate inventory purchase records, including adequate transfer records if inventory is moved between stores.

(b) If a vendor owns more than one vendor store, including multiple stores under a Master Vendor Agreement, separate inventory purchase records including transfer records, must be maintained for each store location. Inventory purchase records, including transfer records for each individual store under one ownership will be reviewed separately and will not be combined for purposes of audit to determine if a vendor is claiming reimbursement for the sale of a volume of supplemental food which exceeds the vendor inventory purchase documentation for a specific period of time as identified in the audit.

(c) All vendors must maintain inventory purchase records and transfer records for a period of three (3) years and provide agents of the State, the Department, and the Comptroller General of the United States access to these records. Records can be retained in paper or electronic formats.

(d) Inventory purchase records include all of the following:

- (1) Records showing all WIC authorized supplemental food purchases, wholesale and retail, in the form of invoices. Each invoice or receipt shall:

- (A) Be prepared entirely by the wholesaler, distributor, or retailer from whom the WIC vendor made the purchase;
 - (B) Indicate the date of purchase, the name of the seller, and the name of the WIC vendor who made the purchase;
 - (C) Be specific when identifying WIC food items- for example; “milk” is not an adequate identification. It must be specified as to the type of milk, such as “fluid”, “dry”, or “evaporated” and whether it is “whole”, “lowfat”, or “nonfat”, etc. Similarly, “fruit juice” is not an adequate identifier. The type of juice, e.g., “orange” or “apple” must be indicated, and the brand must also be identified;
 - (D) Identify the quantity and container size of each WIC food item purchased from the wholesaler, (number of containers, cans, boxes, etc., and number of ounces, pounds, etc., per container); and
 - (E) Indicate the unit price for each WIC food item purchased.
- (2) Sales and use tax return, if required by federal and state law
- (3) Books of account
- (4) Other records that can be used to verify WIC authorized supplemental food item purchases or proper peer group assignment including, but not limited to, check registers and bank statements.
- (5) Transfer records. Transfer records must:
- (A) Be created at the time the food products are shipped from the location of original delivery to the following vendor store location;
 - (B) Indicate the date of the transfer;
 - (C) Indicate the address and store name where the food item is being shipped from;
 - (D) Indicate the address and store name where the food item is being shipped to;
 - (E) Be specific when identifying WIC food items – for example; “milk” is not an adequate identification. It must be specified as to the type of milk, such as “fluid”, “dry”, or “evaporated” and whether it is “whole”, “lowfat”, or “nonfat”, etc. Similarly, “fruit juice” is not an adequate identifier. The type of juice, e.g., “orange” or “apple” must be indicated, and the brand must also be identified; and
 - (F) Identify the quantity and container size of each WIC food item ~~purchased~~ transferred from the source location (number of containers, cans, boxes, etc., and number of ounces, pounds, etc., per container).

(e) If a vendor fails to maintain the required inventory and transfer records, including separate inventory and transfer records for each vendor location owned, the Department shall terminate the vendor's agreement.

Article 4, §71100 is revised as follows:

71100 Minimum Stocking Requirements. (a) For participation in the Program, all vendor and vendor applicant locations must at all times maintain on the premises of the vendor applicant or authorized location the amounts listed in subsection (b)(1)-(15) below of WIC authorized supplemental foods, adopted as the WIC Authorized Food List and Shopping Guide by WIC Regulatory Bulletin.

(b) Inventory must be stocked on store shelves in the public area available for purchase unless quantities of stock allowed in storage on the premises of that store location are specified in subsections (b)(10), (12), and (13). For purposes of this regulation, inventory shall not include inventory on order that has not been delivered. Each vendor and applicant vendor must stock, at a minimum, the following:

(1) Bottled Juice and Concentrate.

(A) Eight (8) sixty-four (64) ounce bottles of authorized shelf stable juice.

(B) Ten (10) eleven and a half (11.5) or twelve (12) ounce containers of authorized frozen juice concentrate.

(2) Breakfast Cereal. At least one hundred forty-four (144) total ounces, of any four (4) different types or brands of authorized cereal. Of the total ounces one (1) type must be of twelve (12) ounce size box and one (1) type must be of eighteen (18) ounce box. Two (2) of the types or brands must be listed as whole grain cereals on the WIC Authorized Food List and Shopping Guide.

(3) Canned Fish. Either

(A) Twelve (12) five (5) ounce cans or ten (10) six (6) ounce cans of authorized types of tuna; or

(B) Four (4) fifteen (15) ounce cans of authorized types of sardines; or

(C) Twelve (12) five (5) ounce cans, ten (10) six (6) ounce cans, or four (4) fourteen and three quarters (14.75) ounce cans of authorized types of salmon.

(4) Cheese. At least four (4) one (1) pound packages of any combination of types of cheese.

(5) Dry Beans, Peas, or Lentils. At least six (6) pounds of any combination of authorized dry beans, peas, or lentils, in either one (1) pound packages or six (6) pounds in bulk.

(6) Eggs. At least four (4) one (1) dozen containers of authorized types of eggs.

- (7) Fresh Bananas. Eight (8) fresh yellow bananas.
- (8) Fruits and Vegetables.
- (A) Thirty-two dollars (\$32) worth of a combination of five (5) authorized varieties of fresh fruits and five (5) varieties of authorized fresh vegetables. Dollar amount is based on the vendor shelf price.
- (B) Thirty-two dollars (\$32) worth of a combination of three (3) varieties of authorized frozen fruits and (3) varieties of authorized frozen vegetables. Dollar amount is based on the vendor shelf price.
- (C) Thirty-two dollars (\$32) worth of a combination of three (3) authorized varieties of canned fruits and three (3) varieties of authorized canned vegetables. Dollar amount is based on the vendor shelf price.
- (9) Infant Cereal. Two (2) sixteen (16) ounce containers and two (2) eight (8) ounce containers of any authorized brand and type of infant cereal.
- (10) Infant Formula. Authorized milk-based infant formula in the following quantity:
- (A) Twenty (20) authorized size containers of authorized milk-based infant formula in powdered form. Of the twenty (20) containers, at least no less than ten (10) must be on the shelf, with the remainder kept and no less than ten (10) shall be in storage on the premises. For example, if the vendor stocks twenty (20) containers on the shelf, no less than four (4) containers must be in storage on the premises.
- (11) Infant Fruits and Vegetables. Either
- (A) Fifty-six (56) four (4) ounce containers; or
- (B) Sixty-four (64) three and a half (3.5) ounce containers.
- (12) Infant Meats. Sixty-two (62) two and a half (2.5) ounce containers of authorized infants meats. Of the sixty-two (62) containers at least thirty-one (31) must be on the shelf with the remainder kept and no less than thirty-one (31) shall be in storage on the premises. For example, if the vendor stocks thirty-one (31) containers on the shelf, no less than thirty-one (31) containers must be in storage on the premises.
- (13) Milk.
- (A) Six (6) one (1) gallon containers of authorized fluid whole milk;
- (B) Fourteen (14) one gallon containers of 2%, 1%, or nonfat authorized fluid milk. Of the fourteen (14) one (1) gallon containers, at least ten (10) must be on the shelf with the remainder kept and no less than four (4) shall be in storage on the premises. For example, if the vendor stocks ten (10) one (1)

gallon containers on the shelf, no less than four (4) one (1) gallon containers must be in storage on the premises;

(C) Two (2) half-gallon containers of any combination of 2%, 1%, or nonfat authorized fluid milk.

(14) Peanut Butter. At least four (4) sixteen (16) to eighteen (18) ounce containers of authorized types of peanut butter.

(15) Whole Grain.

(A) At least two (2) one pound packages of 100% whole wheat bread loaves; and

(B) At least two (2) one pound packages of white or yellow soft corn tortillas; and

(C) At least two (2) one pound packages or two (2) pounds of bulk oatmeal or oats; or two (2) one (1) pound packages or two (2) pounds of bulk brown rice.

(c) A vendor who fails to meet the stocking requirements in this section at any time shall be issued a written notice of the vendor's failure to meet authorization criteria. If after thirty (30) days from the date of the notice and within a twenty-four (24) month period from the date of the notice the vendor subsequently fails to meet the stocking requirements of this section the vendor shall have demonstrated a pattern of failure to meet minimum stocking requirements and shall be disqualified from participation in the program for a period of one (1) year for failure to meet authorization criteria.

Article 4, §71300 is revised as follows:

71300 No Conflict of Interest Between the Vendor and the Department or any WIC Local Agency. The Department shall not authorize a vendor applicant or continue authorization of a vendor if the Department makes a determination that a conflict of interest exists ~~with~~ between a vendor and the Department or between a vendor and a local agency. For purposes of this article, local agency is defined to include all employees of local agencies pursuant to Title 22, California Code of Regulations, Section 40641. A conflict of interest exists when:

(a) The vendor could profit by having a relative or an agent who is on the staff of a local agency or the Department who could refer participants to the vendor's store; or

(b) The vendor could profit by having a relative or an agent who is on the staff of the Department who could make Departmental decisions or influence Department policies and procedures related to program vendors.

Article 4, §71700 is revised as follows:

71700 Vendors Must be SNAP/CalFresh Authorized. As of February 28, 2014, vendors and vendor applicants must be authorized for participation in the

SNAP/CalFresh Program at the time of application and at all times during the term of the vendor agreement.

Article 4, §71800 is revised as follows:

71800 Vendor Training. (a) Prior to authorization and at least once every three (3) years after authorization while authorized, vendor applicants and vendors or their designated representative must attend an interactive training and successfully pass an examination upon completion of the training as required by Title 22, California Code of Regulations, Section 40733.

(b) All vendors or their designated representatives must also participate in annual training provided by the Department as required by Title 22, California Code of Regulations, Section 40733. Each vendor must certify completion of the annual training by returning, within thirty (30) days of their receipt of the annual training, a statement certifying their participation in the annual training and their understanding of the materials.

(1) The Department will provide written notice to an authorized vendor that fails to complete the annual training.

(2) The vendor will be provided thirty (30) days from the date of the notice to complete the training and certify their participation in the annual training and their understanding of the materials.

(c) Failure to complete the annual ~~and interactive~~ training and certify their participation in the annual training and their understanding of the materials thirty (30) days from the date of the written notice will result in the Department terminating the vendor's agreement.

Article 4, §71900 is revised as follows:

71900 Visible Posted Prices. (a) All vendors and vendor applicants are required to post prices of all WIC authorized supplemental foods so that the prices are visible to customers.

(1) Prices must be posted on the individual WIC authorized supplemental food item, or

(2) Prices must be posted on the shelf on which the WIC authorized supplemental food is placed, directly below the product,

(3) Directly above the product, or

(4) If the supplemental foods are part of a display, the prices must be posted on the display.

(b) A vendor who fails to meet the price posting requirements of this section at any

time shall be issued a written notice of the vendor's failure to meet authorization criteria. If after thirty (30) days from the date of the notice and within a twenty-four (24) month period from the date of the notice the vendor subsequently fails to meet the price posting requirements of this section, the vendor shall have demonstrated a pattern of failure to meet price posting requirements and shall be disqualified from participation in the program for a period of one (1) year for failure to meet authorization criteria.